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Re: Submission regarding Draft Refugees Amendment Bill, 2015

1. Introduction

The Scalabrini Centre of Cape Town (SCCT) is a registered NPO that perceives migration as an opportunity and is committed to alleviating poverty and promoting development in the Western Cape while fostering integration between migrants, refugees, and South Africans. In providing our assistance, we advocate respect for human rights and use a holistic approach that considers all basic needs. The SCCT was founded in 2002 and roughly 2,000 clients use its services each month. Through daily interaction with clients attempting to access the Department's asylum system, and in particular fair and efficient refugee status determination processes, the SCCT has direct experience in the obstacles refugees face and thanks the Department for the opportunity to provide input on the proposed changes to the Refugees Act (No 130) of 1998.

At the outset, we support the Department's efforts to address corruption within the asylum system and the inclusion of anti-corruption tools in this bill provide a good starting point to begin to tackle corrupt networks within the asylum system. We implore the Department to implement more practical measures at Refugee Reception Offices (RRO). The widespread and institutional nature of corruption within the refugee status determination process as well as with access at certain RROs has severe consequences for the protection system and is also a pull factor for irregular migrants who can use corrupt means to abuse the system to legalise their stay. Without adequate resources

and political will to tackle this problem, the asylum system will continue to fail at its core mandate of efficiently and accurately identifying those in genuine need of international protection.

We also support the Department's attempts to improve the quality of decisions produced within the refugee status determination process and strongly recommend the Department continually engage in training and awareness-raising measures for all staff to ensure legitimate refugees are able to access protection in the first-instance and to alleviate the backlog found at the appeal stage.

Despite the above positive developments, overall we believe the tenor of the bill is negative and many of the new provisions are overly restrictive and in many cases contrary the Constitution as well as the 1951 Convention relating to the status of Refugees[1] and the 1969 Organisation of African Unity Convention governing the Specific Aspects of Refugee Problems in Africa.[2] Many of the provisions also go against many of the recommendations made by the Office of the High Commissioner for Refugees (UNHCR), the UN agency tasked with implementing the 1951 Convention and assisting states with refugee protection matters.

The primary flaw of the asylum system since its inception has been its inability to efficiently and accurately identify individuals in need of international protection; this flaw is due in part to poor decision making by Refugee Status Determination Officers (RSDO), overt and inescapable corruption in all parts of the asylum process, and the highly restrictive provisions of the Immigration Act (No 13) of 2002 which does not consider the migration patterns present in sub-Saharan Africa. We believe that the asylum system cannot be fixed unless these structural challenges are addressed and that these challenges require more than legislative amendments. To begin to address the current challenges the Department needs to have the political will to acknowledge those in need of international protection as well as to implement changes in the immigration regime.

Toward that end, we note that this Amendment Bill is coming prior to the Department's new Green Paper and subsequent White Paper (planned for release in early 2016) and overhaul of the legislation on Immigration thereafter.[3] It would seem self-evident that any significant change in strategic immigration policy must include a discussion on the future of Refugee Policy. We therefore believe that amendments to the Refugees Act should be made in concert with the migration policy

[1]Adopted 28 July 1951, entered in to force 22 April 1954) 189 UNTS 137 (hereafter referred to as the '1951 Convention').
[2]Adopted 10 September 1969, entered into force 20 June 1974, 1001 UNTS 45. The OAU is now known as the African Union (AU)(hereafter referred to as the '1969 Convention').
[3] Department of Home Affairs, 'Home Affairs hosts two-day Immigration Policy Colloquium' (29 June 2015). Available at: http://www.dha.gov.za/index.php/statements-speeches/640-home-affairs-hosts-two-day-immigration-policy-colloquium

review process to ensure policy and legislative changes are addressed in a holistic manner and are harmonised to increase the viability of the entire system.

In sum, it is our view that these restrictions will not assist the Department in accurately and efficiently identifying those in need of protection – if the Department can do this accurately, many of the proposals in this Amendment Bill are unnecessary and will fall away, such as the complex provisions regarding the endorsement for the right to work for asylum seekers. As it stands, we believe that the current proposals are likely to lead to increased numbers of undocumented individuals in the community at risk of exploitation, unable to access services, and vulnerable to detention and deportation and violation of the principle of *non-refoulement*. Many of the proposed amendments do not take into consideration the current situation on the ground at border posts or RROs nor do these measures consider the vulnerabilities of the asylum seeker and refugee community who are often unaware of legislative requirements or their rights. The courts have recognised refugees as vulnerable group and as such we believe that any legislative amendments to the Refugees Act should at minimum bear this fact in mind when attempting to improve the function of the asylum system.

SUBMISSIONS ON DRAFT AMENDMENT BILL

1. PROPOSED CHANGES TO CHAPTER 1 – INTERPRETATION, APPLICATION AND ADMINISTRATION OF THE REFUGEES ACT

The Amendment Bill's proposes the substitution for the definition of "dependent", as below:

> *'"Dependent" in relation to an asylum seeker or a refugee, means any unmarried minor dependent child, including an adopted child if such child was legally adopted in the asylum seeker's or refugee's country of origin, a spouse legally married to the asylum seeker or the refugee in his or her country of origin or any destitute, aged or infirm parent of such asylum seeker or refugee who is dependent on him or her, and who is included by the asylum seeker in the application for asylum.'*

This substitution raises a number of concerns regarding the protection of children and the protection of family unity.

