REFUGEES AMENDMENT BILL

2015

The Law Society of South Africa (LSSA) is grateful for this opportunity to make submissions on the Refugees Amendment Bill, 2015.

We deal first with specific Sections in the order they are set out in the Bill and conclude with a general statement.

Our specific comments are as follows:

1. SECTION 1

(a) The generally accepted definition of a Visa is an endorsement on a passport indicating that the holder is allowed to enter, leave, or stay for a specified period of time in a country. The specified period of time usually relates to a number of weeks, months or years. By definition an asylum seeker or refugee is in a country for an indefinite period of time. He or she will very often not have a passport. It is therefore respectfully submitted that the term "*asylum seeker permit*" should be retained;

(b) As far as the definition of dependant is concerned, it is submitted that the term "*member of the immediate family*" should be retained and the definition should not be restricted to the "*parent*" of the asylum seeker or refugee. The word "*immediate*" would exclude members of an extended family but would cater for siblings and grandparents who may be destitute, aged or infirm. As such persons may only become destitute, aged or infirm after the arrival of an asylum seeker or refugee in South Africa, it is submitted that the condition "*and who is included by the asylum seeker in the application for asylum"* is likely to work hardship and should be omitted or apply only to spouses or children.

The condition "*legally married*" may cause confusion and should be substituted by a term such as: "*with whom the asylum seeker had a spousal relationship in his or her country of origin*."

2. SECTION 4

4(1)(e)

It is submitted that the proposed paragraph 4(1)(e) should be deleted. An asylum seeker or refugee who commits an offence under the second schedule should be charged under the Criminal Law. Committing such a crime does not invalidate an asylum seeker's right to claim asylum or a refugee's right to remain a refugee. To return a person to a country where he may face torture and detention without trial would be unthinkable, whatever the scale of the crime committed in South Africa.

4(1)(f)

For the same reasons, this paragraph is unacceptable. The import of this paragraph is that for a minor infraction of any of these Acts a refugee would lose the protection to which he or she is entitled in terms of International Law and our own Legislation.

4(1)(g)

This is undesirable. A fugitive from justice in a country which claims to uphold the Rule of Law may also have a well-founded fear of persecution. It is recommended that this paragraph be deleted.

4(1)(h)

Asylum seekers and refugees have a fear of persecution. They may also be apprehensive about not being granted admission to another country. To preclude them from refugee status because a Refugee Status Determination Officer may not be satisfied that he or she

had compelling reasons for such entry offends against the principles of the Act and against Article 31 of the 1951 Convention. This Section would also seem to be inconsistent with the role of the proposed Refugee Status Determination Committee and with the provisions of the existing paragraph 21(4) of the Act.

4(1)(i)

This is, with respect, unworkable. (Notwithstanding the provisions of the Amended Section 23 of the Immigration Act, this section should be deleted).

Persons who do not speak a local language may not be educated, may have entered South Africa not through a port of entry, or have not been afforded access to a Refugee Reception Office through no fault of theirs. Examples of which are manifold, both in the media and the Law Reports since the implementation of the Refugees Act, make this provision both unreasonable and unworkable.

3. SECTION 5

5(1)(c)

The Law Society welcomes the proviso to this section but suggests that a refugee who may have acquired temporary residence should enjoy the same protection.

5(1)(d)

It is submitted that the clause "*or returns to visit such country*" should be deleted and replaced by "*or otherwise voluntarily avails himself of the protection of such country*." As proposed the Section could exclude returns to a country to fetch endangered minor children or dangerously ill parents.

5(1)(f) and (g)

These provisions are unacceptable. A refugee does not cease to be a refugee because he or she may have committed a crime under Schedule 2 or which is punishable by imprisonment without the option of a fine. He or she should be dealt with in terms of the Criminal Law of South Africa, not by being unlawfully refouled to a country from which he or she is a legitimate refugee. Similarly, an offence in relation to the Immigration Act could simply mean that he or she failed to renew a Refugee Recognition Certificate timeously. This should not mean losing refugee status.

5(1)(h)

This Section could mean that an arbitrary decision could be made that is incompatible with international instruments and the proper definition of a refugee. Adequate provision for cessation of refugee status is already provided for elsewhere in the Act.

4. SECTION 8

The amendments to this Section of the Principal Act require substantial alteration.

Refugee Status Determination Officers (RSDOs) should at least be given remedial training, have a Bachelor's Degree and ideally should be legally qualified. They literally have the power of life and death over asylum seekers. Both the Law Reports and relevant literature have revealed a general incapacity on the part of RSDOs.[1] Ensuring proper training and qualifications for RSDOs will alleviate most of the problems perceived by the Department of Home Affairs relating to asylum seeker determination efficiency and honesty. It will also reduce the injustice caused by biased officials and those ignorant of Administrative Law, Refugee Law and country of origin information.

