

Re:

**IMMIGRATION & REFUGEE LAW COMMITTEE
OF THE LAW SOCIETY OF SOUTH AFRICA**

In re:

REFUGEES AMENDMENT BILL

*COMMENTS ON THE REFUGEES AMENDMENT BILL B 11 - 2008
TO THE HOME AFFAIRS PORTFOLIO COMMITTEE:*

INTRODUCTION:

The Portfolio Committee on Home Affairs has invited the public to submit comments on the Refugees Amendment Bill [B 11-2008].

The Immigration and Refugee Law Committee of the Law Society of South Africa [referred to hereafter as "*the LSSA Committee*"] presents the comments set out hereunder for the consideration of the Portfolio Committee.

The LSSA Committee presents its submissions in summarised form for the benefit of the Portfolio Committee due to the limited time that has been given for making submissions.

The LSSA Committee would be glad to be afforded an opportunity to address the Portfolio Committee to expand on various aspects of these submissions and/or to address any questions the Portfolio Committee might have.

SUBMISSIONS:

- a. CLAUSE 1 / DEFINITIONS:

- b. "Biometrics":
 - i. Please refer to the concerns of the LSSA Committee set out below arising from this definition as it is applied at Clause 13 / s 21(3).

- c. "Dependant":

- i. The LSSA Committee is concerned that the proposed definition might be construed as intended to establish a closed list of persons who qualify as dependants when the range of human circumstances, especially in the refugee context can be so varied;
 - ii. The LSSA Committee proposes that the term ***“or any person shown to be lawfully dependant”*** be inserted after the phrase “of the immediate family”.
- d. “Fraudulent application for asylum”:
- i. As presently worded, the definition includes applications based on *“facts which the applicant knows to be false”* which is a *non sequitur*,

ii. The LSSA Committee proposes that the word **“facts”** be removed from this definition.

e. “Spouse”:

i. For the sake of continuity, the LSSA Committee proposes that the definition in (b) be amended to read as follows

(1) “ ***a permanent homosexual or heterosexual relationship as contemplated in the Immigration Act***”

2. AD CLAUSE 11 / SECTION 8B (a):

a. This currently calls for a chairperson who is “legally

qualified”;

- b. This requires only that the person has obtained a qualification lawfully;
- c. The clause presumably intended to convey that the chairperson must have a qualification in law;
- d. Without further ‘qualification’, the proposed definition does not require a qualification in South African law nor does it require admission as an attorney or advocate and/or any amount of experience once so admitted;
- e. Given the importance of the position and the complex questions of law that serve before the RAB and/or SCRA currently - and will increasingly in the future - the LSSA Committee proposes that the requirement read as follows -
 - i. “ *is a practising attorney in good*

standing with the relevant provincial law society or an advocate who is a member of the Bar, with a minimum of five years experience in a related field of law and includes a retired senior Regional Magistrate or Judge of the High Court.”

3. RE CLAUSE 13(a) / S 21:

a. Re 21(1):

- i. An application is to be made at a Reception Office - or *“at any other place designated by the Director General”*
- ii. The vagueness of the alternative location of the place at which an application is to be made is a matter of considerable

concern;

- iii. Under the delegation of powers provision, the power to designate a location can be delegated to “*any officer or employee*” in the public service.
- iv. This could result in the seat of a car or plane or army detention centre being designated on an *ad hoc* basis as the place at which an application is to be made.
- v. This, especially in an age of the so-called ‘war on terror’ and ‘extraordinary renditions’, could lead to applications being made and decided entirely in secret.
- vi. The LSSA Committee proposes that the phrase “*or at any other place*” be deleted.

- b. Re 21(3):
- i. This provides that “*every applicant*” must have his/her *biometrics* taken in the prescribed manner.
 - ii. Biometrics, as defined, include taking fingerprints and photographs - which the LSSA Committee does not take issue with.
 - iii. However it also includes taking DNA samples. The justification for this grave invasion of the asylum seeker’s rights to privacy, dignity and equality is not made clear.
 - iv. More important, there is no provision in the Act for who manages this data base, who has access to it and why, who

oversees or acts as an appeal mechanism to protect the privacy of asylum seekers. Given that criminal elements within the Department have access even to the Department's Population Register, unregulated access to the DNA of asylum seekers has to be unjustified.

