



SUBMISSIONS BY THE LAW SOCIETY OF SOUTH AFRICA ON THE GREEN PAPER ON INTERNATIONAL MIGRATION

I. INTRODUCTION

1. The Law Society of South Africa (LSSA) brings together its six constituent members – the Cape Law Society, the KwaZulu-Natal Law Society, the Law Society of the Free State, the Law Society of the Northern Provinces, the Black Lawyers Association and the National Association of Democratic Lawyers – in representing the attorneys' profession in South Africa. The LSSA speaks nationally on behalf of the profession, provides leadership and support to the profession through policy development and stakeholder relations, publishes *De Rebus* (the South African attorneys' journal), provides vocational training to candidate attorneys and provides input on policy and draft legislation in the public interest. It is in this latter context that the LSSA makes these submissions.
2. On 24 June 2016, the Green Paper on International Migration (the Green Paper) was released for public comment. The LSSA welcomes the opportunity to provide submissions on the Green Paper.
3. **The LSSA has read the joint submission prepared and submitted by the Legal Resources Centre (LRC) and Lawyers for Human Rights (LHR) on the Green Paper and endorses the submissions and recommendations contained in that joint submission.**
4. The LSSA welcomes the proposals in relation to economic management of labour migration from Southern African Development Community (SADC) countries. However,

the LSSA holds concern about the Green Paper's proposals in relation to the management of asylum seekers and refugees, specifically the introduction of new migration-related legislation, in particular the Refugees Amendment Bill 2015 and the amendment of the Immigration Regulations, whilst the Green Paper process is still ongoing; its silence in relation to the needs of foreign children in the migration system; the failure of the Green Paper to address the poor quality of decision-making in relation to asylum applications; and the proposal to open processing centres on the borders of South Africa.

II. MANAGEMENT OF ECONOMIC MIGRATION FROM SADC

5. One of the most notable gaps in South African legislation is the absence of any policy mechanism for legal entry and temporary employment by South African employers wishing to hire individual migrants from the SADC region.¹ However, this has not deterred undocumented migrants from SADC countries entering South Africa to find work given the dire economic conditions that many face.

6. Given the lack of any legal standing for this cohort of individuals, a number of objectionable things have occurred: migrants have fallen victim to exploitation by South African employers who ignore labour laws as those they employ will not report them to authorities and trade in false documentation has increased.² In addition, South African citizens assume that all migrants from the rest of Africa are undesirable and, when the police fail to remove them, they try and do so themselves leading to recurrent episodes of xenophobic violence.³ Deportations to other SADC countries have also increased significantly, the costs of policing soared and over 99% of deportations are to neighbouring countries. There is evidence that deportations are a "revolving door" and also encourage considerable opportunistic corruption (e.g. demands and payment of bribes to avoid arrest and deportation).⁴

¹ Crush, Professor Jonathan, *Towards the Triple Win: Governing Lower-skilled Labour Migration*, Presentation at Colloquium on a New International Migration Policy Paradigm for South Africa, Department of Home Affairs, 20 June – 1 July 2015.

² "Towards the Triple Win," see note 1, page 4.

³ J. Crush, S. Ramachandran and W. Pendleton, *Soft Targets: Xenophobia, Public Violence and Changing Attitudes to Migrants in South Africa After May 2008*, SAMP Migration Policy Series No 64, Cape Town, 2013.

⁴ See note 1, page 5.

7. It is in this context that the LSSA welcomes the proposal in the Green Paper that there needs to be better management of economic migration from within the SADC region to South Africa.
8. The Green Paper recognises the importance of labour migration from within the SADC region that flows into sectors such as mining, agriculture, hospitality, construction and domestic work.⁵ The Green Paper also recognises that the current permitting regimes limit the ability of South Africa to regulate and manage migrants with lower levels of skills and capital, including people from within the SADC, and that a policy relating to this labour flow is missing from the 1999 White Paper.
9. The Green Paper proposes a range of specific policy options to address the flow of migrants from the SADC:⁶
 - 1) Maintaining the *status quo*;
 - 2) Advocating for free labour mobility by SADC nationals in support of regional economic development and integration; or
 - 3) Introducing a permitting regime for economic migrants from neighbouring SADC countries including Zimbabwe, Mozambique and Malawi.
10. It is clear from the Green Paper that the third option is favoured, as the Green Paper explicitly states that “*status quo is clearly not viable, and free labour mobility within the region is not yet a reality.*”⁷ It is envisaged that this option will reduce the number of undocumented arrivals.
11. Three different visas are proposed in the Green Paper, to be accompanied by “*measures such as the robust enforcement of labour and migration laws to ensure that citizens are not disadvantaged by employers paying economic migrants lower wages.*”⁸ These three visas are:

⁵ Green Paper, page 59.

