



Submission on the Green Paper on International Migration in South Africa

21 June 2016

Submitted by

Consortium for Refugees and Migrants in South Africa (CoRMSA)

30 September 2016

A. Introduction:

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

The publication for comment of the Green Paper on International Migration is the next step in a very welcome policy development process that acknowledges the urgent need for South Africa to develop a “new international migration paradigm”¹. It is commendable that there is a recognised need to re-frame the narrative into one that recognises the positive economic and social impact of migration, both inward and outward².

Some overarching comments will be presented under Section B. There are a number of positive proposals in the Green Paper under the seven broad policy areas yet there are some areas of concern that will be elaborated in section C.

CoRMSA, along with others in the sector, have shared the ‘whole of state and civil society led by the elected government’ approach to developing migration policy and has been actively encouraging stakeholders to engage with the Green Paper. The efforts of the Department to reach out to expertise outside of government through the round tables and colloquium held during 2015, the consultations for academics and for refugees, the on-line comment system and the Guidelines for Public Consultation (15 June 2016) are all appreciated. However it is regrettable that there was not more time and capacity for the Department, as the lead agent, to ensure the debate was ignited across the country and all sectors of society. It is therefore hoped that opportunities for civil society to engage with this policy will be maximised as it progresses towards a White Paper. CoRMSA is available to make further written submissions and oral presentations regarding the points raised should such an opportunity arise.

B. Overarching comments:

The Green Paper is premised on the notion of developing an “intelligence-based approach” to migration rather than the current “mechanical application of rules to

¹ Introductory Remarks by the Minister of Home Affairs, Malusi Gigaba MP, on the occasion of the Colloquium on a new International Migration paradigm for South Africa, Pretoria, 30 June 2015

² Ibid

² Ibid

³ DHA presentation to civil society: Toward a New White Paper on International Migration, September 2016

manage risk”. Whilst the idea of having a more strategic understanding of migration, particularly to the issuing of work and family oriented visas, long term multiple entry visas for business people, tourists and academics, could have a positive effect in enabling migrants to have their cases attended to in a manner that is responsive to their particular situations, as well as in the interests of recruiting specific skills, there could be unintended consequences. It is acknowledged that the current system gives rise to systemic corruption. However, without a very thorough overhaul of the functions and training of staff, giving greater flexibility to officials to expedite visas and permits could increase and create new opportunities for corruption. For instance, the idea of enabling fast-tracking permanent residence for those that can make a valuable contribution to economic, social or cultural development is laudable, but open to many interpretations. Building capacity for managing international migration therefore becomes paramount to avoid unintended negative consequences.

The notion of the ‘national interest’ is problematic. The Green Paper does go beyond the current static list of very specific skills that are considered critical and understands the need for families to be enabled to move together. However what is seen as within the ‘national interest’ can be interpreted very differently by different stakeholders within and outside of the Department of Home Affairs. The statement by the Department that “Generally, the majority of foreign nationals that have been granted PR and citizenship in SA do not contribute to the national development agenda of the country” is worrying in this regard³. Different departments will have different ideas of what is in the ‘national interest’ which may create a very uneven understanding of individual cases. This is particularly true given that the policy promotes a holistic approach: covering asylum seekers, refugees and migrants as well as aiming to involve all government departments in migration management. There is a danger that asylum seekers will be adjudicated on the basis of what skills they have and whether or not they are considered to be in the ‘national interest’. Our international obligations must be made clear: asylum claims must be adjudicated for refugee status on the basis of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion or compelled to leave his/her country owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality⁴ and never on the basis of the finances or skills that the individual has to offer.

The addition of migration within the African context is vital to the Green Paper. This enables a recognition of the reality of who comes to South Africa and who should

³ DHA presentation to civil society: Toward a New White Paper on International Migration, September 2016

⁴ UN Convention Relating to the Status of Refugees (1951) and Protocol Relating to the Status of Refugees (1967) and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969)

be encouraged to come to South Africa. It enables a more informed reflection on the history of migration to South Africa under colonial, apartheid and post-1994 policies, acknowledging the historical and contemporary impact of the racist and exploitative migrant labour system. The exploration of various temporary permitting systems for SADC and other African nationals (noting the need to move towards regional free movement regimes and the AU Agenda 2063 vision of a 'borderless' continent) is welcome. The section on the integration of migrants is also a welcome addition. The Green Paper recognises xenophobia and acknowledges that an integration strategy is not yet well developed. However there is a contradiction between the many references to limiting the progression to permanent permits and building cohesive communities. Individuals and communities integrate over time: the longer one remains in a different country, the more one begins to learn new languages, engage with local people and institutions and participate in public life. Feeling insecure in one's status within a country, or aware that it is definitively temporary, does not encourage a true sense of belonging for migrants or for host communities.

