MONITORING
POLICY, LITIGOUS
AND LEGISLATIVE
SHIFTS IN
IMMIGRATION
DETENTION
IN SOUTH AFRICA

## LAWYERS FOR **HUMAN RIGHTS**

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## LAWYERS FOR HUMAN RIGHTS AND IMMIGRATION DETENTION

Lawyers for Human Rights (LHR) is a national non-governmental and non-profit organisation, with six regional offices across South Africa. LHR is a human rights and strategic litigator, and also operates pro bono law clinics. The organisation's vision is to be a leading, effective human rights and constitutional watchdog and seeks to specifically promote and vindicate the rights of vulnerable and marginalised communities and individuals.

LHR aims to achieve its vision through the work of six specialised programmes. One of these programmes is the Refugee and Migrant Rights Programme, which operates out of Johannesburg, Pretoria, Musina and Durban. Assisted by the Strategic Litigation Programme, the RMRP supports and engages in litigation on behalf of refugees, asylum seekers and vulnerable migrant groups. Since 2000, LHR has also operated a Detention Monitoring Unit that provides *pro bono* assistance to and carries out consultations with individuals purportedly detained in terms of the Immigration Act, 13 of 2002 ("the Immigration Act") and/or the Refugees Act, 130 of 1998 ("the Refugees Act"). This unit seeks to realise the rights of as many detained individuals as its resources and capacity allow.

Through these programmes, LHR regularly and consistently monitors immigration detention facilities across the country in order to provide legal assistance and identify relevant trends.

With its 20-year track record of work on behalf of this vulnerable population and direct contact with large numbers of detainees over this period, LHR has unique first-hand information on the experiences of detainees as well as conditions of detention, legislative and jurisprudential development, and shifts in immigration policy and practice.

## ACRONYMS

**ACMS** African Centre for Migration & Society

**DHA** Department of Home Affairs

**IDC** International Detention Coalition

**LHR** Lawyers for Human Rights

**RAA** Refugee Appeal Authority

RAB Refugee Appeal Board

**RSDO** Refugee Status Determination Officer

**SAHRC** South African Human Rights Commission

**SCRA** Standing Committee for Refugee Affairs

**RRO** Refugee Reception Office

#### KEY TERMS

#### (a) Asylum seeker

An asylum seeker is a person who seeks recognition as a refugee in the Republic. Refugee status determination is conducted through a procedure set out in the Refugees Act. A Refugee is defined in section 3 of the Act.<sup>1</sup> An asylum seeker is a person who is still in the bureaucratic process of having their asylum claim adjudicated and refugee status determined.

#### (b) Migrant

These are persons who -

"...choose to move not because of a direct threat of persecution or death, but mainly to improve their lives by finding work, or in some cases for education, family reunion, or other reasons. Unlike refugees who cannot safely return home, migrants face no such impediment to return. If they choose to return home, they will continue to receive the protection of their government".<sup>2</sup>

#### (c) Refugee

Refugees are persons who are granted asylum because they have established their claims on the basis of "armed conflict or persecution". These are persons who are forced to migrate due to "perilous and intolerable" conditions in their countries of origin necessitating their departure to seek safety in nearby countries.

- 3. Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-
  - (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
  - (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
  - (c) is a dependant of a person contemplated in paragraph (a) or (b).

 $https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html, accessed\ 27\ Mar.\ 2019.$ 

<sup>&</sup>lt;sup>1</sup> Section 3 states:

<sup>&</sup>lt;sup>2</sup> United Nations '"Refugee" or "migrant" – Which is right?' available at:

<sup>&</sup>lt;sup>3</sup> Ibid.

<sup>&</sup>lt;sup>4</sup> Ibid.



## EXECUTIVE SUMMARY



This report is motivated by recent changes in policy and practice in respect of immigration detention in South Africa, as well as legislative and jurisprudential development over the past few years. In broad terms, since 2013, shifts have occurred in the following areas: jurisprudence, legislation, practical barriers to accessing the asylum system, and information access regarding designation of places of detention. These are briefly summarised below:

01

The Lawyers for Human Rights v Minister of Home Affairs<sup>5</sup> Constitutional Court judgment significantly impacted the procedure governing immigration detention. All persons arrested in terms of section 34 of the Immigration Act are afforded an automatic right to have the lawfulness of their detention confirmed by a court within 48 hours of arrest. This judgment mandated legislative change to the abovementioned provision of the Immigration Act as well as associated Regulations, which amendments are still pending at the date of publication of this report.

03

Closing of Refugee Reception Offices (RROs) across the country either partially or completely has led to barriers in access and service delivery issues, leaving asylum seekers undocumented and vulnerable to arrest and detention.

02

Amendments to the Refugees Act<sup>6</sup> and Refugees Regulations, 2018,<sup>7</sup> which came into effect on 1 January 2020, create further barriers to accessing the asylum system. This increases the vulnerability of asylum seekers and refugees to unlawful detention and refoulement.<sup>8</sup>

04

Publication of designated places of detention, excluding prisons, provides for definitive locations to monitor compliance with safeguards embedded in our legal framework, aimed at regulating detention.

<sup>&</sup>lt;sup>5</sup> Lawyers for Human Rights v Minister of Home Affairs & Others (CCT38/16) [2017] ZACC 22.

<sup>&</sup>lt;sup>6</sup> Refugees Amendment Act 11 of 2017.

Refugees Regulations, 2018 published in GN 1707 GG 42932 of 27 December 2019.

<sup>&</sup>lt;sup>8</sup> Refoulement refers to the forcible return of refugees or asylum seekers to a country where they are likely to be subjected to persecution. It is prohibited under international law.



I.
INTRODUCTION

The increase in the detention of migrants in South Africa? and the prevalence of human rights abuses in detention processes over the last decade, greatly necessitates the effective and regular monitoring of immigration detention. Monitoring sites of detention is an essential component of democracy as it promotes "transparency and independent oversight of the public administration of the State". 10

Detention and deportation remain the primary tool of immigration enforcement in South Africa. The century's legal framework regulates the arrest and detention of individuals suspected of being undocumented immigrants and offers legal protections for asylum seekers, refugees and other migrants. Despite these protections, the results of LHR's monitoring work reveal that detention and deportation of foreign nationals continue to be regularly carried out in an unlawful manner. Key concerns regarding detention and deportation processes include:

- the continued arrests of newly arrived asylum seekers;
- lack of formalised, independent oversight of immigration detention;
- deplorable conditions of detention at detention centres;
- the inconsistent application of procedural safeguards and statutory limits; and
- the arrests of asylum seekers with expired documentation as a result of the partial or complete closure of RROs.

Over the last seven years, LHR's detention monitoring has revealed a high incidence of unlawful detention, including a high frequency of the detention of minors, repeated disregard for statutory limits of detention, a high frequency of detention of asylum seekers with pending asylum claims and a disregard for court orders. This report highlights and assesses trends in these practices over the last seven years. However, over the reporting period there have also been positive developments regarding historic practices deemed unlawful. This report will also discuss these developments and the interventions that have contributed to changes in practice.

<sup>&</sup>lt;sup>9</sup> Karen Jeynes 'Factsheet: Detention and deportation of undocumented migrants in South Africa at the Lindela Repatriation Centre' Africa Check 2016, available at: https://africacheck.org/factsheets/lindela-repatriation-centre-migrants, accessed 5 March 2020.

<sup>&</sup>lt;sup>10</sup> Eve Lester Monitoring immigration detention: Practical Manual (2014) 21.

### LHR uses the following strategies to monitor and address the concerns surrounding immigration detention:

- **Regular visits** to detention facilities with the aim of preventing abuses and unlawful actions;
- Litigation on behalf of detainees who have been held in detention unlawfully;
- Strategic litigation in the public interest to ensure judicial oversight over detention;
- Individual representation of detainees at immigration hearings in Magistrate's Courts in order to secure their release from unlawful detention;
- Conducting training with legal practitioners on immigration detention with a view towards capacity building, concentrating on advocates, legal aid practitioners, and private practitioners;
- Monitoring conditions of immigration detention and advocating for compliance with prescribed minimum standards;
- Monitoring immigration hearings at the Magistrate's Court level; and
- Working with South Africa's National Human Rights Institution, set up
  in terms of Chapter Nine of the Constitution the South African Human
  Rights Commission in order to gain access to places of detention, report
  on use of violence to discipline detainees, and engage with the DHA in
  respect of ensuring improved legal compliance and lawful detention practices
  that respect the human rights of the detainees.

#### Previous reporting on detention

South Africa's primary place of detention for the purposes of deportation is the Lindela Repatriation Centre ("Lindela"), located in Krugersdorp, Gauteng Province. While there are various places designated as detention facilities in each province, most persons detained for the purpose of deportation are eventually transferred to Lindela for them to be processed and, finally, deported.

Most detention centres prescribe varied limitations to access for purposes of monitoring. The procedure at Lindela, for example, is that 48-hours' notice is required prior to a client consultation. There is also a limit on consultations to just five (5) detainees per day. These access challenges pose obstacles to independent reporting on immigration detention in South Africa, and the state similarly provides no regular, public assessment of its practices in this respect.

LHR has therefore historically endeavoured to produce and contribute to reports on immigration detention to counteract this dearth of information, and based on its regular pattern of visitation of a range of detention sites, as set out below. These reports include:

#### (i) LHR and ACMS

Gina Snyman, Roni Amit, et al Immigration detention in South Africa (2008).

Nicola Whittaker Monitoring Immigration Detention in South Africa (2012).

Roni Amit Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa (2010).

Tara P Ngwato Policy Shifts in the South African Asylum System: Evidence and Implications (2013).

Lawyers for Human Rights Violence and violations at Lindela Repatriation Centre (2017).

#### (ii) South African Human Rights Commission

South African Human Rights Commission Investigative Report Vol 4 (2015).

#### (iii) Scalabrini Centre of Cape Town

Scalabrini Centre of Cape Town 'Migration Statistics: South Africa' available at https://scalabrini.org.za/resources/migration-statistics-south-africa, accessed at 24 March 2020.

#### (iv) Amnesty International

Amnesty International 'South Africa Country Report 2017/2018' available at https://www.amnesty.org/en/countries/africa/south-africa/report-south-africa, accessed on 23 March 2020.

#### (v) Judicial reports

Edwin Cameron, Constitutional Court Visitation Report: Lindela Repatriation Centre (2012). Dikgang Moseneke, Constitutional Court Visitation Report: Lindela Repatriation Centre (2014).

Each of these reports is referred to and relied on in this report.



