

Status of Immigration Detention in South Africa

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LHR remains committed to ensuring that all their human rights are respected and protected, particularly the right to be free of arbitrary arrest and detention within the borders of South Africa.

Lawyers for Human Rights

LHR is an independent, non-profit, non-governmental human rights organisation founded in 1979. Its core mandate is to promote and advance social justice through pro bono legal services. To accomplish this, LHR employs a holistic approach to social justice and human rights enforcement, which includes strategic litigation, advocacy and law reform, human rights education, and community mobilisation and support. LHR offers legal services in the following programme areas: Refugee and Migrant Rights, Land and Housing Rights, Environmental Justice, Gender Equality, Penal Reform, and Strategic Litigation. Specialist legal practitioners and activists' staff each of LHR's programmes.

In sum, LHR's approach to social change is multi-pronged:

Impact litigation, legal advice, and law reform: LHR provides direct legal services through its law clinics and advice offices, located in Johannesburg, Tshwane, and Durban. These offices aid in identifying trends and systemic problems across the country, as well as vulnerable groups that may benefit from strategic litigation.

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Coalition-building: LHR seeks out and builds partnerships not only with other civil society actors, but also with communities for which it acts as legal representatives and advisors. This ensures that LHR is responsive to current changing social justice issues.

This report is the product of the work of LHR's Penal Reform Programme. To keep up to date with the work being done at Lawyers for Human Rights, visit:



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Terms, Abbreviations & Language

Terms and abbreviations

ASYLUM SEEKER	<i>a migrant who has entered South Africa for fear of persecution or war in their country of origin and seeks to be recognised as a refugee</i>
DHA	<i>Department of Home Affairs, which is charged with the implementation of the Refugees and Immigration Acts in South Africa.</i>
LHR	<i>Lawyers for Human Rights</i>
LINDELA	<i>The Lindela Repatriation Centre or Holding Facility</i>
RAASA	<i>Refugee Appeals Authority of South Africa, which governs the appeals of asylum applications which were rejected as unfounded by a Refugee Status Determination Officer</i>
REFUGEE	<i>a person who has been granted asylum who fled their country of origin due to a well-founded fear of persecution or war or other serious violence.</i>
RRO	<i>Refugee Reception Office, run by the Department of Home Affairs where asylum seekers apply for asylum, are interviewed by Refugee Status Determination Officers, and have their visas extended.</i>
RSDO	<i>Refugee Status Determination Officer</i>
SAPS	<i>South African Police Service</i>
SCRA	<i>Standing Committee for Refugee Affairs, which governs the appeals of asylum applications rejected as manifestly unfounded, fraudulent, or abusive by Refugee Status Determination Officers. SCRA also holds the power to certify that a refugee will remain a refugee indefinitely, thereby allowing them to apply for permanent residence in South Africa, as well as the power to withdraw a refugee's status if they cease to be a refugee.</i>
UDHR	<i>Universal Declaration of Human Rights</i>
UNHCR	<i>United Nations High Commissioner for Refugees</i>
ZEP	<i>Zimbabwean Exemption Permit</i>

A note on language

For purposes of this report, unless a person or persons fall within the definition of 'asylum seeker' or 'refugee' outlined above, the term 'migrant' or 'migrants' will be used generally to refer to

persons who are not citizens or nationals of South Africa. The term ‘illegal foreigner’ as defined in the Immigration Act¹ will only be used to accurately quote the term in the Immigration Act.

The term ‘illegal foreigner’ is problematic for a variety of reasons, most especially because it dehumanises migrants and assumes that any person could be ‘illegal.’ It also carries the connotation of criminality. A person cannot be ‘illegal’ and even more so, they cannot be “illegal” because they are not documented in terms of a country’s immigration laws. It is also highly inflammatory in the context of a country that has experienced repeated violent xenophobic attacks. An ‘illegal foreigner’ should not be confused with an undocumented person who does not have government issued proof of identification. Being undocumented does not automatically imply that an individual is an ‘illegal foreigner’ who can be detained and deported from the country; however, these categories often do overlap simply because documentation is insisted upon by law enforcement.

¹ Act 13 of 2002.

Foreword

“It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.” (S v Makwanyane)²

This report is being published as the country prepares for the 2024 elections. The stakes are high for various political parties and already the scapegoating of migrants has reached fever pitch level. We are also bearing testimony to increased levels of arrests, detention and deportation of migrants - people, human beings with partners, families, homes and a life in South Africa- being uprooted violently and with biased reporting by some media, fuelling the hatred of xenophobia.

It is hoped that this report, documenting the status of immigration detention in South Africa will be received in the spirit of strengthening our democracy.

President Mandela rightly asserted that it is the Constitutional Court’s task “to ensure that the values of **freedom and equality** which underlie our interim constitution – and which will surely be embodied in our final constitution – **are nurtured and protected** so that they may endure”³

Our quest in this report is to ensure that the values of freedom and equality are nurtured and protected and that South Africa can in this way, once again be held up as a shiny example and a beacon of hope in a world of increasing violence, othering and hatred as witnessed in ethnic cleansing taking place as thousands of Palestinians are killed.

In the global landscape, the issue of immigration detention remains a complex and sensitive matter, drawing attention to the intersection of human rights, national security, and the pursuit of social justice. This report, focused on the state of immigration detention in South Africa, seeks to shed light on the challenges and opportunities inherent in the nation's approach to this multifaceted issue.

South Africa, a nation with a rich tapestry of cultures and histories, is struggling to uphold the fundamental principles of human dignity and rights.

The objective of this report is not only to provide a comprehensive analysis of the current state of immigration detention in South Africa but also to stimulate constructive dialogue among stakeholders, including policymakers, civil society, and the general public. By fostering a deeper understanding of the challenges faced by those detained and the systems in place, we hope to contribute to the development of humane and effective immigration policies that align with the vision and ethos of the Constitution of South Africa which enshrines respect for human rights and dignity of all who live in South Africa.

This report is the result of work done by the Detention Monitoring Unit located in the Penal Reform Programme and working in collaboration with the Refugee and Migrant Rights Programme at Lawyers for Human Rights. It provides a platform for those directly affected to speak for

² *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 at para 88.

³ Address by President Nelson Mandela at the Inauguration of the Constitutional Court, Johannesburg, 14 February 1995, available at http://www.mandela.gov.za/mandela_speeches/1995/950214_concourt.htm.



themselves, even though their identities cannot be revealed. The report reflects extensive research, collaboration, and engagement with a diverse range of experts and organisations.

It is hoped that this report will empower communities, both South Africans and the community of migrants, who are part of the social fabric of this country. Through this it is hoped that this collective effort can bring about positive change and ensure that immigration detention practices in South Africa are in line with international standards and best practices.

This report will be presented to the Department of Home Affairs, to the Portfolio Committee on Home Affairs, the Department of Justice and Constitutional Development and the South African Human Rights Commission and others. It is hoped that the relevant stakeholders will work with civil society by confronting the challenges head-on and working collaboratively. It is only in this way that we can contribute to a South Africa where immigration policies respect the inherent dignity of every person. As we embark on this exploration, let us keep in mind the importance of empathy, compassion, and a shared commitment to justice.

I express my gratitude to all those who have contributed to the creation of this report.

Sharon Ekambaram, Head of Lawyers for Human Rights' Refugee and Migrant Rights Programme

Executive Summary

The right to seek asylum is a fundamental human right protected under international law. However, the practice of immigration detention in South Africa has persisted for decades, necessitating a critical examination of its necessity and proportionality. This report delves into recent trends in immigration detention in South Africa, shedding light on its impact on migrants and their interactions with various entities, including the SAPS, the DHA, legal professionals, and government officials.

Drawing on both quantitative and qualitative data from the Immigration Detention Hotline at LHR between March and October 2023, supplemented by interviews with 41 individuals, some directly affected by immigration detention, this report offers a comprehensive analysis. Additionally, insights from legal practitioners nationwide who have represented individuals under the Immigration Act contribute to a well-rounded perspective.

This report focuses on the recent trends in immigration detention in South Africa and its effects on migrants, including in their interactions with SAPS, DHA, immigration officials, lawyers, Magistrates, Judges, and other government officials.

Despite the legal protections theoretically afforded to migrants in South Africa concerning immigration detention, a stark disparity exists between these protections and the harsh reality faced by migrants within the country. Challenges such as lack of access to documentation, corruption, irregular law implementation, homophobia and xenophobia render migrants – predominantly black African migrants - susceptible to arbitrary arrest and detention based on their documentation status.

Numerous arrests, as documented by LHR, are deemed unlawful and indicative of an abuse of power by state officials. Concrete examples underscore the urgent need for reform in the enforcement of immigration laws.

The immigration detention system has cultivated a climate of fear within migrant communities in South Africa. Migrants, already enduring challenging experiences before arriving in the country, find themselves traumatised by a system that fosters a sense of powerlessness and dehumanization. For most migrants, the reality is that the immigration detention system is wielded as a discriminatory and xenophobic tool for officials to exert power over them and extract money from them, regardless of their documentation status.

This report emphasises the urgent need for reform in the South African immigration detention system. The gap between legal protections on paper and the reality experienced by migrants demands immediate attention to rectify systemic issues, safeguard human rights, and ensure a fair and just immigration process.

Introduction

Immigration detention is defined as “*the deprivation of liberty for migration-related reasons.*”⁴ It is usually an administrative measure but can also be imposed as a criminal punishment and can be used at various stages of a migrant’s time in the country.⁵

Historical position of immigration in South Africa

Policies of immigration detention stretch back to apartheid-era South Africa. Although post-independence, certain policymakers in South Africa aimed for the country to become a leader in guaranteeing the rights of asylum seekers and refugees, the established legal provisions in the Refugees Act⁶ have been slowly chipped away to resemble a detention and deportation system that has haunting resemblances to that of apartheid South Africa.

Apartheid Practices

The apartheid immigration policy has been described as one of ‘two-gates.’ The first welcomed ‘desirable’ white migrants while the second “*tolerated ‘undesirable’ and often clandestine African migrants for temporary periods, to satisfy labour demands.*” The second gate was regulated primarily through “*policing, detention and deportation.*” After certain black South Africans were stripped of their nationality in 1984, the ‘back gate’ immigration policies applied to them as well.⁷

Aliens Control Act 96 of 1991

The Aliens Control Act, passed by the apartheid regime and known as “*apartheid’s last act,*”⁸ has been referred to as the beginning of “*South Africa’s embrace of restrictive immigration and asylum policies*” as it initially allowed for indefinite immigration detention without recourse to review.⁹ Even after the end of apartheid, the Act was used to detain immigrants, fuelled by “*xenophobia, abuse, and violence.*”¹⁰ Although the right to judicial review was added in the 1995 Amendment, the Act was ultimately replaced as it did not align with “*constitutional expectations.*”¹¹ The Global Detention Project notes that deportations in South Africa began increasing in the early 1990s, reaching a peak around 2007.¹²

⁴ International Detention Coalition, ‘What Is Immigration Detention? And Other Frequently Asked Questions’ 2023, available at <https://idcoalition.org/about/what-is-detention/>.

⁵ International Detention Coalition, ‘There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention’ 2011, p 10, available at <https://www.refworld.org/docid/4f0c14252.html>

⁶ 130 of 1998.

⁷ Tove Van Lennep, ‘Migration II: The South African Migration Policy Landscape’ 17 September 2019, Brief: Helen Suzman Foundation, available at <https://hsf.org.za/publications/hsf-briefs/the-south-african-migration-policy-landscape>.

⁸ Ibid.

⁹ Global Detention Project, ‘Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing Criminal Enforcement of Migration’ 28 June 2021, available at <https://www.globaldetentionproject.org/wp-content/uploads/2021/06/GDP-Immigration-Detention-in-South-Africa-2021.pdf>.

¹⁰ Thomas Hicks, ‘The Constitution, Aliens Control Act, and Xenophobia: The Struggle to Protect South Africa’s Pariah-the Undocumented Immigrant’ (1999) 1 Indiana Journal of Global Legal Studies 393 7.

¹¹ The White Paper on International Migration for South Africa (GN 750 in GG 41009 of 38 July 2017) (“2017 White Paper”) at p 10.

¹² Global Detention Project (note 9 above) at p 9.

Lindela

Established in 1994, Lindela was established as a detention facility designed for undocumented migrants awaiting deportation. Originally established to alleviate overcrowding in other prisons within Gauteng, Lindela was envisioned as a partnership between the DHA and the private company Bosasa.¹³ Over time, the dynamics governing Lindela's operations have undergone a significant transformation. Presently, the facility is managed by EnviroMongz, a private company that operates with limited oversight from the DHA. This shift raises critical questions about the accountability and transparency of Lindela's current administration, signalling a departure from its initial collaborative framework.

From its inception, Lindela has been rife with controversy over the treatment of detainees and human rights violations.¹⁴ The centre has been accused of “*institutionalised xenophobia*” by police officers, DHA officials, as well as the private security personnel.¹⁵

In this evolving context, this report seeks to examine the implications of Lindela's changing management structure on the treatment and experiences of undocumented migrants within the facility. By exploring the historical evolution and present-day operations of Lindela, we aim to provide a comprehensive understanding of the challenges faced by migrants in detention and the broader implications for immigration policies in South Africa.

Refugees Act

By the late 1990s, increasing conflict in the Horn of Africa and Great Lakes regions resulted in large numbers of asylum seekers fleeing into Southern Africa, pressuring South Africa to take a stance on refugee protection. At that time, South Africa ratified the United Nations 1951 Convention on Refugees¹⁶ and its 1967 Protocol.¹⁷ This involved consultation with the UNCHR and civil society organisations to pass the Refugees Act, which is still highly regarded as one of the most progressive asylum policies in the world.¹⁸ The Refugees Act rejected an encampment policy in favour of an “*urban refugee policy*,” described then as “*the inception and cornerstone of refugee protection*.”¹⁹

Despite these enormous advances in eliminating immigration detention and policing through the establishment of a rights-based approach to asylum, public opinion in South Africa was not fully in support of rights for refugees and other migrants.²⁰ Xenophobia and attacks on migrants occurred more often, allowing “*‘violent othering’ [by] agents of the state [who] could act with virtual*

¹³ Anthony Kaziboni, ‘The Lindela Repatriation Centre, 1996-2014. Applying Theory to the Practice of Human Rights Violations’ (December 2018) 66 SA Crime Quarterly 41–52.

¹⁴ Ibid.

¹⁵ Ibid. See for example, South African Human Rights Commission v Minister of Home Affairs: Naledi Pandor [2014] ZAGPJHC 198; [2014] 4 All SA 482 (GJ); South African Human Rights Investigative Reports, Volume 4, Complaint No: GP/2012/0134.

¹⁶ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p 137, available at: <https://www.refworld.org/docid/3be01b964.html> (“1951 Convention on Refugees”).