Finally, the central focus of the Green Paper on shifting migration policy towards one premised on migration for development is in line with global thinking on migration management. The New York Declaration for Refugees and Migrants, adopted by state parties at the UN on 19 September 2016, clearly posits that migration is beneficial to individual migrants, host and home countries and that human rights norms must apply, regardless of migratory status. CoRMSA would like to propose that the Proposed Vision on page 15 of the Green Paper reads: "South Africans embrace international migration for development, guarding sovereignty, peace, *human rights* and security." This is in line with the statement on page 10 that "human rights of both citizens and other nationals must be respected and protected."

C. Specific comments on policy areas:

- Management of admissions and departures

The regulation of community border crossings is a welcome inclusion in the Green Paper, recognising the colonial nature of African borders and looking to remedy the negative impact of this for communities in border areas. There has been interesting research and innovations undertaken by the AU in this regard and the study that the Green Paper states has been initiated as well as the pilot project with the Thidilamolomo border crossing with Botswana will hopefully offer solutions relevant to the Southern African region.

- Management of residency and naturalisation

There are a number of references to the fact that refugees should not be allowed to apply for permanent residence on the grounds of the number of years spent in the country. However at the same time the Green Paper proposes de-linking residency from citizenship. This should mean that refugees and others that have spent a

certain number of years legally in the country could still apply for permanent residency without this automatically leading to citizenship. The idea that refugees who have ended up spending many years in South Africa should not be able to apply to remain on the basis of years spent in the country, even in the eventuality of a cessation agreement, does not comply with the idea behind the UNHCR durable solutions: resettlement, voluntary repatriation, integration. Integration is one of the long-term solutions requiring the possibility of some kind of progression towards permanent status in the host country. By requiring individual refugees to find an appropriate migration permit in the case of agreement on a cessation clause is again creating a worrying linkage between refugees and the 'national interest'.

- Strategic use of visa and permitting to retain international students post-graduation

This is an important way of assisting the development of South Africa. It also rewards graduating students who have paid to study in the country, those from outside of SADC paying considerably higher fees. The granting of permanent residence should be considered as a positive 'pull factor' which would enable graduates to remain in the country and look for work, as well as for the reasons outlined in the Green Paper that demonstrate the benefits to South Africa: the changing nature of necessary skills; that degrees do not always indicate the area in which the graduate will make the biggest contribution; and the general need for a high proportion of graduates in the population. A 'skills transfer' levy on employers is an option to consider.

- Management of ties with South African expatriates

Global migration management thinking has been increasingly focusing on attracting diaspora communities to contribute to their home countries. This is often achieved through remittances (direct people-to-people financial transfers). More research is probably needed on inward remittances to South Africa and what the benefit is to the country. One option to attract funding from the South African diaspora would be to promote and encourage them to contribute to a training fund, as noted above for South African employers, through some of the options under the proposed diaspora institution/committee.

- Management of international migration in the African context

The elimination of visa requirements for African citizens as envisaged by the AU Agenda 2063 is correctly posited as a desirable goal towards which current migration policy should be directed. However the first point (page 56) regarding using the number of overstays and deportations as a risk consideration when moving towards a visa-free policy is confusing as the Green Paper states (page 31) that in 2014-2015 54,169 people were deported, 82% of whom were from neighbouring countries (Mozambique, Zimbabwe and Lesotho). However it is these very neighbour

countries with whom it is most beneficial to initiate visa free agreements as envisaged under point 4. (page 57) as a means towards liberalising movement within SADC. Enabling movement across borders for travel, trade and to work in neighbouring countries eliminates the need for deportations and is presumably the thinking behind the new SADC permits proposed in the Green Paper.

