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Submission on the situation in South Africa for the 2018 Trafficking in Persons Report

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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 of Home Affairs' (DHA) asylum system and therefore has direct experience in assisting individuals at risk for trafficking as well as communicating and working with government officials on migration issues.

Our submission will focus on our extensive experience in assisting migrants realise their rights and access documentation, our interactions with government officials (particularly those from the Department of Home Affairs (DHA)), and engaging with government on migration policy development. In particular, the submission focuses on DHA's approach to migration policy development and its implementation, primarily in terms of the Refugees Act (No 130, 1998) and the asylum system, as well as the processes by which foreign nationals register the births of their children born in the Republic. It is submitted further that DHA's current policies and policy plans lead to increased numbers of undocumented migrants in irregular situations, thus ripening the conditions for exploitation in labour, and decreases the government's ability to effectively address trafficking.

Deficiencies in government's anti-trafficking efforts, limitations on the government's ability to address human trafficking in practice, and misconceptions on the nature of trafficking.

The SCCT submits that while the government has in place sufficient legislation (as mentioned in previous Trafficking in Persons reports) to address human trafficking, legislation and anti-trafficking efforts are limited in their effectiveness by the approach of DHA to documentation of vulnerable groups of foreign nationals, particularly children. DHA's mandate includes the implementation of the Immigration and Refugees Act and is the government department that addresses issues of migration and documentation. Therefore, the policies (and implementation or lack thereof) of DHA can affect the government's anti-trafficking efforts considerably.

It is submitted that in relation to access to documentation, DHA utilises a contradictory approach where the possibility of trafficking is used as a means to deny access to documentation and the asylum system. However, in instances where DHA denies access to documentation, no substantive follow-up to determine the veracity of trafficking claims is undertaken nor are the appropriate law enforcement authorities contacted, suggesting that trafficking is simply used as a means to deny the rights of asylum seekers and refugees. While the risks of trafficking are real and must factor into DHA policy, the risk cannot be inflated beyond the available evidence and used as a means to deny legitimate refugees their statutory rights. Beyond the prejudice that many refugees face due to these policies, the policies also heighten the risk of trafficking as they simply exclude vulnerable foreign nationals from government-issued documentation. The creation of a large population of undocumented individuals increases risks for trafficking and lessens the government's ability to understand and address trafficking as it occurs.

During the reporting period, there were two cases before the High Court involving processes by which children may access documentation through the asylum system: *Mubake & 7 others v the Minister of Home Affairs and 3 others*[1] in the Gauteng High Court and *Scalabrini Centre, Cape Town & 5 Others v Minister of Home Affairs & 4 Others*[2] in the Western Cape High Court. In both matters, DHA argued that the risk of trafficking justified restricting access to the asylum system.

The *Mubake* matter sought to challenge DHA's exclusion of separated children from being documented as dependants under a non-biological caretaker. The Court agreed, rightfully so, with

[1] *Bulambo Biakamboka Mubake and Others v Minister of Home Affairs and Others*, Gauteng Division of the High Court, Case No. 72342/2012 (Unreported judgment) at paras 15-16.
[2] Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others, Western Cape Division of the High Court, Case No. 5242/2016 (Unreported judgment).

DHA that there are 'inherent risks associated with documenting separated children as "dependants" of adult refugees or asylum seekers without any preceding investigation' but that:

> there is a higher risk if that is not done. Insisting on a prior investigation through the process of Children's Court, which may be long and cumbersome, might actually result in the mischief the opposing respondents are concerned about - child abduction and trafficking. This is so because pending that process, the child is undocumented, invisible and untraceable within the database of the department of Home Affairs. What is more, it should be borne in mind that a permit in terms s 22 of the Act is temporary.
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> Thus, the temporary permit has the advantage that the separated children are documented in terms thereof, and thus legalising and regulating their stay in the country. This also means that the child is under the temporary care of a documented refugee or asylum seeker. The investigations and findings by the department of Social Development can be considered prior to a permanent permit being considered. There is nothing to prevent the department of Home Affairs, even at that early stage when a temporary permit is issued to the child, to bring a particular case to the attention of the department of Social Development for referral to the Children's Court if it has concerns about the adult asylum seeker's suitability or bona tides. In other words, there is no reason why the processes of immigration status and that of the interests of the child in the Children's Court cannot run parallel. One does not have to exclude the other.[3]

