

Submission Regarding the Fourth Draft of the Refugees Amendment Bill

Khulumani Support Group

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The mission of Khulumani is to build an inclusive and just society in which the dignity of people harmed by apartheid and by subsequent human rights abuses, is restored through the process of transforming victims into victors. Towards the achievement of these objectives, Khulumani has been involved in activities to build social capital within poorly resourced communities towards promoting community social cohesion that facilitates mutually beneficial relationships amongst residents of organised local communities.

Khulumani's project of building a social dialogue platform in Makana Municipality to promote cooperative and collaborative problem-solving amongst local and foreign African spaza shop-owners in the townships of the municipality, was recognised for the inaugural Mkhaya Migrants' Award of 2015. It was based on bringing together all local spaza shop-owners as stakeholders to craft a platform and to establish rules to regulate and to promote mutual respect and support amongst all the stakeholders. The project was identified as a best practice because of its successful contribution to the building of an integrated and harmonious community in Makana Municipality. Some two years since being announced as the winner of the 2015 prize, Khulumani is still waiting for the transfer from the National Department of Home Affairs of the prize money of R100,000.00 so that its efforts in sustaining this programme are supported. The Khulumani Social Dialogue Platform for Spaza Shop-Owners in Grahamstown was visited by officials from police stations across the Eastern Cape Province because of its successful promotion of respectful relationships amongst local and foreign spaza shop-owners in the town.

Khulumani continues its involvement in activities to prevent the escalation of tension in poorly resourced communities where there are concentrations of foreign nationals, most recently in Rosettenville, Johannesburg and in Mamelodi in Tshwane.

It is against the background of these activities in support of the prevention of conflict within communities and its timeous resolution that Khulumani makes this submission, having recognised the many valuable socio-economic contributions that foreign nationals make to our communities.

Noted Purpose of the Amendments

- i) To insert certain definitions;
- ii) To include additional provisions for disqualifying applicants from refugee status;
- iii) To provide measures to combat fraud and corruption amongst staff of the Department of Home Affairs;
- iv) To omit certain provisions related to the Status Determination Committee;
- v) To substitute certain provisions related to the Refugee Appeals Authority;
- vi) To confer additional powers on the Director-General;
- vii) To clarify procedures related to conditions attached to the asylum seeker visas and the abandonment of applications;
- viii) To revise provisions relating to the review of asylum applications;
- ix) To provide for the withdrawal of refugee status in certain categories of refugees;
- x) To provide for additional offences and penalties and associated matters.

This fourth amendment of the Refugees Amendment Bill introduces so-called “omissions” from the existing enactments and new insertions into the existing enactments. The impression is created of a somewhat flawed legal drafting process. Of particular concern are whether the bill and its amendments align with the best practice as laid out in the 1951 Refugee Convention and the 1967 Protocol relating to the Status of Refugees.

Background

The Refugees Amendment Bill has potential impacts on a large, vulnerable group of people who may be abused within the asylum system. In 2016, the United Nations High Commission for Refugees in South Africa reported that the estimated number of asylum seekers in South Africa was around 1 096 063 individuals. While these numbers could not be verified by Africa Check, it was found that South Africa has “the second largest backlog of unsettled asylum cases in the world.”¹

As detailed in this submission, the overarching concern regarding these amendments is the denial of effective refugee protection in South Africa that could result from amendments to existing regulations that might violate South Africa’s international obligations in terms of the protection of the rights of refugees and asylum seekers in South Africa.

This is regrettable given the country’s stated commitment to the consolidation of a human rights culture in the country and the affording of protection to those whose rights have been violated in their countries of origin on the basis of their “race, religion, nationality, political opinion or membership of a particular social group.”

Leaving the country of one’s birth in search of safety and protection is not an action undertaken without the existence of real fears of persecution on the side of those who leave their countries of origin.

It is of concern that the process of amending the legislation can be traced back to the outbreak of xenophobia of April 2015 that resulted in the Minister in the Presidency announcing that President Jacob Zuma had appointed an inter-ministerial committee (IMC) on migration to “deal with the underlying causes of the tensions between communities and foreign nationals.”

Definitions of a Refugee

The UN definition of a refugee is as follows:

¹ Submission by Ms Christine Botha, Legal Officer, Centre for Constitutional Rights, ‘The refugees Amendment Bill – Will It Truly Combat Corruption?’

