LAWYERS FOR
HUMAN RIGHTS

LAWYERS FOR HUMAN RIGHTS SUBMISSION TO THE PORTFOLIO COMMITTEE ON HOME AFFAIRS ON THE IMMIGRATION AMENDMENT BILL [B8 – 2024]

22 NOVEMBER 2024

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INTRODUCTION

1. Lawyers for Human Rights (LHR) hereby submits comments and recommendations in response to the Portfolio Committee on Home Affairs (PC DHA) call for comments on the Immigration Amendment Bill [B8 – 2024] (the Bill).

2. LHR welcomes the opportunity to make these submissions on the Bill, which follows the landmark Constitutional Court judgments in Lawyers for *Human Rights v Minister of Home* Affairs *and Others*[1] and *Ex parte Minister of Home Affairs and Another v Lawyers for Human Rights; In Re: Lawyers for Human Rights v Minister of Home Affairs and Others*[2](the Constitutional Court judgements), presents a significant opportunity to strengthen South Africa's immigration laws and ensure that they align with constitutional principles and international human rights standards.

A NOTE ABOUT LANGUAGE

3. LHR notes the use of the term of 'illegal foreigner' throughout the Bill purposes of this submission 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 Act 13 of 2002 (Immigration Act) will only be used to accurately quote the term in the Immigration Act.

4. 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'[3] 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 that regulates their

[1] Lawyers for Human Rights v Minister of Home Affairs and Others [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC).
[2] Ex parte Minister of Home Affairs and Another v Lawyers for Human Rights; In Re: Lawyers for Human Rights v Minister of Home Affairs and Others (38/16) [2023] ZACC.
[3] In the South African context, the use of the word 'illegal' to describe someone is problematic given its historical roots. The apartheid government imposed strict laws to control the movement of black South Africans, particularly into urban areas. Under the system, black individuals were required to carry passbooks (dompas) and could be arrested or forcibly removed if found in "white areas" without authorization. This system framed many black South Africans as "illegal migrants" within their own country, as their presence in certain regions was criminalised based on their race and socio-political status.

presence in the country. Being undocumented does not automatically imply that an individual is an 'illegal foreigner' who can be detained and deported from the country.

5. Immigration detention in South Africa is influenced by a combination of domestic laws, regional migration patterns, economic factors, and political pressures. It should also be taken into consideration that South Africa is one of the largest refugee host countries in Africa. While the country remains a popular destination for migrants, the challenges within the immigration detention system raise significant human rights concerns. Below is a brief overview of contributors to immigration detention in South Africa. It is also exacerbated by the fact that in practice migration is not managed in a holistic manner with issues of immigration, emigration and asylum falling within a single policy.

5.1. Irregular migration

5.1.1. **Undocumented Migrants**: A significant number of migrants in South Africa are undocumented or have overstayed their visas. In most cases, it is not due to the client's fault but due to underlying issues within the Department of Home Affairs such as backlog, corruption and long processing period of visas. These migrants are at risk of detention when caught by immigration authorities or law enforcement.

5.1.1.1. Corruption within immigration services and law enforcement agencies can also contribute to detention practices. Migrants, especially those with limited legal knowledge or resources, are vulnerable to exploitation, bribery, or wrongful detention. In some instances, corruption may result in migrants being detained for longer periods or subjected to detention under false pretenses, with little recourse for legal redress.

5.1.1.2. In March 2023, the Portfolio Committee on Home Affairs stated that "there are 49 529 permanent residency applications of which 40 365 are backlog cases. Also, there are 75 814 temporary residence applications of which 55 1732 are older than 8 weeks"[1]. The above statistic gives an indication that the processing time for visas and permanent residence is way longer. The effect of this is that a lot of migrants will remain undocumented even after applying for an extension of their visa 3 months prior to its expiration.

5.1.2. **Unauthorised Entry**: Many asylum seekers in South Africa enter the country irregularly due to the lack of formal asylum procedures in their home countries or due to fleeing violence and persecution. While international law protects the right

of individuals to seek asylum, asylum seekers may be detained under South African law for entering without valid documentation.

5.1.3. **Economic factors:** Law enforcement officers often detain individuals as part of alleged efforts to curb undocumented employment, especially in sectors that rely heavily on migrant labour, such as agriculture, mining, and construction.

5.1.3.1. **Zimbabwean Exemption Permit (ZEP) holders:** Many Zimbabweans have been in South Africa since 2009 enjoying the benefit of being ZEP holders. In 2021, the Minister of DHA made a decision not to renew the permits. Many blanket extensions have been issued; however, we still see ZEP holders and their families being arrested and treated like irregular migrants.

5.1.3.2. **Labour migration:** In many sectors, such as agriculture, construction, and mining, migrant labour is in high demand. However, many of these workers remain undocumented due to the lack of formal migration channels or because they work in the informal sector. This informal economy increases the likelihood of migrants being detained for being in the country without the correct paperwork.

5.2. Asylum Seeker and Refugees

South Africa is a signatory to both the **1951 Refugee Convention**[4] **and** its **1967 Protocol**[5], committing itself to protecting individuals fleeing persecution. However, the country's asylum process is plagued by inefficiencies and delays, resulting in asylum seekers being detained for prolonged periods before their cases are resolved. LHR's direct and indirect engagement with the system presented the following challenges:

5.2.1. Digitization of applications for asylum and renewal of documents.

5.2.2. Lack of coordination between government departments- The DHA does not often update other government departments and other parties such as schools and banks about changes to their systems. For instance, after the online extension application was introduced, a lot of asylum seekers and refugees were detained as law

[4] Convention relating to the status of Refugees, signed at Geneva on 28 July 1951. South Africa acceded to it on 12 January 1996.
[5] Protocol relating to the status of refugees, done at New York on 31 January 1967.

enforcement officers were not aware of the online system, this issue continues to exist.

5.2.3. Inefficient asylum application process - One of the most significant contributors to the detention of asylum seekers is the inefficient asylum application process in South Africa. While the country is one of the largest recipients of asylum seekers in Africa, the systems in place to process asylum claims are often slow and overwhelming, which results in long waiting times for asylum seekers and may lead to detention.

5.2.4. To note that LHR made the following point in its Joint Submission to the Department of Home Affairs on the Green Paper on International Migration in South Africa (2016) [6]. And the situation still applied: We further note, however, that the current asylum protection system is in crisis and is effectively non-functional. This is partly due to large numbers accessing the system, however the problems experienced go far beyond numbers. They are also indicative of a lack of capacity within the Department to deal effectively and efficiently with claims for asylum, a lack of resources to allow departmental officials to conduct their work independently and fairly as well as widespread and endemic corruption. This corruption occurs mainly at the Refugee Reception Offices (RROs), but also with the South African Police Services and immigration officials. This comment is still relevant to-date.

5.2.5. Backlog of asylum applications- the DHA faces a significant backlog in processing asylum applications, resulting in long delays for individuals seeking refuge in the country. The backlog has become a persistent issue, with thousands of asylum claims waiting to be processed. During these delays, asylum seekers are being detained, especially when they are waiting for their online visa extension applications to be processed. On many occasions they are accused of being in the country illegally.

5.2.6. First time applications for asylum are in person, and no longer online- the practice at the RRO is that after a person has attended at the office, they will not be issued with any form of documentary proof of their visit to the RRO. In reality, an average

[6] https://www.lhr.org.za/lhr-resources/joint-submission-to-the-department-of-home-affairs-on-the-green-paper-on-international-migration-in-south-africa-2016/.

person will visit the RRC at least four times before being issued with an asylum seeker visa or any form of documentation. This means that the person can be detained during this period as they will not have any form of formal documentation or proof of their visits to the RRC.

5.2.7. Lack of Clear Guidelines: Asylum seekers often find themselves detained due to a lack of clarity or misunderstanding about the asylum process. Some are detained because they are perceived as having entered the country irregularly, even though they may be in the process of seeking asylum.[7]

5.3. Statelessness

5.3.1. The 1951 Convention relating to the Status of Stateless Persons defines a stateless person in Article 1(1) as "a person who is not considered a national by any State under the operation of its law". Statelessness arises due to a combination of legal and administrative barriers that prevent individuals from acquiring or proving their citizenship. In South Africa, the legacy of colonialism and apartheid has left a profound impact on access to citizenship, resulting in many unrecognised South African citizens who are effectively stateless, together with a relatively smaller percentage of stateless migrants. This is compounded by the absence of a dedicated statelessness determination mechanism, leaving individuals without recognition or protection under the law.

5.3.2. UNHCR estimates that there were over 10 000 stateless people in South Africa as at 2016,[8] while in 2019, the World Bank data set revealed that approximately 15 million people in South Africa, encompassing both citizens and non-citizens, lack legal identity. This would also include a significant number of in situ stateless individuals—those born in South Africa, who have lived their entire lives in the country they consider home but are not recognised as citizens. Moreover, in the recent matter of *PPM v Minister of Home Affairs* 2024 (3) SA 469 (GP) (16 January 2024), the Department of Home Affairs admitted to irregularly blocking 2,5 million IDs, with about 700 000 still blocked. This has left thousands of South African citizens and permanent residents undocumented, deepening the risk of

[7] Following *Ashebo v Minister of Home Affairs and Others* (CCT 250/22) [2023] ZACC 16; 2023 (5) SA 382 (CC); 2024 (2) BCLR 217 (CC) (12 June 2023) there have been strict implementations of the 'good cause' requirement set out in the Refugees Act. This is however *sub judice*.
[8] UNHCR The UN Refugee Agency 'South Africa: Operational Context' available at https://www.unhcr.org/ibelong/south-africa-joint-strategy/.

statelessness. The stigma attached to statelessness and the lack of documentation exacerbates the vulnerability of affected individuals.

