UNIVERSITY OF CAPE TOWN

REFUGEE RIGHTS CLINIC

Kramer Law School Building
Middle Campus 1 Stanley Road
Rondebosch 7701
Telephone: (021) 650 5581
Telefax: (021) 650 4107
Email: refugeelawclinic@uct.ac.za;

In reply please quote reference

RE: SUBMISSIONS TO THE DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON THE CRIMINAL MATTERS AMENDMENT DRAFT BILL, 2020.

24 April 2020

INTRODUCTION

The Refugee Rights Unit is housed within the UCT Law faculty and it is a multi-functional unit, housing a LAW CLINIC (registered with the Legal Practice Council of South Africa), a Research UNIT which is duly recognised as such by the University's Research Body. The Refugee Rights Unit Teaches Refugee Law to Final year LLB students as well as at a master's level to LLM and M.Phil. students. It also provides direct legal assistance to approximately 5000 refugees and asylum seekers annually to navigate the complex asylum process in South Africa.

We therefore welcome the opportunity to make submissions on the Criminal Matters Amendment Draft Bill[1]. These submissions will begin with general comments about the impact of the Bill on the rights of asylum seekers and refugees in South Africa. Moreover, the submissions will highlight the need for South Africa to abide by international law in the fulfilment of its legal obligations.

[1] Criminal Matters Amendment Draft Bill, 2020

CRIMINAL MATTERS AMENDMENT DRAFT BILL, 2020

The Constitution[2] of the Republic of South Africa mandates that all legislation be compliant and harmonious with the constitutional rights and human rights framework that shapes our democracy. The concern raised, as we will elaborate, relates to the Criminal Matters Amendment Bill (hereafter referred to as the "Bill") and the implications it has on the already precarious position of refugees and asylum seekers in South Africa. The focal point of concern is the impact that this Bill will have on already vulnerable members of our society, namely refugees and asylum seekers, and hope to, by expressing our concerns, mitigate the potential of any harm or prejudice to befall them. Further, to raise concern that the amendments posed in this Bill, jeopardise South Africa's commitment to the international law principle of non-refoulement. This principle is informed and entrenched by our Bill of Rights and the Refugees Amendment Act.

SOUTH AFRICA'S COMMITMENT TO INTERNATIONAL LAW PRINCIPLES

South Africa's commitment to providing safety and security for all refugees and asylum seekers is not only informed by our domestic legislation, but international conventions that we have ratified. South Africa signed and ratified the *1951 United Nations Convention Relating to the Status of Refugees*[3] and the *1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa*[4].

Domestically, South Africa committed itself further to the objectives of these international refugee law conventions by enacting the Refugees Act 130 of 1998[5]. It remains imperative that domestic legislation is informed by these international standards. The Constitution requires courts to consider international law when interpreting the Bill of Rights[6]. Further, when interpreting legislation, favour is to be shown for interpretation that is consistent with international law.

---

[2] Constitution of the Republic of South Africa, 1996.

[3] The 1951 United Nations Convention Relating to the Status of Refugees 189 UNTS 150 (hereafter the '1951 Refugee Convention'

[4] The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1001 UNTS 45 (hereafer the '1969 OAU Convention')

[5] Refugees Act 130 of 1998.

[6] Section 39(1)(b) of the Constitution.

The only instance by which customary international law may not be treated as law in the Republic, is when it is conflicting with the Constitution or legislation[7].

The United Nations High Commissioner for Refugees ('UNHCR') has determined that the grounds for cessation and exclusion have a finite and exhausted list of grounds. The 1951 Refugee Convention[8] and the 1969 OAU Convention[9] also provide an extensive list of grounds which result in the exclusion or cessation of a person's refugee status.

The 1951 Refugee Convention states, at Article 32:

> 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

The above mentioned Convention states at Article 33:

> No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

The 1969 OAU Convention states, at Article 1 (4) and (5):

> This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or, (b) having lost his nationality, he has voluntarily reacquired it, or, (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, (e) he can no longer, because the circumstances in connection with which he was recognized as a refugee have ceased to exist,

---

[7] Section 233 of the Constitution.

[8] Article 32 & 33 of the 1951 Convention.

[9] Article 1 (4) and (5) of the 1969 Convention

continue to refuse to avail himself of the protection of the country of his nationality, or, (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this Convention.

The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that: (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) he has been guilty of acts contrary to the purposes and principles of the Organization of African Unity; (d) he has been guilty of acts contrary to the purposes and principles of the United Nations.

