Submission on the Refugees Amendment Bill, 2015

Submitted by

Consortium for Refugees and Migrants in South Africa (CoRMSA)

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CoRMSA, 501 Heerengracht, 87 De Korte Street, Braamfontein, 2001. Tel: 011 403 7560/2, Fax: 011 403 7559. Reg No: 010-387NPO

A. Introduction:

CoRMSA is a national network of organisations working with asylum seekers, refugees and migrants. CoRMSA member organisations include legal and social service providers; research institutions; law clinics and refugee and migrant communities who have expertise on migration and broader human rights issues at local, national, regional and global levels.

CoRMSA welcomes this opportunity to make a submission on the Refugees Amendment Bill 2015 [B12-2016] and reiterates our concerns raised in our submission to the Department of Home Affairs last year. Specific comments and recommendations are listed in Section B. Whilst it is acknowledged that there are dysfunctional elements in the current asylum management system, recent empiricle research has shown that the challenges lie primarily in the implementation of the provisions in the Refugees Act, rather than the underlying assumptions of the Act[1]. Our main concerns therefore are around the proposed amendments that limit the rights of asylum seekers in South Africa. Furthermore, the Green Paper on International Migration has already been published for public comment and seeks to reframe the policy narrative into one that recognizes the positive economic and social impact of migration, both inward and outward. In this regard, it seems pre-emptive to table this Amendment Bill before completing the process of developing the White Paper on International Migration.

CoRMSA is available to make oral presentations regarding this submission should such an opportunity arise.

B. Comments on specific sections of the Refugees Amendment Bill, 2015:

- **Section 1(b) definition of dependent:**

The proposed amendments seek to limit dependents that are able to be included in the asylum seeker's claim. Only children who are minors, children legally adoted in the country of origin, a spouse legally married in the country of origin and only parents that are destitute, aged or infirm and that are named in the claim will now be eligible to be included as dependents. This precludes children above the age of majority, children that are under guardianship of the asylum seeker, common law partners and elderly family members other than parents. It also requires the asylum seeker to fully understand that they must name all those in the above categories on

[1] Amit, R. (2015) 'Queue Here for Corrruption: Measuring Irregularities in South Africa's Asylum System'. *A Report by Lawyers for Human Rights and the African Centre for Migration & Society;* ACMS (2012) No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices. Research Report September 2012 ACMS, Wits: Johannesburg.

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their application even if they have become separated from family members in the course of the journey to ensure family reunion is possible in the future.

- **Section 4 exclusion from refugee status**

The additional exclusions in **Section 4(1) (f), and (h)** create confusion around irregularities under the Immigration Act, the humanitarian principles of the Refugee Act and obligations under the UN Refugee Convention. These provisions are also open to subjective interpretation by the Refugee Status Determination Officer (RSDO), for instance arriving without documentation or entering the country other than through a designated port of entry should not be impediments to seeking asylum. However **4(1) (h)** puts the onus on the asylum seeker to convince the RSDO that "there are compelling reasons" for not entering through a designated border post. **Section 4(1) (g)** is problematic for asylum seekers as the nature of forced migration means that an asylum seeker may well be"a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary". LGBTIQ asylum seekers, taking just one category as an example, may indeed be facing just such a situation and should not be excluded on this basis.

Section 4(1) (i) is also problematic, given the closure of Refugee Reception Offices (RROs) and the well documented difficulties (including the current high levels of corrupt practices at some RROs) of entering these offices to lodge a claim. Offices that designate a specific day for specific nationalities mean that in fact there is only one day out of the five stipulated on which the asylum seeker **must** gain entrance to the RRO, thus making applicants more susceptable to bribery in order to access the asylum system.

- **Section 5 cessation of refugee status**

More thought should be given to the siutations that can arise in the case of a person with refugee status having committed a crime stipulated in **Section 5(1) (f)** or an offence stipulated in **5(1) (g)**. Opening up the refugee to deportation could violate the principle of *non-refoulement* which should be upheld even if the person is convicted or has been deemed to have committed an offence under the relevant Immigration, Identification, Passports and Travel Documents Acts.

The intention of **Section 5(1)(h)** is unclear. If an individual, or indeed a "category" (as defined in Section 8), has been deemed a refugee by an RSDO through the asylum managent system then their status should not be further contingent on the subectivity of the Minister and Cabinet colleagues. This speaks to focusing on improving the status determination process, rather than giving additional possibilities to over-turn decisions made by that system.

- **Section 8 Refugee Reception Offices**

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Section 8(1) appears to give the Director-General the possibility to open and close RROs without recourse to any other legislation such as the Promotion of Administrative Justice Act. In the light of the current challenges arising from the closure of RROs and the short time period (5 days) for lodging a claim, this amendment seems to be opening the door to further compounding the difficulties in lodging an asylum claim.

