
4 September 2015

Chief Director: Legal Services
Department of Home Affairs
230 Johannes Ramokhoase Street, Hallmark Building
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Attention: Adv TsietesiSebelemetja and Adv Moses Malakate

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Re: Border Management Agency Bill, 2015
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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, the SCCT has direct experience in the obstacles refugees face and their difficulties in realising their rights in relation to the international protection they seek.

Our submission is based upon our experience in assisting migrants integrate into South African society. We note with concern that there has been some debate about the constitutionality of the Draft Bill as well as concerns raised about implementation,¹ but our submission focuses on our concerns regarding the Draft Bill's intention to restrict the principle of *non-refoulement* and lack of reference to important international legal instruments regarding cross-border movements and security.

¹ Craig Dodds 'SA border control plan hits brick wall' *Sunday Independent* (21 June 2015). Available at: <http://www.iol.co.za/news/politics/sa-border-control-plan-hits-brick-wall-1.1874119#.Vel2BPnzook>

SUBMISSIONS ON DRAFT BORDER MANAGEMENT AGENCY BILL 2015

1. IMPORTANCE OF NON-REFOULEMENT

We are concerned about the Draft Bill's lack of focus on the importance of *non-refoulement*, the cornerstone of international refugee law. *Non-refoulement* forbids the return of individuals to states where they may face harm or persecution and is found in many international legal instruments as well as considered customary law. At the present, there is debate regarding *non-refoulement's* status as *jus cogens*, a peremptory norm of international law from which no derogation is permitted.²

The South African definition, as found under section 2 of the Refugees Act No 130 of 1998 codifies the principle of *non-refoulement* into domestic law as below:

General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where -

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

Accordingly, South Africa's definition is expansive and recognises explicitly that *refoulement* can occur when refugees are refused entry at border posts or the frontier and can also occur if individuals are returned to a third country that may return that individual to a country where they may face persecution or harm.

The courts have reinforced the principle of *non-refoulement* in regards to asylum seekers, refugees, and individuals whose deportation would put them at risk of harm as under the Convention Against Torture or threaten their right to life as under Section 11 of the Bill of Rights. The court's

² See for example, Jean Allain, 'The jus cogens Nature of non-refoulement' 13 (4) *International Journal of Refugee Law* (2001) 533-558, who argues that non-refoulement has acquired the status of *jus cogens*.

jurisprudence on this issue underscores its importance and below we reference several cases that involving its interpretation:

- *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA): The Supreme Court of Appeal held that the return of persons to a third country where they would face a real risk of suffering and physical harm was unlawful and would amount to *refoulement*. Additionally, the rights to life and dignity would be violated if the state returns a refugee to any country, including those other than their own, where they are likely to face harm.
- *Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others* (CCT 110/11, CCT 126/11) [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) (27 July 2012): The Constitutional Court found that a person convicted of a crime 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

Despite the formal codification of *non-refoulement* as elaborated on above, we note with concern that earlier this year an individual was deported unlawfully to Botswana where he faced the death penalty without the South African State having received the necessary assurances that it would not be applied.³ Reference is made to *Samotse and Another v Minister of Home Affairs and Others*⁴ where the court recommended the development of Standing Operating Procedures to ensure that the necessary assurances are indeed obtained. The Border Management Agency (BMA) needs therefore to take this into consideration in carrying out its mandate.

These instances underscore the need for the Department to reinforce the importance of *non-refoulement* with its officials, in public statements and communications, and in legislation. Towards that end, we are concerned that the Draft Bill makes no reference to *non-refoulement* except in Schedule 1 in which assigns the BMA legislative functions and powers as follows:

'Restriction of the power to refuse entry to refugees in terms of section 2' of the Refugees Act.⁵

³ eNCA News 'Deportation scandal: Judge says Home Affairs must get house in order' (31 October 2014). Available at: <http://www.enca.com/south-africa/thorough-investigation-illegal-deportation-needed-home-affairs-head-office-says-judge>

⁴ *Samotse and Another v Minister of Home Affairs and Others* (60113/2014) [2014] ZAGPPHC 1001 (23 December 2014).

⁵ Schedule 1, p. 36.

We believe this wording is confusing and infers that the BMA will itself restrict the right to *non-refoulement* which is non-derogable as outlined above. Secondly, the statement discusses the right to refuse entry to 'refugees', defined in the Refugees Act as 'any person who has been granted asylum in terms of this Act', a clearly unlawful and unconstitutional act. Even if the word 'refugee' is removed and instead refers to individuals, we remain concerned that the BMA will act contrary to the spirit and intent of South Africa's obligation to protect refugees and urge the Department to consider how to reinforce *non-refoulement* as a critical means of protection and ensure that the BMA's primary concern is not the refusal of entry to individuals requesting refugee protection.

We recommend that the phrase in Schedule 1 be reworded to underscore the importance of *non-refoulement* and obligate BMA officials to ensure it is respected. We recommend it be reworded as follows:

'To uphold the principle of non-refoulement in terms of section 2.'

2. LACK OF REFERENCE TO RELEVANT INTERNATIONAL CONVENTIONS

We are concerned that the Draft Bill does not reference the relevant international legal instruments concerning smuggling, trafficking, and organised crime. In particular, the Palermo Protocols, consisting of:

- the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000);
- the Protocol against the Smuggling of Migrants by Land, Sea and Air (2000); and
- the Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition (2001)

These protocols were adopted to supplement the Convention against Transnational Organized Crime (2000). South Africa has ratified these instruments and the Prevention and Combating of Trafficking in Persons Act (No. 7) 2013 has been signed into law by the President (although not yet in effect).

We recommend that the Draft Bill be amended to include reference to these protocols as they elaborate on the particulars of smuggling and trafficking including the differences between trafficked and smuggled migrants and will provide assistance in striking the appropriate balance between security concerns and the human rights and security of migrants.