



UNIVERSITY OF CAPE TOWN

REFUGEE RIGHTS UNIT

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Attention: The Select Committee on Social Services

BY EMAIL CORRESPONDENCE

RE: UCT REFUGEE RIGHTS UNIT'S SUBMISSIONS ON THE REFUGEES AMENDMENT BILL [B12B - 2016]

1. INTRODUCTION

1.1. The University of Cape Town's Refugee Rights Unit is both an academic research unit and a registered Law Clinic that provides free legal services to asylum seekers and refugees living in South Africa. We have been providing legal assistance and support to refugees and asylum seekers since 1998.

1.2. Our core functions include assisting asylum seekers and refugees with navigating through the asylum process by helping them with obtaining documentation from the Department of Home Affairs and where their applications have been rejected, represent them before the Refugee Appeal Board or make representations before the Standing Committee for Refugee Affairs. We also through direct legal intervention defend and uphold the rights of asylum seekers and refugees through our domestic courts in circumstances where there are violations or deprivations of their rights.

1.3. We thank the Select Committee on Social Services for the opportunity to make these submissions, which are focused on how the Refugees Amendment Bill [B12B - 2016] (“the Bill”) may impact the rights of refugees and asylum seekers.

1.4. Internationally, South Africa is hailed as having one of the most progressive and liberal asylum laws and refugee protection frameworks in the world. Though some of the proposed changes in the Bill are welcomed, such as the reference to the Prevention and Combating of Torture of Persons Act (Act No. 13 of 2013) as a ground of exclusion,¹ and the confirmation that children born to asylum seekers and refugees will be afforded the same status as their parents², however some of the proposed changes in the Bill are retrogressive and erode at the many positive strides that South Africa has made in its refugee protection framework.

1.5. The proposed changes in the Bill are extensive and have wide reaching implications. We have herein itemised our concerns regarding the proposed changes in the Bill. The discussion which follows identifies the issues of concern and provides suggestions where possible.

2. KEY ISSUES OF CONCERN

A. The Definition of a Dependant³

2. The amendment of the definition of a “dependant” in the Bill can be grouped into 5 fundamental changes and the addition of a proviso:

2.1. First, the Bill has narrowed the definition of “dependant”. The deletion of the term “includes” and the insertion of the term “means” connotes a closed list of people who are deemed to be dependants. The proposed definition clearly excludes members of the extended family, and in the context of the reality of how refugees flee from their country of origin, this is a serious omission. For example, a niece or a nephew of an applicant may potentially not be included in the definition despite a clear guardianship/care relationship in existence. Many children are separated from their parents during times of war. We would

¹ Amendment to section 4(1)(a), page 3 of the Bill.

² Section 21B, page 10 of the Bill.

³ Substitution of section 1(b), page 2 of the Bill.

therefore recommend reverting to the 2008 Act definition of dependant, such that, in this example, a niece may be included as a dependant.

2.2. Secondly, the amendment limits the age of a dependent child by the inclusion of the word “minor” to 18.⁴ However, many major children remain dependent on their parents well beyond the age of majority. We submit that the inclusion of the word “minor” will unfairly prejudice major refugee children who, for instance, are attending tertiary education or are 18 whilst in matric. It is common place for South African major children to remain dependant on their parents well beyond the age of majority. The current wording of the Bill will serve to discriminate against refugee major children in the same position.

2.3. Thirdly, the amendment limits dependency of non-biological children to those adopted in the individual’s country of origin. This unfairly excludes non-biological minor children, such as the niece in the example given above, who have either travelled with the asylum seeker or refugee or who have joined the individual in South Africa. We submit that the exclusion of these children is not in the best interests of the child in terms of the Children’s Act (Act 38 of 2005). The Department of Social Development has devised standard operating procedures for dealing with such cases. We submit that the placement of these children with foster parents by a Children’s Court, as is the current approach⁵, should be retained and the Bill should accordingly reflect the recognition of dependency via an order of the Children’s Court.

2.4. Fourthly, the limitation of a spouse to a marriage concluded between the asylum seeker or refugee in his or her country of origin unfairly excludes marriages concluded in South Africa. Many asylum seekers and refugees reside in South Africa for many years and during that time it is common for them to marry and establish family bonds. We are concerned that the above amendment of the term “spouse” will prejudice two categories of individuals who marry during their time of asylum in South Africa: [1] those where one spouse is finally rejected by the Department; and [2] those where the spouses have been initially documented at different Refugee Offices. In both cases the removal of the ability for one spouse to become the dependant of the other renders the couple in danger of separation. The effect of the amendment is

⁴ The age of majority is set at 18-years of age by section 17 of the Children’s Act 38 of 2005.

⁵ Section 32(1)(2) of the current Refugees Act.

therefore a bar to marriage while in South Africa which would be unlawful and unconstitutional.

