UNIVERSITY OF CAPE TOWN

REFUGEE RIGHTS CLINIC

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Attention: The Chief Director: Legal Services

BY EMAIL CORRESPONDENCE

Dear Sir or Madam,

RE: UCT REFUGEE RIGHTS UNIT SUBMISSIONS ON THE DRAFT REFUGEES AMENDMENT BILL, 2015

1. INTRODUCTION

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.

We thank the Department for the opportunity to make these brief submissions, which are focused on how the Draft Refugees Amendment Bill, 2015 ("the Draft Bill") may impact the rights of refugees and asylum seekers.

The changes proposed in the Draft Bill are extensive. We see the reference to the Convention Against Torture, in the grounds of exclusion,[1] and the confirmation that children born to asylum seekers and refugees will be forded the same status as their parents[2] as positive developments in the Draft Bill.

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

[1] Amendment to section 4(1)(a), page 7 of the Draft Bill.
[2] Section 14, page 22 of the Draft Bill.

2. KEY ISSUES OF CONCERN

a. The Definition of a Dependant[3]

The amendment of the definition of a "dependant" in the Draft Bill can be grouped into 5 fundamental changes and the addition of a proviso.

First, it would seem as though the Draft Bill has 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 definition clearly excludes members of the extended family, and in the context of the reality of refugees' flight from their country of origin, this is 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.

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. 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 Draft Bill will serve to discriminate against refugee major children in the same position.

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. The Department of Social Development have devised standard operating procedures for dealing with such cases. We submit that the placement of

[3] Insertion of section 1(b), page 6 of the Draft Bill.
[4] The age of majority is set at 18-years of age by section 17 of the Children's Act 38 of 2005.

the child by a children's court enquiry, as is the current approach, should be retained and the Draft Bill should accordingly reflect the recognition of dependency via order of the South African Children's Court.

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 that the individual to marry. We would suggest that this evidences a signs of improvement in the individuals psyche to the extent that once settled in South Africa the individual is able to contemplate forming a family which is a big step from the trauma that compelled the person to flee from their country of origin.

We are concerned here with two categories of individuals who marry during their time of asylum: [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 therefore a bar to marriage while in South Africa.

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.'

Similarly, Article 23 of the International Covenant on Civil and Political Rights, which South Africa has ratified, provides:

'(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.'

The African Charter on Human and Peoples' Rights, also ratified by South Africa, provides in Article 18:

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

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

. . .'

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

Domestically, the Constitutional Court in *Dawood v Minister of Home Affairs*[5] recognised 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.'[6]

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[5] *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)

[6] Ibid. at para [31].

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.[7]

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 spouses to honour their obligations to one another would also limit that right.'[8]

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.[9] 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.

Fifthly, the deletion of the words "member of the immediate family" and the insertion of the "parent" unfairly limits the scope of dependency by excluding members of the extended family.

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 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 fundament right to family unity or accord with the best interests of the child. We therefore recommend that the proviso be removed.

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[7] 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.

[8] *Dawood v Minister of Home Affairs* (note 2 above), at para [37].

[9] See the Prohibition of Mixed Marriages Act 55 of 1949.

b. The Refugee Status Determination Committee[10]

We note that the decision has been made to abandon the move towards a "Status Determination Committee". The decision is welcome as there are 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.

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.[11]

c. Exclusion from Refugee Status[12]

The extension of the exclusion clause now contemplated by the Draft 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-refoulment (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). This principle is embodies in section 2 of the Refugees Act and has been extended to the return of an individual to place where there is a serious disturbance of the peace.

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.[13]

i. <u>Crimes in the Republic listed in Schedule 2 of the Criminal Law Amendment Act or punishable offences without the option of a fine</u>[14]

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

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[10] Insertion of section 1(c) , page 6 of the Draft Bill.
[11] This was the finding in *Kiliko v The Minister of Home Affairs* 2006 (4) SA 114 (C).
[12] Section 2, page 7 of the Draft Bill.
[13] 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).
[14] Insertion of section 4(1)(e), page 8 of the Draft Bill.

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. At the very least the exclusion should be limited to individuals who have been found guilty of the commission of such a crime. A simple allegation of having committed the crime in question will not afford the individual their constitutional right.

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.

We recommend that the ground for exclusion 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.

ii. Offences in terms of the Immigration Act, Identification Act and Passport and Travel Document Act[15]

The exclusion from refugee status on the basis of committing a statutory offence in terms of the Immigration Act, Identification Act or Passport and Travel Documents Act 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.

