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**LRC**

**Legal Resources Centre**

Your Ref:

Our Ref: MM/WK/MP/REFUGEEAMENDMENTBILL-2015

**SUBMISSIONS BY THE LEGAL RESOURCES CENTRE  
TO THE DEPARTMENT OF HOME AFFAIRS IN RESPECT OF REFUGEE  
AMENDMENT BILL, 2015**

**31 AUGUST 2015**

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## **INTRODUCTION**

1. The Legal Resources Centre (hereinafter referred to as the "LRC") hereby submits comments and recommendations on the Draft Refugees Amendment Bill, 2015 (hereinafter referred to as the "Draft Bill") as advertised in Government Gazette no 39067 dated 6 August 2015.
2. The LRC welcomes the opportunity to make these submissions and to engage with issues that pertain to the refugee and asylum seekers legal framework in South Africa.

## **INTRODUCTION TO THE LEGAL RESOURCES CENTRE**

3. The LRC is a public interest, non-profit law clinic in South Africa that was founded in 1979. It has since its inception shown a commitment to work towards a fully democratic society underpinned by respect for the rule of law and constitutional democracy. The LRC uses the law as an instrument of justice to facilitate the vulnerable and marginalised to assert and develop their rights; promote gender and racial equality and oppose all forms of unfair discrimination; as well as contribute to the development of human rights jurisprudence and to the social and economic transformation of society.
4. The LRC has since its inception operated throughout South Africa from its offices situated in the cities of Johannesburg, Cape Town, Durban and Grahamstown. Through strategic litigation, advocacy, education and training, the LRC has played a pivotal role in developing a robust jurisprudence in the promotion and protection of rights of asylum seekers and refugees. A significant proportion of the LRC's work, since 1996, has been in the sphere of refugee law and it is hoped that the comments and recommendations set out below will be of assistance to the Department of Home Affairs (hereinafter referred to as the "DHA").

## **GENERAL REMARKS**

5. From the onset, it is important to emphasise that Article 14(1) of the Universal Declaration of Human Rights guarantees everyone the right to seek and enjoy asylum from persecution in other countries. Article 14(1) is the foundational basis that informs the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention). As a result of this context, the ability of a person to seek and enjoy asylum from persecution should not be arbitrarily or unnecessarily limited.
  
6. Moreover, both the 1951 Refugee Convention and the Organisation of African Unity (now African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) affirm that all human beings shall enjoy fundamental rights and freedoms without discrimination. This is a principle that is firmly entrenched in the Constitution of the Republic of South Africa (hereinafter referred to as the "Constitution") which also emphasises equality and non-discrimination in the access of rights and freedoms.
  
7. The rights and freedoms of persons seeking and/or who have applied for asylum cannot be limited simply because of their immigration status. The obligations that are entrenched in the Constitution as well as regional and international conventions ratified by South Africa are therefore constantly applicable to persons seeking asylum from persecution in South Africa. It will undoubtedly be a serious dereliction of South Africa's obligations to limit the applicability of these rights to vulnerable and marginalised persons seeking asylum in South Africa. These sentiments were echoed by the Supreme Court of Appeal in the *Watchenuka* case where Nugent J held that:

*Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights.*<sup>1</sup> (Own emphasis)

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<sup>1</sup> *Minister of Home Affairs and Others v Watchenuka and Others* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) ("*Watchenuka*") at para 25.

8. Significantly, there are legal principles in relation to refugee law that are entrenched internationally and regionally and therefore binding on South Africa. The principle of *non-refoulement* is one such example which is embedded in customary international law.<sup>2</sup> This principle is also entrenched in Section 2 of the Refugees Act which states that:

***“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.<sup>3</sup>”*

9. It must be borne in mind that the Refugees Act mirrors, in many aspects, the 1951 Refugee Convention and the OAU Refugee Convention. However, we submit that the current version of the Bill is a clear deviation from the international standard set by these two Conventions, among others. Additionally, the UNHCR regularly issues recommendations and guidance for governments, legal

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<sup>2</sup> Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, Ministerial Meeting of States Parties, Geneva, Switzerland, 12-13 December 2001, UN Doc. HCR/MMSP/2001/09, 16 January 2002. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, para. 4, adopted on 18 December 2001 available at <http://www.unhcr.org/419c74d64.pdf>.