2.5. International human rights law imposes obligations upon States to respect and protect marriage and family life. Article 16 of the Universal Declaration of Human Rights provides:

“(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

2.6. Similarly, Article 23 of the International Covenant on Civil and Political Rights provides that:

“(1)The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.

(3) No marriage shall be entered into without the free and full consent of the intending spouses.

(4) States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

2.7. The African Charter on Human and Peoples’ Rights⁶, provides in Article 18:

“1. The family shall be the natural unit and basis of society. It shall be protected by the State . . .

⁶ Which has been ratified by South Africa.

2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

...”

2.8. International human rights law therefore clearly recognises the importance of marriage and a State obligation to protect the family.

2.9. Domestically, the Constitutional Court in *Dawood v Minister of Home Affairs*⁷ held that:-

“The institutions of marriage and the family are important social institutions that provide for the security, support and companionship of members of our society and bear an important role in the rearing of children. The celebration of a marriage gives rise to moral and legal obligations, particularly the reciprocal duty of support placed upon spouses and their joint responsibility for supporting and raising children born of the marriage. These legal obligations perform an important social function.”⁸

2.10. Indeed in the refugee context the family unit serves as a fundamental “first line of protection” within the life of refugees. The family provides its members with physical care, protection and emotional and psychological support.⁹

2.11. In *Dawood v Minister of Home Affairs* the Constitutional Court pointed out that:-

“The decision to enter into a marriage relationship and to sustain such a relationship is a matter of defining significance for many if not most people and to prohibit the establishment of such a relationship impairs the ability of the individual to achieve personal fulfilment in an aspect of life that is of central significance... [S]uch legislation would clearly constitute an infringement of the right to dignity. It is not only legislation that prohibits the right to form a marriage relationship that will constitute an infringement of the right to dignity, but any legislation that significantly impairs the ability of

⁷ *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (8) BCLR 837 (CC).

⁸ *Ibid.* at para [31].

⁹ Jastram K. & Newland K. ‘Family Unity and Refugee Protection’ in Feller E., Türk V. & Nicholson F. (eds.) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) at p. 562.

spouses to honour their obligations to one another would also limit that right.”¹⁰

2.12. It is worth reflecting here on the darkest days of South Africa’s history where laws sought to dictate who could marry and who could not.¹¹ Such fundamental violations of family life must be strongly guarded against. We accordingly suggest the retention of the current definition of a dependant as far as it pertains to spouses.

2.13. Fifthly, the deletion of the words “member of the immediate family”¹² and the insertion of the “parent” unfairly limits the scope of dependency by excluding members of the extended family. As noted above many children who arrive in South Africa are separated from their parents and often come with relatives.

2.14. Then the amendment inserts the proviso that the dependant must have been “included by the asylum seeker in the application for asylum”. This proviso prohibits the addition of dependants who could not have been contemplated by the asylum applicant at the time when he or she initially applied for asylum to the Department. For instance, marriage while in South Africa or the joining on non-biological children by way of a Children’s Court order. This narrow proviso, we submit, will not afford the asylum seeker his or her fundamental right to family unity or accord with the best interests of the child. We therefore recommend that the proviso be removed.

B. *The Refugee Status Determination Committee*¹³

2.15. We note that the decision has been made to abandon the move towards a “Status Determination Committee”. The decision is welcomed as there were grave concerns about the case load management that a single committee can achieve as compared to an adequate complement of individual Refugee Status Determination Officers.

2.16. It is prudent to remember that the Department has been held to have a duty to provide adequate facilities to process asylum applications and that a policy which restricts the number of applications per day is unconstitutional.¹⁴

¹⁰ *Dawood v Minister of Home Affairs* (note 5 above), at para [37].

¹¹ See the Prohibition of Mixed Marriages Act 55 of 1949.

¹² Page 3 of the Bill.

¹³ Deletion in section 4(c), page 3 of the Draft Bill.

C. Exclusion from Refugee Status¹⁵

2.17. The extension of the exclusion clause¹⁶ now contemplated by the Bill is a worrying development. The net has the potential to be cast too widely and has the potential to violate the principle of non-refoulement¹⁷. This principle is embodied in section 2 of the current Refugees Act and has been extended to the return of an individual to place where there is a serious disturbance of the peace.

2.18. The principle of non-refoulement constitutes an essential component of asylum and international refugee protection. Indeed, the principle is such a cornerstone of the asylum regime that it has been recognised as constituting a norm of Customary International Law.¹⁸

C. (i) Commission of a crime in the Republic listed in Schedule 2 of the Criminal Law Amendment Act or punishable offences without the option of a fine¹⁹

2.19. The exclusion from refugee status on the basis that a person has committed a crime listed in schedule 2 of the Criminal Law Amendment Act, 1997 has the potential to violate the principle of non-refoulement.

2.20. The use of the word “committed” is ambiguous as it is an important element of our criminal law that every accused has a constitutional right to be presumed innocent until proven guilty. A simple allegation of having committed the crime in question will not afford the individual their constitutional right.