5.3.3. Statelessness presents a unique challenge to South Africa's immigration laws, as it is often synonymous with being undocumented. This becomes particularly problematic under section 41 of the Immigration Act, which requires any person approached on reasonable grounds by an immigration officer or police officer to identify themselves as either a "citizen, permanent resident, or foreigner". Failure to do so may result in the presumption of unlawful presence and possible arrest, detention, and deportation. The identification clause in section 41 is narrowly construed, providing a closed list of legal statuses that exclude stateless persons. As stateless persons are often unable to obtain documentation, they are also unable to produce legal identity, prove lawful presence, or meet the conditions for release if they are detained. For many, the lack of any State willing to accept them further extends their detention, leaving them trapped in a cycle of repeated arrest, prolonged detention, or attempted deportation to a 'foreign' State that they have never known.

5.3.4. To address these challenges, it is necessary to incorporate a protection mechanism for stateless persons at risk of arrest and detention, aligned with the international protection framework. South Africa's immigration law, as it stands, is ill-suited to provide the necessary safeguards for stateless persons, and the indiscriminate application of immigration law against all undocumented persons, including presumed non-citizens,[9] exacerbates these injustices. The plight of stateless persons underscores the inefficiencies of a system that relies on administrative detention for the purposes of deportation, even when such deportation is practically impossible. This highlights the urgent need to identify stateless persons swiftly and to implement complementary protection mechanisms to provide remedies to their detention while upholding their rights and dignity.[10]

[9] Lawyers for Human Rights 'Statelessness and nationality in South Africa' (2013) 42 available at https://citizenshiprightsafrica.org/wp-content/uploads/2013/03/LHR-Statelessness-and-Nationality-in-South-Africa-2013.pdf.

[10] South African Human Rights Commission 'Media statement: The South African Human Rights Commission investigates alleged arrest and detention of a matter by SAPS for not carrying an identity document' (2024) available at https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/3905-media-statement-the-south-african-human-rights-commission-investigates-alleged-arrest-and-detention-of-a-minor-by-saps-for-not-carrying-an-identity-document.

5.4. The contributors to immigration detention in South Africa are complex and interrelated, involving a combination of legal frameworks, economic factors, political dynamics, and human rights concerns.[11] While South Africa is an important destination for migrants seeking not just economic opportunities and asylum but South Africa is known for its Constitution and protection of basic human rights and respect for human dignity. But, the country's immigration detention system faces significant challenges, including overcrowding in immigration facilities, human rights violations, and corruption.

[11] Media Statement: Commendable Progress in Eradicating Backlogs in Home Affairs but Concerns Remain with Permitting and Visa Environment - Parliament of South Africa

6. Under international law, detention must adhere to specific standards and criteria to avoid being considered arbitrary. These criteria have been established over time through the through decisions by international, regional, and national courts, as well as statements from human rights bodies. [12]While there is no single definitive source, a synthesis of these frameworks highlights that detention is arbitrary unless it meets the following criteria: provided for by law, pursued in the interest of a legitimate objective, non-discriminatory, necessary in the specific circumstances, proportionate and reasonable, and conducted in alignment with the procedural and substantive safeguards of international law.

7. The UNHCR emphasises that "arbitrariness" should be understood broadly, extending beyond mere unlawfulness to include elements such as injustice, unpredictability, and inappropriateness. To prevent arbitrary detention, it must be demonstrated that the detention serves a necessary purpose for the specific case and is proportionate to that purpose. Ultimately, the determination of whether detention is arbitrary depends on its justification in the given context, as the concept of "arbitrary" inherently signifies the absence of reasonable cause or basis.

8. This section sets out current detention practices that LHR is observing that might lend itself to arbitrary detention and current situations that give rise to the risk of arbitrary detention.

Current Detention Practices

Detention of asylum seekers and failed asylum seekers

9. The Constitutional Court in Ruta[13] emphasized the need to interpret the Immigration Act[14] and the Refugees Act[15] harmoniously.[16] This means that while a person might have entered South Africa in contravention of the Immigration Act, the Refugees Act takes precedence and their claims must be processed under the Refugees Act, regardless of their immigration status.

10. Furthermore, the Court clarified that an immigration officer's discretion to arrest and detain an migrant must be exercised in a manner that respects the provisions of the Refugees Act.[17]

[12] Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the Convention on the Rights of the Child.
[13]Ruta v Minister of Home Affairs (CCT02/18) [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC).
[14] Immigration Act 13 of 2002.
[15] Refugee Act 130 of 1998.
[16] Ruta (n 13 above) para 43.
[17] Ruta (n 13 above) para 46.

This implies that if an individual is seeking asylum, their claim should be considered before any decision is made to arrest or detain them.

11. LHR has noted the following categories of persons susceptible to detention pending deportation under section 34 of the Immigration Act[18]:

11.1. **Newcomer asylum seekers:** These individuals have recently arrived in the country and have not yet formally lodged an asylum application. They may lack documentation due to various reasons, such as a lack of access to asylum offices or information about the process. Even after the easing of COVID-19 restrictions, many asylum seekers continue to face significant challenges in accessing the asylum system in South Africa.[19] Newcomer asylum seekers, in particular, often struggle to gain access to RROs and initiate their asylum claims.[20] This lack of access leaves them vulnerable to exploitation, discrimination, arrest and detention and potential deportation. The delays and bureaucratic hurdles associated with the asylum process further exacerbate the difficulties faced by these individuals, highlighting the urgent need for streamlined procedures and increased support for asylum seekers in South Africa.

11.2. **Asylum seekers with section 22 temporary asylum seeker permits:** Section 22 of the Refugee Act[21] provides that pending the outcome of an application for asylum, a person is entitled to an asylum seeker permit.[22]After lodging an asylum application, individuals fall into this category while their claims are being processed by the RRO.[23] The Refugees Act outlines the procedures for appeals and the rights of

[18] Immigration Act (n 14 above) section 34. (1) Without need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested and shall. irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department determined by the Director-General, provided that the foreigner

[19] T Washinyira 'Refugees who arrive after lockdown have no way to apply for asylum' Ground Up (2021) available at https://groundup.org.za/article/refugees-who-arrived-after-march-2020-risk-arrest-and-deportation/.

[20] S v Minister of Home Affairs and Others; M v Minister of Home Affairs and Others; R v Minister of Home Affairs and Others (2024/021421; 2024/025071; 2024/025073) [2024] ZAGPJHC 1695 para 1, D S L and Others v Minister of Home Affairs and Other [2024] ZAGPJHC 123 paras 5-9 and E C M v Minister of Home Affairs and Others (3152/2024) [2024] ZAECMHC 73 (27 August 2024) paras 6 – 10. These matters have also been reported in the media, for example K Mutendiro 'Asylum seekers fear arrest but can't access documents' Ground Up accessed at https://groundup.org.za/article/diepsloot-asylum-seekers-struggling-to-get-documents-for-years-say-they-live-in-fear-of-being-arrested-daily/

[21] Refugee Act (n 15 above).

[22] Refugee Act (n15 above) Section 22(1).

[23] Refugees Act (n 15) Section 22:
22. (1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

individuals during this process.[24] After an appeal is lodged, individuals wait for a decision from either the RAASA or the SCRA.[25] During this period, they are entitled to certain rights and protections, such as access to essential services and the right to work.

11.3. **Failed asylum seekers**: While refugee law and immigration law are distinct legal frameworks, they intersect at crucial points throughout the asylum process. One such intersection occurs when an asylum seeker's claim is definitively rejected, resulting in their reclassification as a 'failed asylum seeker'.[26] This transition marks a shift from the protection-oriented refugee regime to the more restrictive immigration regime, significantly impacting the individual's legal status and rights.[27] Where a migrant's application is initially rejected, they are typically referred to the Refugee Appeal Authority of South Africa (RAASA) or the Standing Committee on Refugee Affairs (SCRA) for further review. Despite the provisions of the law in practice we have seen migrants are often invited to the RRO to collect their decision notices through email when they attempt to renew their asylum permit online. However, upon arrival, they are subjected to arbitrary arrests as a result of a final adverse decision regarding their refugee status determination application.