⁶ Green Paper, page 62.

⁷ Green Paper, page 62.

⁸ Green Paper, page 62.

- 1) **SADC special work visa** which would allow the holder to work in South Africa for a prescribed period of time but would not allow for progression to permanent residence;
 - 2) **SADC traders' visa** which would be a long-term, multiple entry visa for cross-border traders who enter/exit South Africa frequently; and
 - 3) **SADC SME visa** which would be for self-employed people, such as micro- and small business owners.
12. As stated above, the LSSA welcomes this development and believes that creating a permitting regime for economic migrants from SADC countries will be beneficial for both those migrants and South Africa. We believe this will help address irregular migration and the issues outlined above, including the exploitation of migrants. Given the regional context, we believe that labour flows should be managed and protected in a regulated way that supports the interests of all parties.

III. INTRODUCTION OF NEW MIGRATION-RELATED LEGISLATION

13. The LSSA is concerned with the recent introduction of migration-related legislation, including the introduction of the Border Management Agency Bill 2015 and the Refugee Amendment Bill 2015.
14. The LSSA is particularly concerned that the Refugee Amendment Bill 2015 which contains proposals that would radically alter the current asylum seeker system in South Africa, and the draft First Amendment of the Immigration Regulations 2014, were released before the Green Paper process has been finalised. The Green Paper process is an essential part of the law-making process in democratic countries and it is an important component of the public consultation process when governments seek to make laws.
15. Along with our colleagues at the LRC and LHR, we recommend that the implementation of such legislation be suspended from further deliberations until the consultation process has been finalised and Cabinet has approved the White Paper. This of utmost importance in order to uphold a robust and credible law-

making process in South Africa that considers the input of stakeholders and to ensure any proposed legislation is compliant with the South African Constitution and international law.

IV. THE NEEDS OF FOREIGN CHILDREN IN THE MIGRATION SYSTEM

16. The Green Paper reports that an increase in children are migrating to South Africa and that children fall into a vulnerable group who are negatively impacted by an overloaded asylum system. Despite this, the LSSA observes that the Green Paper is silent on the needs of foreign children in the migration system. There is no discussion on the potential impact that the proposed reforms would have on children. In particular, we are concerned about the potential detention of asylum seeker children in the proposed processing centres.
17. The LSSA notes that the detention of children should be only as a last resort and if so, for the shortest possible period of time.⁹ As children are considered a vulnerable group, and do not receive specific mention elsewhere in the Green Paper, we are concerned that the proposed policy direction will ultimately result in the detention of children. Research shows that the mental health impacts of detention on children can be seriously detrimental.¹⁰ It is also unclear what the Green Paper proposes for dealing with the issue on the detention of minors and how minimum standards of detention will be upheld, including the obligation to ensure that detention should be for the shortest period of time.

V. ADJUDICATION QUALITY IN ASYLUM APPLICATIONS

18. In the Green Paper, the Department of Home Affairs (DHA) asserts that the overwhelming majority of asylum seekers in South Africa are economic migrants: *“The reality is that about 90% of applicants do not qualify as refugees but are seeking work or business opportunities.”*¹¹

⁹ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, Article 37(b).

¹⁰ See for example: Silove, D., Austin, P., & Steel, Z. (2007), “No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia.” *Transcultural psychiatry*, 44(3), 359-393.

¹¹ Green Paper, p. 12.

19. However, recent research has shown that less than 50 percent of respondents “listed economic factors as their sole motivation for flight”¹² and that slightly less than 50 percent of respondents “did not cite economic reasons at all as a reason for flight.”¹³
20. The reason for the high rejection rate is not because the majority of asylum seekers are economic migrants, but rather it is due to the current flawed asylum seeker system and a systemic failure to apply the principle of *audi alteram partem*. Due to a number of factors, refugee status determination officers (RSDOs) lack adequate skills for adjudicating asylum applications and this is one of the most problematic issues seen in rejection decisions. Common themes include RSDOs misapplying the law, failing to properly consider claims and failing to provide adequate reasons for rejection.
21. As Roni Amit found when she investigated hundreds of RSDOs for her report “*All Roads Lead to Rejection*”:

*“Refugee status determination officers incorrectly deployed refugee law and failed to consider the details of individual claims as required in a properly administered status determination process. The result is a bureaucracy that mass produces rejection letters without any evidence of a reasoned decision-making process.”*¹⁴
22. Further contributing to the flawed process is that many asylum seekers report confusion over the asylum process, failure by the RSDOs to explain the interview process before it begins, extremely short interviews, faulty interpretation and confusion about the appeals process.¹⁵ For example, Amit found that “51 percent of status determination interviews lasted less than 15 minutes”¹⁶ and sixteen percent of respondents reported an interview time of five minutes or less.¹⁷ It is,

¹² Amit, Roni. “No Way In: Barriers to Access, Service and Administrative Justice at South Africa’s Refugee Reception Offices.” *African Centre for Migration & Society*. September 2012. p.9.