CoRMSA supports the free movement of people within SADC. The SADC Protocol on the Facilitation of Movement of Persons is a start in this direction and continued advocacy for it to come into force is welcome. Some of the proposals under Option Three (page 62) are relevant in the interim. The SADC traders visa and SME visa are welcome ideas to address the reality of migration into South Africa and the benefits that this brings. Quotas for the SME visa should only be considered after implementation when the numbers issued to nationals from various SADC countries can be assessed. The SADC traders visa speaks to the economic benefit to South Africa and the region of enabling cross-border trade: research by Gauteng City Regional Observatory of 1,270 cross border traders that travelled to and from Gauteng indicates that those interviewed spend over R160 million per year in the province on goods.⁵

The SADC special work visa, whilst a good initiative, would be better conceived as a SADC work-seekers permit, an idea that has previously been mooted by the Department. The Green Paper proposes that the special work visa will be issued on a quota based system implemented through bilateral state party agreements without any indication of the role and responsibility of employers, portability of benefits and other labour rights. The basis for the length of stay allowed by the visa is not elaborated, making it appear as if this visa will be used for seasonal workers or other very short term contracts, open to exploitation by unscrupulous employers and labour brokers, with no indication of a renewal system. Again, this visa will not lead to permanent residence based on years spent in the country which militates against integration into South African communities. The brief outline of this visa in the Green Paper looks more like previous apartheid era bilateral arrangements used to provide cheap black labour to the mines. The regularisation programme to regularise existing undocumented SADC migrants already residing in South Africa, like the ZDP, ZSP and Basotho Special Permit, is supported. However the uncertainty attached to renewal of these permits, or the possibility to move to permanent status, is again a concern.

- Management of asylum seekers and refugees

⁵ Peberdy, S. *Informal sector cross border trading in Gauteng*, September 2015, Vignette, Gauteng City Regional Observatory
http://www.gcro.ac.za/media/reports/GCRO_Vignette_Informal_cross_border_trade_spending_in_Gauteng_FA_XD9dcZI.pdf

CoRMSA believes that it is in the national interest of South Africa to continue to offer protection and basic social and economic rights to those fleeing war, conflict and persecution. The proposals in the Green Paper and the Refugee Amendment Bill move away from our current policy and legislation of non-encampment, self-sufficiency and rights-based provisions. The key premise on which the suggested changes are based is the statistic quoted by the Department that “about 90% of [asylum] applicants do not qualify as refugees but are seeking work or business opportunities” and that the majority come from SADC countries (page 63). Should this be the case, it would be wise, in the first instance, to pursue the implementation of the proposed new permitting regimes for economic migrants. This should have the desired effect of decreasing the number of new asylum claims from SADC countries and thus the overall number of new asylum claims. In addition, the quality of adjudications has long been of concern⁶, borne out by the high number of appeals against these decisions. Human and financial resources should therefore be put into dealing with the backlog in the status determination process – for it is the backlog that reflects in the high number of asylum seekers currently in the country, not annually increasing numbers of new claimants - and in improving the quality and oversight of status determination decisions rather than mobilising resources to build Asylum Seeker Processing Centres close to the borderline. The Green Paper notes that the processing centres will not be “contrary to policy of non-encampment” (page 66) but provide “temporary” accommodation for asylum seekers during their status determination. However there is no evidence to suggest that the processes will be efficiently and effectively managed in remote border areas when there has not been progress in this regard in well developed urban areas. The processing centres could end up housing asylum seekers for indefinite periods of time, becoming *de facto* ‘camps’.

The Green Paper states that administrative detention centres ‘could’ be housed within the processing centres. There are vague notions of identifying ‘high’ and ‘low’ risk asylum seekers, without details on how these risks will be determined or how the overburdened system will cope with an additional layer of screening prior to the determination interview. Low risk asylum seekers “may have the right to enter and leave the facility under specified conditions.” Thus by implication the centres are envisaged as places of detention with the possibility of exemption, the criteria for which are unclear. Even if asylum seekers are exempted to leave the centres, their location on the land borders will make it hard for them to reach families, communities and organisations that can provide assistance as these are predominantly in urban areas. There is a strong possibility that informal settlements will develop around the centres if families travel to find relations or people are allowed outside but have no means to travel back and forth.

⁶ Amit, R. *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Status Determination*. Research Report, September 2012, ACMS, Wits: Johannesburg.