12. These practices are contrary to the provisions of Article 31 of the 1951 Refugee Convention which prohibits penalisation of refugees for their illegal entry or presence in a country subject to certain requirements.[28]

13. It is imperative that the government takes immediate steps to address these concerns. This includes ensuring that all migrants, regardless of their immigration status, are treated with

[24] Refugee Act (n 15 above) section 24 provide at subsection (4):
If an application is rejected in terms of subsection (3)(b)-
(a) written reasons must be furnished to the applicant within five working days after the date of the rejection or referral;
(b) the record of proceedings and a copy of the reasons referred to in paragraph (a) must be submitted to the Standing Committee within 10 working days after the date of the rejection or referral.
[25] Refugee Act (n 15 above) section 25. (3) The Standing Committee- (a) may confirm or set aside a decision made in terms of section 24(3)(b).
(5) After the Standing Committee has decided a question of law referred to it in terms of section 24(3)(d), the Standing Committee must refer the application back to the Refugee Status Determination Officer with such directives as are necessary and the 15 Refugee Status Determination Officer must decide the application in terms of the directives.
[26] UNHCR and the International Organization for Migration (IOM) define failed asylum seekers as 'people who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status, nor be in need of international protection [and thus] are not authorized to stay in the country concerned' (UNHCR/IOM, 1997)
[27] C Johnson 'Failed asylum seekers in South Africa: Policy and practice' (2015) African Human Mobility Review 1 (2) 203.
[28] 23 September 2024 the UN High Commissioner for Refugees (UNHCR) published Guidelines on International Protection No. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees.

dignity and respect. Furthermore, it is essential to establish clear and transparent procedures for the assessment of asylum claims, and to provide adequate legal assistance to all those who need it. There should be a plan to ensure resources are available to include cost of translation and for information to be made available in relevant languages.

Challenging the arbitrariness of detention of stateless persons

14. The rights of stateless persons must be upheld and protected at all times, including during the exercise of immigration control. Statelessness places individuals in a uniquely vulnerable position, exacerbated by the significant challenges associated with their removal. These challenges must be carefully considered when determining the lawfulness of immigration detention. Establishing legal identity and citizenship during removal proceedings can be a protracted and complex process. For individuals who are stateless or at risk of statelessness, lawful removal is frequently subject to significant delays or entirely unfeasible, leaving them particularly vulnerable to prolonged, repeated, or indefinite detention.

15. Stateless persons face distinct vulnerabilities in immigration detention, bearing a disproportionate burden of its harmful effects. The lack of any realistic chance of release or removal subjects them to prolonged or indefinite detention, which can cause significant emotional and psychological harm. When it is determined that an individual is stateless and removal is not feasible, any continued detention becomes arbitrary by nature. Allowing such detention amounts to endorsing indefinite confinement, a practice that would violate constitutional principles, especially when the individual has not committed a crime. South Africa's current immigration detention system, however, fails to account for the specific challenges faced by stateless persons or adhere to international and regional human rights standards. This oversight leaves stateless persons unprotected and creates significant gaps in addressing their unique needs and circumstances.

16. Stateless persons face unique vulnerabilities in detention, as South Africa's immigration law does not include specific provisions for their release when deportation is not feasible. The Immigration Act lacks a dedicated mechanism to address situations where undocumented individuals, including stateless persons, cannot be removed from the territory. This legislative gap leaves the judiciary with limited guidance, resulting in inconsistent outcomes in cases involving stateless persons.

17. Although there are no reported judgments providing detailed reasons on whether a stateless person can lawfully be detained for deportation once it has been established that they

cannot be removed, two cases have addressed this issue indirectly. In *Herbert Baluku v Minister of Home Affairs,*[29] the Pretoria High Court declared the detention of a stateless person unlawful, as he had a pending application for permanent residence. While the decision resulted in his release, no written judgment was issued, leaving the reasoning unarticulated. Similarly, in *Mntambo v Minister of Home Affairs,*[30] the Johannesburg High Court found the deportation of a stateless person to be unlawful after he was detained and deported before the case could be heard. Despite these cases, South Africa's legal framework remains inadequate in protecting stateless persons from arbitrary detention. Individuals who are neither deportable nor legally present in the country face an impasse. This was evident in the *Nibigira v Minister of Home Affairs,*[31]where the judiciary acknowledged the impossibility of deportation but did not deem the detention arbitrary, focusing instead on the time limits prescribed by the Immigration Act. The court upheld the statutory 120-day detention period, asserting that it was not punitive, and demonstrated reluctance to order a release unless an exemption was granted by the Minister of Home Affairs, as seen in *Baluku* and *Mntambo*. In *Nibigira*, the court highlighted the dilemma of stateless persons, noting: "There is no country that is prepared to acknowledge the applicant as a citizen." Yet, it raised concerns about the implications of releasing such individuals, questioning whether they should be allowed to remain in South Africa without proper documentation or whether immigration officials should simply re-arrest and detain them. This reasoning underscores the systemic failure to provide clear protections for stateless persons, leaving them in a cycle of prolonged or repeated detention without resolution.

The criminalisation of migration

18. The criminalization of immigration and emigration, coupled with the denial of rights to non-citizens, renders impoverished migrants particularly vulnerable.[32] Criminal law is designed to punish individuals who commit acts that harm others or society. Irregular migration, however, does not inherently constitute a crime against persons, property, or national security. Criminalizing migration has proven ineffective in preventing irregular status and often leads to human rights abuses. Instead, a more humane and effective approach would focus on

[29] *Herbert Baluku v Minister of Home Affairs* Case No. 35164/2013.
[30] *Mntambo v Minister of Home Affairs* Case No. 20485/2015.
[31] *Nibigira v Minister of Home Affairs*[31] (41265/2011) [2011] ZAGPJHC 178.
[32] B Hudson 'The criminalisation of migration' (2007) Criminal Justice Matters 70 (1) 36.

comprehensive immigration policies that address the root causes of migration, provide safe and regular pathways, and protect the rights of all migrants.[33]

19. While the Immigration Act affords discretion to officers who, on *reasonable grounds*, believe a person is in the country illegally, the scope of discretion was clarified in *Ulde v Minister of Home Affairs*.[34] The Court confirmed that an officer who decides that an undocumented migrant is liable to be deported and has discretion whether or not to arrest and detain the person pending his or her deportation must construe the exercise of discretion in *favorem libertatis* when deciding whether or not to arrest or detain a person under Section 34(1) of the Immigration Act.

20. Section 49 of the Immigration Act acts as the legal benchmark to determine whether a person falls within the scope of Section 34. For instance, someone without valid documentation as outlined in Section 49 is categorised as a migrant and becomes subject to detention and deportation under Section 34. The inquiry is not about their status in respect of asylum seekers and refugees but rather a process where detention and possible deportation is the intended usage of the two sections.

21. This inconsistency raises concerns about the potential for arbitrary detention and the fair administration of immigration law. It is crucial to ensure that any new legislation is clear, coherent, and aligns with the broader legal framework to prevent such inconsistencies and safeguard the rights of all migrants.

22. The confluence of poverty, unemployment, crime, and endemic racism and xenophobia has fostered a climate of rising anti-immigrant sentiment in South Africa's townships and low-income communities.[35] The 2016 government initiative, Operation Fiela,[36] was implemented to combat increasing crime rates in these areas. Nevertheless, the program drew widespread condemnation from human rights organizations for its excessive focus on the arrest and deportation of undocumented foreign nationals.[37]

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[33] OCHRC 'The criminalisation of irregular migration' available at https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/CriminalisationIrregularImmigration.pdf

[34] Ulde v Minister of Home Affairs and Another (320/08) [2009] ZASCA 34; 2009 (4) SA 522 (SCA) ; 2009 (8) BCLR 840 (SCA)

[35] MC Van Hout & J Wessels '#ForeignsMustGo versus "in favorem libertatis": Human rights violations and procedural irregularities in South African immigration detention law' (2023) Journal of Human Rights 2.

[36] South African Government *Operation Fiela* (2015) https://www.gov.za/issues/operation-fiela.

[37] G Nicolson Operation Fiela: Thousands of arrests, doubtful impact (2015) Daily Maverick https://www.dailymaverick.co.za/article/2015-09-08-operation-fiela-thousands-of-arrests-doubtful-impact/.

23. The South African courts have been increasingly inundated with cases involving the arrest of migrants under section 49 of the Immigration Act. A troubling trend has emerged where individuals are apprehended solely due to their immigration status. This has led to a surge in applications[38] for release from immigration detention, particularly by asylum seekers who have been denied the opportunity to formally lodge their claims.

24. These cases highlight a systemic issue within the immigration system, where individuals are detained without adequate procedural safeguards or the opportunity to present their asylum claims. Such arbitrary detentions not only violate fundamental human rights but also undermine the principles of a just and equitable immigration system.

Places of detention

25. Migrants awaiting deportation may be detained at facilities designated by the Director-General of Home Affairs, including certain police stations, detention facilities, and Home Affairs offices. Typically, individuals awaiting deportation are transferred to the Lindela Repatriation Centre in Gauteng, South Africa's sole immigration detention centre.[39]

26. While South African law outlines specific conditions for detention, as detailed in Regulation 2.11, observers have consistently reported violations of these standards. These violations include overcrowding, insufficient access to healthcare, inadequate nutrition, and the detention of migrants, refugees, and asylum seekers alongside criminal offenders. Excessive use of force by authorities and limited access to legal representation have also been recurrent issues.