<sup>3</sup> Para (b) to be substituted by s. 3 of Act No. 33 of 2008 with effect from a date to be fixed by the President by proclamation in the *Gazette* – date not fixed.

practitioners, decision-makers and the judiciary carrying out refugee status determination. These guidelines and recommendations are aimed at contributing to the improvement of the relevant legal protection framework and implementation practices. We therefore urge the DHA to ensure that they comply with the available guidelines and recommendations to ensure that the protection afforded to refugees and asylum seekers in South Africa does not deviate from international and regional practices.

10. Lastly, it is important to stress that an overly bureaucratic / restrictive asylum system will have the adverse effect of driving asylum seekers underground which will cause the exact deregulation which the Bill seeks to redress. An effective asylum system should actively and openly seek to document and assist asylum seekers. To effectively do so, the DHA should focus on increasing its capacity at the Refugee Reception Offices (hereinafter referred to as "RROs") as opposed to seeking to diminish applications received. It is common knowledge that the RROs cannot adequately manage applications in terms of the current Refugees Act and, without a substantial increase in capacity; the Draft Bill *is* creating an unworkable system which, in effect, punishes refugees and asylum seekers for the DHA's and, specifically, the RROs' failings.

## **SPECIFIC REMARKS**

### **Section 1 of the Draft Bill – Definitions**

11. In this section we have focused on the proposed substitution of the definition of the word dependant.

The need to recognise the fundamental spousal relationship in marriages that may not be recognised in South Africa:

11.1 The proposed definition of dependant is only applicable to "*spouses legally married to the asylum seeker or refugee...*" From our experience there have been numerous reports where officials at RROs have refused to join spouses from marriages deemed to be "invalid" in South Africa as

dependants of recognised refugees or asylum applicants. This is especially the case for Muslim Marriages and customary marriages where there is often no marriage certificate issued at the time of their conclusion.

- 11.2 We submit that it is vital to note that Courts in South Africa have, on occasion, given recognition to the underlying spousal relationship to spouses married according to *Shariah* law. This recognition has the effect of recognising a husband or wife married in accordance with *Shariah* law in a monogamous marriage as a "spouse" in certain aspects of the law. More concretely, the Constitutional Court has found that women who are party to a polygamous marriage, though not legally recognised, are deemed to be spouses for purposes of inheriting from the intestate estate of their deceased husband.<sup>4</sup> Nkabinde J, writing for a unanimous Constitutional Court, stated that:

*"By discriminating against women in polygynous Muslim marriages on the grounds of religion, gender and marital status, the Act clearly reinforces a pattern of stereotyping and patriarchal practices that relegates women in these marriages to being unworthy of protection. Needless to say, by so discriminating against those women, the provisions in the Act conflict with the principle of gender equality which the Constitution strives to achieve. That cannot, and ought not, be countenanced in a society based on democratic values, social justice and fundamental human rights."<sup>5</sup>*

- 11.3 In light of the above, particularly the need to ensure that spouses in any marriages are afforded protection and treated equally with other

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<sup>4</sup> *Fatima Gabie Hassam v Johan Hermanus Jacobs NO and Others (with the Muslim Youth Movement of South Africa and the Women's Legal Centre Trust as amici curiae)* [2009] ZACC 19.

<sup>5</sup> *Ibid* at para 37.

spouses, we urge the DHA to, at the very least, recognise spousal relationships for the purpose of joining a dependant to an asylum application and/or file. We propose that the word "legally" married be deleted from the definition of dependant as it relates to marriage.

#### Spouses / children of asylum seekers married / born in South Africa

11.4 The adjudication of asylum applications is often lengthy, in some instances asylum applicants have waited up to ten years to receive a final decision on their application. It is therefore natural that asylum applicants who arrive in South Africa single without any dependants may during this time enter into relationships / get married and have children who may not be included in their asylum file at the time of application. We therefore submit that excluding spouses or children born to asylum seekers in South Africa in the definition of dependant is an unreasonable limitation of the right to a family life which the Constitutional Court has recognised within the broader right to human dignity and the right not to be unfairly discriminated against on the basis of birth, among other grounds.

