Southern African Catholic Bishops' Conference
PARLIAMENTARY LIAISON OFFICE

SUBMISSION

to the

Department of Home Affairs

on the

Draft White Paper on Citizenship, Immigration and Refugee Protection

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1. Introduction

The Southern African Catholic Bishops' Conference Parliamentary Liaison Office (CPLO) welcomes the opportunity to comment on the *White Paper on Citizenship, Immigration and refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa*, which was published in Government Gazette 49661, dated 23.11. 2023.

We also welcome the efforts of the DHA to engage the public in consultation around this topic, especially through various provincial encounters. These consultations enhance public participation and thus offer the possibility of a wider, more nuanced understanding of the potential legislation and its consequences.

We state for the record that the CPLO is an office of the Southern African Catholic Bishops Conference especially mandated to engage with the National Parliament and Government around policy and legislative issues. Amongst the specific areas of interest to the Roman Catholic Church is the area of the mobility of peoples, especially vulnerable communities seeking a better life. Pope Francis, the spiritual leader of the Roman Catholic Church, has made this one of the key areas of interest and concern for the worldwide Church and has contributed significantly to an understanding of this contemporary phenomenon.

We note in particular that the title of the Draft White Paper tellingly speaks of 'refugee protection'. Protection is a key theme of Pope Francis' teaching.[1] Hence, the title, and the hermeneutic it provides, resonate very clearly for us. We also note that one of the key forms of protection is the creation of safe, legal pathways for mobility. We hold this in mind as a key outcome for any pro-human rights refugee and migration policies.[2] Our submission is made in that spirit and with that background in mind.

2. Framing Remarks

We acknowledge in principle the importance of several of the stated objectives and aims of the White Paper. Amongst the important aims is the commitment to filling the gaps in various bits of legislation which have the effect of undermining the protection and prosperity of mobile peoples. We acknowledge the importance of synchronising bits of relevant legislation and policies so as to avoid contradictions in both policy and practice. We also acknowledge the importance of enhancing the capacity and skills of those who work in the system. It is generally recognised that a lack of capacity and a low level of skills greatly hinder the work and efficiency of the DHA, resulting in dire consequences for those affected, one of which is to render people vulnerable to deportation on the basis of expired documentation. One has merely to recall the various backlogs in the issuance of documents, to see the impact on already vulnerable communities. Finally, we acknowledge the importance of border management. In the face of extensive, and indeed porous, borders, opportunities for the smuggling of goods and persons and the trafficking of persons need to be stopped forthwith. Hence we acknowledge the importance of these objectives.

We also note, however, that in the public domain there is considerable unease, suspicion and cynicism as to the possibility of subverting these important goals, interpreting and using them as tools to fashion a policy built on exclusion and an understanding of mobility within the framework of crisis, rather than as an opportunity for growth and enhancing the common good.[3]

In these framing remarks we also want to record our concern that the thrust of this White Paper seems to depart significantly from the *National Development Plan 2030* (NDP) which, since 2013, has been South Africa's overarching policy umbrella. In terms of the NDP, legislation – including legislation and policies to do with migration, protection of refugees and people on the move – should

resonate with the NDP and its values. One of the guiding principles set out in the summary of the NDP makes this clear: "The long term plans of departments are aligned with the NDP and areas are identified where policy change is required to ensure consistency and coherence."[4]

The NDP is specific in this regard: "If properly managed, migration can fill gaps in the labour market and contribute positively to SA's development. Energetic and resourceful migrant communities can contribute to local and national development, and diverse cosmopolitan populations are often the focus of cultural, economic and intellectual innovation. If poorly managed, the skills and potential of migrants will be neglected. Migration will remain a source of conflict and tension, and migrants will be increasingly vulnerable, subject to continued abuse, exploitation and discrimination."[5]

Following on from the NDP, the 2017 *White Paper on International Migration* began to seek alignment with the NDP and to discuss possibilities for visas for SADC countries, low-skill visas, and the extension of the dispensations offered to Angolans, Lesotho citizens and Zimbabweans to other neighbouring countries. This has been all but dropped in the 2023 White Paper.