We submit that the insertion of 'including the adopted child if such child was legally adopted in the asylum seeker's or refugee's country of origin' insofar as the definition pertains to children is too narrow, for the following reasons:

- The proposed insertion does not take into account the declaratory order of *Mubake and Others v the Minister of Home Affairs and Others* in the North Gauteng High Court on 9 July 2015[4] which directs that 'Section 1 of the Act should be interpreted so as to include in the category of person who are dependents of the adult asylum seekers, separated children.'[5]Further 'It is declared that separated children are dependents of their primary caregivers in terms of the definition of 'dependent' in Section 1.'[6]

- The provision does not allow for the inclusion of a child adopted in South Africa, or placed in the foster care of the refugee by the Children's Court.

- The suggested insertion is impractical given the varied application of legal adoption measures in many sending countries (including the Democratic Republic of Congo and Somalia). It can be foreseen that extremely few children who are effectively cared for by asylum applicants would have been legally adopted or possess proof of such adoption.

- The proposed amendment excludes the customary duty of care of children which may be assumed by the asylum applicant in respect of children who were separated from their families in the context of displacement, conflict, or those who may have been orphaned as result thereof.

Article 3 (1) of the UN Convention on the Rights of the Child states that '[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. In the case of a displaced child, the principle must be respected during all stages of the displacement cycle. At any of these stages, a best interest determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life. It follows therefore that the cases of unaccompanied or separated minors be dealt with by the Children's Court and that any decisions pertaining to the placement in alternative care should be in the child's best interest. As is noted by Makgoka J in the *Mubake* judgment:

> 'while I agree that there are inherent risks associated with the documentation of separated children as "dependents" of refugees or asylum seekers without any preceding investigation

[4]*Mubake and Others v the Minister of Home Affairs and Others* (Unreported) Case No. 72342/2012 09
[5]Ibid, para 26.
[6]Ibid, para 28.

there is a higher risk if that is not done...pending that process the child is undocumented, invisible and untraceable within the database of the Department of Home Affairs.'[7]

We submit therefore, that it is in the Department's interest to record the separated children who enter South Africa with caregivers other than their parents as such.

We submit further that the insertion of 'a spouse legally married to the asylum seeker or refugee in his or her country of origin' insofar as the definition pertains to spouses is too narrow for the following reasons:

- For purposes of this submission, it is presumed that the term 'legally married' refers to civil marriages, or marriages registered on a national database. The proposed submission is wholly dependent on the legal framework of the particular sending country and either presumes the registration of customary or marriages concluded in accordance with Islamic rites in a civil registry, or exclude customary marriages or Muslim marriage in favour of civil marriage. In reality, many applicants originating from African countries have concluded customary or religious marriages, which may or may not be considered a legal marriage in the particular country of origin. It is submitted that spouses, who submit proof of their union – whether religious, customary or civil be recognized as dependents.

- The Immigration Act (No. 13) of 2002 recognizes permanent relationships that have existed for a minimum duration for purposes of derivative status in the form of a relative's visa. It is submitted that the exclusion of *bona fide* permanent relationships from the definition of 'dependent' constitute unfair discrimination on the basis of marital status.

- The insertion of 'a spouse legally married to the asylum seeker or refugee in his or her country of origin' is a significant restriction of the principle of family unity and the individual's right to family life.

The principle of family unity is enshrined in international law as the fundamental unit of society and protection of the refugee family is paramount; UNHCR has underscored this importance in several Executive Committee Conclusions, namely Conclusion No. 24[8] and Conclusion88.[9]

[7]ibid, para 15.

Under South African law, we refer to *Dawood v Minister of Home Affairs* in which case the Court held that the right to dignity should be interpreted to afford protection to the institutions of marriage and family life, as a component to the Constitutional right to human dignity.[10] We submit that it is not the prerogative of the legislator to decide whether the relationship between spouses who were married prior to entering South Africa, as opposed to spouses who were subsequently married, and may have started a family together, is more worthy of protection over the other. It is proposed that marital relations are equally recognised for the purposes of preserving family unity.

Regarding the insertion of 'and who is included by the asylum seeker in the application for asylum', we submit this places an undue procedural limitation on the application of the definition to the dependents of the applicant.

Procedural irregularities at the time of application are well documented. Some of these are highlighted in a report by the African Centre for Migration and Society, some of the key findings of which were that applicants do not realise that the information they provide on the application form would be used to determine their status and that applicants expressed confusion over requirements of the form.[11]Many asylum seekers are illiterate or poorly educated, which increases the risk that the form may contain omissions or *bona fide* mistakes. It has been observed in practice that asylum applicants are often assisted by a Refugee Reception Officer or an interpreter to complete the form – the latter sometimes completing the form on behalf of the applicant. It has frequently been observed that interpreters make mistakes when completing the form on behalf of an individual. In some instances, the asylum applicant is wrongly advised on the completion of the form; or the services of an interpreter are not provided at all. The applicant should not be penalised for the lack adequate interpretation. A study released in 2015 which was conducted at RROs indicated that sufficient information for applicants regarding the asylum procedure is not readily available.[12] In light of the various factors which impact on the accuracy of the information provided on the application form, it is submitted that the *bona fide* dependents of the asylum applicant should not be excluded from the outset.

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[8] UNHCR Executive Committee, Conclusion No. 24 (XXXII) *Family Reunification* (21 October 1981).Available at: http://www.unhcr.org/3ae68c43a4.html

[9]UNHCR Executive Committee, Conclusion No. 88 (L) *Protection of the Refugees' Family* (1999). Available at: http://www.unhcr.org/3ae68c4340.html

[10]*Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) paragraphs 52 – 58.

[11] Amit, R., African Centre for Migration and Society (2012) *No way in, Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices,* p.11;

[12] Amit, R., Lawyers for Human Rights and African Centre for Migration and Society (2015) *Queue here for corruption, Measuring irregularities in South Africa's asylum system*, p.6.