11.5 The provisions of Section 14 of the Bill which states that a child born to an asylum seeker or refugee in the Republic has the same status as the asylum seeker or refugee attempts to cure this exclusion. While we welcome this inclusion, it is worth pointing out that a child born to an asylum seeker / refugee would only get this status because they are a dependant of the asylum applicant. For ease of reference, the definition of dependant should therefore include both children and spouses of the asylum applicant noted in the initial application as well as dependants from relationships in South Africa.

#### Children adopted in South Africa

11.6 The proposed definition also excludes children adopted by asylum seekers and refugees in South Africa. Given that adoption orders are granted by the Children’s Court and an adopted child is legally regarded as if they were the biological child of the adopting parent, it is irrational to exclude children adopted in South Africa from the definition of dependant once such an order is granted.

#### Members of the immediate family

11.7 We submit that the members of the immediate family of the asylum applicant / recognised refugee should be included in the definition of dependant. Limiting the meaning of dependants to only include parents, children and spouses would exclude members of the asylum applicant / recognised refugee’s family who may be destitute, aged, infirm who may include grandparents, minor siblings etc. who are dependant financially or otherwise on the asylum applicant / recognised refugee. We therefore submit that the words “member of the immediate family” should be retained in the definition of dependant.

11.8 Lastly, we submit that the condition of inclusion in the asylum application is an impracticable condition and we suggest that it be excluded from the definition. We submit that once a person qualifies as a dependant as defined, that should suffice for the purposes of joining that person to the file without any further unnecessary qualification.

### **Section 2 of the Draft Bill - Exclusions from applying for asylum**

12. As noted earlier, the ability to apply for asylum is grounded in Article 14 of the Universal Declaration of Human Rights 1948, which recognises the right of persons to seek asylum from persecution in other countries<sup>6</sup>

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<sup>6</sup> Introductory Note of the 1951 Convention.

13. It is common knowledge that Paragraph 7(d) of the 1950 UNHCR Statute, Article 1F of the 1951 Refugee Convention and Article I(5) of the OAU Refugee Convention all oblige States Parties and the United Nations High Commissioner for Refugees (UNHCR) to deny the benefits of refugee status to certain persons who would otherwise qualify as refugees. *The rationale for the exclusion clauses, which should be borne in mind when considering their application, is that certain acts are so grave as to render their perpetrators undeserving of international protection as refugees. Their primary purpose is to deprive those guilty of heinous acts, and serious common crimes, of international refugee protection and to ensure that such persons do not abuse the institution of asylum in order to avoid being held legally accountable for their acts.*<sup>7</sup>
14. More importantly the UNHCR have stated that the exclusion clauses in the 1951 Refugee Convention **are exhaustive**.<sup>8</sup> As the language in the OAU Refugee Convention is almost identical, this would also be the case when interpreting its Article I(5). As the exclusion clauses are exhaustive, South Africa as a signatory to the 1951 Refugee Convention and the OAU Refugee Convention cannot lower the threshold of protection that they offer to persons seeking asylum; a lower threshold would be contrary to international and regional law which South Africa has voluntarily chosen to bind itself.
15. In light of the above, we submit that it is unlawful to provide additional exclusionary clauses as envisioned in the proposed section 4(1)(e) – (i). These additional exclusionary clauses should be removed as they will not stand constitutional scrutiny if challenged in a court of law.
16. Furthermore, the proposed section 4(1)(g) which seeks to exclude any person who is a “*fugitive from justice in another country where the rule of law is upheld by a recognised judiciary*” is problematic and too vague. We acknowledge that persecution must be distinguished from punishment for a common law offence and

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<sup>7</sup> Para 2 of the Guidelines On International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees available at <http://www.unhcr.org/3f7d48514.html>

<sup>8</sup> Ibid at para 3.

that persons fleeing from prosecution or punishment for such an offence are not normally refugees. We note also that a refugee is a victim or potential victim of injustice, not a fugitive from justice. Occasionally though, this distinction can be obscured.