2.21. It is important to note that section 34 of the Refugees Act already dictates that ‘a refugee must abide by the laws of the Republic’. Any transgression of the

¹⁴ This was the finding in *Kiliko v The Minister of Home Affairs* 2006 (4) SA 114 (C).

¹⁵ Section 4, page 3 of the Bill.

¹⁶ Section 4 of the current Refugees Act.

¹⁷ The cornerstone and guiding principle of refugee protection throughout the world. The essence of which is that a State may not oblige a person to return to a territory where he may be exposed to persecution or harm.

¹⁸ In *C v. Director of Immigration* CACV 132-137/2008 the Hong Kong court of final appeal found that the concept of non-refoulement of refugees has developed into a Customary International Law (at para 67).

¹⁹ Insertion of section 4(1)(e), page 3 of the Bill.

laws renders a refugee subject to criminal sanction in the same way that a South African citizen would.

2.22. We recommend that the ground for exclusion introduced by section 4(1)(e) of the Bill be removed. An individual who transgresses the laws of South Africa can repay his or her debt to society through the criminal justice system without the principle of non-refoulment being violated.

C. (ii) Offences in terms of the Immigration Act, Identification Act and Passport and Travel Document Act²⁰

2.23. The exclusion from refugee status on the basis of committing a statutory offence in terms of the Immigration Act (13 of 2002), Identification (Act 68 of 1997) or Passport and Travel Documents Act (Act 4 of 1994) serves to elevate these other Acts above the Refugees Act to preferential status. It is important that these Acts are reconciled with the Refugees Act.

2.24. We are concerned that the above ground for exclusion presently in the Bill has the potential to violate the principle of non-refoulment.

2.25. In relation to the Immigration Act, of particular concern is section 49(1)(a) which provides that “anyone who enters or remains in...the Republic in contravention of...[the] Act, shall be guilty of an offence...”.

2.26. However, Article 31 of the UN Convention on the Status of Refugees, to which South Africa did not enter a reservation, provides that:-

“REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only

²⁰ Section 4(1)(f), page 3 of the Draft Bill.

be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

2.27. Furthermore section 21(4) of the current Refugees Act provides that:

“(4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or

(b) such person has been granted asylum.”

2.28. We accordingly recommend that the Bill be amended so as not to violate the principle of non-penalisation for unlawful entry.

2.29. With relation to the Identification Act or Passport and Travel Documents Act we are concerned with section 18(1)(a) of the Identification Act and regulation 15(1)(a) of the Passport and Travel Documents Act both of which create a statutory offence in terms of the making or causing to be made of a false statement. While reprehensible, there may well be reasons underlying such statements and in the refugee context it should not be held to be a bar to an application for asylum. In *Tantoush v RAB & Others*²¹ it was found that:-

“The objective facts must be examined to decide if a well-founded fear exists. And for that purpose it will usually not be enough to rely almost exclusively on the evidence of the asylum seeker only to reject his claim of fear of persecution because he has previously lied while living, for whatever reasons, on the margins or in the shadows of a legal existence.”²²

2.30. In essence the applicant’s claim must be considered in its entirety rather than simply being excluded due to a false statement.

²¹ *Tantoush v RAB & Others* 2008 (1) SA 232 (T).

²² *Ibid.* at para 102.

2.31. We recommend that the ground for exclusion be removed. An individual who transgresses the Immigration Act, Identification Act or Passport and Travel Documents Act can repay his or her debt to society through the criminal justice system without the principle of non-refoulment being violated.

C. (ii) Fugitive from justice in another country²³

2.32. The exclusion from refugee status on the basis of being a fugitive from justice in another country may violate the principle of non-refoulment.

2.33. The individual's fugitive status may well be linked directly to the individual's refugee claim. A good example of this would be a homosexual man fleeing from Uganda where he is to be charged and convicted in terms of the Ugandan Anti-Homosexuality Act, 2014.²⁴ The individual would technically be a fugitive from justice in Uganda. However, he would clearly be a refugee in that he fears persecution in the form of prosecution on the basis of his sexual orientation and he would have no option to turn to the state for protection which in this example is the same persecutor.

2.34. Another example is the case of military desertion or the evasion of forced conscription. In many countries military service is compulsory and consciences objectors are criminally prosecuted. In other places forced conscription occurs through the abduction of young men. Professor Goodwin-Gill, a prominent academic in the field of refugee law, argues that:

'Military service and objection thereto, seen from the point of view of the state, are issues which go to the heart of the body politic. Refusal to bear arms, however motivated, reflects an essentially political opinion regarding the permissible limits of state authority: it is a political act.'²⁵

2.35. As a result such an individual may well be both a refugee and a fugitive from justice. His or her exclusion will therefore be a violation of the principle of non-refoulment.

²³ Insertion of section 4(1)(g) , page 8 of the Draft Bill.