¹⁷ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p 267, available at: <https://www.refworld.org/docid/3ae6b3ae4.html> (“1967 Protocol”).

¹⁸ Van Lennep (note 7 above).

¹⁹ Marie Claire Van Hout and Jakkie Wessels, ‘#ForeignersMustGo versus ‘In Favorem Libertatis’: Human Rights Violations and Procedural Irregularities in South African Immigration Detention Law’ (2023) 22:4 Journal of Human Rights 541-562.

²⁰ Jonathan Crush and Belinda Dodson, ‘Another Lost Decade: The Failures of South Africa’s Post-Apartheid Migration Policy’ (2007) 98: 4 Tijdschrift Voor Economische En Sociale Geografie 436–54 at p 445.

impunity."²¹ Deportations continued, with over 1.7 million migrants deported between 1990 and 2002.²²

Immigration Act

In immediate post-apartheid South Africa, the first DHA Minister Buthelezi was instructed to construct a new immigration policy framework in consultation with civil society and other actors. This culminated in the Immigration Act, in which then Minister Buthelezi's anti-immigrant stance appears to have prevailed over advocates for a more welcoming and inclusive policy. The Immigration Act contains both administrative and criminal provisions for immigration detention which migrants are charged with and detain under today.²³

Causes of Immigration Detention

Immigration detention is used *"for the purpose of identifying persons and determining nationalities, preventing persons from gaining unauthorized entry, and expelling or ensuring the enforcement of a deportation order."*²⁴ In South Africa, immigration detention is authorised as an administrative measure under Sections 34(1) and 41(1) read with 34(2) of the Immigration Act and as a criminal offence under Section 49 of the Immigration Act.

An additional significant rationale for immigration detention is rooted in the concept of deterrence. Politicians frequently posit that those entering the country through unauthorised means and residing without legal status must be punished to further dissuade 'illegal' immigration. These perspectives often align with xenophobic ideologies which seek to punish all migrants, regardless of the reason or lawfulness of their entry into the country.

The International Detention Coalition notes that governments often use immigration detention both as a tool to manage migration and to address broader domestic social and political issues. Specifically, immigration detention aims to deter future migrants and *"provide a sense of control over borders for citizens...and respond to political pressure."*²⁵

In 2017, the Government of South Africa articulated its intention in the White Paper on International Migration for South Africa ("the 2017 White Paper"), to use immigration detention, not only to manage migration, but to manage rising political pressures about economic instability and social tensions. These pressures have manifested in incidents of xenophobic violence as well as widespread protests against migrants.²⁶

Recent Trends in South Africa

Recent trends in immigration detention in South Africa underscore a notable disjunction between official rhetoric and practical implementation, a dissonance expounded upon with anecdotal

²¹ Ibid.

²² Ibid at p 446.

²³ Van Lennep (note 7 above).

²⁴ International Organisation for Migration (IOM), 'Immigration Detention and Alternatives to Detention' Global Compact Thematic Paper, available at https://www.iom.int/sites/g/files/tmzbdl486/files/our_work/ODG/GCM/IOM-Thematic-Paper-Immigration-Detention.pdf.

²⁵ International Detention Coalition (note 5 above) at p 11.

²⁶ See for example, Dinky Mkhize, 'Anti-Immigrant Unrest Hits South Africa as Zuma Condemns Violence' Reuters 16 April 2015, available at <https://www.reuters.com/article/uk-safrica-violence-idUKKBN0N71AL20150416>; 'South Africa: Thousands Join 'Operation Dudula' Protest against Migrant Workers' Africanews 19 February 2022, available at <https://www.africanews.com/2022/02/19/south-africa-thousands-join-operation-dudula-protest-against-illegal-migrant-workers/>.

evidence in this report. Despite the government's formal condemnation of xenophobia and declared support for the fundamental rights of asylum seekers and other migrants,²⁷ there exists, in practice, a contradictory trend wherein immigration detention is not only legitimized but also actively promoted.

The 2017 White Paper emphasised the need to update South Africa's migration policy in order to *"adequately embrace global opportunities while safeguarding...sovereignty and ensuring public safety and national security."*²⁸ The 2017 White Paper, described in more detail below, argues for increasing securitisation of the immigration system. This involved heightened criminalisation and containment measures of migrants driven by concerns that *"South Africa has also become an attractive destination for irregular migrants...who pose a security threat to the economic stability and sovereignty of the country."*²⁹

The 2017 White Paper, along with the Border Management Act of 2020, the 2020 Amendments to the Refugees Act, and recent case law has shown a growing presence of immigration detention as a form of institutionalised xenophobia. Regardless of documentation status, migrants in South Africa are on constant alert and afraid to be stopped by the police. Far from the vision that laws would protect everyone in South Africa from unlawful arrest and detention after the terrible legacy of apartheid, in practice the corruption, delays, and obstacles to documentation have made migrants fear the immigration detention system.

Methodology

This report focuses on the recent trends in immigration detention in South Africa and its effects on migrants, and their interactions with SAPS, DHA immigration officials, lawyers, Magistrate Judges, and other government officials. The report is based on quantitative and qualitative data from the Immigration Detention Hotline operated by LHR (detailed below) as well as interviews with asylum seekers, refugees, other migrants and community leaders directly impacted by immigration detention. Interviews were also conducted with legal practitioners around the country who have represented persons arrested under the Immigration Act.

The total number of people that we have interviewed is 41 and out of this number: 14 were asylum seekers, 3 were recognised refugees, 1 was a ZEP holder, 3 were migrant community leaders, 11 were legal practitioners, 1 was a social worker and 8 were persons with knowledge of immigration detention in South Africa.

Interviewees were advised of the purpose of the report prior to their interviews and gave informed consent prior to participation. Interviews, conducted either in person or telephonically by LHR staff members, adhered to the guidelines and procedures outlined in the Protection of Personal Information Act³⁰ and the regulations thereto. All names of interviewees quoted in the report and elsewhere have been changed (unless consented to otherwise) to safeguard interviewees' safety.

Immigration Detention Hotline

The Immigration Detention Hotline was established in March 2023 and is run by the Penal Reform Programme at LHR. It operates as a dual toll-free phone or WhatsApp line whereby persons - or

²⁷ Department of Justice, 'National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance' 2019, available at <https://www.justice.gov.za/nap/docs/NAP-20190313.pdf>.

²⁸ 2017 White Paper (note 11 above).

²⁹ Ibid at p 35.

³⁰ Act 4 of 2013.

family or friends of persons - who are arrested and/or detained for immigration-related reasons can obtain legal advice and legal representation if possible.

As of September 2023, the Hotline had processed more than 200 requests for assistance with regards to immigration-related arrests and detention of persons between the ages of 19 and 55 from approximately 20 countries with various documentation statuses.

The Hotline serves as a crucial avenue for individuals facing immigration challenges, providing valuable insights into the multifaceted issues surrounding immigration detention in South Africa. The aim of this Hotline is to develop a network of legal practitioners across South Africa who are able to provide legal representation to persons who are arrested and detained for immigration-related reasons in instances where LHR cannot.

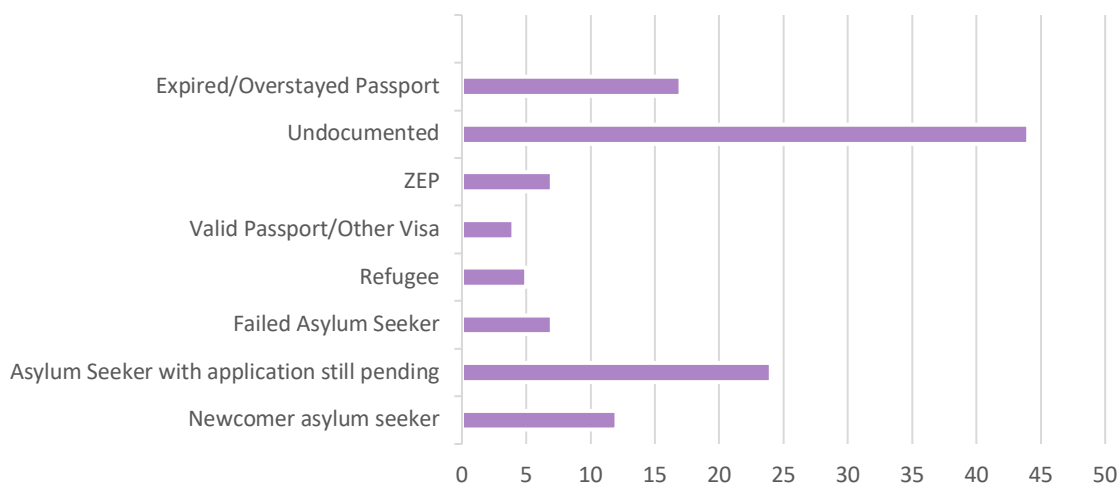


Figure 1: Documentation Status - Reported Instances of Immigration Detention by LHR Hotline*
(March-September 2023)

**Excludes those whose documentation status was not reported*

Legal Framework for Immigration Detention

There are a multitude of international, regional, and domestic legal obligations and guidelines surrounding immigration detention, especially given that it affects the freedom of liberty and the freedom of movement (of migrants), as well as its impact on asylum seekers. The most noteworthy are set out below.

International Law

Immigration is a complex process with implications that extend beyond national borders, necessitating consideration in public international law to address its broad, cross-state nature. The year in which the foundation for the international human rights legal framework was adopted serves a specific historical importance in the South African context because it was in this year – 1948 - that the apartheid system came to power. This historical juncture marked the provision of asylum for South African refugees fleeing the systematically oppressive apartheid regime, with neighbouring countries offering refuge. Conversely, and with the increase in oppressive prosecutions across countries outside of South Africa, this means that South Africa itself holds the legal international obligation to provide asylum to migrants seeking such in fear of said persecution.

UDHR

In 1948, the UDHR³¹ laid the foundation for the international human rights legal system. Human rights are unalienable rights and are inherent to all individuals by virtue of their humanity. This fundamental principle underlies all articles of the UDHR, irrespective of the specific context of each article.

In the realm of immigration detention, the UDHR underscores the inherent and inalienable right to dignity. This right extends universally, asserting that individuals, regardless of nationality, have the right to be treated with equal dignity. Specifically addressing migrants, this implies that the dignity afforded to citizens should in equal measure be afforded to migrants.³²

The right to non-discrimination based on national origin is explicitly enshrined in articles 2, 6, and 7 of the UDHR, emphasising the universal application of all human rights to individuals, regardless of nationality or documentation status.

Article 9 of the UDHR safeguards against arbitrary arrest and detention, while Article 14 establishes the right to seek asylum when fleeing persecution. The simultaneous recognition of these rights during a pivotal moment in international human rights history underscores the importance placed on protection from arbitrary and unlawful immigration detention in international human rights law.

³¹ UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at <https://www.refworld.org/docid/3ae6b3712c.html>.

³² In terms of Article 1 of the UDHR, “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”

The 1951 Convention on Refugees

Among the paramount international legal instruments governing the rights of asylum seekers and refugees encountering the immigration detention system is the 1951 Convention on Refugees. Extending beyond the UDHR, the Convention offers specific regulations and protections for migrants who are fleeing persecution in their country of origin. Originating from Article 14 of the UDHR, the 1951 Convention on Refugees aims to provide clarity on facilitating the process of asylum-seeking.

The 1951 Convention on Refugees defines ‘refugee’ under Article 1(A)(2) as:

“Any person who, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.

Beyond establishing the definition of “refugee”, the 1951 Convention on Refugees also specifies the rights of asylum seekers and refugees. Notably, Article 16 enshrines the right to access to justice, specifically that “*refugee[s] shall have free access to the courts of law on the territory of all Contracting States.*” In other words, this article seeks to protect asylum seekers and refugees from arbitrary detention without judicial oversight and intervention. This prohibition has the implication that refugees arrested on any charge must be allowed to appear before the courts of that jurisdiction.

Further, regardless of charge, state parties to the 1951 Convention on Refugees may not expel a refugee from their territory except in cases of national security or public order. Where one of the exception grounds are invoked, the decision to expel must be made “*in accordance with the due process of law.*”³³

Non-Refoulement

Perhaps most importantly, the 1951 Convention on Refugees enshrines one of the pinnacle principles of international refugee law: *non-refoulement*.

Article 33 of the 1951 Convention on Refugees states that:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”

Non-refoulement therefore acts as a safeguard for asylum seekers, ensuring that upon reaching a host country, they are protected from the persecution they fled in their country of origin, as they will not be compelled to return to it. This principle is an essential aspect of the international, regional, and domestic frameworks governing immigration detention, including in South Africa. It protects all migrants, even those not recognised as refugees, from deportation to a country where they might face persecution or danger to their life.

³³ 1951 Convention on Refugees (note 16 above), art. 32.

Regional Law

1969 OAU Refugee Convention

The 1969 OAU Refugee Convention³⁴ is meant to supplement the 1951 Convention and address issues which are specific to the problems facing asylum seekers and refugees in Africa. Beyond the definition of refugee in the 1951 Convention on Refugees, the 1969 OAU Refugee Convention creates an additional category of refugees, namely those who:

“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”.

In short, this secondary definition for refugee status allows asylum seekers fleeing war to be recognised as refugees without the burden of establishing individualised persecution.

Non-Refoulement

The OAU Convention echoes the significance of the non-refoulement principle established by the 1951 Convention. Article 5 specifically states that repatriation, or return to a country of origin, must be done voluntarily and *“no refugee shall be repatriated against his will.”*

South African Law

Law in South Africa provides a multitude of guidelines, obligations, and rights in relation to immigration detention.³⁵

Constitution of the Republic of South Africa

Chapter 2 of the Constitution sets out the domestic codification of Basic Human rights in the context of South Africa. This Chapter sets out the Bill of Rights. Section 7(1) reads:

“This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom”.

Similar to the UDHR, the Bill of Right applies equally to *all* persons in South Africa, regardless of nationality or documentation status due to their *“inherent dignity and the right to have their dignity respected and protected.”*³⁶

Relevant to immigration detention, the Bill of Rights establishes several rights that apply to those arrested or detained to their documentation status:

- a) Freedom and Security: All persons have a right not to be deprived of their freedom arbitrarily or without just cause or be detained without trial. In addition, they are

³⁴ Organization of African Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45, available at: <https://www.refworld.org/docid/3ae6b36018.html>.

³⁵ For a deeper review and analysis of the relevant law, see Lawyers for Human Rights, ‘A Practitioner’s Guide to Immigration Detention in South Africa’ (August 2020), available at <https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2020/08/Handbook-on-Immigration-Detention.pdf> and Lawyers for Human Rights, “Monitoring Policy, Litigious and Legislative Shifts in Immigration Detention” (June 2020), available at <https://lawyersforhumanrights.b-cdn.net/wp-content/uploads/2020/06/Detention-Report-Final-Final-Digital-1.pdf>.