Our understanding is that this White Paper in fact marks a regression from the NDP and from the 2017 *White Paper on International Migration*. Many of the innovative and sensible ideas mooted in both documents seem to have been abandoned and, worse still, the present White Paper seems to exclude such possibilities. We urge a serious reconsideration of a freer visa regime for SADC citizens – to start off with – especially geared to low and middle range skills bearers. Following progressive practices, the emphasis should be on creating expanded legal pathways for the movement of people. The present suggestions in this White Paper do not favour such possibilities.

One final remark in this section. We disagree with the idea, which is quite central to this White Paper, that legislation is mainly responsible for the difficulties in this area; and with the idea that, without legislation and commitments to protocols and conventions, the courts would not have developed the socio-economic jurisprudence that pertains presently. A close understanding of this sector would show that, rather than legislation, the problems that bedevil this sector are linked largely to issues of lack of capacity and skills, a lack of political will, wrong policy choices, corruption, and conclusions reached from understanding of the problems that is not based on proper evidence.

The responsible thing to ensure is that policies and legislation should not be divorced from jurisprudence, international or domestic law, but rather that they should in fact be brought in line with jurisprudence and best practice.

3. Two Specific Issues

We wish to emphasise two basic areas where we adopt a different line to that offered by the Draft White Paper. Both of them are connected to the proposed withdrawal of South Africa from the 1951 Refugee Convention and the 1967 Protocols.

3.1. South Africa's Proposed Withdrawal from the 1951 Refugee Convention and 1967 Protocols

The bottom line in the Draft White Paper with regard to this contentious issue is an understanding that it is due to legislation and to being a signatory to the Convention that South Africa has to provide a range of costly social rights and economic benefits that, in turn, prevent poor South Africans from having access to these benefits. It is assumed that, by withdrawing from the Convention and registering reservations especially with regard to socio-economic rights, and very particularly the right to work, South Africa would be in a position to provide for its own poor first. Several of the Minister's speeches spell this out.[6] Having registered the reservation South Africa would re-join but this time around with reservations. The reality is very far removed from this assumption. The

granting or progressive realisation of refugee rights in South Africa develops not from international law, nor from the Convention, but from the principles of the Constitution. This is clear in all the case law. So, whether South Africa is bound to the Convention or not, the very same jurisprudence and best practice will apply. We can see no good reason to justify a withdrawal from the Convention and Protocols since it is not these instruments that place obligations on South Africa, but rather its own Constitutional requirements. We would also be concerned that, in the time between withdrawal and subsequent re-joining, vulnerable people would be without the temporary protection that the Convention and Protocols extend.[7]

An example of this appears from sections 32.7 and 32.8 of the Draft White Paper, where it is noted that many countries have made reservations under Article 17 of the Convention with regard to the right to work for refugees. This might indeed be so, but the important point is that that the right of refugees to work is protected in our Constitution under the rubric of the right to dignity. Hence, it is the Constitution and not international law that safeguards this right. The same can be said of several of the other rights, including the right to education, which is specifically mentioned in the Draft White Paper. Hence, a withdrawal from the 1951 Convention will not relieve the State of its constitutional duties, and neither will it allow the exclusion of vulnerable people from accessing their rights. Hence we argue once more in favour of South Africa not withdrawing from the Convention and the Protocols.

3.2. Non-refoulement

Sections 32.1, 32.2 and 32.5 deal with the principle of *non-refoulement*. This is probably one of the most fundamental and respected laws in the refugee framework. Any attempt to tamper with it in any of its iterations could well be considered as an offence against the very notion of protection. This bolsters our call for South Africa not to withdraw from the Convention and Protocols. We note that, even should one register reservations, no entity can register a reservation concerning the right to *non-refoulement*. Section 42(1) of the Convention guards against any such reservation. It is also protected by section 232 of our Constitution and thus, even were South Africa to withdraw from the Convention and Protocols, it would not alter the requirement to respect the principle of *non-refoulement*.