²⁴ A copy of the Act is available at <<http://www.refworld.org/pdfid/530c4bc64.pdf>>.

²⁵ Goodwin-Gill G. *The Refugee in International Law* (1983) at pp. 33-34.

2.36. The UNHCR Handbook²⁶ is very instructive in this regard. The section on Punishment²⁷ provides as follows:

'56. Persecution must be distinguished from punishment for a common law offence. Persons fleeing from prosecution or punishment for such an offence are not normally refugees. It should be recalled that a refugee is a victim--or potential victim--of injustice, not a fugitive from justice.

57. The above distinction may, however, occasionally be obscured. In the first place, a person guilty of a common law offence may be liable to excessive punishment, which may amount to persecution within the meaning of the definition. Moreover, penal prosecution for a reason mentioned in the definition (for example, in respect of "illegal" religious instruction given to a child) may in itself amount to persecution.

58. Secondly, there may be cases in which a person, besides fearing prosecution or punishment for a common law crime, may also have "well-founded fear of persecution". In such cases the person concerned is a refugee. It may, however, be necessary to consider whether the crime in question is not of such a serious character as to bring the applicant within the scope of one of the exclusion clauses.

59. In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against "public order", e.g. for distribution of pamphlets, could for example be a vehicle for the persecution of the individual on the grounds of the political content of the publication.

60. In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded.'

²⁶ *UNHCR Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees* (1979, re-edited 1992).

²⁷ Paragraphs 56 – 60.

2.37. We recommend that the ground for exclusion be accompanied with extensive guidance or a definition to prevent the incorrect rejection of asylum applications on the basis of this ground alone.

C. (iv) Entry via means other than through a port of entry²⁸

2.38. This strict application of this ground for exclusion has the potential to violate Article 31 of the UN Convention on the Status of Refugees, to which South Africa did not enter a reservation. Article 31 provides that:-

“REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.”

2.39. In our experience many asylum seekers are not aware where official port of entries are. We accordingly recommend that this ground for exclusion be removed or implemented only with a high degree of flexibility in relation to the requirement for “good cause”, so as not to violate the principle of non-penalisation for unlawful entry.

C. (v) Failure to apply for asylum within 5 days²⁹

2.40. The exclusion from refugee status for failing to apply for asylum within 5 days is another country may violate both the principle of non-refoulment and the principle of non-penalisation for unlawful entry.

²⁸ Section 4(1)(h) , page 3 of the Draft Bill.

²⁹ Insertion of section 4(1)(i) , page 3 of the Draft Bill.

2.41. The principle of non-refoulment contains two vital components. First, no one may be refused entry and secondly no one may be expelled from the Republic. The possibility of exclusion on the basis of failing to apply within 5 days serves to violate the expulsion dimension of the principle. On a strict reading of the ground for exclusion an applicant who is unable to apply within 5 days would be excluded from refugee protection and liable to processing as an illegal foreigner under the Immigration Act. The deportation would violate the individual's right to non-refoulment.

2.42. In the matter of *Abdi and Another v Minister of Home Affairs and Others*³⁰ the SCA noted that:-

'The Department's officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file an application with the relevant Refugee Reception Office....'³¹

2.43. We are of the opinion that barring application after only 5 days does not afford the applicant a reasonable opportunity to apply.

2.44. Currently Regulation 2 of the Refugee Regulations³² provides that:

"(1) An application for asylum in terms of section 21 of the [Refugees Act 130 of 1998] —

(a) must be lodged by the applicant in person at a designated Refugee Reception Office *without delay*;

...

(2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."

2.45. In *Bula and Others v Minister of Home Affairs*³³ and *Ersumo v Minister of Home Affairs*³⁴ the SCA considered regulation 2. The result in both instances was

³⁰ *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA).

³¹ *Ibid.* at para [22].

³² GG 21075 of 6 April 2000.

³³ *Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA).

a finding that if an asylum seeker delays in applying for asylum, he will not lose his rights under regulation 2(2), and the immigration authorities will not be relieved of their obligation under the Refugees Act to entertain his application.

2.46. From a practical perspective the 5 day timeframe set out in this ground for exclusion is too short. Many of the Refugee Reception Offices have begun to apply a case management system by means of which applicants from only certain countries are seen on particular days.³⁵ So for example consider a scenario where a particular office assists Somali applications on a Monday. Any individual who arrives on Tuesday would have to wait 6 days before he or she could apply for asylum thus falling foul of the ground for exclusion. Furthermore, the number of Refugee Reception Offices that accept new applications across the country has decreased. This has caused long lines and delays at remaining Refugee Reception Offices.

2.47. We recommend that the timeframe be changed from “5 days” to “within a reasonable time”.

2.48. We further recommend the inclusion of a discretionary mechanism to allow the decision maker to consider the reasons for the late filing of the application. For instance a “sur place” refugee claim may legitimately arise after a substantial time in the Republic on an immigration visa.