The use of administrative immigration detention is being discredited internationally with growing evidence suggesting detention causes psychological traumas compounding already traumatised people as well as creating conditions in which abuse becomes prevalent⁷. The UN New York Declaration on Refugees and Migrants commits states to pursuing alternatives to detention. It therefore seems extremely retrogressive to consider building detention centres for asylum seekers and violating the current right of asylum seekers to free movement within the country. There is no mention made of how children will be managed – either those traveling with a family member or unaccompanied minors. International best practice recognises that detention is never in the best interest of the child. The UN Convention on the Rights of the Child states that children can only be detained as a matter of last resort and for the shortest period of time. Unaccompanied minors cannot be detained and must be handled in line with the Child Care Act.

CoRMSA does not support removing the right to work for asylum seekers. The statement that the 2004 Watchenuka judgement which entitles asylum seekers to work and study is “a major pull factor that overwhelmed the asylum system” is unsubstantiated by the figures provided by the Department which do not show a year on year increase in total asylum seeker numbers from 2004. As CoRMSA pointed out in its submission to the Refugee Amendment Bill, the policy imperative for this seems to be based on a common misconception that non-nationals dominate the informal sector at the expense of South Africans. Gauteng is the Province with the highest number of migrants in the country. Yet research from the Gauteng City Regional Observatory (GCRO) indicates that 82% of informal business owners were born in Gauteng or moved from elsewhere in the country and only 18% moved to Gauteng from another country. Only 29% of this cohort were asylum seekers.⁸ CoRMSA again stresses that taking away the right to work from asylum seekers will not create jobs for South Africans. Indeed the GCRO data showed that non-nationals were more likely to employ people in their businesses, including South Africans.

The Green Paper states that asylum seekers will not need to work as “their basic needs will be catered for in the processing centres” (page 67). It says that all relevant South African government departments and international organisations such as UNHCR and the Red Cross will provide services (page 66). The cost implications for this are not clear, but given that asylum seekers will not be allowed to integrate into communities (page 66), separate education, health and other services will need

⁷ A Glimpse of Australia’s Manus Island Refugee Prison, Al Jazeera, 1 December 2015 <http://www.aljazeera.com/blogs/asia/2015/12/australia-manus-island-refugees-151201080133207.html>

⁸ Peberdy, Sally (2015). *Informal Sector Enterprise and Employment in Gauteng*, Gauteng City-Region Observatory (GCRO), Data Brief No.6 http://www.gcro.ac.za/media/reports/gcro_data_brief_informal_sector_enterprise_and_employment.pdf

to be established for sole use by asylum seekers in the processing centres. Failure to provide basic services will lead to Constitutional violations and breaches of international commitments. The logistical, human resource and financial burden this will place on government departments to deliver in remote rural areas and the lack of clarity as to the support that will be provided by international agencies does not make this a cost effective policy proposal. CoRMSA believes that providing assistance to asylum seekers above that which is provided to South African citizens will increase resentment and lead to further hostility toward non-nationals, particularly if asylum seekers are kept out of sight in processing centres. Indeed the processing centres will become 'no-go' areas for citizens, something which the Green Paper notes as undesirable in an integrated society.

The section on durable solutions is somewhat confusing as it covers a range of issues beyond the UNHCR durable solutions framework. Durable solutions are long term solutions for refugees: resettlement, voluntary repatriation and integration into the host country. Further consideration needs to be given to these options and the processes involved in negotiating cessation agreements between the host country, country of origin and the UNHCR. A better understanding of "integration" in this context needs to be developed and should be considered under the section dealing more broadly with managing integration process for international migrants.

The issue of exclusions of asylum seekers and refugees needs to be elaborated. There are a number of concerns with the "third country" principle which are particularly pertinent to contemporary geo-political realities in the African continent where crossing a border might not mean one is entering a "safe" country. The Dublin II agreement sets out third country arrangements for EU member states given that there is free movement within the EU. The unilateral approach taken by Australia to the "third country" principle has caused legal actions and global condemnation for their inhumane use of returns, outsourced detention, and their unwillingness to share responsibility by admitting asylum claims. South Africa should rather focus, in the first instance, on advocating for the implementation of free movement within the sub-region. Another concern is the exclusion of asylum seekers for committing crimes in a country that SA recognises as having a fair justice system. This could adversely affect LGBTIQ asylum seekers fleeing from countries that criminalise same-sex relationships yet are considered to have a fair justice system. It is unclear what the tighter regulation of refugee travel documents seeks to remedy. Refugees are entitled to travel, with documentation that is issued by the Department and checked at South African borders.