## II. METHODOLOGY

LHR conducts regular visits to key immigration detention centres across Gauteng, KwaZulu-Natal, and Limpopo provinces, to consult with detainees and monitor conditions of detention.

**TABLE 1:** PLACES OF DETENTION WHERE LHR CONDUCTS IMMIGRATION DETENTION MONITORING

Province	Detention Centre monitored by LHR
Gauteng	The Lindela Repatriation Centre Hillbrow Police Station Jeppe Police Station Johannesburg Central Police Station Kempton Park Police Station Pretoria Central Police Station Sunnyside Police Station Vereeniging Police Station
KwaZulu-Natal	Durban Central Police Station  Mayville Police Station  Umlazi Police Station
Limpopo	Makhado Police Station  Musina Police Station

LHR provides legal representation to select, particularly vulnerable clients and has secured release in more than 97% of the immigration detention cases in which the organisation has intervened. Given capacity constraints, only a small number of clients brought to LHR's attention are able to be taken on as clients. LHR's case intake criteria prioritises intervention with respect to the most vulnerable groups of detainees, such as unaccompanied minors, pregnant women, asylum seekers and refugees with refoulment concerns, and stateless individuals. LHR endeavours, were possible, to assist other wrongfully detained individuals such as citizens, permanent residents, and migrants who do not fall into the category of persons entitled to additional protection under international refugee law and who might not have access to legal representation.

LHR further monitors Magistrate's Courts that are mandated to provide judicial oversight of immigration detention in terms of section 34 of the Immigration Act. 11 LHR's Strategic Litigation Programme also pursues broader systemic change by way of litigation with the potential to set precedent that would increase safeguards available to detained individuals. Previously, LHR's detention work was limited to cases of administrative detention and did not include foreign nationals detained in relation to criminal matters. However, LHR has noted concerning trends in respect of the criminalisation of migration through the use of the criminal justice system to enforce immigration provisions. Arrested foreign nationals are often criminally charged with having illegal immigration status in terms of section 49 of the Immigration Act and are thereafter dealt with in terms of the provisions of the Criminal Procedure Act. 12 This has necessitated increased monitoring and intervention in criminal matters concerning both the Immigration Act and Refugees Act.

LHR uses the following strategies to advocate for improved conditions of detention and improved implementation of laws for detained individuals:

- Monitoring immigration detention facilities with the aim of preventing unlawful actions and holding officials accountable;
- Litigating on behalf of detainees through civil proceedings to secure releases of unlawfully detained individuals and also litigating damages claims for unlawfully detained individuals;
- **Strategic litigation** to secure systemic change to ensure improved judicial oversight of immigration detention and comprehensive observance of constitutional safeguards regarding detention;
- Reporting rights violations to the SAHRC and seeking remedial action against state organs where applicable;
- Making submissions to Parliament on legislative gaps and proposed amendments to ensure they are in line with the Constitution and Bill of Rights; and
- **Empowering communities** and affected vulnerable populations by running workshops on migrant and refugee rights.

The findings and observations included in this report are the result of the above strategies, and represent an update on and expansion of findings included in the last LHR report on conditions of immigration detention, published in 2013.

<sup>&</sup>lt;sup>11</sup> Nobuntu Mbelle & Erin Patrick Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg Volume 17 (2005).

<sup>&</sup>lt;sup>12</sup> Criminal Procedure Act, 51 of 1977.



## III. LEGAL FRAMEWORK

The legal framework governing immigration detention has been discussed in detail in previous detention reports, most recently in LHR's 2013 Detention Monitoring Report. <sup>13</sup> However, there has been considerable development in the jurisprudence since then. This necessitates that an overview of the framework is provided to give context for this report.

#### (a) The Constitution<sup>14</sup>

"...Persons within our territorial boundaries have the protection of our courts..."15

The entitlements afforded by the Bill of Rights in South Africa's Constitution are applicable to all persons within the Republic, regardless of nationality or immigration status.

The right to dignity<sup>16</sup> is one of the most important constitutional rights, both in and of itself, and as an interpretive instrument for other rights. The Constitution further guarantees everyone "the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause." <sup>17</sup> As was said in the *Matebese* judgment, " [t]he right to liberty is inextricably linked to human dignity". <sup>18</sup>

The arrest and detention of any person is *prima facie* unlawful and must be justified by the State. <sup>19</sup> For immigration detention, this means that immigration officers, as representatives of the Department of Home Affairs (DHA), are required to justify any arrest or detention. While DHA's power to detain is established under the Immigration Act, administrative detention is also contingent upon the prescriptions and safeguards of the Bill of Rights, and the legislation governing administrative justice. <sup>20</sup> Section 35(2) of the Constitution specifically highlights arbitrary detentions and identifies the protections afforded to persons in detention. Such protections apply to administrative detentions to the same degree as detention for any other lawful purpose. Specifically, section 35 provides every detained person the right to be brought in front of a court within 48 hours of their arrest and the right to challenge their detention. This is a right that immigration detainees did not have access to until recently, as discussed below.

Section 33(1) of the Constitution provides for the guarantee of lawful, reasonable and procedurally fair administrative action. This provision is given effect through the Promotion of Administrative to Justice Act ("PAJA").<sup>21</sup> The Constitution requires that state actors "respect, protect, promote and fulfil all the rights in the Bill of Rights", which includes those summarised above.<sup>22</sup>

<sup>&</sup>lt;sup>14</sup> Constitution of the Republic of South Africa, 1996.

<sup>&</sup>lt;sup>15</sup> Lawyers for Human Rights case supra note 5 at 26-7.

 $<sup>^{\</sup>rm 16}$  Constitution supra note 14 at s 10.

<sup>&</sup>lt;sup>17</sup> Ibid s 12(1)(a).

<sup>&</sup>lt;sup>18</sup> Matebese v Minister of Police (2224/2017) [2019] ZAECPEHC 37 at para 15.

 $<sup>^{19}</sup>$  Minister of Police and Another v Du Plessis 2014 (1) SACR 217 (SCA) at para 14 – 17.

<sup>&</sup>lt;sup>20</sup> Promotion of Administrative Justice Act, 3 of 2000.

<sup>21</sup> Ibid

<sup>&</sup>lt;sup>22</sup> Constitution, supra note 14 at s 7(2).

#### (b) The Immigration Act

Two principal pieces of legislation govern the entry and immigration-related treatment of foreign nationals in South Africa: the Immigration Act and the Refugees Act. The Immigration Act differentiates between "illegal foreigners" and "foreigners". Both refer to persons who are neither permanent residents nor citizens in South Africa, but an "illegal foreigner" is someone who is in the country in contravention of the Immigration Act.

#### (i) Section 34(1)

The detention of any foreign national in terms of the Immigration Act is administrative in nature. The purpose of such detention is specifically to facilitate the deportation of an individual who has been found to be in South Africa in contravention of the Immigration Act and who is thus deemed an "illegal foreigner" for the purposes of the Immigration Act. Detentions of this kind must be distinguished from criminal detention which would ordinarily follow the processes prescribed by the Criminal Procedure Act.<sup>23</sup>

Section 34 of the Immigration Act grants an immigration officer the discretion to execute the arrest of an illegal foreigner and detain her/him for purposes of deportation. This authorisation to arrest is often mistaken as an absolute and indisputable power. Section 34(1) must be read with section 32 of the same Act, which requires an illegal foreigner to depart the Republic voluntarily or be deported. Section 34 was historically implemented to grant immigration officers and police broad discretion and powers to arrest and detain anyone suspected of being an illegal foreigner without having to bring the individual before a court. After being declared an illegal foreigner, an individual could be detained for up to 30 days without the detention being confirmed by a court and without the individual having been brought before a court. This detention could be extended for a further 90 days, simply through the immigration office seeking a warrant of extension by bringing the detainee before a Magistrate's Court. In practice, individuals were frequently detained for 120 days (or more) with little consideration for the warrants of extension. The initial omission of a constitutional safeguard – the fact that the individual was generally not brought before a court within 48 hours, as per section 35 of the Constitution – inevitably exacerbated the risk of the abovementioned timeframes simply not being adhered to in immigration detention. This omission and the litigation used to address it will be discussed in detail below.

It must be acknowledged that the number of detainees found to have been detained beyond 120 days over the last five years has notably decreased. Whilst there are still some detainees held for over 120 days at Lindela and in police stations, these instances are significantly fewer than they were in the early 2010s, and DHA will normally release them without the need for litigation. The DHA's improved compliance is discussed in further detail under the 'Trends & Litigation' section below.

<sup>&</sup>lt;sup>23</sup> Criminal Procedure Act, supra note 12.

#### (ii) Section 41

The Immigration Act provides for a process known as "verification" – section 41 of the Immigration  $Act^{24}$  read with regulation  $37^{25}$  to provide for verification of visas and immigration status-related documents. This process principally pertains to persons suspected of being in South Africa without the correct documentation.

Once a foreign national is arrested under the suspicion of not being in the country lawfully, the immigration officer has a duty to verify the individual's documents. Section 41, read with regulation 37 of the 2014 Immigration Regulations, provides that prior to any detention in terms of section 34, an immigration officer is expected to assist with the verification of such person's identity or status. Only after verification of their immigration status, if necessary, can a person be detained in terms of section 34. A person can be detained on reasonable grounds that they are an illegal foreigner for a period not exceeding 48 hours, while their status is being verified in terms of section 41. The purpose of this provision is to avoid unlawful and arbitrary arrests and detentions that last longer than the prescribed 48-hour limit.

The 2014 Regulations to the Immigration Act<sup>26</sup> clearly outline how immigration officers must carry out this duty:

- "access relevant documents that may be readily available in this regard"; <sup>27</sup>
- "contact relatives or other persons who could prove such identity and status"; 28
- "access Departmental records in this regard"; <sup>29</sup> or
- "provide the necessary means for the person to obtain the documents that may confirm his or her identity and status".<sup>30</sup>

On multiple occasions, LHR has observed persons detained beyond the 48-hour limit, whose verification process occurs a week after transfer to Lindela, and this does not factor in the time spent in police holding cells prior to transfer to Lindela. Such practices are a clear breach of the requirement that verification must be done within a maximum period of 48 hours. It is essential to note here that the law requiring an appearance before the Magistrate's Court within 48 hours of the arrest is separate, yet related to the process of verification. In other words, even if a detainee's verification takes place within the 48-hour time period, they must still be brought before a court within 48 hours, failing which, the detention is unlawful.

<sup>&</sup>lt;sup>24</sup> Immigration Act, 13 of 2002.

<sup>&</sup>lt;sup>25</sup> Immigration Regulations, 2014 in GNR.413 GG 37679 of 22 May 2014.