2.EXCLUSION FROM REFUGEE STATUS

The Amendment Bill proposes a number of additions to the exclusion clause which lower the threshold for exclusion and raise a number of concerns. The primary concern is that the proposals are contrary to the 1951 Convention's rationale for excluding individuals from refugee status, namely those involved in serious crimes against humanity and crimes that were of such a horrendous nature that they justified the exclusion of those individuals from refugee protection; as such, the exclusion of individuals from refugee status should be invoked on an exceptional basis and applied in a scrupulous and restrictive manner due to the serious consequences of exclusion for the individual concerned.[13]The Amendment Bill's proposals involve a number of crimes do not meet the 'exceptional basis' threshold and we therefore submit that the proposed amendments should be removed from the Bill, as discussed in detail below.

The Amendment Bill's proposed substitution for section 4(1)(f) is as follows:

> *4. (1) An asylum seeker does not qualify for refugee status for the purposes of this Act if the Refugee Status Determination Officer has reason to believe that he or she: -*
>
> > *(f) has committed an offence in relation the Immigration Act, the Identification Act, 1997 (Act No. 68 of 1997) or the South African Passports and Travel Documents Act, 1994 (Act No. 4 of 1994);'*

We submit that the exclusion of an asylum application on the basis of having contravened these Acts is too broad. It is submitted, for example, that the contravention of Sections 49(3) or 42(1)(a) and (b)(iii),(iv),(v),(viii) or (ix) of the Immigration Act of 2002[14] would not outweigh the than the State's

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[13]*Summary Conclusions: exclusion from refugee status* (June 2003)para 4. Available at:http://www.unhcr.org/419dbaa44.html

[14] 49(3) Anyone who knowingly employs an illegal foreigner or a foreigner in violation of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding one year: Provided that such person's second conviction of such an offence shall be punishable by imprisonment not exceeding two years or a fine, and the third or subsequent convictions of such offences by imprisonment not exceeding five years without the option of a fine;

42(1)Subject to this Act, and save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help -

(a) an illegal foreigner; or

(b) a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable,

(iii) entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation;

(iv) conducting any business or carrying on any profession or occupation in cooperation with him or her;

(v) assisting, enabling or in any manner helping him or her to conduct any business or carry on any profession or occupation; (viii) harbouring him or her, which includes providing accommodation; or

duty to protect the individual against *non-refoulement.* According to the UNHCR Guidelines, the proportionality of the gravity of the offence in question should be weighed against the consequences of exclusion for the individual concerned, in terms of the degree of persecution feared upon return.[15]

The Amendment Bill provides through 4(1)(g) exclusion from refugee status for 'fugitives from justice' the following:

> *'(g) is a fugitive from justice in another country where the rule of law is upheld by a recognized judiciary;'*

Except for in exceptional cases involving high-profile asylum seekers, we submit that RSDOs will be unlikely to be able to determine which applicants are fugitives. It is submitted that the powers discretion afforded to a single RSDO to establish whether a person is a fugitive from justice, or to decide whether the rule of law is upheld in any particular country, and to exclude the asylum applicant based on his or her belief, is too wide and open to subjectivity. Such determinations must be handled within the context of criminal law and its associated procedural safeguards as well as expertise of public prosecutors and defence attorneys – none of these elements are present in the RSDO interview procedure where an asylum seeker does not retain counsel.

One question arising from this insertion is whether the RSDO will be provided with a pre-determined list of countries considered to have a functional legal system or recognized judiciary in order to base decisions on? Another question arising from this insertion is how it will be ensured that the RSDO weighs up the *non-refoulement* principle, or South Africa's obligations in terms of the UN Convention Against Torture when deciding to exclude a person from refugee status. In this regard, attention is drawn to the Constitutional Court case of *Minister of Home Affairs v Tsebe* which dealt with the relation between international refugee law and extradition. The Court found that a fugitive from justice may not be extradited, deported or otherwise removed from South Africa to a jurisdiction where he or she may face the death penalty, without assurance from that country that the death penalty will not be imposed or carried out upon conviction.[16] It is submitted that safeguards be put in place to avoid subjective decisions and to ensure that the rights to life, human dignity and protection against punishment which amounts to torture or cruel, inhuman or degrading treatment are upheld.

(ix) letting or selling or in any manner making available any immoveable property in the Republic to him or her.

[15] UNHCR, *Guidelines on international protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05 (September 2005) para 24.

[16] *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC).

It is not argued that South Africa should be a safe-haven for fugitives from justice, however, the Amendment Bill's proposal does not appear workable and as mentioned above should occur within the context of criminal law.

The Amendment Bill also proposes to criminalise irregular entry through 4(1)(h) which excludes individuals from refugee status who

> *(h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy the Refugee Status Determination Officer that there are compelling reasons for such entry';*

We believe the addition of this clause is harmful to legitimate refugees and is contrary to section 32 of the 1951 Convention. We note here that UNHCR states that the exclusion clauses should applied to include safeguards which minimize the possibility of abuse of refugees' and asylum-seekers' rights, and which seek to reinforce the obligation of non-refoulement.'[17]Regarding safeguards, we note here that in implementing the Refugees Act, the exclusion clauses have been at times invoked by RSDOs as a means to reject individuals as unfounded before determining if the individual qualifies for refugee status. The amendment is likely to lead to more rejections without considering the refugee claim of the applicant leading to increased adjudication times and more required resources from the Department. The current proposal does not include any safeguards and does not reinforce the obligation of non-refoulement.