D. Cessation of Refugee Status³⁶

2.49. It is important to reflect on UNHCR’s position on cessation in this section:-

“Cessation of refugee status terminates rights that accompany that status. It may bring about the return of the person to the country of origin and may thus break ties to family, social networks and employment in the community in which the refugee has become established. As a result, a premature or insufficiently grounded application of the ceased circumstances clauses can have serious consequences. It is therefore

³⁴ *Ersumo v Minister of Home Affairs and others* 2012 (4) SA 581 (SCA).

³⁵ The lawfulness of that practice can be debated in another forum.

³⁶ Section 3, page 4 of the Bill.

appropriate to interpret the clauses strictly and to ensure that procedures for determining general cessation are fair, clear, and transparent.”³⁷

2.50. The point is clear, the end result of cessation is the termination of rights and therefore we urge the Department to take the view that the Bill’s detailed grounds for cessation should only be exercised with caution.

2.51. We recommend that the Department pay close attention to the UNHCR Guidelines on the application of the Cessation Clauses.³⁸

2.52. We are concerned about the inclusion of the commission of crimes in the republic listed in Schedule 2 of the Criminal Law Amendment Act or offences in terms of the Immigration Act, Identification Act or the Passports and Travel Documents Act as a ground for cessation

2.53. The use of the word “committed” is ambiguous as it is an important element of our criminal law that every accused has a constitutional right to be presumed innocent until proven guilty. It is important to note that section 34 of the Refugees Act already dictates that ‘a refugee must abide by the laws of the Republic’. Any transgression of the laws renders a refugee subject to criminal sanction in the same way that a South African citizen would.

2.54. We recommend that the ground for cessation be removed. An individual who transgresses the laws of South Africa can repay his or her debt to society through the criminal justice system without the principle of non-refoulment being violated.

E. “Disestablishment” of Refugee Reception Offices³⁹

2.55. We note the intention to confer on the Director-General the power to “disestablish” any Refugee Reception Office by notice in the Gazette if deemed necessary for the proper administration of the Act.

³⁷ GUIDELINES ON INTERNATIONAL PROTECTION: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the “Ceased Circumstances” Clauses) at para 7, available at <<http://www.unhcr.org/3e637a202.html>>.

³⁸ The Cessation Clauses: Guidelines on their Application UNHCR, Geneva, April 1999, available at <<http://www.unhcr.org/3e637a202.html>>.

³⁹ Section 8(1), page 5 of the Bill.

2.56. Given the gravity of the impact that disestablishment of an office has on the people it was established to service⁴⁰ we are concerned by the removal of the obligation to consult with the Standing Committee for Refugee Affairs or the refugee community in that area.

2.57. As the Department is well aware this has been the subject of intense litigation over the last few years. The Supreme Court of Appeal has accepted that a duty to consult arises in circumstances where it would be irrational to take a decision without such consultation, because of the special knowledge of the person or organisation to be consulted.⁴¹

2.58. We suggest that both the Standing Committee for Refugee Affairs and the UNHCR have special knowledge which would both assist the Director-General and provide valuable checks and balances for such an important decision. We accordingly recommend the insertion of a line to expressly mandate consultation with the Standing Committee for Refugee Affairs, the UNHCR and the refugee community in that area.

F. *The Standing Committee for Refugee Affairs*⁴²

2.59. We note that under the functions of the newly constituted Standing Committee for Refugee Affairs the obligation to determine applications for certification for permanent residence has been omitted. This is currently an important function of the Standing Committee for Refugee Affairs.

G. *Application for asylum*⁴³

2.60. We wish to express our concern regarding the practicality and legality of the amendments that that Bill includes with respect to applications for asylum.

⁴⁰ See for instance the argument in *Scalabrini Centre Cape Town v Minister of Home Affairs and Others* [2012] 4 All SA 576 (WCC).

⁴¹ *Minister of Home Affairs and others v Scalabrini Centre and others* 2013 (6) SA 421 (SCA) at para [72]; *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape* 2015 (3) SA 545 (SCA) at para [17].

⁴² Section 9, page 6 of the Bill.

⁴³ Section 21, page 9 of the Bill.

G. (i) *Within 5 days of entry into the Republic*⁴⁴

- 2.61. The requirement that an application be made within five days of entering into South Africa is both impractical and could violate the principle of non-refoulement.
- 2.62. As has been set out above the principle of non-refoulement contains two vital components. First, no one may be refused entry and secondly no one may be expelled from the Republic. The requirement that an applicant must apply within 5 days serves to violate the expulsion dimension of the principle. On a strict reading of the provision an applicant who is unable to apply within 5 days would be excluded from the refugee regime and liable to processing as an illegal foreigner under the Immigration Act. The deportation would violate the individual's right to non-refoulement.
- 2.63. From a practical perspective the 5 day timeframe set out in this ground for exclusion is too short. Many of the Refugee Reception Offices have begun to apply a case management system by means of which applicants from only certain countries are seen on particular days.⁴⁵ So for example consider a scenario where a particular office assists Somali applications on a Monday. Any individual who arrives on Tuesday would have to wait 6 days before he or she could apply for asylum thus falling foul of the ground for exclusion.
- 2.64. We recommend that the qualification that an application be lodged within 5 days be changed from "5 days" to "within a reasonable time".
- 2.65. We further recommend the inclusion of a discretionary mechanism to allow the decision maker to consider the reasons for the late filing of the application. For instance a "sur place" refugee claim may legitimately arise after a substantial time in the Republic on an immigration visa.