³⁶ Constitution of the Republic of South Africa, Chapter 2, Section 10.

safeguarded from torture, cruel, inhumane, or degrading treatment, or being subjected to forms of violence.³⁷

- b) Dignity: While in detention, persons must be afforded “adequate accommodation, nutrition, reading material and medical treatment,” and generally the conditions of detention must be “consistent with human dignity.”³⁸
- c) Access to Justice: Persons arrested must have a fair public hearing before a court within 48 hours of arrest and a chance to challenge the lawfulness of their detention. They must further be allowed legal representation and be assigned legal representation by the State if they cannot afford their own.³⁹
- d) Information: Individuals who are arrested must be granted a fair public hearing before a court within 48 hours of their arrest, providing them with an opportunity to contest the lawfulness of their detention. Moreover, they are entitled to legal representation and should be assigned legal counsel by the State if they are unable to afford their own.⁴⁰ Where there are court proceedings, everyone has the right to an interpreter so as to understand the charge and the developments of their case.

Refugees Act

Section 21(4) of the Refugees Act states that:

“Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence in the Republic if-

(a) Such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such application has been reviewed in terms of Section 24A or where the applicant exercised his or her right to appeal in terms of section 24B; or

(b) Such a person has been granted asylum”.

This means that individuals, from the moment they apply for asylum until they receive a final decision from the RAASA or the SCRA, are immune to arrest and detention for entering and being in the country illegally. This protection is especially important for those who may have entered the country through irregular means. Additionally, it protects those individuals who may face challenges in renewing their asylum visas or refugee certificates on time due to factors such as lack of funds, lack of transport, or illness.

This section is further bolstered by the Constitutional Court judgment in *Ruta v Minister of Home Affairs*⁴¹ which found that a delay in applying for asylum does not exclude a person from applying for asylum.

³⁷ Ibid, Section 12.

³⁸ Ibid, Section 35(2).

³⁹ Ibid, Sections 34 & 35(2).

⁴⁰ Ibid, Section 35(2).

⁴¹ [2018] ZACC 52; 2019 (2) SA 329 (CC).

Non-Refoulement

Despite these measures, the processes of immigration detention persist in seeking the imminent deportation of refugees. Consequently, refugees often find themselves compelled to seek counsel from the Courts to revive the principle and invoke the protection it envisions.

Immigration Act

The Immigration Act allows for arrest and deportation of persons found to be an “illegal foreigner...who is in the Republic in contravention of this Act.” There are two types of detention that can occur when someone is found to be undocumented:

- a) administrative immigration detention for the purpose of deportation; and
- b) criminal detention for the crime of entering and remaining in the country illegally.

Administrative arrest and detention are authorised under Section 34 of the Immigration Act for the purposes of deportation. This section must be considered alongside Section 32 of the Immigration Act which allows an “illegal foreigner” to depart voluntarily or be deported by the State. Suspected “illegal foreigners” can be arrested and detained for the purpose of verification under Section 41 of the Immigration Act.

While the police have the authority to detain individuals for up to 48 hours for documentation verification, this period is frequently exceeded. Instances have been noted where individuals are held for extended periods at police stations without proper verification, and there are cases of individuals not being brought before the court within the stipulated 48-hour period, often due to the solicitation of bribes from the arrestees.

The Immigration Act read with *Ex Parte Minister of Home Affairs*⁴² sets out that when arrested for the purpose of deportation under Section 34, individuals must be brought before a court within 48 hours. Their detention can continue for up to 30 days, during which it must be confirmed by a court.⁴³ Immigration officers can seek a further 90-day extension of the detention at Magistrate’s Court. Even with court confirmation, detainees are not to be held beyond 120 days, although this continues to occur regularly in practice.

Criminal detention due to documentation is authorised by Section 49 of the Immigration Act, allowing charges for unlawful entry or stay, typically resulting in fines or three months of imprisonment. In recent years, there has been a notable increase in persons arrested under both Section 49 and Section 34, leading to sequential detention: first a criminal sentence and then an administrative detention pending deportation.

Case Law

There has been a plethora of litigation on the topic of immigration detention in South Africa, especially as it relates to the rights of asylum seekers and refugees as enshrined in the Refugees Act. Notably, the Constitutional Court has held that “*a person does not become a refugee because*

⁴² *Ex Parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2023] ZACC 34.

⁴³ This was not originally the case under the Immigration Act and was challenged initially in *Lawyers for Human Rights v Minister of Home Affairs* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC) (2017 judgment). The Constitutional Court found the sections to be invalid and declared that while the legislature remedies the unconstitutionality, all detainees must have access to the courts within 48 hours of arrest.

of recognition but is recognised because he or she is a refugee.”⁴⁴ We set out below two seminal cases in the context of immigration detention.

Ruta v Minister of Home Affairs

One of the pivotal rulings in the realm of immigration detention is *Ruta v Minister of Home Affairs*. This judgment affirmed the long-standing judicial precedence in the field, reinforcing that a delay in applying for asylum does not invalidate a person's right to seek asylum. In this judgment, the Constitutional Court resolved a critical conflict between the Immigration Act and the Refugees Act. It ruled that in cases where an 'illegal foreigner' expresses an intention to apply for asylum, the provisions of the Refugees Act take precedence. This judgment not only echoes but also solidifies decades of jurisprudence surrounding immigration detention and the rights of refugees, marking it as a fundamental decision in this area of law.

While the *Ruta v Minister of Home Affairs* decision has been instrumental, subsequent developments, which will be discussed in the next section, have built upon the definitive legal framework it established.

Ex Parte Minister of Home Affairs

On 29 June 2017 the Constitutional Court handed down judgment declaring section 34(1)(b) and (d) of the Act inconsistent with sections 12(1), 35(1)(d) and 35(2)(d) of the Constitution.⁴⁵ The declaration of invalidity was suspended for 24 months from the date of the order to enable Parliament to correct the defect. Pending the enactment of legislation, the Court provided interim relief that any persons detained under section 34(1) of the Act was to be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.

Parliament failed to meet the 29 June 2019 deadline to enact the corrective legislation (in 2023, six years after the aforementioned 2017 order, Parliament has still not enacted corrective legislation). This has resulted in confusion and uncertainty in the application of section 34(1) of the Act – courts have taken divergent positions on the legal effects of the expiry of the suspension period with some Magistrates' Courts incorrectly applying the 2017 order by requiring detainees to prove the lawfulness of their documentation status while others have been unwilling to confirm detentions beyond 30 days resulting in almost automatic releases from detention. As a result of this some immigration officers have detained detainees beyond 30 days without bringing them before a court; and some Magistrates have been instructed not to handle section 34 applications.

The Minister and Director-General of Home Affairs approached the Constitutional Court in July 2022 on an *ex parte* basis seeking a revival of the 2017 order for a further period of two years. LHR, the applicant in the 2017 proceedings, was admitted as an intervening party in these *ex parte* proceedings.

The Constitutional Court affirmed LHR's contention that the Court's intervention was required to provide clarity on the proper interpretation of the 2017 Order, especially in light of the inaction and failure by the state to enact remedial legislation. In this regard, the Court ordered the following procedure to operate in instances where someone is detained pending deportation under section 34(1) of the Act:

⁴⁴ *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC) at para 34.

⁴⁵ 2017 Judgment (note 43 above).

- a) an immigration officer must apply the interests of justice criterion when considering the arrest and detention of a person in terms of section 34(1) of the Act;
- b) a detained person shall be brought before a court within 48 hours from the time of arrest;
- c) the court must apply the interests of justice criterion when this person is brought before it;
- d) the court may authorise the further detention of this person if it concludes that the interests of justice do not permit the person's release;
- e) if the further detention of this person is ordered, they must again be brought before the court prior to the expiry of the authorised detention period and the court must again apply the interests of justice criterion at this stage;
- f) the court may then again authorise the further detention of this person, but by no more than 90 days, if it concludes that the interests of justice do not permit the person's release; and
- g) whenever this person is brought before a court, they must be given an opportunity to make representations to the court.

On the issue of costs, the Constitutional Court held that "this litigation has been conducted in a dreadful manner" and was "deserving of a punitive costs order". The Court further held that the "applicants' legal representatives have abysmally failed in their duty to represent their clients in the manner required by their professional rules". Accordingly, the Court held that the Minister was to pay 10% of LHR's fees in his personal capacity, the Director-General was to pay 25% of LHR's fees in his personal capacity and the fees of the Home Affairs' former legal representatives in this matter were disallowed.

Recent Developments in Immigration Policy and Law

White Papers on International Migration

2017 White Paper

The White Paper outlines the Government of South Africa's perspective that cross-border movements should be scrutinised "through the lens of national security, social instability, and criminality."⁴⁶ Specifically, it calls for an increase in repatriation facilities⁴⁷ and Asylum Seeker Processing Centres.⁴⁸ Although the White Paper acknowledges that asylum seekers and refugees need protection and assistance, it expresses the concern that the system is being "abused by economic migrants resulting in over 90 per cent of the claims for asylum being rejected."⁴⁹

This statistic is misleading, as countless reviews of the refugee determination procedures have found that the high rate of initial rejections is more indicative of the problematic procedures for determination of asylum than an abuse of the asylum system. For example, according to an article published by the Migration Policy Institute,

"The status-determination process itself is...highly flawed. Surveys of asylum seekers and refugees and a review of hundreds of status-determination decisions by the author show that status-determination officers conduct short, cursory interviews and issue rote, often cut-and-pasted decisions that invariably contain legal and factual errors. These include reliance on the wrong burden and standard of proof and the exclusion of many of the legal bases for refugee status found in the Refugees Act. Decisions routinely contain inaccurate or outdated country information. Some decisions detail country information that supports the asylum claim followed by a rejection without explanation. Many decisions lack reasons altogether or refer to the wrong claimant or country. Status-determination officers often issue identical decisions to a number of claimants without addressing their individual claims. Asylum seekers who recount tales of torture, sexual and gender-based violence, or other forms of persecution are rejected on the grounds that they suffered no harm and did not have a well-founded fear of persecution. Roughly 90 percent of asylum claims are rejected amid these problematic procedures. Despite the fact that there is generally no link between an individual's asylum claim and the decision rendered, DHA characterizes these claimants as economic migrants and uses this figure to justify further restrictions on the asylum process."⁵⁰

⁴⁶ Global Detention Project, 'Immigration Detention in South Africa: Stricter Control of Administrative Detention, Increasing Criminal Enforcement of Migration' 28 June 2021, p 7, available at <https://www.globaldetentionproject.org/wp-content/uploads/2021/06/GDP-Immigration-Detention-in-South-Africa-2021.pdf>.

⁴⁷ 2017 White Paper (note 11 above) at p 68.

⁴⁸ Ibid at p 61.

⁴⁹ Ibid at p 59.

⁵⁰ Roni Amit, 'Paying for Protection: Corruption in South Africa's Asylum System' Migration Policy Institute, 5 November 2015, available at <https://www.migrationpolicy.org/article/paying-protection-corruption-south-africa%E2%80%99s>

The White Paper also demonises “*human rights organisations and legal practitioners [who] abuse the loopholes in the system to secure the release of the illegal immigrants, at the expense of the government*” and blames them for the issues enforcing policies around irregular migration to South Africa.⁵¹

In relation to immigration detention, the White Paper has been criticised for threatening the presumption of liberty and the constitutional provisions for freedom of movement, right to personal liberty, and right to be free from arbitrary detention.⁵² The language of the paper itself refers to ‘illegal migrants’ instead of ‘undocumented persons,’ which “contributes to the unnecessary criminalisation of migrants.” As one commentator writes:

“[a]s a result of the evident punitive nature of the detention of migrants in practice, South Africa’s migration-related detention policies have drawn criticism for years...Clearly, South Africa has disregarded a protection-based approach to managing vulnerable non-citizens in favour of a risk-based approach, as seen in its latest 2017 White Paper and Border Management Authority Act.”⁵³

2023 White Paper

On 10 November 2023, the DHA published the White Paper on *Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the Migration System in South Africa* (“2023 White Paper”)⁵⁴ for public comment.

The White Paper seeks to amend the immigration and citizenship framework, specifically the Citizenship Act,⁵⁵ the Immigration Act and Refugees Act, the 2023 White Paper proposes the following key amendments:

- a) In respect of refugee protection measures, the biggest being that South Africa review and/or withdraw from the 1951 Convention on Refugees and the 1967 Protocol with a view to acceding to them again but with reservations. The 2023 White Paper also includes proposals to relocate the processing of asylum applications to the border.
- b) In respect of citizenship rights, that sections of the Citizenship Act should be reviewed, including sections relating to citizenship by naturalisation during the legislative process; and that the Citizenship Act and the Births and Death Registration Act⁵⁶ be repealed in their entirety and a proper register should be kept for all persons granted citizenship by naturalization by the Minister and tabled every year in Parliament by the Minister of Home Affairs; and

asylum-system. See also *Somali Association of South Africa v Refugee Appeal Board* [2021] ZASCA 124; 2022 (3) SA 166 (SCA).

⁵¹ 2017 White Paper (note 11 above) at p 67.

⁵² International Detention Coalition, ‘There Are Alternatives Africa: A Guide for Policy Makers’ 2018, available at <https://idcoalition.org/wp-content/uploads/2018/04/There-are-alternatives-Africa-2018.pdf>.

⁵³ Fatima Khan, ‘Challenging the Practice of Administrative Detention for Stateless Persons in South Africa’ (2022) 8 *African Human Mobility Review* 129–44, 130.

⁵⁴ The White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of the Migration System in South Africa (GN 4061 in GG 49690 of 10 November 2023) (“2023 White Paper”).

⁵⁵ Act 88 of 1965.

⁵⁶ Act 51 of 1992.

- c) In respect of the immigration framework, that the Border Management Authority Act⁵⁷ must be reviewed to align it with the new immigration and citizenship policy framework; and that the new policy framework must provide for the establishment of a cross governmental department Advisory Board, including representatives of the Departments of Trade, Industry and Competition, Labour and Employment, Tourism, South African Police Service, South African Revenue Service, Education, International Relations & Cooperation, Defence & Military Veterans and Director- General of the DHA and representatives of organised labour; legislation giving effect to strengthened powers of immigration officers and Inspectorate; that quotas for employment of migrants be implemented; and that Immigration Courts be establishment as contemplated by the first iteration of the Immigration Act.

The content of this 2023 White Paper stands in contrast to the rights afforded to migrants under the Bill of Rights, and the protective legal and policy framework afforded to asylum-seekers and refugees, including the right to work, the right to health and the right to access permanent residency after a period. These are rights entrenched in our jurisprudence and they include the right not to be refouled; and the rights of asylum seekers and refugees to acquire the legal entitlements to residence, employment and study in South Africa.

