

THE REPATRIATION PROCESS: DOES SOUTH AFRICA LIVE UP TO ITS  
HUMAN RIGHTS OBLIGATIONS?

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AFRICA)

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## DECLARATION

I, MAUSHAMI CHETTY, do hereby declare that the work submitted for this dissertation is the result of my own efforts and that this work has not been submitted for any degree in any other university. Where any secondary information has been referred to it has been duly acknowledged.

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Maushami Chetty

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A special mention must be given to the Centre for Human Rights for giving me the opportunity through this wonderful program to gain practical knowledge of Africa's human rights and governance problems in particular nepotism, lack of accountability and administrative injustice.

Tyaktva sva-dharmam caranambuyam  
harer bhajann apakvo 'tha patet tatoyadi  
yatra kva vabhadram abhvid amusya kim  
ko vartha apto 'bhajatam sva-dharmatah  
-Srimad-Bhagavatam (1.5.17)

## **DEDICATION**

This is dedicated to all the teachers who said I would amount to nothing'  
- Christopher Wallace

## **List of Abbreviations**

AB-Immigration Amendment Bill  
AI-Immigration Act  
ACA- Aliens Control Act  
ACHPR- African Charter on Human and Peoples' Rights  
CAT-Convention Against Torture and other Cruel Inhuman or Degrading Treatment  
CEDAW-Convention on the Elimination of All Forms of Discrimination Against Women  
CERD-The International Convention on the Elimination of All forms of Racial Discrimination  
CRC-Convention on the Rights of the Child  
CSVR- Centre for the Study of Violence and Reconciliation  
D-G- Director General  
DHA- Department of Home Affairs  
ECHR- European Court of Human Rights  
GIS- Ghana Immigration Services  
HRC- Human Rights Committee  
HRW- Human Rights Watch  
ICCPR-International Covenant on Civil and Political Rights  
ICESCR-International Covenant on Economic, Social, and Cultural Rights  
ICMW-International Covenant for the Protection of the Rights of Migrant Workers and Their Families  
ID- South African Identity Document  
JRS- Jesuit Refugee Services  
LHR- Lawyers for Human Rights  
NEPAD-New Partnership for African Development  
NGO- Non-governmental organisation  
OAU Refugee Convention-OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa  
PAIA- Promotion of Access to Information Act  
PAJA- Promotion of Administrative Justice Act  
SADC- Southern African Development Community  
SAHRC- South African Human Rights Commission  
SAMP- Southern African Migration Project  
SANDF- South African National Defence Force  
SAPS- South African Police Service  
SARS- South African Revenue Services  
UN Refugee Convention- Convention relating to the status of refugees



## Chapter 1: Introduction

### 1.1 Introduction

South Africa has one of the world's most progressive constitutions and constantly portrays itself as a leader in Africa in terms of rights recognition and governance.<sup>1</sup>The Immigration Act (IA), in line with this philosophy, makes explicit mention of human rights in section 2.<sup>2</sup>

In the administration of *this Act*, the *Department* shall pursue the following objectives: promoting a human-rights based culture in both government and civil society in respect of migration control.

This indicates a break with the past and the intention for migration policy to be based on these ideals. This is important as the previous legislation, enacted during the death throes of apartheid, was draconian and discriminatory. Reform of this law by the democratic government was considered essential as it was one of the last remaining apartheid laws. The racist background to the Aliens Control Act (ACA) was a convenient cover to the democratic government for the unconstitutionality of the practices that took place under it.<sup>3</sup>It was hoped that the pitfalls of the ACA would be remedied in the IA.

The AI was hurriedly passed to meet a Constitutional Court deadline amid controversy and immediate calls for amendment.<sup>4</sup> There is at present an Immigration Amendment Bill (AB),<sup>5</sup> which makes the task of commenting on the immigration legislation difficult due to the necessity of commenting on the bill as well (only six sections of the act remain unchanged).<sup>6</sup>

There are also Immigration Regulations whose constitutionality was fiercely contested.<sup>7</sup> It has been argued that these regulations provide more of the policy than the act itself. It could be said that the South African immigration law is in a state of flux.

### 1.2 Background

The Aliens Control Act was racially biased towards immigrants who were easy to assimilate into the white population. It thus did not accord with the principles of the new regime based on equality and reflected an exclusionist apartheid ideology. Not only was the act itself repugnant but the practice of the enforcement bodies in arrest, detention and deportation procedures was maligned as well. There were

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<sup>1</sup> The Constitution of the Republic of South Africa Act 108 of 1996.

<sup>2</sup> Act 13 of 2002.

<sup>3</sup> Act 96 of 1991.

<sup>4</sup> 'South African Immigration Policy Developments: Latest developments', March 2001 <[www.queensu.ca/samp](http://www.queensu.ca/samp)> (accessed 10 June 2004).

<sup>5</sup> Immigration Amendment Bill, B11-04, *Government Gazette* No 26507, 24 June 2004. <[www.gov.za](http://www.gov.za)> (accessed 14 September 2004).

<sup>6</sup> Crush, J and Klaaren, J 'Comments and Recommendations on the Immigration Amendment Bill', submission to The Parliamentary Portfolio Committee. <[www.queensu.ca/samp](http://www.queensu.ca/samp)> (accessed 2 October 2004).

<sup>7</sup> *The Minister Home Affairs v Eisenberg and association: in re Eisenberg and association v the Minister of Home Affairs*. CCT 15/03 <[www.constitutionlaw.co.za](http://www.constitutionlaw.co.za)> (accessed 2 October 2004).

allegations of violence, arbitrary arrest, harassment, exploitation, unfit detention facilities and lack of procedural fairness.<sup>8</sup>

This precipitated the drafting of the Green and White paper on International Migration, the much contested Immigration Bill and the IA itself.<sup>9</sup> The well researched Green paper's recommendations about the shift in focus from control to management of migration were not taken cognisance of. The government in consultation with US immigration specialists focused on control to prevent an influx from the rest of Africa into South Africa's newly 'opened' borders.<sup>10</sup> The only concession granted was the amnesties for long-time residents (usually mineworkers and refugees) from SADC countries but this was not well responded to.<sup>11</sup> The South African government seemed to be intent on keeping the exclusionist mindset, with a shift from race to nationality.

### **1.3 Relevance**

The IA has to be examined to see whether the contents of the legislation which inform the repatriation process meet constitutional and international law muster. This should be done with the background and criticisms of the ACA in mind. The actual practice of the enforcement agencies that effect the arrest, detention and deportation must be measured against South Africa's accepted human rights norms. A consideration of the past harsh and unconstitutional immigration control mechanisms must take place as well to track South Africa's progress towards a human rights based repatriation program.

### **1.4 Statement of the problem**

Whilst promoting Pan-Africanism, the African renaissance and fostering greater regional cooperation through its crucial role within SADC and NEPAD South Africa follows an isolationist migration policy alienating its neighbours. This can be seen from the decisive role that South Africa played in the demise of the SADC protocol on free movement.<sup>12</sup>

As a fledgling democracy the allegations of gross human rights abuses, unaccountability and xenophobia are worrying. Migrants (temporary sojourners) have contributed to the building of the nation as workers

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<sup>8</sup> These allegations emanate from sources such as Lawyers for Human Rights (LHR), Human Rights Watch (HRW), Amnesty International and the South African Human Rights Commission (SAHRC).

<sup>9</sup> Available at < [www.gov.za](http://www.gov.za) > (accessed 23 April 2004).

<sup>10</sup> 'Fostering International cooperation and the rule of law' < [www.fas.org](http://www.fas.org) > (accessed 23 September 2004).

<sup>11</sup> Klaaren, J and Ramji, J 'Inside illegality: migration policy in South Africa after apartheid' *Africa Today Journal* vol 48 number 1 (2001), 37.

<sup>12</sup> Crush, J and Ocho, J 'Contra free movement: South African and the SADC migration protocol' *Africa Today Journal* (n 11 above) 139.

in the farming and mining industries. The treatment of such migrants and immigrants (permanent settlers) especially those that are undocumented needs to be addressed as they form a vulnerable group.<sup>13</sup>

### 1.5 Literature review

Alienikoff and Chetail<sup>14</sup>, Plender<sup>15</sup> and Goodwin-Gill<sup>16</sup> set out the norms that govern the rights of aliens in international law. These sources were useful in setting out and commenting on the law that governs immigration on an international level. There was no literature addressing the rights of aliens in the deportation process in particular.

Comparative European and American sources regarding the rights of aliens tend to focus on the issue of control of the influx of migrants and on issues surrounding access to public services.<sup>17</sup> These included Jones<sup>18</sup> which discussed the American- Mexican border control processes.

The bulk of African literature surrounds the rights of refugees. This was helpful as far as it explained the duty of *non-refoulement* which may be breached when refugees or asylum seekers are indiscriminately deported. Of comparative assistance were the discussions of forced removals in west and east Africa as well as mass expulsion in general.<sup>19</sup>

On the particular topic of the human rights implications of South Africa's repatriation process there is a report on the processes of arrest and detention by the SAHRC.<sup>20</sup> The follow-up to this report deals with the detention centre in particular.<sup>21</sup> Human Rights Watch also published a book after considerable research on this topic.<sup>22</sup> However, these reports are dated having taken place in 2001 before the enactment of the much awaited new immigration legislation. Thus there is a need to re-examine the practices of the South African government and the repatriation camp, controversially contracted out to the private company known as Bosasa (previously called Dyambu), given the suggestions made by the previous researchers and the change in legislation.

