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ATT: Mr Mosa Steve Chabane
Chairperson: Portfolio Committee on Home Affairs

AND TO: Mr Eddy Mathonsi
Secretary: Portfolio Committee on Home Affairs
Email: emathonsi@parliament.gov.za

RE: BRIEFING BY LAWYERS FOR HUMAN RIGHTS ON STATELESSNESS IN SOUTH AFRICA, RE-OPENING OF REFUGEE RECEPTION OFFICES AND PROCESSING OF DOCUMENTATION FOR REFUGEES AND ASYLUM-SEEKERS, AND TRENDS ON ARRESTS AND DETENTION OF MIGRANTS

Dear Mr Chabane,

INTRODUCTION

1. Lawyers for Human Rights (LHR) is an independent human rights organisation, with a 42-year history of human rights activism and public interest litigation in South Africa. LHR provides free legal services to vulnerable, marginalised, and indigent individuals and communities, both non-national and South African, who are victims of unlawful infringements of their rights. Our mandate is to support the deepening of democracy and the entrenchment in society of core constitutional values including equality, non-discrimination, and respect for human dignity, as well as to promote the realization of economic, social, and cultural rights for all. This is critical to a culture where human rights and social justice thrive, and where access to justice is guaranteed to all. Our Refugee and Migrants Rights Programme (RMRP) is our largest programme and provides assistance to some 10 000 clients per annum through our four law clinics situated in Pretoria, Johannesburg, Durban and Musina.

2. The RMRP seeks to advocate for, strengthen, and enforce the rights of asylum-seekers, refugees and other marginalised categories of migrants, through the provision of free walk-in legal services in four offices around the country, as well as through the initiation of strategic litigation, engagement with communities, civil society, government, and other stakeholders, and by contributing to the regional dialogue on refugees and migrants. The programme also has projects

focused on statelessness, immigration detention, transgender migrant rights, and unaccompanied and separated migrant children.

3. Lawyers for Human Rights submits this report to shed light into the current situation on statelessness in South Africa, reflections on the challenges in the refugee and asylum seeker system, and trends pertaining to the arrest and detention of migrants as observed by the Refugee and Migrant Rights Programme. The following information has been submitted from our law clinics in Durban, Pretoria and Johannesburg.

A. STATELESSNESS IN SOUTH AFRICA

4. South Africa lacks a mechanism to identify stateless persons, rough estimates by the UNHCR suggest that over 10,000 people are stateless in South Africa. Various legal, administrative, and practical barriers exist in the immigration/refugee, birth registration and citizenship frameworks that aggravate the condition of statelessness, as explained below.

Lack of access to birth registration:

5. While lack of birth registration (or a birth certificate) does not automatically result in statelessness, it does create a heightened risk of statelessness as a birth certificate is the first form of legal identity assigned to a child and assists in establishing two critical facts relevant to the acquisition of citizenship: i.e. place of birth and parentage. Section 28(1)(a) of the Constitution states that every child has a right to a name and nationality from birth. The UN Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child further provide for every child's right to birth registration. However, the Department of Home Affairs has implemented policies and practices that prevent universal birth registration in South Africa and leave thousands of children unregistered, undocumented and at risk of childhood statelessness. **LHR currently has over 400 birth registration clients**. The existing barriers to universal birth registration that LHR has observed include the following:

5.1. DHAs regulations to the Births and Deaths Regulations Act require that parents submit copies of **valid identification documentation** to lodge an application for birth registration. This requirement makes the child's right to birth registration contingent on the parents' documentation status and prevents children whose parents are undocumented or whose documentation has been invalidated (e.g. expired passports, permits of visas or blocked IDs) from accessing birth registration. The High Court in *Menzile Naki and another v Director General: Department of Home Affairs and Another* (4996/2016) [2018] ZAECGHC 90, ruled this requirement unconstitutional and ordered that DHA can only request the parents' identity documentation "*where it is available*", however DHA continues to apply this requirement in practice resulting in children born to undocumented parents going unregistered and inheriting the lack of documentation.

