HELEN SUZMAN FOUNDATION

Dr Pakishe Aaron Motsoaledi
Minister of Home Affairs
909 Arcadia Street
Pretoria

26 February 2020

Dear Minister

The Refugees Act and Refugees Regulations

Introduction

We acknowledge the importance of the Department of Home Affairs' task in protecting and managing refugees in South Africa, as well as the inherent difficulties experienced by the Department in carrying out this mandate. It is against this background that we are writing to you on the recent amendments to the legislation governing refugees in South Africa.

On 1 January amendments to the Refugees Act came into effect, accompanied by the 2018 Refugees Regulations. This legislation will be referred to below as "**the amended Act**" and "**the Regulations**".

At the outset, we wish to confirm that we welcome many aspects of the amended Act and Regulations, such as –

- the reconstitution of the Refugee Appeals Board to address its backlog of appeals;
- the introduction of biometrics to improve the identification system for asylum seekers;
- the introduction of integrity measures to combat corruption and fraud in the asylum system;
- the remedied and, in some cases, expanded recognition of spouses and dependants of asylum seekers and refugees;
- the introduction of procedures aimed to combat undocumented immigration that do not unduly compromise the right to seek asylum and associated rights;
- the procedures implemented to inform asylum seekers of their rights, such as the right to appeal against a declined application for refugee status and the right to legal representation;
- the enforcement of communication with asylum seekers in their language of choice;
- the introduction of measures attempting to manage abandoned asylum seeker visas;

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- the establishment of the recording of status determination interviews; and
- the provision of identity documents to refugees that resemble the South African identity card or document.

At the same time, there are some aspects of the amended Act and Regulations that raise serious concern. In bringing our comments to your attention, we pose only those issues that raise concern from a constitutional and legal perspective, without burdening you with issues of administrative detail.

We approach you directly in this regard in order to contribute to a process that may address the relevant aspects in an informal but effective manner, specifically in order to avoid the issues becoming the subject of protracted litigation.

The issues are set out below under separate headings.

Political activity and exclusions

Section 4 of the Regulations, read with Section 5(1) of the amended Act, limit refugees' and asylum seekers' right to participate in any political activity related to their country of origin whilst in South Africa (without the permission of the Minister). They further remove refugees' and asylum seekers' right to participate in 'any political activity or campaign in furtherance of any political party or political interests' in South Africa. Political participation in both of these cases (related to their country of origin or South Africa) may result in the Standing Committee withdrawing a refugee's or asylum seeker's status and their being treated as illegal foreigners.

These provisions violate several provisions of the Bill of Rights, as set out in the Constitution. The Constitution stipulates that *everyone* within South Africa's borders has the right to freedom of expression[1]; assembly, demonstration, picket and petition[2]; freedom of association[3]; and equality[4].

The Constitutional Court has consistently found 'everyone' in the Bill of Rights to be an all-inclusive term, as is demonstrated by these comments on Section 17 of the Constitution, which governs the right to assemble, demonstrate, picket and petition:

> *'[S]ection 17 provides for a solemn undertaking to citizens and non-citizens alike that everyone has a right, peacefully and unarmed, to assemble, demonstrate, picket and present petitions. The language in section 17 is unambiguous: everyone has a right to engage in any of the activities that it spells out. "Everyone" is a word of wide import. In its ordinary sense it is all-inclusive. The only internal qualifier contained in this constitutional provision is that anyone exercising this fundamental right must do so peacefully and unarmed'*[5].

Political rights[6] in the Bill of Rights are articulated as the rights of *citizens* (as opposed to *everyone*). However, the wording of the provisions relating to 'political rights' makes it clear that they pertain to the normal exercise of a citizen's right to participate in the South African political system, through voting in elections and campaigning for a particular party. No one would expect a non-citizen to have these rights. However, the fact that a non-citizen cannot take part as a voter in a South African election does not imply any limitation on activities as, for instance, commenting on a South African

political party's policy, demonstrating peacefully against xenophobia, or picketing in support of women's rights.

The wording relating to the Constitution's 'political rights' provisions also does not, explicitly or implicitly, prohibit non-citizens from being involved in political activities or campaigns relating to their country of origin. Taken together with *everyone's* constitutional right to freedom of expression, association, assembly, demonstration, picket and petition, the only possible conclusion is that the Constitution places no restriction on such activities of refugees, providing, of course, that they are conducted peacefully and unarmed. In this context, we also wish to refer to the provisions of Section 27 of the amended Act, which specifies that a refugee is entitled to full legal protection, which includes the rights set out in Chapter 2 of the Constitution, except those rights that only apply to citizens.

