LAWYERS FOR HUMAN RIGHTS

LRC Legal Resources Centre

JOINT SUBMISSIONS BY THE LEGAL RESOURCES CENTRE AND LAWYERS FOR HUMAN RIGHTS

TO THE DEPARTMENT OF HOME AFFAIRS IN RESPECT OF GREEN PAPER ON INTERNATIONAL MIGRATION IN SOUTH AFRICA, 2016

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INTRODUCTION

1. The Legal Resources Centre (hereinafter referred to as the "LRC") and Lawyers for Human Rights ("LHR") hereby submit comments and recommendations on the Green Paper on International Migration, 2016 (hereinafter referred to as the "Green Paper") as advertised in Government Gazette no 40086 dated 24 June 2016.

2. We welcome the opportunity to make these submissions and to engage with issues that pertain to the migration framework in South Africa with a particular focus on the protection of refugees and asylum seekers within our constitutional framework.

Introduction to the Legal Resources Centre and Lawyers for Human Rights

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").

5. Lawyers for Human Rights (LHR) has been providing legal services to indigent and vulnerable individuals and communities in South Africa for over 37 years. LHR has the country's largest refugee and migrant rights programme with law clinics in Johannesburg, Pretoria, Durban and Musina. We consult with between 10 000 – 15 000 clients every year in our clinics and have been at the forefront of many of the developments in refugee law since 1996.

6. In addition to general legal advice related to access to the asylum system and the rights of refugees, we also provide specialist services for immigration detainees through the Detention Monitoring Unit, persons who are at risk of being stateless as well as asylum seekers and refugees who are living with mental health issues.

Consultation Process on International Migration

7. Through the funding of the Open Society Foundation of South Africa, LRC and LHR have undertaken a series of roundtables discussing migration policy and potential changes to how migration is managed. These roundtables took place between January to June 2016 in Johannesburg, Pretoria, Mbombela, Upington, Musina, Port Elizabeth and Durban. Participants included local community members (both South African and non-national), local government, officials from the Department of Home Affairs, the South Africa Police Services As the Green Paper was planned to be released in January 2016, it was our hope that these roundtables would take place before that time. But as it happened, we had a series of very interesting conversations about migration policy and refugee protection. Those conversations have informed to large extent these submissions.

8. We also engaged in a conversation with refugee practitioners, academics and representatives from the Department of Home Affairs and the United Nation High

Commissioner for Refugees at the annual Public Interest Law Gathering held at Wits University in August 2016. In addition, an "experts' roundtable" was organised in September 2016 to discuss the proposed recommendations included in this report.

9. Comments at the regional roundtables provided interesting perspectives from a variety of actors who are interested in the field of migration. This included local municipal officials who spoke of tensions being raised in trading relationships due more to a lack of proper spatial planning than immigration status. Interestingly, the municipal officials that we spoke to expressed no concern with the ability of non-nationals to work and trade in communities. They were more concerned about a lack of policy regarding the distribution of trading places in township areas.

10. We are confident that the recommendations in this report reflect many of the concerns and feelings expressed in this extensive civil society consultation process about the Green Paper, both its good aspects as well as those that we propose should be reviewed.

EXECUTIVE SUMMARY

11. Lawyers for Human Rights (LHR) and the Legal Resources Centre (LRC) are pleased to take this opportunity to present our submissions on the Green Paper on International Migration which was released for public comment on 24 June 2016.

12. We are also happy to note that the Green Paper deals with migration in a holistic manner by including both issues of immigration, emigration and asylum within a single policy. We support this approach as it will ensure that each of the systems are able to interconnect and deal with successes and shortcomings in a holistic manner.

13. We further note, however, that the current asylum protection system is in crisis and is effectively non-functional. This is partly due to large numbers accessing the system, however the problems experienced go far beyond numbers. They are also indicative of a lack of capacity within the Department to deal effectively and efficiently with claims for asylum, a lack of resources to allow departmental officials to conduct their work independently and fairly as well as widespread and endemic corruption. This corruption occurs mainly at the refugee reception offices, but also with the South African Police Services and immigration officials. We were disappointed to see that there is no effective plan for dealing with corruption in the Green Paper.

14. At the Civil Society Dialogue hosted by the Minister of Home Affairs on 16 September 2016, the organisers took the unfortunate view that current problems within the asylum system are irrelevant to submissions relating to the Green Paper. With respect, we disagree with this position. The failings of the current system, as outlined further in these submissions, will undoubtedly affect any future policy implementation unless steps are taken to deal with lack of skills, poor resources and corruption. We trust that our submissions in this regard will be considered in this light.

15. Both the LRC and LHR were involved in the previous public consultations which led to the 1999 White Paper on International Migration. We welcome this opportunity to again contribute. Our submissions will be centred around the following 12 principal recommendations.

    1. ***Halting the introduction of new migration – related legislation until the Green Paper / White Paper policy process has been completed. This would include the suspension of the Refugee Amendment Bill, 2016.***

    2. ***Including a chapter in the White Paper on combatting corruption within the Department of Home Affairs, and particularly in the asylum system.***

    3. ***Including in Chapter 5 of the Green Paper specific policy guidelines to increase the skills capacity within the Department of Home Affairs, particularly with refugee status determination ("RSD") procedures and the constitutional right to just administrative action. Of particular importance is the allocation of resources (such as information databases, etc.) to improve knowledge of best practice for RSD and up to date country of origin information.***

    4. ***Referencing the case-law which has been developed over the past 20 years of constitutional litigation in the field of migration, including how the risk-based approach to visa adjudications will be in line with the requirements of Dawood and others v Minister of Home Affairs and others (CC); how a blanket detention policy will comply with the findings in Ulde v Minister of Home Affairs and others (SCA); and the use of human dignity to ground the right to work and trade in Watchenuka and others v Minister of Home Affairs (SCA) and Somali Association of South Africa and others v Limpopo***

Department of Economic Development, Environment and Tourism and others (SCA).

5. ***Issuing annual statistical reports on the migration system (including both immigration <u>and</u> asylum statistics) with an accompanying baseline survey and impact assessment report in order to measure the effectiveness of policy changes in meeting the stated goals and objectives of the new migration policy.***

6. ***Ensuring further alignment with the stated goals of the African Union's Agenda 2063 goals of freer travel in on the continent for African citizens, including visa-free travel and long-term visas. This would include addressing issues of potential "brain-drain" from other regions, increased mobility of benefits to encourage settlement in countries with fewer skilled workers and regional professional bodies to recognize qualifications in other jurisdictions.***

7. ***Expanding further on the policy guidelines regarding SADC visas for work, trade and SME's with more details regarding length of stay, requirements to apply, which countries' nationals would be eligible as well as other details. The Department should also review the delinking of permanent residence from such visas in order to avoid the pitfalls of "guestworker programmes" which create instability within migrant communities and may be reminiscent of labour migration schemes from the pre-democratic era.***

8. ***Encouraging the participation of ex-residents of South Africa as well as South African expatriates in promoting the country abroad.***

9. ***Removing provisions relating to exclusions and restrictions on the rights of refugees to travel.***

10. ***Removing the automatic detention of asylum seekers at border processing centres along the borderline. Any provisions relating to the automatic detention of a class of persons will like not meet constitutional muster under sections 9(3), 12(1) and 35(2) of the Constitution of the Republic of South Africa, 1996. Asylum processing should be reconsidered in terms of South Africa's obligations under the 1951 Convention Relating to the Status of Refugees and its Protocol, the 1969 OAU Convention Governing Certain Aspects of Refugee Protection in Africa, the Basic Agreement of 1993 and the adoption of the urban protection policy to ensure that asylum seekers and recognized refugees have access to asylum protection in urban centres throughout South Africa.***

11. ***Similarly, delinking of permanent residence for recognized refugees is irrational and a regression of Article 34 of the 1951 Convention Relating to the Status of Refugees which encourages states toward naturalization of refugees who are unable to voluntarily repatriate.***

12. ***Ensuring that the right to work for asylum seekers is considered through the lens of the Constitution, and particularly ensuring that the right to human dignity is upheld. Automatic detention provisions are an inherent violation of the right to human dignity, even where accommodation and food are provided, and will likely not meet the requirements of proportionality under the limitations clause under section 36 of the Constitution.***

16. We welcome the statement in the Green Paper as well as by the Minister at the Civil Society Dialogue that provisions which are inconsistent with the Constitution will not be included in the White Paper. We have noted a lack of examination of the

Constitution in the Green Paper and we hope that our submissions will assist with filling that gap.

17. We are concerned that there has been inadequate access to public consultations for communities located outside of Gauteng province, particularly those in Cape Town and Durban where no dialogue sessions were provided. As such, LHR and the LRC have attempted to disseminate the information in the Green Paper to those areas in order to ensure fuller participation. We would recommend that additional time be granted for written submissions to be filed in order to ensure that interested parties from outside of Gauteng who have not had the same access to information or consultation processes will be able to send their written submissions.

18. However, we trust that although the written submissions are due by the end of September, this will not be the end of the consultative process. We look forward to working with officials from the Ministry and Department of Home Affairs while they draft the White Paper for presentation to Cabinet. If we can be of assistance in any way, we remain at your disposal.

COMMENTS ON THE DEFINITIONS

19. We would like to make some comments on the definitions as included in the Green Paper:

"Family reunion / family reunification migrants"

20. This term is not a legal term in our legislation and its origin is unknown. However, any reference to family reunification should take into account the principle of family unity which is provided for Recommendation B contained in the Final Act of the Conference of Plenipotentiaries which adopted the 1951 UN Convention Relating to the Status of Refugees and forms part of the principles of refugee protection. At present there is no formal process to ensure family reunification and, instead,

numerous barriers have been erected to joining files of family members under section 3(c) of the Refugees Act.

"Irregular migrants (or undocumented / illegal migrants)"

21. This term would also imply those persons who have "overstayed" or remained in the Republic beyond the expiry of their visas and become illegal foreigners in terms of the Immigration Act. However, it must be noted that the term "overstay" does not apply to the field of refugee law. Whereas a holder of an asylum seeker or recognised refugee permit may be found guilty of an offence by not abiding by a condition of his or her permit (by failing to renew on time), this does not make the holder an "illegal foreigner" under the Immigration Act and subject to deportation. Only those persons whose asylum application has been finally adjudicated may be dealt with in terms of the Immigration Act.

22. We are concerned that the provisions of the Refugee Amendment Bill which provides for the closure of dormant files unless the holder of the permit can prove that he or she was institutionalised or hospitalised may be unfair as it does not take into consideration other reasons for not renewing permits, such as corruption by officials at the refugee reception office.

"Naturalization"

23. It should be noted that naturalisation must be a *voluntary* act on the part of the individual concerned.

"Refugee"

24. We note that only the definition as reflected in section 3(a) of the Refugees Act is included in the definition of a refugee. This reflects only the 1951 UN Convention definition. The definition should be expanded to include the 1969 OAU definition under section 3(b) of the Refugees Act as well as section 3(c) of the Refugees Act which provides for dependents of refugees.

25. We further note the difficulties that dependents currently have in accessing section 3(c) claims under the Refugees Act. It should be made clear in policy that the principle of family unity is an important principle recognised in South African law and that it is in the interests of the family insofar as it is possible to have the same status. We further submit that it is not in the best interests of the child to have a different status than his or her parents. We are concerned that the Refugee Amendment Bill indicates that this new policy will narrow the definition of a dependent to exclude children adopted in South Africa or marriages conducted in South Africa.

26. We also note paragraph 28 of the 2011 UNHCR Handbook on Refugee Protection which states:

> ***28. A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.***[1]

27. Therefore, many asylum seekers are already refugees while their status is being official determined. Refugee status is a declaratory status from the moment one crosses an international boundary due to persecution under the definitions in section 3 of the Refugees Act. Strict differentiation of treatment between asylum seekers and refugees may therefore be inappropriate (such as detention measures). While it is recognised that many people applying for refugee status do not meet the criteria of a refugee in terms of the Act or international conventions, the assumption of "abuse" by such persons is firstly, unfounded as will be explained below, but is secondly, unfairly treating asylum seekers who may qualify for refugee status. Explicitly removing asylum seekers from "integration programmes"[2] is unhelpful in

[1] UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (2011), p. 9
[2] Green Paper, p. 71

determining the level of treatment provided by the Constitution and international law.