- Management of integration process for international migrants

One of the main impediments to better integration of non-nationals and citizens in South Africa over recent years has been the unwillingness of high-level leaders (political, traditional, religious, academic) to challenge xenophobic attitudes and the misconceptions around migrants; to present migration as enriching our society and

economy; and to foster discussion on an inclusive concept of nationhood as society grapples with what it means to be a South African and to build a nation. Government departments, the private sector and civil society need to fully understand the international and Constitutional rights afforded to non-nationals, to recognise the various permits and the rights attached to them and to ensure the correct services are provided.

Integration therefore requires a lot of focus on South African citizens as well as ensuring that non-nationals are informed and aware of South African society, languages, legislation etc. An integration policy should not favour wealthy, professional, middle class migrants as we have seen that it is in the poorer neighbourhoods that misinformation easily turns to resentment, hatred and violence against non-nationals. The desire for a society that is diverse, multi-cultural and inclusive is a long-term project that requires robust engagement with the intersection between racism, colonialism, neo-colonialism and xenophobia and the history of migration into South Africa in particular. The Green Paper notes that integration is not the sole preserve of the Department but requires an integrated approach across government departments working with civil society. It is particularly important to engage municipalities which are at the cutting edge of service provision. It is vital to assist municipalities to develop migration strategies which include platforms for migrants and support the development of migrant community groups to give voice to their own concerns, disseminate information in their communities and negotiate contentious issues that arise within communities. Managing a strategy for migrant integration should be linked to the objectives of the National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances and the governance structures that will be designated to ensure implementation across government and society.

Conclusion:

CoRMSA has tried to briefly outline some of the policy areas of concern that have been raised through workshops with members and other civil society networks as well as noting those areas which speak to the intention of creating a new positive paradigm for managing migration in South Africa. It is clear that whilst the policy framework is situated in a willingness to promote the beneficial aspects of migration both for the individual and the host country, some of the proposals work against this trajectory.

The management of asylum seekers is a particular case in point. Our current legislation is considered one of international best practice. CoRMSA has consistently argued that the implementation challenges require political will, capacity and resources not a change of policy direction. The proposals in the Green Paper fundamentally alter the underlying assumptions of our current legislation through

taking away freedom of movement, the right to work and live within communities and to access basic services at the existing points of delivery. Detention in remote border areas does not address a real policy gap and will require a substantial new input of funding. Directing resources to deal with the backlog in the status determination system, to ensure that the Standing Committee for Refugee Affairs and the Refugee Appeals Board are fully functional and to introduce monitoring and evaluation of adjudications would cost less and positively impact on the current backlog of claims.

The concept of the 'national interest' as a basis for flexibility in permitting systems is problematic as there is no agreed definition of what this means which creates the potential for mis-use and corruption. Furthermore it is important to separate asylum seeker and refugee protection from the concept of 'national interest'. The decision to grant refugee status should not be made on the basis of the financial or professional status of the asylum seeker but on a fair assessment of their well founded fear of persecution or that they have been forced to leave their country due to war or conflict.

A key contradiction in the Green Paper is the desire to elaborate a strategy for managing integration of migrants with the conviction that long-stay in the country should not lead to any form of predictable and permanent status. The only category of migrant that is considered for permanency is that of non-national graduates that have studied at South African universities. Whilst this is welcome, creating new temporary permits without criteria for renewal and that are de-linked from any permanent status will not encourage integration. Permanent status could be envisaged in the form of 'long-stay' permits linked to length of stay and following a certain number of renewals and need not lead to citizenship. This would reward those who have abided by the rules of the temporary permits and contributed to the South African economy over a number of years. It would encourage establishment and integration and make real the promise of the Green Paper to harness the benefits of migration whilst mitigating the risks.

Finally CoRMSA would like to appeal to the Department to include specific policy recommendations for children on the move and for groups that face specific vulnerabilities such as women, persons with disabilities, older persons, LGBTIQ migrants and others in line with domestic and international commitments, most recently elaborated in the 19 September 2016 UN New York Declaration For Refugees and Migrants.

Submitted by the Consortium for Refugees and Migrants in South Africa (CoRMSA)

Contact information:

Roshan Dadoo, Director, roshan@corma.org.za, 011 403 7560/1