

15 February 2023

ATT: **Mr Felipe González Morales**  
Special Rapporteur on the Human Rights of Migrants  
Office of the United Nations High Commissioner for Human Rights  
Per email: [hrc-sr-migrant@un.org](mailto:hrc-sr-migrant@un.org)

**SUBMISSION TO THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS FOR THE FORTHCOMING REPORT TO THE 53<sup>RD</sup> SESSION OF THE HUMAN RIGHTS COUNCIL ON *EXPANDING AND DIVERSIFYING REGULARISATION MECHANISMS AND PROGRAMS TO ENHANCE THE PROTECTION OF THE HUMAN RIGHTS OF MIGRANTS IN IRREGULAR SITUATIONS – SOUTH AFRICA***

1. Lawyers for Human Rights (LHR) is an independent, non-profit human rights organization, started by a group of activist lawyers in 1979 and located in South Africa. LHR's programs undertake strategic work in six areas of human rights law, including a key focus on refugee and migrant rights, including immigration detention. LHR employs a holistic approach to social justice and human rights enforcement that includes strategic litigation, advocacy, law reform, human rights education, and community mobilization and support.
2. This submission has been prepared by LHR for consideration by the Special Rapporteur on the Human Rights of Migrants in preparation for the forthcoming report to the 53rd session of the Human Rights Council to discuss how to expand and diversify regularization mechanisms and programs to enhance the protection the human rights of migrants in irregular situations.
3. This submission seeks to specifically focus on the following:
  - a. legislative and policy measures as well as challenges in the context of the covid-19 pandemic in the implementation of regularization programs;
  - b. how irregularity increases the risk of human rights violations;
  - c. national solutions to legalise the stay for migrants; and
  - d. the contributions of migrants to South Africa.
4. We make this submission against the backdrop of the communication sent by the Mandates of the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special

Rapporteur on the human rights of migrants to the South African government dated 1 July 2022 and the South African government's response dated 30 August 2022.

## Legislation, Policy and Challenges in the Context of Covid-19

### *General*

5. The South African Constitution generally does not only afford rights to citizens but to everyone living in South Africa<sup>1</sup>. The Refugees Act (the Refugees Act)<sup>2</sup> was praised for the extensive protections it provided to asylum seekers and refugees. It allowed asylum seekers and refugees to move freely, work and study and afforded them many of the rights in the Constitution. However, the commencement of the 2017 Refugees Amendment Act<sup>3</sup> (RAA) and its accompanying Regulations<sup>4</sup>, have curtailed many of these rights making the asylum process long and onerous.
6. Of significance is the extension of the grounds of exclusion for asylum<sup>5</sup> beyond the closed list of exclusions provided in the 1951 UN Refugee Convention.<sup>6</sup> The Amendments have also increased the grounds on which a person ceases to qualify for refugee status<sup>7</sup> beyond those listed in the Convention. These amendments place asylum seekers and refugees at greater risk of refoulement.
7. The amendments also give the Director General the discretion to close any Refugee Reception Offices (RRO) he deems necessary for the proper administration of the Refugees Act.<sup>8</sup> Between 2010 and 2012 three of the six RROs were closed. This placed a significant strain on the asylum system and largely contributed to the massive backlog in processing applications. After several court battles, the Department of Home Affairs (DHA) finally reopened five of the six RROs. However, the wide discretion granted to the Director General to close RROs meant that a repeat of the earlier closures could occur, resulting in the exacerbation of the backlog.
8. Finally, the Amendments allow refugees, asylum seekers or any categories of these to be removed from the Republic on the grounds of national security, national interest, or public order. This is a clear violation of the principle of non-refoulement.

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<sup>1</sup> Act No. 7 of 1996. The only rights restricted to citizens in South Africa are political rights (section 19), citizenship (section 20) and freedom of trade, occupation and profession (section 22). An online copy of the Constitution can be accessed here: <https://lawlibrary.org.za/akn/za/act/1996/constitution/eng@2013-08-23>.

