

**Presentation to Refugee Status Determination and Rights in
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Country Report: Refugee Status Determination in South Africa

By Kaajal Ramjathan-Keogh, Lawyers for Human Rights

www.lhr.org.za

1. Introduction

This paper outlines the situation in which the asylum system operates in South Africa and its connection to the immigration system. It raises certain challenges within the asylum system and recommends policy changes, which could be used to address these challenges.

2. Overview and brief history of the development of the South African legal system

The South African parliamentary system can be defined as a constitutional democracy. The interim Constitution came into force on 27 April 1994. Its effect on the South African legal system can justifiably be described as revolutionary.¹ For the first time in South Africa's history, the franchise and associated political rights were accorded to all citizens without racial qualification. The interim Constitution brought to an end the racially-qualified constitutional order that accompanied three hundred years of colonialism, segregation and apartheid. The doctrine of parliamentary supremacy was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put in place to safeguard human rights, ending centuries of state sanctioned abuse. The strong central government of the past was replaced by a state with federal elements. The Westminster-style electoral system was replaced by a system based on proportional representation. Before 1994 the effective protection of human rights through the courts was virtually impossible. The common law provided some protection for individual rights but Parliament could pass legislation to amend the common law in whatever way it thought fit. This interim constitution was a transitional constitution which was to set out the procedures for the negotiation, drafting and implementation of the final Constitution. The 1996 Constitution completed South Africa's negotiated revolution.

2.1 The rule of law

In the post 1994 period the courts have made reference to the rule of law but have made no attempt to define it.ⁱⁱ The court in *Fedsure* has confirmed that the rule of law at least includes the principle of legality. Legality means that the government, including the courts, must act in accordance with the legal principles and the rules that apply to it.ⁱⁱⁱ

2.2 The right to administrative justice

Just administrative action in the South African context is relevant to any discussion around refugee status adjudication. Administrative action imposes a constitutional duty on public authorities to act lawfully, reasonably and with fair procedures in relation to private individuals and organisations.

2.3 Overview of the refugee situation

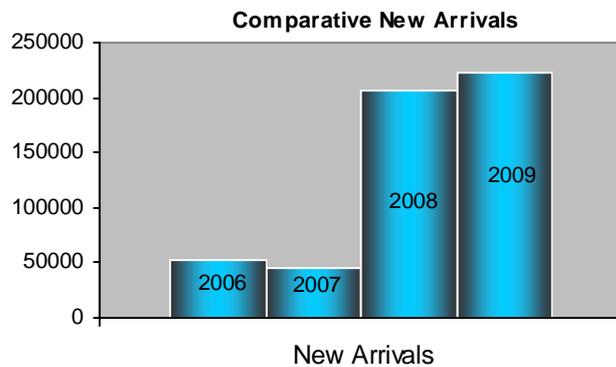
Prior to 1994 no persons sought refuge in South Africa, and South Africa was a refugee producing country rather than a safe haven. However in the post 1994 period it became necessary to develop rules and laws governing the granting of asylum as people for the first time began to migrate to South Africa. The Refugees Act^{iv} was finalised in 1998 and came into operation in 2000. The definition of “refugee” in the Refugees Act is quite progressive as both the UN 1951 Convention as well as the OAU 1969 Convention were consulted in the formulation of the definition.

South Africa employs an urban refugee policy so there are no refugee camps and asylum seekers are not routinely detained - however there are some exceptions to this rule. The Department of Home Affairs is responsible for the administration of the Refugees Act. The Act has been through two amendment processes; the first of these was in 2008 and is at the current time in 2010 in the midst of a second amendment process. The original Act is well drafted and on the face of it is not in need of serious amendments. However the operation and practical implementation of the asylum process is plagued by serious challenges of corruption, mismanagement and an absence of uniform operations which leads the asylum process in general and in particular the refugee status determination process to operate ineffectively. The result is that the quality of decisions is extremely poor and this has a serious impact on effective protection.

According to the Department of Home Affairs^v a total of **223,324** new asylum seekers were registered by the end of 2009 in contrast to the **207,206** applications received in 2008. On the other hand, a total of **50,622** asylum claims were adjudicated at first instance. Of these claims, **4,567** were approved whereas **46,055** were rejected as manifestly unfounded (**27,199**) and unfounded (**18,856**).