16.1 Penal prosecution for any of the 1951 Refugee Convention grounds noted in section 3(a) of the Refugees Act may in itself amount to persecution. For example, prosecution of a person because of their sexuality which is common in many African countries where there is a recognised judiciary. In this instance, a homosexual person may flee their country of origin as a wanted fugitive, however, what they are fleeing from is really persecution based on their membership to a particular social group.

16.2 Secondly, a person guilty of a common law offence may be liable to excessive punishment because of the applicable laws, which may amount to persecution within the meaning of the definition. The UNHCR has noted that, *"In order to determine whether prosecution amounts to persecution, it will also be necessary to refer to the laws of the country concerned, for it is possible for a law not to be in conformity with accepted human rights standards. More often, however, it may not be the law but its application that is discriminatory. Prosecution for an offence against "public order", e.g. for distribution of pamphlets, could for example be a vehicle for the persecution of the individual on the grounds of the political content of the publication. In such cases, due to the obvious difficulty involved in evaluating the laws of another country, national authorities may frequently have to take decisions by using their own national legislation as a yardstick. Moreover, recourse may usefully be had to the principles set out in the various international instruments relating to human rights, in particular the International Covenants on Human Rights, which contain binding commitments for the States parties and are instruments to which many States parties to the 1951 Convention have acceded."*<sup>9</sup>

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<sup>9</sup> Para 59 and 60 of the Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of

16.3 Thirdly, there may be cases in which a person, besides fearing prosecution or punishment for a common law crime, may also have “well-founded fear of persecution”. In such cases, the person concerned should fall within the ambit of the Refugees Act unless the crime in question places them within the application of the exclusionary clauses.

16.4 We therefore propose that this determination of whether a person is fleeing prosecution or persecution must be left to the consideration of the Refugee Status Determination Officer. We believe that this will ensure that all the applicable laws and factors are taken into consideration when a decision has to be made.

17. Additionally, we submit that failure to apply for asylum within 5 days (a condition also included in section 13(a) of the Draft Bill) is not comparable to war crimes or crimes against humanity. In our opinion, doing so is irrational as there may be valid reasons including financial constraints and / or limited understanding of the refugee process, which may delay a potential asylum applicant from applying for asylum. Moreover, it is common knowledge that asylum seekers who report to RROs are not always given access to the services available immediately. On many occasions they have to report numerous times to the RROs before they are offered any services. We therefore submit that excluding a person who fails to apply for asylum within five days of entry into the Republic is not only an unreasonable exclusion but also a violation of the principle of non-refoulement discussed above.

18. Furthermore, blanketly excluding persons with refugee status from another country from applying is problematic as there maybe instances where such a person may face persecution even in the country of asylum that will forced them to seek asylum in a third country. In light of the obligations on South Africa in terms of the 1951 Refugee Convention, the OAU Refugee Convention and the Refugee Act,

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Refugees Reissued Geneva, DECEMBER 2011 available at <http://www.unhcr.org/3d58e13b4.html>

South African cannot turn a person away, as doing so will be contrary to both domestic and international law.

19. With relation to the exclusion based on criminal conduct (including an immigration violation) and the punishment by imprisonment as set out in the Criminal Procedure Act, the proposed sub-section is contrary to the principle that a person cannot be repatriated to a country where they would suffer persecution and possibly death which violates the right to life and the principle of non-refoulement.
20. We therefore submit that the proposed additional exclusionary clauses in section 2 of the Draft Bill must be deleted except those that comply with both the 1951 Refugee Convention and the OAU Refugee Convention.