"Resettlement"

28. It should be noted that the term "relocation" is often used by practitioners to relocate someone *within* South Africa as a means for protection from danger where resettlement may not be an option.

"Xenophobia"

29. We agree with the expanded definition and recognition of the presence of xenophobia within South African society. We also agree that often xenophobic tendencies (including violence) are based on perceptions rather than fact.

Definitions not listed in the Green Paper

30. We note that there are certain definitions which have not been listed in the Green Paper which may guide future policy makers and legislators when creating migration law and policy:

"Children / Minor"

31. We note that there is no mention of children in the Green Paper or their special vulnerabilities as persons on the move. We understand that other submissions will be made in this regard, however we recommend that a definition be included in the Green Paper regarding children / minors which is in line with section 28 of the Constitution of the Republic of South Africa, 1996 and makes reference to the UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. This is particularly important where decisions must be made in the best interests of the child in terms of our constitution and international law.

32. In formulating policy relating to minors and children a number of considerations have to be kept in mind. Below we list a few of the considerations that came out of our consultation process:

32.1. Undocumented minors are unable to access schooling and health care since they are reliant on their parents' documentation, and challenges exist in ensuring minors to provide correct details about birth date and country of birth to social workers, due to either lack of pre-existing records or knowledge of parents, or due to fear of deportation and a mistrust of officials. In some cases, refugees and asylum seekers are forced to marry South Africans in order to become documented, and these power dynamics result in abuse.

32.2. Stakeholders have voiced frustration at a failure of public agencies to observe the Children's Act, resulting in minors being detained in police stations and correctional centres instead of being taken into the custody of the State.

32.3. Universal birth registration of all children born in and entering South Africa is further necessary, irrespective of nationality or legal status of the parents, since there is also no formal registration system for minors entering South Africa, and therefore no way of knowing the number of unaccompanied or separated minors in the Republic. Lack of documentation results in later problems when children pass through foster care and are removed from the system at the age of 18. It is therefore difficult to offer protection to these children, particularly because their access to due rights are interlinked with documentation. Lack of access is further exacerbated by travel required to access specific offices, since the Department of Social Development does not fund this type of travel.

"Human Smuggling / Human Trafficking"

33. These terms are all too often used interchangeably, but they do have separate definitions. We recommend that the definitions should be aligned with the definition in the Prevention and Combatting of Trafficking in Persons Act 7 of 2013 to note that human trafficking has an added element of exploitation during the transits and upon arrival in the destination country. While both are considered offences, the victims of trafficking may need extra support (both legally and psycho-socially) when interacting with state officials.

"International Obligations"

34. While state sovereignty is the cornerstone of international law, South Africa's sovereignty is exercised through the Constitution of the Republic of South Africa, 1996 which provides that international agreements are applicable within the Republic under section 231 after approval by the legislative branch.

35. Section 232 of the Constitution provides that international customary law is automatically applicable in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

36. Section 233 states the following:

> ***233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.***

37. In order to avoid any inconsistencies with international law, we recommend that a definition be inserted to define international obligations. This would include a definition that refers t to "the collection of relevant Conventions, agreements and declarations to which the Republic has agreed to be bound" through the

Constitution. Specific mention may be made to the relevant conventions included in Section 6(1) of the Refugees Act.

"Statelessness"

38. Although stateless persons are not necessarily migrants, they are often treated as such at least during the initial adjudications relating to the reason for statelessness. The definition of statelessness should be in line with international law such as the Statelessness Conventions which South Africa has signed but not yet ratified. One principle of international law is that states may not act against the spirit of a Convention which they have signed, even if it has not been ratified or brought into operation.

39. The documentation of stateless children is an issue of concern. Countries predominantly pass on nationality through parentage, children born to stateless parents are one of the most rapidly sources of statelessness, due to the inability of the birth of children to be registered in their country of origin. Children also become stateless when abandoned or separated from their families, and their nationality cannot be ascertained due to lack of birth certificate. There have been reports of the frontline staff at the Department of Home Affairs refusing to register births if children born to refugees in South Africa. There are also hindrances in undocumented parents being unable to register the births of their children.

RECOMMENDATIONS ON MIGRATION MANAGEMENT

A Halt to Proposed Legislation

1. ***Halting the introduction of new migration – related legislation until the Green Paper / White Paper policy process has been completed. This would include the suspension of the Refugee Amendment Bill, 2016.***

40. LRC and LHR were invited, with a number of other civil society organisations, to attend the Colloquium hosted by the Minister of Home Affairs at Kievits Kroon in June / July 2015. During that roundtable, there was a presentation of a new approach to migration management and a timeline was presented for the presentation of a new Green Paper on International Migration.

41. In order to participate in this process, a number of organisations began to organise discussions and projects to feed into submissions into this process. This was all the more important considering the xenophobic violence which had just been experienced in KwaZulu-Natal and Gauteng that year.

42. We were surprised, however, when new legislation was introduced regarding migration, not the least of which was the Refugee Amendment Bill, 2015 which in fact provided for whole scale changes to the asylum system. This included removal of the right to work from asylum seekers, narrowing of the definition of a dependent, additional exclusion and cessation clauses not provided for in the 1951 Convention and discretion given to the Director-General to require asylum seekers to report to particular refugee reception offices. The public consultation process was extremely short and required organisations to make submissions within a relatively short period of time.[3]

43. In the meantime, additional pieces of legislation were also introduced, including the Border Management Agency Bill, 2015, and the Employment Services Act 4 of 2014 was brought into operation. It was difficult to locate these bills and new laws within the Green Paper process as we had been promised extensive consultation.

44. It seems clear that many of the changes introduced in to the Refugee Amendment Bill are the very policy changes which have been suggested in the Green Paper. However, this has been done outside of the Green Paper consultation process. This

[3] Our submissions are available on our websites but can be provided to you upon request.

quite naturally raises the concern that the consultation process risks being perceived as a "ticking the box" exercise.

45. It should be noted that the changes in the Refugee Amendment Bill in particular are sweeping changes which will change the nature of refugee protection in South Africa. The requirement of asylum seekers to declare their ability to provide for themselves or rely on the UNHCR and its implementing partners is a copy of some of the worst practices from Europe, including Denmark's attempt to seize property from asylum seekers crossing its borders.[4] The removal of the right to work with a "letter of employment" seems to also be an attempt to circumvent the findings of courts in the *Watchenuka* and *Somali Association of South Africa* ("Limpopo Traders") cases cited below.

46. In order to lend credibility to this process and ensure that South Africa future migration policy is compliant with the Constitution and international law, thereby reducing the necessity for needless and expensive litigation, we recommend that the Refugee Amendment Bill be suspended from further deliberations in Parliament until Cabinet has had an opportunity to study the White Paper and approve its content. We further recommend that further systemic changes to the migration system, including changes to the Immigration Act, its regulations and the Border Management Bill, should equally be suspended until the White Paper process has been completed.

47. As stated numerous times during the public consultation process for the Green Paper, the current asylum system is in crisis and is all but dysfunctional. Of particular concern is the backlog caused by the current failure to compose the Refugee Appeal Board. We recommend that those changes can proceed in order to ensure the right to just administrative action under the Promotion of Administrative Justice Act no 3 of 2000. However, the introduction of sweeping changes to the

[4] See: http://www.aljazeera.com/news/2016/01/danish-mps-vote-seizing-valuables-refugees-160126055035636.html (Accessed 30 September 2016)

asylum and migration systems before the White Paper has been approved will likely lead to a lack of credibility in the public consultation process.

Chapter on Counter Corruption

2. Including a chapter in the White Paper on combatting corruption within the Department of Home Affairs, and particularly in the asylum system.

48. No single issue has affected access to the migration system (including both immigration and asylum) than corruption. It is unfortunately omnipresent and a daily experience of non-nationals (and, of course, nationals) in South Africa.

49. It should be mentioned that this is not only a problem with the Department of Home Affairs, but pervades the public and private sectors of South Africa's economy. While a holistic approach to migration management is a laudable goal, we would recommend that a holistic approach to fighting corruption is equally important.

50. In the 2015 report entitled "Queue Here for Corruption," LHR and the African Centre for Migration and Society (ACMS) based at the University of the Witwatersrand conducted a survey of 928 asylum seekers and refugees at the country's five refugee reception offices. This survey demonstrated the pervasiveness of corruption within the asylum system:

    50.1. In total, approximately 20% of respondents nationally had experienced corruption (been asked to pay money for free services) in the queue. This number shot up to 51% in the queues at Marabastad;

    50.2. Nationally, 13% of respondents had experienced corruption within the RRO. Again, this was worse at Marabastad with 31% experiencing corruption.

    50.3. And 13% of respondents had been asked to pay to an official at the border.[5]

[5] Queue Here for Corruption Report (LHR and ACMS), p. 3 – 4

51. Clearly with corruption playing such an important role in accessing the refugee reception offices (including over half of respondents from the Marabastad office), there is a need to deal with the issue head on.

52. We appreciate the changes that have been introduced at the Marabastad Refugee Reception Office in order to reduce the incidents of corruption as well as the recently reported arrests of 109 Home Affairs officials who have been implicated in corrupt activities.[6] However, this shows how corruption has become endemic and loopholes are soon found in the system. A complacent attitude toward fighting corruption will simply allow it to resurface again. One of the key findings of the report is as follows:

> *"These examples show that although the DHA has at time responded to individual allegations of corruption, it has avoided conducting broader investigations, leaving its efforts largely reactive.* ***The focus on specific individuals in the absence of broader efforts to target corruption has done little to alleviate the structural problem, allowing corruption to flourish even as certain corrupt individuals are rooted out****."*[7]

53. The examples referred to above were regarding efforts by LHR and other partners such as the Scalabrini Centre, to work with the Department's Counter-Corruption Unit. Our experience has been that the burden is often shifted to our clients in order to prove the allegations of corruption with little support or assistance from the Department. While individuals within the Department may take complaints seriously, investigations are often haphazard and amateurish, leading to gaps which may be exploited by defence attorneys or disciplinary committees. We have also

[6] News24 report, "'Arrest them!' shout bystanders as Hawks raid home affairs office": http://www.news24.com/SouthAfrica/News/arrest-them-shout-bystanders-as-hawks-raid-home-affairs-office-20160929 (Accessed 30 Sept 2016)

[7] Queue Here for Corruption Report, p. 22

experienced reprisals against our clients for reporting corruption including lost files, failure to adjudicate and threatening language used against them. In this environment, it is little wonder that clients often feel discouraged from reporting corruption to aggressive officials within the Department.

54. The Prevention and Combatting of Corrupt Activities Act no 12 of 2004 does provide that an offence is committed both by the "corruptor" and the "corruptee" in the corrupt transaction. However, it is also important to note that asylum seekers and refugees are a particularly vulnerable group[8] and the power lies with Home Affairs officials. This must be recognised when creating a policy which will tackle corruption.

55. A specific chapter will also clearly put counter corruption measures at the heart of any new policy. For example, we note the call for the creation of "security envelopes" around "people, facilities and systems" from criminal syndicates.[9] This should be expanded to include counter corruption measures as part of the facilitation of services for clients and the risk-based methodology approach in visa adjudications.

56. We do not agree that simply detaining asylum seekers will reduce the incidents of corruption. LRC and LHR have been present and working with detainees in the Lindela Holding Facility for over 15 years. Unfortunately, corruption remains rampant in that institution as well. We are concerned that the creation of another detention facility outside of the jurisdiction of any oversight mechanism will lead to further corruption.

57. Lastly, it should be noted that the criticism of the current system particularly with regards to corruption is in order to ensure that any new policy is not bogged down

[8] Union of Refugee Women and others v Director: Private Security Industry Regulatory Authority and others 2007 (4) SA 395 (CC)

[9] Green Paper, p. 34

with the same issues. Lessons must be learnt from the breakdown of the current system in order to prevent the same practices from seeping into any new systems or policy. By emphasizing a particular chapter on counter-corruption, it will allow an engaged debate to take place and ensure that corruption is tackled dead on rather than as a secondary problem.