5.2. The Constitutional Court in *Centre for Child Law v Minister of Home Affairs* CCT 101/20 [2021] ZACC 31 recently declared Section 10 of the Birth and Deaths Registration Act unconstitutional. Section 10 unlawfully discriminated against children born to unmarried parents, in that it prescribed a bifurcated birth registration process for children born to unmarried parents as opposed to children born to married parents. The effect of this ruling is that mothers and fathers, regardless of marital status, should now have an equal right to register the births of their children in order to prevent a situation of statelessness where the mother is unable (due to e.g. lack of valid identity 3documentation or death) or unavailable (due to e.g. abscondment) to register the birth of the child**.** Following the judgment, LHR and the Centre for Child Law continue to receive queries from fathers who have been denied services at DHA local offices. They have reported that DHA officials either claim to have no knowledge of the judgment or refuse to implement the judgment in the absence of directives from the head office. In some instances, the officials demand proof of paternity in the form of DNA test results but refuse to issue the required DNA referral letter or insist on the presence of the mother when the mother is deceased or has abandoned the child and left them in the care of the father. **LHR has recorded and alerted the DHA of over 30 cases of children in the care of single fathers who have been denied birth registration since the judgment**.

5.3. DHA Circular 5 of 2014 in relation to **DNA testing as a requirement for birth registration** states that: where both parents are South African citizens no DNA test is required, but if one parent is a non-South African citizen then a DNA test is required where a DHA official has "reasonable suspicion" regarding the paternity of the child. This circular is ultra vires the law as it has no basis in the Birth and Deaths Registration Act. The Act only refers to "proof" (this could include other alternatives such as lobola agreements, a proof of birth form, affidavits or biometrics). The circular is also discriminatory as it is targeted at children born to at least one non-South African citizen parent and it does not specify what constitutes "reasonable suspicion" – this is left to the unfettered discretion of the DHA officials. Of even more concern, is the fact that the DNA requirement is applied without the option of a waiver or subsidy, thus making it a prohibitive cost for children born to poor or indigent families.

5.4. In addition to the above, several LHR clients have been unable to access birth registration or birth certificates due to i**nordinate delays and backlogs in late registration of birth applications**.

QUESTIONS:

- What measures has DHA taken to ensure the implementation of the judgments in *Menzile Naki and another v Director General: Department of Home Affairs and Another* (4996/2016) [2018] ZAECGHC 90 and *Centre for Child Law v Minister of Home Affairs* CCT 101/20 [2021] ZACC 31?

- What mechanism is in place for late registration of birth applicants to lodge complaints about inordinate delays on their applications?

Access to citizenship:

6. Section 2(2) and Section 4(3) of the Citizenship Act provide important legal safeguards against statelessness in that they provide for acquisition of citizenship by birth for stateless children born in South Africa and citizenship by naturalisation for children born in South Africa to migrant parents. However, these provisions are not accessible in practice.

7. In terms of Section 2(2) of the Citizenship Act, a child who is born in SA, and who is not recognised as a citizen of any other country (i.e. stateless), is a South African citizen by birth. However, the DHA has not promulgated regulations prescribing the administrative process for such applications nor has it established a **Statelessness Determination Mechanism** to determine eligibility. It is therefore practically impossible to access this provision. In 2018, the High Court and the Supreme Court of Appeal ruled that it was not in the best interests of a child to remain stateless indefinitely and ordered DHA to promulgate the necessary regulations to this provision of the Act by March 2018. The DHA has not complied with this order to date (See: *DGLR v the Minister of Home Affairs* (GPJHC) (unreported) case number 38429/13 of 3 July 2014).

8. In terms of Section 4(3) of the Citizenship Act, children who are born in South Africa to parents who are not South African citizens nor permanent residents, and who have lived in South Africa from birth to the age of 18 years old, qualify for South African citizenship by naturalisation. However, as with Section 2(2), no regulations prescribing the administrative process for such applications. The High Court and Supreme Court of Appeal in *Minister of Home Affairs v Miriam Ali* (2018) ZASCA 169 SCA, ordered DHA to promulgate the necessary regulations to this provision of SACA by 30 November 2019. The DHA has not complied with this order to date. the court further ruled that DHA must accept applications on affidavit in the interim. While DHA recently started accepting these applications, there has been no indication of how long it takes to adjudicate the application and issue a decision. **LHR has submitted 57 applications in the period of February 2022 – July 2022 and only received 3 decisions.** (See also: M*inister of Home Affairs v Jose* (2020) ZASCA 152 25 November 2020).

9. The applicants LHR assists are vulnerable children and youth who are stateless or undocumented and at risk of statelessness. This includes:

   a) foundlings, abandoned or orphaned children (with inadequate or no information on place of birth or parentage);
   b) youth born to undocumented migrant parents, stateless migrant parents, migrant parents with irregular status; or

c) youth with parents who were refugees or asylum seekers, but the main applicant is deceased, the main application has been finally rejected or the client has been de-linked from their parents file due to age.