<sup>&</sup>lt;sup>26</sup> Ibid.

<sup>&</sup>lt;sup>27</sup> Ibid reg 37(a).

<sup>&</sup>lt;sup>28</sup> Ibid reg 37(b).

<sup>&</sup>lt;sup>29</sup> Ibid reg 37(c).

<sup>30</sup> Ibid reg 37(d).

#### (c) The Refugees Act

The Refugees Act establishes a legal framework separate from that contained within the Immigration Act. Essentially, the Refugees Act provides that even if a foreigner is in the country in contravention of the Immigration Act, that person may not be considered an "illegal foreigner" if they fall within the ambit of the Refugees Act. More particularly, the Refugees Act prescribes a clear prohibition against the detention of asylum seekers as "illegal foreigners" under the Immigration Act.

Appropriately, asylum seekers and refugees are not governed by the provisions of the Immigration Act and, consequently, ought not to be dealt with in the immigration context. This is so because asylum seekers and refugees are provided with particular protections under international law, including not having to apply for an entry visa in the same way that a visitor might have to when coming to South Africa. There are also further obligations placed upon the South African state to offer protection to refugees, as well as asylum seekers on South African territory, while they are awaiting the adjudication of their claim to refugeehood.

#### (i) Section 2

The principle of *non-refoulment* is the basis of refugee protection and is enshrined in section 2 of the Refugees Act. This principle is "at the heart of international refugee law" and "all other provisions of the Refugees Act are subordinated to those of section 2. That means that section 2 takes precedence." The principle of *non-refoulment* prohibits the forced return ("refoulment") of an asylum seeker to a country where he or she may face persecution or harm. This is a principle of international refugee law and has been heavily endorsed by South African courts, which have emphasised that the principle of *non-refoulment* in section 2 of the Refugees Act takes precedence over section 21(4), as set out below.<sup>32</sup>

<sup>&</sup>lt;sup>31</sup> Saidi and Others v Minister of Home Affairs and Others (CCT107/17) [2018] ZACC 9 at paragraph 27-8.
<sup>32</sup> Ibid para 28. See also Tshiyombo v Members of the Refugee Appeal Board and Others (13131/2015) [2015] ZAWCHC 170; [2016] 2 All SA 278 (WCC); 2016 (4) SA 469 (WCC); Tantoush v Refugee Appeal Board and Others (13182/06) [2007] ZAGPHC 191; 2008 (1) SA 232 (T); and Kiliko and Others v Minister of Home Affairs and Others (2739/05) [2008] ZAWCHC 124.

#### (ii) Section 21(4)

Section 21(4) of the Refugees Act provides that "no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if" such person has applied for asylum and is awaiting a decision, or if they have been granted asylum.<sup>33</sup> The courts have interpreted this provision generously, so that it applies to persons who have applied for asylum as well as those who have yet to apply but who express the intention to do so even once detained. This has been confirmed by South Africa's courts in the Arse case.<sup>34</sup>

In addition, the courts have extended this protection to persons who intend applying for asylum but who have yet to apply either because they have not yet been able to gain access to an RRO despite attempting to do so,<sup>35</sup> or because they have simply not yet applied at all.<sup>36</sup> Thus, section 21(4) protects those foreign nationals who have applied for asylum and are awaiting the outcome of such application, and those who have been granted asylum. Such protection is granted against deportation and detention for persons who fall within either category. Any detention or deportation which is executed in these circumstances is unlawful and would constitute a violation of the Refugees Act and South Africa's obligations under international refugee law.

#### (iii) Section 23

Section 23 pertains to the detention of asylum seekers. Given the generous interpretations of section 21(4) as described above, section 23 ought to be read in an especially restrictive manner so as to adhere to the international principle of *non-refoulment* and so as to avoid any internal contradiction of interpretation of provisions in the Refugees Act. In this regard, asylum seekers may only be detained under exceptional circumstances, and only after strict criteria have been met, as set out in the Refugees Act. Section 23 provides for the Director-General of DHA to withdraw an asylum seeker's visa in the prescribed manner, if one of the criteria listed in section 22(5) of the Act has been met. Those criteria are:

- The applicant has contravened any conditions endorsed on their visa;
- the application for asylum has been found to be manifestly unfounded, abusive or fraudulent;
- the application for asylum has been rejected; or
- the applicant is or becomes ineligible for asylum due to exclusion or cessation.<sup>37</sup>

<sup>&</sup>lt;sup>33</sup> Refugees Act, 130 of 1998 at s 24(1).

<sup>&</sup>lt;sup>34</sup> Arse v Minister of Home Affairs and Others (25/2010) [2010] ZASCA 9. In this matter, Mr Arse was detained at Lindela initially because he had yet to apply for asylum, despite attempting to do so, but thereafter he was further detained while awaiting the outcome of an appeal hearing at the RAB. The court indicated that once an asylum seeker has applied for asylum, he or she is no longer an illegal foreigner and no proceedings may be instituted against him or her in respect of his or her unlawful entry or presence in the country until a decision has been made on his or her application. This includes the time such asylum seeker is waiting for a decision to be issued by the RAB (para 19).

<sup>35</sup> Ersumo v Minister of Home Affairs and Others (69/2012) [2012] ZASCA 31, in this matter, Mr Ersumo had tried to apply for asylum, but had been unable to gain entry to one of the RROs. The SCA provided that where a person was arrested in terms of section 34 read with section 23 of the Immigration Act, if such person expresses the wish to claim asylum, they must be released from detention in terms of sections 2 and 21(4) of the Refugees Act.

<sup>&</sup>lt;sup>36</sup> Bula & Others v Minister of Home Affairs & Others (589/11) [2011] ZASCA 209. In this matter the SCA indicated that once an intention to apply for asylum is indicated by a person detained as an illegal foreigner, the asylum seeker is entitled to protective provisions and must be assisted in making an application for asylum. Any continued detention would be unlawful. The assessment of the persons claim can only be done by a Refugee Status Determination Officer, so the immigration officer cannot determine the strength or validity of the claim.

<sup>&</sup>lt;sup>37</sup> Refugees Act supra note 33 at s 22(5).

#### (d) The Amendments to the Refugees Act

The Refugees Act has been amended on a number of occasions since 2008. However, the substantive amendments were not brought into effect until recently.

On 1 January 2020, sweeping amendments to the Refugees Act,<sup>38</sup> as well as a new set of Refugees Regulations,<sup>39</sup> came into force. The impact of the amendments and new regulations is that the Act in its current form now contains various problematic provisions pertaining to the detention of asylum seekers and which could have the effect of violating the principle of *non-refoulment* as well as various constitutional provisions and rights in the Bill of Rights.

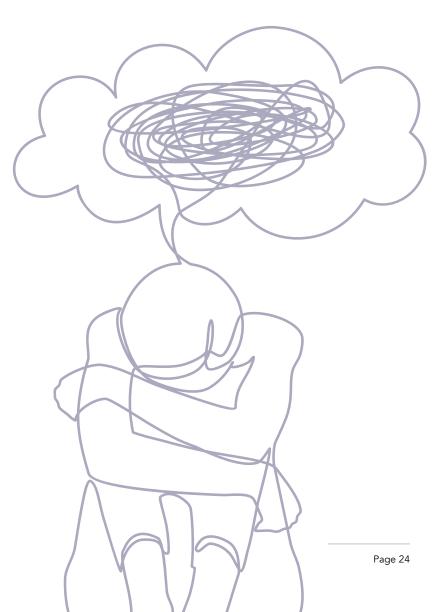
At the time of publication, some of the amendments were being implemented, but not all of them. Thus, we are yet to see how they will be implemented or how the courts will rule on their constitutional validity. A list of concerning provisions, directly related to detention and deportation, include, *inter alia*:

- Section 4, which now allows for the exclusion of asylum seekers who do not report to a RRO within five days of their arrival to the country despite the attempted and successful closure of various RROs across the country and well documented access issues. This exclusion may be implemented in a way that will result in detention and potential deportation.
- **Section 28**, which allows for the detention and removal of an asylum seeker or refugee on the vague grounds of "threat to national security" or "national interest".
- Regulation 22(4), which limits applications for judicial review of decisions made under section 28 of the Act to within 48 hours of the arrest of a person, which is wholly impractical considering that most detention centres require 48-hours' notice before consultations with a client.
- Regulation 21(5), which requires that any order made by a High Court securing the release of a person detained in terms of section 28 to be confirmed by the Constitutional Court within two calendar weeks failing which the High Court Order lapses and the person may be removed from the country. The lawfulness of this provision is questionable as it appears to violate the separation of powers between legislature and the judiciary.

<sup>&</sup>lt;sup>38</sup> Refugees Act supra note 33.

<sup>&</sup>lt;sup>39</sup> Refugees Regulations supra note 7.

The above-listed provisions appear to erode significant, rights-based jurisprudence developed by South African courts over the last two decades, which has purposively interpreted the Refugees Act (prior to amendment) so as to ensure practical safeguards are available to detained individuals. These amendments are also inconsistent with various international instruments that South Africa is bound by, and are inconsistent with international refugee law. In addition to the ways in which the amendments contradict or undermine provisions previously pronounced on by our courts, the contradiction with international refugee law further illustrates a concerning example of legislative inconsistency, given that the interpretive provision of the Amendment Act states that the Act "must be interpreted and applied in a manner that is consistent with" relevant international instruments.40 This is simply not possible when the other provisions of the same Act are not in line with those same international instruments.



 $<sup>^{\</sup>rm 40}$  Refugees Act supra note 33 at s 1A.

#### (e) International instruments

South Africa has ratified, and is signatory to the following international and regional conventions:

- The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol; 41
- The 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa ("the OAU Refugee Convention"); 42
- The 1948 United Nations Universal Declaration of Human Rights; 43 and
- The 1987 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention Against Torture (CAT)).

These international instruments were previously reflected in South Africa's 1998 Refugees Act, prior to the amendments, by way of section 6 on "interpretation, application and administration" of the Act. While section 6 was repealed by the recent amendments, it was replaced by section 1A relating to "interpretation and application" of the Act. The previous section 6 indicated that the Act "must be interpreted and applied with due regard to" the 1951 UN Refugee Convention, 1967 Protocol, and other international instruments listed. (our emphasis).<sup>45</sup> Importantly, the amended interpretative provision states that the Act "must be interpreted and applied in a manner that is consistent with" the 1951 UN Convention, 1967 Protocol, and other international instruments listed (our emphasis). The amended provision is therefore far stronger than the previous interpretive provision and places international refugee law (as articulated in various international instruments) at the centre of any interpretation of the Act. Indeed, it is a mandatory interpretative lens through which the Act must be understood and applied. This same interpretive lens must be applied to the Immigration Act, and particularly in relation to how the principle of non-refoulement interacts with provisions of these Acts.