Thus the Court recognised that the risks of excluding children are greater than issuing documentation while investigations into possible cases of trafficking and/or a Children Court Inquiry is opened. The judgment is currently suspended as DHA has been granted leave to appeal (in June 2017), meaning that many children are presently excluded from accessing documentation in the asylum system.

In the *Scalabrini* matter, the applicants argued that DHA's policies and practices to implement section 3(c) of the Refugees Act were unlawful and that, in practice, children and spouses of recognised refugees were unable to have their dependants joined to their file and realise their statutory rights. DHA opposed the application and relied heavily on trafficking as a means to deny access to documentation to dependants, particularly those whose asylum files did not list the family member in the application form. In court papers, the Acting Manager of the Cape Town Refugee Reception Office stated that:

[3] *Bulambo Biakamboka Mubake and Others v Minister of Home Affairs and Others*, Gauteng Division of the High Court, Case No. 72342/2012 (Unreported judgment) at paras 15-16.

> the Department cannot grant dependants, refugee status in the absence of sufficient information, particularly, in respect of those who are alleged to be children of recognised refugees. The Department must always be alert to the risks of child trafficking. South Africa simply cannot afford to grant its official imprimatur to an illegal trafficking arrangement, by granting dependant status to a child that is not considered to be the true child of a recognised refugee.[4]

During arguments, counsel for DHA argued that the risks of trafficking were real and justified the restrictive approach to 3(c) family joining applications. This argument fails to consider the well-known administrative issues present at Refugee Reception Offices where asylum seekers struggle to complete forms in English and are rarely informed of the purpose of the forms nor their rights during the asylum process.[5] Further, endemic corruption has severely affected the accuracy of these forms as those who cannot pay are often not assisted as necessary.[6]

During oral arguments, counsel for DHA repeatedly raised the issue of trafficking but on the papers did not offer any evidence to suggest that trafficking rings were using the asylum system in any way nor that any of the individuals listed in the case were under investigation for trafficking. From the bench, Davis J issued an *Ex Tempore* judgment which stated the lack of a family member being declared on an asylum application form is not the sole criteria for family unity. Also from the bench, Fortuin J stated to counsel that a more effective anti-trafficking strategy for their clients – DHA – would be to advise them to dedicate their limited resources to devising and implementing effective policies instead of litigating on matters in court. The court issued an order in December 2017 setting out the law and compelling DHA to issue its national policy for family joining to the applicants by 31 January 2018. Unfortunately, DHA has requested more time to compile and issue the policy despite the case being launched in 2016.[7]

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[4] Responding affidavit of Thembi Ndlovu, Acting Manager of the Cape Town Temporary Refugee Facility, dated 30 May 2016.
[5] Roni Amit, 'No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices', The African Centre for Migration & Society Research Report (2012), available at: http://fhr.org.za/files/5413/8503/7665/no_way_in_barriers_to_access_service_and_administrative_justice_final_report.pdf.
[6] 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%99s-asylum-system.
[7] See Annexure 1 for the order.

What measures did the government take to establish the identity of local populations, including birth registration and issuance of Start documentation, citizenship, and nationality?

