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Comments on the Draft Refugees Regulations and Draft Rules of the Standing Committee, 2018

The Scalabrini Centre of Cape Town (SCCT) is a registered not-for-profit organisation 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. The Scalabrini Fathers have been providing welfare services in Cape Town to displaced communities since 1994. In providing assistance, the SCCT advocates respect for human rights and utilises a holistic approach that considers all basic needs including advocacy, development, and welfare services.

We welcome this opportunity to provide comments to the Department of Home Affairs ('the Department') on the Draft Refugees Regulations and Draft Rules of the Standing Committee ('Draft Regulations') to implement the Refugees Amendment Act.[1] Our comments are based on our extensive and direct experiences in assisting migrants and refugees.

INTRODUCTION

1. At the outset, we wish to raise three issues by which our comments are framed – the special vulnerability of refugees, the need to adhere to international legal standards and principles, and the need to consider historical challenges in implementing the Refugees Act when developing new procedures and regulations.

2. Firstly, the legal and social position of refugees is unquestionably a vulnerable one. This was held by the Constitutional Court when it stated:

> Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion […] the fact that persons such as the applicants are refugees is normally due to events over which they have no control. They have been forced to flee their homes as a result of persecution, human rights

[1] The Refugees Amendment Bill was first released for comment by the Department in 2015 and then introduced into Parliament in 2017 before being signed in December 2017 as the Refugees Amendment Act (No 11, 2017).

violations and conflict. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country.[2]

3. Secondly, the Preamble to the Refugees Act reiterates that the Government of South Africa has assumed certain obligations to receive and treat refugees in its territory with the standards and principles established in international law, and that the Refugees Act is enacted to ensure that the relevant international legal instruments, principles and standards relating to refugees are given effect domestically.

4. Thirdly, the Refugees Act has been labelled by former UNHCR High Commissioner António Guterres as 'one of the most advanced and progressive systems of protection in the world today' and that the challenges faced with refugee protection in South Africa were those of implementation.[3] A decade after this statement was made, little improvement is visible in regards to implementation and significant challenges remain unaddressed such as the failure of frontline staff to adhere to prescribed regulations and processes, systemic challenges in the Refugee Status Determination (RSD) process, access issues at Refugee Reception Offices (RRO), corruption, and difficulties in administering systems.[4]

5. It follows that any legislations, regulations, or policies should take the above into consideration. It is our belief that many areas of the Refugees Amendment Act and Draft Regulations will actually exacerbate the aforementioned challenges in critical areas with little positive benefits. Given that the Refugees Amendment Act introduces a range of new and additional processes and procedures of great consequence to the well-being of asylum seekers and refugees, it is our view that the Draft Regulations must – at minimum – provide a rights-based framework for implementation to ensure adequate protection for this vulnerable group. The SCCT submits that the Draft Regulations are likely to increase complications and do little towards achieving the primary goal of the asylum process: an effective and efficient RSD process and protection. The SCCT believes that it is of the

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[2] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* 2007 (4) SA 395 (CC) para 28.

[3] Pumla Rulashe, 'UNHCR chief commends Pretoria's refugee policy, pledges cooperation' (24 August 2007) [Available at: http://www.unhcr.org/news/latest/2007/8/46cf10634/unhcr-chief-commendspretorias-refugee-policy-pledges-cooperation.html].

[4] As recent as last month oversight visits to RROs revealed poor conditions and unlawful procedures; Lizeka Maduna, 'Asylum Seekers At The Durban Refugee Reception Centre Tell Of Their Plight', *Daily Vox* (16 June 2018) [Available at: https://www.thedailyvox.co.za/asylum-seekers-at-the-durban-refugee-reception-centre-tell-of-their-plight-lizeka-maduna/]. For other pertinent examples, see: Tariro Washinyira And Joseph Chiruma, 'Broken Home Affairs system leaves refugees stranded', *The Times* (3 June 2016) [Available at: http://www.timeslive.co.za/local/2016/06/03/Broken-Home-Affairs-system-leaves-refugees-stranded]; Roni Amit 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions,' Forced Migration Studies Programme Research Report (April 2010), [Available at www.migration.org.za/uploads/docs/report-24.pdf]; Roni Amit, 'All Roads Lead to Rejection: Persistent Bias and in South Africa's Asylum System' African Centre for Migration & Society Research Report (June 2012) [Available at: www.migration.org.za/newcms/uploads/docs/report-35.pdf]; and Roni Amit, 'Queue here for Corruption: Measuring Irregularities in South Africa's Asylum System', Lawyers for Human Rights and The African Centre for Migration & Society Report (2015) [Available at: http://www.lhr.org.za/publications/queue-here-corruption-measuring-irregularities-south-africa%E2%80%99sasylum-system].

utmost importance to bear this in mind so as to not further exacerbate these challenges.

6. Lastly, the Draft Regulations were only open for comment over a 13 business days. Considering the drastic changes and complexity of the Refugees Amendment Act and the Draft Regulations, this was not enough time for the SCCT to fully engage with all of the Draft Regulations. We note that this goes against parliamentary practice where last year, due to the importance and contentious nature of the Refugees Amendment Bill, the period for public comment was extended to the prescribed 30 days. Multiple partner organisations informed us that they also had difficulties in considering the Draft Regulations and developing substantive comments, and that their requests to the Department for an extension were all denied. This is of major concern, suggesting the Department is not concerned about public comments and fair processes. This is especially regrettable given the Department's past record of failing to uphold its obligations to genuinely consult with the public and persons affected by the Department's decisions.[5]

7. Our submission below should not be considered as comprehensive and we have attempted to engage with the Draft Regulations in areas of major concern as much as possible.

OMISSIONS

8. The SCCT is concerned that the current Draft Regulations have omitted previous sections which outlined the duties and responsibilities of officials during the asylum process. In particular, we note that many sections of Regulations have been removed entirely from the previous Regulations[6] as evidenced in the table below:

Table 1 – Comparison of the Schedule of Regulations

Schedule of Regulations and Forms (2000)	Schedule of Draft Regulations (2018)
1. Definition 2. Application for asylum 3. Adjudication process, time periods, and conditions 4. Duties of Refugee Reception Officer 5. Interpretation 6. Disclosure of information and surrender of documents 7. Asylum seeker permit 8. Failure to appear, withdrawal of asylum seeker permit and detention	1. Definitions 2. Verification of marriage 3. Permanent homosexual or heterosexual relationship 4. Cessation of refugee status 5. Cessation of refugee status in terms of section 5(1)(h) 6. Standing Committee for Refugee Affairs 7. Integrity measures 8. Application for asylum

[5] See for example the following cases from the Supreme Court of Appeal regarding the Department's record on public consultation in regards to the status of Refugee Reception Offices: *Minister of Home Affairs v Scalabrini Centre, Cape Town* (735/12 & 360/13) [2013] ZASCA 134 (27 September 2013); *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015); *Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017).