<sup>41</sup> UN General Assembly The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol U.N.T.S. Vol. 189 at p 137.

<sup>&</sup>lt;sup>42</sup> Organisation of African Unity Convention Governing the Specific Aspects of the Refugee Problem in Africa (1969).

<sup>&</sup>lt;sup>43</sup> UN General Assembly Universal Declaration of Human Rights (1948).

<sup>&</sup>lt;sup>44</sup> UN General Assembly Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Vol 1465 (1984) at p 85.

<sup>&</sup>lt;sup>45</sup> Refugees Act supra note 33 at s 6.

The principle of *non-refoulement* has arguably emerged as a *jus cogens* norm – or a norm of customary international law from which derogation is not permitted.<sup>46</sup> It is also a principle to which all other provisions in the Refugees Act are subordinated. Each of the international instruments referred to above enshrine the importance of not sending back people to places where they will be vulnerable to persecution or harm.

International law has both a direct and indirect impact on law and policymaking in South Africa. First, Section 233 of South Africa's Constitution provides that, "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". A Similarly, section 232 of the Constitution provides that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". A Further, Section 39 of the Constitution states that the courts, and other legal bodies, when interpreting the Bill of Rights, must consider international law.

It also bears mentioning that, in addition to the abovementioned international instruments, South Africa has also ratfied other noteworthy conventions, such as the Convention Against Torture and its Optional Protocal (OPCAT). A direct implication arising from South Africa's ratification of the OPCAT is the obligation placed on the state to establish a National Preventative Mechanism to prevent torture at places of detention. The National Preventative Mechanisms functions include visiting and monitoring detention centres and advising on detention to legislative bodies. The Department of Justice and Constitutional Development launched South Africa's National Torture Preventive Mechanism of the OPCAT in July 2019. It remains to be seen whether it will provide a form of effective monitoring of immigration detention facilities specifically, though this is certainly within the National Preventative Mechanism's mandate.

<sup>&</sup>lt;sup>46</sup> Jean Allain 'The jus cogens nature of non-refoulement' (2001) 13 International Journal of Refugee Law 533-58.

 $<sup>^{\</sup>rm 47}$  Constitution supra note 14 s 233.

<sup>&</sup>lt;sup>48</sup> Ibid s 232.

<sup>&</sup>lt;sup>49</sup> Constitution supra note 14 at s 39.

<sup>&</sup>lt;sup>50</sup> Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted on 18 December 2002 at the fifty-seventh session of the General Assembly of the United Nations by resolution A/RES/57/199, entered into force on 22 June 2006 available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCAT.aspx.

<sup>&</sup>lt;sup>51</sup> John H Jeffery 'Keynote Address by the Deputy Minister of Justice and Constitutional Development at the Launch of South Africa's National Torture Preventative Mechanism of OPCAT' available at https://www.justice.gov.za/m\_speeches/2019/20190719-NPM-OPCAT-Launch\_dm.html, accessed on 24 March 2020.

# IV. TRENDS & LITIGATION





#### (a) Introduction

According to replies to questions posed in Parliament in late 2019, the DHA is the respondent in a significant number of cases.<sup>52</sup> Many of these cases represent strategic interventions instituted by public interest litigators in the non-profit and human rights sector. While the outcomes of these matters have not closed all the legislative and implementation gaps apparent in the refugee process, and particularly in respect of detention and deportation practices, they have certainly made significant progress in this endeavour.

For example, given the development of jurisprudence providing clear legal principles and barring certain practices of the DHA, a growing number of lawyers (from NGOs as well as for-profit firms) have brought unlawful detention matters before the High Court. Many, if not most, of these matters have been successful in obtaining release for detained persons from immigration detention. The following section discusses various substantive and administrative justice abuses in immigration detention practices, and the development of policy and practice in response to various litigious and advocacy efforts to address those abuses.

<sup>&</sup>lt;sup>52</sup> On 5 November 2019, the Minister of Home Affairs reported to the Parliamentary Portfolio Committee on Home Affairs that the DHA's contingency liability in respect of immigration detention related litigation and damages claims against the department, was R698 454 792,08. This amount was in respect of just 183 cases instituted against the DHA for detention related issues alone. In subsequent reports to the Portfolio Committee it has been reported that the total number of cases instituted against DHA was 2493 matters in 2017, and 3706 matters in 2018.

## (b) Overview: the DHA's improved compliance

At the outset, it is essential that the recent trends and description of litigation that follow are considered against the backdrop of the DHA's increased compliance with the law governing immigration detention in the last seven years. However, this compliance must be understood as the result of a multi-pronged strategy undertaken by various stakeholders intent on shining a light on the unlawfulness of the DHA's detention practices, and the various advocacy initiatives that resulted in this behaviour change.



Beginning in 2013, LHR instituted several matters against the DHA in respect of the conditions and timeframes of detention seeking the release of unlawfully detained individuals. However, despite increased litigation and court orders issued against it, the DHA continued to rashly exercise broad powers and discretion with minimal risks and repercussions, demonstrating flagrant non-compliance over a period of several years. To support the critical outcomes of the litigation, a range of strategies were pursued to ensure that the end goals of these legal cases were realised. These included:

- LHR's collaboration with the SAHRC in monitoring sites of immigration detention as well as increased monitoring of immigration detention;
- Implementation of the SAHRC's recommendations relating to monitoring and oversight and informing detainees of their rights;<sup>53</sup>
- Requiring increased judicial notice of the rights of immigration detainees<sup>54</sup> accompanied by improved and constant judicial oversight of immigration detention;
- Establishing and strengthening coalitions between LHR and other CSOs;
- Adoption of broader advocacy strategies; and
- Co-ordinating with the International Detention Coalition ("IDC") in providing widespread assistance to immigration detainees.

DHA compliance with rights-based detention timeframes, for example, materially improved in response to these efforts.<sup>55</sup>

 $<sup>^{53}</sup>$  See South African Human Rights Commission Investigative Report Vol 4 (2015) 35.

<sup>&</sup>lt;sup>54</sup> See Lawyers for Human Rights supra note 5 for example; see also South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] ZAGPJHC 198; 2014 (11) BCLR 1352 (GJ); [2014] 4 All SA 482 (GJ).

https://www.news24.com/SouthAfrica/News/how-lindela-became-bosasas-meal-ticket-20191210, accessed on 22 January 2020. It bears mentioning, however, that journalist Jan Bornman has suggested that the DHA's increased "compliance" with LHR's interventions may have also partially been as an unintended consequence of corrpution at the Lindela Repatriation Centre. 55 Indeed, management of the facility was led for years by Bosasa, a sprawling, now-defunct, South African congolomerate, which provided services mainly to the state, and has since been implicated in billions of rands of corruption. 55 Through his reporting, Bornman has documented that in 2000, Bosasa was compensated by the state per detainee per day for each person detained at Lindela and further, that it was on the basis of this single fact that Bosasa's "warped and perverse mandate, geared toward ensuring the perpetual admission of new immigration detainees, was maintained". Consequently, it was in Bosasa's interests to ensure the continued detention of foreign nationals with little to no prospect of being released or deported. However, Bosasa's approach altered dramatically with the renegotiation of its contract with the DHA removing the financial incentive to hold detainees over a long period of time and consequently the number of detainees decreased.

#### (c) Substantive irregularities

The state bears the onus to justify both the prodedural and substantive aspects of detaining any individual.<sup>56</sup> LHR have detailed various irregularities that make detention unlawful in past reports. This section will outline the substantive irregularities that have been observed in the last seven years, as well strategies used to address each of them.

#### (i) Detention of minors

One of the most egregious and urgent substantive irregularities has been the detention of minors in facilities intended for adults. Such detention is blatantly unlawful.<sup>57</sup> "Children in immigration detention include unaccompanied migrant children, children in families (including young infants), asylum-seeking and refugee children, and children whose parents are seeking asylum or are refugees." <sup>58</sup> In 2012, the IDC, of which LHR is a member, launched a campaign to end immigration detention of children and used South Africa as a focus country. <sup>59</sup> In 2013 and 2014, LHR regularly encountered children detained for the purpose of deportation either at police stations (particularly in Musina, a border town located at the northern end of Limpopo Province) or at Lindela.

At that stage, LHR's experience was that the screening process for new detainees was not effectively identifying minors and implementing a diversion process as is mandated by law, which process would divert those minors to alternative service providers. LHR and IDC hosted a number of workshops with different state entities including the DHA, the Department of Health and the Department of Social Development (DSD) in order to educate officials and revise this process.

In terms of LHR's own recent observations and experience, it must be acknowledged that the number of minors found in detention over the last few years has notably decreased. While children are at times still identified in Lindela and detained in the holding cells at police stations, the numbers of detained children that LHR has encounters have significantly decreased from those identified in the early 2010s.



<sup>&</sup>lt;sup>56</sup> Zealand v Minister of Justice and Constitutional Development [2008] SA 458 (CC) at para 25.

<sup>&</sup>lt;sup>57</sup> Centre for Child Law v Minister for Justice and Constitutional Development and Others (CCT98/08) [2009] ZACC 18.

<sup>58</sup> Alice Farmer 'The impact of immigration detention on children' (2013) 44 Forced Migration Review.

<sup>&</sup>lt;sup>59</sup> Office of the High Commissioner for Human Rights 'Global Campaign to End Immigration Detention of Children' End Immigration Detention of Children 2012, available at http://endchilddetention.org, accessed 5 March 2020.

#### (ii) Detention of newcomer asylum seekers

The detention of newcomer asylum seekers has become increasingly prevalent. As outlined in Section III C (ii) above, newcomer asylum seekers are afforded protection by section 21(4) of the Refugees Act. <sup>60</sup> That provision dictates that the arrest and detention of any newcomer asylum seeker is presumptively unlawful – a newcomer asylum seeker includes, *inter alia*, those persons who have been granted asylum or until such person has been afforded the opportunity to lodge an application for asylum, a decision has been made on such application, and all rights of appeal and review have been exhausted.

In its monitoring activities, LHR has identified numerous concerning examples where immigration officers or South African Police Services (SAPS) officers simply apply the Immigration Act to newcomer asylum seekers without considering the Refugees Act, with the consequence that these asylum seekers are detained for the purpose of deportation and face potential *refoulment*. It is imperative that the provisions of the Refugees Act are understood as paramount, and implemented as such in these circumstances.