The majority of asylum seekers were coming from Zimbabwe, Malawi, Ethiopia, DRC, and smaller numbers from Nigeria, Mozambique, Bangladesh and China. In 2009 and for the previous two years South Africa received the highest numbers of asylum seekers of any country in the world.^{vi} The majority of these asylum seekers are from Zimbabwe. There have been very few successful asylum applications from Zimbabwe. There is a mixed migration of persons from Zimbabwe. Zimbabweans are escaping from the economic, political and humanitarian situation in that country, however a very small number are able to show that they have faced persecution. Even persons who are able to show persecution however are routinely being rejected as a result of an extremely poor RSD process coupled with bigoted and ill equipped home affairs decision makers who are tasked with making the asylum determination. Most asylum seekers and refugees live in urban areas and the majority live in Johannesburg, Pretoria, Cape Town and Durban.

New Arrivals: Key Statistical Indicators^{vii}



There have been some research studies carried out on the RSD process, the most recent being the Wits Forced Migration Studies Research Study, 'Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions.'^{viii} The study found that there were both micro and macro factors influencing the quality of decision-making. At the macro level the broader migration context has given rise to several systemic factors that affect the proper functioning of the status determination process:

- An immigration policy that does not provide adequate opportunities for legal economic migration, resulting in artificially high numbers of people seeking asylum as a means of temporarily regularising their status;
- The failure to address large migration flows from Zimbabwe. Because the government has not until recently implemented any alternative documentation options, large numbers of

Zimbabweans have been forced into the refugee system, increasing demand beyond the capacity of the system;

- General capacity constraints throughout the Department of Home Affairs.

At the micro level, a properly functioning status determination system is characterised by an administratively fair procedure, which includes a fair status determination hearing, a well researched decision and a decision that properly implements the provisions of refugee and administrative law and gives effect to the Constitutional guarantee of administrative justice.

The study found that there are serious flaws in the status determination process as it is being conducted by the RSD officers. The results of the study will be discussed in greater detail by Roni Amit in a presentation tomorrow.

2.4 Civil Society's impact on refugee protection

There are several NGOs and academics observing the asylum and RSD process in South Africa. These are Lawyers for Human Rights (LHR), the University of Cape Town Law Clinic, the Nelson Mandela Metropolitan University Law Clinic, the Wits Law Clinic, the Legal Resources Centre, Wits Forced Migration Studies Programme and the Consortium for Refugees and Migrants in South Africa. These are just some of the organisations who are working in the asylum and migration field. South Africa has a vibrant civil society who is vocal and activist in their approach to government shortcomings.

While there is little room for representation and observation of the RSD process at first instance, rejected asylum seekers may be represented at the appeal stage and many do seek legal representation. To give you an indication of the numbers of asylum seekers who seek legal assistance, LHR assisted nearly 8,000 persons in our three law clinics in 2009 and the majority of these (about 80%) sought assistance and representation in appeal matters.

Chapter 9 of the Constitution created a number of state institutions supporting constitutional democracy including the Human Rights Commission. However the level of oversight and protection being offered by these institutions is minimal.

LHR is an independent human rights organisation established in 1979. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. LHR provides free legal services to vulnerable, marginalised and indigent communities, both foreign and South African, who are victims of unlawful infringements of their constitutional rights.

3. The international legal framework

South Africa has acceded to the 1951 Convention relating to Status of Refugees, the 1967 Protocol relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, as well as other human rights instruments, and has in so doing assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.

The status of ratification of relevant international instruments is as follows:

International Convention on the Elimination of All Forms of Racial Discrimination (CERD)

- Entry into force 4 January 1969
- **Ratified by South Africa 10 December 1998**

International Covenant on Economic, Social and Cultural Rights (ICESR)

- entry into force 3 January 1976
- Signed by South Africa 3 October 1994

International Covenant on Civil and Political Rights (ICCPR)

- Entry into 23 March 1976
- **Ratified by South Africa 10 December 1998**

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

- entry into force 26 June 1987
- **Ratified by South Africa 10 December 1998**

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

- Entry into force 18 December 1979
- **Ratified by South Africa 15 December 1995**

Convention on the Rights of the Child (CRC)

- Entry into force 20 November 1989
- **Ratified by South Africa 16 June 1995**

International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

- Entry into force 18 December 1990
- South Africa has not signed this convention. However at the 2010 UNHCR Excom Meetings in Geneva, the South African delegation indicated its intention to look into signing this convention