We also wish to refer to the limitation of rights[7] in the Bill of Rights: rights may only be limited to the extent that they are 'reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom'. An attempt to curtail refugees' and asylum seekers' political activity with respect to *their country of origin* cannot be justified in an open and democratic society: those seeking refuge in South Africa retain a vested interest in the rehabilitation or change of the circumstance that influenced their fleeing, which can be instrumental in their eventual return. Similarly, demonstration or expression of opinion by refugees on South African issues cannot be taken as unlawful interference in elections or political campaigns. Such activity should be welcomed as an expression of buy-in on the part of refugees to the affairs of their communities and the South African nation. It indicates a step towards much-needed integration.

Section 4 of the amended Act further excludes from refugee status an asylum seeker who 'is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary'. This exclusion creates several potential problems. Firstly, opinions may well differ on whether the rule of law is upheld and a judiciary is recognised in a specific country. Secondly, an asylum seeker should not be excluded if the offence for which he is accused is not an offence in South Africa. For example, this provision would allow South Africa to exclude a homosexual person – a "criminal" and fugitive from justice in some regions – from the international legal definition of 'refugee'[8] that applies to him or her.

The amended Act and Regulations explicitly contravene Article 33 of the UN Refugee Convention regarding "refoulement"[9], which South Africa ratified in 1996:

> *'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'*

The UN Refugee Convention permits an exception to this general rule only in the case of there being reasonable grounds for regarding a refugee as a danger to national security or, having been convicted by a final judgment of a particularly serious crime, a danger to the community of that country.

For these reasons, Section 5 of the amended Act, in withdrawing refugee status from any refugee who has committed a crime ('Schedule 2 of the Criminal Law Amendment Act') in South Africa, clearly conflicts with South Africa's international obligations. It is submitted that, like any citizen, a refugee

who has committed a crime in South Africa must be dealt with according to the proper criminal justice procedure *within South Africa's borders*.

Asylum seekers' education and livelihood

In terms of the amended provisions, only asylum seekers found 'unable to sustain themselves'[10] (with or without support from family or friends) for the arbitrary period of four months, or those who are not offered shelter by the UNHCR or another charitable organisation, may acquire the right to work. This right is extendable after a six-month interim period with a formal letter of employment[11].

For those who are initially found able to sustain themselves for four months (and may not be able to sustain themselves for a longer period) or for those who are unable to find work within six months, the reality is self-reliance and survival for an indefinite status-determination period. Experience has shown that applications take substantially longer than four months to be processed. The intention behind this policy is therefore not clear.

South Africa does not have refugee camps, nor does it provide asylum seekers with grants or the equivalent support. The inability of asylum seekers to work is therefore likely to lead to destitution, with the associated social consequences. Whilst a policy of this kind may be the result of concern on the part of Government not to imperil employment opportunities for South African citizens, it does not solve the problem of providing basic necessities for asylum seekers. Not only may this policy create more problems than it solves, but the amended Act and Regulations violate the following provisions in the Bill of Rights, which are applicable to *everyone* (and not just *citizens*): human dignity[12]; health care, food, water and social security[13]; and equality.

It is accepted that great demands are placed on the Department of Home Affairs to deal with large numbers of asylum seekers. However, by limiting the right to work, the measures above oblige the Government to shoulder the support of asylum seekers, for which it does not appear to have the resources. In addition, the amended Act requires onerous bureaucratic procedures which will not facilitate the role of the Department of Home Affairs.

Refugees' education and healthcare

Refugees had been entitled to basic health services and primary education in the 1998 legislation, but those rights have now been removed from Section 37 of the amended Act.

This amendment violates the provisions of sections 27 and 29 of the Constitution, which provide that *everyone* has the right to health care and basic education. The legislation is also questionable in relation to the limitation of rights provisions of the Bill of Rights: these rights may only be limited to the extent that they are 'reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom'. It is submitted that the exclusion of health care and basic education for refugees is not compatible with these principles. Once again, we refer to Section 27 of the amended Act, which specifies that a refugee is entitled to full legal protection, including the rights set out in Chapter 2 of the Constitution, except those rights that only apply to citizens.

