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Attention: The Chairperson: Portfolio Committee on Home Affairs

C/O: Eddy Mathonsi
PER EMAIL: emathonsi@parliament.gov.za

Dear Sir

RE: UCT REFUGEE RIGHTS UNIT'S SUBMISSIONS ON THE DRAFT IMMIGRATION AMENDMENT BILL, 2018

A. INTRODUCTION

1. The University of Cape Town's Refugee Rights Unit has been providing free legal assistance to refugees and asylum seekers for over a decade. Amongst its core functions includes assisting asylum seekers with navigating through the asylum process and ensuring that the rights of refugees and asylum seekers in South Africa are upheld.

2. We thank the Portfolio Committee on Home Affairs (the "Committee") for the opportunity to make these brief submissions, which are focused on how the Draft Immigration Amendment Bill, 2018 (the "Draft Bill") may impact the rights of asylum seekers who inadvertently get detained.

3. An examination of the definition of an illegal foreigner makes it is clear that asylum seekers are precluded and should not be dealt with in terms of section 34 of the Draft Bill, however, in our experience we have encountered many asylum seekers (especially undocumented ones) who are arrested and dealt with in terms of section 34 of the Immigration Act 13 of 2002 (the "Immigration Act").

4. It is important to note that many undocumented asylum seekers (those who have not had an opportunity to apply at a Refugee Reception Office) have been hindered from making applications not of their own actions but through the unlawful actions of the Department of Home Affairs. Historically there have been 5 Refugee Reception Offices throughout the country but the Department of Home Affairs decided to suspend services to first time applicants in 2 of them (the Cape Town and Port Elizabeth offices) which has caused added pressure to the remaining offices that still assist new applicants. The remaining Refugee Reception Offices that assist new applicants are fraught with long lines and massive delays which creates a barrier to entry for many new applicants.

5. Despite judgements from the highest courts in this country, the Department of Home Affairs has not re-opened services to new applicants at the Cape Town and Port Elizabeth offices. The Supreme Court of Appeal in the case of the *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others [2017] 4 All SA 686 (SCA)* on 29 September 2017 found that the decision taken by the Department of Home Affairs on 31 January 2014 to close the Cape Town Refugee Reception Office was "substantively irrational and unlawful" and ordered the Department of Home Affairs to reopen and maintain a fully functional refugee reception office in or around the Cape Town Metropolitan Municipality, by **31 March 2018**. The Department of Home Affairs then petitioned the Constitutional Court in order to appeal the decision of the Supreme Court of Appeal but was refused an audience. This means that as per the Supreme Court of Appeal order of 29 September 2017, the CTRRO must be reopened and be fully

functional by **31 March 2018**. This office still remains closed to new applicants.

6. This concern is aggravated further by the fact that a similar decision and subsequent legal challenge was brought in relation to the Port Elizabeth Refugee Reception Office in the case of *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another 2015 (3) SA 545 (SCA)*. On March 2015 the Supreme Court of Appeal ruled that the decision taken by the Department of Home Affairs to close the Port Elizabeth Refugee Reception Office was unlawful and ordered that it be reopened by 1 July 2015. This order by the Supreme Court of Appeal has to date not been complied with at all.

7. In light of the above barriers to accessing the remaining Refugee Reception Offices, we have noted that asylum seekers wanting to make applications for asylum who are stopped by an immigration official are often unlawfully detained in terms of section 34 of the Immigration Act. It is for this reason why we as the Refugee Rights Unit wish to make submissions regarding the Draft Bill in order to ensure that it affords the greatest protection for anyone who is detained especially when they are an asylum seeker.

8. Though we welcome aspects of the Draft Bill, we are however concerned that it does not go far enough to ensure that the rights of those that are detained are respected and through sufficient safe-guards, protected.

9. We have herein itemised our concerns regarding the Draft Bill. The discussion which follows identifies the issues of concern and provides suggestions where possible.

B. KEY ISSUES OF CONCERN

A discretion whether to detain a person must always be construed in favorem libertatis (in favour of freedom or liberty)

10. As a contextual starting point is important to note that all detentions of any kind should be guided by the Constitution of the Republic of South Africa, 199 (the "Constitution"). Section 12(1)(a) of the Constitution states in the relevant part that "*everyone has the right to freedom and security of the person, which includes the right . . . not to be deprived of freedom arbitrarily or without just cause.*"

11. Whenever an immigration official is ceased with making a decision about whether they should detain a person that discretion should as far as possible be exercised in favour of liberty.