⁴⁴ Section 21(a)(1), page 9 of the Bill.

⁴⁵ The lawfulness of that practice can be debated in another forum.

G. (ii) Requirement for categories of asylum seekers to report to designated offices⁴⁶

2.66. The power of the DG to dictate that categories of asylum seekers report to designated offices will effectively amount to a barrier to the asylum process. If a person falling within one category attempts to apply for asylum at the incorrectly designated refugee office then he or she would be effectively barred from applying at the office that the individual has reported to. This could result in delays in the individual's asylum application through no fault of his or her own. This requirement assumes that asylum seekers have the money and resources to travel to far flung Refugee Offices that are outside the province they reside in.

2.67. We are of the opinion that the requirement that only certain categories of asylum applicants will be assisted at a given office serves to discriminate against all other categories. Should the requirement be exercised in a manner that amounts to unlawful discrimination then the DG exercise of his powers will not pass constitutional muster.

2.68. This strict application of this power has the potential to violate Article 3 of the UN Convention on the Status of Refugees, to which South Africa did not enter a reservation. Article 3 provides that:-

'NON-DISCRIMINATION

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'

2.69. We recommend that the inclusion of the power of the DG to dictate that categories of asylum seekers report to designated offices should be removed.

G. (iii) Rejection on the basis of false or misleading information⁴⁷

2.70. While certainly reprehensible, there may well be reasons underlying an asylum seeker proffering misleading information. In *Tantoush v RAB & Others*⁴⁸ it was found that:-

⁴⁶ Section 21(b)(1C), page 9 of the Bill.

⁴⁷ Section 21(e)(6), page 21 of the Bill.

⁴⁸ *Tantoush v RAB & Others* 2008 (1) SA 232 (T).

'The objective facts must be examined to decide if a well-founded fear exists. And for that purpose it will usually not be enough to rely almost exclusively on the evidence of the asylum seeker only to reject his claim of fear of persecution because he has previously lied while living, for whatever reasons, on the margins or in the shadows of a legal existence.'⁴⁹

2.71. In essence the applicant's claim must be considered in its entirety rather than simply rejecting the applicant on the strength of a false statement made during the asylum application.

2.72. We recommend that the requirement be removed from the asylum application provisions. If and when the false statement comes to light, the individual can be questioned on the statement and required to defend his or her reasons therefore. The decision maker should then weigh the reasons against the rest of the claim. In its current formulation the provision in the Bill effectively removes this discretionary obligation from the adjudication process.

G. (iv) Presumption of proficiency in language indicated on form⁵⁰

2.73. We wish to caution the Department against relying on a presumption of proficiency simply on the basis of an indication on the form. Many do not understand the content and meaning of what is stated on the forms due to a poor or no grasp of the English language. Many asylum seekers either come from French speaking countries or countries where their native tongue is spoken predominantly and have limited or no understanding of English.

2.74. Should the presumption be retained it is imperative that the individual be advised fully of the existence of the presumption that that they be given the opportunity to rebut the presumption at a later stage should the correction not be made during the initial statement of the claim.

H. Asylum seeker visa⁵¹

2.75. We wish to point out that the term "asylum seeker visa" may lead to confusion regarding whether the document is issued in terms of the Refugees Act or the

⁴⁹ Ibid. at para 102.

⁵⁰ Section 21(e)(7), page 9 of the Bill.

⁵¹ Section 22, page 10 of the Bill.

Immigration Act. It would be more appropriate to retain the current reference to “asylum seeker permit”.

H. (i) Extension from time to time⁵²

2.76. The new amendment in relation to when the asylum seeker visa will be extended is vague as it only refers to “from time to time”. The section should include the words “till an application has been finalised or the completion of any judicial proceedings for the review of an adverse decision in terms of section 21”. This will save a great deal of costs on the part of both applicants and the state as it would do away with the need to approach the High Court for urgent interim relief in order to have the applicant documented during the judicial proceedings.

2.77. In the case of the *Director-General: Home Affairs v Dekoba*⁵³ the SCA held that it was proper for an applicant’s permit to remain valid throughout any internal appeal process and, depending on the outcome, any further proceedings taken by way of appeal or review.⁵⁴

H. (ii) Withdrawal of visa by the DG⁵⁵

2.78. The power of the DG to withdraw an asylum seeker visa has the potential to violate the principle of non-refoulment, discussed more fully above.