27. The Lindela Repatriation Centre, a privately run facility situated 30 kilometers from Johannesburg, was established in 1996 by the DHA and the Dyambu Trust. As South Africa's sole designated immigration detention facility, Lindela was initially housed in converted huts with a capacity of approximately 1,000 people. In 2020, the facility's capacity increased to

[38] S v Minister of Home Affairs and Others; M v Minister of Home Affairs and Others; R v Minister of Home Affairs and Others (2024/021421; 2024/025071; 2024/025073) [2024] ZAGPJHC 1695 para 1, D S L and Others v Minister of Home Affairs and Other [2024] ZAGPJHC 123 paras 5-9 and E C M v Minister of Home Affairs and Others (3152/2024) [2024] ZAECMHC 73 (27 August 2024) paras 6 – 10. These matters have also been reported in the media, for example K Mutendiro 'Asylum seekers fear arrest but can't access documents' Ground Up accessed at https://groundup.org.za/article/diepsloot-asylum-seekers-struggling-to-get-documents-for-years-say-they-live-in-fear-of-being-arrested-daily/

[39] UNHCR The UN Refugee Agency *Arrests detention and deportation https://help.unhcr.org/southafrica/get-help/arrest-detention-and-deportation/*.

4,000, but overcrowding remains a persistent problem.[40] Reports describe shared sanitary facilities for groups of 30 male detainees and overcrowded cells housing 45-60 individuals.

28. Beyond overcrowding, conditions at Lindela have been subject to significant criticism. Detainees have frequently complained about insufficient food provisions, with only two meals provided daily, and the failure to accommodate religious or dietary requirements. Additionally, detainees receive unwashed bedding, inadequate toiletries, and have reported infestations of fleas. The healthcare provision at the centre remains inadequate, posing a serious threat to the health of detainees.

Lack of proper procedural safeguards

29. Numerous barriers hinder migrants' effective access to justice. These obstacles include a general lack of knowledge, information, and capacity among migrants, migration officers, judges, and lawyers regarding available rights, redress mechanisms, and legal aid options.[41] To address this, legal representation should be readily available, free of charge, and accessible to those who cannot afford it. This includes border and transit areas, as well as detention and reception centres, particularly in cases involving deportation or detention.

30. It is imperative that migrants, especially those in detention or facing expulsion, have access to information in a language they comprehend and to translators or interpreters during legal proceedings. This enables them to understand and actively participate in their cases. However, the scarcity of legal aid and assistance, coupled with the absence of interpretation and translation services, often prevents migrants from effectively utilizing available legal mechanisms, effectively denying them access to justice.

31. There is a need for the Bill to include a provision that is designed to ensure that migrants appearing before Magistrate's Courts are afforded fair treatment and due process. By mandating that magistrates inform migrants of their rights, ensure their understanding of the proceedings, and provide necessary support services, this provision aims to:

    31.1. **Promote Access to Justice:** By guaranteeing access to legal representation, interpretation, and translation services, the provision enhances migrants' ability to understand and participate in legal proceedings.

[40] Global Detention Project Country Report *Immigration detention South Africa: Stricter control of administrative detention, increasing criminal enforcement of migration* (2021) 34 – 35.
[41] IOM UN Migration International Migration Law Unit *Migrants' access to justice: International standards and how the global compact for safe, ordely and regular migration helps paving the way* (2022) 7 – 8.

31.2. **Prevent Miscarriages of Justice:** By ensuring that migrants comprehend the charges against them and the potential consequences, the provision helps to prevent wrongful convictions or unjust sentences.

31.3. **Uphold Human Rights:** The provision aligns with international human rights standards, which emphasize the importance of fair trial rights, including the right to be informed, the right to legal representation, and the right to an interpreter.

31.4. **Enhance the Integrity of the Judicial System:** By ensuring that all individuals, regardless of their immigration status, are treated fairly and justly, this provision strengthens the integrity and legitimacy of the judicial system.

32. The absence of a robust legal framework not only perpetuates arbitrary detention but also disregards South Africa's obligations under international human rights law, which requires detention to be strictly necessary, proportionate, and time-limited. Urgent reforms are needed to address this protection gap, including the establishment of statelessness determination procedures to identify stateless persons and ensure their release when deportation is not possible.

33. As far back as 1998 the SAHRC issued a report following its own investigation and made the following comment: The report makes a number of findings about the arrest process. In the majority of cases, there were no reasonable grounds for an apprehending officer to suspect that a person was a non-national. A significant number of persons interviewed had identification documents which were either destroyed or ignored or which they were prevented from fetching from home. Apprehended persons were often not told or did not understand the reason for their arrest. Extortion and bribery are practises extremely widespread among apprehending officers. Reports of assault during arrest were not uncommon. Current immigration legislation combined with its interpretation has created an effective pass law requirement.[42]

The Impact of the Two Constitutional Court Judgments

34. The Constitutional Court judgments are having a profound impact on the landscape of immigration law in South Africa. These cases challenged the constitutionality of legislation that permitted administrative detention without judicial oversight for immigration purposes.[43] By scrutinizing the compatibility of such provisions with the rights enshrined in sections 12

[42]https://www.sahrc.org.za/home/21/files/Reports/Report%20into%20the%20Arrest%20and%20Detention%20of%20suspected%20migrants19.pdf.
[43] Lawyers for Human Rights (n 1 above) para 4.

(right to freedom and security of the person) and 35 (detention) of the Bill of Rights, these judgments have set important precedents for the protection of individual liberties and the fair administration of immigration laws.

35. The Constitutional Court judgments read collectively, have put the following safeguards in place when it comes to the detention of persons pending deportation:

    35.1. That Section 34(1) of the Immigration Act grants excessive discretionary power to immigration officers to detain individuals without adequate procedural safeguards. This power is exercised without clear guidelines or oversight, leading to potential abuses and arbitrary detentions.[44]

    35.2. That any detention pending deportation under section 34(1) is subject to judicial oversight to ensure that detentions are lawful and justified. This involves ensuring that there is access to adequate procedural rights for detainees, including the right to appear before a judicial officer within 48 hours of their detention, as the right to legal representation and the right to challenge the lawfulness of their detention before a court. These deficiencies in the legislation undermine the principles of fairness, justice, and human rights.[45]

    35.3. That at each instance when the decision to continue to detain a person pending deportation is made, that that decision maker, be it the immigration officer or the court, consider the interests of justice criterion. The imposition of the "interests of justice" criterion emphasizes that detention should only be used in exceptional circumstances.

    35.4. That detention under section 34(1) is limited to a period of up to 120 days.

36. These Constitutional Court judgments have significantly impacted detention practices and clarified the rights of detainees. Immigration officials and courts are now required to consider the interest of justice before detaining an individual and to ensure that the detainee's rights are protected under the Constitution.

The “Interests of Justice” Criterion

37. The proposed amendment to the Immigration Act introduces a critical consideration of the "interests of justice" in the context of detaining migrants. This provision requires immigration

[44] Lawyers for Human Rights (n 1 above) paras 47 -52.
[45] Lawyers for Human Rights (n 1 above) paras 53 -58.

officers to conduct interviews and assess whether the circumstances warrant the release of the individual, subject to reasonable conditions. While the term "interests of justice" is inherently flexible and can be interpreted in various ways, it is crucial to consider both its positive and negative connotations.

38. The term "interests of justice" is enshrined in several key legislative provisions, including sections 25(2)(d) and 35(1)(f) of the Constitution[46], as well as sections 100(2) and 102(1) of the Interim Constitution[47], and sections 167(6) and 173 of the current Constitution. Notably, it is frequently employed in section 60 of the Criminal Procedure Act (CPA)[48] specifically in subsections 60(1), (4), (9), (10), (11), and (12).

39. This versatile term encapsulates a broad and evocative judgment of fairness and justice for all parties involved. The precise interpretation and application of the term are highly contextual, and its adaptability can sometimes lead to imprecise understanding and misuse.[49]

40. Section 60 of the CPA provides a clear example of the potential consequences of misapplying the "interests of justice" concept. In subsection (1)(a), the term mirrors the constitutional criterion, encompassing a broad evaluation of all relevant interests, including the arrested person's right to liberty.[50] However, this broader interpretation is incongruous with the usage of the term in subsections (4), (9), and (10).[51]

41. For instance, in subsection (9), the court is instructed to weigh "the interests of justice" against the accused's right to personal freedom. In this context, the "interests of justice" cannot refer to a comprehensive evaluation of all interests, as this would inherently include the accused's liberty interests. Similarly, in subsection (10), the term cannot logically encompass the "personal interests of the accused.".

42. In analysing the questioned provision of the Immigration Act, the Constitutional Court in *Lawyers for Human Rights* held:

> This provision grants drastic powers to an administrative official, the immigration officer. It empowers the officer to deport an illegal foreigner without the need for a warrant

[46] Constitution of the Republic of South Africa, 1996
[47] Constitution of the Republic of South Africa Act 200 of 1993.
[48] Criminal Procedure Act 51 of 1977.
[49] S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat (CCT21/98, CCT22/98 , CCT2/99 , CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 para 46.
[50] S v Dlamini (n above) para 47.
[51] As above.

authorised by a court. To ameliorate the harshness of the exercise of this power, the provision requires the immigration officer to give the affected foreigner a written notice of the decision to deport and his or her right to appeal against the decision. [52]

Notably, the very same provision authorises an immigration officer to arrest and detain an illegal foreigner, pending his or her deportation. The exercise of this power is not subject to any objectively determinable conditions. Nor does the section lay down any guidance for its exercise. There can be no doubt that in present form section 34(1) offends against the rule of law by failing to guide immigration officers as to when they may arrest and detain illegal foreigners before deporting them. More so because this power may be exercised without the need for a warrant of a court. The detention is quintessentially administrative in nature.[53]

43. In *Dawood*[54] the Constitutional Court struck down a statutory provision that conferred wide discretionary powers on immigration officers without any guidelines. O'Regan J said:

> We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority. Such guidance is demonstrably absent in this case. It is important that discretion be conferred upon immigration officials to make decisions concerning temporary permits. Discretion of this kind, though subject to review, is an important part of the statutory framework under consideration. However, no attempt has been made by the Legislature to give guidance to decision-makers in

[52] *Lawyers for Human Rights para* 47.
[53] *Lawyers for Human Rights* (n above) para 48.
[54] Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) paras 54-55.

relation to their power to refuse to extend or grant temporary permits in a manner that would protect the constitutional rights of spouses and family members.