[6] Refugees Act Regulations (No. R 366) (6 April 2000), GG 21075. ('2000 Regulations').

9. Limitation on departure from the Republic 10. Hearing before Refugee Status Determination Officer 11. Burden of proof evidence 12. Eligibility determinations and service of decisions 13. Referral to standing committee 14. Appeals to the Appeal Board 15. Refugee status and identity document 16. Dependents 17. Withdrawal of refugee status 18. Retrospective application of Regulations	9. Abandoned application 10. Spouses and dependents of refugees 11. Asylum seeker visa 12. Determination hearing 13. Review of applications 14. Appeals to Refugee Appeals Authority 15. Formal recognition of refugee status 16. Identity document 17. Travel documents for refugees 18. Surrender of documents 19. Detention and removal of refugees and asylum seekers relating to national security threat 20. Change of address and contact details 21. Withdrawal of refugee status 22. Repeal of laws 23. Short title commencement

9. Of particular concern is the omission of the following regulations:

9.1. **Regulation 3 - Adjudication process, time periods, and conditions**

9.1.1. Regulation 3 of the 2000 Regulations set out prescribed timeframes for the adjudication of an application for asylum (180 days), timeframes for the first interview to take place (30 days) and setting out procedures to follow when applications remain in process after 180 days.

9.1.2. The Refugees Amendment Act sets out numerous (and minimal) time frames for asylum seekers and refugees to comply with provisions; as written, there is no similar guidance for the Department to discharge its duties. This is a serious oversight and we recommend that Draft Regulations be amended accordingly.

9.2. **Regulation 4 - Duties of Refugee Reception Officer**

9.2.1. Regulation 4 of the 2000 Regulations set out the duties of a Refugee Reception Officer, including *inter alia* such duties as ensuring that applicants are provided with adequate interpretation, to assist in filling in forms, and to notify applicants about the conditions on asylum permits and their responsibilities as an asylum seeker.

9.2.2. It is concerning that these duties have been omitted from the current Draft Regulations considering the importance of the Refugee Reception Officer, especially under the Refugees Amendment Act (where errors on BI-1590 forms cannot be corrected and where expired documentation can result in asylum files being closed).

9.3. **Regulation 5 – Interpretation**

9.3.1. The SCCT welcomes the Department's recent efforts to address the systemic shortcomings of interpretation services in the RSD process. However, it is submitted that the Draft Regulations should engage with the responsibilities of the Department in relation to interpretation and also the rights of asylum applicants in this process given the critical importance of this aspect of the asylum system.

9.4. **Regulation 11 – Burden of proof and evidence**

9.4.1. The current Draft Regulations do not discuss the burden of proof in relation to an asylum claim. This is concerning given that many Refugee Status Determination Officers (RSDO) and Refugee Appeal Board (RAB) members consistently apply the wrong test.[7] The SCCT recommends that the Department consult the relevant case law emanating from South African courts on this issue and the UNHCR Handbook[8] to formulate a lawful regulation to clarify this issue.

10. In conclusion, it is unclear as to why these regulations would be repealed given the importance they carry, and specifically in relation to the challenges that the Department officials have had in properly administering the asylum system since it went into force. The SCCT strongly recommends the Draft Regulations be amended to include sections on the above issues.

SPECIFIC REMARKS

Draft Regulation 2 – Verification of marriages

11. Before discussing Draft Regulation 2 in detail, the SCCT directs the Department to the recent Order of the Western Cape High Court (WCHC) where a full bench of the court held that spouses and dependent children of a recognised refugees are entitled to refugee status in South Africa irrespective of:

11.1. Whether the recognised refugee declared their existence when making the application for refugee status;

11.2. When they applied for refugee status; or

11.3. Where they were married to, or born to, the recognised refugee.[9]

12. Therefore, the Draft Regulations must conform to the above order to comply with the law. We recommend that the Department reformulate this Draft Regulation to ensure it is lawful.

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[7] *Fang v Refugee Appeal Board* [2006] JOL 18635 (T); *Tantoush v Refugee Appeal Board and others* 2008 (1) SA 232.

[8] 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) at paras 42, 196 (hereafter 'UNHCR Handbook').

[9] See Annexure 1 for a copy of the Order.

13. We are concerned over the restriction of family joining to only those spouses declared by an asylum seeker during the initial application process or concluded while in the Republic after submission of an application, as set out in Draft Sub-regulation 2(1). The SCCT agrees that an applicant must declare all family members in an application, but in practice this often does not occur. The fact that many asylum seekers do not understand English or are illiterate and do not understand the asylum process. This greatly increases the chances of omission, bona fide mistakes, and confusion over specific requirements in asylum applications, not to mention malpractice on the part of officials. For instance, we have heard from several asylum seekers who were under the mistaken belief at the time of application that they should only declare their family members who arrived in South Africa with them. This has led to spouses, and often some children, being omitted from their eligibility forms, despite a very real desire to protect the unity of their family, for the simple reason that the applicants have not had the asylum procedures explained adequately to them.

14. During RSD hearings, asylum seekers are rarely asked about their family members or their whereabouts which misses an opportunity to verify that family information was correctly recorded and to protect family unity. In fact, these draft regulations actually omit the provision allowed for by the Regulation 10(2)(b) of the 2000 Regulations, which directed that an RSDO may 'verify the identity of any dependents seeking refugee status based on their relationship to the applicant'. This, coupled with the binding finality of the information recorded on the DHA-1590 form in Draft Regulation 8 is of particular concern to the SCCT. As such, we recommend the removal of the requirement that a spouse existing at the time of application is declared in order to protect family unity and to comply with the Order of the WCHC.

15. Further, we note that the duty to verify a marriage falls to either an RSDO or *any other authorised official of the Department*. We are concerned over the lack of clarity over what positions the other 'authorised' officials will hold within the Department to decide who qualifies as a dependent in terms of the Act. The SCCT submits that this important function should only be performed by duly-appointed, and appropriately trained, RSDOs.

16. The SCCT is concerned at the potential discretionary power given to the RSDO, or any other authorised official, to refuse to verify the marriage through Draft Sub-regulation 2(1). For instance, we believe that the inclusion of 2(1)(b) requiring a Department official to interview both spouses to ascertain the existence of a marital relationship is not appropriate in cases where the marriage certificate has been supplied and duly authenticated. We believe that it will merely create an unnecessary added burden on the already heavy workload of Department officials and lead to an unnecessary invasion of privacy.