- **Section 13 Designation of Refugee Reception Offices**

The intention behind **Sections 13(1) (a) and (b)** are unclear. To separate "categories" as listed in 13(1) (b) and for the Director-General to designate specific RROs for various categories would infringe upon the right of asylum seekers to move freely within the borders of South Africa. Limiting freedom of movement places additional burdens on the state or other agencies to provide services to categories that have been sent to one or other location rather than enabling access to RRO services in the places where people live.

- **Section 20A Crime prevention and integrity measures**

The intention behind amendments dealing with integrity testing in **Section 20A(2), (4) and (5)** is welcomed as it is presumed to be in line with the Minister's stated intention to reduce and deal firmly with corrupt practices by officials in the department. Although polygraph testing might not always detect malpractice, these amendements, including vetting, and the statements of action which can be taken against officials who fail or refuse to subject themselves to a vetting investigation are acknowledgements of the extent of the problem of corruption at RROs and an indication that such practices are unnacceptable.

- **Section 22 the right to work and study**

The proposed amendments in this section seek to restrict the rights of asylum seekers to work. **Section 22(6)** states that the asylum seeker "may" be means tested to see if they are able to support themself and dependents for up to four months. There is no detail about what will trigger the means test, what will be deemed "enough to sustain himself or herself and his or her dependents", how this will be done or what happens after the four months. **Section 22(7)** stipulates that if the asylum seeker is unable to support themself and their dependents for up to four months, the UNHCR "may" offer assistance. There is no indication if the UNHCR and implementing partners have already agreed to providing such assistance. **Section 22(8)** then implies that the asylum visa will be endorsed with the right to work if the asylum seeker cannot support themself and dependents for up to four months and the UNHCR and partners do not offer to provide assistance. However this is qualified in **Section 22(9)** by the fact that the asylum seeker must provide a letter of employment within fourteen days of taking up employment or, under **Section 22(11)** forfeit their right to work within six months of the endorsement being granted.

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These amendments mean that asylum seekers are effectively prohibited from legally undertaking piecework, work in the informal sector or self employment of any kind as they would not be able to comply with Section 22(9). The policy imperative for this seems to be based on a common misconception that non-nationals dominate the informal sector at the expense of South Africans. Gauteng is the Province with the highest number of migrants in the country. Yet research from the Gauteng City Regional Observatory (GCRO) indicates that 82% of informal business owners were born in Gauteng or moved from eslewhere in the country and only 18% moved to Gauteng from another country (not all of whom are asylum seekers)[2].

Care should also be taken that amendments to the Refugees Act do not counter the direction of the Department of Home Affairs current migration policy process, which will look at the positive role that migration can play in the development of countries of origin and destination. The role of in-migration, including asylum seekers and refugees, in strengthening economies should not be disregarded. GCRO data indicates that not only does Gauteng have the highest number of migrants, but also has the second lowest unemployment rate and is the biggest and fastest growing economy in the country[3]. Furthermore, data from Johannesburg shows that non-national traders are more likely to employ more people in their businesses at a ratio of 1 non-national entrepreneur: 1.97 employees and 1 South African entrepreneur: 0.82 employees. It should also be noted that amongst the non-nationals surveyed, only 29% were asylum seekers[4]. Simply excluding asylum seekers from this sector does not, on the basis of the existing evidence, seem to be addressing a genuine policy imperative. The impact of this amendment will negatively affect asylum seekers' ability to look after themselves and legally contribute to the South African economy, including through job creation.

C. Conclusion

This submission has focused on the amendments which will limit the rights of asylum seekers in South Africa. There seems to be no evidence that the proposed limitations will address the current challenges within the asylum management system. Indeed the amendments that limit the right to work add on additional adminstrative functions to the system. Many of the amendments listed above will

[2] Peberdy, Sally (2015). *Informal Sector Enterprise and Employment in Gauteng*, Gauteng City-Region Observatory (GCRO), Data Brief No.6 **http://www.gcro.ac.za/media/reports/gcro_data_brief_informal_sector_enterprise_and_employment.pdf**.

[3] Peberdy, Sally (2015). *Gauteng: a province of migrants*, Gauteng City-Region Observatory (GCRO), Data Brief No. 5 **http://www.gcro.ac.za/media/reports/gcro_data_brief_migration.pdf**

[4] Peberdy, Sally (2015). *Cross border migrant entrepreneurs and South African entrepreneurs in the informal sector of the City of Johannesburg,* Gauteng City-Region Observatory (GCRO) draft report

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make it harder for asylum seekers to access the asylum system and remain legally documented within it. As has been repeatedly shown around the world (one has only to look at the desparate measures asylum seekers are currently resorting to at European borders) limiting access to protection does not reduce the numbers of people seeking asylum. It must be re-iterated that prohibiting asylum seekers from self employment will not create jobs for South Africans. Policies and legislation should not be based on misconceptions around the numbers and function of asylum seekers in the economy but should be considered on empirical evidence and the humanitarian principles enshrined in the UN Refugee Convention and existing domestic legislation.

Contact Details:

1. Ms Roshan Dadoo, Regional Advocacy Officer, CoRMSA

   Email: roshan@cormsa.org.za

   Telephone: 011 403 7560/1