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<sup>13</sup> Estimated to be around 4 million people. Lawyers for Human Rights Presentation, The African Commission for Human and People's Rights: Issue of the Detention of Undocumented Migrants in South Africa, 10 May 2002.

<sup>14</sup> Alienikoff, A and Chetail, V (eds) *Migration and international legal norm* (2003).

<sup>15</sup> Plender, R *International migration law* (1972).

<sup>16</sup> Goodwin-Gill, G *International law and the movement of people between states* (1978).

<sup>17</sup> Hall, S *Nationality, migrants rights and citizenship of the union* (1997).

<sup>18</sup> Jones, R *Illegal immigration: an unfolding crisis* (1984).

<sup>19</sup> Henckaerts, J-M *Mass expulsion in modern international law and practice* (1995).

<sup>20</sup> South African Human Rights Commission (SAHRC), *Illegal? Report on the arrest and detention of persons in terms of the Aliens Control Act* (1999) < www.sahrc.org.za > (accessed 13 June 2004).

<sup>21</sup> SAHRC, *Lindela: At the cross roads for detention and repatriation* (2000).

<www.sahrc.org.za > (accessed 13 June 2004).

<sup>22</sup> Human Rights watch (HRW) *Prohibited persons: the abuse of undocumented migrants, asylum seekers and refugees in South Africa* (1998).

Literature analysing the constitutionality of the ACA such as that of Crush<sup>23</sup> and articles by Klaaren and Ramji,<sup>24</sup> Oucho and Crush<sup>25</sup> exist. These discuss the old South African legislation, its merits and possible alternatives. They also give a background to the migration policy and issues in South Africa.

There are also a number of studies and publications discussing xenophobia and the general situation of illegal immigrants. The Southern African Migration Project (SAMP) publications as well as the Centre for the Study of Violence and Reconciliation (CSVr) publications discuss the links between aliens and crime, vulnerability, public service access and the hypothesis surrounding migration myths in South Africa. The only source that advocated stronger controls on immigration and seemed 'contra immigration' was the recent work by Solomon<sup>26</sup>.

This paper studies the current position of foreigners under the new legislation and revisits the processes of arrest, detention and deportation, which has not been done by the literature examined.

## 1.6 Definitions

Repatriation can be voluntary or involuntary. The term repatriation in this work is used to mean involuntary or forced removals of persons. Authors generally distinguish forced repatriation from deportation as deportation has an element of criminality outside immigration law, for instance the deportation of a legal immigrant who has committed a crime. The terms, however, are used interchangeably in the South African context.<sup>27</sup> The definition of deportation as an 'action or procedure aimed at causing an illegal foreigner to depart from the Republic involuntarily or under detention in terms of this act' as set out in the IA and accepted by the Constitutional Court does not contain an element of criminality and means the same as forced repatriation.<sup>28</sup>

## 1.7 Research questions:

- Is the IA human rights compliant?
- What are the practices of the South African government as regards arrest, detention and deportation of illegal immigrants?

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<sup>23</sup> Crush, J *Beyond Control: Immigration and human rights in a democratic South Africa* (1998).

<sup>24</sup> Klaaren, J and Ramji, J ( n 11 above).

<sup>25</sup> Crush, J and Oucho, J ( n 12 above).

<sup>26</sup> Solomon, H *Of myths and migration: illegal immigration in South Africa*, (2003).

<sup>27</sup> Manby, B 'A foreign experience: violence, crime and xenophobia during South Africa's transition' *Violence and Transition series* vol 5 (2001). < www.csvr.org > (accessed 2 July 2004).

<sup>28</sup> Section 1(1)(xii); *Director of Public Prosecutions v Mohamed* 2002(4) SA 843 (CC) para 28, One difference between the terms in South Africa should be noted. The term deportation can mean, according to the Constitutional Court, removal to any country unlike the term repatriation. However, in practice people are returned to their countries of origin thus repatriated.

- What are the international, regional and domestic standards that apply to South Africa in the field of deportation?
- Has the South African government respected these rights and fulfilled these obligations in their practices?

### **1.8 Methodology**

- Desk research.
- Internet research.
- Analysis of the tiers of human rights obligations to South African.
- Analysis of applicable case law
- Analysis of published reports.
- Visits to the Lindela repatriation camp to observe conditions, treatment of detainees and interview detainees. Use was made of a limited number of interviews with specific and open-ended questions. These were then factored into the consideration whether or not there have been human rights violations.

### **1.9 Limitations of proposed study**

This study is focused particularly on the question of deportation including arrest, detention and deportation. The issues of refugees and citizens will be covered only where incidental to the study.

There are other perceived problematic areas in the IA particularly the community policing and control emphasis which is seen as promoting xenophobia and the wide discretions afforded to the immigration officers but these will not be discussed in this work.

Physical limitations faced included the difficulty of gaining access to the Lindela repatriation centre through the company itself, the Department of Home Affairs (DHA) or independent structures and NGO's. The situation was very delicate and researchers felt they would endanger their research by assisting me in gaining access or providing information about the detention conditions. The DHA and Dyambu (the private company that operates Lindela repatriation camp) refused to allow me access to what they considered their private sphere of influence.

### **1.10 Overview of chapters**

- Chapter 1: Introduction
- Chapter 2: An analysis of the Immigration legislation

- Chapter 3: An analysis of repatriation practices
- Chapter 4: International, regional and domestic norms
- Chapter 5: Recommendations and Conclusion

## **Chapter 2: An analysis of the Immigration legislation**

### **2.1 Introduction**

The ACA was a consolidation of previous racist legislation: the Immigration Regulation Act of 1913 and the Aliens Act of 1937. The 1913 Act was aimed at controlling the entry of Indian merchants into the country whilst the 1937 Act was to control the influx of Jewish settlers after World War 1. Both groups were considered a threat to the racial and religious fabric desired in South Africa.<sup>29</sup> Despite amendment<sup>30</sup> in 1995 the ACA still contained problematic and unconstitutional provisions.

This chapter will attempt to set out the scheme of arrests, detentions and deportations under the previous Act, the ACA, as well as the same under the current legislation, the IA. Where applicable the suggested amendments to the AI in the form of the AB will be discussed. This is necessary as academics have been involved in the process of law reform from the beginning of the constitutional era and have provided valuable commentary on the shape that the legislation that succeeded the ACA should take. Thus it is important to see whether there has been evolution and development of the immigration law following these suggestions or whether the AB is retrogressive in terms of creating a rights sensitive repatriation process.

### **2.2 The Aliens Control Act**

#### **2.2.1 Arrest Provisions**

The ACA contained a categorization of persons that would be considered ‘prohibited persons’ who were then mandatorily subject to removal.<sup>31</sup> These included persons convicted of certain crimes, persons removed from the republic under warrant or other persons deemed prohibited persons under the act as well as non citizens entering the republic without proper documentation.<sup>32</sup>

The most important clause in terms of the arrest, detention and deportation of a person was section 53 (1) of the ACA.

‘If any immigration officer or police officer suspects on reasonable grounds that a person is an alien he may require such person to produce to him proof that he is entitled to be in the Republic, and if such person fails to satisfy such officer that he so entitled, such officer deems it necessary detain such person in a manner and at a place determined by the Director-General, and such a person shall as soon as possible be dealt with under section 7’.

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<sup>29</sup> Crush, J and Perberdy, S ‘Rooted in racism: the origins of the Aliens Controls Act’ in Crush (ed) (n 23 above) 18, 20.

<sup>30</sup> The Aliens Control Amendment Act 76 of 1995.

<sup>31</sup> Section 44(1)(a) of the ACA.

<sup>32</sup> Section 11(1) ACA these also include visa over-stayers and visa or permit violators under section 26(7).

The SAHRC identified it as the ‘primary statutory authority’ for the apprehension of persons with a view to deportation.<sup>33</sup> This clause implied in the opinion of the SAHRC at the very least that a person stopped was entitled to be informed of the reasons and given a chance to demonstrate his/her legal status in the country.<sup>34</sup> The onus on the individual to prove entitlement to be in the country was of questionable constitutionality.<sup>35</sup>

Section 7 set out the steps to be taken when investigating whether a person was in the country legally or not. There were two appeal procedures available against a declaration as a prohibited person, although neither was judicial. These procedures were firstly section 52(1) which allowed individuals who had been declared prohibited persons under certain sections to make a representation in writing to the minister. Secondly, the minister had review powers over any decisions made in terms of section 4(3).

### **2.2.2 Detention Provisions**

Section 44(1)(a) allowed for the detention of a person pending his/her repatriation ‘in a manner and a place determined by the Director-General’. Section 55(1) introduced substantive restrictions on detention stating that a person should not be detained for over 48 hours from the period of arrest. Where a person had been detained for over 48 hours without a section 7 examination the immigration officer had to release that person or detain that person for another 48 hours with written reasons for the detention.