QUESTIONS:

- When will DHA publish regulations to guide and monitor the implementation of Sections 2(2) and 4(3) of the Citizenship Act?
- What is the turnaround time on applications submitted in terms of Sections 2(2) and 4(3) of the Citizenship Act?

Inaccessible pathways to documentation for unaccompanied and separated migrant children ("USMC"):

10. Unaccompanied and separated migrant children face several situations during migration that place them at a heightened risk of statelessness (e.g. being orphaned, abandoned by parents, loss or damage to documentation from country of origin).

11. The gaps in South Africa's laws and policies on asylum protection, immigration and civil registration result in many USMC remaining in a protracted legal limbo without durable documentation options or even legal identity. While some may access protection through the childcare system, their difficulties worsen when they age out of the system and cannot pursue further education, cannot get jobs and risk of detention and deportation due to irregular status or lack of documentation. Majority of USMC that grow up in the childcare system in South Africa cannot return to their country of origin because the Children's Court has found that it is not in the best interests of the child to repatriated, the child has no knowledge or memory of their country of origin or the Department of Social Development would have failed in its efforts to trace the child's family and arrange for reunification.

12. While migrant children who are born in South Africa might be able to access birth registration and citizenship through the Citizenship Act, migrant children who are "foreign-born" have very limited options: to lodge an asylum application if they qualify under the Refugees Act or to apply for an exemption under Section 31(2)(b) of the Immigration Act. However, the asylum protection system is fraught with many difficulties affecting claims relating to children and the exemption application process is also subject to several complexities; the application process if complex, there is ambiguity as to what satisfies the requirement of "special circumstances", a passport and application fee of R1 550 is required, and the application is subject to the discretion of the Minister of Home Affairs. The DHA is urged to consider establishing a special dispensation or special permit to facilitate access to documentation for this vulnerable category of children.

QUESTIONS:

- What steps is DHA taking to identify all undocumented USMC in Child and Youth Care Centers in South Africa and to establish a special dispensation or exemption permit for USMC living in South Africa?

DHA's ID blocking/marking practice is a growing threat to citizenship:

13. There is a growing concern around the DHA's ID blocking/marking practice and its contribution to statelessness in the country. **LHR has over 100 clients who have fallen victim to this practice and whose citizenship has effectively been withdrawn due to the invalidation of their identity documents or identity numbers**. Majority of them are South African citizens.

14. In all LHRs cases, clients discover their ID is blocked/marked when they try to access a service e.g. at a bank, renewing a passport, renewing a driver's licence, accessing a social grant, or crossing the border. None of them receive prior written notice that their ID is to be blocked, nor written reasons explaining why the ID is to be blocked, nor an opportunity to make representations, an appeal or review to challenge the decision to block the ID. The block/marker on the ID results in "citizenship-stripping", particularly where the decision is taken with a statement that the affected person is suspected to be an "illegal immigrant".

15. Without an ID, clients can no longer exercise their citizenship rights to vote, to run for public office or to claim diplomatic immunity. Moreover, they are deprived of other fundamental rights such as the right to dignity, to freedom and security of the person, to education, to health care, to work or to social assistance. DHA has refused and/or failed to furnish its Standard Operating Procedures in relation to ID blocking/marking or to provide the criteria that is used to block IDs. LHR has only observed that an ID is frequently blocked/marked in the following scenarios: the person is suspected to be an "illegal foreigner", the person has obtained the ID through alleged birth, marriage or death registration, or the person has a duplicate/multiple ID case. In some cases where a parent's ID has been blocked/marked, the IDs of their children are also automatically blocked. Clients are stuck in a limbo between weeks and years until their case is resolved.

QUESTIONS:

- What empowering legal provision does the DHA rely on to block/mark an ID?
- What processes or policies does the DHA rely on to ensure that this practice is in line with the requirements of the Constitution and the Promotion of the Administration of Justice Act on due process?
- What criteria is used to decide on blocking/marking an ID?
- What safeguards have the DHA established to prevent a situation of statelessness after deciding to block/mark an ID?
- What is the process one should follow and the turnaround time to resolve a blocked ID issue?

B. RE-OPENING OF REFUGEE RECEPTION OFFICES AND PROCESSING OF DOCUMENTATION FOR REFUGEES AND ASYLUM-SEEKERS

Online Renewals:

16. In March 2020, the Director-General of the DHA directed the closure of the Refugee Reception Offices ("RROs") across the country pursuant to the declaration of the national lock down due to the Covid-19 pandemic. These offices remained closed despite the adjusted levels.