¹³ “No Way In,” see note 10, p. 28.

¹⁴ Amit, Roni. “All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination.” *African Centre for Migration & Society*. June 2012. Accessed 11 July 2016.

http://www.lhr.org.za/sites/lhr.org.za/files/all_roads_lead_to_rejection_research_report.pdf. p.18.

¹⁵ “No Way In,” see note 10, page 12.

¹⁶ “All Roads,” see note 12, page 12.

¹⁷ “No Way In,” see note 12, page 68.

in our view, impossible that an RSDO could fairly evaluate an asylum seeker's claim in such a short amount of time, particularly if an interpreter is required.

23. In addition, for many months last year and early this year, RSDOs declared an unprecedented number of matters to be 'fraudulent' without any justification. Fortunately this practice seems to have ceased but nevertheless at the time it was widespread and damaging to the asylum seekers whose applications were rejected on this basis during that period. This practice provides a further example of poor quality decisions made by RSDOs, with potentially life-threatening consequences.
24. We provide a few random examples below that illustrate the scenarios mentioned above.¹⁸ The lack of particularised reasons and the inadequate grammar demonstrate the poor quality of adjudication.

Example #1

October 2012

Client's asylum application rejected by RSDO officer:

"There is no well-founded fear. The reasons you state why you did not ask protection from Zambia are not clear. You claim that you were arrested and released after two days. To me this is the indication that the authorities were not interested in harming/killing you, if they were interested in killing they were supposed to do so in prison because there was no one to stop them and the charges against you are not clear. You failed to state the dirt things that were done by officers. You failed to demonstrate that you were subjected to persecution and there is nothing which indicates that you were targeted [there are no series of events that were directed to you]. Although you claim you were journalist you seem not having a clue of journalism. There is reasonable threat to your life and you are not in need of protection and DRC's government can grant you."

Example #2

October 2014

Client's asylum application rejected by RSDO officer who misapplied the law:

¹⁸ These case studies were provided by the LRC.

"The facts of the case are assessed. You vividly stated that you because a lesbian because you do not like men. The fact that you do not like men does not make you a lesbian...

I therefore by the power vested in me, rject this application as unfounded. This decision is subjected to be interlectually challenged through legally authorised body (Appeal board) on valid grounds."

Example #3

June 2015

Client's asylum application rejected by RSDO officer based on credibility and client was not provided particularised reasons:

"These reasons fall outside the scope of the Refugees Act and cannot be the basis for granting asylum in terms of the Refugees Act 130 of 1998. Therefore the application is rejected in terms of Section 24(3)(b) of the Refugees Act as manifestly unfounded.

Example #4

June 2015

Client's asylum application rejected by RSDO officer as being fraudulent and client was not provided particularised reasons:

"The applicant claim from first interview and second interviews is only General situation Happen in the Country to others people, nothing happen to affecting the Applicant"

Example #5

June 2015

Client's asylum application rejected by RSDO officer as manifestly unfounded and client was not provided with particularised reasons:

"The claim advanced by the applicant is not listed as grounds that fall within the ambit of Section 3 of the Refugees Act. It is on this basis that the application is rejected as Manifestly Unfounded in terms of section 24(3) b read with Section 1 (xii) of the Act.

You claim that you left your country because of the civil war , The government and the Alshabab are fighting , you indicated that many people are being killed by the gun shooting that is taking place daily because of the war , Your younger brother was killed by the bomb in Somalia , your life was not safe in Somalia than you have decided to left the country and ran to south Africa for senility and security . therefore your application are based on civil war and insecurity of your country .

The applicant's claim talks about generalized country information. Nothing personally happened to the applicant and also the applicant has been made to influence the RSDO decision. It is on this basis that the application is rejected as Fraudulent application. In terms of section 24 (3) (b) read with Section 1 (xii) of the Act."

Example #6

August 2015

Client's asylum application rejected by RSDO officer as being fraudulent and client was not provided particularised reasons:

"Your application for asylum is based without reasonable cause on facts, information, documents or representations which the applicant knows to be false and which facts, information, documents or representations are intended to materially affect the outcome of the application. Therefore the application is rejected as fraudulent in terms of Section 24(3)(b) read with Section 1 (xii) of the refugees Act."