Border Management Authority Act

The Border Management Authority Act was passed *“to strengthen border control and give the Authority effective control at the ports of entry and the border law enforcement area.”*⁵⁸

The Global Detention Project has warned that the Border Management Act *“could encourage an expansion of migration-related detention in South Africa and in nearby countries in Africa.”*⁵⁹ Similarly, the Institute for Security Studies wrote that *“[a]rmed border guards with expanded powers could lead to increased arrests and detention of migrants, asylum seekers and refugees.”*⁶⁰

2020 Amendments to the Refugees Act

In 2020, the amendments to the Refugees Act also came into force, which allowed for broader powers relating to immigration detention.⁶¹ The Amendments allow for an asylum seeker or refugee who is a *“threat to national security”* or *“national interest”* to be detained and deported.

The Refugees Amendment Act and its accompanying Regulations have introduced changes that alter the rights of asylum seekers and refugees significantly. Many of the changes curtail the likelihood of asylum seekers becoming recognised as refugees. This results in many migrants being dealt with as *“illegal foreigners”*. Notably, the grounds on which a person does not qualify or ceases to qualify for refugee status have been expanded beyond the grounds recognised in the 1951 Convention on Refugees.

⁵⁷ Act 2 of 2020.

⁵⁸ Border Management Act Authority, ‘BMA Fact Sheet’, available at <https://bma.gov.za/fact-sheet/>.

⁵⁹ Global Detention Project (note 9 above) at p 7.

⁶⁰ Ottilia Anna Maunganidze and Aimée-Noël Mbiyozo, ‘South Africa’s Border Management Authority Dream Could Be a Nightmare’ 11 August 2020, ISS Africa, available at <https://issafrica.org/iss-today/south-africas-border-management-authority-dream-could-be-a-nightmare>.

⁶¹ Zoë Postman, ‘Refugee Act Amendments Increase Probability of Unlawful Detention, Says Report’ GroundUp News, 11 June 2020, available at <https://www.groundup.org.za/article/amendments-refugee-act-increase-probability-unlawfully-detained-and-deported-says-report/>.

Asylum transit visa & 5-day requirement

The Amendments require asylum seekers to obtain an asylum transit visa by declaring their intention to apply for asylum at the border. This visa is only valid for five days, during which individuals are expected to report to an RRO to apply for asylum.

Moreover, an asylum seeker risks exclusion from refugee status if they fail to report to an RRO within 5 days of entering the Republic without compelling reasons. This limitation is unreasonable due to potential delays in accessing an RRO for various reasons.

Firstly, many asylum seekers are unfamiliar with the law or the process for applying for asylum. The language barrier faced by migrants can make it challenging to obtain information on where to go and what steps to take.

Secondly, many asylum seekers arrive in South Africa with limited funds making travel to an RRO difficult.

Lastly, RROs designate specific days for certain countries, meaning individuals arriving on the wrong day might face a week-long wait before being seen.

ZEP Termination/Extensions

Since 2009, the DHA has issued or granted eligible Zimbabweans exemption permits, allowing them to live and work in South Africa. This specific type of permit, now known as the ZEP, was introduced for those who sought refuge in South Africa due to economic and political challenges their home country.

Termination

In a significant decision, the Minister of Home Affairs, Aaron Motsoaledi, opted to terminate the extension of Zimbabwean exemption permits, affecting over 178 000 individuals living in South Africa.⁶² The non-renewal of the ZEP meant that permit holders not applying for or not granted an exemption would be required to return to Zimbabwe after more than a decade of calling South Africa home.

In April, the High Court heard arguments in an application brought by the Helen Suzman Foundation and the Consortium for Refugees and Migrants in South Africa challenging the Minister's December 2021 decision not to renew the ZEP.

The High Court found that the Minister's decision to terminate the ZEP was unconstitutional, unlawful and invalid, the full Bench reviewed it and set it aside.⁶³ The court ordered that the matter go back to the Minister for reconsideration following a fair process that complied with the requisite legislation. The court also declared that, pending the process, the ZEP will be deemed to remain valid for the next 12 months.

Decision taken behind closed doors

According to the full Bench, the Minister of Home Affairs was obligated to give the ZEP holders and other affected parties a reasonable opportunity to make representations as per the Promotion of

⁶² Department of Home Affairs, Immigration Directive 10 of 2021, 29 November 2021.

⁶³ Helen Suzman Foundation v Minister of Home Affairs [2023] ZAGPPHC 490; 32323/2022.

Administrative Justice Act.⁶⁴ It found that the Minister's decision lacked genuine consultation, and his first call for representations occurred after the fact.

Extensions

The Minister of Home Affairs issued a directive in September 2022, extending the validity of exemption permits issued to the Zimbabwean nationals to 30 June 2023. Subsequently, numerous waiver applications were approved, resulting in a surge in visa and waiver applications. Considering these developments, the Minister, taking submissions from affected individuals and relevant officials into account, issued another Immigration Directive, extending the validity of Zimbabwean exemption permits for an additional 6 months, until 31 December 2023. Most recently, the Minister issued another directive extending the validity of the ZEP to 29 November 2024.⁶⁵ In addition, the Minister has stated that a further exemption will be provided to Zimbabwean nationals, upon application, until November 2025.

Recent Regressive Case Law – *Ashebo v Minister of Home Affairs*

Although the aforementioned *Ruta v Minister of Home Affairs* judgment still holds that “illegal foreigners” arrested under the Immigration Act must be allowed to apply for asylum and have their applications duly processed by the Department of Home Affairs, a recent Constitutional Court judgment has stripped away some of the broad protections from immigration detention that *Ruta v Minister of Home Affairs* provided to asylum seekers in South Africa. In *Ashebo v Minister of Home Affairs*,⁶⁶ the Constitutional Court concluded that although the current legal framework allows individuals to apply for asylum without an asylum transit visa, it still needed to determine to the lawfulness of detaining an “illegal foreigner” during the process of establishing whether there was good cause, especially when an application for asylum is pending.

The Constitutional Court noted that while an illegal foreigner is still entitled to apply for asylum, it does not absolve them of contravening the Immigration Act. Sections 34 and 49 of the Immigration Act both regulate illegal entry and stay by migrants into South Africa, each serving a distinct purpose. Section 34 is used for deportation, while section 49 criminalises certain conduct.

The question that arose, irrespective of the charge, was whether the expression of an intention to apply for asylum entitled the applicant to be released from detention. To this, the Constitutional Court answered, no. The Constitutional Court determined that accepting the applicant’s argument that it would, would create a practical challenge, leading to the release of any “illegal foreigner” in immigration detention upon declaring their intention to apply for asylum. The Constitutional Court clarified that there is therefore no automatic right entitling an “illegal immigrant” to release once they declare their intention to apply for asylum. However, in cases where such an intention is expressed while in detention, the DHA must take all reasonable steps to facilitate the application process.

The impact of this case is particularly significant, especially when every asylum seeker declaring their intention to apply for asylum relies on the DHA to facilitate the process. The case highlights

⁶⁴ Act 3 of 2000.

⁶⁵ Immigration Act (13/2002): Implementation of the decision in respect of Granting Exemptions to Zimbabwean Nationals in terms of section 31(2)(b) of the Act (GN 4142 in GG 49814 of 4 December 2023).

⁶⁶ *Ashebo v Minister of Home Affairs* [2023] ZACC 16; 2023 (5) SA 382 (CC).

challenges, indicating that the DHA may not be sufficiently capacitated to manage this responsibility effectively.⁶⁷

COVID-19 Policy Changes

While opinions on whether we are officially beyond the pandemic may vary, its repercussions on the migrant population remain profoundly devastating.

Closure of RROs

In March 2020, as the world grappled with the COVID-19 pandemic, the DHA offices, including the RROs, closed indefinitely. This closure halted all services, including the submission of new asylum applications as well as the renewal of expired refugee certificates and asylum seeker visas.

To address the challenges, on 10 June 2020, the government issued a directive extending the validity of asylum seeker visas and refugee certificates that had expired after 15 March 2020 to 31 July 2020. Despite the blanket extension, many migrants faced precarious situations. Expired documentation led to job loss, eviction, frozen bank accounts, and increased vulnerability to arrest and detention. Unfortunately, police often disregarded or were unaware of these existing legal protections.

“They (police officers) know nothing about immigration (law), they depend heavily on immigration officers because immigration officers are perceived to be knowledgeable about immigration matters” - Linton Harmse (Head – Refugee Rights Centre, Nelson Mandela Metropolitan University)

Extensions were granted but arrests and detentions persisted. Clients reported instances of police officers soliciting bribes for release, with some detainees being held beyond the 48-hour period until they could pay the bribe.

In September 2020, while 18 lands ports of entry reopened, the RROs remained closed. Only visa-related services under the Immigration Act were provided. This left those seeking asylum with minimal protection from arrest and detention.

Online system for renewal

In April 2021, the DHA introduced an online system for asylum seekers and refugees to renew their documents. However, this system only covered permits expired during the lockdown period, excluding those expired before that period. The process involved sending an email, printing signing, and scanning forms, and providing proof of address and a copy of a current visa. Despite this initiative, many whose permits expired after the onset of Covid 19 remained vulnerable to arrest, even after applying online.

“I was so surprised when the police came and catch me while I was working. I showed them my papers and they said your papers are not right while I had

⁶⁷ Report of the Auditor-General on follow-up performance audit of the immigration process for illegal immigrants at the Department of Home Affairs, Portfolio Committee on Home Affairs Briefing, February 2020, available at https://static.pmg.org.za/200204AGSA_report.pdf

already applied online. I tried to tell them my paper is alright, but they didn't want to hear me, they said you must get inside the car" - Makanika, an asylum seeker whose permit expired after the onset of Covid 19 (arrested after having applied online, while awaiting response from Home Affairs)

Re-opening of RROs

The RROs began to provide additional services in May 2022, including new asylum applications and family joining for children born outside of South Africa. Individuals were required to send an email requesting an appointment, and confirmation of the appointment date would be sent to the individual.

"During the COVID period, when they had the online application system, the benefit of that online application system for newcomers was that you received acknowledgement that your application was received, you know and then they would say they will advise you in due course of the date and if you get that letter with the date, that was a form of documentation that sort of safeguarded the undocumented people because immigration officers accepted that, and the police accepted that too so that helped (prevent unlawful detention) to a degree". - Harmse Linton (Head – Refugee Rights Centre, Nelson Mandela Metropolitan University)

Realities of Immigration Detention in South Africa

The analysis, personal anecdotes and recommendations that follow stem from the first-hand experiences of persons arrested due to their documentation status and/or detained at Lindela.

The contrast between the legal protections outlined for migrants in South Africa with respect to immigration detention and the reality that migrants face within the country is glaring. Non-nationals often find themselves exposed to arrest and detention due to their documentation status, exacerbated by factors such as:

- limited access to documentation;
- corruption;
- inconsistent law enforcement practices;
- homophobia; and
- xenophobia.

Among the arrests brought to the attention of LHR, a significant number are identified as unlawful and constitute an abuse of power by SAPS, DHA, or court officials.

Further, the climate of fear that the immigration detention system has created among migrant communities in South Africa has traumatised migrants who often go through incredibly difficult experiences even before coming to South Africa. Migrants are made to feel powerless and dehumanized as they navigate through the processes of arrest, detention, and possible deportation, often without a clear understanding of the procedures. For most migrants, the reality is that the immigration detention system is wielded as a discriminatory and xenophobic tool by officials to exert power, assert control, and extract money from them, regardless of their legal status in South Africa.

Access to Documentation

The absence of accessible documentation directly correlates with immigration detention. Increased challenges in obtaining and renewing documentation heighten the risk of unlawful arrest and detention under the Immigration Act. In situations where asylum seekers and refugees lack access to legal representation or community advocates who can clarify the reasons behind expired documents, they may find themselves compelled to pay bribes for release or endure prolonged periods of detention.

Most...foreigners, they are uncomfortable by the road. They are afraid to get arrested. Most of them, they don't have [correct] papers and most of them, they don't have money to pay to do this, to do this. So they are afraid, they are not free.

- WINNER, 21-YEAR OLD
ASYLUM SEEKER FROM THE
DEMOCRATIC REPUBLIC OF
CONGO ARRESTED FOR NOT
HAVING DOCUMENTS

Online System for Extension of Asylum Visas and Refugee Certificates

While the online application extension process seemed relatively straightforward upon its introduction, it posed challenges for individuals without access to the necessary technology for submission.

Many asylum seekers and refugees lacked access to the internet, printers, or smartphones, Compelling them to visit internet cafes with associated charges. Some sought assistance from non-governmental organisations (“NGOs”) such as LHR and Future Families.

Usually, the system generates an automatic response confirming receipt of the application. However, instances occurred where there was no automatic response, leading to a lack of proof of application in the system. Sometimes, applicants would send multiple emails before receiving a response, and other times there was no response despite repeated attempts. Despite these challenges, many still prefer the online system as certain RROs have efficiently managed online requests, saving applicants both money and time, compared to travelling to the RROs for extensions every 3 or 6 months.

“To be a refugee in South Africa it’s tough because even to get papers at home affairs not everyone has opportunity to go to home affairs. Some people apply in Durban are in Cape Town but relocate. Now you have to go to that place that you did apply to make extension. But now online it’s helping people. But even online it’s not easy. Many people are applying online but to get the response it’s not easy. It’s always a problem. Many people have been waiting and are illegal because of that extension. They’ve been waiting and waiting and waiting but they’ve applied online. The response is taking long sometimes they don’t even respond. So I think if they can make the response to that people, then it makes it easier because online it’s easy for people. They’re not going to...wake up early in the morning to go to the queue.”⁶⁸

[Even with] the right document...the police sometimes they tell you, it is fake, it is expired, they want money. They will arrest you.

- **MOHAMED, ASYLUM-SEEKER FROM SOMALIA**

Questions of Authenticity

The asylum visas and refugee certificates issued by the online system presented a new challenge. A number of government institutions such as the South African Social Security Agency (“SASSA”) and the SAPS, refused to accept the online-issued documents, suspecting them to be fake. Especially during the initial months of online issuance, there was limited knowledge-sharing between government departments, placing the burden on asylum seekers and refugees to explain the online-issued documents. According to Odia, an asylum seeker and community leader from the DRC: “there is many many police who don’t know our papers. They don’t know what is asylum, what

⁶⁸ Phone interview with Josiah, 06 September 2023.

is status. They only know passport.”⁶⁹ Even today, individuals presenting valid permits obtained from the online system are still likely to face arrest and detention.⁷⁰

It’s not fair for us as foreigners in the country. You try to follow all the procedures, you get your asylum seeker [visa], you get your [refugee] status, even sometimes with those documents [the police] they complain. They say, “where did you get this paper? It’s not legal. We don’t know this paper.” You go to help your brother in the police station, and in the police station where you are supposed to be safe, you are supposed to be protected, they just took you like that and then they put you in the cell. I was very traumatised.