Birth on South African soil does not automatically confer South African nationality and a child's nationality is the same as that of the parent. It is commonly thought that the registration of a foreign birth in South Africa confers citizenship to the child but this is not the case.[8] Birth registration in South Africa is governed by the Births and Deaths Registration Act (No 51 of 1992) (BDRA) and accompanying Regulations. The most recent amendments to the Regulations, which came into operation on 1 March 2014, requires of all parents to give notice of a child's birth within 30 days. Hereafter, it is treated as a late registration of birth and requires additional supporting documents of the applicant. The ability to register a foreign child's birth is directly linked to the immigration documentation status of the foreign parent(s). Provided the applicant produces the supporting documents listed in Section 7 of BDRA, children born to refugee or permanent resident parents are entitled to a birth certificate with an identity number. Non-citizens other than permanent residents or refugees, i.e. temporary residents or asylum seekers, may register births in the same manner, but will be issued a birth certificate without an identity number.[9] However, the SCCT's experience has shown that refugees receive birth certificates in the same manner as other non-citizens and do not systematically have their identity numbers listed on birth certificates.[10]

Regulation 8(3)(d) and (e) of the BDRA asks of the non-citizen parent to produce a valid identity document or passport and visa or permit, or asylum seeker permit as a pre-requisite to birth registration.[11] Section 7(2) requires of non-citizen parents who are permanent residents or refugees produce:

(a) a permanent residence permit issued under the Immigration Act; or

(b) a permit issued under Section 24 of the Refugees Act.

[8] In terms of the Citizenship Act (No 88 of 1995) as amended by the South African Citizenship Amendment Act (2010), foreign children born in South Africa could be eligible for naturalisation in terms of section 4(3)(a) and (b) if they have lived in South Africa until reaching the age of majority and had their birth registered in accordance with the BDRA. In practice, this requirement would likely exclude those children born to undocumented parents as their births cannot be registered. Additionally, the Department of Home Affairs has advised the SCCT that children attempting to access this provision would have to have legal status to apply.

[9] Section 7(2) of the Regulations to the Births and Deaths Registration Act of 1992

[10] A refugee would only have an identity number if they applied for and received a Refugee Identity Document in terms of section 30 of the Refugees Act (No 130, 1998) as read with Regulation 15(1) of Refugees Act Regulations (Forms and Procedure) R6779 GG21075 (6 April 2000). Many refugees are unable to apply for and receive this document due to administrative and access issues coupled with a lack of awareness regarding the identity document

[11] Regulation 8(3)(d)&(e) of the Regulations to the Births and Deaths Registration Act of 1992

With regards to non-citizen parents who are asylum seeker or temporary residents, Section 8(3) requires of one or both non-citizen parents to produce:

(c) a valid passport and visa; or

(e) asylum seeker permit issued under section 22 of the Refugees Act.

These requirements exclude birth registration by those parent or parents who are which includes individuals in the following situations pertaining to the legality of their presence in terms of the Immigration Act:

- Those without any form of identity documentation nor any legal status to sojourn in the Republic; and
- Those with expired asylum seeker and refugee permits as well as those with expired visas in a passport.

The inability of the undocumented parent to register the child's birth effectively functions as a form of migration control or a punitive measure towards the parent but has profound negative impacts on the child. Without a birth certificate, the child has no documentary link to the parent, and therefore an eventual claim to the nationality of the parent.

This heightens the risk of statelessness. Birth registration is a pre-requisite to holding an identity document and a passport. It extends parental rights and duties of care to the parent(s). In a society where access to human rights and public services revolves around the possession of a valid identity document, the result of not having a birth certificate equals exclusion from education, the formal labour market, health care services, marriage, and social support. It is submitted that exclusion from birth registration forces a large group of children to live undocumented (and essentially undetected) in South Africa. For obvious reasons this is not desirable for a variety of reasons including publics goods such as public health and education as well as in terms of policing, trafficking, and forced labour. Beyond South Africa, this issue can affect other states which may have to confront individuals who claim citizenship at a later date but have difficulty proving their claim due to lack of documentation.

In light of the above, the SCCT submits that the current system of birth registration for undocumented foreign nationals is raising the risk of statelessness as well as trafficking. The government should ensure that birth registrations can occur for all people in the Republic to mitigate these risks and ensure children are visible to government.

Conclusion

The SCCT is appreciative of the opportunity to contribute to the Trafficking in Persons Report for 2018. Please feel free to contact us should you require any further information or clarification.