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

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....'

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

[15] Insertion of section 4(1)(f), page 8 of the Draft Bill.

'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.'

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

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*[16] 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.'[17]

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

We recommend that the ground for exclusion be removed. An individual who transgresses the Immigration Act, Identification Act or Passport and Travel

[16] *Tantoush v RAB & Others* 2008 (1) SA 232 (T).
[17] Ibid. at para 102.

Documents Act can repay his or her debt to society through the criminal justice system without the principle of non-refoulment being violated.

iii. Fugitive from justice in another country[18]

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

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.[19] 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.

Another example is the case of military desertion and draft evasion. 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.'[20]

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.

The UNHCR Handbook[21] is very instructive in this regard. The section on Punishment[22] provides as follows:-

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[18] Insertion of section 4(1)(g) , page 8 of the Draft Bill.
[19] A copy of the Act is available at <http://www.refworld.org/pdfid/530c4bc64.pdf>.
[20] Goodwin-Gill G. *The Refugee in International Law* (1983) at pp. 33-34.
[21] *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).
[22] Paragraphs 56 – 60.

'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.'

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.

iv. Entry via means other than through a port of entry[23]

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.'

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.

v. Failure to apply for asylum within 5 days[24]

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.

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 the refugee regime and liable to processing as an illegal foreigner under the

[23] Insertion of section 4(1)(h) , page 8 of the Draft Bill.
[24] Insertion of section 4(1)(i) , page 8 of the Draft Bill.

Immigration Act. The deportation would violate the individual's right to non-refoulment.

In the matter of *Abdi and Another v Minister of Home Affairs and Others*[25] 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....'[26]

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

Currently Regulation 2 of the Refugee Regulations[27] 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 subregulation 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.'

In *Bula and Others v Minister of Home Affairs*[28] and *Ersumo v Minister of Home Affairs*[29] the SCA considered regulation 2. The result in both instances was 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.

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[25] *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA).
[26] Ibid. at para [22].
[27] *GG* 21075 of 6 April 2000.
[28] *Bula and Others v Minister of Home Affairs and Others*2012 (4) SA 560 (SCA).
[29] *Ersumo v Minister of Home Affairs and others* 2012 (4) SA 581 (SCA).

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.[30] 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.

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

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 Status[31]

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 appropriate to interpret the clauses strictly and to ensure that procedures for determining general cessation are fair, clear, and transparent.'[32]

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 Draft Bill's detailed grounds for cessation should only be exercised with caution.

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[30] The lawfulness of that practice can be debated in another forum.
[31] Section 3, page 9 of the Draft Bill.
[32] 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>.

We recommend that the Department pay close attention to the UNHCR Guidelines on the application of the Cessation Clauses. [33]

We are concerned about the inclusion of the express inclusion as a ground for cessation 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.

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.

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 Offices*[34]

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

Given the gravity of the impact that disestablishment of an office has on the people it was established to service[35] we are concerned by the removal of the obligation to consult with the Standing Committee for Refugee Affairs.

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 were it would be irrational to take a decision without

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[33] The Cessation Clauses: Guidelines on their Application UNHCR, Geneva, April 1999, available at <http://www.unhcr.org/3e637a202.html>.
[34] Insertion of section 8(c)(3), page 11 of the Draft Bill.
[35] See for instance the argument in *Scalabrini Centre Cape Town v Minister of Home Affairs and Others* [2012] 4 All SA 576 (WCC).

such consultation, because of the special knowledge of the person or organisation to be consulted.[36]

We suggest that the 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.

f. Standing Committee[37]

We note that under the functions of the newly constituted Standing Committee 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[38]

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

i. Within 5 days of entry into the Republic[39]

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-refoulment.

As has been set out above 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 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

[36] *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].
[37] Section 12, page 16 of the Draft Bill.
[38] Section 13, page 20 of the Draft Bill.
[39] Amendment to section 21(a)(1), page 20 io the Draft Bill.

Immigration Act. The deportation would violate the individual's right to non-refoulment.

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.[40] 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.

We recommend that the qualification that an application be lodged within 5 days be changed from "5 days" to "within a reasonable time".

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.

ii. Requirement for categories of asylum seekers to report to designated offices[41]

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.

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.

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[40] The lawfulness of that practice can be debated in another forum.
[41] Insertion of section 21(b)(1A)-(1B), page 21 of the Draft Bill.

