

SUBMISSION ON BEHALF OF THE SCALABRINI CENTRE OF CAPE TOWN

1. Barriers to accessing the asylum system

During the previous UPR session, South Africa accepted a recommendation advanced by Mexico to ensure

'the mechanisms for supervising procedures be established or strengthened, including the procedure for recognition of the status of refugees and deportations of foreigners, with a view to ensuring the right to a hearing and thus close the door to possible abuses and complying with the principles of non-refoulement.'

Since that recommendation was accepted, the procedures for recognising the status of refugees remain deeply problematic and highly irregular, creating many opportunities for *refoulement*. Issues such as under-resourcing and insufficient administrative capacity are leading to backlogs, poor status determination decisions, and long waiting times for first and second instance decision-making continue to exist.

Since the last UPR review, these problems have been compounded by the introduction of a host of restrictive policies in the asylum system resulting in a 'significant reduction of asylum seeker and refugee protection, culminating in increased danger of *refoulement* of people seeking to apply for asylum in South Africa, in contravention of domestic and international law.'¹ In particular, the integrity of the system has been undermined by the closure of Refugee Reception Offices (RRO) in the major urban centres of Cape Town, Port Elizabeth and Johannesburg, resulting in extreme access difficulties for recently arrived asylum seekers, asylum seekers with active asylum applications, and refugees who have attained formal recognition of refugee status in South Africa. Despite court rulings against the Department of Home Affairs (DHA) on these closures, to date they remain closed.² The government indicated in 2012 that it would open a new RRO on the Mozambique border but no facility has been established.

The RRO closures have placed an increased burden on many asylum seekers, especially those based in metro areas without an RRO, as asylum seekers must now make long and expensive journeys to distant RROs to claim asylum and every time their permit requires administrative action (including interviews, renewals, and appeal hearings).³ The SCCT has observed that our clients in the Cape Town area are often unable to undertake these repetitive journeys due to health issues, lack of financial means (for transportation and accommodation) and the inability to take time off from work. In our experience this has resulted in asylum seekers remaining undocumented or becoming undocumented through expired permits and therefore being exposed to a range of vulnerabilities including elevated risk of detention/deportation, labour exploitation, and criminality.

Those able to travel face further issues including increased access difficulties at remaining RROs, particularly the Pretoria RRO,⁴ which have fostered conditions in which corruption is endemic; for example, 30% of Pretoria RRO asylum seekers reported being unable to access services due to corruption in a recent report.⁵

For those who do gain access, asylum status determination processes and decisions are well-documented in their shortcomings.⁶ At the SCCT, asylum applicants regularly report for assistance with negative status determination decisions that are unreasonable, poorly argued, and do not substantively engage in refugee law or the country of origin information. Poor decisions are uniform across the system and these decisions are given to asylum seekers who clearly fit the asylum criteria. Unfortunately, there has been no improvement in the quality of decisions in recent years,⁷ with only 4% of applications being approved in 2015.⁸

Recommendations:

- Provide adequate resources and training to Refugee Status Determination Officers in order for them to understand and apply principles of refugee law to all applications for asylum in a consistent and administratively fair manner.
- Develop rigorous methods and systems to combat endemic corruption present in all components of the asylum system.
- Open and maintain fully functional RROs in metropolitan areas to ensure the urban refugee protection system can function.

2. Asylum Seeker and Refugee Protection Legislation and Policies

At the last UPR session, South Africa accepted a recommendation by Paraguay to *'[c]ontinue multiplying measures that guarantee the full protection of the human rights of foreigners in South Africa.'*

Rather than multiplying measures to advance the rights of asylum seekers and refugees, there instead appears to be a trend towards the restriction of such rights. At present, migration policies are undergoing a significant overhaul, including both immigration and refugee legislation. A proposed Refugees Amendment Bill has been published and opened to a first round of public comment.⁹

This Amendment Bill is worrisome in a number of important ways, including:

- Revised definitions of what constitutes a 'dependent' under the Refugees Act as well as children formally adopted in the asylum seeker or refugee's country of origin;
- Revisions of asylum seekers' right to work, which is proposed to be linked to a financial assessment of the asylum seekers' means to support himself or herself;

- The Amendment Bill further has potentially grave implications for asylum seekers' right to movement within the country.¹⁰

At the time of writing, the Draft Amendment Bill is now before Parliament as the Refugees Amendment Act [B12-2016];¹¹ this legislation has largely replicated the Draft Amendment Bill's provisions. This is concerning as the Refugees Amendment Act is being promulgated prior to the conclusion of the Green Paper for International Migration process which was launched by DHA in June 2016 with comments due by 30 September.

While there is a problematic lack of clarity surrounding this proposed legislative approach, we believe the basic premise is deeply flawed and the implementation of such an approach is unfeasible. Such a process both impinges on the dignity of asylum seekers and would result in further administrative burdens in a system that already places enormous burdens on asylum seekers in terms of access to the asylum system.

Further, the aforementioned closure of RROs in major urban centres appears to be part of the GOSA's larger, still unofficial, policy to move all refugee reception functions to the country's north-eastern land borders. This raises critical and as yet unanswered questions around how (or whether) the human rights of asylum seekers and refugees will be protected through these changes.

Recommendations:

- Instead of enacting restrictive legislation that infringe on the rights of refugees, consider how to effectively manage the asylum system and improve refugee status adjudication procedures and processing times.
- Reconsider plans to limit the scope of the term 'dependent' in the Refugees Act in order to ensure that all refugee children are able to access refugee status through their caretaker and ensure the principle of family unity is respected.
- Remove the 'sustainability' provision from the proposed amendments thereby allowing all asylum seekers the right to work.

3. Racial Discrimination and Xenophobia

South Africa accepted recommendations advanced by Iraq and Djibouti in the last UPR process to '*[s]trengthen measures to combat the phenomena of xenophobia*' and to '*[c]ontinue combating acts of xenophobia against migrants, refugees and asylum-seekers.*' A related recommendation was given by Indonesia to '*[s]tep up its measures to mitigate the scourge of xenophobia, which include, among others, visible policing, community awareness programmes, promotion of tolerance and cultural diversity,*' which was also accepted.

While there have been important developments towards a National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, attacks against foreign nationals and foreign owned businesses and properties have continued unabated since the previous UPR session. In particular, attacks against foreign nationals

over a number of weeks in KwaZulu-Natal and Gauteng in early 2015 represented the worst such violence since May 2008.¹² Additionally, in April 2016, foreign-owned shops in Dunoon, outside of Cape Town, were looted in a spree of xenophobic violence.¹³

On the heels of the 2015 violence, the GOSA launched 'Operation Fiela,' ostensibly a national crack-down on crime, in which undocumented migrants were heavily targeted for arrest, along with individuals wanted for serious crimes such as theft, murder, sexual offences, as well as drug and weapons offences.¹⁴ The unfortunate message transmitted by the GOSA through this initiative reinforced rather than combated xenophobic attitudes in both state institutions and amongst the general public, in which migrants are unfairly and widely associated with criminal behaviour.

The SCCT advances the position that efforts to combat xenophobia are undermined by the both xenophobic sentiments expressed by the state and the GOSA's failure to address inflammatory comments.¹⁵ The SCCT is also concerned that President Zuma reiterated a position commonly advanced by the GOSA that xenophobic attacks were initiated by criminal elements with material aspirations, rather than being motivated by xenophobia,¹⁶ and an Ad Hoc Parliamentary Task Team focusing on the 2015 violence also came to similar conclusions.¹⁷

While the specific motivations of attacks on foreign nationals are complicated and varied, the SCCT believes that presenting the message that such attacks are predominantly driven by criminal elements is unhelpful and that the wholesale dismissal of xenophobic motivations and attitudes gives cause for concern regarding the efficacy of attempts to increase social cohesion going forward.