The proposed amendment does not consider past difficulties asylum seekers have experienced in trying to access the Republic through ports of entry and declare their intention to apply asylum there. Research and media sources have repeatedly shown these difficulties and we note here the following:

- Lawyers for Human Rights produced a report in 2011 documenting the refusal of Department officials to issue section 23 permits to individuals at the border, namely undocumented Zimbabweans attempting to seek asylum. The report details what it describes as 'systematically refusing entry' to undocumented Zimbabwean asylum seekers and quotes officials who declared that they did not issue any asylum transit permits to Zimbabweans as they were not genuine asylum seekers.[18]

[17] UNHCR, 'Note on the Exclusion Clauses' EC/47/SC/CRP.29 (30 May 1997). Available at: http://www.unhcr.org/3ae68cf68.html

[18]Lawyers for Human Rights, 'Situation Report: Refoulement of Undocumented Asylum-seekers at South African Ports of Entry with a Particular Focus on the Situation of Zimbabweans atBeitbridge' (September 2011)

- IRIN News reported on the refusal of asylum seekers from the Horn of Africa who, as of April 2011, were refused access to the Republic based on the fact that they had transited other countries en route to South Africa. Large numbers of these asylum seekers were from Somalia, a country well-known for its production of refugees.[19]

- IRIN News detailed the plight of asylum seekers in 2012 who were forced to cross the border irregularly after being refused asylum transit visas at the Beitbridge border post by officials from the Department.[20]

- The Department itself has acknowledged the unlawful actions of its officials at ports of entry regarding their duties to properly administer the Immigration Act and admit foreign nationals through the prescribed procedure. Speaking on this issue in July of this year, Minister Gigaba noted that the failure to uphold their duties 'boils down to the attitude of the particular immigration official. That is not the official position of the South African government, but officials do it at the borders.'[21]

Given these difficulties, section 4(1)(h) is unreasonable and irrational and penalises asylum seekers forced to enter the country irregularly due to the failure of the Department's officials to carry out their duties. The proposed amendment violates Article 31 of the 1951 Convention as well as Article 16 of the Protocol against the Smuggling of Migrants by Land Sea and Air which both provide for the non-penalisation of irregular entry.

While the proposal allows for the RSDO to grant status if the applicant can provide 'compelling reasons' as to why they were required to enter irregularly, we submit that this proviso is an unworkable proposition in practice as RSDOs in general are overworked and under-resourced and the quality of RSDO decisions has been consistently poor.[22] The decisions produced by RSDOs commonly bear little relation to the asylum seeker's protection needs or reasons for flight and

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pp. 8-9. Available at: http://www.academia.edu/2236673/Refoulement_of_Undocumented_Asylum-seekers_at_South_African_Ports_of_Entry

[19] IRIN News, 'AFRICA: Horn migrants heading south "pushed backwards"'(2 August 2011). Available at: http://www.irinnews.org/report/93403/africa-horn-migrants-heading-south-pushed-backwards

[20] IRIN News, 'SOUTH AFRICA: Asylum-seekers resort to border jumping' (9 February 2012). Available at: http://www.irinnews.org/report/94820/south-africa-asylum-seekers-resort-to-border-jumping

[21] JonisayiMaromo, 'Ignore border officials' hogwash: Gigaba' *IOL News* (24 July 2015). Available at: http://www.iol.co.za/news/crime-courts/ignore-border-officials-hogwash-gigaba-1.1890535#.VeAxxvnzook

[22] See for example Roni Amit 'All Roads Lead to Rejection: persistent bias and incapacity in South African Refugee Status Determination' (2012) and Roni Amit 'No Way In. Barriers to access, service and administrative justice at South Africa's Refugee Reception Offices' (2012). Both reports are available at: http://www.migration.org.za

corruption has also been a persistent and systemic feature of the refugee status determination process and the additional power to refuse refugee status to RSDOs is likely to continue to foster corrupt practices and will do little to assist the RSDOs in accurately and efficiently identifying individuals in need of protection.

> *'(i) Has failed to make an application for asylum within five days of entry into the Republic as contemplated in section 21.'*

Regarding section 4(1)(i), there is no proviso to allow individuals to apply after the five day period and is unlawful. This section does not take into consideration the basic access problems prevalent at RROs over the past decade which are well-known and well-documented and recently released research found that survey respondents were on average in the asylum system 1 037.5 days (2.8 years) with the longest individual being the asylum system over 18 years.[23]

The proposed amendment does not consider the current structure of the application process as applied at RROs where individuals are allocated a day or two of application based on nationality or geographic area of residence; this system would thus make it near impossible for individuals to comply with 4(1)(h) depending on what date they entered the Republic.

Lastly, this provision does not consider *sur place* refugee claims in which individuals may enter the Republic without the intention of applying for asylum but a fundamental change of circumstances in the individual's country of origin (in cases such as the outbreak of civil war, a *coup d'etat*, or when an individual's activities since leaving their country now places them at risk of persecution upon return).[24] Individuals in this situation would thus be denied refugee status and would have no recourse to their plight.

We are cognisant of the Department's needs to ensure border security and that irregular border crossings are a concern and generally undesirable. However, given the current realities surrounding access to the asylum system for refugees and the severity of the consequences for the asylum seeker who may be refused access to protection from this clause, we believe this amendment is unlikely to improve the refugee protection system and as such we recommend it be removed.