#### (iii) Detention of refugees and asylum seekers

Previously, a lack of verification resulted in the detention of asylum seekers and refugees for longer than the maximum prescribed time periods. Not only did this practice impede upon the rights of asylum seekers in terms of both the Bill of Rights and the Refugees Act, it also risked contravention of the principle of *non-refoulment*.

Recently, LHR has noted significant improvements in this respect, with verification taking place at Lindela. However, newcomer asylum seekers continue to fall through the cracks. In particular, it was established by the Constitutional Court that it is inappropriate to regard a delay in making an application for asylum or the commission and conviction of a crime committed within the country of refuge as decisive factors in barring any person from making an application for asylum.<sup>61</sup> This was determined because section 4 of the Refugees Act (the 1998 Refugees Act prior to amendments) details the factors considered in making an exclusion determination, and did not include either of those elements.<sup>62</sup>

These issues were presented for determination before the Constitutional Court in 2018 in the *Ruta* case.<sup>63</sup>

<sup>60</sup> Refugees Act supra note 33 at s 21(4).

<sup>&</sup>lt;sup>61</sup> Ruta v Minister of Home Affairs (CCT02/18) [2018] ZACC 52.

<sup>62</sup> Ibid s 4.

<sup>&</sup>lt;sup>63</sup> Refugees Act supra note 33 at s 21(4).

#### Ruta v Minister of Home Affairs

Mr. Ruta entered South Africa in December 2014 and was living as an illegal foreigner until March 2016, when he was arrested for a traffic violation. The DHA moved to deport him to his country of origin, Rwanda, but he requested to apply for asylum as he claimed he faced certain death in Rwanda. The DHA opposed his application, stating that it was too late for him to apply as he had been in the country for 15 months already and had not made application.

The Constitutional Court found that the principle of *non-refoulement* is not only embraced by international conventions to which South Africa is a signatory, but is also a deeply entrenched part of customary international law and international human rights law. The 1951 UN Convention protects those who have not yet had their refugee status confirmed (*de facto* refugees) and those who have been determined to be refugees (*de jure* refugees). This, along with international human rights law, requires a state to provide protection to an individual seeking asylum until a final determination of their claim has been made.

With regard to the harmonisation of the Refugees Act and the Immigration Act, the Court found that the Refugees Act alone governs who may apply for asylum. "Though an asylum seeker who is in the country unlawfully is an "illegal foreigner" under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act."

Finally, the Court found that while a delay is a crucial factor in determining a claim for refugee status, it is to be considered by the Refugee Status Determination Officer and in no way disqualifies an application for asylum from being made.

However, the enactment of the Refugees Amendment Act as well as its accompanying Regulations materially alter the position of newcomer asylum seekers to South Africa today, and especially for those who were historically protected by the interpretation of the law provided by the Ruta judgment.

Importantly, regulation 7 now requires newcomer asylum seekers, upon entry at a recognised port of entry, to declare their intention to apply for asylum.<sup>64</sup> At this point they should be issued with an Asylum Transit Visa, valid for five days, in terms of section 23 of the Immigration Act. 65 This requirement is further confirmed by the introduction of section 4(1)(i) of the Refugees Amendment Act obliging an asylum seeker to report to an RRO within five days of entry into the country.66 Failure to do so will result in exclusion from refugee status. When at the RRO making the application for asylum, a newcomer asylum seeker must submit the Asylum Transit Visa together with her/his asylum application, thereby proving legal entry into the country.<sup>67</sup> Where this is not possible, good cause must be proven for the illegal entry or stay in the country. In addition, an asylum applicant not in possession of an Asylum Transit Visa must be interviewed by an immigration officer "to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa".68 This is notably different from the direction provided by the Constitutional Court in Ruta, where the court indicated that a RSDO should consider the delay and reasons provided by the asylum applicant for such delay.



<sup>&</sup>lt;sup>64</sup> Refugees Regulations supra note 7 at reg 7.

<sup>&</sup>lt;sup>65</sup> Immigration Act supra note 24 at s 23.

<sup>66</sup> Refugees Act supra note 33 at s 4(1)(i).

<sup>&</sup>lt;sup>67</sup> Refugees Regulations supra note 7 at reg 7(3).

<sup>&</sup>lt;sup>68</sup> Refugees Act supra note 33 at s 1B.

The new processes in the Refugees Amendment Act and 2018 Regulations bring about significant changes for newcomer asylum seekers. Jurisprudence, as well as practical and anecdotal experience indicates that the five-day transit visa is impractical and unworkable. It is reasonably certain that numerous newcomer asylum seekers will simply not be able to adhere to the prescribed procedures, through no fault of their own. The majority of instances of lack of adherence will be unintentional or unavoidable. A five-day time constraint to fill-out a lengthy application for asylum and submit it to one of the few fully functional RROs in the entire country<sup>69</sup> is an onerous, if not impossible, task. It presumes the newcomer understands the process, has the resources to get to the RRO, and has the ability to complete the application without assistance or with the limited assistance provided at the RRO, or the resources required to get external assistance. Since refugees are fleeing their homes, often with little more than the clothes on their backs, this is hardly a reasonable requirement.

In addition, the practice of "nationality days" at the RROs is a further barrier which will increase the likelihood of a newcomer asylum seeker falling foul of the five-day transit visa's time periods. The RROs have specific days designated for specific nationalities, ostensibly to assist with interpretation on those days. An example is that the Somali nationality day is currently scheduled for Thursdays across the country. Thus, if a Somali newcomer asylum seeker enters the country on a Thursday through a land port of entry, and is provided with the five-day Asylum Transit Visa, she would have to wait until the following Thursday before being permitted to enter the RRO, as that is the Somali nationality day. As such, she would automatically have violated the five-day prescribed time period, and would thus risk being excluded as a result. This would place the asylum seeker at risk of detention and deportation, which could amount to refoulement.

This is just one example of the practical barriers to asylum experienced by asylum seekers, through no fault of their own, and which clearly illustrates the unreasonableness and unworkability of many of the amended provisions in the Refugees Amendment Act. Such provisions are not only impractical, but also potentially unconstitutional and in violation of international refugee law.

<sup>&</sup>lt;sup>69</sup> At time of publication, the RROs that normally accepted new asylum applications were located in Musina, Pretoria, Durban and Port Elizabeth. There is an SCA Court Order indicating DHA should have re-opened a fully functional RRO in Cape Town by the end of March 2017. However, this had not yet been adhered to by DHA.

#### (iv) The closure of Refugee Reception Offices

In 2011, the Director-General of Home Affairs at that time, Mkuseli Apleni, made the decision to close three of the six Refugee Reception Offices in the country. At the beginning of 2011, there were RROs in Johannesburg, Pretoria, Cape Town, Durban, Musina, and Port Elizabeth. The Johannesburg, Port Elizabeth, and Cape Town RROs were all subsequently closed either completely, or to any new applicants. Litigation challenging these closures followed. LHR brought an application on behalf of the Somali Association of South Africa's Eastern Cape branch and other stakeholders to challenge the decision to close the Port Elizabeth RRO, as outlined in the case study below.

As can be seen from Ponnan JA's judgment in that matter,<sup>70</sup> the true effect of the closure of the Port Elizabeth RRO was increasing barriers to accessing asylum. The judgment was highly critical of DHA. While the Court does not go into detail regarding the impact of such barriers, the judgment does state that without access to RROs, asylum seekers risk being deemed illegal foreigners. The impact of that, is that increasing numbers of the most vulnerable asylum seekers (the elderly, infirm, and those with dependents) who are not able to easily transit to other, open RROs are often those who are rendered undocumented through no fault of their own. Being undocumented increases the likelihood of arrest and detention, as well as limits access to basic services including healthcare and education, access to a bank account, and access to employment.

The Port Elizabeth RRO was reopened on 18 October 2018 after LHR returned to court to seek enforcement of the Supreme Court of Appeal's 2015 court order mandating the re-opening.<sup>71</sup>

It bears mentioning that although courts have thus been clear that open RROs are critical components of an asylum system that ensures the rights of asylum seekers, the Johannesburg and Cape Town RROs remain closed today. This has the consequence of increasing barriers to accessing asylum and documentation which leaves a number of asylum seekers at risk of arrest and deportation.

<sup>&</sup>lt;sup>70</sup> Minister of Home Affairs and Others v Somali Association of South Africa, Eastern Cape (SASA EC) and Another (831/2013) [2015] ZASCA 35.

<sup>&</sup>lt;sup>71</sup> Malusi Gigaba 'Minister Malusi Gigaba: Re-opening of the Port Elizabeth Refugee Reception Office' Department of Home Affairs 19 October 2018, available at

https://www.gov.za/speeches/statement-minister-home-affairs-19-oct-2018-0000, accessed on 23 March 2020.

# Minister of Home Affairs and Others v Somali Association of South Africa, Eastern Cape (SASA EC) and Another

In 2015 the Supreme Court of Appeal found that the closure of the RRO in Port Elizabeth (PE RRO) was irrational and unlawful. The Court gave the DHA three months to reopen the RRO. The Court further ordered the DHA to submit monthly progress reports to the applicants to ensure steps were being taken toward the reopening in a timely manner.

In coming to the decision that the closure of the PE RRO was irrational and unlawful, the Court found that consultations required for the decision to close the office had only occurred after the final decision had been made. It stated, "that meeting was a charade and positively misleading as to the intentions of the relevant authorities. What is worse, is that after having lulled the respondents into a false sense of security as to the continued operation of the PE RRO, it was suddenly sprung on them on 20 October 2011 that a decision had already been taken". The DHA argued that the PE RRO was to be replaced by a border RRO in Lebombo that was to open in late 2012. However, when asked in Parliament in 2014 about the opening of the new RRO in Lebombo, the Minister replied that a new RRO would not be opened. The Court did not accept the DHA's attempts to explain the Minister's response in Parliament, instead stating, "[t]ellingly, in England, Ministers who knowingly mislead Parliament are expected to offer their resignation to the Prime Minister and such an offence might also be proceeded against as a contempt".

Later, the new estimate by the DHA in their submissions to the Court for the opening of the Lebombo RRO was February 2016, at the earliest. The Court stated that this meant that the decision to close the PE RRO was made in ignorance.

Acknowledging that the closure of the RRO would require asylum seekers resident in the Eastern Cape to travel, at times up to 900km, multiple times to apply for asylum, renew permits, be interviewed, collect decisions, etc. the Court stated that the DHA's attempt to downplay the impact on asylum seekers "trivialise[d] the vulnerability and desperate circumstances of many asylum seekers in the country".