Secondly section 55(5) allowed a person who had been examined under section 7 and found to be an illegal alien to be detained for a ‘reasonable and necessary’ period of up to 30 days. Once a person was detained longer than 30 days the detention could be reviewed by the Supreme Court. An enumeration of the rights of a detained person was lacking.<sup>36</sup>

Thus if a person had not been found to be an illegal alien within 48 hours by a section 7 examination he/she was entitled to be released or at least have further detention substantiated in writing. Once detention for the purposes of deportation (after a person was found to be an illegal alien) reached beyond 30 days it was subject to judicial review.

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<sup>33</sup> SAHRC (n 20 above) 17

<sup>34</sup> As above.

<sup>35</sup> Klaaren, J ‘The arrest and detention of undocumented migrants’, *Human Rights Commission working paper* (1998) 5. The author challenges both the reverse onus and the wide discretion granted by the words ‘Reasonable grounds’.

<sup>36</sup> Crush, J (n 23 above) 34; SAHRC (n 21 above) 11.



### **2.2.3 Deportation framework**

Those who were declared or deemed prohibited persons had to be removed, whilst those who were declared prohibited persons under section 10 and did not obey an order to leave would be removed by ministerial warrant.

The most important exception to the removal of prohibited persons was the ability to be issued a section 41 permit allowing entry into and residence in the country. This process was used to allow for the ‘prohibited persons’ working in the mining and farming sectors to be regularized as well as for asylum seekers to make applications for refugee status.<sup>37</sup> Those who violated these permits were subject to removal by warrant and were declared prohibited persons. They were also subject to removal if their permit was invalid or revoked.

The commission of certain criminal offences would render a person liable to be removed. This could result in a fine, imprisonment or deportation. The minister was given two wide discretions. Firstly he could declare a permanent resident who committed a certain offence a prohibited person in terms of section 45(1). The minister could also deport, by warrant, any person if he considered it in the public interest in terms of section 47(1).

### **2.2.4 Constitutionality**

The discretions under section 53 were very wide and the requirement of ‘reasonable grounds’ was too unconstrained which lead to discrimination on the basis of race as will be discussed. The Ministers discretion in revoking permits and declaring persons to be prohibited was unfettered and open to abuse.

Procedural guarantees under ACA were also lacking. Commentators agreed though they may have been sufficient for persons stopped at the border they were not sufficient for a person arrested and detained within the state.<sup>38</sup> The process of declaration as a prohibited person could only be appealed to the minister and not a court. There were no administrative appeals procedures relating to the removals themselves. Since declaration as a prohibited person was only one way of removal this left people removed by other methods vulnerable.

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<sup>37</sup> Klaaren, J ‘Immigration control and the South African constitution’ in Crush (ed) (n 23 above) 55, 62.

<sup>38</sup> HRW (n 22 above) 62.

## **2.3 The Immigration Act**

### **2.3.1 Definitions:**

The Act sets out four categories of persons important for our purposes. These are citizens, residents, foreigners and illegal foreigners. The distinctions between the last two categories are not particularly clear. A foreigner is defined, as a person who is neither a citizen nor a resident but is not an illegal foreigner. An illegal foreigner is described as a foreigner in the country in contravention of the IA and includes a prohibited person. The act quizzically goes on to use the term foreigner to denote all foreign nationals including permanent residents.<sup>39</sup>The AB seeks include permanent residents in the definition of foreigner which would deprive them of substantial benefits.

The term ‘undesirable person’ is retained as used in the ACA, which is not in line with the apparent human rights sensitive approach to immigration policy. The category of undesirable persons includes a person who is a fugitive from the law (section 30). This section is over broad, as this could include people wanted for political crimes as well as refugees. The door is open for the principle of *non-refoulement* to be breached and for *de facto* extraditions to occur. The Minister can exempt a person from such status.

The terms ‘Refugee’ and ‘Asylum seeker’ should have been defined in terms of the Refugee Act within the IA and not through the regulations. The AB states that a person may be granted an asylum transit permit which is valid for 14 days. If that person does not present him or herself to a refugee office in order to apply for asylum they will be dealt with as illegal foreigners. This means a person with a face value case for asylum could be removed and the principle of *non-refoulement* could be breached.

The case of *Barakangera* provides guidance.<sup>40</sup> Here a Rwandan woman had been granted a section 41 permit which had to be renewed at the place of issue. She could not however afford to travel back there. The Court held that deportation would breach the norm of *non-refoulement*. Although the AB does not specify a specific refugee office it is still an onerous burden on a refugee to do so within two weeks.

### **2.3.2 Immigration advisory board:**

Section 4 establishes an Immigration Advisory Board to carry out certain advisory functions set out in section 5 and other provisions in the IA.

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<sup>39</sup> Watters, C ‘Enforcing the Immigration Act’, *De Rebus*, June 2004. < [www.derebus.org.za](http://www.derebus.org.za) > (accessed 2 October 2004).

<sup>40</sup> This is an unreported case available on the Wits Law Clinic site. < [www.law.wits.ac.za](http://www.law.wits.ac.za) > (accessed 26 October 2004).

### **2.3.3 Administrative Justice:**

The most important innovation is section 8 which provides for administrative and judicial review of decisions under the act. Section 8(1) states, in words echoing the Promotion of Administrative Justice Act (PAJA) that before making a determination that adversely affects a person the Department must notify the person of the contemplated decision in writing with motivations. He/she must be allowed to make representations.<sup>41</sup>

The decision can then be confirmed, withdrawn or enforced subject to section 8(2), which provides that a person may appeal within 20 days to the Director General (D-G) who can change or reverse it, failing which, it will be deemed to be confirmed in ten days. Within 20 days from the appeal to the D-G the person may appeal to the minister who may change or reverse the decision, failing which, within 20 days it is deemed confirmed and final. There is an exception to the finality for a person in exceptional circumstances and a person who stands to be deported as a consequence of the decision. The AB does not include this exception, which is a substantial deprivation of administrative rights as a person could be deported before the decision is final.

Ultimately within 20 days of the modification or confirmation by the Minister the person may appeal to the court. If not appealed in terms of section 8(2) then the decision of the Department is final, subject to section 37. Section 37 provides for the powers of the immigration courts to, amongst other things, review decisions, of the Department, deal with legal proceedings against the department, and deal with any matter regarding status.

Section 8(4) provides that a person adversely affected by the decision of the DHA must be informed in writing of the rights under the section and may not be deported till the decision is final. Section 8(5) renders the decision of an immigration officer to refuse someone entry into the republic effective without the requirement of ten days notice once that person has been informed thereof in terms of section 8(4).

Section 8's relationship with PAJA is unclear. It is also unfortunate that the opportunity was not taken to list the rights and consequences of decisions as per section 3 of PAJA comprehensively. The time limits given in the prescribed forms as set out in the Immigration Regulations are the absolute minimum allowed.<sup>42</sup> The time limit allowed should vary on a case-by-case basis instead of being a departmental policy norm.<sup>43</sup>

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<sup>41</sup> Act 3 of 2000.

<sup>42</sup> Regulations are available on the SAMP website. (n 6 above).

<sup>43</sup> Watters, C (n 39 above).

There is doubt as to whether certain decisions of the Minister fall under section 8, because the Minister is not part of the Department and because the second stage in the appeal structure is the Minister himself. This leaves people who have been adversely affected by a decision of the Minister without redress but for the provisions of PAJA. .<sup>44</sup>

The AB seeks to remove section 8, thus allowing recourse to PAJA alone, whose time limits are not definite. The D-G has powers of review under the AB in only two limited circumstances: the refusal of entry and determinations of status as an illegal foreigner. This position reflects that of the ACA and would be a step backwards in protecting the rights of foreigners. In the absence of clear statutory obligations to provide appeals procedures the enforcement bodies are likely to avoid the procedures set out in PAJA, particularly since the DHA has stated they find compliance with the current section a hamper on removals.<sup>45</sup>

The finding of constitutionality in the *LHR* case, as will be discussed, depended on the existence of the procedural guarantees in section 8 thus if it is removed section 34(8) would be unconstitutional.<sup>46</sup>

#### **2.3.4 Cross border permits:**

An interesting inclusion in terms of the permit scheme of the act is in section 24(1) where the department may issue border passes for prescribed foreign countries. This could be used to alleviate the problems faced by people living in border communities whose ethnic groups cut across colonial borders.

#### **2.3.5 Arrest and search provisions:**

The powers of the Department are listed in section 3 of the act including the power to:

Request anyone in the republic, who is reasonably suspected of being an illegal foreigner, to identify himself as a *citizen* or *resident*, or to produce a permit to be in the *Republic* (emphasis original).

Section 34 is the main arrest provision in the IA. It provides that, without a warrant, an immigration officer can arrest or cause to be arrested as an illegal foreigner and shall irrespective of whether there has been an arrest or not cause him to be deported. This section also includes provisions on deportation and detention.

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<sup>44</sup> Watters, C (n 39 above).

<sup>45</sup> Crush, J and Klaaren, J (n 6 above).

<sup>46</sup> *Lawyers for Human Rights and Another v The Ministers of Home Affairs and Others* CCT 18/03 < [www.lhr.org.za](http://www.lhr.org.za) > (accessed 20 July 2004).

