UNIVERSITY OF CAPE TOWN

REFUGEE RIGHTS CLINIC

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

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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 BORDER MANAGEMENT AGENCY BILL, 2015

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 Border Management Agency Bill, 2015 (the "Bill") may impact the rights of refugees and asylum seekers.

Rather than undertaking a clause for clause analysis of the Bill we wish to raise several key issues of concern regarding the approach of Border Management as a whole. We will complete our submissions by focusing specifically on the power granted to the Agency in Schedule 1 as far as it pertains to refugees.

KEY ISSUES OF CONCERN

Militarized borders, while on the rise globally, are the most extreme form of international border management. European countries are under fire for this

practice.[1] Research indicates that where border control mechanisms fail to deter unauthorised border crossing the results is an increase in illegal border crossers who are exposed to significantly increased risks.[2] The Human Rights Watch has recently declared the Mediterranean to be the world's deadliest migration route, quoting figures obtained from the International Organization for Migration estimates that 22,400 migrants and asylum seekers have died since 2000 in attempts to reach the European Union, many of them at sea. Over 3,500 migrants died at sea in 2014, making it the deadliest year on record, with at least 1,850 estimated deaths in the Mediterranean in the first five months of 2015.[3]

While we note that the Bill makes provision for far more than the regulation of migrants entering into South Africa we are concerned that the Agency's activities and powers could negatively impact upon the ability of genuine refugees from availing themselves of the protection of South Africa.

The office of the United Nations High Commissioner for Refugees ("UNHCR"), has expressed the view that border-crossing is central to a refugee regime and the ability of refugees to access international protection is dependent upon their ability to cross international borders.[4] The right to leave one's country and to seek asylum in another state is enshrined in the Universal Declaration of Human Rights.[5]

While the UNHCR recognises that controlling borders is a fundamental expression of a state's sovereignty.[6] However, what is critical is that a balance be found that permits the state to combat issues such as drug and arms trafficking without creating barriers to those in need of international refugee protection.

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[1] See for instance 'Fortress Europe: How the EU Turns Its Back on Refugees' available at <http://www.spiegel.de/international/europe/asylum-policy-and-treatment-of-refugees-in-the-european-union-a-926939.html>.
[2] See the Border Crossing Observatory 'Border Crossing Research Brief No. 3' (March 2012), available at <http://artsonline.monash.edu.au/thebordercrossingobservatory/files-/2013/02/Border-deaths-and-border-control-policies-Research-Brief-3.pdf>.
[3] Human Rights Watch 'The Mediterranean Migration Crisis, Why People Flee, What the EU Should Do' (2015), available at <https://www.hrw.org/sites/default/files/report_pdf/-eu0615_web.pdf>.
[4] UNHCR Policy Development and Evaluation Service 'No entry! A review of UNHCR's response to border closures in situations of mass refugee influx' at para. 4, available at <http://www.unh-cr.org/4c207bd59.pdf>.
[5] Article 14. The text may be found at <http://www.un.org/en/documents/udhr/>.
[6] UNHCR Policy Development and Evaluation Service (note 4 above) at para. 7.

The powers and functions of the Agency set out in Schedule 1

Having stated our opinion regarding the militarisation of South Africa's borders we now turn to addressing our main point of concern. While this is informed to a measure by our stance in relation to militarised borders broadly our submission in regards to the specific power of the Agency will focus on adherence to international refugee law.

Schedule 1 of the Draft Bill grants the Agency the specific power, in relation to the Refugees Act,[7] of *'[r]estriction of the power to refuse entry to refugees in terms of section 2.'*

The phrasing of this power is a little unclear and has the potential to be overly extensive. We believe that there are two possible interpretations: [1] So as to empower the Agency to bar access to South Africa; and [2] so as to enable the use of restrictive measures which would limit access to the Republic. We will address these two interpretations in turn.

Schedule 1 further assigns the function of enforcing the provisions of the Immigration Act[8] to determine and restrict access to the Republic any foreigner deemed to be a prohibited person[9] or an undesirable person.[10] It is important that the exercise of this function not be done in any manner that will in any way prevent or restrict the application for asylum in South Africa.

Barring access interpretation

If the power vested in the Agency is interpreted so as to empower the Agency to bar entry to South Africa then this would be in violation of the cornerstone 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, either through refusal of entry or return). This principle is embodied in section 2 of the Refugees Act and has been extended to the return of an individual to a place where there is a serious disturbance of the peace.

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[7] Act 130 of 1998.
[8] 13 of 2002.
[9] Section 29.
[10] Section 30(1).

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.[11]

The principle of non-refoulment contains two vital components. First, no one may be refused entry to the host state; And secondly no one may be expelled from the Republic. In order to understand the application of these two dimensions it is important to reflect on the findings in the seminal South African cases on non-refoulment.