Dependants

Children of asylum seekers and refugees are required to enter and remain in South Africa as dependants, under the legal status of their parents. The provisions of Section 11 of the Regulations, read with Section 21B of the amended Act, introduce the termination of the dependency of asylum seeker and refugee children when they cease to be 'dependants' – we assume, when they reach the age of 18. Such individuals are required to apply for asylum within six months of ceasing to be dependants to be permitted to remain in South Africa. Section 11(3) of the Regulations state that '[a]ny person who fails to apply or whose application has been refused must forthwith depart the Republic, failing which such person must be dealt with as an illegal foreigner in terms of the Immigration Act'.

It is legally and ethically unacceptable to transform a minor with refugee status into a major without such status, purely on the grounds of reaching the age of 18. By delinking children's status from the status of their parents, and requiring them to re-apply to remain refugees or asylum seekers, the new legislation has the propensity to return children *who have been recognised refugees in South Africa for much of their lives* to their countries of origin. At the age of 18, formerly recognised refugees will revert *back* to asylum seekers for an indefinite status determination period, without the rights assigned to them as refugees.

The new legislation is unlawful, effectively revoking rights that had already been granted, for reasons out of an individual's control. Purely by reaching the age of 18, refugee children are rendered stateless for the status determination period. The legislation has the potential to split up families, imposes considerable hardship on children for no justifiable reason, and places unnecessary bureaucratic demands on South Africa's asylum system.

National security, court procedures and arrested and detained persons

Section 28(1) of the amended Act states that the Minister can order the removal of a single or category of refugees or asylum seekers on the grounds of national security, national interest or public order.

Section 21(4) and (5) of the Regulations continue that an application for judicial review must be made before the High Court within 48 hours of the arrest of the person and that

> *'[a]ny order made by a High Court shall be confirmed by the Constitutional Court, within two calendar weeks from the date of the issue of the order contemplated in 28(1), failing which the order of the High Court shall lapse and the Director-General must, notwithstanding the legal status of the order issued by the Minister, proceed with the removal of the person from the territory of the Republic, in the national interest.'*

There are three major problems with this procedure:

1. Section 21(4) of the Regulations requires a detained person to file an application for judicial review within 48 hours. In practice, this is impossible. A reasonable period would have to be granted to the detained individual to find an attorney to take on their case, and to consult with such a lawyer who would have to prepare the necessary review application.

2. There is no apparent reason to require a Constitutional Court confirmation of a High Court order. If the state wishes to appeal against a High Court order, it is able to do so, following normal established appeal procedures.
3. A fundamental principle of the rule of law is violated by stipulating that a High Court order lapses if not confirmed by the Constitutional Court within a period of two weeks. A person's rights cannot be affected as a result of an inability of the judicial process to conform with timelines (whether reasonable or not).

If these provisions are challenged in court, we have no doubt that they will be declared unconstitutional. In terms of Section 33 of the Bill of Rights, it is everyone's right to administrative action that is 'lawful, reasonable and procedurally fair', and 'national legislation must be enacted to give effect to these rights, and must provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal'.

Administrative justice and unchecked power

The Refugee Reception Office ("**RRO**") system imposes considerable hardship on asylum seekers who are almost exclusively self-supporting, forcing them to travel long distances, often with small children, sacrifice valuable time and money and risk jeopardising what may be precarious employment arrangements.

The amended Act requires asylum seekers to report to an RRO within five days (reduced from 14 days) of entering South Africa in order to be considered for refugee status.[14] It enables the Director-General of Home Affairs to require any category of asylum seekers to report to any particular RRO or other place if it is considered necessary. Asylum seekers are required to renew their permits at an RRO every six months.

The logistical complications were exacerbated by the Department of Home Affairs between 2010 and 2012, when three out of South Africa's five RROs were closed to new asylum applicants. The closures forced asylum seekers across the country to travel to Durban or Musina to apply for, and later renew, their permits. In 2017, the arbitrary disestablishment of these RROs was declared 'irrational and unlawful' by the Courts,[15] compromising the constitutional right to just administrative action as set out in the Bill of Rights; the right to seek asylum guaranteed by Article 14(1) of the Universal Declaration of Human Rights of 1948 to which South Africa is a signatory; and Article 12(3) of the African Charter on Human and Peoples' Rights of 1981, ratified by South Africa. The designation and disestablishment of RROs should not be made at the sole discretion of the Director-General. It is submitted that a decision of such consequence requires consultation with and support from the Standing Committee, as defined in the amended Act.