17. In 2021, the Director-General relaxed the restrictions on the RRO operations to allow those whose permits expired on or after March 2020 an opportunity to apply for the renewal of their permits through an online email system. While this is widely welcomed, it has been a difficult system to navigate considering that asylum seekers are generally a vulnerable group with little access to internet, print and virtual communication resources. This is a huge challenge in respect of the DHA not having had foresight in anticipating this digital divide.

18. This burden has been placed entirely on the civil society organisations such as LHR. **The Durban law clinic received over 100 renewal related queries over the period of March 2022 to August 2022. The Pretoria law clinic received 68 queries and advised 116 new arrivals from 2021 to August 2022**. If that number is multiplied by the number of LHR law clinics and the other organisations such as ProBono.Org, Scalabrini and UCT Refugee Law Clinic, the number is large.

19. To crystallise the point that the civil society organisations had to carry this burden, the Durban law clinic was able to aid the Durban RRO by having online renewal case flow management engagements where these queries are collected and sent to this RRO bi-weekly or monthly, depending on the volume. LHR bears the responsibility of notifying the clients on the status of their applications, act as a go-between between the RRO and the clients, and in most cases, assist clients with fixing errors in their applications. On the list, space is left for "RRO Office Use Only" where a Durban RRO official would give the status of the permit or send the renewed permits directly to LHR. This is indicative of the fact that the DHA introduced a system without a mechanism to monitor its effectiveness and accessibility.

20. LHR law clinics spent large amounts of time engaging directly with the RRO staff regarding the renewal of asylum visas and refugee permits online.

> *In one case the Pretoria law clinic assisted on asylum seeker to submit their renewal application in July 2021. In March 2022 the DTRRO called the person to complete their proof of address. In June 2022 the DTRRO informed LHR that the asylum seeker's file was empty and that they should submit a copy of their RSDO decision to assist the DTRRO to complete the contents of the file at the date of writing this submission the asylum seeker visa is not yet renewed. Similarly another asylum seeker applied to renew online in November 2021. In February 2022 she was called to the*

DTRRO to be interviewed again because her file was empty, and to date her asylum visa is not yet renewed.

21. The other RROs require that for an online renewal query to be lodged by the civil society organisations, or attorneys must present power of attorney documentation and request documents through an application in terms of the Promotion of Access to Information Act ("PAIA"), which is both tedious and time consuming, and in any event a response is rarely received.

22. Another challenge is that this system corresponds in English primarily. Most refugees and asylum seekers communicate in French, Swahili, Lingala among others. This is a huge challenge where an asylum seeker, even with resources, is met with yet another roadblock which is the language barrier.

New asylum application process:

23. The new asylum seeker system was introduced on 3 May 2022. The DHA published a two-page notice announcing the introduction of additional services as a result of the lifting of the state of disaster.

24. Asylum-seekers and refugees that LHR engaged with did not know that new asylum applications, family joinder, family reunification and follow up on online renewals were re-introduced in May 2022. The new system was not properly communicated to its intended users (i.e., asylum-seekers and refugees) and the notice itself was vague.

25. The new system is also fraught with numerous challenges. It is easily susceptible to corruption, the system often crashes, applicants often do not receive responses.

26. In addition to the above, one of the major challenges is lack of accessibility. An asylum-seeker who arrives in a foreign country, has fled their country of origin with little or no financial resources, cannot be reasonably expected to afford internet and data costs to access the online system. This system requires that an applicant should always be in a position to receive emails and correspond readily with the DHA. If an email is missed, then the applicant must start the application all over again having waited for weeks for the appointment to begin with.

Closed list of required documents and unlawful additional requirements:

27. The waiting period for an interview extends to up to two months. During this period the asylum-seeker is vulnerable to arbitrary arrest and detention and faces the risk of deportation and refoulement. Even after the appointment is received, when an applicant presents themselves at the RRO for interview or biometrics, they are met with another roadblock that requires that they produce passports, transit visas, identification cards etc.

28. LHR submits that this an unlawful and unreasonable request since the Refugee Act does not make this a requirement, especially in claims where it could be reasonably purported that the asylum seeker was fleeing their COO and would not have been able to take their documents.