Despite several legal decisions reversing the decision to close the RROs, including decisions in which the judge clearly stated that the RRO must be reopened pending the appeal of their decision, the DHA proceeded with its intended closure. The Court understandably took offence to this disregard for legal obligations, and lectured the DHA on the meaning of democracy and the rule of law. It stated that the "officials have proven themselves not deserving of trust", and as a result exercised its supervisory jurisdiction to secure compliance with its order.

#### (v) The issuing of appointment slips

Another trend that has been observed and discontinued, particularly at the Port Elizabeth RRO, concerned the issuing of appointment slips to asylum seekers who presented themselves at the RRO for assistance.

The PE RRO had started to issue appointment slips to those seeking to apply for asylum at that RRO. Some of these appointment slips were issued months, or even up to a year in advance. The appointment slip did not offer any form of legal protection, including protection against being deemed an illegal foreigner, for the holder of such appointment – it simply delayed the ability of the asylum seeker to actually apply for asylum.

The appointment slips stated the following:

"NOTE: You will not be granted access to the centre on any other day, except on the day and time of your appointment. You will not be assisted any time before or after the allocated date and time. This Booking Slip is not a permit and does not grant the holder any rights of stay in the Republic of South Africa. It serves only as confirmation of the date and time of the booking for an appointment."

Upon return to the RRO on the date specified on the appointment slip, some asylum seekers reported being rescheduled to future dates, which dates were stamped on the back of their appointment slip. The risk associated with this practice centres on the fact that the appointment slip itself offers no form of protection to the person to whom it is issued. This means that that individual risks possible arrest, detention and deportation as they have no legal protection regarding their documentation status within South Africa. This practice is unlawful and a contravention of the Refugees Act. It further undermines judgments that our courts already made in respect of similar situations.<sup>72</sup>

Indeed, similar appointment slip systems had previously been used at other RROs, prior to 2010, and had been deemed unlawful at that point. The reemergence of the appointment slip system was challenged by private individuals in PE in late 2019, which resulted in a further judgment confirming the unlawfulnesss of the practice.<sup>73</sup>

<sup>&</sup>lt;sup>72</sup> Kiliko case supra note 32; See also Tafira & Others v Ngozwane, Macanda and the Minister of Home Affairs & Others (12960/2006) TPD [2006].

<sup>&</sup>lt;sup>73</sup> Huda and another v Minister of Home Affairs & Others (2434/2019); Willard and another v Minister of Home Affairs and others (2435/2019); Issan v Minister of Home Affairs and others (1891/2019); Chiputa and others v Minister of Home Affairs and others (2192/2019) ECLD, PE (17 December 2019).

However, the 2018 Regulations to the Refugees Amendment Act, implemented in early 2020, potentially undermine the positive wins that prohibited the practice of issuing appointment slips. Specifically, regulation 8(1)(a) states "an application for asylum in terms of section 21 of the Act must be made in person by the applicant upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office."<sup>74</sup> It is fundamental to bear in mind that this practice, despite the attempted legalisation of it and its inclusion in the new regulations, remains detrimental to the rights of asylum seekers in its effect.

## (d) Procedural irregularities

This section will outline the procedural irregularities in how individuals are detained for the purpose of deportation, as observed by LHR in the last seven years. It will also outline how LHR has sought to address procedural irregularities using various strategies.

#### (i) Statutory limits of detention

Section 34(1) of the Immigration Act is clear regarding the statutory limit of detention: the detention of a foreign national for purposes of deportation may not exceed 30 days without a warrant of court which may be extended for a period not exceeding 90 days. <sup>75</sup> It has been widely established that this provision should be construed to mean that "the maximum period for which any person may be so detained in terms of section 34(1) is a period of 120 days". <sup>76</sup> Several judgments concur with this interpretation. <sup>77</sup>

Significantly, the period of detention prior to the foreign national arriving at Lindela must be included when calculating the total period of detention.<sup>78</sup> LHR has observed that the problem of miscalculating the period of detention on the misguided basis that the 120-day period commences upon arrival at Lindela is particularly prevalent. It has been established that these practices are unlawful and unconstitutional.<sup>79</sup> Even so, the persistence of this practice was well-illustrated in the investigation led by the SAHRC, which eventually went before the Constitutional Court.

<sup>74</sup> Refugee Regulations supra note 7 at reg 8(1)(a)

<sup>75</sup> Immigration Act supra note 24 at s 34(1).

<sup>&</sup>lt;sup>76</sup> Aruforse v Minister of Home Affairs and Others (2010/1189) [2010] ZAGPJHC 160 at para 17.

<sup>&</sup>lt;sup>77</sup> See Arse case supra note 34; see also Okonkwo v Minister of Home Affairs and Another (EL464/2012, ECD1164/2012) [2015] ZAECELLC 15.

<sup>&</sup>lt;sup>78</sup> South African Human Rights Commission case supra note 54 at para 28.

<sup>79</sup> Ibid.

# South African Human Rights Commission Investigative Report Vol. 4 (2015)

In 2014, the SAHRC investigated the living conditions at Lindela and made various recommendations to the DHA. The investigation revealed complaints relating to abuse, overcrowding, deficient hygiene standards, and the continued detention of migrants beyond the prescribed maximum periods for detention.

The extended periods of detention stretched well beyond 120 days (in one case extending up to 524 days) and were regarded by the SAHRC as "extra-legal" and a violation of the detainee's rights to freedom and security of the person.

As a result of these findings, the SAHRC made the following recommendations to the DHA:

- The provision of written information relating to one's rights to the detainee, and such information must be in a language that they understand.
- The implementation of a system that makes essential provision for the written notification of:
  - Decisions made to deport and the right to appeal;
  - The right to legal representation and to have the lawfulness of the detention confirmed by a court; and
  - The right against detention for periods exceeding 30 days without a warrant of court.
- A special report to be compiled by DHA detailing the detainees who
  have been held in detention in excess of 120 days and the date of their
  expected releases.

Also irregular are the avenues utilised by the authorities in order to prolong detention for administrative offences. Foreign nationals are arrested and charged in terms of section 49(1) of the Immigration Act.<sup>80</sup> This section states that a violation of provisions of the Act is a criminal offence. As a result, this avenue of detention follows criminal law procedure and results in sentencing or the payment of a fine by the foreign national concerned.<sup>81</sup> The practical implications are that foreign nationals, especially newcomer asylum seekers, serve criminal sentences for illegal immigration charges for as long as three months prior to being transferred to Lindela to be processed for deportation. Against this backdrop, detainees have consistently reported the following procedure of detention when charged under section 49:

(1)

Arrest and subsequent police detention, often for an extended period;

(2)

One to three months spent in detention at a correctional facility following sentencing;

(3)

Further extended periods spent in police detention which follow the served sentence period; and

(4)

Transfer to Lindela to be detained pending deportation.

In the course of its monitoring, LHR has observed that the above-described practices of prolonged detention are prevalent, and likely a violation of the statutory limits on detention in the Immigration Act. Better informed and independent oversight of immigration detention as a mechanism through which such practices can be curtailed is critical, as detailed in the following section.

 $<sup>^{\</sup>rm 80}$  Immigration Act supra note 24 at s 49(1).

<sup>81</sup> See S v Phemadu (185/2012) [2012] ZAFSHC 192; see also S v Madocha (A335/16) [2016] ZAGPPHC 387.

#### (ii) Judicial oversight

Despite the development and confirmation of substantive and procedural safeguards and the numerous pieces of litigation against the DHA, there was initially little change in DHA's unlawful detention practices over the period in consideration. One reason for this was the lack of judicial or independent oversight of immigration detention.

Previously, "section 34(1)(b) read with sub-regulation 33(3) of the [Immigration Act did] not afford a detainee an automatic right to have the lawfulness of his/her detention confirmed by a court nor [did] it provide for an appearance in court". 82 This practice gravely contravened several constitutional rights specifically related to detention, including:

- The right to physical freedom and protection against detention without trial;<sup>83</sup>
- The right to be brought before a court after an arrest;84 and
- The right to challenge the lawfulness of the detention before a court.<sup>85</sup>

This practice was especially problematic given that "judicial control or oversight ensures that appropriate procedural safeguards are followed." In lieu of such oversight, compliance with procedural safeguards were in large part ignored. This position has since changed as a result of the Constitutional Court's judgment in Lawyers for Human Rights v Minister of Home Affairs and Others.<sup>87</sup>



<sup>83</sup> Constitution supra note 14 at s 12.



<sup>84</sup> Ibid s 35(1)(D).

<sup>85</sup> Ibid s 35(2)(D).

<sup>&</sup>lt;sup>86</sup> Lawyers for Human Rights case supra note 5 at para 35.

<sup>87</sup> Ibid.

# Lawyers for Human Rights v Minister of Home Affairs and Others

On 29 June 2017, the Constitutional Court declared section 34(1)(b) and (d) of the Immigration Act 13, of 2002 inconsistent with the Constitution and therefore invalid. The Court reflected on the history of how detention was used in South Africa during the apartheid era. Detention was used to oppress opposition, and was considered out of reach of judicial oversight. Detainees were tortured, kept in solitary confinement, and detained at the complete mercy of their captors. The Court further emphasised that it goes without saying that this was an unjust system that should not be repeated in today's democratic South Africa.

At issue in this case was the "validity of legislation that authorises administrative detention without trial for purposes of deportation". The Immigration Act provides for a number of safeguards including a limitation on the period of detention to a maximum of 120 days. In practice, however, these safeguards were routinely disregarded. LHR argued that even if correctly implemented, these provisions allowed for the detention of an individual to continue for a full 30 days without appearing before a court (and even then the detainee would have to have made a request to appear). This was clearly a violation of section 35 of the Constitution, and therefore unconstitutional. Judicial oversight and control is vital in ensuring procedural safeguards are followed. The Court highlighted that even in a declared state of emergency, the maximum amount of time a detainee can go without access to the courts under section 37 of the Constitution is 10 days. The DHA had sought to argue that a reason for not bringing detained individuals before a court was because the transport of such persons to a court incurred cost implications for the DHA.

The Court thus declared sections 34(1)(b) and (d) of the Immigration Act to be inconsistent with sections 12(1) and 35(2)(d) of the Constitution and therefore of no force and effect. It further ordered that the legislature correct the offending provisions within 24 months of the date of the order. In the interim, the Court held that a suspension of the declaration of invalidity was appropriate, imposing an interim regime allowing all detainees access to the courts within 48 hours of their arrest. At the date of publication of this report the corrective legislation had not yet been finalised despite the deadline having been 24 months from 29 June 2017 – thus the amendments to the Immigration Act, as mandated by the Constitutional Court should have been passed and in effect by no later than the end of June 2019.