“A refugee is someone who has been forced to flee his or her country because of persecution, war, or violence. A refugee has a well-founded fear of persecution for reasons of race, religion, nationality, political opinion or membership in a particular social group. Most likely, they cannot return home or are afraid to do so. War and ethnic, tribal and religious violence are leading causes of refugees fleeing their countries.”

According to South Africa’s Refugee Act of 1998 and Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person

- a. owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- b. owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere: or
- c. is a dependant of a person contemplated in paragraph (a) or (b).

Criticisms of the Amendment Bill

Khulumani as an organisation that has provided some paralegal and social support to asylum-seekers, hereby submits the following critiques and concerns related to the amendments currently under consideration:

1. The 5-day registration period as an asylum-seeker is too short:

The proposed amendments suggest that, “[A person seeking asylum] does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she...

(i) has failed to make an application for asylum within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason of similar nature.”

This period is reduced from the previous period of 14 days given to refugees to make an application for asylum. This will make it More difficult for people seeking asylum to become official refugees, and might mean that they have to return to a country in which they are being persecuted.

Given the circumstances that have forced an individual to seek refuge in a country other than their country of origin, the affected individuals are likely to be traumatised and to have few means of support to provide for travel to offices of the Department.

The circumstances affecting women asylum-seekers are even more prohibitive than for men because:

- i) Women asylum seekers carry the main responsibility for the protection and support of children.
- ii) Most women asylum seekers are multiply traumatized by violence experienced in their home countries as well as the hostility they face on their arrival in South Africa. For women asylum seekers, their exposure to repeated and/or ongoing trauma has a cumulative effect on their cognitive functioning and when subjected to threats (even if these are never carried out) a cognitive and emotional paralysis sets which makes it impossible for victims to rationally assess threats and explore reasonable ways of protecting

themselves². The capacity of newly-arrived asylum seekers to find the offices of the Department of Home Affairs and to present a coherent narrative to officials may be beyond the capacity of the affected person at the time, given the impacts of the trauma to which they have been subjected that necessitated their relocation across national borders.

Khulumani therefore concurs with submissions that the provision of 5 days for making an application for an asylum seeker visa is entirely unreasonable given that an applicant who arrives in the context of the trauma of an emergency relocation to the country may have no access to adequate information regarding the processes involved or the location of a Refugee Status Determination Office.

2. There is no guarantee that policy changes will make the process more efficient:

Khulumani endorses the submission of the Refugee and Migrants' Rights Desk of Lawyers for Human Rights³, that the proposed amendment is detrimental in the context of the existing massive backlog within the Department of Home Affairs in terms of the processing asylum seeker applications. Khulumani concurs that the proposed change in the existing regulations will not necessarily expedite the processing of these applications.

3. Unrealistic financial expectations of asylum-seekers:

The bill notes that "An asylum seeker may be assessed to determine his or her ability to sustain himself or herself, and his or her dependants, with the assistance of family or friends, for a period of at least four months"

This is a difficult expectation to have for people who came to South Africa because they were being persecuted. Many people seeking asylum do not have friends or family in the country, who are able to support them. Thus, this new regulation might

² <http://jhbchildadvocacyforum.blogspot.co.za/>; Reflections on the hidden face of Xenophobia and effects on women and children of the inner city of Johannesburg, Outcomes of a Discussion of the Trauma Debriefing Group Session on Xenophobia (Violence and Attacks), 21 April 2015

³ <http://www.lhr.org.za/policy/lawyers-human-rights-submission-refugees-amendment-bill>

mean that some asylum seekers get turned away, because they are not able to support themselves. Additionally, this suggestion puts extra pressure on any family members of individuals seeking asylum in South Africa as well as on organisations such as the UNHCR.

The overarching concerns:

The major concern is that the additional amendments to the Act providing for the recognition and protection of refugees who seek asylum in South Africa render the processes more complicated and challenging to persons who are already in precarious and vulnerable situations. This undermines the purpose of refugee protection regulations that is required to be coherent with the principles of the 1951 Convention Relating to the Status of Refugees.

The asylum seeking process is complex and difficult, and these amendments compounds the existing difficulties in a country that is not welcoming to refugees, particularly refugees from other African countries. The prevalence of xenophobia, has made South Africa to a large extent inhospitable to African refugees. This reality is further entrenched by the proposed additional amendments.

Recommendations

1. Leave the application procedure at 14 days, giving asylum-seekers more days to get to the relevant office, and to file their application.
2. Remove the financial dependency clause, which would increase the difficulties facing asylum seekers who seek refuge in South Africa.