44. In light of the Constitutional Court's judgment in *Dawood*, the Immigration Amendment Bill provision of if the immigration official deems it to be in the best interest of justice to detain a migrant or not should be rejected, as it fails to provide the necessary guidance to ensure that the discretionary powers it grants to immigration officers are exercised in a manner that aligns with the protections afforded by the Bill of Rights. The Court in Dawood and further emphasised in Lawyers for Human Rights emphasized that legislation must not only respect constitutional rights but also provide clear guidelines to ensure that any limitations on those rights are justifiable.

45. The absence of such guidance in the Immigration Amendment Bill, particularly with respect to the discretion granted to immigration officials regarding whether to detain a migrant or not, risks unjustifiably infringing on the rights of individuals without adequate safeguards. As O'Regan J stated, discretion without clear legislative direction undermines the spirit and purpose of the Bill of Rights. Therefore, the Bill, in its current form, fails to meet the constitutional obligations of providing appropriate protection and guidance, and should be rejected to uphold the integrity of our constitutional framework.

46. The interpretation of the "interests of justice" should include specific considerations for stateless persons. Statelessness should be recognised as a mitigating factor against detention, given the practical impossibility of resolving their status through standard immigration processes. In cases involving stateless persons, the court should prioritise alternatives to detention and ensure regular reviews of detention decisions to prevent indefinite detention.

47. More generally provision and guidance to ensuring that the Constitution takes root in the daily practice of governance requires ongoing guidance in several key areas. These include legal, institutional, educational, and civic efforts to bridge the principles of the constitution with practical governance.

48. Recommended alternative wording that better align with the constitutional obligations of providing appropriate protection and guidance:

    An immigration officer may arrest and detain an migrant for purposes of deportation, provided that: (a) the officer conducts a thorough assessment of the individual's

circumstances, considering factors such as their family situation, health conditions, and any vulnerabilities;

i. the officer determines whether detention is the least restrictive measure necessary to achieve the immigration objective, taking into account alternative measures such as reporting conditions or electronic monitoring; and

ii. the officer ensures that the individual's rights and dignity are respected throughout the detention process, including access to legal counsel, healthcare, and basic necessities.

Alternatives to Detention

49. South Africa has a broad authority to detain categories of migrants and others seeking humanitarian protection or various migration categories into the country as their applications or administrative proceedings wind their way through the immigration legal system.[55] This detention is administrative in nature, meaning that it should never be punitive. Despite this technical legal distinction, the South African immigration detention infrastructure is indistinguishable from the criminal detention context because of the movement of immigration detainees to Lindela for deportation.[56]

50. Alternatives to immigration detention requires that legislation and policy framework, whether formal or informal ensures that people are not detained for reasons relating to their immigration status.[57] Globally, the interests in immigration detention is perpetuated by the understanding that detention is fundamentally punitive, especially to those categories of persons who, in a sense, did not commit a criminal offense.

51. On the other hand, governments have become increasingly apprehensive about admission and regularisation of migrants, refugees and asylum seekers in their territories for various reasons, including public safety and fiscal burdens. However, ATDs listed below have been

[5555] Immigration Act (n 14 above) section 34.
[56] Determination of places of detention of illegal foreigners pending deportation https://www.dha.gov.za/index.php/immigration-services/places-of-detention-for-those-pending-deportation (accessed 16 November 2024)
[57] Human Rights Watch 'Dismantling Detention: International Alternatives to Detaining Immigrants' (2021) https://www.hrw.org/report/2021/11/03/dismantling-detention/international-alternatives-detaining-immigrants (accessed 16 November 2024)

proven effective in other regions[58] in that the South African government can achieve both the interests of protection of a wider community from challenges posed by immigration into South Africa or ensure compliance with the country's immigration laws and proceedings (including removal/deportation) while also, recognising the fact that there are alternatives that can achieve a similar objectives to those that the government is pursuing.[59] Essentially,

> In the context of immigration, countries should be implementing the least restrictive means necessary to accomplish legitimate government objectives. This means that, beyond a brief initial period to document migrants' entry, identities, and claims, authorities should in general release migrants and impose conditions only when necessary and proportionate to a legitimate aim. Any conditions imposed on release should be solidly grounded in an individualised assessment of the migrant's circumstances, such as the likelihood that they would abscond.[60]

Rationale for Alternatives to Immigration Detention

52. International law requires that immigration detention must be a measure of last resort.[61] It constrains the use of immigration detention, requiring that it can be applied only when prescribed by law, and when necessary and proportionate for a legitimate purpose as an exceptional measure of last resort, for the shortest possible period of time. It absolutely prohibits the detention of children for immigration-related purposes.[62] In practice however, despite some promising developments, detention of asylum-seekers and refugees is a persistent and growing challenge in South Africa. Asylum-seekers are sometimes mandatorily detained upon entering South Africa irregularly or are detained for long periods or indefinitely. They are often held in inadequate or degrading conditions, including sometimes in criminal justice facilities.

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[58] UNHCR 'Options for governments on open reception and alternatives to detention (2015) https://www.unhcr.org/sites/default/files/legacy-pdf/5538e53d9.pdf (accessed 22 November 2024) The reports conducts a comparative analysis of ATDs in countries such as Belgium, Netherlands, UK, USA, Zambia, Canada and Austria.

[59] UNHCR 'Unlocking Rights: Towards ending immigration detention for asylum seekers and refugees' (2024) https://www.refworld.org/policy/polrec/unhcr/2024/en/148655 (accessed 16 November 2024)

[60] n (3) above

[61] UNHCR 'Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention' https://www.refworld.org/policy/legalguidance/unhcr/2012/en/87776 (accessed 22 November 2024)

[62] UNHCR's position regarding the detention of refugee and migrant children in the migration context http://www.refworld.org/docid/503489533b8.html. The Detention Guidelines further restate, in paragraph 51 and successive, the provisions of the Convention on the Rights of the Child (CRC) regarding international obligations in relation to children and the guiding principles for their protection.

53. As the Immigration Act strives to manage arrivals at borders and to process asylum claims fairly and efficiently, how can immigration detention be restricted so that it truly becomes a measure of last resort? We believe that the Act should explicitly make additions in its language, with the aim to limit immigration detention and its impact:

Procedural Safeguards

53.1. The Act should make it explicit that the detained refugees, asylum seekers and migrants receive the information regarding the circumstances of their arrests and detention at the time that they are taken into detention. The Act should include that the detained person has prompt access to information about their rights in detention, including availability of legal representation. As much as the Constitution provides for these safeguards, the reality of the implementation of these procedural safeguards when it comes to these categories of persons is paradoxically fraught with the confusion between the extent to which the refugees, asylum seekers and refugees can fully enjoy them.

53.2. Further, the access to this information is not readily available to them or it is not communicated in a way or language that they comprehend. International law in respect of the right to liberty requires that detained asylum seekers and refugees need to have access to procedural rights, particularly the right to information regarding their detention, in a language that they understand, access to legal representations and regular judicial review in respect of detention and extended detention.[63]

53.3. Furthermore, the Act ought to include international standards that affirm the need for unrestricted access to places of immigration detention by independent monitoring groups, such as UNHRC and partners. This is underpinned by Article 35 of the 1951 Refugee Convention which states that independent monitors, including UNHCR should have unhindered access to all places where asylum seekers and refugees are deprived of liberty including places of *de facto* detention.

Access to Information

[63] 1951 Convention (n 4 above) Article 16.

53.4. The Act should include that the detained person must be immediately informed of their rights and given access to them in terms of Section 34 of the Constitution. The Act should contain this language.

Timely Detention Reviews

53.5. The right to be brought promptly before a judicial or other independent authority to have a detention decision reviewed is a crucial procedural safeguard. Such reviews should be automatic, and take place in the first instance within 48 hours of the initial decision to hold the asylum-seeker or other migrant. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release including alternatives to detention until the matter is resolved.

Immigration Officials Preliminary Inquiries

53.6. Prior to arrest and detention, the immigration officials should be equipped with enough pre-screening interview and determination skills to discern whether persons should be subjected to the detention or further inquiries. If the preliminary inquiries are conducted prior to a person being brought to court for an inquiry, this would limit the time spent in the court process determining whether a person should be kept in continuous detention or not.

Screening

53.7. First line officers – such as police or immigration authorities – need to base their decisions to detain or release on a detailed and individualised assessment in line with international law. Appropriate screening or assessment tools can help guide decision-makers, including to take account of the special circumstances or needs of particular categories of asylum-seekers and other migrants. First contact personnel – such as immigration officials, police officers, social welfare, health and prison officers and civil society personnel – must be mandated to identify vulnerable migrants and asylum-seekers. A “migrant profiling form” may be used during the initial interview, which would help identify whether the individual falls within one of the following categories: asylum-seeker, victim of trafficking (including presumed trafficked person and potential trafficked person), unaccompanied or separated child (UASC), stranded migrant, stateless person or other vulnerable migrant.