<sup>2</sup> No. 130 of 1998 at section 27. See the full act, including incorporated amendments here:

[https://lawlibrary.org.za/akn/za/act/1998/130/eng@2020-01-01#chp\\_1\\_sec\\_3](https://lawlibrary.org.za/akn/za/act/1998/130/eng@2020-01-01#chp_1_sec_3)

<sup>3</sup> 11 of 2017.

<sup>4</sup> Refugees Act (103 of 1998) Refugees Regulations.

<sup>5</sup> Note 2 at section 4.

<sup>6</sup> UN General Assembly *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol* U.N.T.S. Vol. 189 at Article 1F.

<sup>7</sup> Note 2 at section 5.

<sup>8</sup> *Ibid* at section 8.

## *Covid 19*

9. In March 2020, the RROs were closed as a result of the national lockdown. As a result, asylum seekers and refugees could not renew their permits.<sup>9</sup> However, the Department of Home Affairs instituted a blanket extension of all permits that expired during the lockdown period. Despite this, many of LHR clients who are asylum seekers and refugees lost their jobs, were evicted from their homes, and had their bank accounts frozen. Many of them could not move freely without facing harassment by police officials who ignored the moratorium on the arrest of those with expired permits.
10. In 2021, the DHA introduced an online renewal system that allowed asylum seekers and refugees whose permits expired during the lockdown to renew their permits online.<sup>10</sup> However, this online system has been plagued with issues. The biggest issue is the lack of response after the submission of an application. Many asylum seekers and refugees have been forced to submit multiple applications before they finally receive their renewed permits. In some cases, regardless of how many applications are sent, no response is received. Moreover, the RROs remained closed for in-person permit renewals or queries making permit renewal impossible for persons who do not have access to internet, printing, and email services.
11. Should asylum seekers and refugees fail to renew their permits on time, they are either required to present a valid reason for the failure to renew or to pay an overstay fee before they can renew their permits. This is an added financial burden that many asylum seekers cannot shoulder, leaving many of them without valid documentation. Those whose permits expired prior to the lockdown period and who were unable to renew their permits are currently facing this dilemma.
12. In May 2022, the RROs re-opened and have been operating on an appointment basis only. All persons are required to send an email requesting an appointment to attend the relevant RRO. However, this presents the following issues: firstly, not all of LHR's clients have access to internet services and so cannot send an email. Secondly, where clients are able to send an email, they rarely receive a response and must send numerous follow-up emails before they receive an appointment. Once they arrive at the RROs for their scheduled appointments, the long queues mean that not everyone who has an appointment will be seen that day. This is clearly an inefficient system.

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<sup>9</sup>See the following articles for regarding the continued closure of the RROs:

<https://www.dailymaverick.co.za/article/2022-02-15-immigrants-question-continued-closure-of-reception-offices-while-all-other-home-affairs-facilities-are-open-for-service/>; <https://www.news24.com/citypress/news/home-affairs-to-open-refugee-offices-after-two-year-closure-20220421>

<sup>10</sup> <http://www.dha.gov.za/index.php/statements-speeches/1436-the-department-of-home-affairs-provides-an-update-on-the-online-extension-of-asylum-seeker-visa-and-refugee-status>