The method of deciding whether someone is an illegal foreigner is included in section 41 under the title ‘identification’:

When so requested by an immigration officer or police officer any person shall identify himself or herself as a citizen, resident or foreigner...and if on reasonable grounds such immigration officer or police officer is not satisfied that such person is entitled to be in the *Republic*, such...officer may take such person into custody without a warrant and if necessary detain him or her in a *prescribed* manner and place until such person’s *status* or *citizenship* is ascertained.

This section has changed very little from section 53 in the ACA. The drafters chose to ignore the pressures for clarification; the opportunity was missed to make it mandatory for police officers to afford people the chance to retrieve their documents as well as provide guidelines as to what constitutes a reasonable suspicion and to explicitly denounce racial profiling.<sup>47</sup> The AB includes a requirement that an interview be held to determine whether or not to arrest a person. Including substantive guidelines as to the contents of this interview would be welcome.

Section 34 (1)(c) grants the right to be informed immediately on arrest of the other rights set out in the same section (section 34 (1)(a-b)), which will be canvassed later. There should have been a discussion in this section of the right of an arrested person to be informed of the reasons for the arrest.

### **2.3.6 Search and seizure**

Section 33 sets out many of the provisions dealing with arrest and search. Section 33(5) provides that an officer may obtain a warrant to search the premises for a person or a thing. The officer is empowered to search the premises, arrest and question persons amongst other things.

Seizure of documents or a thing may take place only if there is a reasonable suspicion of the items being connected to a matter under investigation. A receipt must be issued for items seized and they may only be seized if they will be returned in good order as soon as possible after the purpose of the seizure has been accomplished. A person should also be allowed reasonable access to the item.

Thus the seizure of identity documents by immigration and police officers is clearly illegal unless they obtain a warrant. Even if this is done they may not keep items indefinitely and deny a person access thereto.

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<sup>47</sup> During comments on the Amendment Bill it was suggested that section 34 include the statement ‘provided that that person is given reasonable opportunity to verify his or her identity or status’, National Economic Development and Labour Council draft report of The Immigration Task Team, 2004. < [www.pmg.co.za](http://www.pmg.co.za) > (accessed 2 October 2004).

A magistrate may grant the warrant if the officer swears to having reasonable grounds to believe the item sought is on the premises, and must specify the acts he/she intends to take. Guidelines as to execution are also provided, for example, that it should be as far as possible executed by day unless the magistrate authorizes a search by night which shall be reasonable with due concern for the privacy, dignity, freedom and security of a person.

It also provides substantive guidelines as to how a search should be conducted. The officer should identify himself to the person in charge of the premises and serve that person a copy of the warrant as well as provide, on request, particulars of his/her authority to carry out the warrant. Therefore it is directive for the officer to provide a copy of the warrant. The person may not enter onto the premises unless they have audibly demanded access and given notification of the purpose of entry.

There is a procedure for a warrant-less search that excludes the search of private dwellings. The provisos to this power are that there must be either consent from the person in charge of the premises or a reasonable belief that the warrant would have been granted but that the delay would defeat the purposes of the search. There is a provision to protect confidential information in subsection 33(11).

These provisions are a departure from the scheme of the ACA, and provide guidelines and protections similar to that available under the criminal search and seizure procedures.

### **2.3.7 Detention provisions:**

The main provisions dealing with detention are contained in section 34 stating that an immigration officer or police officer may, pending detention, detain an illegal foreigner or cause him to be detained ‘in a manner and at a place under the control or administration of the Department.’ This would have been a good place to mention a private contractor explicitly and mention the relationship between the DHA and the contractor Dyambu. Some hold the opinion that this omission renders detention at Lindela unlawful.<sup>48</sup> The AB extends the places of detention to include police cells and other places under the control and administration of the Department but the position of Lindela has been neglected again.

Section 34 includes a list of detainees’ rights. Detention for the purpose of deportation can be confirmed by a court on request, which if not issued within 48 hours will occasion the release of the detainee (34(1)(b)). Section 34(2) provides that for purposes other than deportation detention may not exceed 48 hours (except when detention is on a ship).

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<sup>48</sup> Crush, J and Klaaren, J (n 6 above).

There is a provision that a person may not be detained for longer than 30 days without a warrant of the court extending the detention on reasonable and good grounds for a maximum of 90 days in section 34(1)(e). There is also a note that detention must be in compliance with the minimum prescribed standards in terms of a person's human dignity and human rights.

Section 34(1)(e) is not a substantial departure from the ACA and there is no clarification that detention in police and prison custody should be recorded and counted towards the 30 day detention limit. The 48 hour limit for the purpose of detention is problematic as it puts the onus on the detainee to request confirmation of detention. The legality of the provision, in light of section 35 of the constitution, has been questioned by the Department of Home Affairs (DHA) itself. In an unprecedented move it has asked the Constitutional Court to pronounce on the matter.

The recent *LHR* case discussed the constitutionality of section 34(8). The Court found that the denial of 30 day judicial review for a person detained on a ship was unconstitutional and read this requirement into section 34(8). The Amendment Bill reflects this case.

Section 34(7) is potentially problematic in that once a warrant for the release of a person has been issued and that person has been delivered into the custody of the bearer of the warrant he/she shall be deemed in lawful custody. No further guidelines are provided as to when that person is entitled to release from what is intended to be temporary custody. This section is open to abuse.

### **2.3.8 Deportation Framework:**

Section 32 sets out, in a manner similar to the ACA that any illegal foreigner 'shall' depart unless authorized by the Department to remain in the country pending application for status. Section 32(2) unambiguously states that any illegal foreigner will be deported. Section 31(2)(b) allows an application to the Minister who, with terms and conditions he/she deems fit may allow a foreigner permanent residence when special circumstances justify such. This should be spelt out more explicitly with better guidelines as to how the DHA should exercise such discretion and who in particular should do so. This is similar to section 28(2) of the ACA. The AB places this responsibility on the D-G by means of regulation and no longer by discretion. This creates a more precarious situation for an illegal foreigner seeking status.

Section 34(3) provides that the DHA may order the illegal foreigner to make a deposit to cover the costs of detention and deportation. Failure to comply is an offence subject to a fine or imprisonment.

The IA should have made more explicit the application of human rights standards to the conveyance and deportation of illegal foreigners as has been done in section 34(1)(e) for detention.

### **2.3.9 Inter-departmental co-operation**

The lack of cooperation and of identifiable spheres of action makes the South African policy unfeasible and fosters corruption. The Act provides for interdepartmental co-operation in section 6 saying that the D-G will chair a meeting of senior members of the department with functions at the ports of entry. However no real guidance is given as to whom these role players are, what each of their roles should be and, vitally, with whom final accountability lies. This provision has been removed in the AB whereas it should have been retained with greater detail and certainty.

The role of the South African Revenue Service (SARS) and Customs and Excise has now been recognized in a section discussing the monitoring of entries (Section 36).

### **2.3.10 Corruption**

Section 47 provides for an internal anti-corruption unit charged with preventing, deterring, detecting and so forth any corruption, abuse of power, xenophobia and dereliction of duty by any person in the Department.

Section 49 provides that the offering of financial and/or other considerations or threats to an officer to breach his duties will constitute an offence and be liable on conviction to a fine or imprisonment up to 18 months. If the officer indeed breaches his duties then anyone who has induced this will be subject to a fine or imprisonment up to three years. The IA also criminalizes activities by civil servants to provide fraudulent documentation to an illegal foreigner as well as criminalizing any conspiracy to conduct activities aimed at breaching the IA.

It is patent that the focus is on the illegal foreigners more so than on the immigration officers. As will be demonstrated in the next chapter corruption is endemic amongst the enforcing bodies of the immigration legislation, hence the focus of these provisions should have reflected this.

## **2.4 Conclusion**

As can be seen the Immigration Act is not a great improvement on the wholly unsatisfactory ACA. The government may be clinging to outdated legislative tools which unfortunately fall below the constitutional and international standard. The efforts at amending the IA through the AB have been retrogressive, in particular the removal of section 8 and asylum permit procedures, instead of improving on the short comings of the IA.



## **Chapter 3: An analysis of the repatriation practices**

### **3.1 Introduction**

Migration control has been effected by the DHA, the South African Police Services (SAPS) and the South African National Defence Forces (SANDF). The focus is both on controlling South Africa's expansive borders as well as employing internal enforcement measures. There are several specialized police units called Internal Tracing Units and a national Aliens Investigation Unit.<sup>49</sup> Previous initiatives at border control cooperation floundered due to rivalries and an absence of role clarification and accountability.<sup>50</sup>

### **3.2 Border controls**

The porous South African borders are 'controlled' mainly through the SANDF. The task is aided by rivers, wildlife as well as the electrified fence that runs along part of the border with Mozambique. Since the early 1990's due to human rights concerns the fence has only been on alert mode.

The SANDF patrols the borders and sets up roadblocks at certain well-established points where immigrants cross. It has been shown that the SANDF apprehend a far larger amount of undocumented migrants than the SAPS and DHA. This is problematic as there is little cooperation between these bodies. Army officials are not trained to evaluate the cases of asylum seekers, which creates the possibility that the principle of *non-refoulement* is breached when they turn such people away at the borders. There have also been reports of assaults by the SANDF.<sup>51</sup>

### **3.3 The practice under the ACA**

#### **3.3.1 Arrest procedure**

The main tools the SAPS use in apprehending undocumented migrants have been organised crime sweeps such as operation crackdown in 1998 (which included searches of buildings and road blocks) and randomly approaching people in streets. Police have been known to frequent areas that have large foreign communities.<sup>52</sup>

There was substantial evidence of racial profiling as the criteria for arrests. People were targeted for being too dark, not speaking any of the main South African languages, dressing like a foreigner, having

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<sup>49</sup> HRW (n 22 above) 44.