International Convention for the Protection of All Persons from Enforced Disappearance

- Entry into force 20 December 2006
- South Africa indicated its intention to sign in 2008 but no signature has been forthcoming

Convention for the protection and assistance of the Internally Displaced Persons in Africa (Kampala Convention), 2009

- The convention is not yet in force and requires 15 ratifications to come into force
- South Africa has not signed

SADC Draft Protocol on the Facilitation of Movement of Persons

- SADC Draft Protocol on the Facilitation of Movement of Persons was drafted in 1995 but has not come into force and requires ratification by two thirds (9 ratifications) of member states in order to do so.
- **South Africa has ratified** the protocol along with Botswana, Lesotho, Mozambique and Swaziland.

Article 28 of the Protocol deals with asylum seekers and refugees

1. State Parties hereby reaffirm their commitment to their obligations under international agreements to which they are parties, and which relate to refugees.
2. The management of refugees in the Region shall be regulated by a specific Memorandum of Understanding (MOU) between State Parties; and
3. State Parties reaffirm their commitment to co-operate with the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM) and other International Organizations.

In addition to these international instruments South Africa has also entered into bilateral agreements with Zimbabwe, Mozambique and Lesotho on the free movement of citizens between

these countries. These bilateral agreements sought to abolish visa regimes and facilitate movement between these countries by means of a 90 day visa free entry in a calendar year.

4. The domestic legal and policy framework

Section 7 of the 1996 Constitution^{ix} declares that the Bill of Rights contained in chapter 2 of the Constitution is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of dignity, equality and freedom. The state is obliged to 'respect, protect, promote and fulfil' these rights. The significance of this provision is the implication that the Bill of Rights is not merely a negative enforcement mechanism shielding subjects against the abuse of government power; it also imposes a positive duty on the state to protect, promote and fulfil the entrenched rights.^x

The Refugees Act^{xi} is the applicable legislation. The Immigration Act^{xii} is also relevant here with limited applicability. The definition of refugee in the Act is as follows:

Refugee status

3. Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or

(c) is a dependant of a person contemplated in paragraph (a) or (b).

4.1 Explanation of RSD process

Refugee status determination is carried out by refugee status determination officers (RSDOs) in terms of the Refugees Act. RSD has always been conducted by state officials. There is space for consultation by the UNHCR. There was an attempt to remove any reference to the UNHCR in the 2010 amendment process however as a result of fierce civil society opposition this move was reconsidered. A negative decision by the RSDO may be taken on appeal before the Refugee Appeal Board, which is currently able to hear matters *de novo*. There are however proposed changes to the Refugees Act, which seek to replace the RSDO with a Status Determination Committee. The changes

also seek to change the way the Refugee Appeal Board (to be replaced with the Refugee Appeals Committee) operates in that they will no longer be able to hear matters afresh and there is a move to finalise appeal cases without the presence of the rejected asylum seekers. These changes are currently being discussed and LHR along with other civil society organisations have made submissions on the changes and were recently invited to make oral submissions in Parliament.

4.2 Applications for review

In the event that an asylum seeker is finally rejected on appeal by the Refugee Appeal Board, there is still an opportunity to lodge an application to review the rejection by the Appeal Board and either have the decision set aside or substituted with a High Court decision. Review applications are not pursued routinely as they are expensive and require the services of legal representatives.

4.3 Prima facie determination

South Africa has already been receiving a mass influx of persons from Zimbabwe. The mixed nature of this group has however posed a serious challenge for the asylum system. Prior to September 2010 and after December 2010 there will be few avenues for ordinary foreigners to regularise their immigration status. South Africa seems reluctant to employ or consider *prima facie* determination.

4.4 Migration from Zimbabwe to South Africa

The most significant movement of persons has been from Zimbabwe over the Beitbridge border into South Africa. There are an estimated 1.5 million Zimbabweans in South Africa.^{xiii} The major movements are linked to significant events in Zimbabwe: elections and forced removals like Operation Murambatsvina, which forced thousands of people over the border seeking asylum. This migration has been ongoing for several years.