Increasing the Skills Capacity within the Department of Home Affairs and Other Departments

3. ***Including in Chapter 5 of the Green Paper specific policy guidelines to increase the skills capacity within the Department of Home Affairs, particularly with refugee status determination ("RSD") procedures and the constitutional right to just administrative action. Of particular importance is the allocation of resources (such as information databases, etc.) to improve knowledge of best practice for RSD and up to date country of origin information.***

58. Another legacy issue which needs to be dealt with head-on is the lack of skills within the Department of Home Affairs. An example of this is the low quality of decisions by refugee status determination officers ("RSDOs") in rendering asylum decisions. In this regarding, the reported 96% rejection rate[10] cannot be depended upon as a ground for policy development where the decisions do not meet the basic constitutional requirement of just administrative action.[11]

59. Firstly, it must be stated that not all RSDO's produce the same quality of work. There are many who take their job seriously and attempt to make independent decisions based off of the most up-to-date country of origin information available to them. However, they work within an environment of lack of adequate resources (such as current country of origin information), specific tools (such as standardized credibility assessment tools) and under pressure to produce a high number of

[10] DHA's presentation to the Home Affairs Portfolio Committee in Parliament in March 2015
[11] Section 33 of the Constitution of the Republic of South Africa, 1996

decisions per day. This is not conducive to encouraging a proper adjudication of refugee status determinations.

60. Secondly, much of the pressure appears to emanate from management which tends to repeat messages such as "over 90% of the applicants are abusing the system" and distinguishing between "economic migrants" and "genuine refugees". These messages also send clear expectations to RSDO's that the default position is to reject.

61. Similar messages are sent to the Refugee Appeal Board which, at the time of writing, is not properly composed in terms of section 13 of the Refugees Act and is therefore not able to adjudicate any appeals. This is increasing the potential backlog which will again limit members' ability to deal individually with each claim.

62. Unfortunately, however, there are also those examples of poor quality decision-making from the RSDO's at refugee reception offices. The fact that the Musina Refugee Reception Office had a 0% acceptance rate in 2015 is evidenced of a failure to take proper decisions.

63. On average, the international rate of approval of asylum applications is 38 percent; in 2011, South Africa approved only 15.5 percent of all applications.[12] In 2015, it was only 4%.[13] The South African asylum system is overwhelmed, as well as unforgiving, but this is not for the reasons that the DHA asserts – *"The reality is that about 90% of applicants do not qualify as refugees but are seeking work or business opportunities."*[14]

64. This oft-cited statistic is inaccurate for a few reasons, not least because it fails to

[12] Siegfried, Kristy. "South Africa's Flawed Asylum System." *IRIN News.* 30 April 2013. Accessed 18/7/2016. http://www.irinnews.org/analysis/2013/04/30.

[13] DHA Powerpoint Presentation to Parliament, March 2016 (Accessed through the Parliamentary Monitoring Group)

[14] Green Paper 12

consider the number of asylum-seekers in appeal proceedings. Moreover, for the DHA's statistic to be valid, the current asylum system would need to be robust enough to preclude the possibility of wrongful rejections of asylum-seekers. But the reality is that, in the current system, many asylum-seekers are rejected by Refugee Status Determination Officers (hereinafter referred to as "RSDOs") on invalid grounds; this malpractice makes us question the DHA's assurance in dismissing the vast majority of asylum claims.

65. Roni Amit found, in stark contrast to the DHA's figure, that less than 50 percent of respondents *"listed economic factors as their sole motivation for flight"*[15] and that slightly less than 50 percent of respondents *"did not cite economic reasons at all as a reason for flight*[16]

66. The caseload of RSDOs is unreasonably large, but this does not excuse a single rejection based on misapplication of refugee law, ignorance of the conditions of an asylum-seeker's country of origin, or generalizations about asylum-seekers of the same nationality. And yet, as Amit found when she investigated hundreds of RSDOs for her report "All Roads Lead to Rejection":

> ***Refugee status determination officers incorrectly deployed refugee law and failed to consider the details of individual claims as required in a properly administered status determination process. The result is a bureaucracy that mass produces rejection letters without any evidence of a reasoned decision-making process.***[17]

[15] Amit, Roni. "No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices." *African Centre for Migration & Society.* September 2012. p.9.

[16] "No Way In" 28

[17] Amit, Roni. "All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination." *African Centre for Migration & Society.* June 2012. Accessed 11 July 2016. http://www.lhr.org.za/sites/lhr.org.za/files/all_roads_lead_to_rejection_research_report.pdf. p.18.

67. Our experience has corroborated Amit's research. For instance, we have seen RSDOs fail to comply with UNHCR guidelines by rejecting clients with gender-based claims, who have suffered rape or persecution because of their sexuality on the grounds that their persecution was not politically motivated, or that they were not in danger of facing future persecution. We include below an excerpt from the rejection notice issued to one of our clients, an asylum-seeker from Uganda. We do not purport to know all the factors that influenced the RSDO to reject her asylum application. But the abysmal standard of the grammar and writing style and the subjectivity of the RSDO's decision demonstrate the carelessness and lack of understanding of the context of the client's claim that are currently rampant in the system:

> ***"WHAT HAPPENED TO YOU?...Nothing happen to her. But you claim your partner was killed by people and nothing happen to you and I do not understanding. She ran to her uncle to safe herself?...Why did not apply for protection in Kenya? She did not want to apply for asylum there. What do you want here in RSA? She wanted to be a lesbian."***
>
> ***Your fear is unfounded. There were no series of incidents that led you to believe that your life was in danger. You claim that you hides yourself in your uncle's place for four days without being harassed/killed to me that shows that they were not interested in you. Obvious rumors would tell them where you are hiding? You failed to demonstrated that you need international protection and there are no reasonable threat to your life."***

68. If an asylum-seeker tells an RSDO in his interview that he or she came to South Africa to search for work or a better life, many RSDOs will automatically stop questioning him or her, label the applicant as an 'economic migrant,' and assume that he or she is not protected by the Refugee Convention. When an RSDO fails to consider the context of the applicant's claim, he/she not only violates UNHCR guidelines, but also ignores the reality that the distinction between 'refugees' and

'economic migrants' is often blurred. As the UNHCR points out in its Handbook, a repressive regime may be responsible for systemic poverty; religious, political, and racial factors – grounds for asylum – may affect someone's livelihood[18]; an economic policy so oppressive that it "threatens a person's ability to survive,"[19] may constitute persecution. This confluence of factors can 'push' asylum-seekers to flee their homes, which further complicates the narrative that so-called 'economic migrants' come to South Africa solely because of 'pull' factors, such as a stronger economy.

69. We have seen this malpractice particularly affect asylum-seekers from Zimbabwe, whom the DHA casts as economic migrants in the Green Paper. In Zimbabwe, even those who are not outright opponents to ZANU-PF may face persecution or may be deprived of food or other services. In *RT and others v Secretary of State for the Home Department,* the U.K. Supreme Court explained:

> ***"… those at risk are not simply those who are seen to be supporters of the MDC but anyone who cannot demonstrate positive support for ZANU-PF or alignment with the regime…The risk of not being able to demonstrate loyalty to the regime exists throughout the country, in both urban and rural areas."***[20]

70. But the DHA, wishing to curb the number of Zimbabwean arrivals to South Africa, ignores the fact that there is no limit on the number of people that can meet the standard of persecution for the same harm, and ***"categorises Zimbabweans as economic migrants [and] insists that the high numbers of asylum applications indicate 'abuse' of the system by 'economic migrants.' This attitude has resulted in a bias against all asylum seekers that assumes, without investigation, that only a***

[18] Foster, Michelle. *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation.* Cambridge, U.K.: Cambridge UP, 2007. Print. p.13.

[19] Foster 127

[20] *RT (Zimbabwe) and others (Respondents) v Secretary of State for the Home Department (Appellant); KM (Zimbabwe) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2012] UKSC 38; 2 at para 6, and 7 at para 16.

very small minority of claims are bona fide."[21]

71. Our own courts have also looked at the low quality of refugee status determination and the need for judicial intervention. In *Tshiyombo*,[22] the court stated the following:

> ***"It is plain that there is a systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated judicial admonitions, to comply with its legal obligations in matters in which its decisions are taken on judicial review. The consequences prejudice not only the proper administration of justice, but also the effective administration of the Refugees Act. Courts are frequently called upon to make, and it would appear from the cases cited to me by Ms Harvey,[12] frequently do make substitutive decisions determining the refugee status of applicants in judicial review matters. This might be just and equitable in given cases, but it is far from ideal."***[23]

72. Asylum-seekers face other obstacles at RROs that force us to question the validity of the DHA's picture of the asylum system as being overrun by 'bogus' asylum-seekers. The DHA professes that asylum-seekers can renew their permits at any RRO, but in practice, DHA officials order asylum-seekers to renew their documents at the RRO where they initially applied. Yet even after traveling for hours to their RRO of entry, asylum-seekers report that RROs fail to renew or issue their documents on the same day, if at all; this forces many asylum-seekers to spend the night, or multiple nights, sleeping outside.

[21] "All Roads" 20
[22] Tshiyombo, 2016(4) SA 469 (WCC)
[23] Tshiyombo, para

73. Amit has found that while RROs have improved the assistance they provide to asylum-seekers on completing their asylum applications, many asylum-seekers reported confusion over the asylum process, and around 50 percent of surveyed asylum-seekers reported that their RSDO failed to explain the interview process before it began.[24] Asylum-seekers also reported confusion about the appeals process and faulty interpretation (although we are happy to see the number of interpreters at RROs has increased).

74. Moreover, we are very concerned that RSDOs spend, on average, a mere 17 minutes interviewing each applicant: in Amit's survey, "*51 percent of status determination interviews lasted less than 15 minutes"*[25] and sixteen percent of respondents reported an interview time of five minutes or less.[26] It is highly unlikely that an RSDO could fairly evaluate an asylum-seeker's claim in such a short amount of time. We are also troubled by the practice of same day adjudication that forces asylum-seekers to have their RSDO interview and receive their decision on the same day that they apply for asylum.[27] This process endangers asylum-seekers' rights to procedural fairness, and exacerbates asylum-seekers' confusion about the asylum process.

74.1. The corruption at RROs that asylum-seekers, journalists, DHA officials, and many human rights organisations, including People Against Suffering Oppression and Poverty (PASSOP),[28] have observed further undermines the DHA's credibility, and thus, their insistence that the majority of asylum claims are not genuine. In the long queues outside RROs, physical and verbal harassment, as well as theft and extortion, are common.[29] In her study for the African Centre for Migration & Society, "No Way In," Roni Amit found that

[24] "No Way In" 12
[25] "All Roads" 12
[26] "No Way In" 68
[27] "No Way In" 60
[28] *Ibid*
[29] "No Way In" 41-42

more than 30 percent of respondents had been forced to pay DHA officials to avoid detention or arrest.[30] An interpreter at the Pretoria RRO confirmed that it was common for officials to demand bribes to approve asylum applications or renew asylum permits.[31]

75. Unfortunately, this situation will not be improved in any new policy which does not provide for a wholescale change in the way that RSDO's see their work. These are, again, legacy issues that if ignored will lead to a failure of the new policy. We are concerned, for example, that the move to the borderline will decrease the capacity of RSDO's even further to make quality decisions due to:

    75.1. A lack of oversight by NGO's, Chapter 9 institutions and other service providers who provide services to rejected asylum seekers;

    75.2. A lack of access to services will mean that representation before review bodies such as the Refugee Appeal Board (or Refugee Appeal Authority) and the Standing Committee for Refugee Affairs will be reduced. This will also limit the number of judicial review cases before the High Courts which act as a buffer for unconstitutional decision-making, but also provide an opportunity to create jurisprudence which is based on South African law and experience and not on examples from Europe, Canada or New Zealand; and

    75.3. As stated above, a move away from urban centres will likely reduce the number of experienced RSDO's willing to uproot themselves and their families to rural border areas with fewer opportunities for themselves and their families.