<sup>50</sup> Minaar, A 'Border controls and regionalism: the case of South Africa', *African Security Review*, vol 10 number 2, 2001.

<sup>51</sup> Peberdy, S *Selecting immigrants: nationalism and national identity in South Africa's immigration policies, 1910-1998*. Unpublished doctorate, Queens University, Canada as quoted by Manby, B (n 27 above) 144.

<sup>52</sup> The SAHRC found that 42,3 percent of people interviewed had been apprehended in pedestrian spot checks. SAHRC (n 20 above) 18.

certain inoculation marks and even walking like a foreigner.<sup>53</sup> These reasons are arbitrary and can hardly be the basis of a ‘reasonable suspicion’.

Very few white undocumented migrants were apprehended, the deportation statistics being testament to this phenomenon.<sup>54</sup> As the SAHRC report stated ‘if the composition of the population at Lindela is anything to go by, it would suggest that only people of African origin are arrested and deported as illegal aliens’.<sup>55</sup>

Documented aliens and South African citizens were also targeted on the basis of these arbitrary criteria. South Africa’s border towns share cultural, linguistic and familial ties with groups in neighbouring countries; there is consequentially movement across the borders between these groups. People have been apprehended with South African Identity documents (ID) and been arrested merely because they did not speak one of the main languages or because they had inoculation marks received on visits to family in neighbouring countries. More disturbing was the trend observed that often people in possession of valid documents would have them confiscated or torn up by police officials who did not believe their stories.<sup>56</sup>

Another problematic factor in the interpretation of the previous legislation was that the requirement that an individual ‘satisfy such officer’ meant that the person had to produce documents then and there. Although this is not the official policy of the DHA it is the *de facto* policy of the enforcement agencies. This gave rise to an apartheid-like pass requirement. People were routinely prevented from going home to fetch documents. Often legal documents would lapse in detention as they could not be renewed. This results in the creation of illegality as has been observed by the CSV. <sup>57</sup> Aliens or people perceived to be aliens are persecuted and ‘made illegal’ through the actions of the enforcement institutions.

Those who were arrested and detained were not given reasons therefore. This indicates that did not have the opportunity to prove entitlement to be in the country. These problems lead to the SAHRC recommendation that the DHA publish clear guidelines and criteria for forming a reasonable suspicion to affect an arrest.

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<sup>53</sup> SAHRC (n 21 above) 8.

<sup>54</sup> HRW only observed black detainees (including Indians and Pakistanis) (n 22 above) 50.

<sup>55</sup> SAHRC (n 20 above) 15.

<sup>56</sup> Klaaren, J ‘Immigration control and the South African constitutional Law’ in Crush, J (ed) (n 23 above) 54.

<sup>57</sup> HRW (n 22 above).

### 3.3.2 Arrival, investigation and registration process

When suspected undocumented migrants arrived at Lindela they had to be registered on a computerized system and issued identity cards stating their date of arrival and country of origin. According to senior management no one was registered until they were declared prohibited persons after a section 7 investigation. Another Dyambu staff member admitted that investigations took place within a few days of arrival.<sup>58</sup>

Some persons arriving at Lindela had not been declared prohibited persons under section 9 and had yet to undergo a section 7 investigation under the ACA. This procedure had to take place within 48 hours of arrest as stated above. However people were often detained initially in police cells before being transported to Lindela. It was the practice of the DHA officials not to count the period in police detention either towards the time for section 7 examinations, or towards the 30 limit in terms of section 55, regardless of how substantial the detention may have been.

It should also be noted that police holding cells are not suitable for the long term detention of undocumented migrants. Some people were detained in prisons and although the conditions of detention in prisons have been shown to be better than Lindela this is not conducive either as this example illustrates:

...I was kept arrested together with criminal offenders who had knives inside the cells...I got my R210 stolen together with my Malawian friend who had R650 stolen.<sup>59</sup>

The investigation process in Lindela was cursory and incomplete. It involved little privacy or opportunity for people to explain their stories but for answering questions from country specific questionnaires such as nationality, date and place of birth and parents names and nationality. The interviews were also conducted in English not accounting for the language barrier faced by most detainees. This process was problematic due to its rushed, rigid nature and because it was based on the assumption that a person was from a certain country. It was rare for wrongly noted countries of origin to be corrected.<sup>60</sup>

A problem in the investigation process also lay in process of verifying identity documents. Detainees in possession of identity documents had to wait for them to be verified and even produce further proof such as birth certificates and school records. This is difficult as many South Africans do not have ID's let alone access to birth certificates. Due to the amalgamation of the racially divided schooling systems

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<sup>58</sup> HRW (n 22 above) 50.

<sup>59</sup> SAHRC (n 20 above) 35.

<sup>60</sup> SAHRC (n 21 above) 45.

documents such as school records have been lost. This burden of proof is very high and onerous on the detainee.

The lack of access to free phone calls hampered the process of proving entitlement to be in the country. Most detainees were found not to be aware of the right to a free phone call. The only access to phones was pay phones situated in the men's quarters in Lindela, which many detainees could not afford to use. Although Dyambu and the DHA agreed when meeting with the SAHRC that people were entitled to one free phone call they were reluctant to shoulder the costs.

Immigration officers were not freely available; a detainee was only permitted to speak to an immigration officer when he/she requested it and had to be escorted by Dyambu staff. It was observed that Dyambu staff members sometimes refused to allow a detainee access to the immigration officer. Immigration officers themselves were busy and reluctant to revise cases. It was also observed that people with valid South African ID's languished in detention because they were denied the opportunity to present their documents to the immigration officers.

Immigration officers lacked the expertise and man-power to undertake asylum applications or renewals which maybe necessary in some cases. The entire climate at Lindela was found to be negative towards asylum seekers. Senior members of Dyambu commented that most people 'made up' asylum claims when they arrived in Lindela and that they, as per 'international practice', only assisted with applications that had been initiated before arrest.<sup>61</sup> Although one member of Dyambu said it was policy to take those claiming asylum to the Johannesburg to apply, it is not the case in practice.<sup>62</sup>

Detention in excess of the 30 day limit was rife including of asylum seekers and refugees. The detention of asylum seekers for indefinite periods amounts to arbitrary detention in the opinion of HRW.<sup>63</sup> The SAHRC repeatedly observed this and eventually took court action which resulted in people being released on section 42 permits with 7 days within which to apply for asylum.

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<sup>61</sup> UNCHR IOM/22/99 guideline 5 in SAHRC (n 21 above) 48.

<sup>62</sup> SAHRC (n 21 above) 49.

<sup>63</sup> HRW, *Locked away: Immigration detainees in jails in the United States* (1998) <[www.hrw.org](http://www.hrw.org)> (accessed 12 July 2004).

### 3.3.3 Detention conditions

The main complaints during the investigations in 1999 and 2001 were inadequate food, inadequate health care services and disturbed sleep.

The detention facility is divided into two sections one for men and one for women. There is also a main hall for visitors and for new detainees before registration. The women's court yard had trees and benches but was used on deportation days to hold those awaiting deportation. The men's facilities included pay phones a small shop and bathrooms. The women's section did not have bathrooms available. Women needed permission to make use of the facilities in the men's section.

The rooms had up to 25 beds in them. It was observed that people were asked to sleep two to a bed. An inventory list revealed that despite the fact that there can be up to 1500 detainees at Lindela there were only 657 mattresses. The bedrooms did not have toilets. Researchers observed buckets under beds which served as toilets and noticed that faeces had been thrown out of the windows. It has since been observed that Dyambu began installing bathrooms in the rooms in the women's section.

Food was served twice a day, between 5 and 7 in the morning and between 4 and 6 at night, thus a substantial amount of time may pass between meals. The quality of the food was found to be poor. Breakfast was usually 4-6 slices of white bread and maize meal porridge and soup in the evening. This was found to be very different to the foods listed in the tender agreement between DHA and Dyambu stating they would supply three meals a day including meat, vegetables and beverages.<sup>64</sup>

Although Dyambu contended that the food it supplied was of good quality and sufficient for the nutritional needs of the detainees it agreed to look in to revising the agreement with the DHA to provide three meals a day. Dyambu does not cater for the particular religious needs of detainees as it pertains to food. After this was raised by the researchers halaal and kosher foods were stocked in the shop.<sup>65</sup>

Medical treatment was available at Lindela. For serious illnesses or problems people could be sent to the hospital (security guards confided that they were reluctant to allow this for fear that detainees would escape). The detainees, however, complained that access to the doctor was conditioned by the security staff; this resulted in people being denied access to health care.

Assault and violence towards detainees has been observed by various researchers. 20,1 percent of the sample during the 1999 study by the SAHRC reported violence against themselves or others. It has also

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<sup>64</sup> SAHRC (n 21 above) 63.