4.5 Zimbabwe regularisation process

In April 2009 the South African government announced a moratorium on deportations to Zimbabwe. Prior to this date thousands of Zimbabweans were deported annually. In September 2010 the government announced that it would end the moratorium on deportations on 31 December 2010. The state also announced a Zimbabwe Regularisation Programme which aimed to document any Zimbabweans who were working, studying or operating businesses. This process is in operation but will not be able to document the thousands of Zimbabweans who wish to regularise their immigration status by the December deadline. Despite requests by NGOs to extend the deadline of the regularisation process, the state appears unwilling to do so.

There are some significant problems around the roll out of the regularisation process. The most pressing is the inability of the Zimbabwean authorities to make passports available to their nationals in South Africa as well as the absence of uniform procedures by the South African authorities in rolling out this process. Only Zimbabweans who are working, studying or operating a business may take advantage of the regularisation process. The benefit of the process is that it may unclog the already overburdened asylum process by moving Zimbabweans out of the asylum system.

4.6 End of moratorium and concerns regarding deportations

Post December 2010 we are likely to see a return to the situation of mass deportations to Zimbabwe. We are also likely to continue to see Zimbabweans again returning to documenting themselves via the asylum system as in previous years. This will result in sending Zimbabweans underground again and increasing their vulnerability. We have already started seeing indications that Zimbabweans with refugee status will start to have their status reviewed and possibly withdrawn in light of perceived stability in Zimbabwe.

4.7 Special arrangements for vulnerable groups

- i. HIV positive refugees and asylum seekers: health circular on access to ART for HIV positive persons*

In 2007 through efforts by LHR together with the UNHCR we obtained a circular issued by the Department of Health, which guaranteed the right of refugees and asylum seeker to access health care and in particular anti-retroviral treatment. While this circular is still applicable a study conducted by LHR and Wits FMSP around migrants' access to ART showed that migrants (including refugees and asylum seekers) have increased difficulty in receiving ART services from state clinics largely on account of xenophobic attitudes. The same study also showed that migrants showed a higher rate of adherence to their ART regimes than South Africans.

- ii. Unaccompanied minors*

In the 2008 amendments to the Refugee Act and again in the 2010 amendments there are special measures inserted at the request of civil society organisations on measures to assist and protect unaccompanied minors applying for asylum. Currently unaccompanied minors face discrimination and are routinely turned away from refugee reception offices if they attempt to lodge asylum applications.

4.9 Xenophobia and refugees

Violence against foreign nationals and internal migrants has been an ongoing feature of post-apartheid South Africa. While the most intense period of attacks took place in May 2008, similar patterns of violence began long before and have yet to stop. Violence did not occur in sites with the highest percentage of foreign residents.

While not a direct cause of violence, widespread anti-outsider sentiments serve as a resource for ethnic, economic and political entrepreneurs and criminals. Outsiders can easily become scapegoats for economic hardship and are vulnerable to robbery and attack because they lack documentation, often carry cash due to banking barriers and are less likely to have the support of the general residents of the area. Although all South African residents face high levels of physical insecurity, outsiders are particularly vulnerable to ordinary and 'hate' crimes, meaning that any crime targeted at a foreign national *because* they are a foreign national can be considered xenophobic.^{xiv}

5. Conclusion/Recommendations

It is essential for the Zimbabwe Regularisation Process to continue past the 31 December deadline. If the process is not extended this would have serious implications for the asylum system as well as the status of Zimbabweans in South Africa.

While there have been attempts to look at broader immigration policy reform, much more needs to be done to address the limited avenues, in particular for SADC citizens who have been working and living in South Africa for a long time, to document themselves.

There is also an urgent need to address the poor quality of decisions emanating from the asylum system.

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ⁱⁱ *National Party v Jamie* NO 1994 (3) SA 483 (EWC) at 492F; *ANC (Border Branch) v Chairman, Council of State of the Republic of Ciskei* 1992 (4) 434 (Ck)

ⁱⁱⁱ Bill of Rights Handbook at p 11

^{iv} Refugees Act 180 of 1998

^v Department of Home Affairs National Immigration Information System (NIIS)

^{vi} UNHCR Trends www.unhcr.org

^{vii} Department of Home Affairs: Refugee Affairs Directorate, 2010

^{viii} Amit, R, <http://www.migration.org.za/report/amt-r-2010-protection-and-pragmatism-addressing-administrative-failures-south-africa-s-refug>

^{ix} Constitution of the RSA 108 of 1996

^x Du Plessis and Gouws, 'The Gender implications of the final Constitution' 1996 SAPL 473 at 475

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^{xii} Immigration Act 13 of 2002

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