29. We have recorded a case where the DTRRO has rejected identity documents from a Congolese newcomer and compelled them to complete an affidavit. LHR believes that an affidavit should be sufficient to satisfy the requirements further to Regulation 14 (5) (a) and (b) of the Refugee Act. However, LHR is burdened with requests for assistance with these affidavits on behalf of asylum-seekers - when this should be the function of the DHA.

30. Furthermore, the RROs are requesting that the applicants provide translated identification documents.

> *LHR Durban has been confronted with this reality recently with the Bashengezi family. Mr. Bashengezi has been a long-time client of LHR, he came to South Africa early 2019 and attempted to apply for refugee status for himself, his wife and 6 minor children. He was turned away multiple times on the advice that the RRO did not have capacity to process the big family's claim. This went on until the national lock down, and only through the online system has he been able to get an appointment, however, he was told to go interpret his documents at his own costs. This resulted in LHR having to foot the cost of interpreter invoice of R1600.00*

31. This is an example of the DHA shifting the goalposts and making a difficult system almost impossible to navigate because nationals who do not have financial means, cannot be reasonably expected to pay interpreters.

32. Prior to the introduction of the new asylum seeker application, the Durban law clinic shared a list with the Durban RRO of undocumented asylum seekers with intention to submit asylum applications. This list reflects numbers from January 2020 to date. **The total is over 250 and counting**. However, the RRO did not express its plans to deal with the new asylum applications effectively.

Family unification and documentation of minor dependents:

33. With the re-introduction of additional services at the various RROs in May 2022 the DHA resumed family joinder and documentation for children born in the Republic and outside the Republic. In this regard the RROs have not made much progress. For example, the centre manager of the Durban RRO advised that in terms of their *due diligence* processes, the biological parents of minors are required to conduct paternity tests. These are at the cost of the parent, which many of our indigent clients cannot afford. This negatively affects the rights of children to be documented in terms of section 3 (c) of the Refugees Act.

De-linking:

34. Section 33 of the Refugees Act provides for dependents of refugees or asylum-seekers to remain in the country despite the cessation of their dependency on the main applicant.

35. In practice the RROs would "de-link" or remove the dependent from the main applicant's file and thereafter issue them with a new asylum permit (even if they had previously held refugee status) and re-interview them as a new applicant. These applicants were routinely rejected by the Standing Committee on Refugee Affairs ("SCRA") as "manifestly unfounded". This practice started in 2018, but it continued through the amendments to the Refugees Act. Practically, upon turning 18 a dependent loses their previous documentation status without due process, and their claim is rejected, leaving them without a substantive claim for refugee status.

36. LHR raised this issue during an engagement between with the DHA in March 2022 and Mr. Mandla Madumisa (Chief Director of Asylum Seeker Management) stated that the de-linking process described above was an incorrect interpretation of the Refugees Act. He further made an undertaking that dependents who were removed from their guardian's file may write directly to him and request to be added back to the file and reinstate their previous documentation status. However, this has been difficult to implement in practice and would be easier to facilitate if the DHA issued a clear directive to all RROs to operationalise the reversal of de-linked cases as per Mr Madumisa's undertaking.

QUESTIONS:

- What challenges is the DHA facing in documenting children of asylum seekers and refugees and what is the plan to ensure that these children are timeously documented?

Systematic xenophobia and access to services:

37. The closure of the RROs and this digitization era is a form of systematic xenophobia when one considers who the face of this system is. Refugees and asylum-seekers are one of the most vulnerable groups in South Africa. Xenophobia shows itself in many forms in South Africa; scapegoating by politicians, pitting of citizens against non-nationals, denial of access to services and the DHA failing at its domestic and international duty as the custodians of the asylum protection system.

38. Possessing valid documents enables the holder to access education, healthcare, and other services. Since the introduction of the COVID19 watermarked permits, the holders face new challenges.

39. Public hospitals do not trust the authenticity of the online permits. At Steve Biko Academic hospital the administrators engaged with the Desmond Tutu RRO and requested additional verification of the asylum and refugee documents. The hospital requested that asylum seekers and refugees go back to the RRO and obtain a stamp and a signature before they can access healthcare services, and the DTRRO agreed. This additional burden clearly limits the right to access healthcare.

40. Further, the South African Social Security Agency (SASSA) indicated a mistrust of these online issued documents. They too, limited access to social services because of their lack of understanding of these documents. Many refugees had their grants cut off or not approved when they presented these COVID19 permits. Some had their documents damaged by SASSA staff. LHR was compelled to call a meeting with SASSA national office management to resolve the issue. This action ought to have been prevented by the DHA properly engaging with various government departments to introduce the new permits and assure government and other stakeholders of their authenticity.