### **Section 3 of the Draft Bill – Ceasing to qualify for Refugee Status**

21. With regard to a person ceasing to qualify for refugee status because of criminal offences including immigration violation proposed section 5(1)(f) –(g), we refer the DHA to our comments in paragraph 19 above.
22. Any powers granted to the Minister relating to cessation of refugee status of any individual or category of persons must be done in a manner that complies with the Constitution, particularly section 33 which guarantees *"everyone the right to administration action that is lawful, reasonable and procedurally fair."* This decision would also have to comply with the Promotion of Administrative Justice Act (hereinafter referred to as "PAJA"). Additionally, the UNHCR has guidelines on the application of cessation clauses which this decision would have to comply with. The proposed section 5(1) of the Draft Bill must reflect these administrative law frameworks.

### **Section 5 of the Draft Bill - Disestablishment of RRO**

23. Disestablishment of an RRO must always be gazetted and open for public comment given the impact it has on asylum seekers and refugees utilising the office. Again

we wish to reiterate the need to ensure that public exercises of power comply with the Constitution, especially section 33, and PAJA. The Director General of the DHA cannot simply be granted unfettered powers to disestablish an RRO without consultation. We recommend that the clause, "*notwithstanding the provisions of any other law*" in section 5(b) of the draft Bill be deleted. The power to disestablish an RRO must be subject to consultation with proper notice of intention to disestablish an RRO publicly and widely circulated to ensure that there is public participation before the final decision is taken. There must also be clear procedures developed in ensuring efficient service continues to be rendered to asylum seekers and refugees who received services at the RRO to be disestablished.

24. As is stated in the current section 8(1) of the Refugees Act, the SCRA must be consulted when an RRO is to be disestablished. More importantly, refugees and asylum seekers must also be consulted in order to ensure that the Director General is cognisant of the impact the decision to disestablish will have on the reality of already vulnerable persons who benefit from the services of the RRO. Lastly, we submit that the Director General must consult with stakeholders who may also provide useful insights on the impact of the decision among others. We verily believe that this would ensure that the rights of those utilising the service are protected and respected as well as ensuring that public power is exercised in a manner that is transparent, accountable and procedurally fair.

### **Section 6 - 11 of the Draft Bill - Refugee Appeal Board**

25. We welcome the inclusion of legal qualification for members of the Refugees Appeal Board (hereinafter referred to as the "RAB"). This we believe is necessary as the function of the RAB is one that requires application and interpretation of the Constitution, the Refugees Act, the OAU Refugees Convention, and the 1951 Refugee Convention, among others.
26. In terms of section 13(1) read with section 15(5) of the current Refugees Act, the RAB should consist of three persons. This was confirmed in *Harerimana v Refugee Appeal Board* 2014 (5) SA 550 (WCC) at paras 555J – 556E and subsequently

applied in *Bolanga v Refugee Status Determination Officer & Others* [2015] ZAKZDHC 13. In *Harerimana* the Court stated that “manifestly, it was required that the RAB sit with its full complement of members” and in *Bolanga* it states at paras 14 – 15 that “[t]he first ground of review deals with the RAB not being properly constituted. It will be seen from annexure CB3 that the applicant’s appeal was heard by one member only of the RAB, MD Morobe. Section 13(1) of the Refugees Act deals with composition of the RAB and requires that it consists of “a chairperson and at least two other members”.’ We submit that the DHA must ensure that they give effect to this jurisprudence by ensuring that the findings are incorporated into the Draft Bill. As such we suggest that the Draft Bill includes a section that specifically mentions the quorum for hearing, alternatively requiring the RAB to include this in their rules.

### **Removal of members from RAB**

27. In our legal framework there are certain procedures in place which must be followed when either an employer or employee wishes to terminate employment. The Minister seeking to remove a member of the RAB from office must ensure that at the very least they comply with the provisions of the Basic Conditions of Employment Act (BCEA) as it applies to all employers and employee. Key to the provisions of the BCEA is section 37 which sets out the notice periods for terminating a contract of employment. We therefore urge the DHA to ensure that they comply with already existing legal frameworks when conferring powers to any of its officials.

28. Additionally, it is unclear what happens once the Minister has removed a member of the RAB from office. Section 8G of the Refugees Act provides that in event that a member of the RAB dies in office or is disqualified from holding office, the Minister may appoint a suitable person for the remainder of the term of office of such member. The Draft Bill seeks to repeal section 8G without ensuring that this concern is legislated elsewhere in the Draft Bill. We therefore recommend that the DHA ensures that provisions are included to cater for this concern.