Recommendations:

- Combat the phenomena of xenophobia by addressing beliefs and attitudes within the institutions of state, to ensure that strong, unequivocal leadership on the issue is advanced.
- Perpetrators of xenophobic violence must be properly prosecuted as a priority, and the incitement of violence, particularly at political level, should be adequately addressed and discouraged.

4. Statelessness

At present in South Africa, there is a patchwork of legislation which offers some protection to stateless persons or those at risk of statelessness, yet there is 'no dedicated, local legal mechanism [...] for the identification or protection of stateless persons or persons at risk of statelessness in South Africa'.¹⁸ While a number of rights exist in international law to protect and advance the rights of such individuals, including within international instruments to which South Africa is already state party,¹⁹ in practice, there are still significant gaps in the country regarding the protection of the rights of stateless persons or those at risk of statelessness.

The SCCT currently assists individuals who are stateless or at risk of statelessness, particularly in our ongoing work with unaccompanied foreign minors in state or

informal care. In our experience, many such individuals currently have very limited options in terms of obtaining documentation to legally remain in South Africa on coming of age. This is especially concerning as such documentation is critical in terms of enabling individuals to lead a productive, safe and healthy life. We are also concerned that the access difficulties at RROs will result in a new generation of stateless children whose births will not be registered due to the inability of asylum seekers to keep their documentation valid.

We are encouraged by the recent Supreme Court of Appeal judgment that ordered DHA to recognise a stateless individual as a South African citizen and requires DHA to put in place mechanisms to process applications from similar individuals in terms of section 2(2) of the Citizenship Act within 18 months.²⁰ We believe this is a positive step towards combating statelessness in the region.

Recommendations:

- Accede to the 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the reduction of Statelessness and ensure national laws, regulations, and policies are in line with international obligations.
- Ensure that a person's nationality is properly determined and recognised by the receiving country, including issuance of identifying documentation, before the person is deported to such a country.
- Provide protection against statelessness for unaccompanied migrant children by facilitating better access to the asylum system and by providing a mechanism to regularise the status of unaccompanied migrant children placed in care through a temporary immigration status. Further, implement regulations that will allow for stateless children to apply for citizenship in terms of the Supreme Court of Appeal judgment given in *Minister of Home Affairs and Others v DGLR and Another*.

5. Barriers in access to health care

South Africa accepted a recommendation advanced by Germany to '*[p]rotect and fulfil migrants' rights, in particular [...] by improving their living conditions, also through the access to adequate health-care services.*'

Since the previous UPR session, access to healthcare for foreign nationals has largely remained challenging. While we applaud the GOSA's commitment to provide healthcare to those in the refugee system, the SCCT regularly receives asylum seekers and refugees who are unable to effectively access healthcare or services despite the legal protections that do exist in South African law. While national health policy guarantees access and treatment at public sector hospitals, there remain serious challenges in implementation and confusion amongst healthcare providers regarding the treatment of asylum seekers, refugees and migrants.²¹ In Cape Town, these challenges have been exacerbated by the closure of the Cape Town RRO.

Recommendations:

- Improve policies regarding access to health and psychosocial services and develop monitoring procedures to strengthen the protection of foreign migrants.
- Ensure that health care providers, particularly 'front line' staff involved in client intake procedures, are aware of refugee rights and vulnerabilities as well as the obstacles to documentation.

6. Barriers to Family Unity

The SCCT has also seen an increase in rights violations in regards to the principle of family unity. The right to family unity is constitutionally protected as the Constitutional Court has confirmed in *Dawood v Department of Home Affairs* where it held that the right to family, marriage and family life is born out of dignity as all people have the right to build a home together and raise a family.²² While existing legislation allows for dependants of recognised refugees to derive refugee status through their dependency, this provision is consistently denied to those who arrived in South Africa after the main applicant, dependants who were not declared during the initial asylum application (often due to translation difficulties and/or lack of trained interpreters at RROs), and dependants whose marriage was conducted in South Africa. As a consequence, a family risks being separated as asylum claims are assessed independently or with some members of the family remaining undocumented for significant periods of time. The absence of proper and accessible procedures for receiving and assessing asylum claims by the dependants of refugees is an impediment to the principle of family unity.