- DADA, REFUGEE FROM THE DEMOCRATIC REPUBLIC OF CONGO

Despite the COVID-19 watermark intended to indicate online issuance, its continued presence on documents, three years after the pandemic began, confuses many individual officers. Some officers still insist on a stamped visa, even though DHA does not stamp asylum visas.⁷¹

Multiple interviewees noted the risk involved in bringing a friend’s document to them at the police station, especially if the friend had been arrested and needed the document for verification.⁷² This practice instils fear in migrants, discouraging them from helping friends or neighbours at the police station due to the potential accusation of being undocumented. Dada, a refugee from the DRC explained how her husband was arrested despite being documented when he went to the police station to show the police that his friend had documents and should be released:

“The time he call my husband...his friend, he said he’s been arrested. He said, can you bring my paper because they are asking my paper. And then my husband went and took his paper. And he has his own also in his pocket. When he went to the police station just to drop his paper, they took my husband. And then he was showing them his paper saying, I have my paper. [The police said,] “No, why? Why did you bring his paper here?” He said, “No, he [my friend] called me and asked me to help. That’s why I took his paper and bring to you,” but they don’t want to listen to him and they arrest my husband. He slept there in the police station until tomorrow with his paper with him...The next morning they release him, because one of the police officers he knew my husband, that’s why they released him. But the one who took him, he said, “I wanted to show you,”

⁶⁹ In-person interview with Odia, 1 September 2023.

⁷⁰ For example, Nadia, an asylum seeker from the Democratic Republic of Congo, explained that she was arrested because the officer refused to look at the electronic version of her asylum visa, even when she showed the original email it came in. In-person interview with Nadia, 1 September 2023.

⁷¹ In-person interview with Nadia, 1 September 2023.

⁷² In-person interviews with Nadia, Betty, and Dada, 1 September 2023.

he say like that to my husband, "I wanted to show you that I am a South African".⁷³

Accusing asylum seekers and refugees of possessing fake documents is a major justification used by SAPS and traffic officers for arresting and detaining individuals under the Immigration Act. Therefore, even when the document is valid, asylum seekers and refugees are still detained, often held until they pay a bribe or SAPS is compelled to take them to court.⁷⁴

Josiah, a recognised refugee with a valid refugee certificate and ID, was stopped by the police near Primrose in Gauteng:

I showed them my refugee papers. They look at it just like this they say this is a fake one. I said, how can it be fake you just look like this and say it's fake? ...They said no this document is fake we're going to take you to the police station and the immigration is going to check it there. I said no problem we have to go then let's go. Then I showed them first before we go there the email from home Affairs sent me to print that paper. They said no this is not it...they refuse. I see they're refusing everything, so I say OK let's go to police station and we can meet immigration there and they can check if it's fake or not. At the police station they make me sign a paper they lock me inside. They said wait until immigration is going to come. That was Friday. Saturday I never see immigration Sunday, I never see immigration. Monday no immigration came there. Until Tuesday morning they took us to the court.⁷⁵

There are also cases where individuals unknowingly acquire documentation fraudulently. Asylum seekers, unfamiliar with the legal process of applying for asylum, often seek assistance from individuals claiming to be experts or legal personnel. However, these individuals may provide fraudulent asylum seeker or refugee permits, or South African identity documents. Asylum seekers may only realise that their documentation is fake when they are arrested or when they try to access services. Thus, a blanket application of these provisions puts those who unknowingly receive fraudulent documents at risk of refolement.

Overstay

Those whose permits expired prior to the lockdown also continued to be at risk of arrest and detention. LHR interacted with three sub-categories under this group:

- a) those whose documents expired long before the covid-19 lockdown who wanted to pay the overstay fee;
- b) those whose documents expired in the weeks leading up to the lockdown who had tried and failed to renew their permits due to overcrowding at the RROs; and
- c) those whose documents expired immediately before the lockdown who were excluded from the online system by a small margin.

⁷³ In-person interview with Dada, 1 September 2023.

⁷⁴ In-person interview with Nadia, 1 September 2023; Phone Interview with Mohamed, 20 September 2023.

⁷⁵ Phone interview with Josiah, 06 Sept 2023.

Under normal circumstances, these individuals would undergo the overstay procedure, which requires providing compelling reasons for their failure to renew their permits on time or paying an overstay fee to renew their permits. However, this service remained unavailable for over two years, leaving many people with expired permits at risk of being arrested.

Even today, those classified as overstay must apply online and wait for an appointment. If they fail to get an appointment and try to go in person, they are made to wait for several days before being assisted, adding transport costs to the overstay fine, regardless of the reasons for overstaying. In several instances, clients who had stamps proving that they reported to the RRO to try to renew their documents before the lockdown were made to pay the overstay fine, despite not being at fault for overstaying. Others who were hospitalized or in detention while their documents expired were also prohibited from renewing their documents without waiting for an appointment and paying the overstay fine.

Appointment System

When the RROs reopened in 2021, they operated on appointment basis only. Those whose online requests for extension of their visas could not be processed were issued an appointment letter instead of having their asylum visa or refugee certificate renewed. Unfortunately, an appointment letter did not guarantee that an applicant would be assisted on that day.

LHR Pretoria noted that in their visit to the Desmond Tutu RRO, they were told that although there was no cap on the number of appointments given out for a specific day, there was a cap on the number of people the RSD officers saw. Thus, even when a person had an appointment, they could still be turned away if the quota of attendees was reached. Many people had to return to the DTRRO several times before they were finally assisted. In some cases, after a few visits, they did not have the time off from work or the money to for transportation to visit again.

Sometimes, even RSDO's were unaware of appointments given out. On several occasions, asylum applicants were told to report to the RRO, and once they finally saw their RSDO, the RSDO told them that they did not know why they were called in and must simply apply online again. The applicant then had to reapply online and wait for another response, leaving them undocumented for a more extended period. Unfortunately, in certain instances, even after a visit and being instructed to apply online, a few weeks later, the applicant is again sent a new appointment letter, and the process starts over again.

Other times, applicants would be told that the system is down, and they cannot be assisted, even after waiting the entire day from 7am to 4pm. Tsegaye, an asylum seeker from the DRC, explains:

"I was applying online when you apply online you have to wait for Home Affairs first to answer you, and they did answer me. They said yes, we did receive your email. We are still working on it your permit after that we will send you your permit and then you're going to print it. So after 3 to 4 months, I applied again I asked them again, wait until now you didn't answer me and then they send me another paper that I have to go to Marabastad there by Home Affairs for an appointment. The appointment was on 17 April and then I was there, and they said to me go back we're going to send you your paper online. Since that

day when you go there the system is down and sometimes when you go there if you don't have money, they can't help you.”⁷⁶

Due to these delays in appointments, many asylum applicants whose visas that expired in 2020 have yet to renew them, leaving them extremely vulnerable to arrest and deportation, in contravention of the principle of *non-refoulement*. Despite their best efforts to remain documented, the prolonged renewal process has left them in a precarious position.⁷⁷

Recently, RROs have reopened for walk-in appointments for renewal of asylum visas and refugee certificates, if the applicant can provide proof that they applied online and did not receive a response. However, the same issues plague the system, where applicants are made to wait all day and told to come back multiple times, draining them physically, mentally, and financially.

New Asylum Applications

Regarding new asylum applications, after more than 2 years, RROs resumed services for newcomer asylum seekers around May 2022, instructing them to apply online and wait for an appointment to report to their closest RRO. Applicants were required to send an email to request an appointment. However, the news of this was not widely publicised and many communities assumed that newcomer services were still closed. In other cases, newcomers who approached RROs directly were dismissed by security personnel, instructing them to apply online but refusing to provide the necessary email address or details for the application.

Even where newcomers are aware of the application process, the response time can range from a few days to close to a year and sometimes, applicants would never receive a response. As the application and the automatic response lack an official Home Affairs letterhead, many newcomers also faced issues at traffic stops or courts where proof of application is required. LHR counsellors have had to liaise with police officers or prosecutors to explain the new application system. Even when the appointment letter arrives, it often sets a date many months in the future, contributing to prolonged undocumented status.

Due to previous closure of the Cape Town RRO, one asylum seeker in the Western Cape received an appointment letter in 2023 for an appointment to apply for asylum in 2025 at Port Elizabeth, forcing her to stay undocumented for more than a year.

Many desperate newcomers have relied on NGOs for assistance in obtaining appointment dates, as they are not allowed inside RROs. Those without access to NGOs were pressured into paying a bribe to security or officers at the RROs for an appointment to apply for asylum.



Dear

RE: REQUEST FOR BOOKING

With reference to the above-mentioned matter

You are requested to report to the Gqeberha (Eastern Cape) Refugee Reception Office on 14 April 2025 for the processing of your request.

You are advised to bring this referral letter along when you report to the office.

Your reference number is

Please ensure you report to office by 7:30.

Please bring your original documents to the office

Regards

Centre Manager: Gqeberha (Eastern Cape) Refugee Reception Office

Pp: Director-General

Date: 24 May 2023



⁷⁶ Phone interview with Tsegaye Mbutu, 07 September 2023.

⁷⁷ In-person interviews with Odia and Betty, 1 September 2023.

The changes due to the COVID-19 lockdown and online systems have left some newcomers undocumented for more than three years, preventing them from working and proving their status, making them vulnerable to extended detention when arrested.

Since approximately July 2023, newcomer asylum seekers no longer apply online but report directly to the closest RRO. Although this makes it easier to establish intention to apply for asylum, certain RRO's do not provide any proof or stamp for the visit, and many are not assisted on the first day. LHR has noted that, at minimum, applicants typically need at least three visits to be issued an asylum visa, and the number of visits increases if they lack a passport or transit visa.

Asylum Transit Visa & 5-day Requirement

As mentioned earlier, under the 2020 Amendments, an asylum seeker is excluded from applying for refugee status if they do not obtain an asylum transit visa contemplated under section 23 of the Immigration Act at the border and/or fail to report to an RRO within 5 days of entering the Republic without compelling reasons.

LHR has noted instances where a where individuals, despite declaring their intention to apply and attempting to do so within the stipulated 5 days, are still arrested, highlighting the impracticality of this limitation.

Mohamed, an asylum seeker from Somalia, had only been in the country for two days when he was arrested at a garage in Mpumalanga where he was waiting for transport to go to Desmond Tutu Refugee Reception Office to apply for asylum:

“When they arrest me I tell them [that I had come to seek asylum]. They just take me, they say “you don’t have [any documents], go in the car.” They take me, they lock the car. They take us to the police station. It was Friday when they bring us there. They bring many people in other cars. Then they put us in an office like this one, then they question everyone, they write, they take the finger[prints], after that they...question everyone.... they lock me inside with other guys. It was Friday, that day it was around 12 [o’clock]. So Friday, Saturday, Sunday, we sleep in the police station, Monday morning they take us to the Court.”⁷⁸

Language barriers, lack of knowledge of the laws and processes of applying for asylum, and financial constraints often impede asylum seekers from reaching an RRO within the prescribed timeframe.

Mohamed tried to explain this situation to the Magistrate when he was in Court when he was asked why he does not have any documents or an asylum transit visa:

“[The judge is] saying...[I]come illegally in South Africa...What he say... if you come you must first enter from the border...the judge said when you enter the first time he must hand over himself to that migration for border. But me, I don’t have any knowledge about it, the truck driver just put me inside. And when he drop me I don’t know my location. I tell [this to the judge]. Still, he’s refusing. He is saying, you enter illegally.”⁷⁹

⁷⁸ In-person interview with Mohamed, 3 August 2023.

⁷⁹ Ibid.

Even now with walk-in appointments for newcomers, RRO's designate certain countries to certain days meaning that if a person arrives on the wrong day, they may have to wait a week before being seen. In addition, many asylum seekers arrive in South Africa with barely any money. As such, travelling to an RRO within 5 days may be impossible.

Flawed Decision-Making Processes

The decision-making processes in asylum applications lack transparency and are arbitrary, limiting access to documentation for asylum seekers who may quickly receive a final rejection without proper consideration of their claims. Once receiving a final rejection by RAASA or SCRA, asylum seekers are constantly at risk of arrest and deportation.

The irregularity in decision-making can be observed in the stories of three female asylum-seekers from Somalia whose applications for asylum were rejected as fraudulent between 2022-2023:

Farah was abducted by Al-Shabaab from her home in Kismayo and forced to marry one of the fighters. She was continuously raped and prevented from contacting her family. Eventually she escaped and ran back to her family who were staying in Mogadishu. Within a few months, Al-Shabaab fighters came looking for her in the new city when she was not home and shot her brother and mother. She fled to South Africa where when she applied for asylum she was not asked any questions and simply told to let a Somali man fill out her forms without him asking her any questions. She never received her RSDO decision but was simply told that her file was at SCRA, indicating that she had been rejected as fraudulent or manifestly unfounded. When she went back to her RSDO to ask for the decision to understand the reasons for her rejection, he told her that he could not hand her the decision as it was already at SCRA.

Fatima worked with her father at his restaurant in Mogadishu. One day when she was at home with her children, he was shot and killed by Al-Shabaab, an Islamist militant group in the area because they did not abide by warnings not to serve customers who worked for the government. The Islamist group made it clear that they would kill her if they saw her around as well because they knew that she worked there with her father. Fatima fled to South Africa with her children immediately thereafter, and once she was able to have her RSDO interview, she received a decision rejecting her asylum application as fraudulent because the RSDO states that she had very little knowledge about the extremist group and copied and pasted several questions and answers allegedly from the interview in which she says that Al-Shabaab attempted to kill her by planting a bomb. When asked about it, Shadia explained that the RSDO never asked her anything about Al-Shabaab and the entire conversation quoted in the decision letter never happened. Instead, when she tried to bring up Al-Shabaab in her interview, the RRO interpreter told her not to talk about that as the officer never asked anything about it.

Hoda lived near the border between Somalia and Kenya. When she was 14 years old, she was kidnapped by Al-Shabaab, but a local leader managed to convince them to let her go as she was too young. She was warned that they would be back once she was older. She fled to South Africa and was able to explain to her RSDO the story of why she fled Somalia. However, her application was rejected as fraudulent. The RSDO decision states her claim correctly but goes on to say that "There was civil war in Somalia for the past two decades. Right now there is no civil war in Somalia rather there are events that can be described as sporadic attacks there...Your claim has misrepresentation of facts." Within 3 months of the decision being issued, a bomb blast in Mogadishu killed over 100 civilians, with UNHCR reporting that Al-Shabaab continues to abduct and forcibly marry and rape young women and Somalia continues to be affected by non-international conflict.

Refugee Status Determination Officers face longstanding issues, including corruption, inadequate interpretation, privacy and time constraints during asylum interviews, and insufficient knowledge about current country conditions. In some cases, RSDO's decisions state entire conversations in the decision that did not even occur during the interview, sometimes copied and pasted among several applicants from the same country.