**Section 12 of the Draft Bill – Standing Committee for Refugee Affairs**  
**(hereinafter referred to as the “SCRA”)**

29. We welcome the requirement that the Chairperson and members of the SCRA must be legally qualified, because their mandate requires them to apply and interpret national, regional and international laws.

**Functions of the Standing Committee**

30. The SCRA currently is overburdened with reviews and is taking lengthy periods of time to review RSDOs decisions – the DHA must therefore be cautious about adding more unnecessary administrative burdens like the granting of the right to work / study on the SCRA as this may lead to more pronounced inefficiencies and delayed service delivery. As we already noted in our general remarks, multiplying administrative burdens without increasing capacity is neither tenable nor practical.

31. The Draft Bill in entrenching the powers of the SCRA repeatedly mentions that when an asylum seeker is permitted to work / study in South Africa the SCRA must determine the conditions of work / study. We are concerned that the DHA seems to be digressing in their recognition of rights of asylum seekers and refugees physically present in South Africa.

32. We will in the next paragraphs highlight a few key legal provisions that must be borne in mind by the DHA which consequently enumerates why the DHA cannot legally restrict or regulate the right to study and work as it currently proposes.

*Right to Study*

33. Section 29 of the Constitution states that “*everyone has the right to basic education including basic adult education.*” It goes further to state that everyone has the right to further education which the state must make progressively available and accessible through reasonable measures. The right to basic education

is a right that must be immediately realisable as it is not subject to progressive realisation. The Constitutional Court have confirmed this in *Juma Masjid Primary School* where it stated:

*"It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) 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."*<sup>10</sup>

(Own emphasis)

34. More so, Section 3(1) of the South African Schools Act 84 of 1996 makes primary and lower secondary schooling compulsory **for all children** between the ages of 7 and 15 years (or until the completion of Grade 9, whichever occurs first). It obliges every parent / guardian to ensure that every learner for whom he or she is responsible attends school every day during the compulsory phase. In addition, the Policy on Learner Attendance (2010) obliges schools to monitor daily attendance of learners and take supportive action where they are unlawfully absent.

35. For refugees and asylum seeker children education has an empowering effect. It is vital in restoring hope and dignity to children driven from their homes by conflict and / or persecution. It helps them get back on their feet and shows them the potential of a better future. The UNHCR has stated that: *"[i]t is the refugees with an education, above all, who provide leadership during displacement and in rebuilding communities recovering from conflict. The future security of individuals*

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<sup>10</sup> *Governing Body of the Juma Masjid Primary School & Others v Essay N.O. and Others* [2011] ZACC 13; 2011 (8) BCLR 761 (CC) ("*Juma Masjid Primary School*") at para 37.

*and societies is inextricably connected to the transferable skills, knowledge and capacities that are developed through education.”<sup>11</sup>*

### *Right to Work*

36. In the *Watchenuka* case Nugent J, resolutely held that:

*“The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents’ counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.*

*But the protection even of human dignity – that most fundamental of constitutional values – is not absolute and s 36 of the Bill of Rights recognises that it may be limited in appropriate circumstances. It may be limited where the limitation is of general application and is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors.’<sup>12</sup>*

37. In discussing the nature of the limitation that can be placed on the right to work, Nugent J stated further that:

*“But where employment is the only reasonable means for the person’s support other considerations arise. What is then in issue is not merely a restriction upon the person’s capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation.”*

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<sup>11</sup> See <http://www.unhcr.org/pages/49c3646cda.html>.

<sup>12</sup> *Watchenuka* above n 1 at paras 27 and 28.

38. Currently, any person who lodges an application for asylum at a RRO and is issued with an asylum permit is immediately allowed to study and / or work in South Africa. We submit that it would be a serious digression to require asylum seekers and refugees to be permitted to work only if the SCRA grants them such permission in terms of the proposed section 9C(1) and proposed section 22 (8) to (12) in section 15 of the Draft Bill.

