
Towards a Responsible Framework for the Arrest, Detention and Repatriation of Illegal Foreigners: A Human Rights Perspective of the Immigration Bill

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1. Introduction

In the Southern African region people leave their countries and move to other places for a large variety of reasons. These include the search for economic and business opportunities, tourism and study. In addition there are people who have been forced to leave their countries as a result of war, persecution and natural disasters.

This migration is compounded by the growing economic inequalities prevalent between and within countries. Vulnerable groups such as economic migrants, political refugees, and victims of natural disasters form part of a mixed flow of forced and voluntary migrants who are making use of the same migration routes and strategies.

Although there is great emphasis on the mobility of goods, capital and communication in the new global environment exemplified in the region through processes around the New Partnership for Africa's Development (NEPAD), this generosity does not extend to the movement of people, especially migrant workers, refugees and asylum seekers. It has become international practice for governments, and South Africa is no exception, to control migration through restrictive immigration policies, such as excessive visa requirements, and deterrent measures such as punitive and arbitrary detention, carrier sanctions, rejection at borders and large repatriation programmes. Ironically, despite increased efforts to prevent illegal or irregular migration, migration by irregular means seems to be consistently increasing.

South Africa's immigration policy is under revision and is currently debated by the Portfolio Committee for Home Affairs. The drafting of new immigration legislation gives the South African legislators the opportunity to create a new migration system that will not only promote skilled migration and economic growth but also the development of a rights-based approach in its protection of vulnerable and marginalized categories of migrants. However, instead of replacing some of the most offensive aspects of the Aliens Control Act, the proposed Immigration Bill seeks to perpetuate the discriminatory immigration practices of the past. Thus, the Department of Home Affairs intends to continue its burdensome enforcement system of arresting, detaining and deporting migrants.

In order to complement the powerful socio-economic arguments provided by a range of perspectives through this seminar, Lawyers for Human Rights (LHR) believe that a human rights perspective is a necessary foundation for bringing a responsible framework for immigration in South Africa. This is essential for a constructive approach for regional integration in Southern Africa.

In the analysis of the proposed Immigration Bill, Lawyers for Human Rights argue that increased emphasis of illegal migrants will result in costly and inefficient programmes for the arrest, detention and deportation of these immigrants with scant regard for constitutional principles. The policy will also have a fundamentally negative impact on all categories of migrants in South Africa as it will lead to increased human rights abuses and growing xenophobia towards migrants from the region. Instead of recognising longstanding migration patterns, South Africa's immigration policy will attempt to prevent regularised movement of people from the region. This policy will leave a significant number of migrants with no other means than to enter the country through illegal means.¹

2. South Africa's Immigration Policy

South Africa's restrictive immigration policy is not a new phenomenon but is deeply rooted in the political history of the country. The Aliens Control Act, which governs immigration legislation, was passed in the dying years of apartheid when immigration was about control and deportation, not planned and managed entry.³ The immigration policy was essentially designed to keep unwanted African migrants out of South Africa and intended to facilitate the immigration of people of European descent. The implementation of this policy was notorious for its cruel treatment of illegal migrants through the use of lethal electric fences and regular mass deportations. The apartheid government's failure to recognise and protect refugees resulted in large numbers of Mozambican refugees being *refolded* back to a war torn Mozambique.

Despite various attempts to bring the Aliens Control Act in line with the Bill of Rights, significant parts of the enforcement mechanism in the Act, and the implementation thereof still remain unconstitutional. Various human rights organisations, including Lawyers for Human Rights, have criticised the inadequate procedures for the arrest of illegal migrants and the inhumane treatment of people held in detention.⁴

Over the last decade, South Africa's immigration policy has been informed by a common perception that the numbers of non-citizens in the country has escalated dramatically and that a large number of these non-citizens are illegally in the country, and therefore undesirable. The socio-economic burden of this apparent influx of non-citizens has created a political panic; a large

¹ *NGO Background paper on the Refugee and Migration interface*, (2001), Presented to the UNHCR Global Consultations on International Protection, Geneva, 28 – 29 June 2001

² *ibid*, p.2

³ Jonathan Crush, *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, SAMP, 1998, page 2.