The first of these cases is the Constitutional Court matter of *Lawyers for Human Rights & another v Minister of Home Affairs.*[12] The state contended that our Bill of Rights does not accord protection to foreign nationals at ports of entry who have not yet been allowed formally to enter the country. It was accordingly suggested that the provisions of the Immigration Act in issue could not be found to be inconsistent with the Constitution. The state relied on section 7(1) of the Constitution which enshrines the rights of all the people "in our country". The arguement which flowed from this was that people at ports of entry who have not yet been allowed formally to enter South Africa were not "in our country" within the meaning of the subsection. Yacoob J dismissed this argument and held that:-

> 'The only relevant question in this case....is whether....[s 12 and s 35(2) of the Constitution] are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained on a ship in South African waters cannot turn to South African courts for protection, or that a person who commits murder on board a ship in South African waters is not liable to prosecution in a South African court.'[13]

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[11] 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).
[12] *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC).
[13] Ibid at para [26].

The Constitutional Court has therefore confirmed that the values enshrined in the constitution are to be afforded to foreign nationals who are physically in our country, or its jurisdiction, but who have not been granted permission to enter the country formally.

The second case to be considered is the SCA matter of *Abdi and Another v Minister of Home Affairs and Others.*[14] In this case the appellants had been properly documented in South Africa in terms of the Refugees Act (one as an asylum seeker and the other as a recognised refugee). They subsequently left South Africa to travel to Namibia without informing the authorities. In Namibia they were detained and deportation proceedings were instituted. Their deportation was via South Africa. When they arrived in South Africa they were held in the Inadmissible Facility at the Oliver Tambo International Airport. Among the arguments advanced by the State was proposition that while being detained at the Inadmissible Facility they were not in law in South Africa and the South African authorities and courts had no jurisdiction over them.[15] Bertelsmann AJA, who delivered the majority judgment of the SCA, held that:-

> 'The argument that individuals who are held in an inadmissible facility at a port of entry into the Republic are beyond the courts' jurisdiction flies in the face of the decision of *Lawyers for Human Rights & another v Minister of Home Affairs & another...'*[16]

Bertelsmann AJA then went on to find that:-

> 'The words of the [Refugees] Act mirror those of the UN Convention and the OAU Convention of 1969. They patently prohibit the prevention of access to the Republic of any person who has been forced to flee the country of her or his birth because of any of the circumstances identified in s 2 of the Act. Refugees entitled to be recognised as such may more often than not arrive at a port of entry without the necessary documentation and be placed in an inadmissible facility. Such persons have a right to apply for refugee status, and it is unlawful to refuse them entry if they are *bona fide* in seeking refuge. The Department's officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file

[14] *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA).
[15] See Ibid. at para [15].
[16] Ibid. at para [20].

> an application with the relevant Refugee Reception Office – unless the intending applicant is excluded in terms of s 4 of the Act'[17] [footnotes omitted].

It follows that individuals at ports of entry are to be regarded as within the jurisdiction of South African courts. Should an individual wish to seek asylum then a duty is triggered to ensure that the person is given every reasonable opportunity to file an application for asylum. To do otherwise would contravene the principle of non-refoulment.

Restriction of access

The second possible interpretation which can be ascribed to the power vested in the Agency is an empowerment to restrict access to South Africa. Any ad hoc refugee status screening undertaken by the Agency will constitute a barrier to access to applying for asylum in South Africa and as such it would impact upon the right to seek asylum.

In *Tafira and others v Ngozwane and others*[18] the High Court was called upon to consider a pre-screening policy that had been instituted at the Marabastad and Rosettenville refugee offices. The Department believed the procedure would "filter" applicants before the individual even had an opportunity to apply for asylum and in so doing it would reduce the number of asylum seekers and alleviate the administrative burden on the Department. With regards to the administrative burden Rabie J held that:-

> '....[T]he fact that the respondents might find it administratively difficult to deal with applications promptly, is no reason to act unlawfully and to place the rights and interests of asylum seekers in grave danger. No amount of administrative inconvenience can absolve the respondents of their legal and constitutional responsibility to the countless asylum seekers who are faced with the real and perpetual threat that they may be arrested and deported to the countries in which they face persecution, simply because the respondents have been unable to process their section 22 permits in less than six months to a year.'[19]

Then in relation to pre-screening Rabie J held that:-

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[17] Ibid. at para [22].
[18] *Tafira and others v Ngozwane and others* (unreported case), of 12 December 2006, Case No. 12960/06).
[19] Ibid. at p. 26.