---

[1] eg.Tantoush v The Refugee Appeal Board and Others 2008(1)(SA)232 TPD
Katabana v Chairperson of the SCRA – Case No. 25061/2011 (WC)
Koyobe v Minister Of Home Affairs 2010 (4)SA327(CC)
Amit, R "no refuge: flawed status determination and the failures of South Africa's refugee system to provide protection" (2011) 23(3) IJRL 458

The same provisions relating to disqualification from membership of the Refugee Appeals Authority and the Standing Committee should apply to members of the Status Determination Committee.

The existence of a Refugee Appeal Board and Standing Committee for Refugee Affairs does not cure the prejudice asylum seekers may suffer at RSDO level.[2]

8(3)

The proposed Section may be unconstitutional. The use of a polygraph is not sanctioned by Criminal Law and its use in labour matters has consistently been regarded as an unfair labour practice.

8B

This Section should contain a provision that the Refugee Appeals Authority should have appropriate independence. There is no reason for the provisions of Section 12(3) of the Principal Act to be discarded.

8E(h) & (i)

The same objection is raised earlier to polygraph testing apply.

5. SECTION 9

5.1 9A & 9B

The provisions relating to the Standing Committee hereunder are noted.

[2] Tantoush (ibid); Van Garderen NO v Refugee Appeal Board : North Gauteng High Court: Case No. 30720/2006, Monnig & Others v Council of Review & Others 1989(4)SA 866(C)

5.2 9C

Section 9C gives rise to concern:

5.2.1 9C(1)(b)

These provisions add an intolerable burden to the Committee and derogate from the rights of asylum seekers applicable in a regime where asylum seekers are not provided with accommodation and financial assistance while awaiting adjudication. It is submitted that the experience of the asylum seeker system in South Africa indicates that it will continue to be a lengthy process. The fiscus should not have to bear the burden of supporting asylum seekers and it is unlikely in the extreme that the UNHCR will be able or willing to provide adequate funding to do so for the foreseeable future given its commitments in Europe, North Africa and the Middle East.

5.3 9E(h) & (i)

These Sections should be deleted for reasons set out above.

6. AMENDMENT OF SECTION 21

The amendment to Section 21 of subsection (1) is unworkable and inappropriate for the reasons set out above. It is completely unacceptable for an asylum seeker to be denied asylum because he or she failed to apply for asylum within five days of entry. Even where such person has no reason not to have made the application within five days he or she may be a genuine refugee who could not in any circumstances be denied refugee status or refouled.

The proposed Section (1A) will give rise to confusion and hardship. Asylum seekers do not have access to the Government Gazette and the particular category of asylum seeker who may for example arrive by ship in Port Elizabeth could be required to lodge an application in

Musina. The provision is clearly not compatible with the proposed but unacceptable requirement that an asylum seeker make an application within five days of arrival in the Republic. Similarly, subsection (6) is incompatible with Administrative Law, the Constitution and the Principles of Refugee Law. An application for asylum may well contain false, dishonest or misleading information which nevertheless does not impugn the validity of the application for asylum. It is accordingly recommended that the word "*must*" should be replaced by "may".

The proposed Section 21(2A) is welcomed. However, a sentence should be added to state that such child remains eligible for South African Citizenship in terms of Section 4(3) of the Citizenship Act upon reaching majority.

7. AMENDMENT OF SECTION 22

Our comment regarding the use of the word "visa" is repeated.

7.1 There is no objection to Section 22(2) but it is submitted that the DHA's records system should automatically be able to cancel another visa without the need for the asylum seeker to return it. It is submitted that the provisions of Sub-Section 22(12), (13) and (14) are ambiguous, partly through the use of the word "visa", and would appear to be in conflict with the provisions of Section 5(1)(c).

7.2 Section 22(5)(c) is unlawful. It should be replaced by a provision stating that contravention of any conditions <u>may</u> constitute an offence. An asylum seeker's permit should only be withdrawn by the Standing Committee rather than by the Director-General and should only be withdrawn when it is found that the asylum application lacks merit.

7.3 Section 22(6) imposes an unnecessary burden on the Department of Home Affairs. The proposed assessment is incapable of accuracy. An Applicant may optimistically consider family or friends able to assist himself but the Home Affairs official will not be in any position to evaluate this. A far better solution to

subsections 6, 7, 8, 9 and 11 will be for an asylum seeker to have an unlimited right to work until the rejection of his or her application for asylum. This will mean no burden on the State or the UNHCR or civil society and in many instances will lead to employment and income for South Africans who will benefit from these provisions. The provisions relating to work, shelter and basic necessities are incompatible with the proposed but controversial establishment of more refugee reception offices on the northern border.