3. CESSATION OF REFUGEE STATUS

[23]Roni Amit, 'Queue Here for Corruption – Measuring Irregularities in South Africa's Asylum System' (2015) p.31. Available at: http://www.lhr.org.za/publications/queue-here-corruption-measuring-irregularities-south-africa%E2%80%99s-asylum-system

[24] UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/ENG/REV.3, Geneva, (2011) paras 94-96 (hereafter 'UNHCR Handbook'). Available at: www.refworld.org/pdfid/4f33c8d92.pdf

The situations in which a refugee may cease to qualify for refugee status are set out in Articles 1C1-1C6 in the 1951 Convention – these clauses establish the only situations in which refugee status properly and legitimately granted comes to an end. As the cessation of refugee status involves substantial change for the refugee, UNHCR notes that 'a restrictive and well-balanced approach should be adopted in their interpretation'.[25]We believe that the additions in the amendment bill to section 5(1)(a) and 5(1)(d) do not conform to the approach advocated by UNHCR as below.

5(1) A person ceases to qualify for refugee status for the purposes of this Act if -

*(a) 'he or she voluntarily re-avails himself or herself **in any way** of the protection of the country of origin of his or her nationality;'*

This section mirrors Article 1C1 of the 1951 Convention which refers to a refugee possessing a nationality who remains outside their country of nationality and voluntarily re-avails himself to national protection and is no longer in need of protection in the host country. The UNHCR Handbook notes that this clause requires the acquisition to be voluntarily done by the refugee, that the refugee must intend by his action to re-avail himself to the protection of his nationality, and that the refugee must obtain such protection through that action.[26]

We note here that many refugees in South Africa have been forced to communicate with their Consulate or embassy by a variety of state departments, including the Department of Home Affairs, for a variety of documentation matters including national passports, birth certificates, death certificates, or divorce certificates. These documents have been requested by governmental departments who are unfamiliar with refugee and asylum documentation and are further unfamiliar with the specifics of refugee law. In these instances, many contact their Consulates without intending to re-avail themselves to the protection of that country and have not done so voluntarily.

To illustrate how such an event might occur in practice, recently officials at the Department of Home Affairs' Cape Town Temporary Refugee Facility (CTTRF) have informed refugees that they are sending refugees' documentation (marriage, death, and birth certificates) to their respective consulates for 'verification'. While we are not aware if this stated action has been undertaken in fact as the CTTRF Acting Manager has refused to respond to our enquiries, it none the less displays how

[25] UNHCR, *The Cessation Clauses: Guidelines on their Application*, Geneva(April 1999) para 2.
[26]UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, para 119.

refugees might be pushed to organise documentation from their country of origin to undertake routine administrative measures.

Due to these issues, we submit that the inclusion of 'in any way' is unreasonable given the current environment that refugees and asylum seekers have to navigate to sustain themselves. The prior wording of the section is more than sufficient to address the matter concerned.

> *(d) 'he or she voluntarily re-establishes himself or herself in the country which he or she left or returns to visit such country'*

Article 1C4 of the 1951 Convention which provides that refugees who voluntarily re-establish themselves in their country where persecution was feared cease to be recognised as refugees. The UNHCR Handbook notes that this clause is intended to be understood as return to the country of nationality or former habitual residence with a view to permanently residing there. a temporary visit by a refugee to his former home country, not with a national passport, but for example, with a travel document issued by his country of residence, does not constitute 're-establishment' and will not involve loss of refugee status.[27]

The Amendment Bill's inclusion of return visits into clause 5(1)(d) is not in line with the requirement that a refugee voluntarily 're-establishes' himself as it includes a mere 'visit' to their former country of residence. This inclusion is exceedingly restrictive and, if implemented, would interfere with UNHCR's attempts to promote voluntary repatriation through 'go-and-see' or 'look-see' programmes in which representatives of the refugee community are assisted by UNHCR in visiting their countries to assess the security situation, interact with communities and relatives, and ensure that there are adequate services available. These individuals then report to the refugee community in exile on the conditions and the viability of return.[28] As such we recommend that the addition be removed from the bill.

The Amendment Bill proposes the inclusion of section 5(1)(h) which states:

> *'the Minister, after consultation with Cabinet, resolves to cease the recognition of the refugee status of any individual refugee or category of refugees or to revoke such status'*

This insertion does not reference what criteria the Minster and Cabinet are required to consider when resolving to cease the recognition of individuals or groups. The lack of criteria or direction implies that cessation can be applied for any reason and not as outlined in the 1951 Convention or in

[27] Ibid, paras 133-134.
[28] See for example UNHCR, 'Burundian refugees get a taste of home with "go-and-see" visit' (14 May 2004). Available at: http://www.unhcr.org/40a4d37a4.html

relation to other applicable human rights instruments. UNHCR confirms that once refugee status has been granted it is maintained until it comes within the terms of one of the cessation clauses (1C1 to 1C6 in the 1951 Convention) and that refugee status should not be subject to constant review in the light of temporary changes in the country of origin that are not of a fundamental character and not durable.[29] Further, the cessation clauses are 'negative in character and exhaustively enumerated' and 'should therefore be interpreted restrictively, and no other reasons may be adduced by way of analogy to justify the withdrawal of refugee status'.[30]

We recommend that this section be linked with the cessation clauses as to ensure that refugee status is not removed for arbitrary reasons.

Regarding the Amendment Bill's proposal found in section 8(1)(3) for integrity testing of Departmental staff in regards to integrity, we welcome any measures the Department can introduce to root out of corruption within the asylum system. We hope that this proposal, if enacted, is implemented with good effect and is complemented by other non-legislative measures to address corruption including but not limited to increased support for individuals (citizens, asylum seekers, refugees, and undocumented persons) who report corruption to the Department as well as increased oversight at RROs to ensure the Refugees Act is properly implemented.

We also support the proposed substitutions under section8(e) which allow for the appointment of non-nationals to the Refugee Appeals Authority (RRA) as well as increased protections against corruption with the RAA. Similarly, we support the proposal to require all members of the Standing Committee to be legally qualified under section 9B.