Therefore, grounds which are not provided for in the above-mentioned Conventions are contrary to international refugee law. Any further additions to the grounds would only serve to further damage South Africa's commitment to the refugee and asylum seeker cause.

REFUGEE AMENDMENT ACT AND THE CRIMINAL MATTERS AMENDMENT BILL 2020

The principle of non-refoulement has long been considered the cornerstone of international customary law. It has been entrenched in Section 2 of the Refugees Act[10]. The Refugees Act 130 of 1998 was recently amended, and in doing so expanded on the grounds by which the government can exclude an asylum seeker from refugee status or where an applicant has been granted refugee status cease their refugee status. The Refugee Amendment Act[11] ('the Act') came into operation on 1 January 2020. The effect of which could result in an asylum seeker or refugee being return to their country of origin where they might experience harm. The amendments to the Refugees Act included an expansion to the grounds for exclusion, under Section 4, for asylum seekers making application in South Africa. Similarly under Section 5, grounds for cessation, which affects those who have been granted refugee status,

[10] Supra note 5.

[11] 11 of 2017.

were also amended. The grounds for exclusion and cessation were expanded to include Section 4 (1)(e)-(i) and Section 5(1)(f)-(h), respectively.

The amendments read as follows:

4. Exclusion from refugee status:

(1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she-

(e) has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine; or
(f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent
residence permit; or
(g) is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary; or
(h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry;

5. Cessation of refugee status:

(1) A person ceases to qualify for refugee status for the purposes of this Act if-

(e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because 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; or
(f) he or she has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine; or
(g) he or she has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or

(h) the Minister may issue an order to cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status.

These additional grounds are not in line with the provisions of the Conventions and stand in conflict with South Africa's obligations to adhere to international law standards.

The Act, as amended, has since expanded the grounds for exclusion and cessation for refugees. These additional grounds are inconsistent with established international refugee law principles, set out by the 1951 Refugee Convention and the 1969 OAU Convention. South Africa, as a signatory, to both of these conventions has an obligation and duty to ensure that it continues and strengthens our commitment to providing durable safety and security for all refugees and asylum seekers within our borders.

The principal concern of the amendments to the Act, and its relevance to the Bill, is the expansion of the grounds for cessation and exclusion.

The amended section 4(1)(b) of the Refugees Amendment Act provides;

> that a person does not qualify for refugee status, if the status determination officer has reason to believe that he or she has committed a crime which is not of a political nature and which if committed in the Republic would be punishable by imprisonment without the option of a fine.

Section 4 (1)(e) of the Refugee Amendme[12]nt Act;

> excludes an asylum seeker from qualifying for refugee status if the Refugee Status Determination Officer has reason to believe that the applicant has committed a crime in the Republic which is listed in Schedule 2 of the Criminal Law Amendment Act[13] and is punishable by imprisonment.

[12] Supra note 1 at Amendment 10, page 15.

[13] 105 of 1997.

The Bill seeks to expand the list of crimes and offences in Schedule 2 of the Criminal Law Amendment Act, found at Section (10) of the Bill. The net effect of this is that South Africa would be adding grounds of exclusion and cessation for refugees and asylum seekers to a list of already unlawful provisions[14] that are inconsistent with established international law principles and conventions. The expansion of the list of grounds, as proposed in the Bill, is in conflict with the principle of non-refoulement. By adding to the list of offences in Schedule 2, it increases the grounds by which refugees and asylum seekers can be guilty of an offence, triggering the provisions of the Refugees Act 130 of 1998 as amended. The addition of new clauses within the Bill will result in vulnerable refugees being excluded due to measures which can be deemed draconian. As asylum seekers and refugees, who have fled the most severe and dire circumstances, to widen the scope of that which would deport them would be unjust.

Caution must also be considered for the language used in Section 4 (1) of the Refugee Amendment Act. Refugee Status Determination Officers are granted discretion when making decisions relating to status as noted by the use of “reason to believe”. While this, for the purposes of our comments, is not the focus, it is a matter worth highlighting. Section 4 (1)(e) and Section 5 (1)(f), specifically, should be excluded from the Act[15].

The Minister already has the power to exclude or cease asylum or refugee as provided by Section 28[16] of the Act. The Minister may accordingly order for the removal of an asylum seeker or refugee on grounds of national interest, public order or national security. This ministerial power is, thankfully, subject to Section 2 of the Act[17] (the principle of non-refoulement). While the term “national security” in section 28 is undefined in the Act, it is nevertheless constricted by Section 2. Thus, there are already existing measures in our current legislation that provide the necessary means

[14] Those provisions that are not on the exhaustive list in the international conventions South Africa ratified.