2.79. At present the contravention of conditions on the asylum seeker permit is used by the Department to fine applicants who fail to extend their permits on the due date. To now take this further and impose withdrawal of the entire asylum document on the basis of the expiry is grossly unreasonable.

⁵² Section 22(4), page 10 of the Bill.

⁵³ *Director-General: Home Affairs v Dekoba* (224/2013)[2014] ZASCA 71 (28 May 2014).

⁵⁴ *Ibid.* at para [15].

⁵⁵ Section 22(5), page 10 of the Bill.

H. (iii) Assessment of self-sustainability ability and the revocation of the right to work⁵⁶

2.80. We wish to express our concern regarding the new formulation of the new sustainability assessment for new applicants. The procedure will affect asylum seeker's ability to work in South Africa and to engage in self-employment.

2.81. Both the right to engage in work and self-employment have already been adjudicated by our courts. The findings of the courts are rooted in the constitutional rights of migrants and will therefore survive the Amendment to the Refugees Act.

2.82. In the *Minister of Home Affairs v Watchenuka*⁵⁷ the SCA noted that the freedom to engage in productive work is an important component of human dignity in that human beings are inherently a social species with an instinct for meaningful association. Fulfilling a socially useful purpose is therefore linked to an individual's self-esteem and sense of self-worth.⁵⁸ The court ultimately held that a general prohibition on the on employment where there is no reasonable means of support is a material invasion of human dignity and justifiable in terms of the constitutions limitation clause.⁵⁹

2.83. At the time of the *Watchenuka* case the UNHCR provided support to asylum seekers in the form of R160 per month for a period of three months, paid through its implementing partner the Cape Town Refugee Centre. The court, however, recognised that this was an act of charity but that '...a person who exercises his or her right to apply for asylum, but who is destitute, [would] have no alternative but to turn to crime, or to begging, or to foraging.'⁶⁰

2.84. In the *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others*⁶¹ the SCA overturned the decision of the North Gauteng High Court and declared that the

⁵⁶ Section 22(6) – (11), pages 10 - 11 of the Bill.

⁵⁷ *Minister of Home Affairs and others v Watchenuka and another* 2004 (4) SA 326 (SCA).

⁵⁸ *Ibid.* at para [27].

⁵⁹ *Ibid.* at para [33].

⁶⁰ *Ibid.* at para [32].

⁶¹ *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others* (unreported, Case No. 48/2014, ZASCA 143, 26 September 2014).

closure of businesses owned and operated by refugees and asylum seekers in the Limpopo Province was unlawful and invalid. In doing so the SCA indorsed the right to self-employment of asylum seekers and refugees in South Africa.

2.85. Research into migration and employment in South Africa has found that migrants were far more likely than the South African born individuals in the survey to be self-employed.⁶² The study suggested that the large difference in percentages indicated the vulnerable status of foreign-born workers and could possibly be due to difficulties in obtaining work because of issues such as preferences for employment of South Africans and immigration legislation.⁶³ Self-employment within South Africa's informal economy has furthermore been suggested to be an "entry point" for individuals who are excluded from the formal sector by education, skills or poverty.⁶⁴ Another report, which considered the economics of Somali informal traders in the Western Cape, found that, contrary to the popular belief that foreigners are taking South African jobs and resources, Somali traders are largely self-employed and have established a tightly knit social structure in which traders support one another and buy stock together and in some instances employ South African citizens. In this way they contribute to the growth of South Africa's wholesale industry and offer their customers, who are often impoverished themselves, low prices and enhanced services.⁶⁵

2.86. We wish to point out that the new procedures for assessment of self-sustainability ability and the revocation of right to work have the potential to violate Articles 17 and 18 of the UN Convention on the Status of Refugees, to which South Africa did not enter a reservation. Article 17 of the Convention provides that:-

'WAGE-EARNING EMPLOYMENT

1. The Contracting State shall accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances, as regards the right to engage in wage-earning employment.

⁶² Budlender D. 'Migration and employment in South Africa: Statistical analysis of the migration model in the Quarterly Labour Force Survey, 3rd quarter 2012' *MiWorc Report # 5*, June 2014, at p. 8.

⁶³ *Ibid.*

⁶⁴ Charman A., Petersen L., and Piper L. 'Spaza shops in Delft: the changing face of township entrepreneurship' (2011) Working paper 6, African Centre for Citizenship and Democracy, at p. 4.

⁶⁵ ACMS Report, prepared by Gastrow V. with Amit R. 'Somalinomics, A case study of the economics of Somali informal trade in the Western Cape' (2013) available at <<http://www.migration.org.za/uploads/docs-/report-42.pdf>>.

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

(a) He has completed three years' residence in the country;

(b) He has a spouse possessing the nationality of the country of residence. A refugee may not invoke the benefits of this provision if he has abandoned his spouse;

(c) He has one or more children possessing the nationality of the country of residence.