76. We are also concerned that the new "risk-based approach" will have to be conducted ensuring that constitutional right to just administrative action and the

[30] "No Way In" 13
[31] Siegfried

Promotion of Administrative Justice Act no 3 of 2000 ("PAJA") are both fully complied with. This will require adequate training on lawful decision-making and the rendering of adequate reasons, particularly in terms of section 8(3) of the Immigration Act. The constitution guidelines provided through case-law will be dealt with in the next section.

77. We note, however, the Department of Home Affairs officials are only present in only 30 of the 124 South African missions around the world.[32] This will also require training of officials from other departments, such as the Department of International Relations and Cooperation (DIRCO) and their frontline local staff.

78. Plans (and requirements) for training should be included in Chapter 5 of the Green Paper in order to ensure that training forms part of the plan of action for the new policy, that it becomes a measurable outcome to gauge whether the new policy is being effectively implemented and that it forms part of the costing which will inevitably form part of the White Paper / legislative process.

Referencing Constitutional Case Law

4. *Referencing the case-law which has been developed over the past 20 years of constitutional litigation in the field of migration.*

79. On page 16 of the Green Paper, there is a list of the constitutional principles which frame the vision of the new migration policy and "must be understood in context and in the spirit of the Constitution in order to enable the country to manage international migration strategically and securely."[33] This list, however, is incomplete and rather heavy on the security aspects of the Constitution and does not list key human rights provision such as:

79.1. The right to equality (section 9);

79.2. The right to human dignity (section 10);

[32] Green Paper, p. 32
[33] Green Paper, p. 16

79.3. The right to security of the person (section 12(1));

79.4. The right to privacy (section 14);

79.5. The right to fair labour practices (section 23(1)):

79.6. The right to just administrative action (section 33);

79.7. The right to access courts (section 34).

80. Or other constitutional provisions relating to the application of international law within South Africa, such as section 232 which requires the application of customary law in South Africa as cited above.

81. Also absent is a reference to the preamble of the Constitution which begins with:

"We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity."

82. It is generally recognised that the last line also refers to the contributions made by non-nationals who live in South Africa and contribute to its growth, security and development. Unfortunately, some of the provisions of the Green Paper (such as blanket detention provisions, the restriction of permanent residence from low-skilled migrant workers and removing the certification process from refugees) are clearly contrary to these principles.

83. Considering that broad migration was not part of the *apartheid* era's mindset which promoted racially biased policies based on white immigration and abusive black migrant labour,[34] it is not surprising that our new constitutional dispensation provided opportunities for the courts to pronounce on certain key issues relating to

[34] Green Paper, p. 20 - 21

migration. We have come a long way from the Department of Home Affairs insisting that the Bill of Rights should not apply to non-citizens within South Africa.[35] We now recognise the importance that the Bill of Rights and the Constitution plays in the protection of everyone's right in South Africa, but also in defining the scope and limitations of migration law.

84. For this reason, it was surprising that there was no analysis of existing jurisprudence in the Green Paper as a means defining specific interventions and ensuring that they will be constitutionally compliant. In what follows, we will describe some of the case-law that is relevant to specific aspects of the Green Paper, but we would encourage the Department to consider relevant judgments in each of the areas of the Green Paper to ensure that they will comply with the Constitution. This will promote the Minister's view that unconstitutional provisions will not be included in the White Paper.

Discretion and the Risk-Based Approach

85. In the past, much discretion was given to officials to determine who could enter South Africa and under what conditions. This was particularly true when it came to applications for permanent residence and the ability of non-national spouses to remain in South Africa during the application process.

86. This discretion was addressed by the courts in the matter of *Dawood and another v Minister of Home Affairs and others*[36] in which the right of non-national spouses to remain in South Africa during the application process was considered in light of the right to human dignity under section 10 of the Constitution.

[35] Lawyers for Human Rights and another v Minister of Home Affair and others 2004 (4) SA 125 (CC), and Abdi and another v Minister of Home Affairs and others 2011 (3) SA 37 (SCA)

[36] Dawood and another v Minister of Home Affairs and others; Shalabi and another v Minister of Home Affairs and others; Thomas and another v Minister of Home Affairs and others 2000 (3) SA 936 (CC)

87. In *Dawood*, the Constitutional Court looked at the discretion that was given to the regional immigration committee under the Aliens Control Act to grant non-national spouses a permit to remain in South Africa pending the outcome of an application for permanent residence based on the spousal relationship. The Act at the time required that such applications must be made from outside of South Africa.

88. The Court looked at the provisions and found that there were no guidelines given to the committee to determine when a temporary permit should be issued to the spouse or not. At paragraph 47, the Court stated the following:

> ***"[47] It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires that limitations of rights may be justifiable only if they are authorised by a law of general application. Moreover, if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision … If rights are to be infringed without redress, the very purposes of the Constitution are defeated."***

89. The Court went on to say that the protection of rights was an equal responsibility between the three branches of government and that the right to review did not relieve the legislature or the executive from ensuring that legislation was lawful and upheld the principles of the Constitution.

90. However, the Court recognised that there will be times when a temporary permit (visa under the current legislation) could be legitimately denied to a non-national spouse:

> ***"[49] There will be circumstances in which there are constitutionally acceptable reasons for refusing the grant or extension of a temporary residence permit but those circumstances are not identified at all in the Act. An obvious example one can think of is where the foreign spouse has been convicted of serious criminal offences that suggest that his or her continued presence in South Africa even under a temporary residence permit would place members of the public at risk … These are examples only. It is for the***

legislature, in the first place, to identify the policy considerations that would render a refusal of a temporary permit justifiable."[37]

91. The concern is that the "risk-based approach" may violate this interpretation of the Constitution by not providing sufficient grounds for an official to understand what factors must be taken into consideration when adjudicating a visa application. It will also make it impossible for the public to know how to comply with the requirements for a visa if the factors which are taken into consideration are not known.

92. We recommend therefore that any referral to a "risk-based approach" in visa adjudications must be clear in law and policy. The grounds when using this approach should made very clear in order to comply with the *Dawood* judgment. Unfortunately, due to the limited amount of time given to the drafting of submissions, we were not able to do a full legal analysis of the use of discretion in law. However, we suggest that there is likely a large amount of case-law regarding the constitutional use of discretion by public officials which should be taken into consideration when drafting the White Paper.

Protection of Non-National Children

93. As mentioned above, there is no mention of children in the Green Paper, particularly the case of unaccompanied minors who may be in South Africa to seek asylum. There have been cases which have dealt with the best interest of the child when in the migration / asylum system.

94. For example, in the case of the *Centre for Child Law and another v Minister of Home Affairs and others*[38] the High Court looked at the use of immigration detention for unaccompanied non-national children in need of care and protection and found that

[37] Dawood, paragraph 49.

[38] Centre for Child Law and others v Minister of Home Affairs and others 2005 (6) SA 50 (T)

such children could not be placed in immigration detention, but rather had the right to be treated as any other South African child in need of care and protection and placed in a place of safety.

95. In the unreported case of *Van Garderen N.O. v The Refugee Appeal Board*[39], the High Court found that there is a shared burden between a refugee status adjudicator and asylum applicants when proving an asylum claim. This was even more pronounced when the applicants were minor children who may have international protection needs, but arrived as young children and were unable to explain the circumstances of why they fled their country of origin. An important aspect of this case was the use of the UNHCR Handbook on Refugee Protection as "soft law". In our experience, however, it is rarely used by RSDO's in their adjudication of cases.

96. We will not deal too in depth with issues of children as it will be dealt with in other submissions, however we recommend that the full range of case law dealing with the protection of children be considered in any new policy consideration.

Immigration Detention

97. Perhaps one of the most litigated areas of migration law is in the field of immigration detention. Cases have ranged from *habeas corpus* applications to bring unlawfully detained persons to court to challenges to conditions in places of immigration detention.

98. When dealing with conditions of detention, courts have relied heavily on the right to security of the person as well as the right to human dignity. Unfortunately, the Department of Home Affairs and other government departments (most notably the South African Police Service) have not always lived up to their constitutional obligations. In the case of *Lawyers for Human Rights v Minister of Safety and*

[39] *Van Garderen N.O. v The Refugee Appeal Board (NGHC case no 30720 / 2006).* A copy of this judgment can be made available upon request.

Security and others[40], the High Court found that the conditions of detention at the Soutpansberg Military Grounds (SMG) facility near Musina did not meet the threshold of the right to human dignity under the Constitution. It also found that the detention of children in those conditions was equally unconstitutional.

99. In *South African Human Rights Commission and others v Minister of Home Affairs and others*[41], the High Court cited numerous judgments which rejected the notion that "substantial compliance" with the requirements of the provisions of the Immigration Act was untenable and reiterated the view that "strict compliance" with the Immigration Act was required.[42] In this regard, the suggestion in the Green Paper of providing detention for all asylum seekers will require strict compliance with any law dealing with such detention.

100. In any event, we are of the view that a blanket detention policy will be unconstitutional. In the matter of *Ulde v Minister of Home Affairs and others*[43] the Supreme Court of Appeal made it clear that detention of an individual is a serious infringement of his or her rights to security of the person under section 12 of the Constitution.[44] Statutes must be interpreted strictly and *in favorem libertatis* (in favour of liberty).

101. In addition, the recent matter of *Lawyers for Human Rights v Minister of Home Affairs and others*[45] the High Court found that the current detention provisions under the Immigration Act which do not permit a detainee to be brought before a court within 48 hours of arrest and at the 30 day point under section 34(1)(d) of the Act were a violation of section 12(1) of the Constitution. The matter has been

[40] Lawyers for Human Rights v Minister of Safety and Security and other [2009] ZAGPPHC 57 (15 May 2009)
[41] South African Human Rights Commission and others v Minister of Home Affairs and others 2014 (11) BCLR 1352 (GJ)
[42] Ibid, paragraph 31
[43] Ulde v Minister of Home Affairs and others 2009 (4) SA 522 (SCA)
[44] Khan and Schreier, "Refugee Law in South Africa," Juta & Co Ltd, Cape Town (2014), p. 242.
[45] Lawyers for Human Rights v Minister of Home Affairs and others 2016 (4) SA 207 (NGHC)

referred for confirmation before the Constitutional Court, which hearing will take place on 8 November 2016.

102. Again, time and space do not permit us to review the full range of cases which have dealt with immigration detention. Suffice it to also mention *Ersumo v Minister of Home Affairs*[46] in which the Supreme Court of Appeal found that the 14 days provided for in the Immigration Act (previous to the 2014 Amendments) was too subjective a test of what is applying for asylum "without delay".[47] Also, *Arse v Minister of Home Affairs*[48] in which the Supreme Court of Appeal found that "bail conditions" were not provided for in either the Refugees Act or the Immigration Act were unlawful.

103. Any deviation from these set precedents will require substantiation for the limitation of the right of security of the person and the prevention of arbitrary detention. As these are constitutional provisions, simply changing the legislation will not be enough to substantiate such a major limitation to fundamental rights. We suggest that the rationale for these changes (as described in a section below) are not proportional to the stated objective and will not likely pass constitutional muster. It will therefore be necessary to deal directly with the case law, even in the White Paper, before implementation of this radical change in policy can be contemplated.

Integration and Human Dignity

104. Cases regarding the integration of non-nationals into South African society have also been taken up by our courts. The constitutional right to human dignity is usually at the core of these judgments.

[46] Ersumo v Minister of Home Affairs 2012 (4) SA 581 (SCA)
[47] Khan and Schreier, p. 252
[48] Arse v Minister of Home Affairs 2012 (4) SA 544

105. The *Watchenuka* judgment (the only judgment referred to in the Green Paper) will be dealt with below under the right to work. It should be noted that this judgment must be seen in conjunction with the case of *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others (SCA)*[49] and the right to a livelihood and *contribute* to society. In light of these judgments, the right to work is not simply about survival but also about having a role to play in society.

106. The Green Paper clearly states that asylum seekers will be excluded from any programmes regarding integration into South African society. This is a worrying statement, particularly in light of the constitutional restrictions on mandatory detention provisions.