'In principle a pre-screening procedure is not unlawful. If a type of pre-screening is used to genuinely assist a person to quickly arrive at the correct office of the department instead of wasting unnecessary time in the wrong queue or at the wrong building, and if the necessary assistance and interpretation facilities are afforded so that there can be no misunderstanding and the rights of the applicant are properly protected, and if it is made clear to the applicant that he may proceed with an application for asylum regardless of any views to the contrary, there should not be any objection. What the department's officials cannot do after such a pre-screening, however, is to decide for themselves that a particular person actually wants some other permit or decide that it would be better for the person to seek some other permit. The pre-screening process presently in use prevents, or, at least, impedes an applicant for asylum from exercising his rights in terms of the Refugees Act and the Regulations and, as such, is violating the constitutional rights of such a person.'[20]

The purpose and effect of pre-screening must therefore be considered very carefully in order to ensure that the rights of the individuals affected by the policy are not prejudiced. Fundamentally, access to the asylum system cannot be denied.

Undesirable and prohibited persons

We are concerned that the strict enforcement of the provisions of the Immigration Act relating to prohibited[21] and undesirable persons[22] will foster a discriminatory approach to who may and who may not apply for asylum in South Africa.

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[20] Ibid. at p. 36.

[21] Section 29(1) provides that:-

'(1) The following foreigners are prohibited persons and do not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit:
(a) Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;
(b) anyone against whom a warrant is outstanding or a conviction has been secured in the Republic or a foreign country in respect of genocide, terrorism, human smuggling, trafficking in persons, murder, torture, drug-related charges, money laundering or kidnapping;
(c) anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;
[continued] (d) a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence;
(e) anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its ends; and
(f) anyone found in possession of a fraudulent visa, passport, permanent residence permit or identification document.'

We wish to draw the Department's attention to 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.'

This is in keeping with the express extension of the right to seek asylum to "everyone" contained in the Universal Declaration of Human Rights.[23] The right is therefore universal and cannot be limited on grounds such as health, wealth or social status.

We are furthermore concerned that the Agency members will conduct ad hoc screenings in terms of sections 29 and 30 of the Immigration Act without the specialist knowledge that is required to conduct a refugee status determination. For instance, section 30(1)(f) of the Immigration Act designates anyone who is a fugitive from justice as an undesirable person who does not qualify for admission to the Republic.

However, an 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.[24] The individual would technically be a fugitive from justice in Uganda. However, he would clearly be a refugee in that he

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[22] Section 30(1) provides that:-

> '(1) The following foreigners may be declared undesirable by the Director-General, as prescribed, and after such declaration do not qualify for a port of entry visa, visa, admission into the Republic or a permanent residence permit:
> (a) Anyone who is or is likely to become a public charge;
> (b) anyone identified as such by the Minister;
> (c) anyone who has been judicially declared incompetent;
> (d) an unrehabilitated insolvent;
> (e) anyone who has been ordered to depart in terms of this Act;
> (f) anyone who is a fugitive from justice;
> (g) anyone with previous criminal convictions without the option of a fine for conduct which would be an offence in the Republic, with the exclusion of certain prescribed offences; and
> (h) any person who has overstayed the prescribed number of times.'

[23] Article 14.

[24] A copy of the Act is available at <http://www.refworld.org/pdfid/530c4bc64.pdf>.

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 countries 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.'[25]

As a result such an individual may well be both a refugee and a fugitive from justice. Denying the individual entry into South Africa on the basis of section 30(1)(f) of the Immigration Act will therefore be a violation of the principle of non-refoulment, to which we have referred extensively above.

CONCLUSION AND RECOMMENDATION

The establishment of the Border Management Agency will result in the militarisation of South Africa's border. The Agency's functions are clearly wider than controlling migration. We see the Agency's mandate in relation to matters such as poaching, combating drug trade, human trafficking and arms smuggling as extremely necessary for the protection of South African sovereignty and those who live within the Republic.

We are, however, concerned that the powers of the Agency in relation to migrants will potentially bar or restrict genuine refugees from applying for asylum in South Africa. In its current phrasing the power of the Agency in relation to the Refugees Act is vague and capable of adverse interpretation.

We accordingly recommend that the power contained in schedule 1 pertaining to the Refugees Act be rephrased by removing reference to refusal of entry. We

[25] Goodwin-Gill G. *The Refugee in International Law* (1983) at pp. 33-34.

additionally recommend the express inclusion of the duty to direct an individual claiming asylum to report to a Refugee Reception Office.

We further recommend that the functions assigned to the Agency in relation to the enforcement of the provisions of the Immigration Act include an express proviso that exempts any person who intends to apply for asylum. Should the individual be excludable from refugee status then that determination will be made during the person's Refugee Status Determination by the Refugee Office.

Yours faithfully,

The UCT Refugee Rights Unit

Justin de Jager
Senior Attorney

Fatima Khan
Refugee Rights Unit Director