17. In regards to verifying marriage certificates, we urge the Department to take cognisance of the ruling by Judge Botha of the South African High Court that the burden of proof in asylum applications 'is mitigated by a lower standard of proof

and a liberal application of the benefit of the doubt principle'[10] and apply this finding to the current Draft Regulations in regards to family unity.

18. We remain concerned over the lack of provision for an appeal or review process in cases where the official may deny the existence of a marital relationship, and we stress the utmost importance of applicants receiving written reasons for this decision. Added to this, we suggest that the word 'may' is changed to 'must' in this sub-regulation to direct that when an applicant cannot produce a marriage certificate as proof, an RSDO *must '*accept an affidavit as proof of a marriage'. This, in our opinion, is important for three main reasons.

    18.1. Firstly, this will protect the principle of family unity in the context of conflict and displacement, where some individuals are forced to flee their homes without all their documents.

    18.2. Secondly, it is essential in light of Draft Sub-regulation 4(1), which effectively bars an asylum seeker from arranging any replacement of a marriage certificate issued by the authorities in their country of origin, at risk of losing their refugee status or having their asylum application refused.

    18.3. Thirdly, some African countries do not provide marriage certificates for customary marriages

19. The SCCT therefore submits that the inclusion of Draft Sub-regulation 2(3) is unnecessary in light of the details included in Draft Sub-regulations 2(1) and 2(2).

Draft Regulation 3 – Permanent Homosexual or Heterosexual Relationship

20. Draft Regulation 3 provides for, in our view, an unnecessary amount of documentary evidence to prove a relationship.

21. Specifically, Draft Sub-regulation 3(2)(c)(i) requires that in the absence of an official marriage certificate, a party to a permanent homosexual or heterosexual relationship must, among other documentation, submit documentary evidence to prove that co-habitation has been in existence to for a period of no less than two years prior to the application for asylum. This is requiring a different threshold to a relationship with a marriage certificate and may be unconstitutional. For homosexual refugees fleeing countries where homosexuality is unlawful, they will be unable to fulfil this requirement.

22. Other issues arise in Draft Sub-regulation 3(2)(b) where there is a requirement to provide official documents that prove the end of a previous marriage. However, if this requirement is to be met, and an asylum seeker does not have that official documentation and thus their only option is to contact officials in their country of origin, they are at risk of having their asylum application rejected because under Draft Sub-regulation 4(1)(a), the person may be considered to have re-availed

[10] *Van Garderen N.O. v Refugee Appeal Board*, North Gauteng High Court, unreported decision no 30720/2006 (19 June 2007) .

himself or herself of the protection of the country of his or her nationality by seeking such services.

23. Lastly, there is no due process for situations where relationships are deemed not genuine nor is there any guidance on documentation pending final decision or what recourse an applicant may have if their relationship is not deemed genuine.

Draft Regulation 4 – Cessation of Refugee Status

24. We remain concerned with the introduction of section 5(1)(a) of the Refugees Amendment Act which provides that a refugee ceases to qualify as such if he or she voluntarily re-avails himself or herself 'in any way' of the protection of the country of his or her nationality.

25. The UNHCR Handbook states that 'the process for cessation of refugee status should be as formal as the process of grant of status, given the stakes for the individual…[whether or not] the refugee's own conduct causes the asylum state to initiate cessation, or where general political change raises the possibility that the recommended that a 'refugee's status should not in principle be subject to frequent review to the detriment of his sense of security, which international protection is intended to provide.'[11]

26. The exclusion of certain categories of asylum seekers has been expanded in these Draft Regulations and apply to any asylum seeker who has submitted an application for or being granted asylum. Thus, we are concerned that these cessation clauses will provide an opportunity for RSDOs to reject individuals as unfounded before determining if the individual qualify for refugee status and thus South Africa having *non-refoulement* obligations towards deserving refugees.

27. In our experience, many refugees in South Africa have been forced to communicate with their Consulate or embassy by a variety of state departments, including the Department, for a variety of documentation matters, including national passports, birth certificates, death certificates, or divorce certificates. Indeed, as mentioned above, it is a requirement in these very regulations – Draft Sub-regulation 3(2)(b) – that if an asylum seeker was previously married, and is now in a relationship that requires verification, they are required to produce an official document which may require them to communicate with their Consulate or embassy. 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.

28. Refugees have reported to the SCCT that officials at the Cape Town RRO who have informed refugees that will send refugees' documentation (marriage, death, and birth certificates) to their respective consulates for 'verification'. This illustration demonstrates how refugees may be compelled to organise documentation from their country of origin through their Consulate or embassy. The UNHCR Handbook provides guidance by stating that refugees instructed to contact consulate officials do not cease to be refugees because they obey such

[11] UNHCR Handbook, para 116.

instructions – individuals in this situation are often 'constrained by circumstances beyond their control and such acts 'cannot be considered to be a voluntary re-availment of protection and will not deprive a person of refugee status'.[12]

29. Refugee law scholar James Hathaway makes it clear that simply because an asylum seeker or refugee avail themselves of a state's consular facilities do so as a demonstration of either political loyalty or trust, but merely for the practical exigencies of life – travel, enrolment in school, professional accreditation – which may require them to contact the external office of their nationality to secure essential documentation.[13] Such documentation is often requested by the Department, as evidenced above.

30. Adding to this, a person may seldom have well-founded fear of being persecuted by the members of the foreign service of their home country.[14] In our experience, some asylum seekers and refugees are not always fleeing the government but instead serious disruptions of public order and are therefore recognised or can be recognised as refugees under section 3(b) of the Refugees Act. In the case of Somalia, many Somali refugees support the Transitional Federal Government's attempts to implement a democratic government that adheres to the rule of law in Somalia but have instead fled the country due to the lack of effective state protection, non-state actor persecution and the effects of the long-standing civil war.

31. It is unreasonable to require that asylum seekers and refugees adhere to these circumstances contained in Draft Regulation 4 given the current environment in which they have to navigate. We note that Article 1C4 of the 1951 Refugees Convention provides that refugees who voluntarily re-establish themselves in their country where persecution was feared cease to be recognised as refugees. The UNHCR Handbook makes it clear that this is intended to be understood where a refugee returns to the country of nationality with a view of permanently residing there.[15]

32. Of further concern, Draft Sub-regulations 4(1)(g) and (i) restrict the rights of individuals to participate in political life and may impinge on their rights as protected under the Constitution and international human rights law. Additionally, Draft Sub-regulation 4(2) references any 'political structures' but does not define what this may mean. The SCCT recommends these Draft Regulations be reformulated for clarity and to ensure that participation in political organisations with a peaceful agenda is protected and not subjected to withdrawal proceedings.