[15] Supra note 9.

[16] Section 28 of the Refugee Amendment Act 11 of 2017.

[17] Section 2 of the Refugee Amendment Act 11 of 2017, specifically refers to the principle of non-refoulement.

for South Africa to ensure the safety of the public and maintain its commitment to the plight of the refugee and asylum seeker.

Unlike the suggested additions to the Criminal Matters Amendment Act, a Section 28 order by the Minister does not violate the principle of non-refoulement or sacrifice South Africa's international obligations to the refugee community. The expansion of the provisions in the Refugee Act 130 of 1998 as amended do not adhere to international refugee law. Further the provisions are contrary to UNHCR Guidelines which provide that in determining whether a particular offence is sufficiently serious, international rather than local standards are relevant.

UNHCR Handbook page 125 provides that the following factors should be taken into account:

a) The nature of the act, the actual harm inflicted,
b) The form of procedure used to prosecute the crime, the nature of the penalty,
c) Whether most jurisdictions would consider it a serious crime.[18]

Thus, for example, murder, rape and armed robbery would undoubtedly qualify as serious offences, whereas petty theft would obviously not. [19]The amendments by expanding Schedule 2 would result in unlawful grounds being used to exclude refugees. Further the decision to exclude refugees if they commit a Schedule 2 crime is arbitrary and does not take into consideration the socio-economic issues which are prevalent in South Africa.

[18] The UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status has been used extensively by South African courts as a guideline and persuasive authority in interpreting the 1951 Refugee Convention, including most recently the Constitutional Court in the matter of Gavric v Refugee Status Determination Officer, Cape Town and Others (CCT217/16) [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC) (28 September 2018). Please see page 125 of Handbook . accessed at: https://www.refworld.org/docid/4f33c8d92.html

[19] *Ibid*

The Refugee Rights Unit therefore makes the following proposal:

1. For the Minister to include a necessary proviso that Schedule 2 offences, if amended, can lead to imprisonment but not exclusion or cessation of status. This would safeguard against violating the principle of non-refoulement; or
2. For the Minister to remove the grounds of exclusion at Section 4 (1) (e), as it relates to the suggested amendments in the Criminal Matters Amendment Draft Bill; and
3. For the Minister to remove the grounds of cessation at Section 5 (1) (f), as it relates to the suggested amendments in the Criminal Matters Amendment Draft Bill.
4. The reason for this removal of the above grounds, as stated previously, is due to the fact that the Minister already has an existing power under Section 28 of the Act, to exclude or cease status. This is subject to the principle of non-refoulement, at Section 2 of the Act.

CONCLUSION

The impact of expanding the listed grounds for exclusion and cessation in the Refugee Act, as amended has been unfavourable, and despite all efforts to thwart the additional grounds, they were signed into law in January of this year. Adding to the list of Schedule 2 offences, proposed in the Criminal Matters Amendment Bill, paired with the new grounds for exclusion and cessation of refugee status, will only serve to negatively impact an already vulnerable group in our society.

South Africa has the opportunity to remedy this situation by removing the grounds of exclusion and cessation at section 4 (1) (e) and section 5 (1) (f), respectively. Therefore, it is trite that the offence in question is weighed against the detrimental consequences of exclusion of an individual of concern.

It is the hope of the UCT Refugee Rights Clinic, that the Department of Justice and Constitutional Development will continue to work collaboratively with all stakeholders and other ministries, to ensure that less punitive measures are enacted into our constitutional framework.

BIBLIOGRAPHY

Legislation

Constitution of the Republic of South Africa, 1996.

Criminal Law Amendment Act 105 of 1997

Criminal Matters Amendment Bill, 2020

Refugees Act 130 of 1998

Refugees Amendment Act 11 of 2017

Treaties

Organization of African Unity (OAU), *Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention")*, 10 September 1969, 1001 U.N.T.S. 45, available at: https://www.refworld.org/docid/3ae6b36018.html [accessed 29 April 2020]

UN High Commissioner for Refugees (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*, December 2011, HCR/1P/4/ENG/REV. 3, available at: https://www.refworld.org/docid/4f33c8d92.html [accessed 29 April 2020]

UN High Commissioner for Refugees (UNHCR), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, September 2011, available at: https://www.refworld.org/docid/4ec4a7f02.html [accessed 29 April 2020]