41. We have further noted that the Gauteng Department of Education grade 1 and grade 8 online applications are linked to the DHA system to allow verification of documents submitted online. To the extent that it is reasonably practical to do so, we would propose a similar system is implemented in hospitals and other service providers to enable delivery of services to holders of these documents. With the current xenophobic climate in the country, it is the Department of Home Affairs' duty to intervene.

C. ARRESTS AND DETENTION OF MIGRANTS

42. South Africa's legal norms relating to migration-related detention and expulsion are contained in several pieces of legislation: the Immigration Act (13 of 2002), the Immigration Regulations to the Immigration Act, 2014 the Refugee Act, the Refugees Amendment Act, and the Refugees Regulations. To our knowledge, there is no definitive number for the total population of those held in immigration detention or who have been arrested for immigration related offences due to a failure of the relevant departments to publish this information. However, we do know that in 2019, almost 10,000 people were arrested by the South African Police Services for irregular migration.[1] We call on the Departments of Home Affairs and Justice and Correctional Services to make the figures available of those detained under the Immigration Act. Below we detail several issues as they relate to immigration detention, including places and conditions of detention, LHR's observed detention practices, recent observations regarding arrest and detention, the contributions of an overburdened system leading to arrests and deportation and the issue of children in detention.

Places of immigration detention:

43. Observers have highlighted allegations of abuses at detention facilities, prolonged detention periods (including over the legal maximum of 120 days), restricted access to legal representation, a lack of interpreters, corruption and bribery, use of force, and repeated accusations of arbitrary detention. Detention conditions are poor, with limited access to health, food and water, overcrowding, and unsanitary conditions.[2]

[1] South African Police Service 'Annual Report 2019/2020'. Accessed here: https://www.gov.za/sites/default/files/gcis_document/202012/south-african-police-service-annual-report-20192020.pdf

[2] See Lawyers for Human Rights, Monitoring Policy, Litigious and Legislative Shifts in Immigration, May 2020, p 46-50. Accessed here: https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2020/06/Detention-Report-Final-Final-Digital-1.pdf See also Global Detention Project, Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing

44. South Africa's sole dedicated immigration detention centre, the Lindela Repatriation Centre, located near Johannesburg, has a long history of management by controversial private entities. Lindela was operated by Bosasa until December 2019, when it changed its name to African Global Operations. The company has been plagued with allegations of corruption, mismanagement, and abuse of detainees. After Bosasa went into liquidation in 2019, a new private company, EnviroMongz Projects, took charge of operations at Lindela in 2020. The company soon found itself mired in controversy when, in May 2020, 37 foreign nationals escaped from the facility after security guards left their posts.[3] Seven guards were charged with aiding the escapees, although the National Prosecuting Authority refused to enrol the case, citing insufficient evidence.[4]

45. As of June 2021, the South African Human Rights Commission (SAHRC) regularly monitored conditions at Lindela and made recommendations on its observations, however there is still no independent oversight body for the facility.

46. Access to Lindela remains restricted. Legal practitioners are required to give 48 hours notice before conducting a legal visit. 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. In some instances, LHR has found that upon arriving at Lindela, clients that we sought to consult had been deported during the notice period, without any warning or notice to LHR. This arbitrary limitation is in violation with section 35(3)(f) of the Constitution, which provides everyone a right to legal representation. We request that the Department provide reasons for this limitation, or alternatively, that it be dispensed with.

Detention practices:

47. The Immigration Act provides for two types of detention: administrative detention and criminal detention.

48. The first form of administrative detention is under section 34(2) of the Immigration Act read with section 41 of the Immigration Act, is the detention of someone to allow immigration officers time to verify a person's legal status. It empowers police and immigration officers to arrest and detain a

Criminal Enforcement of Migration, June 2021, p 33-36. Accessed here: https://www.globaldetentionproject.org/wp-content/uploads/2021/06/GDP-Immigration-Detention-in-South-Africa-2021.pdf

[3] C. Mahamba, "'Negligent' Guards Blamed for Escape of 27 Undocumented Migrants at Lindela," IOL News, 8 May 2020. Accessed here: https://www.iol.co.za/the-star/news/negligent-guards-blamed-for-escape-of-37-undocumentedmigrants-at-lindela-47711783

[4] News24, "NPA Refuses to Enrol Case Against Security Guards who Allegedly Helped with Lindela Escape," 19 May 2020. Accessed here: https://www.news24.com/news24/southafrica/news/npa-refuses-to-enrol-case-against-securityguards-whoallegedly-helped-with-lindela-escape-20200519

person suspected of being illegally present in South Africa for no more than 48 hours to allow immigration officers time to verify their legal status.