25. In addition to the lack of skills and poor quality decisions made by RSDOs, the DHA lacks adequate resources to properly train and support its RSDOs. Furthermore, there is a huge backlog of asylum applications to process that limits the ability to properly assess asylum seekers' claims, which differ on a case-by-case basis.
26. We recommend that the DHA prioritise investing resources for training and produce guidelines in order to improve the skills and quality of decisions made by RSDOs in order to establish a robust assessment process for asylum seekers.

VI. DETENTION OF ASYLUM SEEKERS IN PROCESSING CENTRES

27. The Green Paper proposes to establish asylum seeker processing centres along South Africa's borders while awaiting final adjudication of their asylum applications, during which time the basic needs of asylum seekers will be catered for.¹⁹ This is a significant change in the current policy which permits asylum seekers to live in the community, and to work and study while they wait for the outcome of their application.

¹⁹ Green Paper, page 67.

28. In proposing this, the Green Paper argues that the right to work and to study has been a major pull factor for migrants to enter the country and apply for asylum, despite coming to South Africa for economic purposes. It justifies that by taking away the right to work and to study, and instead detain asylum seekers while they go through the refugee status determination process, it will deter economic migrants and those who are not 'genuine' refugees.
29. Despite the Green Paper describing the processing centres as "non-encampment", it is our view that there is no other way to describe such centres as anything other than mandatory detention centres, given that it will be compulsory for asylum seekers to be held there and their freedom of movement severely curtailed. Indeed, the UNHCR defines immigration detention as "*Confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed.*"²⁰
30. The LSSA is concerned that opening these proposed centres would violate South Africa's Constitution²¹ and international obligations.²² In particular, the proposed centres would go against the UNHCR's guidance that the detention of asylum seekers should only be used as a measure of last resort, to verify an asylum seeker's identity, to determine the basis of an asylum seeker's claim, to protect national security, or in cases in which it is shown that an asylum seeker destroyed or used fraudulent documents.²³
31. The LSSA is also concerned that the DHA does not have the resources to effectively run the centres. For the past 15 years, asylum applications have not

²⁰UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999).

²¹ The Constitution's Bill of Rights, which provides that everyone in South Africa, unless specifically excluded, has the right to dignity, life, freedom and security, administrative justice, privacy, religion, freedom of movement and access to information and the courts. See sections 10, 11, 12, 21, 14, 15, 33, 32, 34.

²² For example, under international law, the detention of asylum seekers is only permitted where it is necessary, reasonable and proportionate to a legitimate purpose. Under section 9(1) of the International Convent of Civil and Political Rights (which South Africa has ratified, arbitrary detention is not permitted. Furthermore, section 37 of the UN Convention on the Rights of the Child provides the detention of children should only be as a matter of last resort and for the shortest amount of time.

²³ "Legal framework and standards relating to the detention of refugees, asylum seekers and migrations: a guide." *International Detention Coalition*. 2011, p.25.

been processed swiftly due to the systemic issues discussed in this paper. Therefore the proposal that these processing centres will lead to a more effective and efficient asylum seeker processing system is particularly troublesome. If these proposed centres are opened and the asylum-processing regime moves to the borders, the LSSA is concerned that there will be a high risk that the rights of asylum seekers will not be properly recognised if the flaws in the administration of the current asylum processing system are not fixed. It is our strong view that this move will only exacerbate the issues in the already flawed system.

32. The LSSA is also concerned that detaining vulnerable asylum seekers will cause untold harm to their physical and mental health²⁴ and that there will be problems relating to shanty towns and “camps” in those areas.
33. Moreover, it is highly possible that there will be an increase in the number of asylum seekers and refugees in the near future, given the collapse of governance in Zimbabwe at present and given the crisis unfolding in the Democratic Republic of the Congo.
34. It is for these reasons we do not recommend the opening of the proposed processing centres.

Once again, the LSSA thanks you for the opportunity to make these submissions and is looking forward to further engagement.

²⁴ The negative impacts on the physical and mental health of asylum seekers are well-documented throughout the world. See for example, Robjant K, Hassan R and Katona C, 'Mental health implications of detaining asylum seekers: systematic review, *The British Journal of Psychiatry*, March 2009, 194 (4) 306-312; Austin P, Silove D and Steel Z: 'No Refuge from Terror: The Impact of Detention on the Mental Health of Trauma-affected Refugees Seeking Asylum in Australia,' *Transcultural Psychiatry*, September 2007, 44: 359-393.