13. An issue that has emerged recently is the requirement to produce a passport when applying for asylum. This is not a requirement for an asylum application as per the Refugees Act, yet it continues to hinder many migrants from applying for asylum.
14. Other major barriers to the asylum process include the lack of interpretation at the RROs and the manner in which the refugee status determination (RSD) interviews are conducted. Many asylum seekers' first language is not English. The lack of proper interpretation services means that many of their stories are often lost in translation. This is exacerbated by the fact that RSD officers tend to interview multiple people at a time which often results in stories getting mixed up.
15. Many of our clients, when collecting their RSD decisions, do not have their decisions explained to them nor are they informed about the appeal and review procedure. Those whose applications are rejected as unfounded are supposed to lodge appeals with the Refugee Appeals Authority South Africa (RAASA) within 10 days of receiving their decisions. Those whose applications are rejected as manifestly unfounded or fraudulent go for review before the Standing Committee for Refugee Affairs (SCRA) and persons can make written submissions within fourteen days of receiving their decisions. However, many asylum seekers are unaware of these steps and continue renewing their permits indefinitely. This causes a complete stall in the asylum process and prevents many applications from being finalised.
16. It is clear from the above that the inefficiency of the asylum system is a barrier to regularisation. Many asylum seekers have been living in limbo for years whilst awaiting the finalisation of their applications. This delay to regularisation increases their risk of experiencing human rights violations.

### **How irregularity increases the risk of human rights violations**

17. Section 27 of the Refugees Act outlines the rights afforded to refugees. Refugees are entitled to formal written recognition of refugee status and the rights set out in Chapter 2 of the Constitution excluding those rights reserved for citizens.<sup>11</sup> After ten years of continuous residence in South Africa, they may apply for permanent residence should SCRA determine that they will remain a refugee indefinitely.<sup>12</sup> They are also entitled to an identity document, to seek employment, and to apply for a travel document.<sup>13</sup>
18. The RAA included a new section on the protection and general rights of asylum seekers.<sup>14</sup> Asylum seekers are entitled to formal written recognition as an asylum seeker and to remain in South Africa

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<sup>11</sup>Note 2 at section 27.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.

<sup>14</sup> Note 2 at section 27A.

pending the finalisation of their application.<sup>15</sup> They have the right not to be unlawfully arrested or detained and are afforded the rights in Chapter 2 of the Constitution insofar as they apply to them.<sup>16</sup>

19. It is clear from the above that refugees are afforded greater protections than asylum seekers. Even though the rights in the Constitution are mostly afforded to everyone, they can only be fully enjoyed once a person's migration status is regularised. We have seen this play out in many areas. For instance, accessing healthcare services is more difficult for asylum seekers than refugees. Asylum seekers are often charged full price for services at public hospitals whereas refugees are means tested to determine how much they can pay.<sup>17</sup> Primary healthcare clinics and public hospitals are known to turn away undocumented persons or persons with expired documentation. With the current difficulty involved in renewing permits, LHR has had to intervene on many occasions to ensure that clients have access to lifesaving and emergency treatment.
20. In addition, LHR has noted that clients that are in vulnerable positions are especially at risk.<sup>18</sup> Women and LGBTQI migrants have also reported safety concerns, both outside and within the RROs, with officers and staff accused of being xenophobic and discriminatory. Women suffer disproportionately in other ways, for instance, in previous instances when asylum seekers are forced to spend the night outside a RRO to gain access, women would be at disproportionate risk of sexual and gender-based violence and are targets for opportunistic theft and other safety threats. Waiting in long queues, sometimes with small children, also creates opportunities for crime and corruption. Thereafter, applicants are required to repeatedly return to the same RRO for visa renewals. This creates further economic and family care challenges for women, who are often the primary caregivers of children. Applicants for asylum often do not settle near the RRO that issued their asylum seeker visa, and instead travel to cities and towns each time to do so.
21. Another example of the human rights violations asylum seekers face is the way in which the police administer immigration detention. The Refugees Act echoed by the constitutional decision of *Ruta v Minister of Home Affairs*<sup>19</sup> states 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 in accord with the DHA where the challenges that the RROs face is concerned. The South African Police Services (SAPS) and Immigration Officers fail to allow this group of persons to either produce their documents or express this intention. This is contradictory to the SAPS' and Immigration Officer's duties in Regulation 37 of the Immigration Regulations, 2014 which

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> For Example, see the *Gauteng Province Policy Implementation Guidelines on Patient Administration and Revenue Management* (2020).