- v. The LSSA Committee urges that such a critical issue not be left to regulation but be addressed by Parliament.

4. CLAUSE 14:

- a. re S 21b(2):

- i. It is impractical to legislate that the fact of births "must" be reported to the Refugee Reception Office within a month of the birth when so many asylum seekers scarcely speak a word of English, come

from a myriad of cultures and may even be unaccompanied women who are simply not able to comply;

- ii. The LSSA Committee proposes that this period should rather be dealt with in regulations to the Act with allowance made therein both for exceptions and for what is to happen if the birth is not reported.

b. Re s 21B(3):

- i. This provides that where a dependant who has refugee status, ceases to be a dependant, he or she may apply to be permitted to remain in the RSA.
- ii. To clarify the section the LSSA Committee proposes that the words “as a refugee” be added after the words “*within*

the Republic".

5. RE CLAUSE 19 / S 24A(5):
 - a. The reference here to the Immigration Act must be an error as that is a non-sequitur; moreover the RSDO has no jurisdiction in terms of the Immigration Act.
 - b. The LSSA Committee proposes that the word "Immigration Act" be replaced by "Refugees Act"

6. CLAUSE 21 / 27(f):
 - a. In terms hereof, the refugee's rights are limited to *"seeking employment"*
 - b. The LSSA Committee's members have experienced employers not understanding this provision;
 - c. The LSSA Committee is also concerned at its

evident limitations.

- d. The LSSA Committee proposes that the clause be amended to read as follows:

- i. “ ***seek and take up employment, undertake self-employment and/or to study.***”

7. CLAUSE 22 / 27A:

- a. In terms hereof, the asylum seeker’s rights do not address their socio-economic rights as have been dealt with in various decisions of the High Court, Supreme Court of Appeal and Constitutional Court.
- b. The LSSA Committee is similarly concerned at its limitations.
- c. The LSSA Committee proposes that the clause be

amended to add a sub-clause to read as follows:

- i. “ ***seek and take up employment, undertake self-employment and/or to study.***”

8. CLAUSE 24 / S 29(1):

- a. This provides that if a person is detained in terms of the Act for longer than 30 days, a magistrate is to “*review*” the detention and to do so “*immediately*” and again “*immediately after*” the expiry of any further such 30 day-period;
- b. The LSSA Committee is deeply concerned at the vagueness of what is a critical oversight mechanism in respect of extremely vulnerable persons;
- c. There is no indication - and there is consequently a need for clarity in the Bill - as to who shall bear the

onus of establishing legality or illegality, if any one, and what exactly is to be reviewed, as experiences with the Immigration Act detentions have shown;

- d. The Bill should provide that these applications are to be heard in open court unless good reasons exist for the application to be heard in chambers;
- e. The Bill must provide that the detainee is allowed and is to be invited to make written and/or oral representations;
- f. There is no indication as to what the terms "*immediately*" or "*immediately after*" mean. When is the review application to be heard by a magistrate - within a day or two of the 30 days expiring, or would a week - or more suffice? And what sanctions apply if this is not done in time?
- g. If the detainee is to be permitted to make meaningful representations, he or she needs to have obtained

the Department's representations, be allowed a reasonable opportunity to consult an attorney and make his or her own representations;

- h. Once papers have been exchanged the matter needs to be set down - all of this impacts on the practical meaning of "immediately" as this process can take days; in terms of the Immigration Act something like 10 days is set aside for the preliminary processes.
- i. What happens if the court reserves judgment on the matter and then takes weeks or more to decide the issue? .
- j. At what point in time does the continued detention after any given 30-day period become unlawful if the magistrate's court has not yet ruled on the matter?
- k. The LSSA Committee proposes that this Clause be substantially re-worked - to give meaningful content

to the rights of persons in terms of s34 of the Constitution in this context and to ensure the Bill measures up to the required constitutional and international standards.

DATED at PRETORIA on this the 20th day of MARCH 2008.