<sup>65</sup> Meeting with Dyambu trust officials, 15 September 2000, SAHRC (n 21 above) 76.

been observed that detainees were subjected to demeaning verbal attacks. A repeated complaint was that the sleep patterns of the detainees were disturbed either by keeping the lights on or by repeated spot checks. Interviewees said that they were often beaten if they did not get up fast enough or if they disobeyed the orders of a security guard.

In September 1999, five men said that security guards had assaulted them. The men were taken to the doctor who treated them. Dyambu dealt with the matter internally only Dyambu staff was allowed into the disciplinary hearings and no attempt was made to take criminal action. The security officers involved were dismissed.

It was suggested by the SAHRC that an independent complaints system be set up and that all incidents be reported to the local police station and the DHA. Dyambu agreed, during a follow up meeting, to reserve a room for the SAHRC and to allow them 24 hour access to the facility.

There were reports of sexual harassment of women by the police and release conditional on sexual favours. Far less information was available about goings on at Lindela than in police custody. This may have been due to fear and a lack of opportunity. It was reported that women and men mixed during meal times and when women accessed the telephones in the men's courtyard. There were also reports of male security guards patrolling the women's sleeping quarters at night. Dyambu reacted to this by building facilities in the women's courtyard, making separate meal times and only allowing female security personnel to patrol the women's section.<sup>66</sup>

The rights of juvenile detainees were also important as children were often detained in the company of their parents. Lindela does not have facilities to detain children separately or given them separate amenities. Lindela stated its policy was not to detain unaccompanied children but a 15 year old boy was found there in October of 1999.<sup>67</sup>

### **3.3.4 The actual deportation**

Most detainees are southern African and transported by train or by truck.<sup>68</sup> Police and the DHA work together in facilitating this process hence their officers accompany detainees on the journey. The trips are long and arduous and provide the opportunity for commission of human rights abuses by officials.

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<sup>66</sup> SAHRC (n 21 above) 68.

<sup>67</sup> SAHRC (n 21 above) 69.

<sup>68</sup> HRW (n 22 above). 42.

HRW quoted testimonies that people were made to sit with their heads between their legs for ten hours on the train to Mozambique. If they looked up they were beaten and often had money taken from them by officials.<sup>69</sup> There were reports of people dying or being injured after having bribed the guards to allow them to jump of the train. The fact that less people arrive in Ressano Garcia then board the train indicates this practice maybe true.<sup>70</sup> There were also reports of people being thrown from trains:

I had R250 hidden in my collar. They took it and pushed me off the train. I hit my head and face and I was coughing blood ... We heard a woman screaming as she was thrown onto the tracks. Both her legs were cut off by the train.<sup>71</sup>

Mozambican officials noted that South African's who were dark or had mental problems were routinely dumped at the border point.<sup>72</sup>

### 3.3.5 Corruption

Abuse of power occurs at all points in the process from arrest to the actual repatriation. During the arrest process people routinely admitted to either bribing officers (SAPS, DHA, SANDF) or having witnessed officers being bribed to release detainees. The SAHRC noted that 25,5 percent of the sample in their 1999 study were requested to pay a bribe. There was evidence of a market rate for release. R50 was the minimum required to secure release at initial apprehension and raised to R100 once a person was in police custody. These reports of bribery were volunteered to researchers who did not ask whether the interviewees had knowledge of corruption.<sup>73</sup> At the DHA people were able to buy valid documentation.<sup>74</sup>

At Lindela bribes were paid either to immigration officers or Dyambu officials. Even those detainees entitled to be released stated that they had been required to pay R150. Friends and family of detainees also stated that they were required to pay certain amounts to either secure the release of the detainee or to carry out some administrative step in the release process. There is in fact no fee required to verify documents.<sup>75</sup> The SAHRC was of the opinion that corruption amongst apprehending officers was endemic.<sup>76</sup>

There was also evidence that officials extorted money from those awaiting removal by threatening to delay their removal and detain them for longer. Bribes were also elicited for 'privileges' such as access to the telephone and for finger printing.

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<sup>69</sup> HRW (n 22 above) 102-103.

<sup>70</sup> Manby, B (n 27 above).

<sup>71</sup> 'Police throwing us off the train' *The Star* 8 August 1999 < www.thestar.co.za > (accessed 22 July 2004).

<sup>72</sup> SAFM radio network 17 June 1999 as quoted in Manby, B (n 27 above).

<sup>73</sup> SAHRC (n 20 above) 25.

<sup>74</sup> Manby, B (n 27 above); A task team at the DHA found that 3387 fraudulent marriages were registered since 2001 'Huge probe into fake marriages' *Sunday Times* 25 July 2004.

<sup>75</sup> SAHRC (n 20 above) 37.

<sup>76</sup> SAHRC (n 21 above) 27.

After the SAHRC investigation Dyambu instituted a clamp down on bribery and offered a reward of R1000. In December 1999 Dyambu decided to allow the SAHRC to attend all disciplinary hearings. The Departmental Anti-Corruption Unit was present at Lindela but the SAHRC was informed there had been no convictions.<sup>77</sup>

### **3.3.6 Lack of accountability**

The above issues serve to indicate that there is an amorphous division of power between the DHA and Dyambu. The contract between the parties is also unhelpful. Although it is clear that DHA must make determinations of the status of detainees and order the release or deportation of persons and that Dyambu is responsible for the day to day running of Lindela, as the governmental body the DHA must share responsibility with Dyambu. Accountability and transparency are new constitutional values which seem to be undermined by such an arrangement.<sup>78</sup>

The DHA had no powers of control or monitoring capacity at Lindela. The investigative role had been left to outside independent structures such as the SAHRC. Unfortunately this role has been difficult to carry out with the reluctance of Dyambu, which as a private body feels it has no obligation to disclose information to the public.<sup>79</sup>

There seemed to be few internal control measures in place either by the DHA or Dyambu and those of Dyambu were of questionable validity as they were not transparent and open.

There was also a lack of accountability between the DHA and enforcement bodies. There were no guidelines as to how apprehensions should take place and no controls over the different parties involved. The level of information sharing such as dates of arrests, validity of documents outcomes of section 7 examinations was seen to be lacking or non-existent.

### **3.4 The Practice of arrest, detention and deportation under the IA**

During my field research I interviewed 22 people. This was through two visits to Lindela Repatriation Centre, to which I could not gain access, as well as interviews with people in the Jeppe Street, Hillbrow and Marabastad areas.<sup>80</sup> The method used during the interview was random sampling of people and the administering of a set questionnaire. The interviewee was also given the opportunity to comment. I used secondary sources such as news reports, Non-governmental organisation (NGO) statements, as well as case law to support my findings.

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<sup>77</sup> SAHRC (n 21 above) 79.

<sup>78</sup> SAHRC (n 21 above) 26.

<sup>79</sup> SAHRC (n 21 above) 27.

<sup>80</sup> On the advice of researchers at the Wits Law Clinic I interviewed people outside Lindela.



### 3.4.1 Arrest procedure

The modus operandi of the police seems not to have changed drastically since the advent of the Immigration Act. This maybe attributed to the fact that the enabling legislation remained substantively the same. Guidelines were issued in 2002 as to what a reasonable suspicion entails but these have not had a tangible effect.<sup>81</sup>

Both those who had been detained in Lindela and those who had previously been arrested were not given the reasons for their arrest. Some claimed that they had been arrested on the basis of their physical appearance such as Elizabeth, who said she was arrested because she does not look South African.<sup>82</sup> Alpheus stated he was arrested because of his accent and the inoculation mark on his arm.<sup>83</sup>

Similarly 5 people out of the sample group mentioned the use of racial profiling in some form or the other. A very telling example was that of a white man who was stopped in the streets of Berea on suspicion of being a Pakistani. It should be noted at the onset that he was stopped simply on the suspicion that he was of a specific nationality that was somehow suspect. He was asked to count to ten in Afrikaans and say an Afrikaans nursery rhyme to demonstrate 'that he was white'.<sup>84</sup> The implication: a white person cannot be an illegal foreigner and all white people speak Afrikaans.

The ability to satisfy an officer that you are entitled to be in the country by producing a permit has not been respected. People in possession of documentation were still taken into custody. Mustafa was apprehended in Johannesburg and told that his refugee permit was not real. Similarly Mike stated he had been arrested despite displaying his section 22 permit. He volunteered that people had their permits torn up or confiscated and he felt that the point of arrests was to illicit bribes.<sup>85</sup>

Kingsley said his wallet containing his permit was stolen, on reporting the theft he was arrested as an illegal immigrant because 'I look different'.<sup>86</sup>

South Africans continue to fall prey to these arbitrary distinctions. Musa was waiting outside Lindela to bring his brother his ID document. Musa said that his father was a Swazi and his mother was Zulu but they lived in the Eastern Cape. His brother had been stopped and asked where he comes from. He was arrested because his surname and the language he spoke did not fit the area he is from.

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<sup>81</sup> LHR 'Review of states' procedures and practices relating to detention of asylum seekers', September 2002 <[www.queensu.ca/samp](http://www.queensu.ca/samp)> (accessed 16 July 2004).

<sup>82</sup> Elizabeth Zondi, Zimbabwean, Hawker, Jeppe Street, Johannesburg, 20 July 2004.