An additional barrier to family unity exists within the Immigration Act (No. 13) of 2002 (Immigration Act, as amended). Section 27(g) of the Immigration Act provides that a foreigner may apply for permanent residence if they have a South African citizen relative within the first step of kinship. Therefore a foreign national who has a child with a South African partner should be eligible to apply for permanent residence based on their South African child. However, in practice, many in this situation have difficulty making applications for permanent residence through this provision. Applications for permanent residence on the basis of the applicant's minor dependent child are rejected. Some applicants are informed that it is not possible for them to submit such an application for permanent residence on the basis of their minor child at all, as they are generally dependent on their parents and not vice versa. As a consequence, the principle of family unity is at risk as parents are compelled to either continuously apply for temporary residence or leave the country and live without their children.

Recommendations:

- Establish proper and accessible procedures for receiving and assessing asylum claims by the dependents of refugees by revising existing policies and administrative procedures and ensure these regulations are accessible in a transparent manner.

- Amend section 27(g) of the Immigration Act to the extent that it requires minor children to assume and provide financial undertaking for their foreign parents. Further, review all the applications rejected on this basis.

¹ Tara Polzer Ngwato, 'Policy shifts in the South African asylum system: Evidence and implications', African Centre for Migration & Society and Lawyers for Human Rights Report (2013) p. 3. Available at: <http://www.lhr.org.za/publications/policy-shifts-south-african-asylum-system-evidence-and-implications>.

² The Western Cape High Court has ruled that the Cape Town RRO closure decision from January 2014 was made lawfully, however this decision is being appealed to the Supreme Court of Appeal. For the other closures, see Simon Allison, 'Port Elizabeth: Home Affairs risks contempt of court after missing refugee centre deadline', *Daily Maverick* (08 February 2016). Available at: <http://www.dailymaverick.co.za/article/2016-02-08-home-affairs-risking-contempt-of-court-after-missing-pe-refugee-centre-deadline/#.V9u15h97IU>. On the Cape Town RRO situation, see Kayla Molander, 'Court setback for immigrants: Cape Town refugee office may stay closed', *GroundUp* (01 July 2016). Available at: <http://www.groundup.org.za/article/court-setback-immigrants-cape-town-refugee-office-may-stay-closed/>.

³ 'Cape Town's asylum seekers struggle to get documented' *IRIN News* (16 May 2013). Available at: <http://www.irinnews.org/report/98051/cape-towns-asylum-seekers-struggle-get-documented>.

⁴ Phillip de Wet, "'Money for papers" at home affairs', *Mail & Guardian* (24 July 2015). Available at: <http://mg.co.za/article/2015-07-23-money-for-papers-at-home-affairs>.

⁵ Roni Amit, 'Queue here for corruption: Measuring irregularities in South Africa's asylum system', Lawyers for Human Rights and African Centre for Migration & Society Report (2015) p. 5. Available at: <http://www.lhr.org.za/publications/queue-here-corruption-measuring-irregularities-south-africa%E2%80%99s-asylum-system>.

⁶ Justin de Jager, 'Refugee status determination in South Africa' in Fatima Khan & Tal Schreier (Eds.), *Refugee Law in South Africa* (2014, Cape Town: Juta).

⁷ See for example Carmel Rickard, 'Refugee wins asylum after 10 years in legal limbo' *Mail & Guardian* (26 February 2015). Available at: <http://mg.co.za/article/2015-02-26-refugee-wins-asylum-after-10-years-in-legal-limbo>; Fatima Schroeder and Sheree Bega, 'Syrian family's asylum bid turned down', *Weekend Argus* (6 February 2016). Available at: <http://www.iol.co.za/news/south-africa/western-cape/syrian-family-s-asylum-bid-turned-down-1980874>.

