UNIVERSITY OF CAPE TOWN

UCT LAW CLINIC

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

20 January 2011

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

Attention: Mr. Eddy Mathonsi

Re:	Submissions to the Portfolio Committee on Home Affairs (National Assembly) on Immigration Amendment Bill 32-2010

INTRODUCTION

The University of Cape Town's Refugee Rights Project (the "Project") has been providing free legal assistance to refugees and asylum seekers in the Western Cape 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 Portfolio Committee for the opportunity to make these brief submissions, which are focused on how the Immigration Amendment Bill 32-2010 (the "Bill") may impact the rights of refugees and asylum seekers.

The Project has recently provided submissions to the Portfolio Committee on the Refugee Amendment Bill 30-2010 and we wish to re-iterate our concerns about the similar lack of consultation process for the current Bill, as it is noted in the Memorandum attached to the Bill that no institutions were consulted in the drafting of same.

Lastly, this submission has been endorsed by the Legal Resources Centre, the Black Sash and the Scalabrini Centre of Cape Town.

KEY ISSUES OF CONCERN

I. Changes to the Asylum Transit Permit

Currently, section 23(1) of the Immigration Act of 2002 provides for the issuing of an asylum transit permit valid for 14 days. The Bill's amendment in Clause 15 changes the validity period to 5 days for reporting to the nearest Refugee Reception Office and further provides for a procedure for establishing whether or not such a person qualifies for making an application for asylum.

(a) *Procedure to assess if person qualifies for asylum before issuing the permit*

While the amendment does not give details about the said procedure, we are extremely concerned about the introduction of any such process that ***implies that an immigration official at a port of entry will be responsible for screening asylum seekers to determine whether to issue such persons with an asylum transit permit. We submit that such a process is unlawful as it violates international human rights law and South Africa's Refugees Act 130 of 1998.*** More specifically, we submit the following:

- Preventing asylum seekers from seeking and obtaining protection in South Africa could potentially lead to a violation of the fundamental human right "to seek and enjoy in other countries asylum from persecution," which is enshrined in the 1948 Universal Declaration of Human Rights and which now forms part of customary international law.
- Section 2 of South Africa's Refugees Act 130 of 1998 expressly prohibits the refusal of entry into the Republic of any person, if it would result in that person having to return to a country where he or she may be subjected to persecution or his or her life would be at risk on account of events seriously disturbing or disrupting the public order.
- Sending asylum seekers back to their country of origin without examining their claim is contrary to the international refugee law principle of non-refoulement (the principle that a country must not return a person to a place where they would face persecution), guaranteed by South Africa, as a party to the 1951 Convention Relating to the Status of Refugees (Article 33).

- With regard to screening asylum seekers with the aim of preventing some of them from accessing the asylum process, the High Court of South Africa in Tafira and Others v. Ngozwane and Others 12960/06 ruled that the procedures adopted by the Johannesburg Refugee Reception Office that prevented or impeded asylum applicants from exercising their rights in terms of the Refugees Act was a violation of their Constitutional rights.
- The determination of an asylum seeker's asylum claim must be conducted by a properly trained Department of Home Affairs official, namely a Refugee Status Determination Officer as contemplated for in Section 24 of the Refugees Act 130 of 1998, who has the requisite knowledge of international and domestic refugee law and refugee status determination procedures. It cannot be stressed enough that it is not the responsibility of an Immigration Official at a port of entry to conduct any sort of status determination that may prevent an asylum seeker from entering the Republic and duly lodging an application for asylum at one of the designated Refugee Reception Offices throughout the country.

(b) *Reduction of validity time period for permit*

We submit that the reduction of the amount of time for the validity of the asylum transit permit, from 14 days to 5 days, is extreme and unwarranted. It should be noted that not all asylum seekers present themselves at ports of entry where there is a nearby Refugee Reception Office (i.e. Beitbridge/Musina or Durban). Furthermore, asylum seekers who have been forced to flee their countries are often without the necessary travel funds, and due to communication and other information barriers, may experience difficulties in presenting themselves within 5 days to a Refugee Reception Office.

2. Increase in Penalties for Contraventions of the Act

We submit that the proposed dramatic increases in the penalties for contraventions of the Act, including for overstaying, may be too exigent in that some foreign nationals can find themselves overstaying due entirely to reasons of poor planning or lack of policy or standard operating procedure on the part of the Department and without any fault at all on their part.

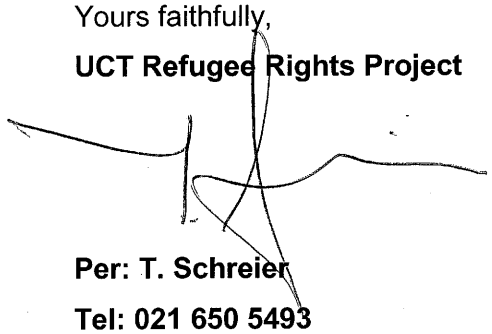
For example, we are currently assisting an asylum seeker who migrated from his asylum seeker permit to a temporary residence permit on the basis of a life partnership with a South African national. After the relationship dissolved, he informed the Department and cancelled his immigration permit and then attempted to obtain his asylum seeker permit again, but was refused and was forced to remain undocumented. He was later arrested by Immigration officials for being an illegal foreigner, an offence which the Bill proposes carries a potential five years maximum imprisonment term. However, this man, who was trying to lawfully normalize his stay, by virtue of the fact that the two arms of the Department (Refugee and Immigration) do not often communicate well with each other, through no fault of his own has been severely prejudiced.

In light of our above-noted concerns regarding to the proposed new penalties in the Bill, we urge the Committee to request the Department to provide its reasoning and justification for the marked increase in the maximum imprisonment terms for each of the offences.

Trusting the above is in order, we remain

Yours faithfully,

UCT Refugee Rights Project



Per: T. Schreier

Tel: 021 650 5493

Email: tal.schreier@uct.ac.za