49. The second form of administrative detention is under section 34(1) of the Immigration Act which is the detention of an illegal foreigner as defined for purposes of deportation, subject to the requirements set out in that section. In Lawyers for Human Rights v Minister of Home Affairs and Others[5] ("2017 LHR Judgment") declared sections 34(1)(b) and (d) of the Immigration Act to be unconstitutional and ordered Parliament to pass legislation to correct the defects within a 24-month period which expired on 29 June 2019. To date, Parliament has failed to pass corrective legislation and those sections, according to the order of the 2017 LHR Judgment, are invalid. The Minister and the Director-General have applied to the Constitutional Court to have the order of 2017 LHR Judgment 'revived' pending the enactment of corrective legislation. This has created uncertainty as there are High Court judgments that have been decided on the basis that sections 34(1)(b) and 34(1)(d) do not exist.

50. Section 49 of the Immigration Act also provides for criminal penalties, including fines and imprisonment, for violations of the act or failure to comply with immigration orders.

51. Prior to the 2017 LHR Judgment, detention was nearly always part of an administrative procedure aimed at ensuring deportation; only rarely were people brought before a court on criminal charges for immigration violations. However, since the 2017 LHR Judgment, LHR is seeing most immigration violations being processed through the criminal justice system" before eventually being transferred over to administrative deportation procedures.

52. LHR is currently representing a client who was detained between October 2020 and May 2021 at Lindela on the basis that he did not have a valid permit. He was released and requested to apply for a renewal of his asylum seeker visa while his asylum application is still pending, which he did. To date he has not received any response on his application for renewal, or his asylum application. In August 2022 he was arrested again and charged with committing an offence under section 49 of the Immigration Act. Although LHR notified the prosecutor and magistrate that our client had previously been detained and was released as his asylum application is still pending, the Magistrate refused to dismiss the matter and has postponed the matter for verification by the Department of Home Affairs until 25 September 2022. This has meant that our client, who is the sole breadwinner in his family, will have been detained for 2 months.

Recent observations regarding arrest and detention:

53. When RROs were closed during the COVID-19 pandemic, LHR received a number of requests from new asylum-seekers coming into South Africa who were detained at Lindela for purposes of deportation, despite expressing their intentions to apply for asylum and the online renewal system

[5] [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC).

not providing for newcomer asylum seeker applications. Our clients were released and given an opportunity to apply for asylum but they were given no level of protection that they would not be arrested again pending the reopening of the RROs. Some of our clients were fleeing persecution in their countries of origin and had they been deported prior to LHR's intervention, the government would have been in violation of the principle of non-refoulement.

54. Now, LHR has observed, through its law clinics and monitoring efforts, that a large number of asylum-seekers and refugees were being arrested despite having produced the online "Covid-19 Watermarked" permits [2]. Upon arrests, the arresting officers have often informed the clients that the permit they present was invalid. This only begs the conclusion that the Department does not circulate information timeously and effectively to the securities clusters, especially in the CBDs. This results in arrests and punitive detention.

    Durban law clinic received a group of 6 asylum seekers who were arrested despite having produced the permits, however, the arresting officers stated that the permits "Looked suspicions". Not only were these clients detained, but they were also asked to pay R500.00 each for release.

Overburdened system leading to arrests and deportation:

55. LHR has observed that the backlog at the DHA has been a difficult thing to overcome. While we understand that RROs cannot revert to their former glory years due to the threat of Covid-19 resurgences, the new digital systems place asylum seekers in a risky and fearful state of living because of the long wait between applications and the other challenges stated above.

56. The DHA does a poor job of curbing unlawful arrests where refugees and asylum seekers are concerned, even if the applications have not been made or decided yet. The Refugees Act echoed by the constitutional decision of *Ruta v Minister of Home Affairs and Others*[6] state that an asylum seeker only needs to express their intention to apply for refugee status and must be given an opportunity to do so. However, the security and policing clusters do not seem to be on one accord with the DHA where the challenges that the RROs are facing are concerned. The South African Police Services ("SAPS") and Immigration Officers ("IOs") fail to allow this particular group of persons to either produce their documents or express this intention and fails to allow steps to be taken to do so. This is contradictory to the SAPS' and IOs duties in Regulation 37 of the Immigration Regulations,2014 which provides that SAPS or IOs must take the outlined steps to verify a person's identity or status, including contacting relatives or other persons who could prove such identity and status; and provide the necessary means for the person to obtain the documents that may confirm their identity and status.