<sup>18</sup> See a report compiled by LHR entitled 'Paper Promises: an audit of the SA forced migration framework and its impact on women' which can be accessed here: <https://www.lhr.org.za/lhr-resources/paper-promises-an-audit-of-the-sa-forced-migration-framework-and-its-impact-on-women/>

<sup>19</sup> *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) which can be accessed here: <http://www.saflii.org/za/cases/ZACC/2018/52.html>

provides that SAPS or Immigration 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.

22. The detention of newcomer asylum seekers has become increasingly prevalent. Newcomer asylum seekers are afforded protection by section 21(4) of the Refugees Act. However, there have been numerous concerning examples where immigration officers or 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. This is just one of the practical barriers to asylum experienced by asylum seekers, through no fault of their own. 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 of legal asylum seekers.

### **National Solutions to Legalise the Stay for Migrants**

23. On 08 March 2021, the Minister of Home Affairs and the Representative of the United Nations High Commission for Refugees (UNHCR) signed an agreement to work together to resolve the RAASA backlog.<sup>20</sup> The project was launched in March 2021 and, according to the UNHCR, aims to resolve the pending appeal cases over the course of 4 years, through increased resources, members, and technical equipment funded by the UNHCR.<sup>21</sup> Asylum seekers who were waiting for a hearing date were invited to email the RAASA to request a new hearing date. This is a positive development as it had been previously estimated that the RAASA backlog would have taken at least 86 years to work through.<sup>22</sup>

### **Contributions of Migrants**

24. One of the most common anti-immigrant narratives is the effect of immigrants on the economy.<sup>23</sup> Many South Africans believe that immigrants are placing a strain on the economy by draining state resources in the health, education, or social services sectors.<sup>24</sup> However, this is incorrect. Several studies have concluded that immigrants generally have a positive impact on the South African economy. In a 2012 World Bank study, it was found that during the period 1996-2011, immigrants

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<sup>20</sup> See <https://help.unhcr.org/southafrica/2022/04/14/appeals-backlog-project/> Accessed 12/02/2023.

<sup>21</sup> Ibid.

<sup>22</sup> Franzisca Luise Zanker & Khangelani Moyo *The Corona Virus and Migration Governance in South Africa: Business as Usual?* (2020) *African Spectrum* 55 at 104.

<sup>23</sup> Steven Lawrence Gordon *Immigration Policy in South Africa: Public Opinion, Xenophobia and the Search for Progress* in (eds) Pragna Rugunanan & Nomkhosi Xulu-Gama *Migration in Southern Africa* (2022) at 62.

<sup>24</sup> Ibid.

were found to have a positive effect on the employment and wages of South Africans.<sup>25</sup> A 2018 OECD-ILO study found that international migration raises the country's income per capita by at least 5%.<sup>26</sup>

25. In another study, it was found that about 70-85% of the estimated 100 000 spaza shops in townships are operated by immigrants.<sup>27</sup> These businesses contribute significantly to the local economy and create employment for both locals and immigrants.<sup>28</sup> However, xenophobic attacks on these businesses have made it challenging for them to continue operating.<sup>29</sup>

## Conclusion

26. It is clear that the inefficiency of the asylum system in South Africa is a major barrier to the regularisation of many asylum seekers. The consequences of a failing asylum system put asylum seekers at grave risk of human rights violations and this goes against the values of our Constitution. The government of South Africa, thus, has to take immediate steps to improve the asylum system and to meet its international law obligations. Some of these measures could include increasing the capacity of RROs, providing detention training to police officials, and considering alternatives to immigration detention. It is only through an active effort by the government that the rights of asylum seekers will be adequately protected and respected.

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Note 18 at 106.

<sup>28</sup> Ibid.

<sup>29</sup> See also a recent study published by the Institute for Security Studies published in September 2022 entitled, *Scapegoating in South Africa: Busting the myths about immigrants* which can be accessed here:

<https://issafrica.s3.amazonaws.com/site/uploads/sar-53.pdf>