Regarding the work of the Standing Committee, the Amendment Bill proposes that section 9I read as follows:

> *'The administrative monitoring or supervisory work connected with the functions of the Standing Committee must be performed by officials of the Department designated by the Director-General for that purpose.'*

The above insertion brings into question the independence of the Standing Committee. Erasmus (J) in *Watchenuka v Minister of Home Affairs* pointed out that 'a committee consisting of the employees of the Department of Home Affairs can hardly be a source of independent advice, or

[29] UNHCR Handbook, para 112.
[30] Ibid, para 116.

constitute an independent review tribunal.' [31] Further, in *Ruyobeza v Minister of Home Affairs* the court found the decision of the Minister of Home Affairs to appoint full-time, salaried employees of the Department as the members of the Standing Committee to be *ultra vires*, unlawful and unconstitutional.[32]

We submit therefore, that the express inclusion of 9I would not withstand scrutiny under the Constitution and that the Department consider alternative measures to ensure the independence of the Standing Committee.

4. APPLICATION FOR ASYLUM

The Amendment Bill proposes a number of restrictive measures that are not clarified as to how they will be implemented in practice. The Amendment Bill proposes the following:

> *'22(6) Upon application for asylum, the applicant may be assessed to determined his or her ability to sustain himself or herself, and any dependents with the assistance of family or friends for a period of at least four months.'*
>
> *22(7) If, after assessment, it is found that the applicant is unable to sustain himself or herself and any dependents as contemplated in subsection (6), the applicant may be offered shelter and basic necessities provided by the UNHCR or any of its participating partners.'*

Comments are made in respect of the above sections, read together.

It is submitted that conducting a financial assessment of asylum applicants is a potentially futile exercise. It should be foreseen that asylum applicants would not disclose their ability to sustain themselves, if, in absence of means, they would receive shelter and other forms of assistance and if there is no other benefit to the applicant to disclose this information – such as an endorsement of the permit with the right to seek employment. It is generally submitted that subjecting asylum seekers to a financial means test is irrelevant

It is presumed that the period of four months is the time period in which the Department foresees the asylum application to have been finalized. The basis on which the period of four months is used as a benchmark to limit UNHCR assistance is not clear, when Section 22(4) proposes that the visa may be extended from time to time pending the decision; and Section 22(11) mentions revoking the right to work or study if the holder is not able to prove that he or she is employed or enrolled for study after a period of six months from the date on which such right was endorsed.

[31] *Minister of Home Affairs v Watchenuka* 2004 (2) BCLR 120 (SCA) para 23.
[32] *Ruyobeza v Minister of Home Affairs* 2003 (5) SA 51 (C).

Furthermore, in the event that the means-assessment is done, it is not clear what will be considered sufficient means and there is no provision for re-assessment if the applicant exhausts his or her means before four months are up. Whilst the above proposed sections create confusion around the application of time lines, it is appreciated that the Department envisages swift refugee status determinations. We would, however, like to point out that despite existing statutory timeframes in status determination, it has been observed in practice that refugee status determination over the past years have taken anything between 2 years and 15 years to adjudicate. As observed by Rogers J in *Scalabrini Centre of Cape Town v Minister of Home Affairs and Others*, 'the adjudication of asylum applications often takes a long time (I was informed that there are some un-adjudicated asylum applications going back 12 years), an asylum seeker will usually need to have his or her s 22 permit extended on several, and perhaps many, occasions.'[33]In March 2014, the Chair of the RAB reported that there were around 110,000 cases awaiting appeal. In her 2015 budget vote speech, Deputy Minister Fatima Chohan stated that there were under 100 000 files awaiting RSDO decisions and 100 000 cases awaiting appeals due to backlogs accumulated between 2006 and 2010.[34]However, in its 2014 Global Trends report, the UNHCR indicated that at 463 900 cases, globally, South Africa had the highest number of applications pending at any level in the asylum procedure.[35]It is submitted therefore, that any legislative changes which place financial obligations, or restrict economic freedom of asylum applicants by the State or other actors, be informed by realistic timeframes and sound rationale.

As an introduction to our submissions made around asylum seekers' right to economic freedom, we wish to state that we do not purport to argue for the unlimited- or inherent right to work for all asylum seekers, however, we submit that allowing asylum seekers the right to work pending the adjudication of their claims is the only feasible alternative to the State having to provide financial assistance, or other forms of assistance to asylum seekers. The ideal would be that asylum applications are dealt with as swiftly, fairly and accurately as possible, so as to limit the duration of stay of the asylum seeker in the Republic if he or she does not qualify for refugee status. During this time, the asylum seeker should be allowed to support himself or herself financially – which position is in line with the existing body of law; and the most logic approach for the State. In this regard,

[33]*Scalabrini Centre of Cape Town and Others v Minister of Home Affairs & Others*, Western Cape High Court Case No. 11681/12, para 16.

[34] Notes of Department of Home Affairs (DHA) Stakeholder Meeting Marabastad Refugee Reception Office, 18 March 2014; See further the Budget vote speech of 6 May 2015 by Deputy Minister Fatima Chohan stating that there were, at the time, under 100 000 files awaiting RSDO decisions and 100 000 cases awaiting appeals due to backlogs accumulated between 2006 and 2010.

[35] UNHCR, *World at war, Global trends: Forced displacement in 2014*, p. 33 and 46. Available at: http://unhcr.org/556725e69.html

reference is made to the judgment in *Minister of Home Affairs v Watchenuka* in which the Supreme Court of Appeal declared the Standing Committee's decision, that all permits issued to asylum seekers contain a condition that to prohibit work and study for the first 180 days where after the applicant can apply to have the restriction lifted, to be unconstitutional.[36] Whilst acknowledging the limitation clause, the Court held that the right to work may not be limited when employment is the only 'reasonable means' for the person's support. Until now, the South African State did not offer any support to asylum seekers and in the continued absence hereof, asylum seekers would be forced to turn to crime, begging or foraging, as pointed out in the *Watchenuka*-case.