⁴ Emma Algotsson, *Towards a Responsible Detention Framework*, Botshabelo Sanctuary, November 2001, volume 4, number 2, SAHRC, *Getting to the Crossroads of Detention and Repatriation*, December 2000, Human Rights Watch, *Prohibited Persons: Abuse on Undocumented Migrants, Asylum Seekers and Refugees in South Africa*, 1998.

⁵ Jonathan Crush, *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, SAMP, 1998, page 2.

percentage of South Africans perceiving foreigners, especially black foreigners, as a direct threat to their future economic well-being and as being directly responsible for the surge in violent crime in South Africa. The perception that South African citizens are competing with millions of illegal immigrants for scarce resources has become the motivation for stricter control.⁶

This perceived threat of migrants has been challenged by a number of reports, which show that cross-border migration into South Africa appears to be much less chaotic and overwhelming than has been previously thought. In a survey conducted in Lesotho, Mozambique, Zimbabwe and Namibia in 1997, it was found that cross border migration into South Africa is predominately legal, short-term and highly formalised. It was also found that the vast majority of migrants take borders seriously and support immigration policy if it is fair and applied humanely.⁷

Significantly, the official figures of illegal immigrants used by the Department of Home Affairs have in recent years been heavily contested. The Human Sciences Research Council has pointed out that there are no accurate methods available to establish the number of illegal immigrants in the country.⁸ The lack of reliable data makes it impossible to establish a precise figure of the number of illegal migrants since by definition they are not officially recorded.

3. Enforcement

One of the primary themes of the Immigration Bill is the prevention of illegal migration through the detection, arrest, detention and repatriation of illegal foreigners. Despite the noble objectives to promote a human rights based culture in respect of migration control, the proposed enforcement mechanism does not substantially differ from the existing Aliens Control Act of the apartheid era. In the new South Africa, migration is still guided by a call for increased migration control to keep unwanted foreigners out.⁹

A disturbing addition to the Bill is the involvement of the South African public to control unlawful migration by detecting and reporting suspected illegal foreigners and the outlawing of any assistance given to illegal immigrants. These two provisions create fertile ground for xenophobic backlash as recently witnessed in Zanspruit outside Johannesburg where Zimbabwean squatters were driven out of their homes and in Port Elizabeth where the businesses of Somali refugees were destroyed.

In order to explore the issue, the following sections will briefly assess the identification, arrest, detention and deportation of illegal immigrants as currently implemented in South Africa.

⁶ National Assembly, "Minister of Home Affairs: Introductory Speech, Budgetary Appropriation," August 9, 1994. As cited by Human Rights Watch, *Prohibited Persons: Abuse on Undocumented Migrants, Asylum Seekers and Refugees in South Africa*, 1998, page 20

⁷ David A Mc Donald et al, *The Lives and Times of African Migrants and Immigrants in Post-Apartheid South Africa*, SAMP Migration Policy Series No 3, 1999, page 2.

⁸ Pieter Kok, *Migration Rules must Reflect Globalised Era*, Business Day, 19 April, 2001, page 9

⁹ BL Masetlha, Presentation of the Department of Home Affairs on the Migration System in South Africa, Portfolio Committee for the Department of Home Affairs, 15 April, 2002.

3.1 Identification and arrest

For foreigners living in South Africa, life continues to be fraught with difficulties disturbingly similar to those faced by black South Africans under the influx control system of the apartheid era. Foreign nationals are continuously harassed by the police and often unlawfully arrested on suspicion of being illegal in the country.

Insufficient identification systems have led to the arrest including detention and deportation of persons with the right to be in the country, people with valid documents and even South African citizens. The South African Human Rights Commission reported in December 2000¹⁰ that numbers of arrested persons were deliberately prevented from providing documents and valid identity documents were destroyed resulting in detention and deportation.

The failure to provide legislative criteria for the arrest of illegal foreigners has resulted in discriminatory patterns of the arrest and deportation of illegal migrants. Currently persons are being arrested for their particular physical appearance and for not speaking any of the main national languages. Analysis of deportation statistics has indicated that an African migrant is much more likely to be arrested than a white person.¹¹

During the latest “operation crackdown” in Hillbrow and Yeoville, two Johannesburg suburbs known for high proportion of immigrants, the police arrested a large number of suspected illegal immigrants. During these raids the police made no effort in trying to identify or separate foreigners with or without the legal right to reside in South Africa. In the beginning of this month, a Burundian refugee was arrested by the police in Hillbrow during one of these operations. Despite showing the police his refugee permit, he was arrested and put in detention.