<sup>83</sup> Alpheus Mbathe, Mozambican, Painter/builder, Lindela Repatriation Centre, 29 July 2004.

<sup>84</sup> M, South African, Student, Hillbrow, Johannesburg, 20 July 2004.

<sup>85</sup> Mekonen Bireda Essa, Ethiopian, Asylum Seeker, Jeppe Street, Johannesburg, 20 July 2004.

<sup>86</sup> Kingsley, Cameroonian, Lindela Repatriation Centre, 20 July 2004.

The police again demonstrated that they would not accompany a person to retrieve their documents. The case of two Zimbabwean students at Wits Technicon is illustrative. They were approached by two policemen and asked to identify themselves. They said they had their study permits at their flat just up the road. The police refused to accompany them, and arrested them despite one boy being in possession of his student ID.<sup>87</sup>

A 16 year old Ethiopian boy was not allowed to fetch his refugee papers and detained in police cells. He was allowed one phone call and released when his brother and a lawyer arrived with his papers and threatened court action.<sup>88</sup>

Police have not allowed people reasonable opportunity to organize their affairs before arresting them. As was the case with Elizabeth, who stated she had been arrested thrice and had her goods looted because she was not given the chance to pack her things.<sup>89</sup> However, Stella was allowed to go home to collect toiletries and belongings before being taken into custody.<sup>90</sup>

### **3.4.2 Searches and Seizure**

I interviewed two people who had experiences with police raids and searches. Ms. Sithole is a nurse at Chris Hani-Baragwanath hospital. She was arriving home after working the night shift and found the police were searching the block of flats where she lives. She was apprehended entering her flat. The police demanded to know why she was coming in so late at night and arrested her apparently on immigration grounds but without giving any reasons.<sup>91</sup>

The second interviewee is a lawyer with knowledge of human rights who lives in the Hillbrow area.<sup>92</sup> At two in the morning police knocked on the door and woke his family up. Although he is aware of the warrant requirement he stated that he 'knew better than to ask for one'. Despite the fact that members of his family did not speak English they were not asked to produce identity documents. They are, incidentally, white. He witnessed neighbours in possession of documents being arrested and maltreated. The event was of a massive scale and involved the presence of the press taking pictures of the 'illegal immigrants'.

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<sup>87</sup> Dan, Jabu, Zimbabweans, Braamfontein, Johannesburg, 20 July 2004.

<sup>88</sup> S, Ethiopian, Marabastad, Pretoria, 18 July 2004.

<sup>89</sup> Elizabeth (n 82 above).

<sup>90</sup> 'South Africa: focus on Lindela Repatriation Centre' 12 October 2004 < [www.irinnews.org](http://www.irinnews.org) > (accessed 12 October 2004).

<sup>91</sup> Sithole, South African, Hillbrow, Johannesburg, 20 July 2004.

<sup>92</sup> G, South African, Braamfontein, Johannesburg, 20 July 2004.

He opined that this was a propaganda exercise in the run-up to the elections to show the tough stance on illegal immigration. He considered the exercise a sham, however, as no real undocumented foreigners were found. The really dangerous buildings and areas had been avoided.

It is questionable whether the police had a reasonable suspicion that they would find illegal foreigners or any items necessary to an investigation. No one had seen a warrant which is required for a search of a private dwelling and which the act states must be shown to the person in control of the premises in terms of section 33.

### **3.4.3 Detention Practices**

None of those interviewed who had been detained in police cells stated that their detention was beyond 30 days, however, they had not been warned about the ability to have the detention confirmed by a court of law in terms of section 34(1)(c). An interviewee confirmed that he knew of people who had been in detention for up to three months without going to court.<sup>93</sup>

Only one person volunteered information about an assault by policemen in Rustenburg.<sup>94</sup> He was of the opinion that at Lindela ‘the brutalization was not as much as in the media’. I encountered three cases that had been brought by the Wits Law Clinic on behalf of foreigners who had been arbitrarily arrested and detained during a crackdown in 2002. One case involved a severe assault. These cases had been settled out of court by the DHA.

In 2004 a man was allegedly beaten to death when a few men managed to escape from Lindela by crawling past the dog kennels and scaling the wall. Management blamed the deaths on men at a tavern.<sup>95</sup> Similarly in 2002 a Nigerian man was beaten to death, resulting in the arrest of two guards.

This illustrates that news of such incidents are starting to emerge and that the police are involved in the investigations. This may simply be because the events involved a death; incidents of assault may still go undetected. In order to curb abuses Lindela has installed cameras; the videos are then kept for two months as evidence.

Only three interviewees who had been detained in police cells said they were given free phone calls.<sup>96</sup> Musa noted that his brother had been denied a free phone call. Since his cell phone battery was flat he

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<sup>93</sup> Eric Bahcho, Cameroonian, Lindela Repatriation Centre, 20 July 2004.

<sup>94</sup> Kingsley (n 86 above).

<sup>95</sup> (n 90 above).

<sup>96</sup> (n 90 above).

sold his cap to pay the guards to charge his phone.<sup>97</sup> Kingsley stated that there are no free phone calls and you have to pay three times the normal price to make a phone call.<sup>98</sup>

#### **3.4.4 Detention Conditions**

This is the one respect in which there have been improvements. The reception area is now more comfortable with bathrooms, water coolers and posters displaying human rights and NGO information. The centre has activities such as soccer in the men's section and a netball court and jungle gym in the women's section. There is a new clinic, a small library, cash canteen, and religious visitors are allowed. Many of the rooms now have televisions in them.<sup>99</sup>

The company that runs Lindela, now called Bosasa, has gone some way toward making life better for the inmates. However, Jody Kollapen of the SAHRC said conditions have improved at the centre, but 'when you look beyond the buildings and the food you see the scale of human suffering, the look of desperation on their faces.'<sup>100</sup>

The food remains one of the major complaints at Lindela. 6 out of 11 people (whom had either been detained at Lindela or where friends and family of inmates) complained about the food quantity and quality. Alpheus stated that the food was bad and 'makes you sick'. Kingsley stated that there was supposed to be three meals a day but you only received two. Musa's brother told him that the food was terrible and consisted of watery soup with potato peels and that Lindela was very dirty.<sup>101</sup>

The position of women in detention is still problematic; there have been reports of rapes and requests for sexual favours. In October 2003 two policemen reportedly raped illegal immigrants being held in police cells in the Freestate province.<sup>102</sup> Memory Moyo, whose permit was torn up during a police raid, was told she could avoid deportation by sleeping with four policemen and paying R400. She refused and was taken to Lindela. Valentine Mpofu was also asked for sexual favours in exchange for release from police custody.<sup>103</sup>

It was found that several children had been detained in Lindela unaccompanied and in the same place as adults. This detention, which was not as a matter of last resort, was held to be unconstitutional by the

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<sup>97</sup> Musawenkosi Dube, South African, Lindela Repatriation Centre, 29 July 2004.

<sup>98</sup> Kingsley (n 86 above).

<sup>99</sup> Mustafa, Somali, Refugee, Lindela Repatriation Centre, 29 July 2004.

<sup>100</sup> (n 90 above).

<sup>101</sup> Musa (n 97 above).

<sup>102</sup> South African Broadcasting Corporation (SABC), 'Illegal immigrants raped: policemen on bail', 30 October 2003. <[www.sabcnews.org](http://www.sabcnews.org)> (accessed 24 September 2004).

<sup>103</sup> 'SA Police are as cruel as Mugabe's Militia', 6 September 2004. <[www.siener.co.za](http://www.siener.co.za)> (accessed 24 September 2004).

Pretoria High Court who interdicted Dyambu from detaining the children. Later it was found that more unaccompanied children had been accepted into Lindela despite the interdict. Lawyers for Human Rights mentioned that children were ‘dumped’ over the border without any arrangements made for contacting their parents or transporting them to their homes.<sup>104</sup>In September 2004 a researcher at Lindela contacted me stating 20 children were being detained and that it was ‘depressing’.

Two Rwandan sisters deportation was halted until they had been given the opportunity to apply for refugee status, which they had been denied by immigration officers in the Freestate.<sup>105</sup>

One interviewee outside Lindela, was particularly distraught. His 15 year old brother had been arrested. Mr Z had first gone to the police station, with his birth certificate and then to Lindela to find that he had been removed and no one knew where he had been taken. The man was terrified that his brother had been deported.<sup>106</sup>

The newspapers recently carried a story about a 15 year old boy who was arrested on his way to school because he was ‘too black to be South African’. The police ignored the boy’s pleas to contact his parents. It was only through the bus driver’s intervention that his parents found out he was arrested and raced to the police station to prevent his deportation. He was only released (from detention with 24 adult men) when the parents called a journalist to the scene.<sup>107</sup>

### **3.4.5 Corruption**

The position in this regard does not seem to have improved in the slightest. 10 of the interviewees had direct knowledge of or had participated in bribery.

H a shop owner laughed as he told me he had never been arrested on immigration charges: ‘All I do is open the till, or give them some perfumes’.<sup>108</sup> Jabu, a Malawian national said he bribed the police R300 and was released.<sup>109</sup> Mike stated that despite being in possession of valid asylum documentation the police demanded R2000 or he would be taken to ‘sun city’, a notorious prison.<sup>110</sup>

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<sup>104</sup> ‘High Court stops repatriation of children’ *Pretoria News* 4 March 2004 < www.lhr.org.za > (accessed 21 July 2004).