107. However, the courts have been approached to deal with issues of day-to-day integration such as *Consortium for Refugees and Migrants in South Africa and others v Absa Bank Ltd and others*[50] in which the parties to the litigation agreed to amend PCC03 of the Financial Intelligence Centre to allow for asylum seeker and recognised refugee permits to be used as means of identification for financial transactions under the Financial Intelligence Centre Act.

108. Other settlement orders have also been intended to ensure better integration of asylum seekers and refugees into South Africa society. For example, the settlement agreement in *Dabone v Minister of Home Affairs*[51] which was intended to allow asylum seekers to also hold a permit issued under the Immigration Act (for example a spousal permit) without the need for a passport.[52] This order was "overturned"

[49] *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others (SCA)*2015 (1) SA 151 (SCA)

[50] Consortium for Refugees and Migrants in South Africa and others v Absa Bank Ltd and others Case no 34220 / 2010. This matter was settled between the parties who agreed on the wording of an Order of Court. This order can be shared with the Department upon request.

[51] Dabone v Minister of Home Affairs (unreported) Case no: 7526/2003 (C). This order can be made available upon request.

[52] Khan and Schreier, p. 262

by Immigration Directive 21 of 2015 which denied asylum seekers to hold visas under the Immigration Act. Through the use of litigation again, the Western Cape High Court recently held in *Tashrig Ahmed v The Minister of Home Affairs* [53] that the Immigration Directive 21 of 2015 was unconstitutional and set it aside.

Access to Asylum

109. Another area that has attracted the attention of the courts has been ensuring access to the asylum process, particularly access to refugee reception offices where the Refugees Act requires applications to be submitted.

110. Cases such as *Kiliko and others v Minister of Home Affairs and others*[54] as well as *Intercape Ferreira Mainliner (Pty) Ltd and others v Minister of Home Affairs and others*[55] dealt with the conditions of accessing the Cape Town Refugee Reception Office and the failure by the Department of Home Affairs to take effective measures to deal with queue control and adequate resourcing of the offices in order to prevent nuisances to neighbouring businesses and ensure proper services to the client community that they were serving.

111. The answer to these cases has been moving the reception offices to the borderline. Civil society's challenge to these decisions has been well noted in reports[56] as well as in other cases including:

111.1. CORMSA and others v Minister of Home Affairs and others, case no 53756/2011 (NGHC)

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[53] Tashrig Ahmed & Others v Minister of Home Affairs & Others Case No. 3096/2016 Western Cape Division. Judgement Delievered on the 21st of September 2016

[54] Kiliko & others v Minister of Home Affairs & others 2006 (4) SA 114 (C); Kiliko and others v Minist.er of Home Affairs and others [2008] ZAECHC 124 (4 March 2008) and Kiliko and others v Minister of Home Affairs and others [2009] ZAWCHC 79 (9 March 2009) – both available on www.saflii.org

[55] Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others 2010 (5) SA 367 (WCC)

[56] Lawyers for Human Rights and the African Centre for Migration and Society, "Policy Shifts in the South African Asylum System: Evidence and Implications" available on the LHR and ACMS websites.

111.2. Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape and Another 2015 (3) SA 545 (SCA);

111.3. Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and Others 2013 (6) SA 421 (SCA)

112. These matters have resulted in negative decisions against the Director-General for the way in which decisions have been taken to close refugee reception offices. Unfortunately, they have not been adhered to and these offices remain closed to new applicants. It is incumbent upon the Department of Home Affairs to understand the judgments and ensure that the guidance given to the Department, and particularly the Director-General in exercising his powers to open and / or close a refugee reception office, is complied with. Failure to do so will likely result in further litigation and needless expense to the state and litigating organisations.

113. However, the closure of offices has not been the only barrier to accessing the asylum system. In *Tafira and others v Ngozwane NO and others*[57] the appointment slip system (in which appointments were given to asylum applicants for months later to return to file an application for asylum) as well as a screening questionnaire were found to be unlawful and violated asylum seekers' rights to access the asylum system.

114. We note that practices to limit the ability of asylum seekers to access refugee reception offices, including the new "box" system, requiring travel documents or affidavits to apply for asylum and requiring the payment of fines under section 37 of the Refugees Act and section 57 of the Criminal Procedures Act No 51 of 1977 before asylum seeker permits will be reissued are clear signs that the Department

[57] Tafira and others v Ngozwane NO and others [2006] ZAGPHC 136 (12 December 2006) and confirmed by order of the Supreme Court of Appeal (case no 155 / 2007).

has not heeded the guidance and direction of the courts regarding access to the system.

115. We encourage the Department to review the judgments which have already been issued in the area of migration, particularly with regards to the proposed changes to the system including the discretion given to officials regarding the "risk-based approach" to visa adjudications, integration seen through the lens of human dignity, proposed detention policies for asylum seekers and creating additional barriers to accessing the asylum system when formulating policy as these judgments often have their roots in the Constitution which supersedes any changes to legislation proposed in the White Paper.

Issuing Annual Statistics on Migration

5. Issuing annual statistical reports on the migration system (including immigration and asylum statistics) with an accompanying baseline survey and impact assessment report in order to measure the effectiveness of policy changes in meeting the stated goals and objectives of the new migration policy.

116. This recommendation stems from the statistical analysis within Chapter 3 of the Green Paper. Many of the statistics were very useful for grounding migration policy (particularly with regards to the focus on SADC) however other statistics begged more questions than it answered.

117. At the "Experts' Roundtable" which was held in Johannesburg on 22 September 2016 and hosted by LRC and LHR, it was suggested by some of the participants that the statistics needed further study to truly understand them. For example, it was noted that there was no baseline survey done to determine a "starting point" for measuring the progress of any new policy. Statistics were also pulled from the

DHA system from different time periods therefore it was difficult to get an accurate snapshot picture of the migration system as a whole at any one time.

118. It was also noted that there was no impact assessment of the statistics presented in Chapter 3 to get an understanding of what they mean and put them in context. Many of the conclusions from the statistics seem to be based on conjecture and this conjecture has led to policy proposals. For example, after reviewing the asylum statistics on page 30, the paper draws the following conclusions:

> ***"The expiration of these permits could be explained by the fact that refugees might have moved onto an immigration permit (permanent residence, for instance) and have allowed their refugee permits to lapse. It could also indicate that the asylum process might be a stepping stone to obtaining other immigration visas or to use SA as a transit country."***

119. However, many of these facts could be ascertainable as recognised refugees who have moved from a refugee permit to a permanent residence permit would do so through the certification process with the Standing Committee for Refugee Affairs. In addition, to assume that 983 473 dormant files translate into people moving on to other permits (which should also be discernible from the statistics) or moving on to other countries is a leap which is not supported by fact. It also does not take into account other barriers to renewing permits at refugee reception offices such as the high costs of traveling due to office closures, the imposition of fines without the option of negotiating a lower amount (or challenging the charge) with the court or corrupt officials and security guards at offices. It also does not take into account the numerous individuals who both the LHR and LRC have encountered at Lindela with valid claims to remain in South Africa but who have been subsequently deported due to expired asylum seeker / refugee permits, destroyed permits or a lack of verification of status.

120. Many suppositions can therefore be made regarding statistics. It is therefore important to ensure that a proper impact assessment is conducted to understand the context of the numbers.

121. We are also confused by the asylum numbers which seem to indicate that very low numbers of asylum seekers remain active in the system, the majority of which are from the SADC region. Although the 96% rejection rate is far too high as indicated in the recommendation above regarding the quality of RSD decisions, it can be assumed that many within the system are so-called "purely economic" migrants who will be catered for in the SADC permitting regime. This will vastly reduce the numbers even further removing the requirement for deterrence measures through a blanket detention policy for asylum seekers (security concerns can then be dealt with on an individual basis).

122. Another point that was raised during the "Experts' Roundtable" was the lack of information regarding criminality. There has been a heavy emphasis on "criminal syndicates" as well as human trafficking and human smuggling within the Green Paper to justify a shift to a more security oriented approach to migration. However, no statistics are presented regarding convictions for corruption or human trafficking. Statistics presented to substantiate policy regarding human trafficking have been fact-checked and indicate an overestimation of cases regarding human trafficking.[58] While human trafficking is a condemnable offence, the mere mention of it cannot be used to overemphasize security over a rights-based approach to migration under the Constitution.

123. Another gap in the statistics was any attempt to look at costing or funding models for the new approaches under the new policy. Very little in terms of budget was considered in the Green Paper, such as the amounts spent on the Lindela Holding Facility which may indicate how much future detention of asylum seekers may

[58] https://africacheck.org/reports/are-30000-kids-trafficked-into-south-africas-sex-trade-every-year-the-claim-exaggerates-the-problem/ (Accessed 30 September 2016)

cost the taxpayer.[59] This information may have certainly shaped the public's mind regarding the pro's and con's of a new migration policy which seeks to increase enforcement capacity. The 1999 White Paper's emphasis on enforcement has been a waste of highly valuable resources and it is highly doubtful that any future policy based on enforcement will be any more effective.

124. This is particularly surprising in terms of the widely publicised budget cuts imposed by the Treasury Department in January 2016.[60] A funding model would therefore seem appropriate as the new policy of detaining and providing for the accommodation, health care and basic needs of asylum seekers pending the adjudication process is likely to be quite high. At one Protection Working Group meeting, it was indicated by government officials that the amount would be in the range of R1200 / person / month, outside of detention. Depending on whether planning is based on the total number of asylum seeker files (1 061 812) or the number of *active* files (78 339), this is likely to be a significant amount from the public purse. Health care alone will add a significant amount to the operating costs of such processing / detention centres if the minimum international standards are adhered to.[61]

125. We recommend that accurate statistics are vitally important in order to track the progress of any new policy. This will require not only annual release of statistics to give a "snapshot" of the migration system as a whole, including both immigration and asylum statistics, but also a well-researched baseline survey and impact assessment of the statistics.

[59] Pages 31 and 39 of the Green Paper talk about enforcement and deportations.

[60] This was indicated to Lawyers for Human Rights in the last report by the Department of Home Affairs which was handed to LHR in terms of the SCA order of court of 25 March 2015 in the matter pertaining to the PE Refugee Reception Office.

[61] Médecins sans frontières (MSF) has produced standard operating procedures for health care which analyses health needs in vulnerable populations and emergency situations.

126. We further recommend that the statistics be made public and shared with academic and research institutions with the capacity to analyse trends and track progress. This will result in further transparency in the system as well as adjust the policy where necessary. One practical application of this would be if the points-based system is adopted for immigration visas, what weighting should certain factors be given in order to ensure that the points reflect the needs of South Africa's economy, society and development.

Further Aligning Green Paper with AU Agenda 2063

6. ***Ensuring further alignment with the stated goals of the African Union's Agenda 2063 goals of freer travel in on the continent for African citizens, including visa-free travel and long-term visas. This would include addressing issues of potential "brain-drain" from other regions, increased mobility of benefits to encourage settlement in countries with fewer skilled workers and regional professional bodies to recognize qualifications in other jurisdictions.***

127. LHR and the LRC support the alignment with South Africa's migration policy with our place on the African continent, changing the focus from supporting European to ensuring African migration and investment in South Africa.

128. While the Green Paper refers repeatedly to "international best practice" from jurisdictions such as Canada and Australia (which are not necessarily examples of best practice in terms of international law), there are many examples of good practice on the African continent. For example, the Economic Community of West African States ("ECOWAS") which allows visa-free travel between states. Lessons should be taken from the African example in a region with an economic "powerhouse" (like Nigeria) with neighbours of mixed development and political systems.

Expanding the SADC Visa for Work, Trade or SME's

7. ***Expanding further on the policy guidelines regarding SADC visas for work, trade and SME's with more details regarding length of stay, requirements to apply, which countries' nationals would be eligible as well as other details. The Department should also review the delinking of permanent residence from such visas in order to avoid the pitfalls of "guestworker programmes" which create instability within migrant communities and may be reminiscent of labour migration schemes from the pre-democratic era.***

129. LHR and LRC support the proposal for a SADC focused permit which will permit workers who do not meet the requirements of education, skills or capital in the existing visa regime. We hope that this will relieve much of the pressure from the asylum system. We do wish to make the following comments.