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

2.87. Article 18 of the Convention then goes on to provide that:-

‘SELF-EMPLOYMENT

The Contracting States shall accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage on his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies.’

2.88. We recommend that the new procedures for assessment of self-sustainability ability and the revocation of right to work should be removed.

H. (iv) Deeming asylum applications as abandoned⁶⁶

2.89. The deeming of an asylum claim as abandoned and the accompanying bar to re-application may violate both the principle of non-refoulment, which has been discussed above in detail.

⁶⁶ Section 22(12) – (13), page 11 of the Bill.

2.90. We are concerned that an applicant who has been unable to gain access to a Refugee Office or who does not have the funds to travel to an office of application as directed by the Department will be deemed to have abandoned his or her asylum claim. The result for such an individual will be the potential of deportation to their country of origin where they could face persecution and the Department will violate the principle of non-refoulement.

2.91. The strict application of this process will potentially undermine the very purpose for which the asylum process was established. We recommend that it be removed.

H. (v) Statutory offence for an expired permit⁶⁷

2.92. While more appropriate than deeming an application abandoned it must be remembered that the expiry of a permit is an administrative offence akin to failing to renew a driver's license. As a result the imposing of a fine or imprisonment for a period of up to 5 years or both is excessive. We recommend that the reference to imprisonment be removed and that the fine be set at a nominal amount.

I. The requirement that the granting of refugee status be confirmed by the Standing Committee for Refugee Affairs⁶⁸

2.93. The requirement that only the granting of refugee status be confirmed by the Standing Committee for Refugee Affairs potentially creates a system for refugee status determination which is biased towards rejection.

2.94. Studies of the South African refugee status determination system have found that it has created a "biased incentive system" due to the fact that RSDOs are forced to conduct cursory interviews to reduce backlogs.⁶⁹ The study argued that the

⁶⁷ Section 22(14), page 11 of the Bill.

⁶⁸ Section 24, page 12 of the Bill.

⁶⁹ Amit R. 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' International Journal of Refugee Law Vol. 23, No. 3, 458 at p. 459. For further discussions on this pervasive problem see FMSP 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions,' Forced Migration Studies Programme Research Report, April 2010, available at <<http://www.migration.org.za/report/amit-r-2010-protection-and-pragmatism-addressing-administrative-failures-south-africa-s-refug>>, and FMSP 'All Roads Lead to Rejection, Persistent Bias and Incapacity in South African Refugee Status Determination' Forced Migration Studies Programme Research Report, 2012 <[24](http://ww-</p></div><div data-bbox=)

situation is compounded by the internal review process, which encourages negative RSDs irrespective of the validity of asylum claims.⁷⁰

2.95. We recommend that the duty to confirm decision be removed. It is vitally important that RSDO's see the rejection of refugee status with the proper weight and not as an easy way out.

J. Withdrawal of Refugee Status⁷¹

2.96. We are concerned that the inevitable consequence which will flow from the withdrawal of refugee status is the expulsion of the individual from the Republic. We wish to draw the Department's attention to Article 32 of the UN Convention on the Status of Refugees, to which South Africa did not enter a reservation. Article 32 provides that:-

‘EXPULSION

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.
3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.’

2.97. It is vitally important that stringent protocols be placed on the withdrawal of refugee status. We recommend that the Standing Committee be mandated to only exercise this power after consultation with the UNHCR.

w.migration.org.za/publication/all-roads-lead-rejection-persistent-bias-and-incapacity-south-african-refugee-status-det>.

⁷⁰ Ibid.

⁷¹ Section 36, page 13 of the Bill.

3. CONCLUSION

3.1. With the introduction of the Refugees Act Amendment Bill and the policy proposals suggested in the Green Paper in International Migration, we have begun to notice that South Africa has begun to narrow the content and scope of its refugee protection framework in a manner that is not in keeping with the constitution and our international obligations.

3.2. Our view is that that the changes proposed in the Refugees Amendment Bill and many other new policies adopted by the Department of Home Affairs are a disappointing departure from a human rights approach to refugee protection in South Africa.

3.3. On 20 June 1997 President Nelson Mandela issued a message on Africa Refugee Day. In his ever eloquent manner President Mandela concluded his message as follows:-

“As long as armed conflict persists, Africa will need to formulate progressive and humanitarian refugee policies to deal with the crisis. To this end South Africa is committed to regional as well as inter-regional cooperation within the framework of the Organisation of African Unity.”⁷²

3.4. It is with great dismay that we submit that the Draft Bill moves away for these ideals. We therefore urge the Department to re-consider the provisions set out in the Bill.

Yours faithfully,

The UCT Refugee Rights Unit



Popo Mfubu
Attorney



Fatima Khan
Director

⁷² The full message can be viewed at <<http://www.anc.org.za/show.php?id=3125>>.