⁸ Department of Home Affairs, 'Asylum statistics: Department Home Affairs briefing', Presentation to the Portfolio committee on Home Affairs, Parliament (8 March 2016). Minutes available at: <https://pmg.org.za/committee-meeting/22163/>.

⁹ Department of Home Affairs, 'Draft Refugees Amendment Bill, 2015 (Act No. 130 of 1998) Notice 806 of 2015, *Government Gazette No. 39067* (6 August 2015). Available at: www.gov.za/sites/www.gov.za/files/39067_gen806.pdf.

¹⁰ Scalabrini Centre of Cape Town, *Submission regarding Draft Refugees Amendment Bill* (2015). Available at: <http://scalabrini.org.za/wp-content/uploads/2016/01/Scalabrini-Centre-Submission-on-Draft-Refugees-Amendment-Bill-2015.pdf>.

¹¹ The latest version of the Refugees Amendment Bill is available online at: www.parliament.gov.za/live/commonrepository/Processed/20160919/616058_1.pdf

¹² Associated Press, 'Xenophobic violence in South Africa leaves at least five dead', *The Guardian* (14 April 2015). Available at: <https://www.theguardian.com/world/2015/apr/14/south-africa-xenophobic-violence-outbreak>.

¹³ 'Dunoon calm after foreign shops looted', *eNCA* (18 April 2016). Available at: <https://www.enca.com/south-africa/dunoon-calm-after-foreign-shops-looting>.

¹⁴ Joni sayi Maromo, 'The numbers behind Operation Fiela', *Mail & Guardian* (7 September 2015). Available at: <http://mg.co.za/article/2015-09-07-the-numbers-behind-operation-fiela>.

¹⁵ For example, the GOSA failed to address xenophobic comments made by King Zwelithini and Edward Zuma. See Amanda Khoza, 'Zuma's son wants foreigners out of the country', *News24* (1 April 2015). Available at: <http://www.news24.com/SouthAfrica/News/Zumas-son-wants-foreigners-out-of-the-country-20150331>.

¹⁶ Thulani Gqirana, 'Zuma: South Africans are not generally xenophobic and must promote social cohesion,' *Mail & Guardian* (16 April 2015). Available at: <http://mg.co.za/article/2015-04-16-zuma-do-not-turn-xenophobia-into-a-political-football>.

¹⁷ Aldrin Sampear, 'Attacks on foreign nationals not xenophobic: Ad Hoc Committee', *SABC News* (10 July 2015). Available at: <http://www.sabc.co.za/news/a/d3f67900490e95bda40ebd70b5a2a8d2/Attacks-on-foreign-nationals-not-xenophobic-AdHoc-Committee>.

¹⁸ Jessica P. George and Rosalind Elphick with additional updates and editing by Kaajal Ramjathan-Keogh and Liesl Muller (Lawyers for Human Rights), *Promoting Citizenship and Preventing Statelessness in South Africa: A Practitioner's Guide* (Pretoria University Press: 2014). Available at: http://www.pulp.up.ac.za/pdf/2014_13/2014_13.pdf.

¹⁹ For example, the 1989 UN Convention on the Rights of the Child; the 1966 Covenant on Civil and Political Rights; and the 1999 African Charter on the Rights and Welfare of the Child (ARC).

²⁰ Lawyers for Human Rights, 'Press Release: Stateless No More – A Win for Stateless Children in South Africa – Supreme Court of Appeal: Minister of Home Affairs and Others v DGLR and Another (Case Number 1051/2015 SCA) (6 September 2016). Available at: <http://lhr.org.za/news/2016/press-release-stateless-no-more-win-stateless-children-south-africa-supreme-court-appeal-m>.

²¹ Kristy Siegfried, 'South Africa's health system shuns asylum seekers' *IRIN News* (31 October 2014). Available at: <http://www.irinnews.org/news/2014/10/31>.

²² *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).