33. It is our strong view that to include this list of circumstances in Sub-regulations 4(1)(a)-(j) represents a departure from South Africa's international obligations under the Refugees Convention as well as the South African Constitution.

34. In relation to Draft Sub-regulation 4(1)(3) which provides that the Director-General must issue a notice of intention to deport who ceases to qualify for

[12] UNHCR Handbook, para 20.
[13] James C. Hathaway, *The Law of Refugee Status* (1st Edition, 1991), p.192.
[14] Atle-Grahl Madsen, as quoted by James C. Hathaway, ibid.
[15] UNHCR Handbook, paras 125, 133-134.

refugee status in terms of section 5 of the Refugees Act to the UNHCR which may resettle such person within 14 calendar days of receipt of the notice, failing which the Director-General must deport such person. It is our view that it is entirely unrealistic for the UNHCR to resettle a person – with no criminal record and desperate protection needs – within 14 calendar days, let alone a person deemed a threat to national security. It remains unclear where the UNHCR is meant to resettle these individuals. In this regard, the SCCT suggests the Department conduct close consultation with the UNHCR over Draft Sub-regulation 4(1)(3).

35. In regards to the Draft Regulations pertaining to cessation, we believe many of these provisions and draft regulations are unlawful as they are exceedingly broad in scope, and inconsistent with the 1951 Refugees Convention and the Constitution.

Draft Regulation 5 – Cessation of Refugee Status in terms of Section 5(1)(h)

36. We welcome the inclusion of waiving the withdrawal of refugee status based on humanitarian grounds relating to such refugee being an orphan has no relative or extended family in his or her country of origin; or is receiving life-saving medical treatment in South Africa which is unavailable in the relevant country of origin. However, we submit that this should not be limited to those categories.

37. We recommend that 'or other who is assessed as warranting humanitarian intervention' or the inclusion of a sub-regulation permitting the ability to decide other categories. For example, a decision-maker could decide that based on medical evidence, there are compelling reasons to waive the withdrawal of refugee status. This was the approach of the High Court in the case of *Mayongo v Refugee Appeal Board* JOL 19645(T), where the High Court dealt with the issue of the compelling reasons exception for cessation. The High Court found that the applicant had compelling reasons for an exception to the cessation of his refugee status, being post-traumatic stress syndrome and major depressive disorder, which was confirmed by medical and psychological evidence.

38. In relation to the period of time that a refugee is able to make representations regarding the possible cessation of refugee status, we are concerned that an adequate amount of time has not been specifically prescribed. We recommend that a timeframe to respond be prescribed to provide an adequate and consistent amount of time to reply to adhere to fair and just administrative processes.

Draft Regulation 7 – Integrity Measures

39. The SCCT welcomes any measures that the Department can introduce to address corruption within the asylum system and we trust that such measures would be in line with fair labour standards and protect the staff from unfair action.

40. We again strongly recommend that the Department complement any legislative counter-corruption measures by introducing other non-legislative mechanisms such as but not limited to increased support for individuals (citizens, asylum seekers, refugees, and undocumented persons) who report corruption to the

Department and through increased oversight at RROs to ensure the Refugees Act is properly implemented.

Draft Regulation 8 – Application for Asylum

41. Draft Regulation 8 provides, amongst other administrative requirements, that an application for asylum must be submitted together with proof or declaration of the intention to apply for asylum in the form of a valid asylum transit visa. It is our submission that this is at odds with the practical experiences surrounding the admittance of asylum seekers at ports of entry and the provision of transit permits. At present, reports from partner organisations in Musina have referred to the inconsistent issuance of section 23 permits at the Port of Entry, thereby forcing asylum seekers to enter irregularly. Creating additional administrative requirements will only, in our view, deepen the issues seen in the current asylum regime and does nothing to improve processes for determining international protection needs.

42. We are also concerned with Draft Sub-regulation 8(3) which provides that all information contained on Form DHA-1590 or any documentation submitted together with, or in support of, the application for asylum, is deemed to be binding on the applicant and may not be amended. This regulation again does not take into consideration the practical difficulties of ensuring accurate information is recorded – even under the best of circumstances. In our experience, often information is recorded incorrectly that is so blatantly incorrect it beggars belief – asylum seeker's nationality being recorded as Indian when they are in fact from Burundi, incorrect recordings of gender, etc.

43. In *Makumba v Minister of Home Affairs and Others*, the Western Cape High Court found that, under certain circumstances, the Department has an obligation to examine new facts that came to light after an asylum application is rejected so as not to violate the principle of *non-refoulement*. In her judgment, Salie-Samuels AJ held:

> In my view when new facts come to the attention of the Respondents after an application for refugee status has been rejected – even if that rejection was correct on the facts originally presented – there will in some cases be an obligation on the Department to reconsider that application. This would be the case where the following criteria are met: (a) there is a plausible explanation why the true facts were not originally placed before the RSDO; (b) the new facts are credible and are supported by objective evidence or confirmed by witnesses; (c) if the new facts are true.[16]

44. It is unlawful and impractical to not provide for a means to amend incorrect information, especially in light of the challenges encountered in the past on this matter. The SCCT submits this Draft Sub-regulation must be amended accordingly.

[16] *Makumba v Minister for Home Affairs and others,* (Case No 6183/14), para 20.

Draft Regulation 9 – Abandoned Applications

45. Draft Regulation 9 states:

> *9.(1) The endorsement by the Standing Committee of an application as an abandoned application as contemplated in section 22(12) of the Act must be made on a Form 3 (DHA-??) contained in the Annexure.*
> *(2) A Refugee Status Determination Officer must, following an endorsement by the Standing Committee, as contemplated in sub-regulation (1), prepare and forward a recommendation on a Form substantially corresponding Form 3 (DHA-??) contained in the Annexure to an immigration officer to deal with the concerned asylum seeker as contemplated in section 22(3) of the Act.*
> *(3) Any asylum seeker who is found to have abandoned his or her application, shall be dealt with by an immigration officer in terms of the provisions of the Immigration Act.*

46. This Draft Regulation pertains to a provision that provides that an asylum application is considered abandoned if an asylum seeker fails to present for renewal of their asylum seeker permit within 30 days of its expiry.