Referral to actors providing protection services and various legal processes should then be implemented on a case-by-case basis.

Proposed Alternatives to Detention

54. Alternatives to detention must, themselves be compliant with human rights and adequately prescribed by the law. The extent of this prescription in respect of refugees and asylum seekers lies with the discretion of the immigration officials and the courts. The Bill must address and make provision for the following ATDs in addition to those available in the domestic instruments such as the Criminal Procedure Act.

Network of open accommodation options

55. Countries who have a strong attraction for refugees and migrants have adopted a culture of open accommodation centres, which includes flats and purpose built centres that are often referred to as Reception Centres. These operate differently from refugee camps and other encampment facilities which would limit freedom of movement and social or economic participation. This alternative requires participation for all the stakeholders, including community-based organisations and CSOs.

56. Since 2006, the International Social Service, Hong Kong branch (ISSHK), a non-governmental organization for instance, has run a government-funded programme to assist refugee and torture claimants in Hong Kong SAR, China, ("*non-refoulement claimants"),* to live in the community while their cases are being processed.[64] A contract is signed between the persons and ISSHK on rights and responsibilities. ISSHK also provides food, clothing, toiletries, medical assistance and education for children, based on careful assessments of the individual's situation and history. All support is provided "*in kind*".[65] For its part, the Hong Kong Immigration Department (HKID) issues a recognizance document with photo, renewable monthly, to certify that the person has a claim under process and has permission to stay in Hong Kong. All non-refoulement claimants are required to report in person to the HKID once a month or as scheduled. Failure to report is tantamount to absconding and consequently results in an investigation and potential arrest.

57. *Benefit of this alternative:*

[64] International Social Service Hong Kong Branch (ISS-HK) 'Submission to the Joint meeting of the Legislative Council's Security and Social Welfare Panel (2006) https://www.legco.gov.hk/yr05-06/english/panels/se/papers/sews0718cb2-2788-2e.pdf (accessed 16 November 2024).
[65] ISS-HK 'Administering and Delivery of Assistance for Non-Refoulement Claimants' https://www.isshk.org/en/our_services/detail/21/ (accessed 18 November 2024).

a) *Cost of Detention* – This alternative offers a cost-benefit to both the Department of Home Affairs and the Department of Correctional Services. Detention has proven to be generally costlier than non-detention measures.[66] In the context of this alternative, the costs would not only be the burden of the state but also the stakeholders such as the domestic and international CSOs and players. The use of this model will also ensure that procedural safeguards are easily managed because of the access to information that would be available in these settings.

b) *Human rights approach to immigration detention* – The right to liberty and the right to not be arbitrarily detained are part and parcel of the promise of alternatives to immigration detention. ATDs reflects the states obligations to ensure that any decision to detain takes into account less invasive means of achieving the same ends. ATDs according to the Global Compact on Refugees and Global Compact on Migration both seek to advance investment of resources, development of strong systems of ATDs and referral processes that uphold human rights while ensuring compliance with immigration and asylum proceedings.

In-Person Reporting

58. Supervision may be conducted by the Immigration Inspectorate and the South African Police Services. Under a supervision arrangement, the person would be obliged to report to the police authority or to the immigration officials or assigned supervisor at certain times. To make it as convenient as possible for the person subject to the supervision arrangement, the reporting may be at the police station or immigration office situated closest to where he/she is residing. An individual may also be required to surrender his/her passport or other identity document or be required to check-in as often as reasonably possible. The decision on supervision or detention can be appealed at any time according to the interests of justice. The required integrated processes should include:

    a) Reporting to a various number of departments, for instance, if it is a family unity with children, persons with disabilities and the elderly, the supervision may be assigned to the Department of Social Development.

[66] Human Rights Watch' Immigrant Detention Is Expensive, and Alternatives Are Just as Effective' https://www.hrw.org/news/2021/11/15/immigrant-detention-expensive-and-alternatives-are-just-effective (accessed 22 November 2024) *Case Management Programs Cost Less and Are More Humane than Imprisoning Asylum Seekers.*

b) Reasons for non-compliance need to be properly assessed and some flexibility shown where there are good reasons for any delays.

c) Non-compliance with the supervision arrangement on the part of the person without good reason should be prosecuted where it is necessary to do so.

59. *Benefit of this alternative:*

a) *Tracking systems:* The Department of Home Affairs has been struggling with the backlog of cases. Part of the reasons for the backlog includes limited access to the RROs where people are, at times unable to attend to their appointments or access the RROs for follow-up measures. In-Person Supervision will create a culture of ensuring that the refugees and asylum seekers understand the need to be in proximity of the RROs until the adjudication process is complete. Moreover, the in person-supervision will ensure legitimacy to the adjudication process and decrease the revolving door of administrative burdens being placed on the courts in terms of adjudicating over administrative matters. There is no empirical evidence that suggests that the prospect of being detained deters irregular migration, so the solutions should not be based on deterrence but rather a protective mandate based on human rights.[67]

b) *Alignment with human rights* – The decision to detain certain categories of persons and deprive them of their liberty should not simply be based on the preconceived notion that they will abscond the administrative processes. The legal and factual background for authority to deprive someone of liberty should be carefully justified and clearly stated in the decision to do so. For example, the decision to detain asylum seekers and refugees should not be simply based on the fact that they crossed the border illegally. The 1951 Convention and its soft laws is clear in that because of the nature of the flight of refugees, punishment or refusal to grant them refugee status based on illegal entry is unlawful. In-person reporting will allow for the tracking of asylum seekers who do not have boarder authority documents and ensure compliance with international human rights standards.

[67] A. 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, (2011) *UNHCR Legal and Protection Policy Research Series* (1) http://www.unhcr.org/refworld/docid/4dc935fd2.html as restated in United Nations, Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau, A/HRC/20/24, 2 April 2012, para. 8, available at: http://www.unhcr.org/refworld/docid/502e0bb62.html (accessed 18 November 2024).

60. State-funded bail and community-based accommodation are humane alternatives to immigration detention that prioritise compliance with immigration processes while maintaining dignity of detainees and reducing costs. State-funded bail eliminates financial barriers by covering bail payments for individuals who cannot afford them, ensuring equitable access to supervised release. Used together with community-based accommodation and supervision, it allows individuals to reside in supportive, monitored environments, fostering stability and engagement through access to legal, social, and educational services. These alternatives promote integration and reduce reliance on detention facilities.
61. Under contract with the Canadian Border Services Agency, the Toronto Bail Program (TBP), a non-profit organisation, operates to support immigration detainees, including asylum-seekers and persons awaiting deportation, to be released from detention through bail.[68] The TBP acts as the "bondsperson" for those who have no family or other eligible guarantors to pay bond and, in this way, removes the financial discrimination inherent in other bail systems. Under the TBP, no payment is made, rather asylum-seekers are released based on the TBP's guarantee.[69]
62. The TBP carries out interviews to assess suitability of candidates for their supervision. Asylum-seekers agree voluntarily to cooperate with TBP and all immigration procedures, including any reporting conditions set by the TBP as well as to depart Canada in the event of a final negative decision on their asylum or immigration application. As per the contract signed between the asylum-seeker and the TBP, they agree to appear for all appointments, to notify the TBP of a change of address and to participate in meaningful activities while in Canada (e.g. education, vocational training, work). Reporting requirements generally reduce as trust is established between TBP and the asylum-seeker.
63. Unannounced visits to the asylum-seeker's residence may be organised by the TBP. Failure to comply with reporting obligations may result in the TPB informing the provincial authorities, in which case the person would be placed under a Canada-wide arrest warrant. TBP makes it explicit that failure to report may result in return to detention.

[68] Toronto Bail Program: Reducing pretrial detention through supervision and support https://justice-trends.press/toronto-bail-program-reducing-pretrial-detention-through-supervision-and-support/ (accessed 16 November 2024).
[69] UNHCR 'Options for governments on open reception and alternatives to detention' https://www.unhcr.org/sites/default/files/legacy-pdf/5538e53d9.pdf (accessed 16 November 2024).

64. In years 2012-2013, 95.1% of a total of 415 supervised individuals complied fully with the programme. Part of the success of the TBP relates to the provision of case management including a comprehensive orientation at the beginning of the programme. TBP staff provide individuals with information on how to access legal, psycho-social and healthcare services in Ontario.

65. *Benefits of this alternative*

a) I**ncreased Compliance**: As proven by the TBP's high compliance rate (95.1% in year 2012-2013) indicates that structured, supportive programs encourage adherence to immigration procedures.[70]

b) **Reduction in Financial Barriers**: The model avoids financial discrimination by eliminating bail payments, allowing access to supervised release for individuals without economic means.

c) **Community Engagement**: Encourages meaningful participation in education and work, promoting integration and reducing reliance on state detention facilities.

d) **Resource Efficiency**: Reduces costs associated with prolonged detention while maintaining public safety and system integrity.