39. We also point out that unnecessarily limiting the ability to work and study for refugees will only lead to refugees depending on social assistance which has the impact of relegating them to abject poverty. The United Nations Development Programme (UNDP) has found that "*[m]any of the world's poorest people are women who must, as the primary family caretakers and producers of food, shoulder the burden of tilling land, grinding grain, carrying water and cooking. This is no easy burden.*"<sup>13</sup> The UNDP further stated that "*[w]hen women have equal access to education, and go on to participate fully in business and economic decision-making, they are a key driving force against poverty. Women with equal rights are better educated, healthier, and have greater access to land, jobs and financial resources. Their increased earning power in turn raises household incomes. By enhancing women's control over decision-making in the household, gender equality also translates into better prospects and greater well-being of children, reducing poverty of future generations.*"<sup>14</sup>

40. It goes without saying that achieving substantive equality between men and women is more than a matter of social justice; it is a fundamental human right which the Constitution guarantees. Additionally, the issue of refugees and asylum seekers' access to work and study rights has already come before Courts who have established the vital nature of the ability to study and work for asylum seekers and refugees as explained above. Attempting to limit the applicability of these rights to

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<sup>13</sup>Gender and Poverty Reduction

[http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus\\_areas/focus\\_gender\\_and\\_poverty.html](http://www.undp.org/content/undp/en/home/ourwork/povertyreduction/focus_areas/focus_gender_and_poverty.html)

<sup>14</sup> Ibid.

asylum seekers and refugees is not only unlawful, but a serious violation of South Africa's constitutional, regional and international obligations.

41. In light of the above, we strongly urge the DHA to remove any proposed qualifications and limitations on the right to work and study for asylum seekers and refugees in the Draft Bill.

42. Furthermore in light of the above, with respect to proposed Section 22(8) of the Refugees Act in section 15 of the draft Bill we submit as following:

42.1 An asylum seeker arriving in South Africa with means to support themselves is not a reasonable or logical justification to deny such a person the ability to work and earn an income. Such a person must, in fact, be given the opportunity to work to ensure that they continue being able to provide for themselves and their dependants.

42.2 Similarly, being a recipient of assistance by UNHCR should not preclude asylum seekers from working otherwise they would be perpetually dependant on aid which has the potential of placing them in perpetual abject poverty which disproportionally affects women and children as explained above.

42.3 According to Statistics South Africa, the unemployment rate is at around 25% in South Africa and therefore it is not an easy task for an asylum seeker arriving in South Africa to seek and obtain employment. We submit that it is unfair and discriminatory to limit asylum seekers and refugees' ability to work simply because they are unable to find formal employment. More importantly, because of the high unemployment rate a lot of refugees and asylum seekers either work in the informal sector or are self-employed in order to earn an income which the Bill fails to include in its concerning attempt to regulate employment of refugees and asylum seekers.

43. As we have repeatedly noted, the SCRA is inundated with reviews and other functions. The SCRA is not delivering its services timeously. Applicants for indefinite

stay and those whose cases are subject to automatic review have to wait for prolonged periods of time before receiving a decision. This burden of regulating work and study permits will not only add on to the burden of the SCRA but will ultimately make it dysfunctional. If the regulation of work and study permits was lawful, conferring the powers of their regulation to a body that is not able to timeously provide their service will be a serious violation of these rights. However, we submit that it is not a lawful regulation and must be removed totally from the Draft Bill. The ability to work and study should continue as it is currently, i.e. applicable immediately.

### **Section 13 of the Draft Bill**

44. We have already dealt with the requirement of providing five days to apply for asylum. We have further concerns regarding the proposed section 13 of the Draft Bill.

#### *Notice to appear at an RRO in Government Gazette*

45. We have already submitted that it is inadequate for the Minister to simply publish a notice in the Government Gazette in order to communicate with refugees and asylum seekers in South Africa. More measures must be taken including advertising at the RROs, use of community radio, newspapers, approaching CSOs offering services to refugees to pass the message, as well as the UNHCR.