47. We confirm our view expressed in our submission on the Refugees Amendment Bill that Draft Regulation 9 is unlawful and fails to consider *non-refoulement* obligations. It is unduly harsh when considering the current access problems at RROs, the current system of asylum seeker/refugee files and database, the difficulty asylum seekers have in accessing expired permit processes, and the fact that many asylum seekers' permits expire well beyond 30 days due to the Department's own unlawful policies and procedures.[17]

48. Section 22(12) of the Refugees Amendment Act states that the asylum seeker can have the opportunity to 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 form of institutionalisation. However, it is our view that Draft Regulation 9 does not provide for the procedural necessities required for a fair and just process when deeming an application as 'abandoned' and putting an asylum seeker at risk of *refoulement* because they were unable to renew their permits within one month due to circumstances outside of their control.

49. There are a variety reasons beyond the control of an asylum seeker that can hinder their ability to obtain new permits. For example, individuals are often not granted a 'formal renewal' of their documentation and instead receive a simple stamp from officials on the back of their expired documentation advising them when to return again to the RRO.[18] Another example is where asylum seekers are often refused access to permit extensions due to lost files or irregularities in their files through no fault of their own. Asylum seekers in both these categories will be at risk of having their applications deemed abandoned.

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[17] Tariro Washinyira, 'Home Affairs defying Court Order', *GroundUp* (14 March 2018) [Available at: https://www.groundup.org.za/article/asylum-seekers-anxiously-await-reopening-cape-town-refugee-office/]

[18] See Annexure 2 for a copy of an expired permit with stamps on the back over a period of years.

50. In addition, Draft Regulation 1 defines 'abandoned application' as an application for asylum in which an applicant fails to present at the RRO where their visa was issued within a period of 30 calendar days from the date of expiry of the visa. However, this definition does not correspond to the Refugees Act which does not specifically prescribe where an asylum seeker may renew their permit.[19] This was upheld in the WCHC decision of *Ntumba Guella Nbaya & 450 Others v The Director-General of Home Affairs & 4 Others.*[20] It is our experience that asylum seekers are required to renew their asylum seeker permits over a period of several years, and they often move to other parts of South Africa from where they originally entered the country. They experience hardship that may prevent them from travelling to the RRO where their visa was originally issued. The WCHC agreed in the *Nbaya* case that an asylum seeker should have access to a fully functional refugee reception office where they currently reside which would allow for regular renewals of their asylum seeker permits.

51. This Draft Regulation raises questions as to what the process is for how the Department will be alerted to the fact that visas have not been renewed, or what process there is for when an asylum seeker will be notified that their application has been deemed abandoned, or how they will be given an opportunity to prove to the Standing Committee that they were unable to present themselves. We are concerned that this lack of process, in addition to the amendment generally, will result in asylum seekers with genuine refugee claims to be refouled back to their countries of origin or remain in South Africa in an irregular position.[21]

52. We recommend that as a priority that the Department's systems for reception of asylum seekers and administration of permits are strengthened and meet an acceptable standard of administrative justice, and that Draft Regulation 9 be reformulated to take into consideration the vulnerabilities of asylum seekers and refugees as well the 'compelling reasons' provision as found in the Refugees Amendment Act.

Draft Regulation 11 – Asylum Seeker Visa

53. The Refugees Amendment Act introduces a drastic change to the granting and operation of work and study rights for asylum seekers in South Africa. Specifically, the Refugee Amendment Act introduced a provision requiring the Standing Committee to determine when work and study rights are to be granted to an asylum seeker. It is extremely concerning that the Draft Regulations are mostly silent on this issue.

54. It is established in South African case law that asylum seekers have the right to work and study in South Africa. The right to work for asylum seekers was an important component of the right to dignity in *Minister of Home Affairs and Others*

[19] Section 22 of the Refugees Act as amended by the Refugee Amendment Act of 2017 and Section 15 of Act 33 of 2008 provides: '*Section 22(4) the visa referred to in subsection (10), may, pending the decision on the application in terms of section 21, from time to time be extended for such period as may be required.'*

[20] *Ntumba Guella Nbaya & 450 Others v The Director-General of Home Affairs & 4 Others* (Case No. 6534/15).

[21] In *Fang v Refugee Appeal Board 2007 (2) SA 447(T)*, the Court held that ineffective and flawed procedures as well as a restrictive or incorrect interpretation of the concepts can lead to a violation of non-refoulement.

v Watchenuka and Others.[22] In respect of the right to study, the Constitutional Court has confirmed this in the case of *Governing Body of the Juma Musjid Primary School & Others v Essay N.O. & Others*[23] where it held that the right in section 29 of the South African Constitution is a right that is immediately realisable. In that case, the Constitutional Court held that the right to a basic education in section 29(1)(a) of the Constitution may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[24] We submit that taking away the right to basic education for asylum seekers and refugees is not reasonable and justifiable.

55. Draft Sub-regulation 11(4) states that prior to issuing any right to work to any asylum seeker, an assessment must be done on a Form substantially corresponding to parts A3 and B3 of DHA-1590 contained in the Annexure, in addition to the interview that must be conducted by the RSDO. It is our submission that this is unrealistic in the current asylum regime and creates yet another burdensome administrative task for the Standing Committee and RSDOs without addressing the systemic issues.

56. The proposed letters of offer of employment and enrolment in the Annexure requiring a potential employer or school to provide affidavits and keep records of visas and assurances for the employer and school will cause unnecessary difficulties for asylum seekers and provide another layer of bureaucracy that the Department will be unable to manage. Further, it fails to consider informal employment which is a critical livelihood strategy of many refugees.

57. We recommend that the Draft Regulations be reformulated and set out a coherent and clear process by which an RSDO will determine an applicant's ability to support oneself with due regard to the applicable case law. This is critical given the possible outcomes of an impractical and unlawful policy.[25]

Draft Regulation 12 – Determination Hearing

58. Regulation 10(1) of the 2000 Regulations the states:

> In complying with the provisions of Section 24 of the Act, the Refugee Status Determination Officer will conduct a non-adversarial hearing to elicit information bearing on the applicant's eligibility for refugee status and ensure that the applicant fully understands the procedures, his or her rights and responsibility and the evidence presented.

59. In contrast to the existing regulations, Draft Regulation 12 removes entirely any reference to a non-adversarial hearing or interview. This ignores the recognised vulnerability of refugees that has already been touched upon in this submission and relevant case law. The SCCT recommends that the Department consider

[22] [2003] ZASCA 142; [2004] 1 All SA 21 (SCA).
[23] [2011] ZACC 13; 2011 (8) BCLR 761 (CC).
[24] At para 37.
[25] See for example: BBC News, 'Zimbabwean dies queuing for visa' (12 November 2007) [Available at: http://news.bbc.co.uk/2/hi/africa/7090730.stm].

cases regarding determination hearings from the South African High Court, including cases such as *Katabana v Refugee Appeal Board*[26] and *Armand v Refugee Appeal Board and Others,*[27] which emphasize the necessity of supportive and inquisitorial RSDO enquiries, given the likelihood that these asylum seekers have endured great hardship and trauma, to strengthen this Draft Regulation.