The Amendment Bill proposes the addition of section 22(8) as below:

> '*The right to work in the Republic may not be endorsed on the asylum seeker visa of any applicant who –*
>
> *(a) is able to sustain himself or herself and any dependants as contemplated in subsection (6);*
> *(b) is offered shelter and basic necessities by the UNHCR or any of its participating partners; or*
> *(c) seeks to extend the right to work after having failed to produce a letter of employment as contemplated in subsection (9); Provided such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending.'*

From the above, it is implied that certain permits would be endorsed with the right to work or study, but it is not clear which criteria the asylum applicant would need to meet in order to have the asylum seeker visa endorsed. The proposed amendment suggests that all new applicants are divided into two categories – those who can sustain themselves financially for four months and those who cannot. Neither of the categories is eligible to have their visas endorsed with the right to work or study, however, section 22(8)(c) bars the asylum applicant from extending the right to work or study if he or she cannot produce a letter of employment. This implies therefore, that some asylum applicants would be eligible to having the permit endorsed. It is not clear whether, in fact, section 22(8)(c) speaks only to those asylum applicants who are already present in South Africa and who would have the right to work at such a time as the Bill comes into force. If this is indeed the case, we

[36] *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) paras 17 & 18; 15 – 27.

wish to raise concern over the huge administrative burden this would place on the Department. Over the past years, the number of new asylum applicants fluctuated between 70 000 and 90 000 applications per annum. The Department would have to allocate specific resources to administer each individual's right to work or study, as their employment and education situations change. It would also mean that UNHCR assistance be made available to existing asylum seekers, once the right to work or study is removed from the permit. It is submitted that this type of control over asylum seeker's right to economic freedom is not only cumbersome to the State, but will increase poverty amongst asylum seekers and dependency on either State resources or foreign aid – depending on where the funding for subsistence assistance to asylum seeker comes from.

Section 22(8)(c) could also be construed to mean that asylum applicants do not have the automatic right to work or study, but may look for work or may plan to study, and would only be able to have the permit endorsed once the prospective employer or educational institution provide a letter to this extent. If this is indeed the intention of the legislator, we wish to point out that effectively the right to work is restricted, but not removed.

With regard to section *'22(8)(b) is offered shelter and basic necessities by the UNHCR or any of its participating partners'*,we are concerned about the lack of specific details provided regarding such a major overhaul in the urban refugee protection framework which relies heavily on local integration.

We wish to raise concern over increased reliance on UNHCR and its partners to provide for asylum seekers within the Republic. Whilst the above section uses the term 'offered shelter' and does not specifically state that asylum seekers would be confined to refugee camps, the express inclusion of UNHCR, coupled with recent discourse around the introduction of refugee camps,[37] inevitably raises this as a possible aspect of future asylum management. In this regard, we point to Article 21(1) of the Bill of Rights which states that 'everyone has the right to freedom of movement' and submit that the establishment of refugee camps would not be a justified limitation of this right. If indeed the legislator intends, with the above, to introduce the use of camps, we submit that the proposed sections do not provide nearly enough information around the protection of/or restriction of rights, that this would imply.

In terms of the provision of assistance, as described by section 22(8)(b) we question UNHCR's both ability and acquiescence to provide such assistance. In a recent statement to the media, UNHCR spokesperson Tina Ghelli said that 'the proposition that the UN feeds and houses asylum seekers —

[37]See as one of many examples Daniel Finnan, 'Immigration controls tightened in wake of South Africa's xenophobic attacks', *RFI* (16 April 2015). Available at:http://www.english.rfi.fr/africa/20150416-immigration-camps-not-solution-stopping-south-africas-xenophobic-attacks

or provides support to border camps — is a nonstarter. Our funding comes from donors who will not fund a middle-income country such as SA. We don't have resources to run reception camps and it would be difficult to raise funding to do that.'[38]We submit that it is in the public interest that the Department indicates whether UNHCR have indeed agreed to provide shelter and other forms of assistance and what form this would take; what is the estimated number of persons that will be accommodated in these structures; Is it envisaged that the existing body of asylum seekers at the time that the Bill is enacted be provided shelter; Which services will be provided in the shelters – for example, medical services.

Migration on a global level is depleting UNHCR's resources and there are serious concerns around the sustainability of the agency's assistance. To mention just a few international reports - in June 2015, António Guterres of UNHCR warned as follows:

> 'To those that think that it doesn't matter because humanitarian organizations will be there and able to clean up the mess, I think it's important to say that we are no longer able to clean up the mess… UN agencies, NGOs, the Red Cross – we no longer have the capacities and the resources to respond to such a dramatic increase in humanitarian needs.'[39]

Further, Africa, the continent represents the largest challenge for UNHCR in terms of capacity and financial requirements…As international response capacities are overstretched by the unprecedented rise in global forced displacement, and as media attention is focused elsewhere, Africa suffers disproportionally more than other regions."[40]Another article reports UNHCR's financial constraints as a result of the crisis in Syria.[41]

The proposal in Section 22(9) states:

> *'In the event that the right to work or study is endorsed on the asylum seeker visa, the relevant employer, in the case of a right to work, and the relevant educational institution, in the case of a right to study, must furnish the Department with a letter of employment or of enrolment at the educational institution, as the case may be, in the prescribed form within a*

