UNIVERSITY OF CAPE TOWN

UCT LAW CLINIC
Refugee Rights Project
Kramer Law School Building
Middle Campus · 1 Stanley Road
Rondebosch · 7701
Telephone: (021) 650 3775
Telefax: (021) 650 5665
Email: uctlawclinic@uct.ac.za
In reply please quote reference

19 October 2010

The Secretary of Parliament of the RSA
P.O. Box 15
Cape Town
8000

Attention: Mr. Eddy Mathonsi

Re:	Submissions to the Portfolio Committee on Home Affairs (National Assembly) on Refugees Amendment Bill 30-2010

INTRODUCTION

We thank the Portfolio Committee for the opportunity to make these submissions. We wish to advise that prior to the promulgation of the 2008 Refugees Amendment Act (hereinafter referred to as the "Amendment Act") the UCT Law Clinic participated in a comprehensive consultative process, involving both government and civil society stakeholders, in which it provided input on a *draft* Refugees Amendment Bill. Unfortunately, it would seem that on this occasion, the Department of Home Affairs did not find it necessary to consult with any institutions prior to the issuing of the Refugee Amendment Bill 30-2010 (hereinafter the "Bill").

While the Department asserts that the objective of the Bill is to *provide clarity* on a number of issues, this has regrettably not been achieved in our opinion. More specifically, we have not been provided any significant details about the *new* Status Determination Committee or the *new* process involved with the Director General's power to review applications that have been rejected as manifestly unfounded, and the Bill does not provide any details either. We are therefore very concerned that the Bill does not sufficiently address the substantive changes that need to be made to the asylum process so that it functions appreciably better than at present time.

REFUGEE AMENDMENT BILL 30-2010: AREAS OF CONCERN

I. *Manifestly Unfounded Applications*

The Bill has indeed provided clarity on what is meant by an unfounded application and also what is meant by manifestly unfounded application. However, we are querying why the

Department has *re-introduced* manifestly unfounded claims and what is entailed in the new process for reviewing such decisions. Specifically, we would like to know:

- Who the Director General will delegate his or her powers to for this purpose? Will it be an official? Or will it be a board or a new quasi-judicial administrative body?
- Will this official/entity have the necessary legal expertise to conduct this review?
- Large numbers of applicants are currently being rejected as manifestly unfounded? Will this new entity be capacitated to effectively deal with such a large caseload?
- What will happen to the large number of cases currently in the Standing Committee for Refugee Affairs' backlog, for which submissions regarding the manifestly decisions taken, have already been made?
- What will be the prescribed manner and what will be the prescribed time for the review? The 1998 Refugees Act provided the Standing Committee with various options for further investigations into a manifestly unfounded decision, such as the opportunity to call the applicant to appear before it and to provide other information as it may deem necessary). The Bill lacks any similar options for the DG in the review process.

II. *The new Status Determination Committee*

The Bill's accompanying memorandum states that the new Status Determination Committee (hereinafter the "Committee") was created to deal with applications for asylum more "efficiently, promptly, and in a less subjective fashion." It is unclear however whether these objectives are achievable. With regard to this Committee, we query:

- What the composition of the Committee will be?
- In what manner will the Committee hear applications and render decisions?
- It is further unclear what level of expertise and training will be required of members of the Committee. The Bill has not indicated that at least one member of the Committee must be legally qualified.

We would urge that the Committee has the appropriate expertise in light of the fact that they can no longer refer questions of law to the Standing Committee (as was the case for Refugee Status Determination Officers according to the 1998 Act). We are also concerned that there is no longer a body that is intended to oversee the work of the Committee, like the former Standing Committee had done with the Refugee Status Determination Officers.

III. *Definition of Dependant*

We are pleased to note the inclusion of the phrase "who is dependent on him or her;" which indicates that evidence of dependency should guide the decision of whether to include such a family member. However, it would seem as though the Bill has also narrowed the *definition of Dependant* as the deletion of the term "includes" and the insertion of the term "means" connotes a *closed list* of dependant types. This new definition clearly excludes members of the extended family, and in the context of the reality of refugees' flight from their country of origin, this could be seen as an 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. We would therefore recommend reverting to the 2008 Act definition of dependant, such that, in this example, a niece may be included as a dependant, if deemed suitable. We acknowledge the potential of trafficked children possibly being included within these parameters; however, this is an unfortunate possibility in cases of applicants declaring their children as dependants. This is due to the fact that refugees often do not arrive in South Africa with proof of their children's births.

IV. *Removal of Serious Non-Political Crime*

The Bill's amendment of section 4 of the Refugees Act (130 of 1998), as amended by section 5 of the Amendment Act does not provide the necessary clarity with regard to the important issue of excluding a person from refugee protection on the grounds of non-political criminality. In 2008, we were pleased to see that the Amendment Act had brought into line our refugee legislation with the precise wording of Article 1(F)(b) of the 1951 United Nations Refugee Convention Relating to the Status of Refugees (hereinafter the "Refugee Convention"). However, this Bill, by deleting the words "serious non-political crime..." and stating that a refugee could be excluded if he or she committed a non-political crime "which if committed in the Republic, would be punishable by imprisonment" allows for an overly strict interpretation on this issue, which is improper.

In South Africa, there are many minor crimes that may be punishable by imprisonment; however, the intention of the Refugee Convention was not to exclude persons who committed minor crimes. A determination of the seriousness of the crime must be made before *refoulement* (the returning of a refugee to a place where his or her life or freedoms may be threatened) could occur.

Accordingly, we urge that the Department reverts to the Amendment Act's wording of this section in order to bring it into line with Article 1(F)(b) of the Refugee Convention and with international jurisprudence.

Yours faithfully,
UCT LAW CLINIC

Per: Tal Schreier
Tel: 021 650 5493
Email: tal.schreier@uct.ac.za