60. We also note that Draft Sub-regulation 12(3)(a) and (b) only require the RSDO to inform the asylum seeker of the asylum procedures and what his or her rights and responsibilities are, thus removing the duty of the RSDO to 'ensure the applicant fully understands' this information, with there being no mention at all of any obligation on the part of the RSDO to even inform the asylum seeker of the evidence that is presented. As it is absolutely imperative that the asylum seeker fully understands every stage of the asylum process and the information that they are required to disclose, particularly in light of the fact that between 68%[28] and 43%[29] of asylum seekers report receiving no explanation of the asylum process, we suggest that Draft Regulation 12(3) is unnecessary and the rights of asylum seekers would be better protected by the current provisions allowed for in the 2000 Regulations [Regulation 10(1)].

61. The SCCT welcomes the provisions of Sub-regulation 12(4) that the proceedings of the RSDO determination hearing should be recorded. However, we note that the method of recording is not specified exactly and recommend that 12(4) directs for the proceedings to be 'audio-recorded' to allow for complete transparency and accountability throughout the RSD process. We suggest that this is of the upmost importance given the gross paucity of information pertaining to the asylum seeker and his or her reason for flight in the RSDO decisions, in addition to the frequent inaccuracies of information, as found by Amit in her extensive research of South Africa's RSD process.[30] In our experience, we have found that RSDO decisions overwhelmingly contain information on asylum seekers that are blatantly incorrect, and bear no relevance whatsoever to the particulars of the asylum seeker or their refugee claim. In some cases, our experiences have corroborated Amit's suggestion that, given the scrutiny of decisions granting refugee status to asylum seekers, RSDO's may, on occasion, deliberately ignore aspects of an asylum seekers claim that support their recognition as can potentially serve to improve the quality of the RSDO decisions

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[26] *Katabana v Chairportson of the Standing Committee for Refugee Affairs*, unreported Western Cape High Court 25061/2011 (14 December 2012).
[27] *Armand v Refugee Appeal Board and Others* (19483/2015) [2017] ZAWCHC 19 (28 February 2017), paras 13, 15.
[28] Forced Migration Studies Programme, 'National Survey of the refugee reception and status determination system in South Africa', University of the Witwatersrand, Johannesburg, p. 35.
[29] Roni Amit, 'No Way in: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices', ACMS Research Report (September 2012) [Available at: http://fhr.org.za/files/5413/8503/7665/no_way_in_barriers_to_access_service_and_administrative_justice_final_report.pdf] at p. 48.
[30] Roni Amit, 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions', FMSP Report, April 2010; Roni Amit, 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination', ACMS Research Report (June 2012) [Available at: http://www.migration.org.za/wp-content/uploads/2017/08/All-Roads-Lead-to-Rejection-Persistent-Bias-and-Incapacity-in-South-African-Refugee-Status-Determination.pdf]; Roni Amit, 'No Way in: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices'.

and the accurate recording of the asylum seeker's testimony, which will, in turn, strengthen the protection afforded to this vulnerable group of individuals.

62. We reiterate our concern that the condensing of the regulations 10 and 12 of the 2000 Regulations has lowered the protection of asylum seekers during the determination process by removing a number of procedural safeguards. This is particularly clear with sub-regulation 12(5), which has omitted many of the steps that the RSDO may perform when determining a claim. We also express concern over the wording of 12(5)(c) where it is directed that the RSDO must 'test the claim by ascertaining the veracity, plausibility and consistency of evidence or testimony provided by the asylum seeker', in light to the omission of any guidance to the RSDO regarding the application of the burden of proof principle and the lower standard of proof that is required for asylum applications. Again, we would stress the importance of recognising the vulnerability of asylum seekers, their frequent inability to produce the necessary documentary proof to substantiate their testimony and the resulting need for a 'liberal application of the benefit of doubt principle', as found by the South African High Court in *Van Garderen N.O. V The Refugee Appeal Board.*[31]

63. The SCCT welcomes the provision of Draft Sub-regulation 12(6) that the record, along with a copy of the reasons, should be submitted to the Standing Committee for review, and reiterate our recommendation that Draft Sub-regulation 12(4) should be further qualified to direct for the hearings to be 'audio-recorded'. However, our concerns over the effectiveness of this review will be outlined in our comments on Draft Regulation 13 below.

Draft Regulation 13 – Review of applications

64. We note there is no guideline listed in Draft Regulation 13 regarding time frames for review processes in terms of section 24A(4)(3)(b). Draft Regulation 13(2) requires that an RRO must notify the asylum seeker only 'as soon as possible'. In our experience, these decisions sometimes take years to be communicated to individuals, impinging their right to administrative justice. We recommend that a firm time line be put in place for this process.

65. A review decision made by the Standing Committee is to be communicated through Draft Form 7 to the RRO. We recommend that Draft Form 7 should also consider the recorded RSDO interview in the 'documents considered' section to ensure an unbiased and inquisitorial interview was conducted and that the relevant facts were taken into consideration in the making of the decision, and that the decision logically flows from both the interview and any documents considered. Further, the form should also include a box for documents submitted by the applicant in addition to 'representations'. Such documents might be photos, letters, newspaper articles, accreditation, etc.

[31] North Gauteng High Court, unreported decision no 30720/2006 (19 June 2007).

Draft Regulation 14 – Appeals to Refugees Appeals Authority

66. Draft Sub-regulation 14(1)(a) reduces the amount of time an asylum seeker has to prepare an appeal request from 30 days to 10 days. There is no reason given for the reduction in time which only gives an asylum seeker two calendar weeks to prepare an appeal application and seek legal assistance. We believe the reduction in time is unnecessary and unreasonable given the configuration of the asylum system, the immense backlogs which mean applicants wait years for RAB hearings, and the ever-present access difficulties, and recommend that the 30 day timeframe remain in place.

67. Draft Sub-regulation 14(3) provides that an asylum seeker who can prove that their failure to submit an appeal request due to institutionalisation, entry into a Witness Protection Programme, quarantine, or arrest without bail can apply for a condonation on their late submission. These grounds are extremely narrow and any exhaustive list cannot comprehend possible scenarios; we recommend that the list be Draft Subregulations 14(3)(a)-(d) be removed and that condonations may be considered based on 'compelling reasons'.