We welcome the attempt made by the Department of Home Affairs in Section 22 of the amended Act to address the issue of abandoned asylum seeker visas. However, the provisions consider an asylum seeker visa to be 'abandoned' when it has not been renewed within a month after its expiry[16]. An abandoned visa leads to the automatic revocation of status, forfeiture of the right to renewal and treatment as an illegal foreigner under the Immigration Act, subject to deportation or imprisonment.

These abandonment provisions must be looked at with respect to the realities on the ground. The administrative backlog in dealing with asylum applications is substantial. Experience has shown that it can take over 10 years for an asylum seeker's status to be determined. By requiring asylum seekers to return to a designated RRO every six months year on year, or risk being deported, the abandonment provisions ensure that asylum seekers bear the effective burden of state inefficiencies.

These provisions have the potential to render large groups of asylum seekers undocumented. It is only a question of time before their consequences come before the courts as examples of unfair, irrational and unjust state processes.

Also problematic is the right granted to the Director-General to require any category of asylum seekers to report to a specific RRO. These categories are defined as 'those from a particular country of origin or geographic area or of a particular gender, religion, nationality, political opinion or social group'. This type of grouping threatens the right to equality in the Bill of Rights as well as Article 3 of the UN Refugee Convention on non-discrimination:

> *'Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.'*

Section 8 of the Regulations, read with section 15(c) of the amended Act, requires asylum seekers who have failed to declare a child their dependent on first application for asylum, to provide proof in the form of a paternity test. Costing R750 per person (R1500 for parent and child) at the National Health Laboratory Service, it is questionable whether an obligation of this nature can be considered reasonable, as it applies to asylum seekers who have recently fled their countries of origin.

Concluding remarks

It will be seen from the content of this letter that we have serious concerns about a number of aspects of the amended Act and the Regulations. We remain available for any discussion that may be helpful in finding solutions to the issues we have raised.

We look forward to hearing from you.

Yours sincerely

Francis Antonie
Director: Helen Suzman Foundation

References

[1] 16. (1) Everyone has the right to freedom of expression, which includes— (a) freedom of the press and other media; (b) freedom to receive or impart information or ideas; (c) freedom of artistic creativity; and (d) academic freedom and freedom of scientific research. (2) The right in subsection (1) does not extend to— Chapter 2: Bill of Rights 8 (a) propaganda for war; (b) incitement of imminent violence; or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.

[2] 17. Everyone has the right, peacefully and unarmed, to assemble, to demonstrate, to picket and to present petitions.

[3] 18. Everyone has the right to freedom of association.

[4] 9. (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

[5] *Mlungwana and Others v S and Another (CCT32/18) [2018] ZACC 45.* See also *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03) [2004] ZACC 11* and *My Vote Counts NPC v Minister of Justice and Correctional Services and Another (CCT249/17) [2018] ZACC 17.*

[6] 19. Every citizen is free to make political choices, which includes the right— (a) to form a political party; (b) to participate in the activities of, or recruit members for, a political party; and (c) to campaign for a political party or cause.

[7] 36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[8] According to the 1951 UN Refugee Convention and the 1967 Protocol, a refugee is a person who has fled their country of origin 'owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.

[9] Non-refoulement is the cornerstone of international refugee law. No reservations or derogations can be made to it, other than in the case of 'a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final

judgment of a particularly serious crime, constitutes a danger to the community of that country.' (UN Refugee Convention, Article 33)

[10] Form (DHA-1590), annexed to the Regulations, must be filled in by asylum seekers to determine their ability to sustain themselves, and thus their right to work. This form requests the employment and financial status of the applicants, including their bank account details and balance; details of any financial sponsors they might have; and asks how they intend to support themselves and their dependants while their application is pending.

[11] If the right to work or study is endorsed on an asylum seeker visa, the asylum seeker must furnish the Department of Home Affairs with a letter of employment or enrolment at an educational institution within a period of 14 days from the date of the asylum seeker taking up employment or being enrolled.

[12] 10. Everyone has inherent dignity and the right to have their dignity respected and protected.

[13] 27. (1) Everyone has the right to have access to— (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

[14] *In the absence of compelling reasons, which may include hospitalisation or institutionalisation.

[15] *Scalabrini Centre, Cape Town v The Minister of Home Affairs (1107/2016) [2017] ZASCA 126 (29 September 2017).*

[16] Section 22(12) of the amended Act: The asylum seeker visa is considered abandoned after one month of expiry 'unless the asylum seeker provides, to the satisfaction of the Standing Committee, reasons that he or she was unable to present himself or herself, as required, due to hospitalisation or any other form of institutionalisation or any other compelling reason'.