66. *Critical Caveats*

a) General information about bail, lawyers and legal aid needs to be available in multiple languages and in various forms of communication.

b) Bail hearings to be preferably automatic, recognising that bail is also particularly difficult for many asylum seekers to access given their vulnerable financial situation, so efforts to minimise such financial disadvantage should be welcomed.

Release from Detention Pending Voluntary Return

67. To maintain an effective immigration process, the legislation could also address the possibility of alternatives to immigration detention for persons who have made their applications and have no administrative or judicial remedies available to them under the law.

[70] Canada and TBP Program' State funded bail and community supervision' (2013-2014) https://www.unhcr.org/sites/default/files/legacy-pdf/5538e53d9.pdf (accessed 22 November 2024) 8.

68. Allowing release from detention pending voluntary return offers a pragmatic and humane alternative for individuals who have exhausted all administrative or judicial remedies in their immigration processes. This approach ensures that individuals awaiting deportation are not unnecessarily detained, reducing the strain on state resources and promoting compliance through voluntary cooperation. Implementing this alternative aligns with constitutional principles emphasising human dignity and proportionality in state actions.

69. This approach is particularly suitable for the South African, where detention facilities are often overcrowded and under-resourced. Overcrowding is a major issue in remand centres and facilities located in urban areas. At least ten prisons have an occupancy rate of over 200%.[71] This situation is attributed to court backlogs, administrative burdens, minimum sentences, limited access to mandatory pre-release programmes and prolonged pre-trial detention, sometimes lasting multiple years. Financial constraints also hamper the release of prisoners, as many are unable to pay the fines or bail.[72]

70. Offering supervised release for individuals awaiting voluntary return would decrease detention costs, mitigate the risk of rights violations, and foster trust in immigration processes. By addressing procedural fairness and dignity, such measures would contribute to a more effective and humane immigration system. In its 2024 Prison Project Report, the South African Human Rights Commission ("SAHRC") recommended that persons that strategies are needed to alleviate the pressure of detention facilities population by reduction of bail payments, non-custodial measures and separate detention areas.[73]

Considerations by the Court Upon Confirmation for Detention for Deportation

71. The courts generally do not look at alternatives before ordering detention because of the idea that if a person is undocumented there is nothing stopping them from leaving the country and not seeing the administrative process through. The courts must allow for representations even in cases of detention for purposes of deportation. The court must take into account the prospects of return, the person's willingness to actively work towards return, the risks of absconding and any new facts or developments in the personal and country of origin situation.

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[71] Prison Insider: South Africa 2023 Country Profile https://www.prison-insider.com/en/countryprofile/afrique-du-sud-2023 (accessed 18 November 2024)
[72] South African Human Rights Commission 2024 Report: The National Prisons Project of the SAHRC https://www.sahrc.org.za/home/21/files/Reports/The%20Nationals%20Prisons%20Project%20of%20SAHRC.1998.pdf (accessed 18 November 2024)
[73] n 16 page 48.

72. The courts often prioritise the risks of absconding or non-compliance with the administrative process over exploring community-based alternatives. Courts frequently assume that undocumented individuals pose a significant flight risk, which discourages judicial scrutiny of alternatives. This presumption leads to a default reliance on detention, with insufficient exploration of less restrictive measures that could ensure compliance with immigration procedures.

73. The Act should make additions to state that the court should consider the following factors when considering immigration detention:

    73.1. **Risks of Absconding**: Instead of assuming flight risk, courts should require evidence of specific behaviours or circumstances indicating a likelihood of absconding. Alternatives like bond payments, community-based monitoring, or designated residence requirements could address these risks more proportionately.

    73.2. **Evolving Circumstances**: Courts must allow for periodic review of detention orders to account for changes in the individual's circumstances or the country of origin. This includes shifts in political or security conditions that may impact the feasibility of deportation.

Implementation Considerations

74. **Training and Capacity Building**: Equip immigration officers and judiciary members with training to evaluate and apply ATDs effectively. Immigration officers, members of the judiciary, and enforcement personnel must be equipped with thorough training to evaluate and apply ATDs while balancing public interest and the rights of the individuals involved. This training should encompass not only the legal frameworks but also practical aspects of assessing risk factors, understanding human rights implications, and managing cases without resorting to detention.

75. **Collaboration with NGOs**: Leverage partnerships with non-governmental organisations experienced in supporting immigrants and asylum seekers to provide community-based case management. Leveraging the extensive networks and expertise these organisations have in supporting immigrants and asylum seekers. NGOs possess the resources and experience needed to implement community-based case management programs that monitor compliance and support the integration of asylum seekers within society

76. **Clear Guidelines and Monitoring**: Develop detailed protocols to monitor compliance with ATDs, ensuring consistent and transparent application. Guidelines within the wording of the Acts are essential to uphold the consistent and transparent application of ATDs. This involves developing detailed protocols that outline the criteria and processes for implementing ATDs and ensuring oversight through continuous monitoring. Consistent adherence to such guidelines could be supported by independent bodies tasked with reviewing the use of ATDs and reporting on compliance.

Overall Benefits of Alternatives to Detention

77. **Improved Compliance Rates**: Evidence from international models shows that individuals in supervised ATD programs have higher rates of compliance with immigration requirements. Evidence from international models strongly supports the argument that individuals in supervised alternatives to detention (ATD) programs tend to have higher rates of compliance with immigration requirements compared to those in detention.[74] This is largely because ATDs foster greater trust between asylum seekers and the immigration system.

78. **Dignity and Humane Treatment**: ATDs respect the dignity of individuals and reduce the psychological and physical harm associated with detention. One of the most compelling reasons to implement ATDs is the inherent respect for the dignity of individuals. Detention, especially in overcrowded and under-resourced immigration detention facilities, can cause significant psychological and physical harm.

79. **Economic Advantages**: Community-based alternatives are more cost-effective compared to traditional detention, optimising state resources. The financial benefits of ATDs over traditional detention are significant and have been demonstrated in various international contexts. By reallocating funds from the operation of detention facilities to more efficient, community-based alternatives, South Africa can achieve a dual benefit of ensuring better conditions and economic participation of migrants and asylum seekers while optimising government spending. Moreover, ATDs can free up resources within detention centres for individuals who pose a higher security risk, ensuring that detention remains reserved for those who truly require it while reducing unnecessary expenditure on individuals who are not a risk to the community.

[74] European Alternatives to Detention Network ' A review of the European Alternatives to Detention Network's advocacy and influencing work in Europe, 2017-2023' https://atdnetwork.org/wp-content/uploads/2023/12/EATDN-Impact-Study-2023.pdf (accessed 18 November 2024)

80. Self-deportation, also known as voluntary departure, is a process where an individual chooses to leave a country voluntarily rather than facing detention and deportation proceedings. While it can offer a less restrictive alternative to detention, its feasibility and practicality in South Africa are complex and depend on various factors.

Feasibility:

81. **Legal Framework:** South African immigration laws do not explicitly provide for self-deportation as a standard procedure. However, in certain cases, a person may voluntarily deport themselves if they have satisfied the immigration officer that they will leave South Africa within 14 days (or longer, with good cause). In this case the person will be provided with a 'Form 21', which will require them to report back to the Department of Home Affairs to prove that they are leaving South Africa. This option should be accessible throughout the deportation process.[75]

82. **Practical Considerations:** Self-deportation requires individuals to have the necessary travel documents, funds for transportation, and arrangements for their return to their home country. These resources may not be readily available to all migrants, especially those who are undocumented or economically disadvantaged.

83. **Humanitarian Concerns:** Certain individuals are exempt from detention for deportation purposes. This includes asylum seekers and refugees, who are shielded by the principle of non-refoulement. This principle, enshrined in Section 2 of the Refugees Act, prohibits states from returning individuals to countries where they may face persecution or threats to their life, physical safety, or freedom.[76]

Practicality:

84. **Limited Enforcement Mechanisms:** Self-deportation relies on individuals' willingness to comply. Without effective enforcement mechanisms, there is a risk of non-compliance, leading to further detention and deportation proceedings.

85. **Potential for Abuse:** Self-deportation could be used as a tool to pressure individuals to leave the country without due process or adequate consideration of their circumstances.

[75] Detention and Deportation in South Africa - Scalabrini
[76] Ibid

86. **Impact on Human Rights:** Self-deportation may not always be in the best interests of individuals, particularly those who are fleeing persecution or violence. It is crucial to balance the need for effective immigration control with the protection of human rights.

The Potential Challenges and Risks Associated with Self-Deportation.

For Individuals:

87. **Vulnerability to Exploitation:** Individuals may be more susceptible to exploitation by human traffickers or smugglers during their journey back to their home country. In 2005, the International Labour Organisation estimated that, globally, there were approximately 2.4 million victims of human trafficking at any given time.[77]

88. **Lack of Support and Resources:** Self-deportation often leaves individuals without adequate support or resources to reintegrate into their home country, potentially leading to poverty and hardship. Many individuals experience feelings of loneliness and isolation due to the loss of crucial support networks, such as family, friends, and community, which most people take for granted. [78]

89. **Re-entry Attempts:** Some individuals may attempt to re-enter South Africa illegally, further straining the immigration system and potentially leading to increased crime rates.

90. **Human Rights Violations:** In some cases, self-deportation may result in individuals being returned to countries where they face persecution or human rights abuses.