Draft Regulations 15 and 16 – Formal recognition of refugee status and Identity Document

68. The SCCT recommends the Draft Regulations state at what age a dependant is to receive a formal recognition document; in our experience, parents are told at the RRO that they do not need to add (or cannot add) their dependants to their file until the age of five. Clarity in this regard would be appreciated.

69. The SCCT supports Draft Sub-regulation 15(2) which states clearly a refugee document will be valid for a four year period; this clarification is appreciated.

70. Draft Sub-regulation 15(3) states that an individual must apply for an identity document within 90 days of expiry. In order to comply with this provision, direction must be given to the refugee in writing when refugee status is recognised or a permit is renewed.

71. Draft Sub-regulation 16(1) states that any person above the age of 16 must apply for a refugee identity document within 14 working days. In light of the administrative burden on the Department, the SCCT strongly recommends that the refugee identity document application process be incorporated into Draft Regulation 15 so that when a refugee is recognised they simultaneously apply for a refugee identity document. This would alleviate the traffic at RROs and would allow for a more efficient process. There is no reason to force the refugee to return to the RRO at a later date for this process. Further, the issuing of a 13-digit identity number as quickly and efficiently as possible to the refugee will assist other government departments in providing assistance to the refugee.

Draft Regulation 17 – Travel documents for refugees

72. Freedom of movement is a core right for all people in South Africa as protected under section 21 of the Constitution. In regards to travel for refugees, the UNHCR has noted that it is 'particularly important for a refugee to be able to travel outside the country of his normal residence. Such travel, for example in order to take advantage of opportunities for education, training or employment, may be an essential prerequisite for a durable solution to his problems.'[32]

73. In recent years, refugees have reported to the SCCT with difficulties in applying for refugee travel documents. Beyond access difficulties, refugees report that officials require letters of invitation or other documentation to motivate for their travel document application. Further complications arise in collecting the travel document after the application is approved. These complications have resulted in refugees being unable to take advantage of invitations to participate in conferences, travel with school sports teams to regional tournaments, and missing funerals of loved ones who are refugees in other host countries. We therefore welcome the clarity provided in the current Draft Regulations regarding the application process.

74. We remain concerned that there are no timelines provided for in this Draft Regulation regarding application processing times. Should an applicant be rejected, there is no guidance as to how they will be informed or what options they may pursue to challenge the rejection.

75. Lastly, the SCCT believes that the inclusion of the section on Form DHA-1705 in the annexures, 'Motivation for Travel Document', is unnecessary and implies that if a refugee does not offer motivation that is justified in the eyes of the decision-maker, their application will be rejected. Given the importance of the right to freedom of movement, and that a refugee may want to apply for a travel document to be prepared in case urgent travel is required in the future, we recommend that the motivation form be removed. There is no motivation form when a citizen applies for a passport and we believe there is no reason for a refugee to have to motivate as to why they want to exercise a core human right.

76. We make the above recommendations in line with the UNHCR's position that travel documents should be issued to refugees in a liberal manner to all refugees staying in their territory in a lawful manner.[33]

[32] UNHCR, *Note on Travel Documents for Refugees*, EC/SCP/10 (30 August 1978) http://www.unhcr.org/excom/scip/3ae68cce14/note-travel-documents-refugees.html
[33] Ibid, para 47.

Draft Regulation 19 – Detention and Removal of Refugees and Asylum Seekers relating to National Security Threat

77. Draft Regulation 19 provides that the Minister may issue an order requiring the Director-General to immediately detain and remove from South Africa any asylum seeker or refugee named in such order, and the Director-General must withdraw any asylum seeker visa issued or refugee status granted to such person. This Draft Regulation also provides that the UNHCR may, within 12 hours of receipt of notification that an asylum seeker visa or refugee status will be withdrawn, inform the Director-General of its plan to resettle or remove such person to another country within the agreed period which shall not exceed 48 hours. It also provides that any application for judicial review emanating from the Minister's order, withdrawal of an asylum seeker visa or refugee status, detention or repatriation, may only be lodged by or on behalf of a person while they are outside of the country.

78. We submit that any powers given to the Minister to withdraw an individual's asylum seeker visa or refugee permit must be done in accordance with the South African Constitution and the Promotion of Administrative Justice Act ('PAJA'). The rights of refugees and asylum seekers must be protected and upheld under domestic and international law of which South Africa is obligated to adhere to. Whilst the recent amendment to section 36 of the Refugees Act saw the removal of reference to the making of such an order to be in accordance with section 33 of the Constitution, the Minister is still obliged to provide the protections to individuals pursuant to the Constitution. We are concerned that this Draft Regulation does not abide by South Africa's legal frameworks. It fails to provide how such orders by the Minister will be made in a fair and just manner and we are also concerned that there is no review or appeal process in the draft regulation.

79. We further submit that providing the UNHCR 12 hour and 48 hour windows stipulated in this Draft Regulation is unworkable and not viable. It is our view, which is the same as that expressed in relation to draft regulation 4 above, that it is entirely unrealistic for the UNHCR to review an asylum seeker or refugee case and make a determination on whether it will resettle or remove an individual within 12 hours of being notified that their status will be withdrawn. It is also entirely unrealistic for the UNHCR to conclude that process and remove an individual from South Africa within 48 hours. For reference, the resettlement process is often a protracted one that takes place over a period of years and at best, months. There may still be *non-refoulement* claims that would prevent an asylum seeker or a refugee from going back to their country of origin, such that they need to go to another country. If they are not permitted time to be resettled or get approval to go to a country of their choice, they could be at risk of being returned to a country where they face persecution.

80. In this regard, as we also mention above, the SCCT suggests the Department conduct close consultation with UNHCR over Draft Sub-regulation 5(3) but also in regards to the draft regulation pertaining to removal and deportation of refugees and asylum seekers on the basis of national security. In our view, the SCCT recommends that this regulation be removed in its entirety as it is exceedingly broad in scope, and inconsistent with the 1951 Refugees Convention and the Constitution.

81. As mentioned above, we are concerned that people affected by this section will be at risk of persecution in their home countries. The exclusion of individuals from refugee status, or withdrawal of refugee status, should only be invoked on an exceptional basis and applied in a restrictive manner due to the serious consequences for the individual concerned.[34] We submit that an order to remove someone on the basis of national security is too broad, and the assessment of what constitutes a risk to national security and how that assessment process will include the individual, is unclear. This is concerning particularly given the serious consequences for an individual if they are assessed as a risk to national security and then they are removed quickly without having participated in a fair and just administrative process as their right under the South African Constitution.