130. Any SADC work permit must not prevent or dissuade any person from applying for asylum. It has already been noted that many RSD decisions tended to concentrate on the economic factors that led to someone leaving their country of origin without also addressing the possible persecution that the claimant faced. The line drawn between economic factors and factors relating to the definition of a refugee can often be blurred. This was particularly the case in 2008 – 2009 with the collapse of the Zimbabwean economy which led to large numbers of people from that country fleeing to South Africa. Despite the fact that one of the main causes was the meltdown of the economy coupled with political interference and violent repression of opposition members and those perceived to be opposition members, this also led to "events seriously disturbing or disrupting public order" (an element of section 3(b) of the Refugees Act and the 1969 OAU definition of a refugee). These elements were rarely considered in Zimbabwean asylum claims.

131. LHR welcomed the use of the Zimbabwe Special Dispensation to regularise the status of nearly 300 000 Zimbabwe nationals in South Africa. We also welcomed

the extension of the status. However, we note that the Department has declared that there will be no further extensions and that all dispensation visas will expire on 31 December 2017. No transitional provisions have been put in place to deal with the large numbers of Zimbabweans who will be in the country at that time. This must form part of any future policy.

132. However, over and above this, the special dispensation permits have been delinked from any possibility of further renewals or for permanent residence, even for long-term residents who have been contributing to the economy and have not posed any security threat. Many of these applicants have been working for the same employer since 2008 and will leave a gap, particularly in households and small businesses.

133. We submit that lessons can be learnt from this experience. Firstly, the SADC work visa should be further explained. The Green Paper gives scant details about the thinking around the visa and what conditions would be attached such as length of stay, whether families would be permitted to accompany a main applicant, whether they would also be allowed to work and whether children would be allowed to study.

134. Such a regime could effectively create a "guestworker" programme which is reminiscent of previous labour migration programmes through the mines or under corporate visas under the current Immigration Act. A good example of the long-term effects of this type of labour migration scheme appears in the recent report "Voices from the Underground" [62] which documents the experiences of Mozambican Mineworkers and their families in dealing with the portability of benefits, long lasting health issues and accessing information on work conditions.

[62] This report is also available on LHR's website.

135. Importantly, it is the details which are important in order to understand the nature of such a visa regime. Will the visa allow people to seek jobs or must they already have an offer of employment lined up? Will it permit piecemeal jobs in areas which require some skills but may not imply one employer (such as bricklaying)? Will it allow higher skilled workers who are not on the critical skills list to also seek employment? Will the visa expire if no employment is found? How does the Department monitor the conditions of employment to ensure that such workers are not exploited? While these details may be included in future legislation, it warrants further exploration in policy discussion documents.

136. Regarding the trading and SME SADC visas, will there be a minimum amount required in capital? Must that capital come from outside South Africa or may traders rely on existing community links in South Africa to start their own small businesses? Will there be the ability to move from the work visa to a trading visa in order to create the skills / capital necessary for trading or starting a SME? What will happen to the small business owner's capital and structures when his or her visa expires? Will he or she be allowed to sell their business to another? Will exchange controls allow for large amounts of capital to be returned to their country of origin?

137. During the regional roundtable discussion in Pretoria, the Gauteng City-Regional Observatory (GCRO) made a presentation in which it was estimated that between R5 to 9 billion is contributed to South Africa's economy by small-scale cross-border traders which rely on migrant communities living in South Africa to assist with that trade through providing accommodation.

138. This leads to further questions about issues relating to remittances. Will government in its holistic approach to migration step in to reduce the nearly abusive fees charged to non-nationals sending remittances to their countries of origin? If it is too expensive to send remittances back to the country of origin, this

may not build the incentive necessary to have enough capital to return once the visa expires.

139. We are also concerned about the suggestion that the SADC visa will be limited to Southern African Customs Union countries rather than SADC as a region. No reasons were given for this limitation. Which countries will be included in the programme and how will this be determined? Will bilateral agreements be made with each country? Will this be a unilateral act on South Africa's part? What will be the role of the Southern African Development Community secretariat and structures in the development of this type of regime?

140. We are also concerned that the SADC visa will be delinked from any possibility of long-term stay in South Africa. This seems to indicate that the so-called "low skilled worker" is an exception to the general rule that highly skilled and rich workers / business people are preferred over migrant workers with medium to low skills. This is a continuation of the thinking behind the Aliens Control Act, the 1999 White Paper and the Immigration Act.

141. Finally, what type of planning and costing has been put in place surrounding such as visa? What types of social services will holders of this visa (who will likely fall into low-income brackets but will be paying taxes) be eligible for? Will they be able to access health care free-of-charge through the state health facility depending on their income level or will they continue to be subject to the agreements with embassies about deposits to be paid to public hospitals before services are rendered to them?

142. LHR and LRC welcome the introduction of the SADC visa however we recommend that further detail needs to be included in the White Paper in order properly discuss the SADC visa regime. It is clear that this is one of the flagship programmes of the Green Paper as it was intended to relieve the pressure on the

asylum system. We were surprised, however, that it was presented with such little detail or various policy options for discussion.

143. We have, however, seen the success of the Zimbabwe Special Dispensation and support the creation of the Lesotho Special Dispensation by the Minister of Home Affairs. However, the implementation of the ZSP left a lot to be desired, especially in the final two weeks of applications. This included changing the rules to allow applications without passports, but only after many people had already been turned away from the process. There were also problems in the adjudication process with some applicants waiting for years for their permits to be issued. In addition, the fees charged by VFS created a barrier that left some unable to access the extension.

144. We recommend that a formal and independent study should be conducted into the ZSP with public input in order to examine the successes and challenges of that programme and its implementation. The ZSP has gone a long way in regularising the stay of many, but it also had teething problems. These lessons would be helpful in developing a policy on a SADC-wide visa programme.

Promoting South Africa Abroad

8. Encouraging the participation of ex-residents of South Africa as well as South African expatriates in promoting the country abroad.

145. We note the section in the Green Paper on International Migration which also deals with the emigration of South African citizens and the use of expatriate communities to promote the country.

146. We recommend that this does not have to be limited to South African citizens. There are many ex-residents who previously studied, worked and visited South Africa who can also play an active role in promoting South Africa. This can be

encouraged through the same structures suggested in the Green Paper applied for citizens.

GENERAL REMARKS ON ASYLUM PROTECTION

147. We are concerned that the policies outlined in the Department of Home Affairs (DHA) Green Paper on 'International Migration in South Africa' are based on assumptions and evidence that misrepresent the factors that lead asylum-seekers to come to South Africa. We are further concerned that implementing these proposals would violate the Constitution of the Republic of South Africa (hereinafter referred to as the "Constitution") and South Africa's commitments to international and domestic legislation that guarantee the rights of refugees and asylum-seekers.

148. It is important to emphasise that Article 14(1) of the Universal Declaration of Human Rights (UDHR) guarantees everyone the right to seek asylum from persecution in other countries.[63] Article 14 (1) is the foundation of the 1951 Convention Relating to the Status of Refugees (1951 Refugee Convention). Under the terms of the Convention, South Africa is responsible for ensuring that the right to enjoy asylum from persecution is not arbitrarily or unnecessarily limited.

149. 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, which also emphasises equality and non-discrimination in the access of rights and freedoms.

150. 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

[63] 'Universal Declaration of Human Rights' Article 14.

asylum from persecution in South Africa. It will 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."*** [64]

151. South Africa is similarly obligated to uphold the principle of *non-refoulement,* which is not only embedded in customary law[65] and international human rights treaties, including the International Convention on Civil & Political Rights (ICCPR) and the Convention Against Torture (CAT), but is also protected in Section 2 of the Refugees Act,[66] which states:

> **"*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—***

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

[65] 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.

[66] Act 130 of 1998, hereinafter 'the Act.'

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

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."[67]

152. We urge the DHA to ensure that South Africa's current asylum system complies 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. We are concerned that the proposals outlined in this Green Paper clearly violate the aforementioned international conventions, as well as the Act, which incorporates the principles of the 1951 Refugees Convention and the OAU Refugee Convention. The proposals also transgress UNHCR recommendations aimed at contributing to the improvement of the relevant legal protection framework and implementation practices, which are regularly issued for governments, legal practitioners, decision-makers and the judiciary carrying out refugee status determination.

153. The DHA emphasises that international protection for a refugee is meant to be temporary, and this is echoed in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status.[68] But the reality is that most asylum seekers must wait years for their claim to be processed, and it is in South Africa's best financial and social interests to integrate these asylum-seekers, in addition to refugees. Integration *"has as a goal the assurance that all individuals will be part of a State, be protected by that State against the actions of other States, and in return have duties*

[67] 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.

[68] *Refugee Law in South Africa.* Ed. Fatima Khan and Tal Schreier. Cape Town: Juta & Co. Ltd, 2014. p.114.

to that State."[69] It is also an investment: numerous studies indicate that immigrants and asylum-seekers, even those who enter illegally, and even an influx of tens of thousands of people, can *"actually contribute far more money and jobs to their new country than they take."*[70] Above all, a more integrated life allows for a more "dignified exile," and enables refugees to acquire money and skills that they can take home with them and use to contribute to strengthening and stabilizing the economy in their home country.[71]

154. Since the Act came into effect, there has never been an efficient and fair system of adjudication of asylum claims or further assistance provided: our offices have assisted asylum seekers who have waited for sixteen, and as long as twenty-three years, for their asylum claims to be adjudicated; asylum seekers have struggled to renew their permits and obtain family joinders. Understaffed Refugee Reception Offices (hereinafter referred to as "RROs") cannot manage the current backlog of applications.

155. Without substantially increasing its capacity, the DHA is sure to replicate current problems if it implements its proposals to hold and process asylum-seekers in new border Asylum Seeker Processing centres. Such a system of immigration detention centres would be unworkable and would punish refugees and asylum-seekers for the DHA's and, specifically, the RROs' failings. In practice, the DHA has failed to demonstrate that it can fulfill its legal obligations to asylum-seekers; in both the Green Paper and previous discussions of these processing centres in Cabinet meetings and DHA annual reports, the DHA has failed to prove that it would be able to uphold the rights of asylum-seekers in new border processing centres.

156. An effective asylum system should actively and openly document and assist asylum seekers without limiting their rights. To effectively do so, the DHA should focus on

[69] Van Selm 3
[70] *Ibid*
[71] Rosenberg

increasing its capacity at the RROs rather than building new Asylum Processing Centres at South African borders that will violate the rights of asylum seekers.

MANAGEMENT OF ASYLUM-SEEKERS

Proposed Exclusions from Applying for Asylum

9. *Removing provisions relating to exclusions and restrictions on the rights of refugees to travel.*

157. The ***“”’safe third country’ principle that those persons who claim asylum should do so in the first safe country they enter,”***[72] which the DHA began enforcing in 2011 to reduce the number of asylum-seekers coming to South Africa, could result in the unlawful *refoulement* of asylum-seekers, and fails to consider the transit patterns of asylum-seekers – that many flee their home countries on foot or by hitching rides in vehicles, without much knowledge of their route.

157.1. A host country is not absolved of the responsibility *“to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention,”*[73] just because an asylum-seeker transited through multiple countries, as the European Court of Human Rights ruled in *T.I. v the United Kingdom.*

157.2. Moreover, the UNHCR clearly distinguishes between a ‘first country of asylum’ and a ‘safe third country,’[74] recognizing that a country through which an asylum seeker transits is not necessarily safe for that individual because it has ratified the Refugee Convention. Asylum-seekers’ safety should not be evaluated by the number of countries through which they transit, but by their substantive claim, on a case – by – case basis.