For the State:

91. **Limited Enforcement:** Self-deportation relies on individuals' willingness to comply, which can be difficult to enforce. This may lead to individuals remaining in the country illegally.

92. **Increased Strain on Resources:** The state may still need to allocate resources to identify and monitor individuals who have been granted self-deportation, putting a strain on already limited resources.

93. **Potential for Abuse:** Self-deportation could be used as a tool to pressure individuals to leave the country without due process or adequate consideration of their circumstances.

[77] ps://www.unodc.org/toc/en/crimes/human-trafficking.html
[78] Refugees, Asylum Seekers and Migrants - Amnesty International

94. It is important to note that self-deportation should be considered as a last resort and only in cases where it is deemed safe and feasible for the individual.

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PROPOSED AMENDMENTS TO THE WORDING OF THE BILL

Specific proposed amendments to the Bill

Clause	Proposed amendment currently in the Bill	LHR proposed amendment/insertion
New clause proposed	None	**Proposed insertion of definition of "interests of justice"** ***Interest of justice*** *means the overall public good, balanced against the individual rights and circumstances of the person concerned. It should be determined by considering the following factors:* *i. What the persons current documentation status is and whether they have been given an opportunity to regularise their stay in the Republic. In this regard, special consideration must be given if they are an asylum seeker, refugee and/or a stateless person.* *ii. The specific circumstances of the individual, including their family situation, health conditions, age, and any vulnerabilities.* *iii. The least restrictive measure necessary to achieve the immigration objective, taking into account alternative measures such as reporting conditions or electronic monitoring.* *iv. The protection of the individual's rights and dignity, including but not limited to access to legal counsel, healthcare, and basic necessities.* *v. The human rights obligations owed by the Republic to the individual.* *vi. Consideration of whether or not the person has been detained under section 34 prior to this instance on a separate occasion or occasions.*
34(1A)(a)	'(1A) An immigration officer may arrest and detain an illegal for purposes of deportation,	**Proposed insertion of section34(1A)(h)**

	provided that— (a) he or she has interviewed the foreigner concerned and considered whether the interests of justice permit the release of such foreigner subject to reasonable conditions, and must, if he or she so concludes that the interests of justice permit the release of such foreigner, impose reasonable conditions and record the release and reasons therefor on a prescribed form;	"When an immigration officer makes a determination under section 34(1A)(a), such immigration officer must: (i) conduct a thorough assessment of the individual's circumstances, including but not limited to considering factors such as their access to documentation, their personal and family circumstances, health conditions, and any additional vulnerabilities; (ii) whether detention is the least restrictive measure necessary to achieve the immigration objective, taking into account alternative measures; and (iii) ensure that the individual's rights and dignity are respected throughout the detention process, including their due process rights such as access to legal counsel, interpretation services, healthcare, and basic necessities. (iv) assess the feasibility of community-based alternatives to detention, prioritising these measures unless clear evidence supports the necessity of detention as a measure of last resort."
New clause proposed		**Proposed insertion of section 34(1A)(i) as follows:** "a court in terms of sections (b) and (e) must, in reaching their decision, consider whether there are alternatives to detention available in each instance."
New clause proposed		**Proposed insertion of 34(1)(B)** **Safeguards for persons appearing before courts** (1) When a person appears before a court under any provision under this Act, the court must, before proceeding with the matter, ensure that the migrant: *i. is informed of their rights in a language that they understand, including the right to legal representation, the right to an interpreter, and the right to appeal;* *ii. understands the charges or allegations against them;*

		iii. understands the potential consequences of the proceedings; and *iv. has had a reasonable opportunity to consult with legal counsel or an interpreter.* (2) The court must take all necessary steps to ensure that the migrant understands the proceedings and can participate effectively. This may include: *i.* p*roviding interpretation and translation services in a language that the migrant understands;* *ii. (appointing legal aid counsel to represent the migrant, if necessary; and* *iii. ensuring that the migrant is not subjected to any form of coercion or undue influence.* (3) The court must document the steps taken to ensure the migrant's understanding and participation in the proceedings.

SUMMARY OF RECOMMENDATIONS AND CONCLUSION

95. The Immigration Amendment Bill, in its current form, presents significant concerns that could potentially undermine South Africa's commitment to human rights and the rule of law. The lack of clear definitions and guidelines, particularly concerning the term "interest of justice," could lead to arbitrary and discriminatory decisions. The potential for the misuse of detention as a tool for immigration control, without adequate safeguards, is alarming. Furthermore, the Bill's potential impact on stateless persons, who are already one of the most vulnerable groups, is a grave concern.

96. To address these concerns and ensure the Bill aligns with international human rights standards, the following recommendations are proposed:

97. There must be clear definitions and guidelines that:

    97.1. Provide a clear and comprehensive definition of "interest of justice" that prioritizes the human rights of individuals and ensures that detention is used as a last resort.
    97.2. Establish clear guidelines for the use of detention, including time limits, regular reviews, and access to legal aid.
    97.3. Develop specific mechanisms to identify and protect stateless persons, ensuring they have access to legal aid and other essential services.
    97.4. Consider alternative measures to detention, such as reporting conditions or electronic monitoring, for stateless persons.
    97.5. Ensure that all individuals, including asylum seekers and migrants, have access to fair and efficient procedures, including the right to legal representation.
    97.6. Implement robust mechanisms to review detention decisions and expedite release where appropriate.
    97.7. Prioritize non-custodial measures, such as reporting conditions or electronic monitoring, whenever possible.
    97.8. Invest in community-based alternatives to detention, such as case management and support services.

98. The Bill should explicitly incorporate a range of alternatives to detention. These alternatives, such as reporting conditions, or community-based supervision, should be considered and implemented whenever feasible. By prioritizing non-custodial measures, the government can

reduce reliance on detention, promote human rights, and allocate resources more effectively.

99. The Bill should explore the possibility of introducing self-deportation as an alternative to detention. Self-deportation allows individuals to voluntarily leave the country within a specified timeframe, subject to certain conditions such as reporting requirements or surrendering travel documents. This approach can alleviate the burden on detention facilities, reduce costs, and provide a more humane solution for many individuals.

100. Additionally, the Bill should consider repealing Section 49 of the Immigration Act. This section, which outlines the circumstances under which a person may be detained, often overlaps with the provisions introduced by the Amendment Bill. This overlap can lead to inconsistencies and confusion in the application of detention powers. By removing Section 49, the Bill can streamline the legal framework and ensure clarity in the decision-making process regarding detention.

101. In addition to the amendments and/or suggestions contemplated for the Bill, the following broad recommendations are made:

101.1. Training for officials on statelessness - invest in training for immigration officers, border personnel, and judicial authorities on human rights, including on how to identify and appropriately handle cases of statelessness, ensuring compliance with constitutional and international obligations.

101.2. Explicit Protection from indefinite detention - amend the Bill to include provisions explicitly prohibiting the indefinite detention of individuals whose deportation is impossible due to statelessness or other barriers. Ensure regular judicial review of detention in cases involving these individuals.

101.3. Access to legal representation - ensure that all persons including stateless persons have access to free legal representation and interpretation services during detention reviews and any proceedings affecting their immigration or citizenship status.

101.4. Prohibition of deportation without feasibility - mandate that deportation orders for stateless persons only be issued after confirming that a State is willing to accept them and to to a State that will deny the person citizenship. Deportation should not proceed where removal is impossible, as this perpetuates cycles of arbitrary detention.

102. Finally, we make the following statelessness-specific recommendations:

102.1. Establish a statelessness determination procedure - introduce a dedicated procedure to identify and recognise stateless persons in South Africa. This mechanism should operate independently and ensure that stateless individuals are not subjected to arbitrary detention..

102.2. Individual assessments that take account of statelessness - routine detention or a one-size-fits-all approach is arbitrary. States have an obligation to identify and act on statelessness and other vulnerabilities, and to protect individual rights. To prevent discrimination and protect those in vulnerable circumstances, states must tailor their decision making to individual circumstances and put in place mechanisms to identify and address vulnerability.

102.3. Legal status and documentation for stateless persons - provide stateless persons with temporary legal status and documentation, allowing them to access basic rights and services while their status is being resolved.

102.4. Community-based alternatives - develop community-based alternatives to detention specifically tailored for stateless persons, such as case management programs, housing support, and access to healthcare and education.

102.5. Data collection and monitoring - establish a centralised system to collect data on stateless persons in detention, their treatment, and outcomes. This data should inform evidence-based policy reforms and be regularly reviewed by independent oversight bodies.

102.6. Incorporate international standards on statelessness - align the Bill with South Africa's international and regional human rights obligations. The obligation of the state to identify stateless persons within its territory or subject to its jurisdiction is implicit to international human rights law. While South Africa not a state party to the 1954 Convention, the obligation stands to the extent that it is necessary to identify stateless persons in order to fulfil other human rights obligations. For example, it may be that the obligation to not discriminate can only be fully respected and fulfilled if stateless persons are identified so as to ensure they are not directly or indirectly discriminated against.

103. By adopting these recommendations, South Africa can ensure that its immigration system is both effective and humane, upholding the rights and dignity of all individuals, regardless of their immigration status.

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ENDORSEMENTS

Organisations

Consortium for Refugees and Migrants in South Africa (CoRMSA)

Equal Education Law Centre

Save the Children South Africa (SCSA)