Given the centrality of the hermeneutic of protection to our analysis of the Draft White Paper, we add this insight from the case of *Minister of Home Affairs & Others v Tsebe and Others.* The Constitutional Court prohibited the return of convicted murderers to Botswana for fear that they may be subjected to the death penalty (which is unconstitutional in South Africa). The Court explained the principles underlying this decision as follows:

"In this context the state has s7(2) obligations and the person, who has the legal right to the state's protection, promotion and fulfilment of his right to life, right to human dignity and right not to be subjected to cruel, inhuman or degrading punishment, is the person sought by the other state for extradition. If the position were that, after South Africa had asked such a state for the requisite assurance and such state had refused, South Africa might extradite, deport or surrender such person to such state, that person would be entitled to say: the right to life, the right to human dignity and the right not to be subjected to cruel, inhuman or degrading punishment and the state's obligations under s 7(2) are not worth anything. That would be untenable."[8]

We note that the same logic applies to refugees. They, too, have rights protected under section 7(2) of the Constitution, and cannot be returned by South Africa to countries where such rights would be violated. They have, in other words, a constitutional right to *non-refoulement*

We state again, also in the light of the above, that there is no good reason for SA to withdraw from the Convention and the Protocols and respectfully request that the government reconsider this move.

4. Conclusion

After considerable study of the Draft White Paper, and a careful consideration also of the political landscape in which it is proposed, we wish to make the following submissions:

- Given that this Draft White Paper significantly fails to incorporate the values of the NDP, which is the SA government's policy umbrella; and given that it fails to enhance the protection established by earlier legislation, we submit that once the responses to this version of the White Paper have been collated, a new Draft White Paper be written in which there is a specific alignment between the White Paper, the South African Constitution, international and domestic law, and international best practice. The Draft White Paper as it stands, sadly claws back long established values and gains made to protect and promote vulnerable groups. This regression is unacceptable and in the light thereof we submit that the Draft White Paper needs to be reworked.
- Given that the obligations that South Africa wishes to avoid, especially access to the socio-economic benefits available to various categories of people in the country, do not flow from either international law or the Convention or Protocols, but from our own Constitution, established case law and domestic legislation, we would submit that nothing is to be gained by such a withdrawal; and therefore that South Africa abandons its intention to withdraw. We suspect that, since many people will discern that the reasons offered for withdrawal are somewhat spurious, they will conclude that the reasons might well be connected to a longer process of exclusion of mobile people from South Africa. This will result in deep reputational loss for South Africa.

Our hope is that through engagement with this process, the DHA will be able to produce a better document which will serve the good of the different migrant communities possessing various types of status, and of South Africans, all for the common good.

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[1] https://www.icmc.net/2024/01/09/pope-tells-ambassadors-that-migrants-need-respect-protection/
[2] https://www.share-network.eu/legal-pathways
[3] https://www.dailymaverick.co.za/article/2023-12-05-civil-society-slams-poorly-drafted-white-paper-on-citizenship-immigration-and-refugee-protection/
[4] https://www.gov.za/issues/national-development-plan-2030
[5] National Planning Commission, National Development Plan 2030: Our future – make it work (Pretoria, Presidency of South Africa, 2012),
[6] http://www.dha.gov.za/index.php/statements-speeches/opinion-pieces/1524-violence-driven-by-economic-inequality-by-dr-aaron-motsoaled-as-publish-by-the-citizen-13-03-2022
[7] https://law.unimelb.edu.au/__data/assets/pdf_file/0005/1687379/Edwards.pdf
[8] 2012 (5) SA 467 (CC) para 68.