57. The failure to investigate the state of documentation or the regulatory framework that allows asylum seekers and refugees presence in South Africa results in the arbitrary arrests, apprehension of legal asylum seekers and failure to give reasons for apprehension because of the language barriers in some

[6] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC)

instance and most importantly, abuse of power, corruption, and extortion. The problems relating to the lack of due process results in both xenophobic attacks and isolates a closely related issue of police corruption where asylum seekers are concerned. Where asylum seekers and refugees are arrested for purposes of deportation, it also sees the South African government at risk of violation of the international law principal of non-refoulement. In addition, this failure results in liabilities for the Department: according to the latest DHA Annual Report, it reported that in the Immigration Services space, claims arise mainly from the unlawful arrest and detention of illegal foreigners, and damages arising from the department's failure to make timely decisions on visas and permits and that there were 12 major claims (above R5 million) amounting to R555 million.[7]

Children in detention:

58. Section 34 of the Immigration Act provides that children may be detained as a matter of last resort. Section 29(2) of the Refugees Act also contains a provision specifically authorising the detention of a child, which the law says "*must be used only as a measure of last resort and for the shortest appropriate period of time*." In practice, 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 encountered have significantly decreased from those identified ten years ago.

59. The "Minimum Standards of Detention" (set out in Annexure B of the Immigration Regulations) provide that detained children should be separated from unrelated adults. However, observers have highlighted instances in which this provision has been violated. In 2004 the High Court issued a decision stating that migrant children can only be detained as a matter of last resort.[8] Although the country reported to the UN Global Study on Children Deprived of Liberty (2019) that it does not detain children for migration-related reasons,[9] migrant rights NGOs have reported that the DHA and the South African Police Service continue to detain unaccompanied children for immigration violations in contravention of the High Court rulings as outlined below.

60. In 2014, LHR discovered a child detained in the same cell as adults in the Benoni Police Station, without regard for his age or the fact that children are only to be detained as a last resort. The child was then transferred to Lindela while the Department of Social Development worked to verify the child's age and find an alternative "placement." This case demonstrated a lack of emphasis on the issue of detention of minors.

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[7] Department of Home Affairs Annual Report 2020/21, p 35. Accessed here: http://www.dha.gov.za/images/AnnualReports/DHA-Annual-Report-202021_V5-FINAL-SMALL-compressed.pdf
The Report does not specify what the cumulative total of claims below R5 million are as they relate to unlawful arrest and detention.

[8] M. Garcia Bochenek, "Children Behind Bars: The Global Overuse of Detention of Children," Human Rights Watch, 2016. Accessed here: https://www.hrw.org/world-report/2016/children-behind-bars

[9] M. Nowak, "The United Nations Global Study on Children Deprived of Liberty," November 2019. Accessed here: https://omnibook.com/view/e0623280-5656-42f8-9edf-5872f8f08562/page/2

61. Various NGO's have also reported that the Department and SAPS detained unaccompanied minors in immigration violations. In 2015, LHR handled six detention of minor cases and expressed concern that some arresting officers appeared to list minors as adults to intentionally detain them. According to the South African Human Rights Commission, between 2016 and 2017 a Médecins Sans Frontières (MSF) paediatrician working at the Lindela facility identified 50 minors at the centre.[10]

    Earlier this year, LHR was requested to represent a number of migrants arrested in Potchefstroom. Amongst them was a person who was reported to be under the age of 18. The Immigration Officers and magistrate refused to release this person or make alternatives to detention available while the Department of Home Affairs conducted verification of their age, resulting in them being detained for a period of two weeks.

62. LHR calls on the necessary state actors to ensure that there are no minors in immigration detention in fulfilment of their obligations on both a national and international level.

Ends.

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[10] South African Human Rights Commission, "Children Illegally Detained Under Bosasa's Watch at Lindela as Healthcare Crumbles," 13 December 2017, https://www.sahrc.org.za/index.php/sahrc-media/news/item/1075- children-illegallydetained-under-bosasa-s-watch-at-lindela-as-healthcare-crumbles