In the judgment outlined in above, the Constitutional Court made two points abundantly clear. First, South Africa cannot and will not fall into the unlawful apartheid-era practice of detaining people without adequate judicial oversight, regardless of the legality of the individual's status in South Africa. Secondly, cost to the State could not justify limitations being placed on an individual's right to appeal in court to challenge the lawfulness of a detention.

Theoretically, this judgment addresses most, if not all, of the problems discussed in this report. Bringing a detainee before a court within 48 hours of arrest would reduce the number of persons, including minors, in immigration detention and immigration detention centres, provided the judicial oversight exercised is thorough. This is because substantive judicial oversight would ensure the confirmation of the particulars of the detainee, including the age of the detainee. It would further provide the detainee the opportunity to express the intention of making application for asylum. The court then would be in a position to ensure that, regardless of delay, the asylum seeker is afforded the opportunity to make that application for asylum by presenting her/himself at an RRO before an RSDO. The lawfulness of the arrest itself would also have to be examined by the court at the first possible instance in order to further prevent and reduce unlawful detentions. Yet, as previously mentioned, a judgment is only as good as its enforcement, and we have yet to see the Constitutional Court's Lawyers for Human Rights judgment being applied to its full potential, or correct adherence by DHA in respect of the legislative amendments mandated by the judgment.88

To this end, although the Lawyers for Human Rights judgment is ground-breaking in terms of immigration detention, LHR has identified repeated misapplication of the judgment at Magistrate's Courts in particular. For example, the inquiry made at an immigration detention hearing appears to be exclusively centred on whether the detainee in question is documented. In this way, the onus is taken off the immigration officer to justify the arrest and subsequent detention, and instead, the foreign national concerned must prove the unlawfulness of her/his detention simply through presentation of documentation – for persons undocumented who nevertheless fall within the ambit of the Refugees Act, this is insufficient.

This practice further places an unlawful burden of proof on the detainee, and is an incorrect application of the *Lawyers for Human Rights* judgment.<sup>89</sup> The constitutional right to be free from unlawful detention means that all detention is presumptively unlawful until it is justified by the state – not the detainee. The example described above, observed repeatedly by LHR, suggests that the application by magistrates (as the usual presiding officer in such matters) is a conception of lawfulness which mistakenly rests on the status of the foreign national in question rather than on justification of detention by the immigration officer.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

On a correct interpretation of the *Lawyers for Human Rights* judgment, 90 establishing lawfulness is dependent on a number of factors pertaining to the detainee including:

- Whether the immigration officer exercised proper discretion in effecting the arrest;
- Whether the detainee is being held/detained in line with constitutional and lawful standards;
- Age of the detainee;
- The detainee's immigration status in South Africa, which includes:
  - The applicable legislation in the circumstances (this factor requires a consideration of the migrant's intention in South Africa), specifically whether the Immigration Act or the Refugees Act is applicable in the circumstances; and
  - If the detainee is undocumented, is he/she:
    - o Awaiting the outcome of an internal administrative appeal or review on a rejected asylum seeker application?
    - o A newcomer asylum seeker who has been arrested prior to making an application?
    - o In possession of expired refugee/asylum seeker documentation?

Of particular concern is the failure of magistrates to exercise proper and effective judicial oversight in situations of mass arrests where hundreds of individuals are detained at the same time. This usually takes place in the context of immigration raids, such as those seen in inner city Johannesburg in August 2019. In these circumstances, the confirmation of a lawful detention (for the purposes of immigration-related charges) hearing serves as little more than a rubber stamping exercise to transfer the detainee to Lindela. This type of practice is unlawful, and certainly is not a correct application of the procedural safeguards confirmed by the *Lawyers for Human Rights* judgment.

<sup>89</sup> Ibid

<sup>&</sup>lt;sup>91</sup> In August 2019, a joint taskforce made up of SAPS officers as well as immigration officers conducted raids in inner city Johannesburg, resulting in the arrest of hundreds of persons on suspicion of being "illegal immigrants". This in turn resulted in the Magistrate ordering hundreds of people to be sent to Lindela. It is unlikely that a single magistrate could have effectively assessed each individual case in these circumstances. This meant that for many if not all of the group of detainees, the judicial oversight into their arrest was severely lacking. For more information see:

https://www.dailymaverick.co.za/article/2019-08-13-immigrants-arrested-in-joburg-raids-say-they-showed-police-valid-papers.

### (e) Conditions and places of detention

The procedures in relation to detention for the purposes of deportation are important, including ensuring that detainees spend as little time as possible in detention. In addition to procedural safeguards, however, it is also important to ensure that the state respects, protects, promotes and fulfils the rights of individuals while in detention. Key here is ensuring that the conditions of the place of detention are such that they ensure the dignity and associated rights of individuals detained. This applies to all persons, whether they are irregular migrants, or forced migrants such as refugees and asylum seekers.

However, the conditions of detention at Lindela, in particular, as well as police stations, are well-documented to be far below these standards. Importantly:

"Anti-foreigner sentiment appears increasingly institutionalised, having taken firm root in our procedures, reflected in statements by our politicians and echoed in the conditions of detention experienced by asylum-seekers denied refuge in our country... individuals are held at Lindela 'in inadequate conditions that include overcrowding and a lack of hygiene and medical services'. We know, too, that Lindela is not the only place where such individuals are detained – indeed, police stations frequently play host to these migrants, detained in similar, wholly deficient conditions". 92

Even more notable is the Committee Against Torture's concerns surrounding the conditions of detention in South Africa. In particular, the Committee has recognised the deplorable circumstances in which immigration detainees are required to endure, noting "overcrowding, poor materials, dilapidated infrastructure and sanitary facilities, inadequate food, poor ventilation, limited access to health and medical services, lack of exercise, and inadequate working conditions for prison staff due to the overcrowding". These conditions are consistent with LHR's most recent observations.

#### (i) Places of detention

The location, or where a person is detained, can be unlawful, just as the detention itself can be unlawful. In *Rahim*, outlined below, the Constitutional Court found that where the location of detention is unlawful, the detention itself is inherently unlawful.<sup>94</sup>

<sup>&</sup>lt;sup>92</sup> Sharon Ekambaram 'International Human Rights Day: South Africa fails in duty to offer refuge' Daily Maverick 10 December 2019, available at https://www.dailymaverick.co.za/article/2019-12-10-south-africa-fails-in-duty-to-offer-refuge/, accessed 6 Mar. 2020.

<sup>93</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment supra note 44.

<sup>94</sup> Minister of Home Affairs v Rahim and Others (CCT124/15) [2016] ZACC 3.

# Minister of Home Affairs v Rahim and Others

In 2016, various foreign nationals were arrested immediately after having been informed that their respective applications for asylum were unsuccessful. They were detained at various detention centres. However, only specific places are designated as holding facilities for the purposes of immigration detention, this is in terms of section 34(1) of the Immigration Act. The applicants in the *Rahim* matter instituted action against the DHA for damages as their detention took place at centres that had not been designated in terms of section 34(1). The matter therefore centred on the interpretation of section 34(1). The Constitutional Court stated that "it is an international norm that refugees and others caught up in migratory regulation have a peculiar status that differentiates them from those who are imprisoned by the criminal justice system". In this regard, the Constitutional Court held:

- Section 34(1) makes it clear that the Director General of the DHA is required to apply their mind in determining appropriate places for immigration detention; and
- In lieu of such a determination having been made regarding a specific place of detention, any detention at an undesignated site is unlawful.

The *Rahim* judgment makes clear that the DHA's responsibility, through the Director-General, is to designate places to be used specifically for immigration detention purposes.<sup>95</sup> Practically, therefore, where a foreign national is not being detained at a place designated by the Director-General, such detention shall be rendered unlawful. Currently, the Director-General has designated various holding cells at police stations in each province as appropriate for immigration detention. The table below shows the number of police stations so designated per province.

**TABLE II:** POLICE STATIONS DESIGNATED AS PLACES OF IMMIGRATION DETENTION:96

Province	Number of police stations
Gauteng	53
North West	32
Limpopo	72
Northern Cape	32
Western Cape	32
Free State	39
KwaZulu- Natal	38
Mpumalanga	50
Eastern Cape	78

In practice, detainees are often held at police stations that are not designated as places of immigration detention. Historically, this has included other places/centres/stations, which are not designated, and which have not been designated in terms of the 2019 Amendments. These have included, *inter alia*:

- The Desmond Tutu Refugee Reception Office (Marabastad, Pretoria);
- Sunnyside Police Station;
- Vereeniging Police Station; and
- Makhado Police Station.

Given the practice of undertaking immigration detention at places not designated for those purposes, it is highly likely that there are numerous other police stations that are not listed above, but which are currently being used as places of detention for immigration-related charges. These detentions are *prima facie* unlawful. However, this requires magistrates and immigration officers as well as any other arresting officers to correctly implement the law in a manner consistent with the Constitutional Court's judgment in the *Rahim* matter.<sup>97</sup> It would appear that this is frequently not done.

<sup>95</sup> Ibid.

 $<sup>^{96}</sup>$  Immigration Act: Determination of places of detention of illegal foreigners pending deportation in GN 1046 GG 42622 of 8 August 2019.

<sup>97</sup> Rahim case supra note 94.

#### (ii) Conditions of detention

All places of immigration detention must comply with the standards of detention which are provided for in Annexure B of regulation 33(5) of the Regulations promulgated in terms of the Immigration Act. The standards set out in those Regulations pertain to accommodation, nutrition and hygiene, in an effort to ensure the dignity of all persons detained. LHR has routinely observed issues relating to overcrowding, poor nutrition, inadequate access to healthcare and hygiene facilities, unlawful use of force, and limitations in access to legal representation and representatives – all of which limit and undermine the dignity of detainees.

#### Overcrowding

The Regulations state that every detainee should be provided with a bed, mattress and at least one blanket.<sup>99</sup> However, Lindela has a history of reported overcrowding to the extent that this mandate would be nearly impossible to comply with.

Indeed, the DHA has indicated that Lindela has a capacity of 4 000 detainees. However, it has often exceeded this number, such as the reported "average of 6 800 people a month in 2003". 100 Then-Deputy Chief Justice Moseneke reported his observance of a single shower, toilet, and washbasin shared between approximately 30 male detainees. 101 Other reports have documented detainees' complaints pertaining to one cell housing 45-60 detainees at a time. 102 In 2019, through its immigration detention work, LHR confirmed overcrowding was everprevalent at Lindela. Such overcrowding undermines dignity, but also poses significant hygiene and public health risks.