[72] Green Paper 63
[73] Van Selm 22
[74] Van Selm 4

157.3. The DHA should also recall that the legality of returning asylum-seekers has been challenged multiple times in South Africa. In 2001, an urgent application to the Transvaal Provincial Division of the High Court, submitted by Lawyers for Human Rights, forced the DHA to withdraw its policy circular (59 of 2000) that ordered *"border guards to turn back asylum seekers arriving through 'safe' neighboring States."*[75] Similarly, a 2002 court order decreed "*that asylum seekers are not required to seek asylum in countries they transit before becoming eligible for asylum in South Africa."*[76]

158. In light of the above, it would be unlawful for the DHA to carry out its proposal to create a new category of persons excluded from the definition of a refugee – "*those persons who have failed to apply in safe countries en route to SA, often termed 'third countries.'"*[77] This policy is further proof that the DHA fails to take into account the conditions of instability in asylum-seekers' countries of origin and the myriad of experiences possibly for asylum-seekers of the same nationality. We are concerned that rejecting an asylum-seeker because he did not apply for asylum in the first country he reached could precipitate a chain of *refoulement*, with each recipient country sending the asylum-seeker one step closer to a country in which the asylum-seeker has faced or would face persecution.[78]

159. The proposed exclusion of those wanted for committing a crime in a country that SA recognises as having a fair justice system is vague and too wide. Firstly does DHA intend to exclude those wanted for any crime in such a country? Secondly the requirement that SA recognises such a country as having a fair justice system is rather too broad and uncertain. For example a person wanted in Zimbabwe for 'undermining the authority of the President' or 'insulting the office of the President'

[75] Van Selm 9-10
[76] "All Roads" 69-70
[77] Green Paper 69
[78] Van Selm 25

will be automatically excluded because SA does recognize Zimbabwe to be having a fair justice system. It ignores the fact that such countries that SA might recognise as having a fair justice system might actually not, and such recognition is usually left to political leaders who may do so based on political reasons.

160. We are also concerned about the need to 'tightly regulate' the conditions for travel for those granted refugee status as well as their use of travelling documents. Such 'tight regulation' must be done in a manner that recognises the importance of granting refugees the right to travel. It is particularly important for refugees to be able to travel outside the country of their normal residence. Such travel, for example may be in order to take advantage of opportunities for education, training or employment, which is an essential prerequisite for a durable solution to refugees' problems. DHA must keep in mind that facilitation of refugee travel is also of interest to, and an obligation on, the host country. Further, the unreasonable restriction of refugees' movement may have undesirable effect of impeding the refugee's freedom of movement which, as indicated above, may be of special importance in their case.

161. Any 'tight regulation' of the movement of refugees' therefore must be in accordance with Article 28 of the 1951 Convention which provides that:

> ***"the Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require, and the provisions of the Schedule to this Convention shall apply with respect to such documents. The Contracting States may issue such a travel document to any other refugee in their territory; they shall in particular give sympathetic consideration to the issue of such a travel document to refugees in their territory who are unable to obtain a travel***

document from the country of their lawful residence.

162. The DHA may want to cut down the presence of illegal immigrants in South Africa, but its efforts to control immigration cannot come at the expense of asylum seekers. Its misguided proposals for legislation that would clarify the meaning of 'without delay' in Article 31 (1) of the Refugee Convention[79] would penalise asylum seekers. In *R v Uxbridge Magistrates Court: Ex parte Adimi* judgment, the judge held that it did not necessarily constitute a sign of bad faith for an asylum-seeker not to apply for asylum at the first instance. The UNHCR's guidelines clearly state,

> ***Given the special situation of asylum seekers, in particular the effects of trauma, language problems, lack of information, previous experiences which often result in a suspicion of those in authority, feelings of insecurity, and the fact that these and other circumstances may vary enormously from one asylum seeker to another, there is no time limit which can be mechanistically applied or associated with the expression 'without delay.'***[80]

Processing Centres and Detention Provisions

10. *Removing provisions relating to the automatic detention of asylum seekers at border processing centres along the borderline. Any provisions relating to the automatic detention of a class of persons will like not meet constitutional muster under sections 9(3), 12(1) and 35(2) of the Constitution of the Republic of South Africa, 1996.*

163. The DHA has closed RROs in Cape Town, Johannesburg, and Port Elizabeth, and the RROs still operating are overwhelmed. For example, it was announced at the end of August 2016 that the Marabastad office would remain at 60% capacity for 6 to 8

[79] States "shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided that they present themselves **without delay** to the authorities and show good cause for their illegal entry or presence."

[80] *Refugee Law in South Africa* 27-28

weeks following a three-month unplanned effective closure due to renovations. We are alarmed that the DHA, rather than address the flaws in its current system, now seeks to build new Asylum Seeker Processing centres. We are further concerned that asylum-seekers' rights would be violated in these proposed centres, as they are in immigration detention centres in countries around the world, including those which the DHA considers examples.

164. In the Green Paper, the only details that the DHA provides on these centres are the stakeholders that are to run them. With no detail on the proposed layout, organisation, or scale of these centres, it is impossible to take at face value the DHA's claim that asylum-seekers' *"basic needs will be catered for in the processing centres."*[81] This provision fails to consider research that shows that asylum-seekers, refugees, and migrants are "*better able to comply with requirements if they can meet their basic needs while in the community."*[82]

165. It is unrealistic for the DHA, whose resources are already stretched, to incur the enormous expense required to provide for the "basic needs" of victims of trauma and persecution, which go beyond food and drink: it will take a serious investment of resources to guarantee asylum-seekers access to medical assistance,[83] psychological counselling, and other services to help them cope with the torture, sexual assault, or mental stress that they may have experienced in their home countries.

166. The DHA stresses that all relevant government departments and several international agencies will manage these centres. But, as mentioned above, it is highly unlikely that DHA officials will want to work in offices in locations such as Lebombo, let alone that the UNHCR will contribute to the management of these centres: the refugee agency's South Africa Regional Office is only 1 percent funded

[81] Green Paper 67
[82] "There Are Alternatives" iii
[83] We again refer to the international standards for health care published by MSF

and faces a 13.7 M funding gap.[84] Moreover, the UNHCR opposes the *"detention of people seeking international protection"*[85] on principle, and emphasises that the mandatory detention of asylum-seekers violates international law.

167. The DHA claims that its proposed centres "*should not be considered as contrary to the policy of non-encampment, but as centres for mitigating security risks posed by irregular migration."*[86] Every nation is guaranteed the right to regulate its borders, but the DHA's proposed detention of asylum-seekers would constitute the very "penalties" proscribed in Article 31(1) of the 1951 Refugee Convention, which states:

> ***shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided that they present themselves without delay to the authorities and show good cause for their illegal entry or presence.***

168. To be absolutely clear, the DHA's proposed centres will constitute immigration detention, which the UNHCR defines as "*Confinement within a narrowly bounded or restricted location, including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed."* [87] The proposed centres would go against the UNHCR's guidance that the detention of asylum-seekers should only be used as a measure of last resort, to verify an asylum-

[84] According to their "Southern Africa: 2016 Funding Update as of 27 June 2016," the UNHCR faces an overall 71.6 M funding gap (in USD) in Southern Africa and is 6 percent funded, overall. http://reporting.unhcr.org/sites/default/files/2016%20Southern%20Africa%20Funding%20Overview%20as%20of%2027JUN16.pdf.

[85] Mahecic, Andrej. "UNHCR concerned at detention of asylum-seekers, releases new guidelines." *UNHCR News.* 21 September 2012. Accessed 20/7/2016. http://www.unhcr.org/news/makingdifference/2012/9/505c33199/unhcr-concerned-detention-asylum-seekers-releases-new-guidelines.html.

[86] Green Paper 60-67

[87] UNHCR Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum Seekers (1999)

seeker's identity, to determine the basis of an asylum-seeker's claim, to protect national security, or in cases in which it is shown that an asylum seeker destroyed or used fraudulent documents.[88] It is clear that this is an individualised and not a blanket approach for the use of detention in exceptional circumstances.

168.1. It is essential to remember that the UNHCR qualifies these exceptions, as well: the agency only permits detention for the purposes of a preliminary interview, and forbids the use of detention *"to justify detention for the entire status determination procedure, or for an unlimited time period."*[89]

168.2. It is also necessary to establish an absence of good faith on the part of the asylum-seeker in order to justify the detention of an asylum-seeker who destroys or carries fraudulent documents; many asylum-seekers flee their homes with just the clothes on their backs, and it is unlawful to detain asylum-seekers simply because they were not able to obtain documents in their home countries.

168.3. The UNHCR stipulates that officials must determine, on an individual basis, whether an asylum-seeker poses a threat to national security, based on their affiliations or criminal background; this exception cannot be used against the entire class of asylum-seekers.

169. The DHA's proposals for indiscriminate immigration detention violate these principles. In the Green Paper, the DHA promises that low-risk asylum seekers would be released into communities, but without any integration support as asylum seekers are explicitly excluded from any integration programmes. But it pledges to detain not only those who threaten national security, but also "*vulnerable groups*

[88] "Legal framework and standards relating to the detention of refugees, asylum seekers and migrations: a guide." *International Detention Coalition.* 2011. http://idcoalition.org/publication/view/legal-framework/. p.25

[89] "Legal framework" 30

and those whose identity needs to be established"[90] in its proposed "*[s]ecure administrative detention centres."*[91] The proposals clearly violate the UNHCR's Revised Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers, which declare that the detention of asylum-seekers *"as part of a policy to deter future asylum-seekers, or to dissuade those who have commenced their claims from pursuing them, is contrary to the norms of refugee law. It should not be used as a punitive or disciplinary measure for illegal entry or presence in the country."*[92]

170. The DHA's proposed centres risk becoming comparable to the facilities in remote areas on the U.S.-Mexico border, where detained Central American asylum-seekers face obstacles to medical and psychological care, education, and legal representation, as documented by organizations from Human Rights First to the UNHCR. Confining asylum-seekers to the DHA's proposed centres would limit their rights to freedom of movement, enshrined in the Constitution[93], UDHR[94], and ICCPR.[95]

170.1. We are also concerned that child asylum-seekers would be denied the right to education, protected by the Article 29 of the Constitution and Article 26 of the UDHR, in these centres, where they would be unlikely to receive adequate schooling.

170.2. The remoteness of the proposed facilities would make it more difficult for asylum-seekers to have adequate legal assistance, would reduce transparency, and would make it more difficult to hold the DHA accountable for upholding its

[90] *Ibid*
[91] Green Paper 66
[92] "Legal framework" 32
[93] Article 21: "Everyone has the right to freedom of movement"
[94] Article 13: "Everyone has the right to freedom of movement and residence within the borders of each state; Everyone has the right to leave any country, including his own, and to return to his country."
[95] Article 12: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."

legal obligations. For this reason, asylum-seekers would likely face a greater chance of immediate deportation from these centres if they were rejected in their first interview.

170.3. Furthermore, research demonstrates the negative mental and physical health effects caused by immigration detention. In a study of detained asylum-seekers, the International Detention Coalition found that *"77 per cent of the group had 'clinically significant symptoms of anxiety,' 86 per cent had depressive symptoms, and 50 per cent displayed symptoms of Post-Traumatic Stress Disorder (PTSD)."*[96] The longer the period of detention, the worse the symptoms proved to be. The effects of detention on a person's mental health and sense of self follow the migrant or asylum-seeker as soon as they're released into a society, which is likely completely new to them.[97] The trauma of detention thus becomes a burden to the receiving society.