12. Our courts have embraced this principle in many judgments which dealt with the appropriateness of detentions of illegal foreigners. In *Ulde* the Supreme Court of Appeal explained this as follows:[1]

> *"What the learned judge said about the nature of an immigration officer's discretion concerning an arrest of an illegal foreigner is clearly also applicable to the discretion to detain the foreigner concerned. But his description of the discretion not to arrest (or detain) as being 'limited' in that it allows the immigration officer to merely be humane is, however, misleading because this may be read to mean that the illegal foreigner ought presumptively to be arrested (or detained) unless the immigration officer decides not to do so for humane reasons. Bearing in mind that we are dealing here with the deprivation of a person's liberty (albeit of an illegal foreigner), the immigration officer must still construe the exercise of his discretion in favorem libertatis when deciding whether or not to arrest or detain a person under s 34(1) - and be guided by certain minimum standards in making the decision."*

13. In *Jeebhai*,[2] the Supreme Court of Appeal held:

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1 *Ulde v Minister of Home Affairs* 2009 (4) SA 522 (SCA) ("*Ulde*") paragraph 7.

2 *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) ("*Jeebhai*") paragraphs 21-22.

"A decision to deport someone often carries far-reaching consequences - it concerns that person's livelihood, security, freedom and, sometimes, his or her very survival. This is why immigration laws, often harsh and severe in their operation, contain safeguards to ensure that people who are alleged to fall within their reach are dealt with properly and in a manner that protects their human rights. Our courts have thus stressed 'the duty which lies on officials entrusted with the administration of the immigration laws of observing strictly and punctiliously the safeguards created by the Act'.

14. Therefore we welcome the requirement provided for in the Draft Bill which requires that when an immigration official arrests an illegal foreigner it must be subject to subsection (1A) which has been incorporated by the Draft Bill and requires the immigration official to interview an illegal foreigner in order to determine if the "*arrest and detention is justified in the circumstances*".

15. This is in line with the prescripts of the Constitution and many judgements which have held that an immigration official has the discretion whether to arrest or not for purposes of deportation. The Supreme Court of Appeal pointed out in *Jeebhai* at paragraph 34 that:

"To recapitulate, a decision that a person is an illegal foreigner triggers his right to appeal or review that decision. It may also cause an arrest and detention for the purposes of ***deportation, but need not****. The decision to arrest and detain an illegal foreigner for the purposes of deportation is a discretionary one. It does not detract from any of the alleged foreigner's rights under s 8 and is not contingent upon his decision whether or not to exercise them."*

16. Our concern however is that the Draft Bill does not set out clearly what questions will form this enquiry or what the immigration official will consider. The Draft Bill merely requires the immigration official to conduct the "*prescribed interview*" however no clarity is given as to what this interview entails.

17. We suggest that the Draft Bill provides some guidance to immigration officials in order to ensure that there is no unfretted and arbitrary exercise of discretion. Though we do not advocate for a closed list of things that an immigration official may consider we however suggest guidance. For example, the follow are some of the factors that should form part of the enquiry into whether a person should be detained pending deportation, including:

    a. Is there a risk of them absconding if released? Have they previous been detained for purposes of deportation and absconded?

    b. Do they have a fixed address, any assets or a bank account?

    c. Do they have ties, such as family members in South Africa, which make it less likely that they will abscond?

    d. Do they accept the need for them to return to their home country, and/or are they willing to return voluntarily if released? Do they have the means to purchase a ticket for land, air or sea travel and depart on a set date?

The assistance of a competent interpreter when necessary

18. Furthermore, no mention in the Draft Bill is made to the use of a competent interpreter during the interview contemplated in section 1A of the Draft Bill. The use of a competent interpreter is an integral component of an inquiry into whether the illegal foreigner must be detained for purposes of deportation. In *Katshingu v Standing Committee for Refugee Affairs and Others* (unreported decision of the WCC: case number 197264/2010: 2 November 2011 per Bozalek, J), a case which dealt with the failure on the part of a Refugee Status Determination Officer to provide

an interpreter during an interview was held by the court to be "*an egregious shortcoming rendering the entire process to be unfair*".