[38]Carol Paton,'Inside South Africa's illegal immigration nightmare' *Rand Daily Mail* (30 April 2015). Available at:http://www.rdm.co.za/politics/2015/04/30/inside-south-africa-s-illegal-immigration-nightmare
[39] UNHCR, 'World faces major crisis as number of displaced hits record high'(18 June 2015). Available at:http://www.unhcr.org/5582c2f46.html
[40] UNHCR, 'UN Refugee Chief warns against overlooking humanitarian crises in Africa'(29 September 2014). Available at:http://www.unhcr.org/54292c399.html
[41] Al Jazeera, 'UN runs out of money to feed Syrian refugees'(2 December 2014). Available at:http://www.aljazeera.com/news/middleeast/2014/12/un-runs-out-money-feed-syrian-refugees-201412113262243367 5.html [Accessed 28 August 2015]

period of 14 days from the date of the asylum seeker taking up employment or being enrolled, as the case may be.'

It is submitted that the proposed section 22(9) places an unfair restriction on the right to work. Subjecting the endorsement of the permit with the right to work to the asylum applicant producing a letter of employment would eliminate any form of casual, daily, or informal labour. It will also deter prospective employers from engaging the individual for fear of incurring responsibilities under labour law. Lastly, the proposed section would exclude self-employment and trading, which position would be contrary to the judgment of the Supreme Court of Appeal in the 'Limpopo traders' case, where the court found that asylum seekers' right to work includes trade and the operation of businesses.[42]We submit that such restrictions of the right to work would be arbitrary.

The Amendment Bill also makes provisions for the abandonment of claims as below:

'*22(12) The application for asylum of any person who has been issued with a visa contemplated in subsection (1) must be considered to be abandoned and must be endorsed to this effect by the Standing Committee for Refugee Affairs on the basis of the documentation at its disposal if such asylum seeker fails to present himself or herself for renewal of the visa after a period of one month from the date of expiry of the visa, unless the asylum seeker can prove, to the satisfaction of the Standing Committee, that he or she was unable to present himself or herself as required due to hospitalisation or any other form of institutionalisation.*

22(13) An asylum seeker whose application is considered to be abandoned in accordance with subsection (12) may not re-apply for asylum and must be dealt with in terms of the Immigration Act.

Comments are made in respect to both sections.

These amendments are unduly harsh and does not take into consideration the current access problems at RROs, the current system of asylum seeker / refugee files and database, or the difficulty asylum seekers have in accessing expired permit processes or in having immigration officers allow for the extension of expired permits for individuals who have just cause.

As mentioned previously, access issues at RROs have historically been a major difficulty for asylum seekers and for the Department in implementing the Refugees Act. At the present time, these access

[42]*Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014).

issues are most visible at the Marabastad RRO where long queues, capacity issues, and endemic corruption present a number of hurdles for asylum seekers to clear in order to have their permits attended to. For individuals whose permits expire, the expired permit fine process and its accompanying fine schedule often require that asylum seekers go undocumented with expired permits for long periods of time while they attempt to save money and/or access the fine process. Under the current circumstances, considering an asylum seeker's file 'abandoned' after one month is unreasonable and irrational as it places administrative matters over protection and the principle of *non-refoulement*. The practical effect of designating such claims as abandoned will be in effect final negative decisions and increased numbers of undocumented asylum seekers, placing greater strain on the immigration control system which itself has a history of litigation and unlawful practices.

A concomitant issue is the poor state of the Department's asylum filing system and database. Asylum seekers and refugees are often refused access to permit extensions due to lost files or irregularities in their file (lost paperwork, missing information) through no fault of their own; these individuals would be at risk for having their clams considered abandoned. This is particularly the case for Somali nationals whose complicated system of family names and high rates of illiteracy often lead to Somali asylum seekers being unable to access the asylum system if they lose their permits and do not recall their file numbers. Our offices have encountered great difficulty in assisting these individuals access the CTTRF and often these interventions take many months – under the current amendment, these individuals would be considered as having abandoned their claims despite their best efforts to regularise their status.

Lastly, the expired permit process has been fraught with difficulty for asylum seekers for years and pushes individuals into undocumented status. Immigration officials often refuse to extend permits for individuals who have documentation of just cause such as the case of a pregnant asylum seeker being refused access due to immigration officials' reluctance to accept documentation from her doctor[43] or the case of a number of asylum seekers being brought to court twice for expired permits due to the failure of the CTTRF immigration officials to adequately fulfil their duty.[44]

We believe that any measure implemented regarding this matter be done so in a manner that ensures legitimate refugees are able to access the protection system. Toward that end, we recommend that at minimum the Department increase the time frame to six (6) months in section

[43] Giovanni Gerba, 'Home Affairs officials are heartless – refugees' *Eyewitness News* (9 January 2013). Available at: http://ewn.co.za/2013/01/09/Home-Affairs-officials-are-heartless---refugees

[44] TariroWashinyira and GroundUp staff, 'Tried twice for expired asylum papers: bureaucratic nightmare for Zimbabwean farm workers' (28 November 2013). Available at: http://groundup.org.za/content/tried-twice-expired-asylum-papers-bureaucratic-nightmare-zimbabwean-farm-workers

22(12) and also ensure that any unforeseen circumstances do not preclude deserving applicants from resuming their claims if they have just cause for the expiration beyond the time limit denoted.

5. CONCLUSION

We thank the Department for the opportunity to provide comments on the proposed amendments. We reiterate that a more effective asylum system can be attained through improving the quality of decisions produced in the first-instance by RSDOs, increased attention to addressing corruption within the system, and by addressing the lack of alternative legal means for temporary migrants seeking economic opportunities.