171. The DHA claim that its proposals to detain asylum-seekers are informed by "*best practice in countries that do not have encampment policies*," such as Canada and Australia.[98] This is cause for further concern, because none of the DHA's cited systems is a model for guaranteeing the rights and well-being of asylum-seekers. Canada, unlike most industrialized countries, has mandatory detention provisions and houses many of its asylum-seekers in prisons.[99] Australia is notorious for its use of mandatory detention, offshore detention facilities, and practice of diverting boats of asylum-seekers before they reach Australian waters. Juan E. Méndez, the United Nations special rapporteur on torture, argued that the Australian government has

[96] "Reframing immigration detention in response to irregular detention: Does Detention Deter?" *International Detention Coalition.* April 2015. Accessed 6/22/2015. file:///Users/charlottefinegold/Downloads/Briefing-Paper_Does-Detention-Deter_April-2015-A4_web_final_3.pdf. p.48

[97] *Ibid*

[98] Green Paper 65-66

[99] "Canada." *Global Detention Project.* Accessed 15/7/2016. https://www.globaldetentionproject.org/countries/americas/canada.

violated asylum-seekers' rights to freedom from torture and cruel, inhuman or degrading treatment by placing them in facilities with appalling conditions.[100]

172. There is no evidence to suggest that the proposed processing centres would address the DHA's security concerns, because "*irregular migration is not deterred even by stringent detention practices.*"[101] Restrictive border controls do not deter, but merely change the nature of migration, and force people to take greater risks.[102] This is in part because most asylum-seekers and irregular migrants have little understanding of the immigration policies of their destination countries: the majority choose their destination based on its language, its societal values, such as tolerance and democracy, the prospect of jobs, and whether they have historical or family links to the country.[103]

173. Additionally, immigration detention does not deter future asylum-seekers because it does nothing to resolve long-term conflicts that cause displacement. In fact, grouping traumatised and frustrated people, as these processing centres would do, is likely to produce more insecurity. Research on preexisting refugee camps suggests that they are actually "*added sources of instability…because they aggravate existing security problems and create new ones*."[104]

174. Asylum-seekers are more likely to return voluntarily to their home country if they

[100] Doherty, Ben & Hurst, Daniel. "UN accuses Australia of systematically violating torture convention." *The Guardian.* March 9, 2015. Accessed 6/24/15. http://www.theguardian.com/australia-news/2015/mar/09/un-reports-australias-immigration-detention-breaches-torture-convention

[101] Mahecic

[102] "Reframing immigration detention in response to irregular detention: Does Detention Deter?" *International Detention Coalition.* April 2015. Accessed 6/22/2015. file:///Users/charlottefinegold/Downloads/Briefing-Paper_Does-Detention-Deter_April-2015-A4_web_final_3.pdf. p.3

[103] There Are Alternatives." *International Detention Coalition.* 2015. Accessed 1 August 2016. http://idcoalition.org/publication/view/there-are-alternatives-revised-edition/. p.3.

[104] Jacobsen, Karen. "The forgotten solution: local integration for refugees in developing countries." *Fletcher School of Law & Diplomacy.* July 2001. Accessed 12/7/2016. http://www.unhcr.org/research/RESEARCH/3b7d24059.pdf. p.12.

are kept in supported alternative systems to detention, such as case management systems, where they are treated with respect, informed of their rights and duties, and have access to legal advice throughout the process.[105]

175. Nor are immigration detention centres a more cost-effective form of migration control than alternative methods. The International Detention Coalition found that alternatives to detention are 80 percent less expensive than detention centres.[106] In the United States, for instance, it costs $164 per day to detain each of the 400,000 immigrants detained annually in Immigration & Customs Enforcement (ICE) facilities, while community-based alternatives cost 17 cents to $17.[107]

Delinking of residency from citizenship

11. *Similarly, delinking of permanent residence for recognized refugees is irrational and a regression of Article 34 of the 1951 Convention Relating to the Status of Refugees which encourages states toward naturalization of refugees who are unable to voluntarily repatriate.*

176. We are also concerned about the delinking of permanent residence for refugees. This will effectively mean that refugees will remain refugees indefinitely. Although we recognise that the decision of granting citizenship or naturalisation to any State is not absolute, we urge DHA to take into consideration Article 34 of the 1951 Refugee Convention which provides that: **'the contracting states shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.'**

177. It is clear from the above wording that the spirit of this provision is to progress *toward* assimilation and naturalisation as a policy and legal option, and not regress

[105] "Captured Childhood" p. 33

[106] "There Are Alternatives." *International Detention Coalition.* 2015. Accessed 1 August 2016. http://idcoalition.org/publication/view/there-are-alternatives-revised-edition/. p.iii.

[107] "Immigration Detention: How Can the Government Cut Costs?" *Human Rights First.* Accessed 6/25/15. http://www.humanrightsfirst.org/uploads/pdfs/immigration-detention-fact-sheet-jan-2013.pdf

away from integration measures. This will not only assist those refugees in integrating into their respective communities in society but will also assist in alleviating the uncertainties that generally come with being a refugee. This will give them hope for the future and at least be in a position to fully integrate into society without any fears or uncertainties. In this respect we urge that the DHA at least consider certain circumstances such as the length of period that a refugee would have settled in S.A when considering the issuing of permanent residence or citizenship.

178. The Green Paper also cites the linkage of permanent residence and citizenship as a 'pull' factor which is being dis-incentivised by delinking of visas from permanent residence yet no evidence is brought forward to support this notion. If only 10 % of the applications are granted refugees status how then can this be possibly be seen as a pull factor into the asylum regime. It is rather an attempt at discouraging even "genuine" refugees from seeking protection in South Africa.

179. The real problem in our view is that the DHA lacks sufficient capacity to deal with the large volumes of asylum seeker applications. As such the 'pull' factor *may be* that asylum seeker applicants may be well aware of the fact that adjudicating a claim may take years to complete and hence they use this as an avenue to legalise their stay in South Africa, something which the Green Paper makes reference to. Citing the link between permanent residence status and refugee status is therefore incorrect and disingenuous.

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Revoking the Right to Work

12. *Ensuring that the right to work for asylum seekers is considered through the lens of the Constitution, and particularly ensuring that the right to human dignity is upheld. Automatic detention provisions are an inherent violation of the right to human dignity, even where accommodation and food are provided, and will likely not meet the requirements of proportionality under the limitations clause under section 36 of the Constitution.*

181. The right to work for asylum-seekers, upheld in the 2004 *Watchenuka* case, is also codified by the UDHR[108] and the International Convention on Economic & Social Rights (ICESCR).[109] In addition, South Africa's 1999 Immigration White Paper guarantees to refugees "*basic security rights; basic human dignity rights; and, basic self-sufficiency rights, including the rights to work and education.*"[110] In his judgment in the *Watchenuka* case, Nugent J resolutely held:

> ***"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…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."[111]***

[108] Article 23: "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment and art"

[109] Article 6: "the States Parties to the present Covenant recognize the right to work which includes the right of everyone to the opportunity to gain his living by work which he freely choose or accepts, and will take appropriate steps to safeguard this right"

[110] Green Paper 24-25

[111] *Watchenuka* above n 1 at paras 27 and 28.

182. Nugent J's emphasis that the right to work transcends obtaining the means to survive negates the DHA's argument that asylum-seekers would not need to work because the proposed processing centres would provide for their "*basic needs.*"[112]

183. In his ruling, Nugent J did acknowledge that the right to dignity can 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."* However, limiting the rights of asylum-seekers to work and study would be neither reasonable nor justifiable, since there is no evidence to support the DHA's assertion that these rights are "*major pull factor[s] that overwhelmed the asylum system."*[113] As already stated, most asylum-seekers in South Africa lack knowledge about the asylum system or their rights.

184. The DHA's exceptions – that "*asylum seekers may be granted such rights* [to work] *under the Immigration Act in clearly defined or exceptional circumstances*"[114] – would add more unnecessary administrative burdens. As we already noted in our general remarks, multiplying administrative burdens without increasing capacity is neither tenable nor practical. Furthermore, those asylum-seekers who would be released from processing centres, but who would not be granted these rights on an exceptional basis, would be unable to contribute to their communities and would likely remain destitute.

SUGGESTED ALTERNATIVE SOLUTIONS

185. We commend the DHA for reaffirming the benefits of integrating refugees into South African communities over an encampment policy, but we strongly challenge the DHA's exclusion of asylum-seekers from these benefits. According to the DHA,

[112] Green Paper 67
[113] Green Paper 13
[114] Green Paper 67

"integration policy….should not apply to asylum seekers as they have temporary status while awaiting the outcome of adjudication."[115] But seeing as the current national backlog in South Africa's asylum system will take years to resolve, it is misleading to call an asylum-seeker's status in the country "*temporary*," because it is very rare for asylum claims to be processed quickly.

186. The Green Paper shockingly seems to have missed some of the important critique on how South Africa's current refugee system has collapsed amongst such being corruption, capacity, and administrative incompetence. It is therefore difficult to envisage a situation where the current flows in the system will be addressed without reference to some of the major causes of the problems. For this reason we strongly recommend that the DHA acknowledges and takes into account some of these problems in an attempt to try and find solutions to the current problems.

187. As already alluded to in our introductory remarks, the Green Paper shockingly seems to have missed some of the important critiques on how South Africa's current refugee system has collapsed amongst which being corruption, capacity, and a serious skills deficit. It is therefore difficult to envisage a situation where the current flows in the system will be addressed without reference to some of the major causes of the problems. For this reason we strongly recommend that the DHA acknowledges and takes into account some of these problems in an attempt to try and find solutions to the current problems.

188. South Africa must ensure that each asylum case is processed fairly and efficiently; this is not possible with RSDO officers' huge caseloads and inadequate training, as well as the enormous backlog of asylum-seekers awaiting decisions on their applications or appeals. It is not a long-term solution to prioritize new processing centres that fail to address the pre-existing problems in the asylum system, that are

[115] Green Paper 71

unlikely to deter future immigration, and that are likely to cause harm to their residents.

189. We urge the DHA to instead focus its resources on streamlining and improving the current South African asylum system and integration of both refugees *and* asylum-seekers. Every rejection of an asylum-seeker made without cause is unacceptable and violates South Africa's international and constitutional obligations; every asylum-seeker who is denied an education and employment is an opportunity wasted.

189.1.1. RSDOs must remember that the burden of proof for an asylum claim does not entirely belong to an asylum-seeker; rather, the "*duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner."*[116] To fulfill their obligation, RSDO officers must be aware of and must consider the current conditions of an asylum-seeker's country of origin.

189.1.2. Furthermore, it is important to consider that an asylum-seeker may not reveal her full case during the first interview because of inadequate interpretation or knowledge of the asylum process. It is also common for victims of sexual violence not to reveal their story: this is especially likely for a female victim interviewed by a male RSDO; many male victims feel too ashamed to admit that they were raped.[117] RSDOs should be trained in treating victims of sexual violence with special sensitivity and care.

189.1.3. In addition to sensitivity training, RSDOs must be trained to explain to asylum-seekers, at the beginning of every interview, the asylum process and the confidentiality of any information they disclose to RSDOs. Asylum-

[116] UNHCR Handbook, "All Roads" 44
[117] "All Roads" 90-91

seekers will be less likely to disclose traumatic experiences or political beliefs if confidentiality is not guaranteed.

189.1.4. We recommend that the DHA increase the amount of time that an asylum-seeker permit is valid. Doing so would decrease both the DHA's daily caseload and the time and money asylum-seekers must spend on repeated trips to far-away RROs.

190. The DHA must work to uphold asylum-seekers' rights to work and study, which are not currently protected in South Africa: asylum-seekers and refugees with valid documents face widespread employment discrimination. Fatima Khan, Director of the University of Cape Town's Refugee Rights Unit, contends that asylum permits:

> ***"[are] not enabling documents and despite the fact that various rights are attached to such a documents, refugees struggle to access these rights…[and] the most basic services such as health care, the placement of unaccompanied minors, accessing education or finding employment all factors necessary for the successful integration of refugees."***[118]

191. The DHA should leverage partnerships with NGOs to provide refugees *and* asylum-seekers with legal assistance, information, and counseling, and should pay particular attention to families, children, and victims of trauma, torture, and human trafficking and trauma.

192. We also take note the Green Paper is silent on any proposals regarding detention of asylum seekers and or failed asylum seekers. We strongly recommend that resources be streamlined in order to ensure that detention centres and facilities that have been so designated by the Director General adhere to certain minimum

[118] Khan, Fatima. "Local Integration: Lessons Learnt and the Way Forward." *University of Cape Town Refugee Rights Project.* 26 September 2007. Accessed 12/7/2016. Print. p.5.

standards of safely and health conditions. DHA should also leverage partnerships with NGOs to provide asylum seekers with the necessary assistance at these centres and designated police stations to ensure that their rights are protected.

CONCLUSIONS

193. We would like to thank the Minister of Home Affairs and the Department for their attention our to submissions. Considering the monumental changes that are being proposed in the Green Paper, as well as legislation that has already been submitted to Parliament. We look forward to ongoing engagement with you on this process.

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