#### Nutrition

Through the monitoring work done by LHR, it is evident that adherence to guidelines regarding food and nutrition is limited, to the detriment of the rights of immigration detainees. Detainees have consistently reported the insufficient provision of two meals per day and a failure to provide for specific religious or other dietary requirements. In 2012, Justice Cameron reported that certain detainees' dietary requirements, especially those with dietary restrictions related to religious stipulations, were not provided for.<sup>103</sup> In 2014, Justice Moseneke reported improvements in terms of meeting dietary requirements, but then further stated that detainees had been provided with their dinner while lunch was being served. Lindela officials alleged that the reason for this was to mitigate the need for security in the dining hall at night.<sup>104</sup> While LHR has seen some improvements with regard to nutrition, this is still an area of concern, with detainees still reporting insufficient and inconsistent provision of meals.

 $<sup>^{\</sup>rm 98}$  Immigration Regulations supra note 25 at reg 33(5).

<sup>99</sup> Ibid.

<sup>&</sup>lt;sup>100</sup> Bornman supra note 55.

<sup>&</sup>lt;sup>101</sup> Dikgang Moseneke 'Constitutional Court Visitation Report: Lindela Repatriation Centre' (2014).

<sup>&</sup>lt;sup>102</sup> Alexandra Hiropoulos Migration and Detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals (2017) 11.

<sup>&</sup>lt;sup>103</sup> Edwin Cameron *Visit to Lindela Repatriation Centre* Constitutional Court (2012).

<sup>&</sup>lt;sup>104</sup> Moseneke op cit note 107.

#### Access to healthcare

LHR's observation regarding adequate access to healthcare at places of detention is simply that such access is severely limited or not available at all. These observations are reiterated by other organisations conducting monitoring such as Medicins Sans Frontiers (MSF). <sup>105</sup> The issues surrounding access to healthcare at Lindela have, over the years, arisen in abundance and are perhaps the most concerning of all the reported conditions. In 2012, Justice Cameron reported on the conditions at Lindela following a site visit, highlighting in a report following the visit his observations of: <sup>106</sup>

- Detainees receiving the same medication for different ailments;
- Lack of access to the clinic;
- Failure to receive adequate care;
- The absence of antiretroviral and TB medication;
- No provision for HIV screening or testing;
- Refusal of nurses to treat detainees accused of fighting with guards; and
- The absence of any provision for the treatment of mental health issues.

The SAHRC subsequently made similarly concerning observations and findings, including: 107

- Detainees receiving medication from non-medical staff;
- Detainees receiving standard painkillers without any attempt to assess the medical condition; and
- Detainees reporting an inability to access prescribed, chronic medication while being held at Lindela.

In summary, and from LHR's monitoring, there remains an "insufficient provision of access to adequate healthcare, including but not limited to, the absence and/or inadequate provision of prophylactics, evidence of rapid outbreaks of infectious diseases, and insufficient treatment of illnesses at the detention centre". Not only does this pose a grave threat to the health of detainees, but it also poses a public health threat for those detained at Lindela, with many being at risk of contracting a communicable disease while detained, and those with pre-existing conditions not being able to continue with treatment while detained. In addition, this public health threat may become a regional threat as the subsequent deportation of such individuals may exacerbate the spread of communicable disease in their home country after they have been deported.

<sup>&</sup>lt;sup>105</sup> Tove Van Lennep 'Lindela and South Africa's Defective Deportation Regime', Hellen Suzman Foundation 15 November 2019, available at https://hsf.org.za/publications/hsf-briefs/lindela-and-south-africa2019s-defective-deportation-regime, accessed on 22 March 2020.

<sup>106</sup> Cameron supra note 103.

 $<sup>^{\</sup>rm 107}$  South African Human Rights Commission supra note 53.

<sup>&</sup>lt;sup>108</sup> South African Human Rights Commission Annual Report (2017) 32.

These conditions continue to be prevalent. MSF submitted a complaint to the independent Office of Health Standards Compliance regarding the conditions at Lindela in June 2018, noting that:

"Today, the Lindela health services do not prioritise access to HIV and tuberculosis care. Communicable diseases are treated outside of national protocol, and main health needs of those detained are largely neglected."

The complaint outlined the "incoherence" between medical guidelines set out by the government and the medical capacity of Lindela. It said "regular health promotion" was not conducted and that most detainees didn't have access to hygiene supplies." 109

LHR's observations confirm the findings of others who have conducted monitoring of places of detention, such as Lindela. Healthcare and access thereto is guaranteed to everyone by South Africa's Constitution. It is also vital in order to ensure the safety of detainees, as well as the safety of staff at any detention facility. Inadequate healthcare provisions, as well as insufficient public health safeguards, undermines the right to dignity.

#### Hygiene

Justice Cameron also revealed disturbing data relating to access to hygiene provisions in his inspection report. For example, he observed an inadequate provision of sanitary towels, toothpaste and toothbrushes to female detainees in particular. Regarding the former, female detainees complained that only two sanitary towels were provided to them per monthly cycle after an "inspection" was conducted by a female officer to confirm menstruation. There were also complaints regarding the inadequacy of the blankets provided to detainees particularly regarding the small size of the blanket and lack of cleanliness. On the other hand, Justice Moseneke confirmed that Lindela does not provide the detainees with clothing, however, the detainees' families can provide them with same.

In this regard, LHR has made the following findings in its monitoring work:

- Provision of unwashed blankets;
- Reports of flees in beds;
- Overcrowding in cells; and
- Lack of provision of necessary toiletries.

Such conditions of detention not only undermine the right to dignity, but also have implications for the mental and physical health of the detained persons.

<sup>&</sup>lt;sup>109</sup> Bornman supra note 55.

<sup>&</sup>lt;sup>110</sup> Cameron supra note 103.

#### Use of force

Lindela, as with other places of detention, has been criticised for the excessive use of force by authorites. Justice Cameron reported that "officials confirmed the use of teargas and sound bullets" if detainees grow disruptive and, further, these officials state that "there are no isolation cells, and no comparable internal disciplinary mechanisms". Here, detainees broadly highlighted the following to LHR in the course of monitoring:

- Physical injuries during the arrest process;
- Allegations of abuse in the cells by other detainees; and
- Violence by the security guards.

LHR is increasingly concerned about abuse and violence at Lindela. In 2017, LHR called attention to "the excessive use of force and intimidation by private security officers". 112 The Constitution guarantees everyone, including all detainees, the right to not be tortured, treated or punished in a cruel, inhuman or degrading way. 113 Immigration detainees have the right to an environment without unjustifed excessive use of force.

#### Access to legal representation

In Justice Cameron's inspection report, a considerable number of detainees complained of a lack of access to legal representation.<sup>114</sup> In 2016, increasingly limited access to legal representation was again reported:

"Civil rights bodies must give Lindela 48 hours-notice before meeting detainees, and each organisation is only allowed to see five people per day".115

Through LHR's 2019 monitoring, this reality was confirmed. Moreover, Lindela provides no reasonable justification for these imposed limitations. Upon arrival, legal practitioners are required to provide proof of compliance with the 48-hours-notice requirement but detainees are very rarely informed of or prepared for such consultations. Thus the 48 hours' notice does not serve any rational or legitimate purpose for the client, and no purpose has been adequately provided by Lindela management, despite queries in this respect. This arbitrary limitation is in violation with section 35(3)(f) of the Constitution, which provides everyone a right to legal representation. Similarly, at other places of detention, including police stations such as Benoni and JHB Central, it is the observation of LHR that officials routinely denied or limited detainees' access to legal representation and also to family members despite visitation rights being expressly provided for in the Constitution.

<sup>111</sup> Ibid

<sup>112</sup> Lawyers for Human Rights 'Violence and violations at Lindela Repatriation Centre' available at http://www.lhr.org.za/news/2017/violence-and-violations-lindela-repatriation-centre, accessed on 22 April 2020.

<sup>&</sup>lt;sup>113</sup> Constitution supra note 14 at s 12(1).

<sup>&</sup>lt;sup>114</sup> Cameron supra note 103.

<sup>&</sup>lt;sup>115</sup> Jeynes supra note 9.



# V. CONCLUSION

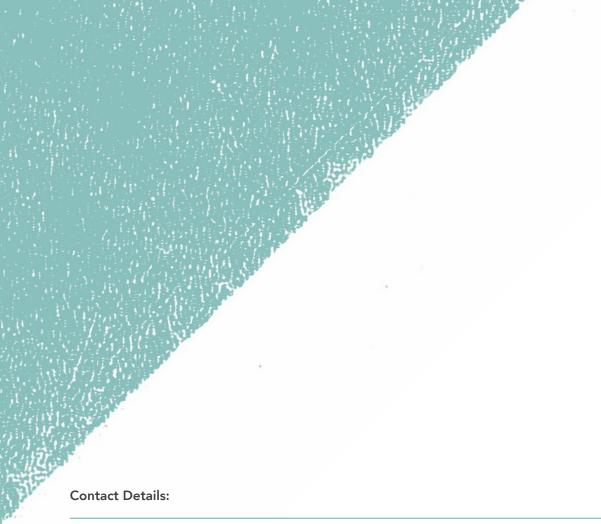
Over the past 20 years the rights of asylum seekers and refugees in South Africa have progressed significantly. Each of the cases discussed above, particularly Lawyers for Human Rights v The Minister of Home Affairs, has advanced the state of refugee law in South Africa to ensure compliance with both domestic and international law. These steps must be acknowledged and celebrated. These were not mere academic exercises but substantive developments that have the ability to make tangible differences to the lives of a vulnerable population.

Certainly, however, there remains significant room for improvement, particularly with the Refugee Amendment Act now in force. The amendments effectively undermine much of the developments in the jurisprudence won in the last two decades. But law reform is often a marathon, rather than a sprint.

As Dr Martin Luther King, Jr. said, "all progress is precarious, and the solution of one problem brings us face to face with another problem." 116

The next challenge is undoubtedly addressing the inadequacies of the newly implemented Refugees Amendment Act and Regulations. How many of these amendments and the manner in which they will be implemented remains to be seen. What is certain, however, is that these changes, on paper, are retrogressive and represent significant backtracking in the rights of asylum seekers and refugees in South Africa. It is hoped that some of the groundwork to challenge and interpret these amendments has been done through the progressive jurisprudence and significant wins achieved over the last 20 years.

<sup>&</sup>lt;sup>116</sup> Martin Luther King Jr Strength to Love (1963).



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