It is not only foreigners who are affected by this arbitrary approach. Last year a South African schoolteacher was arrested on her way to work. The police refused to consider her explanation as to why she did not carry an identity document and to listen to her pupils who tried to convince the police that their teacher was in fact South African. The woman was assaulted by the police and ended up in hospital.

With these issues in mind, an essential addition to the proposed legislation would be to compel arresting officers to demonstrate reasonable grounds for the arrest of a person and an indication that they have given the arrested person the opportunity to prove his or her legal status in the country.

¹⁰ Emma Algotsson, SAHRC, *Getting to the Crossroads of Detention and Repatriation*, December 2000, www.sahrc.org.za

¹¹ Jonathan Klaaren, *Immigration and the South African Constitution*, in Jonathan Crush, *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, SAMP, 1998, page 65.

3.2 Detention

A person arrested for being a suspected illegal foreigner in South Africa may be detained without a warrant for 30 days. The legislation is unspecific in its description of holding facilities and does not set out the standards for detention

A Human Rights Commission report has highlighted the poor conditions of detention at Lindela repatriation centre, the principal detention facility for people awaiting deportation. The findings confirmed evidence of inhumane treatment and indignity of persons held at the facility in terms of constitutional and international standards of detention. The majority of complaints of inmates centred around a lack of adequate nutrition, irregular or inadequate medical care and systematic forced interruption of sleep, general poor living conditions, limited access to information, assault and the mistreatment of minors. The Human Rights Commission also launched a legal challenge against the Department of Home Affairs and the private company managing the facility for detaining persons for extensive periods without any attempt to approach the High Court for a legal extension.¹²

With these violations in mind, Lawyers for Human Rights proposes the development of minimum standards of detention. Such standards should include provisions for conditions of detention such as size and conditions of cells, adequate diet, exercise, health, and the separation of administrative detainees from criminal detainees, women from men and children from adults.

Proper enforcement of the recommended minimum standards requires an independent body with clearly defined powers and duties to enquire into specific incidents as well as monitoring the general conditions of detention. The Immigration Bill provides no statutory limitations or immediate oversight of immigration detention facilities. This problem becomes even more acute since the Department has decided to continue contracting out its functions to detain and escort illegal immigrants to private persons. The problem has two aspects. Firstly, the Department of Home Affairs has no apparent statutory obligation to review, monitor or report on activities at the facilities. Secondly, and equally important, public confidence in the concept of a privately operated detention centre for illegal foreigners relies on a mechanism of external control of the facility.

Although the establishment of an independent monitoring system to safeguard the rights of detained migrants is crucial, it is often difficult to make it work in practice. A model currently under discussion is to broaden the Judge Inspector for Prison's mandate to include the monitoring of immigration detention facilities. The benefit of this model is that it integrates a new watchdog aspect into an established and independent structure.

The outsourcing of detention to a private company is a sensitive issue and raises questions of accountability and legal responsibility. The problem was brought acutely into focus a few weeks ago

¹² Emma Algotsson, *Towards a Responsible Detention Framework*, Botshabelo Sanctuary, Vol 4(2) 2001, page 8.

when security guards employed by the private contractor at Lindela allegedly murdered a Malawian detainee. When investigating the matter, the South African Human Rights Commission found that there was no clear division of responsibility between the Department of Home Affairs and the private contractor, which resulted in the event being insufficiently investigated and reported. Media reports also indicated that the Department of Home Affairs disclaimed accountability of the facility and in doing so also its responsibility for the event.

The failure to prescribe clear conditions for the detention of illegal immigrants and the involvement of private contractors in the process have also resulted in a number of cases where persons have been detained at Johannesburg International Airport by private security and airline companies. Persons who arrive to South Africa without proper documentation or who are in transit during deportation are held in detention in the transit area. It is unclear under what authority persons are detained at the airport, as the Department of Home Affairs is often not informed about the detention. In some cases, Lawyers for Human Rights has discovered that detainees at the airport are not given access to just administrative procedures.

3.3 Deportation

As a result of South Africa's restrictive and exclusionist immigration policies and the concomitant enforcement system, the State deports on average of 350 persons per week, mostly to neighbouring countries such as Mozambique, Zimbabwe, Swaziland and Lesotho. Weekly trains and trucks leave Lindela repatriation centre heading for the border posts of Komatipoort, Beitbridge, Oshoek and Maseru Bridge.