Although the exact number is unknown, it has been stated that over 97% of asylum applications are rejected by RSDOs. That statistic itself reveals clear gaps in the decision-making process. In addition, many asylum seekers do not even receive their full RSDO decisions, hampering their ability to understand the grounds for rejection and appeal effectively.

The inadequacy of the decision-making process of RSDO's is clear in their written decisions when applicants do receive them. Many of the decisions cite the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status ("UNHCR Handbook"):

Burden of Proof

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, at paragraph 196, page 47, affirms the assertion that "it is a general legal principle that the burden of proof lies on the person submitting a claim."

The standard of proof is reasonable possibility of persecution and must be considered in light of all circumstances i.e past persecution and forward looking appraisal of risk (reasonable possibility of persecution).

This citation is, at best, misleading as it takes advantage of asylum seekers' lack of knowledge of the law and policies surrounding their asylum claim. In fact, the full paragraph of the UNHCR Handbook states:

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all relevant facts is shared between the applicant and examiner. Indeed, in some cases, it may be for the examiner to use all means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt. [emphasis added]

Many of the asylum applications that are rejected on credibility or burden of proof inadequacies go to the SCRA for a final decision. Applicants have only 5 working days to make written submissions to the SCRA, an almost impossible time period to find an interpreter, lawyer, and to write out the traumatic life events that led the applicant to South Africa.

Further, once at the SCRA, applicants have little to no transparency regarding the process and reasons for decisions. SCRA rarely shares the written reasons for final rejections with applicants but instead simply hands them a paper stating that they have upheld the decision of the RSDO and finally rejected the application for asylum. Upon receiving the final rejection, applicants are either arrested at the RRO immediately or given 2 weeks to depart the country. In the case of SCRA

I was looking for my son like a mad woman [at the court]. And one police said, "Mama, just keep quiet, just organize the money and your son will come out." And I give them the money, it is not even 10 minutes and I see my son out... We don't have job, we are selling [what we can] to survive and they are taking that little money we have to feed our children. It's painful.

- BETTY, ASYLUM-SEEKER FROM THE DEMOCRATIC OF CONGO WHOSE SON WAS ARRESTED AND DETAINED FOR FOUR DAYS UNTIL SHE PAID A FINE EVEN THOUGH HE HAD A VALID ASYLUM VISA

rejections, applicants may not even know why they were rejected or that they have the ability to appeal the final rejection at the High Court.

LHR has come across many cases in which applicants are told that they are finally rejected or given a final rejection without written reasons and immediately arrested at the RRO, especially in Musina and Durban. Sometimes their phone is also confiscated, or the battery dies, and they are unable to contact their family or friends who may be able to search for legal representation for them. None of the interviewees who were arrested at the RRO were informed of their right to judicial review. Some spend weeks in prison and

are even transported to Lindela before they are able to consult with a lawyer and launch a judicial review application to be released.

Even asylum seekers who find the money and legal representation to launch a judicial review of their final rejection remain at high risk of arrest and deportation due to the fact that they struggle to have their asylum visas renewed. In one case reported to the LHR immigration detention hotline, an applicant who came with copies of his court application for documentation pending the case was refused by RRO officials who instructed him that his lawyer must instead email the documents. When he asked where the lawyer needed to email it, he was told to leave the building.

Corruption

It's the police, it's the government. I can't fight with the government; they seem to do whatever they want. I don't want to fight with those people, so I pay them.

- MOHAMMAD, REFUGEE FROM ETHIOPIA

Money drives the system of arrests due to documentation. Many interviewees expressed how for police, stopping individuals for document checks is not primarily about enforcing the law or ensuring safety but rather a profit-driven enterprise. Sometimes labelled as bail, police and lawyers at Magistrate's Courts collect money from family members of those arrested without documents before they appear in front of the judge and are released without ever formally appearing in Court. They are never given a slip confirming the payment of the fine, thereby rendering them at risk of re-arrest, sometimes as soon as the next day.

A concerning aspect revealed by 100% of interviewees is the pervasive solicitation of bribes. Whether solicited directly or indirectly, such as by prolonging detention while releasing those who pay, individuals are consistently pressured to pay a bribe as a condition for their release. This widespread practice raises serious questions about the integrity of the system and the motivations behind arrests related to documentation issues.

One Malawian interviewee remembered,

“I had two people, they ask for 3000 Rands for two people, 1.5 one person, 1.5 one person. So I paid them. Since I paid them, they never asked those guys to appear before court. Those people, they are looking for money ... they just want money. The government just create this program to collect money from foreign nationals, that’s all.”⁸⁰

Indeed, one of the interviewees reported how after he was forced to pay a bribe in order to be released in December 2022:

The paper that Home Affairs first sent me normally they can’t arrest someone when he’s waiting for a permit, and they already applied online... I showed them the email that says I sent the paper the previous day and that I’m waiting for my permit. I showed that to the police. The immigration said this paper, yes, I think it’s right he can go. But the officer the police commander said, we can’t release you to go you’re already here by police station you can’t go out unless you give us 2000 Rands and I said how can I give you 2000 Rands when the immigration officer said the paper is good. They said you’re here already you can’t say anything to us just keep quiet and give us 2000 Rands. Just give us 2000 Rands or you will go to court. I said it’s fine it’s better for me to go to the court. And the next day, of course they refuse to take me by the court they keep me two more days, like 4 to 5 days they keep me. And until then, my brother is outside my friends they contribute for me. I gave them 2000 rounds and then they released me.⁸¹

After this, the same police officers came around looking for him a few months later, knowing that he was waiting to be served at his appointment at the RRO. Although he had gone to the RRO with his appointment slip close to a dozen times, every day he was told to leave and come back. In August 2023, he

⁸⁰ Phone Interview with Donald, 10 September 2023.

⁸¹ Phone Interview with Tsegaye, September 2023.

Hassan applied for asylum online after the newcomer application launched in May 2022. Around July, he was arrested in KZN for lack of documents, even though he showed the online application.

Once he was arrested, his half-sister in Gauteng tried to assist him. She went to court but it was postponed multiple times. Luckily after a few more weeks, they received an appointment letter for him make his application for asylum.

Upon bringing the appointment letter to the court, she was told by an official inside of the court that in order for the letter to be shown to the judge, she must pay them money, part of which was to be given to the Legal Aid lawyer to represent them. She did so, and the judge ordered that her brother be released. However, when she went to fetch him afterwards, she saw that they were taking him back to the prison. When she asked them why, they told her that the appointment letter is fake and without paying them money he would not be released. Exasperated and desperate to have her brother released, she paid multiple people:

I pay many times there [by the prison and the court]. Too many people they eat my money there. That second time [at least] that one I know they help me even if they eat my money. Another one they was eating my money, they still can’t help me. There was too many people. There was different people. And me I don’t stay there, I don’t know. I was just going and this one person is gonna say, “mama, your brother is never gonna come out, he gonna stay there, I will help you!” You see, just like that.

was again arrested, and he decided that he will not pay and asked to speak to the judge. After spending close to 5 days in detention, he was finally taken to Court where the Magistrate instructed that the immigration officers must take him to the RRO for them to verify his appointment letter, after which he should be released. On the way, the immigration officers informed him that he would be deported unless he paid money and never took him to the RRO. Afraid, exhausted, and thinking of his wife and young children who had been at home alone for five days, he gave the officer the 1500 Rands that his friends had sent him for transport money. He was immediately let out of the van.⁸²

When asked why he paid money rather than waiting to go to court to show that he had a valid document, a refugee from Ethiopia explained that he felt that he will not win in Court as the system seemed to be against him,⁸³The large majority of interviewees also reported having noticed corruption at the RRO's, particularly at the Desmond Tutu RRO in Pretoria. As interviewees put it, there only money talks. One interviewee recalled,

“Last week I go to Home Affairs, I start to cry there. The way they are treating me, I am talking to someone he cannot even listen what I want to tell him. He’s just pushing, “mama go there, I don’t want to hear you. Do you pay me to listen to what you want to say? Do you pay me?”⁸⁴

Although the online system was supposed to assist in preventing corruption that had long plagued the RRO's when asylum seekers came to renew their documents in person, several interviewees shared how the system of corruption, too, has moved online:

“You have officers, because they have our numbers, telling you, if you send R 1000 today, tomorrow you will have your email [with the new document]...Me myself I have the officer’s account number. You have to put money in. Sometimes [after an appointment] you will follow up, they will not reply. Then you will have [another] person coming in your whatsapp who is saying, do you want to get your paper on time? Send to this [account].”⁸⁵

The main complaints regarding corruption at the RROs are against the security, who often arbitrarily decide who gets to stand where in the queue and who gets to enter inside on a particular day. Interviewees reported having seen multiple people who arrived later than them be allowed to enter inside because they paid money to the security.

“An arresting officer has a clear duty under the Immigration Act- there is a resistance from Police Officials to conduct that training and there is an incentive for the Police Officials to stay ignorant so that they can keep on operating in a manner that creates that vulnerability that creates that opportunity for corruption and that is why you hear so many cases that clients are being coerced into paying bribes but they don arrest people when the procedure is more inquisitorial and should detention should be a last resort.” –

⁸² Ibid.

⁸³ Phone interview with Mohammad, 20 September 2023.

⁸⁴ In-person interview with Ayesha, 7 August 2023.

⁸⁵ In-person interview with Odia, 1 September 2023.

Irregularities in Application of Law

Immigration officials, SAPS, and court officers regularly fail to correctly apply the law, either due to lack of knowledge of the law and policy changes, or unwillingness to respect the rights of persons arrested due to lack of documentation. In many instances, this unwillingness is directly tied to corruption and the use of the immigration detention system as a business for immigration officials and SAPS.

[Even with] the right document...the police sometimes they tell you, it is fake, it is expired, they want money. They will arrest you.

- MOHAMED, ASYLUM-SEEKER FROM SOMALIA

Holding for longer than 48 hours

While the police do have the authority to detain a person for up to 48 hours for documentation verification, this 48-hour period is frequently breached. There are instances where persons are held for long periods at police stations without verification taking place. We have also noted cases where people are not brought before the court within the 48-hour period. This usually takes place when police officers want to solicit bribes from the arrestees.

Betty, an asylum-seeker from the Democratic Republic of Congo, went to the police station after her son was arrested on a Friday with a printed copy of his most recent asylum visa after the police accused the electronic version of being fake. Once she brought a printed copy, the police informed her that her son would be held for verification of the document.

“They said Home Affairs is not there because it is the weekend, Home Affairs will only come on Monday. My son sleep by [the police station] for three days without any reason. After Monday they charge me, they say I must pay R 1500 otherwise he must go to Lindela because the immigration they are not working, they are on leave, and only they can verify his paper. I was so shocked. My son slept there for four days even though he was having his document. What is happening here in South Africa? I say we are lost, us and our children.”⁸⁶

Conditions of Detention

Regardless of the location of detention, interviewees agreed that the conditions of detention were “very bad.” Certain detainees also noted how cold the holding cells were during winter, but they

⁸⁶ In-person interview with Betty, 1 September 2023.

Gloria fled rebel violence in eastern DRC and came to South Africa in 2019. While she was fleeing, she was separated from her husband and three children and for many years she did not know if they were still alive or their whereabouts. When she arrived with a group of people on a truck to South Africa, she found shelter in a church and made multiple trips to the RRO to apply for asylum. After waiting outside the entire day many times, only her fingerprints were taken and she was never issued with an asylum visa. Her health deteriorated and she could not stand in the queue for long periods of time. Eventually, the RROs closed due to the 2020 lockdown.

In 2023, she suddenly heard that her family was alive and living in Lubumbashi, a different city in the DRC which is known to be safer than their home. Gloria worked hard to arrange the money for a flight ticket and a travel document from the embassy. At the airport, she was arrested and spent close to 2 months in prison before the charges were dropped. However, she lost all of her money spent on the ticket and the temporary document, which had since expired. Gloria says,

Even right now, if I had money for a ticket, I can go back. I don't want to stay here anymore. The thing is, I don't have that money. Because when they arrest me, I was already raising the money for ticket...But everything I lost. [When I was arrested,] things were the worst, everything was lost here and here. I don't have any money.

As of the writing of this report, Gloria has not seen her family in four years.

were still denied access to their jackets or other warm clothes.⁸⁷ They also pointed out the minimal amount of food that they were given and often went to bed hungry.⁸⁸

In other cases, detainees who were sick or who had medical conditions were not immediately provided with access to medical assistance. However, family and community members noted that once someone on the outside effectively communicated to the station commander that the person required medical attention, they received it.

In certain situations, however, the arrest and detention aggravated pre-existing health conditions. In one extreme case, a newcomer asylum seeker with Type 1 Diabetes had been previously abducted by rebels in her country of origin and denied access to insulin, throughout the time she was abducted. When she fled to South Africa, she was arrested for lack of documentation and could not communicate that she needed insulin. Her health deteriorated until she had to be admitted in the hospital for five days, after which she was taken back to the police station.

Marcus, a refugee from the DRC, noted that he had a stent in his arm from a previous xenophobic attack and when he was arrested, he requested that they not handcuff his wrists due to this injury. Unfortunately, the police refused to listen to him, and he spent several days in severe pain as he waited to be released, without access to painkillers.⁸⁹

The conditions that detainees are subjected to in detention often leave lifelong mental scars, detainees who have never been convicted of any violent crimes end up having to co-exist with convicts of violent crimes inside prisons and become exposed to aggressive living situations that they can't forget even years after being released.

"Until now, I'm traumatized. Sometimes I have a nightmare when I'm sleeping. I just wake up early and, in the night, when I remember what happened there in prison. I remember the time they tried to hit me with knife, I remember many things. And this thing is always in my mind, and I don't know who can help me so that I will remove the remembering that is in my mind." S. Masenga

Abandoned Asylum Claims

LHR has noted multiple cases in which asylum seekers who decide to abandon their claims and return to their countries of origin because of changed circumstances are arrested at OR Tambo

⁸⁷ In-person interview with Nadia, 1 September 2023.

⁸⁸ In-person interviews with Aristotle, Hassan, Marcus.

⁸⁹ In-person interview with Marcus, 31 August 2023.

international airport as they are attempting to board a flight home and charged with contravening the Immigration Act. In some cases, they are reportedly asked to pay a large sum of money to an immigration officer or be arrested.

In most of these cases, the asylum seekers were newcomers who arrived shortly before the COVID-19 lockdown or shortly thereafter and were never able to formally complete their application for asylum and be issued with an asylum visa, although they have proof of attempts that they made to apply for asylum. Eventually when they find out that a family member is safe in a different part of their home country, they decide to join them and approach their embassy for a travel document and complete the formalities. However, despite having the temporary travel document to travel back to their country of origin, they are arrested either due to suspected fraudulent document or under Section 49 of the Immigration Act, meaning that they are told to serve a criminal punishment for allegedly being in the country illegally before being permitted to leave.