19. The illegal foreigner must have an opportunity, through the use of an interpreter, to participate meaningfully in the interview.

20. A competent interpreter must also be provided for with regards to section 34(1)(a) of the Draft Bill which requires that the foreigner concerned must be notified in writing of the decision to deport them and must also be informed of their right to appeal such a decision in terms of the Immigration Act. If the above notification in terms 34(1)(a) of the Draft Bill is not properly explained to a foreigner in a language that they understand then this safeguard will be meaningless if they do not fully appreciate their rights.

21. The only provision in section 34(1)(c) of the Draft Bill regarding language only requires that the rights of an illegal foreigner be informed of their rights "*when it is possible, practical and available in the language that he or she understands*". It is submitted that the right to have rights explained in a language that a foreigner understands should not be qualified but "*when possible, practical and available*" because of the potential risk of grave unfairness which may result. As noted above, a competent interpreter is integral throughout this process as it ensures that the foreigner is fully appraised of their rights. This will ensue that they will be able to exercise their rights especially in relation to the process set out in section 34(1)(d) read with regulation 33(4) which governs the manner in which the warrant of detention may be extended.

22. In terms of section 34(1)(d) an illegal foreigner may not be detained for longer than 30 days without a warrant of a Court. If immigration officials wish to detain any detainee for more than 30 days, they must apply to the relevant court for an extension of the detention.

23. The procedure for such an application is governed by Regulation 33(4) of the Immigration Regulations. It provides:

"An immigration officer intending to apply for the extension of the detention period in terms of section 34(1)(d) of the Act shall-

(a) within 20 days following the arrest of the detainee, serve on that detainee a notification of his or her aforesaid intention on Form 31 illustrated in Annexure A;

(b) afford the detainee the opportunity to make written representations in this regard within three days of the notification contemplated in paragraph (a) having been served on him or her; and

(c) within 25 days following the arrest of the detainee, submit with the clerk of the court an application for the extension of the period of detention on Form 32 illustrated in Annexure A, together with any written representations that may have been submitted by the detainee in terms of paragraph (b)."

24. The above regulation thus prescribes and sets out the timeframes for the various elements of an extension application. A vital element of these timeframes is that the detainee should be given three full days to prepare **written representations** opposing the extension of their detention. It is therefore vital that a foreigner be provided with an interpreter in order for them to make such representations.

The extension of the 120-day maximum period to 180 days

25. Section 34(1)(d) of the Draft Bill empowers a court to extend the detention of a foreigner for an additional two further times "*for a period not exceeding 30 calendar days at a time where the deportation of such foreigner cannot be effected as a result of lack of cooperation, as prescribed, from such foreigner or the relevant authority of his or her country of origin or nationality*".

26. The Draft Bill therefore creates a scenario where a foreigner could be potentially detained for an additional period of 60 days which would bring

the total period of detention to 180 days. The two instances when this can take place is if the foreigner does not “cooperate” or when the embassy of the foreign national also does not “cooperate”. The Draft Bill does not clarify what is meant by a lack of cooperation. In any event, we submit that it is grossly unfair to hold any person in detention for effectively 6 months before they are deported.

27. The previous requirement that no one is detained for no longer than 120 days for purposes of deportation was already in itself a long period and to extend it further is contrary to constitutional and international law principles that protect the right to liberty. This is worrying in light of the fact that a foreigner has no authority over the actions of their embassy and to punish them for any lack of cooperation is egregious. We therefore suggest that this provision be removed.

C. CONCLUSION

28. The Draft Bill is an important step in addressing the manner in which immigration officials approach detentions of foreigners in terms of the Immigration Act however we are concerned that there are still a number of gaps which may cause the arbitrary deprivation of liberty and the violation of rights as highlighted above. move away for these ideals.

29. We therefore urge the Committee to re-consider some of the provisions we have highlighted as concerning and to further include additional safeguards to ensure that the rights of foreigners who are in detention for purposes of deportation are adequately protected.

Yours faithfully,

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