#### *Applications with false, dishonest and misleading information*

46. We submit that blanketly rejecting any application with false information is problematic. For example women raped in conflict who immediately flee their homes without receiving psychological counselling may not always immediately disclose their reason for seeking asylum. This is worsened by the fact that most RSDO interviews are conducted in open places without any privacy and on occasion by a male RSDO.

47. In many instances asylum applicants are unable to read and write in English often have to rely on other persons also waiting to apply. In such an instance they would have to share their traumatising experiences with a stranger who may be male. It would therefore be unconscionable and most certainly unconstitutional to summarily dismiss such an application without applying one's mind on the reasons why the female asylum seeker withheld such information in their application. Such a determination must be made by either the RAB in an appeal, should the case be rejected as unfounded, or the SCRA. In the event that the DHA is of the opinion that the dishonestly or false information warrant the revocation of status, any steps taken towards making this conclusion must comply with PAJA and at the very least afford the person concern with the opportunity to provide a response to the findings.

### **Section 15 of the Draft Bill**

48. An asylum seeker who submits an application must be immediately issued with an asylum permit in the prescribed form as is the case currently. Such documentation is crucial to the applicant as it will ensure that they are not arrested and deported. This documentation is also crucial in ensuring that an applicant is able to access services including hospitals, schools etc. As such we submit that the proposed section 22(1) of the Refugees Act in section 15 of the Draft Bill must ensure that asylum seekers who report to the RRO to apply for asylum are immediately documented.

49. We welcome the continued inclusion of biometrics in the asylum documentation in the proposed section 22(3) of the Refugees Act in section 15 of the Draft Bill as this will enable the DHA to easily identify persons who report to the RROs and avoid conflation and confusion of files and identities.

50. As the person who has expressed his / her intention to seek asylum has the right to remain physically present in South Africa, the renewal of the visa cannot be discretionary. In fact, given the regional and international law obligation on South Africa, such an extension is mandatory until such a time as a final decision rejecting

the application for asylum has been made. This is again because continued documented of asylum applicants ensures their lawful presence in South Africa which ensures that they do not get arrested and deported, among other reasons.

51. The withdrawal of the asylum documentation as envisaged by the proposed section 22(5) must be done in terms of PAJA with notice of intention to withdraw communicated to the affected person. The concerned person(s) must, at the very least, be given an opportunity to make submissions before a final decision can be made. Applications found to be manifestly unfounded, abusive and fraudulent are still subject to automatic review by the SCRA (as envisaged by the proposed section 24A of the Refugees Act in Section 17 of Draft Bill). During this time, as the decision of the RSDO is not final, the asylum applicants' documentation must be extended.
52. With regards, to the assessment intended in the proposed section 22(6) – (7) of the Refugees Act in section 15 of the Draft Bill, it is unclear who will conduct this assessment. Furthermore, what steps should be taken when the UNHCR cannot provide shelter and basic necessities as envisaged in this section.

### **Section 19 of the Draft Bill**

53. We welcome the inclusion of the provisions of PAJA in this proposed section especially the fact that the SCRA is required to inform the respective person of the reasons of its decision and give the said person an opportunity to make written submissions. As envisaged by the Draft Bill, this ensures that the SCRA makes the final decision with all the applicable information considered.
54. With regards to the proposed section 36(3) of the Refugees Act in section 19 of Draft Bill, we urge the DHA to ensure that the implementation of the cessation is done in a manner that also complies with the regulations and guidelines set out by the UNHCR. Again we repeat that the use of the Government Gazette in such instances is not adequate, additional steps as mentioned above are required.

## **Conclusion**

55. In conclusion, we thank the DHA for affording us the opportunity to make these submissions. We trust that they are useful to the DHA and will be considered. We also wish to reiterate the need to ensure that all asylum seekers and refugees in South Africa have access to the freedoms and rights envisaged by the Constitution. Equally important are the obligations that South Africa has in terms of the OAU Refugee Convention and the 1951 Refugee Convention which must be complied with in any law reform planned by the DHA.

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**on behalf of the  
Legal Resources Centre**

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*ENDS*