Xenophobia and Anti-migrant Political Propaganda

In the minds of many South Africans today, the government can either choose to protect the rights of its citizens or the rights of migrants, but never both. When the South African government is not seen as actively fighting the perceived infiltration of migrants into South Africa, it appears to certain citizens that the needs of South Africans are put on the backburner or just completely ignored. Only one group can be seen to benefit at any given time. And so, to protect South Africans, the government must be seen to expel migrants, especially alleged “illegal migrants”, from the country.

So [the immigration] say the police guy is bringing her there, you're going to see her by the police station by OR Tambo. We didn't have another choice but to wait. We beg the police, we try to explain, we don't know, she wants just to go back to her country and no longer come back. Here she doesn't have work, place to stay, what. If you keep her here, it's just a big trouble again. Leave her just to go back on the plane. And they didn't want to release her.

- EMMANUELA, FRIEND OF GLORIA, AN ASYLUM SEEKER WHO DECIDED TO RETURN TO HER COUNTRY AFTER SHE FOUND OUT THAT HER FAMILY WAS STILL ALIVE

An us versus them mentality has been created and has become severely entrenched over the past 20 odd years. However, this has created a false dichotomy where either migrants are allowed to benefit at the expense of citizens or migrants are expelled to allow South Africans to benefit. It is unfortunate that the government has played into this dichotomy to justify its failures and to excuse its inability to fulfil its constitutional duty.

“Political xenophobic rhetoric from the minister of home affairs and others, has exacerbated an already present anti migrant sentiment in all sectors, including institutionalized Xenophobia that has to an extent crept into and

manifested more greatly within SAPS (in certain areas) and the department of home affairs itself, particularly the immigration inspectorate.” - James Chapman (Head of Advocacy and Legal advisor at the Scalabrini Centre of Cape Town)

The anger over these failings is justified but misdirected. The responsibility of the government has been largely ignored. All the corruption and fraud seem to have gone largely unnoticed and the blame has largely fallen on migrants. It is believed that migrants are draining significant resources that should be directed towards improving the lives of citizens. These include social grants, educational resources, healthcare resources, water and electricity. It is believed that migrants are taking away jobs from citizens. This is especially so with lower paying jobs or minimum wage jobs. Finally, it is believed that migrants contribute significantly to the rising rate of crime in South Africa. Certain migrant groups are associated with certain criminal activities. For example, Nigerians are largely blamed for drug-related crimes.

And yet, less than 6 percent of the population of South Africa consists of migrants. A study done by the World Bank showed that migrants in South Africa contribute to the economy instead of taking away from it. This is especially so in townships where shops owned by immigrants provide vital services to people in those areas and provide jobs in a jobless economy. As such, this placement of blame on migrants has no evidential backing and is a populist tool used to steer the masses away from the failings of the government.

It's a traumatising situation for us as a foreigner in another country, you think maybe you are safe, it's an African country. Maybe in Europe I can understand if they mistreat me. But when they mistreat you in Africa...we feel so humiliated and frustrated.

- DADA, REFUGEE FROM THE DEMOCRATIC REPUBLIC OF CONGO

But even when the xenophobia is not obvious, it remains pervasive and has unfortunately become institutionalised. Our clients are refused access to hospitals and clinics because they are migrants. Police officers frequent areas known to house many migrants to make arrests that generally do not lead to any legal action. Migrants are even being attacked by their own communities and the police stand by and do nothing. The number of wrongful arrest cases and assault by police officer cases have steadily increased. It is a truly horrifying a phenomenon that is unfolding all around us.

Operation Dudula

Operation Dudula is a prime example of this. Operation Dudula (“dudula” is translated as “to force out” in isiZulu) was established as an anti-migrant vigilante group.⁹⁰ They declared that they were fighting for the rights of South Africans and that the only way South Africans could get jobs, service delivery, and a crime-free society was by ousting migrants. The ongoing actions of Operation Dudula have put the lives of many migrants in danger. Most recently, Operation Dudula has

⁹⁰Thabi Myeni, ‘What is Operation Dudula, South Africa’s anti-migration vigilante?’ Al-Jazeera 8 April 2022, available at <https://www.aljazeera.com/features/2022/4/8/what-is-operation-dudula-s-africas-anti-immigration-vigilante>.

registered with the Electoral Commission to contest the upcoming 2024 national elections in South Africa.⁹¹

Unauthorised Persons Demanding Papers

Many interviewees reported that persons other than immigration and police officers demand to see their documents once they realise that they are not South African.

One interviewee reported that her taxi was once stopped by Dudula members who were forcing passengers to disembark and show their papers to them, even though they did not have the authority or training to check documents:

“You give them asylum, they don’t know where is your name...he say, I want another paper...Most of the time for us [South Africans] don’t know our paper. They don’t know what is asylum, they don’t know what is status, they don’t know. Even your neighbour one day can ask you for your paper because she knows that you are not from here.”⁹²

Other unauthorised persons reported to have demanded documents in interviewee’s personal experiences included street cleaners, shop customers, and private security personnel.⁹³ Several women noted how they were afraid that if they declined to provide documents to anyone who asked, police would be called and they would be unlawfully arrested, even if their documents were in order.⁹⁴

Language

Language is also often used as a tool of intimidation, harassment, and discrimination against non-nationals who do not speak or understand South African languages.

“[I]f they [the police] see you are speaking another language, they take advantage of you. They can even say anything to you because first of all you’re not from here so you can’t say anything to them if they approach you. So basically you have to listen to them. They can take advantage of you at any time.”⁹⁵

Nadia, an asylum seeker from the Democratic Republic of Congo, commented on how police officers use language to “manipulate” even those who have proper documents because they cannot properly explain the document in a South African language, thereby creating a climate of fear.⁹⁶

They will come to you speaking in Zulu. And they will force you to speak in Zulu. When you respond in English, they know this person is a foreigner. Most of the

⁹¹ Queenin Masuabi, ‘Anti-foreigner group Operation Dudula gets party registration green light’ Daily Maverick 2 October 2023, available at <https://dailymaverick.co.za/article/2023-10-02-iec-slammed-after-operation-dudula-registers-as-party/>

⁹² In-person interview with Odia, 1 September 2023.

⁹³ In-person interview with Nadia, 1 September 2023.

⁹⁴ In-person interviews with Nadia, Odia, and Dada, 1 September 2023.

⁹⁵ In-person interview with Winner, 17 August 2023.

⁹⁶ In-person interview with Nadia, 1 September 2023.

police, they will stop you and greet you in Zulu. They never greet you in English. They will start in Zulu, even traffic cops.⁹⁷

⁹⁷ In-person interview with Dada, 1 September 2023.

Alternatives to Immigration Detention

The Need for Alternatives to Immigration Detention

Practices of immigration detention negatively impact detainees' health and well-being and often violate human rights obligations where the confinement is not found to be necessary and proportional. Although most governments justify immigration detention by stating that it will deter irregular migration, immigration detention has little impact on deterrence.

It is well-established through studies and surveys that immigration detention does not, in fact, deter new arrivals of irregular migration.⁹⁸ According to UNHCR Expert Consultant Alice Edwards, "there is no empirical evidence that the prospect of being detained deters irregular migration...detention is generally an extremely blunt instrument of government policy-making on immigration."⁹⁹

To the contrary, strict detention policies encourage migrants to seek assistance from smugglers or enter through more dangerous means, making them more vulnerable.¹⁰⁰ Specifically, asylum seekers choose the country where they believe they can be safe and in a tolerant and democratic society.¹⁰¹ Even those who are detained have been found to not pass on a deterrence message to contact overseas who are also looking to escape persecution.¹⁰²

What I can say is the people of South Africa, they are good. They are not bad because in South Africa, I found a home... A place where you find a bed to sleep is a good place. Even though there are injustice of many things...They must just perform the good things for the people who are coming outside. They must help because we are not coming for here just for fun. No one would leave their home, a place where they live well with their family and run away and come here just for fun so they should help when someone needs help.

- TAMARA, ASYLUM SEEKER FROM THE DEMOCRATIC REPUBLIC OF CONGO

⁹⁸ Robyn Sampson, 'Does Detention Deter? Reframing Immigration Detention in Response to Irregular Migration' 1 April 2015 IDC Briefing Papers, p 3, available at https://idcoalition.org/wp-content/uploads/2015/04/Briefing-Paper_Does-Detention-Deter_April-2015-A4_web.pdf; UNHCR, "Global Roundtable on Alternatives to Detention of Asylum seekers, Refugees, Migrants and Stateless Persons: Summary Conclusions" (Geneva, Switzerland, July 2011), available at <https://www.refworld.org/docid/4e315b882.html>.

⁹⁹ Alice Edwards, 'Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum seekers, Stateless Persons and Other Migrants,' Legal and Protection Policy Research Series (UNHCR, April 2011), <https://www.unhcr.org/sites/default/files/legacy-pdf/4dc949c49.pdf>.

¹⁰⁰ Sampson (note 98 above) at p 3-4.

¹⁰¹ International Detention Coalition (note 5 above) at p 11.

¹⁰² Ibid.

Effect on Mental Health

Detention can exacerbate previous trauma and increase the occurrence of post-traumatic stress disorder among asylum seekers who are already fleeing difficult situations in their countries of origin. The impacts of detention on mental health extend beyond the period of detention, thereby affecting society at large when the detainee is released as they may be more reliant on health care and social welfare systems. Sadly, detention also leads clinically significant symptoms of depression, including suicidal thoughts.¹⁰³ These impacts spread to family and friends who are witnessing their loved one go through this traumatic experience.

We are all Black. This is our mother continent. We cannot be so traumatised. My paper is expired [although I applied on time to renew it]. I'm so scared to go out. Because you have to have money for bread, and money also for police officer.

- ODIA, ASYLUM-SEEKER FROM THE DEMOCRATIC REPUBLIC OF CONGO

100% of interviewees who were themselves arrested or detained due to their documentation status stated that they were afraid of re-arrest, even if their documents are valid. Some reported having nightmares and racing thoughts worrying about returning to detention.¹⁰⁴

The negative mental health impacts extend to the family members of those arrested as well. One refugee reflected, *"can you imagine, we depend on our husband, we are just three of us and when they took your husband just like that...we were very traumatised. Until the next day [when he was released] I couldn't sleep."*¹⁰⁵

Even those whose families are not directly arrested and detained face an incredibly degree of stress knowing that they must be able to produce their documents at any time.

What are Alternatives to Immigration Detention?

Alternatives to detention in the context of immigration detention are defined as *"any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country."*¹⁰⁶ For example, the Community Assessment and Placement model implements a program wherein a screening and assessment determines which placement option is most appropriate for a migrant: in the community without conditions, in the community with limited restrictions subject to review, and detention subject to review. The process should be accompanied by case management, which allows for support and resolution of issues facing asylum seekers.¹⁰⁷

¹⁰³ Ibid.

¹⁰⁴ In-person interviews with Hassan, Mohammed, and Aristotle.

¹⁰⁵ In-person interview with Dada, 1 September 2023.

¹⁰⁶ International Detention Coalition (note 5 above) at p 12.

¹⁰⁷ International Detention Coalition (note 52 above).

However, alternatives to detention need not be so formal. They can also be informal or ad hoc responses such as short-term practices not formally recognised by the government but practiced in relation to asylum seekers and other migrants.

According to the International Detention Coalition, alternatives to detention must, at the minimum, respect fundamental rights including: 1) right to liberty and freedom of movement; 2) access to education and healthcare; 3) right to work; 4) right to legal status and documentation; 5) right to legal advice and interpretation; 6) timely case resolution; and 7) regular review of placement decisions. Underlying all of these is the presumption against detention.

Benefits of Alternatives to Immigration Detention

Immigration detention is meant to be a measure of last resort because of the abovementioned negative impacts of immigration detention.¹⁰⁸ Alternatives to detention allow governments to comply with the international and domestic human rights obligations and cut down on costs while still encouraging compliance with immigration policies.

"I think in terms of (suggestions for) an alternative, for example the fines process for persons with expired documents. I understand the law (a person can be detained for having that document verified, et cetera) but I think I think detention in those situations can be avoided. (Furthermore) where people are detained for long periods of time, mothers are detained, vulnerable woman, etcetera. There are alternatives to that where people don't have to be detained. I mean, they can just be taken to the refugee Reception Office, maybe run the fingerprint through the system, and then find the document. If not found, be given that opportunity if they expressed their intention to apply for asylum. I think in that way, some of those detentions could be avoided."

Shaazia Sader, UCT Refugee Rights Unit

Cost

Alternatives to detention have been shown to be, on average, 80 per cent less expensive than immigration detention.¹⁰⁹ Immigration detention leads to high costs, especially where the person is detained for a long period of time pending the determination of their status. These costs increase when the detention is unlawful, and governments must pay compensation.¹¹⁰

In South Africa, there is a lack of clarity in exactly how much money is spent on immigration detention, as routine data even on the scope of immigration detention is scant.¹¹¹ However, in 2014, the Institute for Security Studies and the African Centre for Migration and Society at the University of Witwatersrand published a report estimating the cost of the securitization of South Africa's immigration framework.¹¹² Of the R 647 million that was spent on immigration and asylum in 2013/2014, almost one-third was spent on deportations, with another R 90 million spent on

¹⁰⁸ Ibid.

¹⁰⁹ Sampson (above note 86) at p 6.

¹¹⁰ Edwards (above note 99) at p 2.

¹¹¹ Van Hout and Wessels (above note 19).

¹¹² Gregory Mthembu-Salter et al., 'Counting the Cost of Securitising South Africa's Immigration Regime' Migrating out of Poverty Research Consortium, 1 September 2014, available <https://opendocs.ids.ac.uk/opendocs/handle/20.500.12413/14832>.

running Lindela.¹¹³ Specific to legal challenges to immigration detention, it is estimated that the Department of Home Affairs spent at least R 2.5 million simply on legal costs.¹¹⁴

"I think the use of detention as a migration management tool raises many concerns, as it often leads to overcrowding in Correctional Facilities and as a result, there is a lack of adequate food and access to health care. So I think the Alternatives to detention can reduce the costs in relation to the food required and medications at Prison Hospital." Tumelo Mogale, Lawyers for Human Rights

At the time, the average cost of per detainee at Lindela per day was approximately R 100, and the average cost of deportation was R 725 per person for those by road and R 29 000 per person for those by flight.¹¹⁵ These costs were noted to be increasing exponentially each year and are likely much higher today.