82. We believe it is important to direct the Department to the decision of the Full Court of the Constitutional Court in *Minister of Home Affairs and Others v Tsebe and Others*, where the Constitutional Court importantly held:

> The Justice Minister has also expressed the concern that the Government does not want our country to be perceived as a safe haven for illegal foreigners and fugitives from justice wanted for serious crimes in other countries. This concern was discussed by the High Court. Although it is a legitimate concern, it will not arise if countries seeking an extradition of someone in Mr Phale's position would be prepared to give the requisite assurance. Furthermore, our concern about that perception cannot override the need for us as a nation to stay on course on the path we have chosen for ourselves to respect, protect, promote and fulfil human rights, to observe our Constitution and deepen the values upon which we have chosen to create our new society. Those values include human dignity, the achievement of equality and the advancement of human rights and freedoms…
>
> We as a nation have chosen to walk the path of the advancement of human rights. By adopting the Constitution we committed ourselves not to do certain things. One of those things is that no matter who the person is and no matter what the crime is that he is alleged to have committed, we shall not in any way be party to his killing as a punishment and we will not hand such person over to another country where to do so will expose him to the real risk of the

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

> imposition and execution of the death penalty upon him. This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.
>
> If we as a society or the State hand somebody over to another State where he will face the real risk of the death penalty, we fail to protect, respect and promote the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading treatment or punishment of that person, all of which are rights our Constitution confers on everyone. This Court's decision in *Mohamed* said that what the South African authorities did in that case was not consistent with the kind of society that we have committed ourselves to creating. It said in effect that we will not be party to the killing of any human being as a punishment – no matter who they are and no matter what they are alleged to have done.[35]

83. We submit that the Constitutional Court's finding above is applicable to the Draft Regulations. The assessment of what constitutes a risk to national security and how that assessment process will include the individual, is unclear in the current Draft Regulations. This is concerning particularly given the serious consequences for an individual if they are assessed as a risk to national security and then they are removed quickly without having participated in a fair and just administrative process as their right under the South African Constitution.

84. Lastly, it is unreasonable and unworkable to only allow judicial review of decisions made by the Minister to remove on the basis of national security to be lodged only if that person is outside of South Africa. Not only is it impractical for such an individual to undergo such a complicated legal process from another country particularly given the likelihood that they will face difficulties in their home country, it also goes against the legal frameworks in South Africa that provide a fair and just administrative process.

Draft Regulation 21 – Withdrawal of Refugee Status

85. Draft Regulation 21 provides a process for withdrawal of refugee status. Under this Draft Regulation, the Standing Committee must provide written notice to the refugee indication the intention to withdrawal status, the reasons for the intended withdrawal and that the refugee has 30 calendar days of the date of receipt of the notice. If the refugee makes representations, the Standing Committee can then uphold refugee status or withdraw refugee status. If the Standing Committee withdraws refugee status, it must notify the RRO which must refer the matter to

[35] *Minister of Home Affairs and Others v Tsebe and Others* [2012] 5 (SA 467 (CC) paras 63, 67 and 68.

an immigration officer for purposes of detention and deportation of the refugee concerned in terms of the provisions for the Immigration Act. If a refugee fails to make representations, they then become an illegal foreigner and subject to detention and deportation.

86. We are concerned that the process for withdrawal falls short of a complete fair process as:

    86.1. there is no review or appeal process if the refugee does not agree with the decision to withdraw; and

    86.2. secondly, there may be compelling reasons for why a refugee was unable to make representations to the Standing Committee within 30 calendar days.

87. We recommend that this draft regulation be amended to provide for a review process if the refugee does not agree with the decision to withdraw status and to allow a refugee to be able to make representations to the Standing Committee should there be compelling reasons for not making representations within the original 30 days.

Standing Committee for Refugee Affairs Draft Rules

Draft Rule 4 - Review and Monitoring of RSDO Decisions

87. Draft Rule 4.2 provides that representations made by the claimant or his or her attorneys must be submitted in person to the RRO. We recommend that representations can also be made electronically as this provides for a more efficient and effective way of communicating for both asylum seekers and refugees as well as staff at RROs. It would also help the Department in reducing unnecessary visits and queuing at RROs.

Draft Rule 5 – Applications – S27(c) of the ACt

88. The draft rules are silent on time frames for the Standing Committee to make decisions on applications. The SCCT has been approached by many refugees who have made applications under s 27(c) and never received a response, or only receive a response years after application. We recommend a time frame be added to this draft rule.

Draft Rule 6 - Withdrawals – s36 of the Act

89. Draft Rule 6.1 states that the Department, RSDO, RRO or interested party may make an application to the Standing Committee for withdrawal of refugee status in terms of section 36 of the Act. Draft Rule 6.2 states that the Standing Committee may on its own accord apply section 36 of the Act if it has reasons to

believe that there are grounds for withdrawal of refugee status. We recommend that the line 'if has reasons to be believe that there are grounds' be added to Draft Rule 6.1 to bring into line with Draft Rule 6.2 and provide an extra protection to refugees that there must be reasons to believe that an application should be made for withdrawal of refugee status.

90. This draft rule is silent as to how the representations made by a refugee should be submitted. We submit that this be clarified in this draft rule, and our recommendation would be that representations on why refugee status hold not be withdrawn and any supporting documentation can be submitted either in person at any RRO or electronically.

91. The draft rule is silent on time frames for the Standing Committee to make decisions regarding a withdrawal potential withdrawal once representations are received; we recommend a time frame so refugees are not in extended limbo waiting for a decision.

Draft Rule 10 – Change of address

92. We submit that the timeframe of 10 days for updating an address or personal details within 10 days of such change is placing an unnecessary burden onto refugees and asylum seekers. There may be financial constraints and/or limited understanding of the refugee process which may delay such as not speaking English. We recommend this rule to be amended to state they must inform the Standing Committee within 6 months or upon renewal of their permit.

Draft Rule 12 - Cancellation of application

93. This draft rule is silent as to whether a request for cancellation of any application can be made electronically or must be in person at the head office. We submit that this be clarified in this draft rule, and our recommendation is that a request for cancellation of an application can be made either in person at any RRO or electronically.

Draft Rule 13 – Voluntary Withdrawals

94. This draft rule is also silent as to whether a request the withdrawal of refugee status can be made electronically or in person at the head office. Following on from the above, we submit that this be clarified in this draft rule, and our recommendation would be that a request for the voluntary withdrawal of refugee status can be made either in person at any RRO or electronically.

END