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.'

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.

iii. ***Rejection on the basis of false or misleading information***[42]

While certainly reprehensible, there may well be reasons underlying an asylum seeker proffering misleading information. In *Tantoush v RAB & Others*[43] 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.'[44]

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.

We recommend that the requirement be removed from the asylum application provisions. As an 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 Draft Bill effectively removes this discretionary obligation from the adjudication process.

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[42] Insertion of section 21(c)(6), page 21 of the Draft Bill.
[43] *Tantoush v RAB & Others* 2008 (1) SA 232 (T).
[44] Ibid. at para 102.

iv. ***Presumption of proficiency in language indicated on form***[45]

We wish to caution the Department against relying on a presumption of proficiency simply on the basis of an indication on the form. Many applicants fail to understand the content and meaning of what is stated on the forms. An applicant may believe that he is required to list all languages he or she can understand without understanding that he or she should limit the list to only the language that he or she are proficient in. The result may be a presumption that is based a false assertion of the true state of affairs.

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 visa[46]

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 Immigration Act. It would be more appropriate to regain the current reference to "asylum seeker permit".

i. **Asylum seeker pending finalisation may apply for asylum seeker visa**[47]

We note that current asylum applicants may apply for the asylum seeker visa. We wish to express our concern that this new application process should not serve to diminish the rights that the asylum seeker currently enjoys. Should this occur the individual must be informed fully of any and all changes.

ii. **Extension from time to time**[48]

The extension clause would greatly benefit by including the words "or the completion of any judicial proceedings for the review of an adverse decision in terms of section

[45] Insertion of section 21(c)(7), page 21 of the Draft Bill.
[46] Section 15, page 22 of the Draft Bill.
[47] Insertion of section 22(1), page 22 of the Draft Bill.
[48] Insertion of section 22(4), page 23 of the Draft Bill.

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.

In *Director-General: Home Affairs v Dekoba*[49] 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.[50]

iii. Withdrawal of visa by the DG[51]

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.

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.

iv. Assessment of self-sustainability ability and the revocation of the right to work[52]

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.

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.

In the *Minister of Home Affairs v Watchenuka*[53] 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

[49] *Director-General: Home Affairs v Dekoba* (224/2013)[2014] ZASCA 71 (28 May 2014).
[50] Ibid. at para [15].
[51] Insertion of section 22(5), page 23 of the Draft Bill.
[52] Insertion of section 22(6) – (11) , pages 23 - 25 of the Draft Bill.
[53] *Minister of Home Affairs and others v Watchenuka and another* 2004 (4) SA 326 (SCA).

association. Fulfilling a socially useful purpose is therefore linked to an individual's self-esteem and sense of self-worth.[54] 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.[55]

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.'[56]

In the *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others*[57] the SCA overturned the decision of the North Gauteng High Court and declared that the 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.

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.[58] 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.[59] 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.[60] Another report, which considered the economics of Somali informal traders in the

[54] Ibid. at para [27].
[55] Ibid. at para [33].
[56] Ibid. at para [32].
[57] *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).
[58] 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.
[59] Ibid.
[60] 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.

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. 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.[61]

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.
>
> 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.'

[61] 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> .

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.'

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

v. Deeming asylum applications as abandoned[62]

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.

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 a their country of origin where they could face persecution.

The strict application of this deeming process, in real world operation, will potentially undermine the very purpose for which the asylum process was established. We recommend that it be removed.

vi. Statutory offence for an expired permit[63]

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.

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[62] Insertion of section 22(12) – (13), page 25 of the Draft Bill.
[63] Insertion of section 22(14), page 25 of the Draft Bill.

i. *The requirement that the granting of refugee status be confirmed by the Standing Committee for Refugee Affairs*[64]

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.

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.[65] The study argued that the situation is compounded by the internal review process, which encourages negative RSDs irrespective of the validity of asylum claims.[66]

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 Status*[67]

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.

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[64] Section 16, page 26 of the Draft Bill.

[65] 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 <http://www.migration.org.za/publication/all-roads-lead-rejection-persistent-bias-and-incapacity-south-african-refugee-status-det>.

[66] Ibid.

[67] Section 19, page 28 of the Draft Bill.

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.'

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.

3. CONCLUSION

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."[68]

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 Draft Bill.

Yours faithfully,

The UCT Refugee Rights Unit

Justin de Jager
Senior Attorney

Fatima Khan
Refugee Rights Unit Director

28th August 2015

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