Compliance

A major concern of governments in exploring alternatives to detention is that there will be little compliance with conditions as migrants are free to move around the country. However, research has noted that alternatives to detention are extremely *"effective at achieving government objectives such as compliance and voluntary departure,"* especially when *"migrants are able to meet their basic needs and are supported with case management, legal advice and other supports necessary to make realistic and informed decisions about their future."* In fact, studies have shown that alternative policies to detention can lead to a compliance rate of over 90 percent, including relating to voluntary returns.¹¹⁶

Comparative Policies

Zambia

National Migration Policy

The Zambian Government upon realisation of the dangers connected to unregulated migration procedures has introduced a national policy to aid in this regard - National Migration Policy. The government of Zambia saw it necessary to implement this policy as the implications of unmanaged immigration procedures became dire with an increase in Smuggling and human trafficking of migrants, discrimination, social unrest etc.¹¹⁷

This policy introduces a stakeholder integrated approach at managing immigration and achieves this objective by, allowing stakeholders to identify as equal partners in the management of immigration on the national scale. Resulting from this is the increase in understanding amongst these stakeholders, of the importance of provision of accurate disaggregated migration data for the formulation of policy. The way the policy can achieve this is through its institutional arrangement that introduce a 'whole of society' and 'whole of government' approach to migration

¹¹³ Ibid at p 11.

¹¹⁴ Ibid.

¹¹⁵ Ibid at p 12.

¹¹⁶ UNHCR (note 98 above).

¹¹⁷ Ibid

management. Under this policy, each ministry plays a role within their respective competences to ensure the implementation of the above-mentioned approach.¹¹⁸

Immigration Detention – Legal Framework

The immigration detention system in Zambia is regulated by the Immigration and Deportation Act (2010). This Act makes provision for the arrest and deportation of migrants who are undocumented or overstaying in the Country. The provision extends to arrest and detention for illegal entry and unauthorised presence in urban areas. In facilitation of these provisions, officers can conduct searches in areas they suspect could be occupied by undocumented persons. These searches can be conducted without officials warrants and have often been resulted in mass arrests of migrants. In 2016, officers in Lusaka conducted a mass search that resulted in an arrest of over 5000 migrants.¹¹⁹

Mass patrols have become common occurrence even in the South African context however the difference is that often times these mass patrols do not result in arrests. Migrants are detained and expected to pay bribes for their release before the reason for their detention is documented under police records.

“They locked me up with the handcuffs with another guy at the same time, then we were about 10 people. I told them that I’m not going to pay because there, everyone was paying money, I can guarantee you that the money they made from that truck was not less than 50k. The truck kept loading and offloading (migrants), when its full they ask people for money- when its empty they bring other people. It's almost like a shop, the truck is not standing there for immigration, its standing there to make money.” - S. Masenga (documented migrant who was a victim of a mass arrest)

Uganda

Uganda is one of the largest migrant-receiving countries in Africa and despite the country being plagued with poverty, its citizens and government have purported a system of openness to the inpour of refugees into the country over the years. This, however, is not to represent a perfect management and integration of migrants into Uganda, the systems implemented by the country for this purpose continue to be limited by lack of resources, sanitation etc. Despite this however, Ugandan citizens and Ugandan government encourage refugee integration by empowering refugees to become economically independent by working and providing for themselves. The government provides refugees with land for this very purpose, and this benefits not only the refugees but the Ugandan economy itself.

Effect of Covid 19

As was with many other migrant receiving countries, Uganda’s migration systems were not immune to the effects of the Covid 19 pandemic. The Ugandan borders were closed in March of 2020 which

¹¹⁸ Ibid.

¹¹⁹ Global Detention Project, ‘Migrants in Zambia at grave risk of abuse’ 22 December 2022, available at <https://www.globaldetentionproject.org/22-december-2022-zambia> .

left many asylum seekers displaced and vulnerable. 3 months later in June of 2020 however, the gates were temporarily reopened and the refugees that were received kept in quarantine sites.¹²⁰

Legal Framework

The process of migration in Uganda is regulated by various national laws, namely the Uganda's Immigration and Citizenship Control Act, the National Policy for Internally Displaced People, the Refugees Act and the Refugee Regulations, the Prevention of Trafficking in Persons Act. Although it has been widely reported that amidst these regulations, there is no single comprehensive policy that regulates migration procedures holistically, it is worth noting that Uganda has been regarded as the most progressive African country when it comes to integration of foreign nationals into the country.

Uganda laws have made provision for the provision of social services, settlement (residential) and agricultural land to refugees so that they can engage in the Ugandan labour market.¹²¹ This is contrary to the South African context where refugee engagement in the South African economy has oftentimes laid the premises for Xenophobia and left Migrants Vulnerable to Xenophobic Attacks.

"I was selling in town; this was always my life – selling in town. While at work I've been attacked many times and when people ask why you don't just go to the Police Station, we do but when we do, they just tell us that this isn't your country, you must go back to your country. They won't even open a case file for you." - Mwamba, a migrant who was subject to xenophobic attacks at his place of work.

Efforts to Promote Alternatives to Immigration Detention in South Africa

In 2012, UNHCR published Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum seekers and Alternatives to Detention ("the UNHCR Detention Guidelines").¹²² In South Africa, many of these alternatives are outlined in policy but fail to reach their potential impact in practice. Most of the alternative's stem from the *Refugees Act* but have since added practices or obstacles that reflect alternative forms of detention rather than alternatives to detention.

Non-Encampment Policy & Deposit of Documentation

The UNHCR Detention Guidelines centre around the right to liberty and encourage freedom of movement as much as possible. One suggested alternative to detention policy is the surrender of documentation rather than establishing an encampment policy for asylum seekers. The UNHCR Detention Guidelines emphasise that asylum seekers must be issued with substitute documentation that authorises their stay in the country in the meantime.

South Africa's asylum system clearly adopts this policy. Asylum seekers and refugees are not kept in camps; they are instead required to submit their travel document (if they have one) to the DHA

¹²⁰ Global Detention Project "Uganda" 07 July 2020 available at <https://www.globaldetentionproject.org/07-july-2020-uganda>

¹²¹ Winnie Watera, Claire Seremba et al, UGANDA'S REFUGEE MANAGEMENT APPROACH WITHIN THE EAC POLICY FRAMEWORK, "A study by youth4policy, a youth think-tank initiative of the Konrad-Adenauer-Stiftung, Uganda and South Sudan Programme" 2017.

¹²² UNHCR (above note 98) at p 2.

upon arrival and making an application for asylum. Under the Refugees Act, asylum seekers are meant to be issued with a Section 22 visa which should be renewed until a final determination has been made on the application for asylum and the right to review has been exhausted.

However, in practice, depositing documentation has been flipped to prevent asylum applications as the DHA has been turning away new asylum seekers who wish to apply without a passport. This increases their vulnerability as they remain without any valid documents in South Africa, making them acutely at-risk of immigration-related arrest and detention. Section 22 visas are also often not renewed on time. Asylum seekers are asked to return on a different day or are given no response to their request for renewal, again exposing them to the risk of being arrested under the *Immigration Act*.¹²³

Reporting Conditions

The UNHCR Detention Guidelines also suggest periodic reporting conditions to immigration or other authorities instead of immigration detention, with the frequency of reporting obligations reducing over time. South Africa's asylum system also establishes reporting conditions, as asylum seekers must engage with the Department of Home Affairs every 1, 3, 6, or 12 months to renew their Section 22 visas. Refugees who have been granted Section 24 visas are only generally required to report once every four years.

Unfortunately, the reporting conditions and the distance to Refugee Reception Offices ("RROs") have made this practice less effective as an alternative to detention. RROs are marred with extensive delays, corruption, and technological failures, requiring asylum seekers to sometimes return week on week.¹²⁴ Even where the visa is renewed for a few months, the backlog of asylum applications means that asylum seekers must keep reporting several times a year for close to a decade until a final determination has been made. These repeated trips to the RROs put a strain on the financial resources of asylum seekers as well as their ability to maintain employment, as they are regularly required to take time off to report to the RRO.

According to the UNHCR Detention Guidelines, "*overly onerous reporting conditions can lead to non-cooperation, and can set up individuals willing to comply to instead fail. Reporting, for example, that requires an individual and/or his or her family to travel long distances and/or at their own expense can lead to non-cooperation through inability to fulfil the conditions, and can unfairly discriminate on the basis of economic position.*"¹²⁵ Unfortunately, this accurately depicts the situation in South Africa wherein an effective alternative to detention policy can actually lead to immigration detention because the practices surrounding the policy encourage non-compliance. Many asylum seekers simply cannot afford to continue reporting to the RRO to renew, and then are charged an overstay fine which they cannot afford. Thus, they become undocumented and are again vulnerable to arrest and detention.

Case Management

The UNHCR Detention Guidelines as well as the International Detention Coalition's Community and Assessment Placement model identify case management as one of the most important

¹²³ Bernard Chiguvare, 'Asylum Seekers Fear Arrest as Delays Mount' GroundUp News, 20 February 2023, available at <https://www.groundup.org.za/article/asylum-seekers-fear-being-arrested-or-deported-as-delays-with-online-applications-mount/>.

¹²⁴ Lawyers for Human Rights, 'Costly Protection : Corruption in South Africa's Asylum System' 15 September 2020, available at <https://www.lhr.org.za/lhr-resources/costly-protection-corruption-in-south-africas-asylum-system/>.

¹²⁵ UNHCR, 'Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum seekers and Alternatives to Detention' 2012, available at <https://www.refworld.org/docid/503489533b8.html>.

components of an asylum system that centres around alternatives to detention. In South Africa, RSDOs are designated as case managers, responsible for the entire case of a particular asylum seeker. RSDOs conduct the initial interviews of asylum seekers and issue them with their initial decision. If the asylum seeker is initially rejected, the RSDO is tasked with informing them of the right to appeal and the procedures to launch an appeal with the Refugee Appeals Authority of South Africa or the Standing Committee for Refugee Affairs.

Unfortunately, RSDOs do not have much time to devote to each particular asylum seeker. Asylum seekers are often dismissed by RSDOs without assistance, or in cases where an RSDO leaves their job, their files are not clearly handed off to a different officer. In reality, NGOs play the work of case managers, but cannot do so effectively as non-State entities with capacity and resource constraints. The lack of case managers leaves asylum seekers confused about their rights and the asylum process, often leading to simple mistakes that leave them vulnerable to immigration-related arrest and detention.

UNHCR Global Strategy

In 2014, UNHCR launched a five-year global strategy that aimed to promote alternatives to immigration detention, with twelve focus countries. In 2017, the program was expanded, and South Africa joined as a focus country. The goals of the program include putting into place a variety of legal and policy alternatives to immigration detention, specifically programs that take into consideration vulnerable persons. Decisions to detain should be assessed according to the necessity, reasonableness, and proportionality in each individual case. The program also seeks to end the detention of children in the immigration context.¹²⁶

South Africa's commitment to joining this program which explicitly works to ensure that the detention of asylum seekers should only be a measure of last resort is a positive step that reflects the origins of the country's formal refugee policy. Unfortunately, the Government of South Africa does not seem to have submitted a National Action Plan which would allow UNHCR to publish period progress reports on the steps taken to increase the use of alternatives to immigration detention.¹²⁷ However, in its final report on the Global Strategy, UNHCR noted that immigration authorities had on several cases assisted in release of individuals by instructing RROs to document them.¹²⁸

¹²⁶ UNHCR, 'Beyond Detention. A Global Strategy to Support Governments to End the Detention of Asylum seekers and Refugees' 2014, <https://www.unhcr.org/sites/default/files/legacy-pdf/53aa929f6.pdf>.

¹²⁷ UNHCR, 'Detention' UNHCR, available at <https://www.unhcr.org/detention>.

¹²⁸ Global Detention Project (note 9 above) at p 23.

Recommendations & Conclusion

Recommendations

On a policy level, post-apartheid South Africa made great early strides in promoting alternatives to immigration detention. However, the goal of reaching effective alternatives was never fully reached; throughout the last several decades South Africa has continued the practices of arresting and detaining migrants without paying heed to international law principles. In recent years, there is a trend towards reversing some of the rights-based protections and alternatives to detention even at the policy level. In order to ensure the rights of all persons in the immigration detention system, the following recommendations are submitted:

Department of Home Affairs

- * Establish help desks in local communities to assist asylum-seekers and refugees who do not have the means to access technology to submit their online application requesting for the extension of their asylum visas or refugee certificates.
- * Establish a system which allows for all asylum-seekers and refugees who report in person to the RROs to be assisted on the same day, or at the minimum, provide proof through a stamp or signature that the individual reported on that day and provide the date of the next appointment.
- * Establish a confidential mechanism for reporting corruption specifically at RROs.

SAPS

- * Train officers and commanders on the online system of asylum visas and refugee certificates, including the validity of the automatic response from the Department of Home Affairs which shows that an application for extension has been received. Educate officers to understand that by virtue of their asylum claim, asylum seekers and refugees are barred from approaching their embassies and cannot produce a passport.
- * Ensure that asylum-seekers and refugees with expired or no documents are freely allowed to make affidavits at police stations to state their desire to apply for asylum or renew their documents without threat of arrest or deportation.
- * Link the Department of Home Affairs system with that of the South African Police Service to enable the SAPS officials to verify the documents of the asylum seekers and refugee prior to detention or
- * Place at least one Immigration Officer at each Police stations that are designated to detained asylum seekers and refugee to deal with verification prior to charging them with contravening the section 49 of the immigration Act.

Department of Justice

- * Also link the Department of Home Affairs with that of the Department of Justice, to allow the Prosecutor or Senior Prosecutors to verify the status of documentation immediately after they receive a charge sheet in court.

Legal Practitioners

- * Provide training for Legal Practitioners around different types of permits issued under the Refugees Act, different types of rejections and legal recourse available.

Conclusion

The detailed accounts and data in this report paint a distressing picture of the immigration detention system in South Africa—a system fraught with inefficiencies and obstacles that leave non-nationals in a state of perpetual vulnerability. Despite the country's early post-apartheid intentions to uphold human rights, the reality today stands in stark contrast, with a detention system that neither deters irregular migration nor aligns with international standards. The evidence is overwhelming that detention exacerbates the plight of migrants, compelling them to take dangerous routes and causing profound mental health trauma that affects not only the individuals detained but also their families and the broader societal fabric.

The need for reform is undeniable. Alternatives to detention must be prioritized, as they not only offer a more humane approach but also support migrants' integration into the community while their status is resolved. The recommendations provided chart a path toward a system that can fulfil both the nation's security concerns and its human rights obligations. By adopting these measures, South Africa can move towards a fairer, more accountable, and dignified treatment of all individuals within its borders.

As this report concludes, it stands as a clarion call for immediate action. It urges policymakers, law enforcement, and the judicial system to collaboratively enact the recommended changes. The adoption of these reforms is not merely an administrative task; it is a moral imperative and a testament to South Africa's commitment to human rights. The future of the country's values and its international standing hinges on the willingness to embrace these necessary changes, to not only safeguard the rights of migrants but also to strengthen the nation's moral and social fabric. Now is the time for South Africa to reassert itself as a beacon of justice and a champion for the dignity of all people within its care.