Needless to say, the repatriation programme costs the country a great deal of taxpayers' money to maintain. The efficiency of the programme has also been put in doubt by both the authorities and civil society. Although no accurate estimates are available, observers, including the Department of Home Affairs itself, have confirmed that a significant number of deportees are back in South Africa before the trains have returned to Johannesburg.¹³ The efficiency of the system is undermined by the "revolving door" phenomenon where illegal migrants experience multiple deportations.¹⁴

The current deportation programme rides roughshod over the fundamental rights of people believed to be illegal in the country and has been criticised by many for the following reasons:

- The mode of transport and the conditions of deportation lack safety features. People are transported for long distances in closed trucks with inadequate ventilation and very little space;

¹³ Masetla BL, Director General Department of Home Affairs, Presentation to the Parliamentary Portfolio Committee of Home Affairs, 7 March, 2000. Human Rights Watch, *Prohibited Persons: Abuse on Undocumented Migrants, Asylum Seekers and Refugees in South Africa*, 1998, page 106.

¹⁴ David A Mc Donald et al, *The Lives and Times of African Migrants and Immigrants in Post-Apartheid South Africa*, SAMP Migration Policy Series No 3, page 13.

- No special provision is made for the repatriation of children, in particular unaccompanied children. Consideration should be given to the necessary legislative amendments which would require the Children's Court to confirm any decision to remove, return or deport a separated or unaccompanied child;
- Deportation often results in the separation of families; and
- A common complain by deportees is that they are not given the opportunity to retrieve their belongings before being deported, often forcing them to return to South Africa to collect their property.

Lawyers for Human Rights has on numerous occasions found bona fide refugees and asylum seekers in the deportation process, in particular at the Johannesburg International Airport. Current policies prevent deportees from applying for asylum in the transit area, and as a result are at danger of being *refolded*.

4. Towards a more flexible migration system

Cross border migration is an integral part of the social, political and economic lives of the people in Southern Africa. It is clear that the current immigration system prevents rather than facilitates the movement of people into the country. As a result, people are forced to make use of clandestine methods that are unlawful and often dangerous. To enforce this restrictive system the state spends unnecessary resources.

For example, the identification and arrest of undocumented migrants forms a significant part of the governments anti-crime operations. Large amounts of resources and time are spent by the police in tracking down undocumented migrants when their time and resources would be more economically utilised in focussing on real crime. The South African Police Services and South African National Defence Force would be much more efficient if they were allowed to focus all their time on cross border crime than to run after illegals in order to fill arrests quotas.¹⁵

In elaboration of the discussion above, Lawyers for Human Rights proposes the *expansion of existing permits*. The current immigration system, as well as the proposed system, does not provide adequate channels for ordinary people in the region to enter and remain legally in South Africa. For example, cross-border traders should be permitted to enter South Africa for a reasonable period on a permit system. In addition to voluntary migrants, there are growing numbers for involuntary migrants coming to South Africa. Although the Refugees Act protects people fleeing persecution and events it does not adequately provide protection for victims of natural disasters, such as floods and famine, as well as other categories of forced migration that fall outside the refugee regime. For example, there are currently a large number of asylum seekers whose applications were determined

¹⁵ Etienne Hennop, *SANDF Control of the Northern and Eastern Border Areas of South Africa*, ISS Occasional Paper, No 52, August 2001.

and rejected year after they had lodged their applications. The problem was that by the time the Department finally rejected their applications, the political conditions in their country had substantially improved.

The price of visas is generally very high resulting in a large percentage of prospective travellers being unable to afford it. For this reason, Lawyers for Human Rights recommends that visa prices should be reduced or abolished where possible. Lawyers for Human Rights also suggests that issuing of visas should be possible at the border.

The underlying principle of these recommendations is that if migrants are given legal access to the country, it is likely that they will voluntarily comply with immigration laws. As a result, it will reduce illegal migration and consequently the enforcement burden on the authorities. It is acknowledged that there is a need for immigration control and the possibility of immigration authorities to arrest, detain and deport. However, the legislation must ensure the protection of human rights as guaranteed under the Bill in the South African constitution. It is this foundation that will create an effective approach to immigration into South Africa and underpin the process leading to regional integration as envisaged in Mbeki's vision of an African Renaissance.