There should be an automatic right to study for any children up to matriculation.

The history of asylum seeking in South Africa from 1996 onwards has shown that the overwhelming majority of applications are not finalized in anything like 4 months.

7.4 Section 22(12) is unconstitutional. The requirement that failure to renew the necessary document can only be condoned for hospitalization or institutionalization is too narrow and again the exclusion of an asylum seeker from the process on the basis of failure to renew within a month is simply unlawful. It should if necessary be dealt with as an offence.

7.5 The exclusion contained in Section 22(13) is also unjustifiable.

7.6 Section 22(14) is draconian and it is submitted that the penalties are excessive.

7.7 Section 36(1) is unacceptable for the reasons already articulated. It is submitted that the phrase “asylum seeker permit” should remain.

8. GENERAL COMMENT

South Africa has rightly received widespread praise for its Constitution. The opening paragraph of the Constitution states:

i) "*The Republic of South Africa is one, sovereign, democratic State founded on the following values:-*

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms……..."

ii) Fittingly, South Africa has signed and ratified the 1951 United Nations Convention relating to the status of refugees and the 1969 Organisation of African Unity Convention governing the specific aspects of refugee problems in Africa. It committed itself to honoring its obligations under International Law by passing the Refugees Act 130 of 1998 which came into force in 2000. It is submitted that the Refugees Act as it stands is an admirable piece of legislation and that the proposed amendments are both unnecessary and inimical to the human rights of asylum seekers and refugees.

iii) It is submitted that the perceived problems articulated by the Department of Home Affairs in relation to the asylum seeker regime could and should be dealt with by requiring higher qualifications for staff, by dealing effectively with corruption and by implementing a better policy for temporary labour migration from neighbouring countries, not by restricting the rights of asylum seekers and refugees. Internationally, legal scholars and the Courts have made it clear that Refugee Law is a *"remedial or palliative branch of Humans Rights Law…….It is no more than a necessary means to a human rights end, that being the preservation of the human dignity of an involuntary migrant when his or her country of origin cannot or will not meet that responsibility. In pith and substance, Refugee Law is not Immigration Law at all, but is rather a system for the surrogate or substitute protection of human rights."*[3]

The Supreme Court of Appeal has resoundingly stated

"[25] human dignity has no nationality, it is inherent in all people – citizens and non-citizens alike – simply because they are human - and while that person happens to be

[3] JC Hathaway The Rights of Refugees under International Law, Cambridge University Press 2005 at page 5

in this country – for whatever reason – it must be respected, and is protected, by Section 10 of the Bill of Rights.

[26] The inherent dignity of all people – like human life itself – is one of the foundational principles of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights." In ***S v Makwanyane & Another [1995] ZACC3; 1995(3)SA 391(CC)*** para 144 Chaskalson P said the following: *"The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in Chapter 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others."*[4]

iv) Fatima Khan and Tal Schreier have recently stated "*…….the human-rights nature of the refugee protection regime in South Africa, combined with the fact that its Refugee Legislation and implementation must reach the requisite constitutional standard, meaning that refugees and asylum seekers have the right to live in dignity and safety in South Africa. Where this does not occur, or where their rights are substantially violated, refugees and asylum seekers must inevitably turn to the Courts in order to safeguard these precious rights.*

At present South Africa's refugee protection regime is on a precipice and the future looks bleak. Fortunately, South African Law in its current form does not allow for the establishment of refugee camps, as the Law does not provide for restriction on the freedom of movement of refugees in the country. The recent closure of major Refugee Reception Offices in big cities, coupled with the Government's intention of opening "Centres" to process refugees at the country's northern borders, will likely lead to de facto refugee camps or the abhorrent practice of refugee warehousing, which the Law currently does not allow."[5]

[4] Minister of Home Affairs & Others v Watchenuka & Others [2004] 1 ALL SA 21(SCA)
[5] Khan & Schreier Refugee Law in South Africa Juta 2014

v) It would be unfortunate if the Department and Government were to proceed with the undesirable proposed amendments to the Act thereby bearing out the lament by Hathaway that "*as the empirical evidence presented in this book tragically attests, the reality today is that a significant number of Governments in all parts of the world are withdrawing in practice from meeting the legal duty to provide refugees with the protection they require*."[6]

vi) South Africa should continue to provide a human rights example for the rest of the world to follow and not erode the values proclaimed in its Constitution and the Refugees Act.

Once again, thank you for the opportunity to make these representations. The Law Society would appreciate the opportunity to make oral submissions at the appropriate stage.

[6] Ibid at page 998