<sup>105</sup> ‘High Court stops deportation of girls’ *Pretoria News* 19 March 2004 < www.lhr.org.za > (accessed 21 July 2004).

<sup>106</sup> Z, South African, Lindela Repatriation Centre, 29 July 2004.

<sup>107</sup> ‘Boy too dark to be South African’ *The Star* 28 July 2004.

<sup>108</sup> H, Ethiopian, Shopkeeper, Jeppe Street, Johannesburg, 20 July 2004.

<sup>109</sup> Jabu (2), Malawian, Shop assistant, Jeppe Street, Johannesburg, 20 July 2004.

<sup>110</sup> Mike (n 85 above).

The Minister of Home Affairs, Ms Mpakisa-Nqakula stated that she was aware of South Africans detained in Lindela such as Nomvula Zondo who faced deportation because she would not bribe the police.<sup>111</sup>

Eric and Kingsley had been released together. Whilst I interviewed Kingsley he avoided explaining how he was released. When I interviewed Eric he admitted that he and Kingsley each paid R800 to be released. He intimated that this was the rate for people without papers. You could also bribe the guards at night to switch the lights of allowing you to scale the wall.

There was evidence of a market rate of R800 for undocumented detainees and R150-R200 for those who had documentation. While some people were aware of the illegality of the payment others were under the impression that this was the correct 'procedure'. Musa's brother told him he needed money to bribe the police as well as his ID.<sup>112</sup> Mustafa said he paid R150 for checking his refugee status on the computer. JRS reported that there is a huge backlog in the refugee system and that computers are often not working. However people stated that a little money would get the computers working again.<sup>113</sup>

Several people were encountered anxiously waiting in a queue to enter the reception most seemed frustrated. Cuthbert had brought the R800 'bail' for his nephew but could not find the correct official to give it to. Similarly Mr. Y stated he was here to get a colleague out of Lindela and he was told that he needed an ID, passport or R800. He commented that the procedure was confusing.<sup>114</sup>

When looking for interviewees a man wearing the Lindela uniform was witnessed as he walked behind a car and surreptitiously accepted a wad of money from another man who then loaded several people into a car and left.

### **3.4.6 Lack of accountability**

There still seems to be a lack of accountability and confusion of duties between Dyambu and DHA. What has become more apparent through the field research is the lack of accountability. The SAHRC does not seem to have free access at any time to Lindela. There was no room allocated to SAHRC or permanent independent inspectorate set up. This is evident from the fact that both the SAHRC and LHR had to stop visits while waiting for the monitoring agreement between Lindela and the SAHRC to be renewed in August 2004. The general atmosphere is one of deference towards Lindela officials. Both the

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<sup>111</sup> SABC News 'Minister visits centre for illegal immigrants' 29 September 2004 < www.sabcnews.com > (accessed 2 October 2004).

<sup>112</sup> Musa (n 97 above).

<sup>113</sup> Jesuit Refugee Services (JRS), 'South Africa: democratic constitution but little implementation', Dispatch 150, 18 May 2004 < www.isanet.org > (accessed 17 September 2004).

<sup>114</sup> Y, South African, Accountant, Lindela Repatriation Centre, 29 July 2004.

DHA and Lindela officials were secretive, unhelpful and guarded, much like the bad old days of apartheid. The statement of the officer at the reception was telling ‘this is a private place you can’t see our secrets’.

### **3.5 Conclusion**

Dyambu has made some efforts to abide by the suggestions of the SAHRC and has improved the detention conditions to some extent as can be gleaned from reports. Efforts need to be made as regards nutrition, overcrowding and the detention of children as gleaned from the conducted field research. Most of the abuses that continue to happen are because there is no clear accountability between the DHA and Dyambu. The DHA has failed to take either practical or policy steps that would improve the situation.

## Chap 4: International and domestic human rights norms

### 4.1 Introduction

Oppenheim states:

The reception of aliens is a matter of discretion, and every state is, by reason of its territorial supremacy, competent to exclude aliens from the whole or any part, of its territory.<sup>115</sup>

This Chapter will outline the human rights norms that fetter the above mentioned discretion in the deportation context. South Africa is a dualist state but S39(1)(c) of the constitution requires the courts to have regard to international law when interpreting the constitution. In the case of *Makwanyane* this was held to mean both binding and non-binding international law.<sup>116</sup>

South Africa is party to the following international treaties: The Convention Against Torture and other Cruel Inhuman or Degrading Treatment (CAT), the International Covenant on Civil and Political Rights (ICCPR) as well as its two optional protocols, The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), The International Convention of the Elimination of All forms of Racial Discrimination (CERD), the Convention on the Rights of the Child (CRC) and The Convention relating to the status of refugees (UN Refugee Convention). South Africa has signed The International Covenant on Economic, Social, and Cultural Rights (ICESCR). Significantly South Africa has taken no action on the International Covenant for the Protection of the Rights of Migrant Workers and Their Families (ICMW).<sup>117</sup>

At a regional level South Africa has ratified the African Charter on Human and Peoples' Rights (ACHPR), the OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention) and The African Charter on the Rights and Welfare of the Child as well as the African Union Convention on Preventing and Combating corruption.<sup>118</sup>

Within the context of the situation of aliens the customary international law rights most pertinent are the right to life, the prohibition against torture and other inhuman punishment, the right to due process and the prohibition on arbitrary and prolonged detention.<sup>119</sup> Goodwin-Gill adds to this list the concepts of *non-refoulement* and non-discrimination.<sup>120</sup>

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<sup>115</sup> Jennings, R and Watts-Harlow, A (eds) *Oppenheim's international law* (1992) as quoted in Chimni, B 'Development and migration' < www.heiwww.unige.ch > (accessed 23 September 2004).

<sup>116</sup> 1995 (3) SA 391 (CC)

<sup>117</sup> < www.unhchr.ch > (accessed 27 August 2004).

<sup>118</sup> < www.africa-union.org > (accessed 27 August 2004).

<sup>119</sup> Tiburcio, C *The human rights of aliens under international and comparative law* (2001) 76.

<sup>120</sup> Goodwin-Gill, G *International law and the movement of persons within states* (n 16 above) 141.



#### 4.2.1 *Non-refoulement*

The Refugee Convention, the OAU Refugee Convention, CAT as well as regional human rights instruments guarantee the right to *non-refoulement* or the right not to be returned to a state where one faces persecution or particular violations of one's human rights. It is generally accepted that threats to a persons' life, liberty and bodily integrity are protected against.<sup>121</sup>

The UN Declaration on Territorial Asylum in article 3(1) forbids rejection at the border but allows exceptions for national security or to safeguard the population. Article 2(3) of the OAU Refugee Convention explicitly applies the principle to prevent refusal of entry at the border.

The right to life arises in the immigration sphere when the expulsion of a person to a specific country would entail a risk to that person's life. This is well developed in the field of extradition to countries with the death penalty.<sup>122</sup>

The question of a person's physical integrity and the prohibition on torture is also an important factor in the expulsion decision. The European Court of Human Rights (ECHR) has expressly rejected national security arguments in *Chahal v UK* even though it involved a person who was a member of separatist group.<sup>123</sup> This should give rise to interesting implications in a world increasingly polarised against terrorism since traditionally international law prevents the extradition of a person on the basis of a political offence.<sup>124</sup>

The fact that the South African government routinely turns people away at the borders without opportunity to make an asylum claim is a breach of this principle. Similarly the denial at Lindela of the opportunity to lodge or continue the application process also offends the principle. The destruction of valid documentation by enforcement officials is a blatant infringement of refugee rights.

#### 4.2.2 *Non-discrimination*

The principle of non-discrimination is contained all the major treaties and is considered *jus cogens*.<sup>125</sup> None of the instruments includes alienage as a protected ground but it is likely to fall under the ambit of 'other grounds'.

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<sup>121</sup> Tiburcio, C (n 119 above) 84.

<sup>122</sup> Tiburcio, C (n 119 above) 82.

<sup>123</sup> (1997) 23 EHRR 413.

<sup>124</sup> Fisher, D Martin, S Schoenholtz, A 'Migration and security in international law' Alienikoff, A and Chetail, V (eds) (n 14 above) 87, 91.

<sup>125</sup> ICJ Pleadings, South West Africa Cases, *Ethiopia v South Africa; Libya v South Africa* (vol 9) 305. < www.icj-cij.org > (accessed 25 October 2004).

The clauses on non-discrimination and equality are also indicative that aliens are entitled to rights under the instruments, as is the use of the term ‘everyone’ in most provisions.<sup>126</sup> This is affirmed by the Human Rights Committee (pertaining to the ICCPR):

The general rule is that each one of the rights of the Covenant must be guaranteed without distinction between citizens and aliens. These rights of aliens may only be qualified by such limitations as may be lawfully imposed under the covenant.<sup>127</sup>

Authors concede that the norm of non-discrimination places only a modest burden on a state to justify distinctions in its migration policy.<sup>128</sup> Fitzpatrick argues that a state’s distinctions must be reasonable and proportional.<sup>129</sup> European jurisprudence suggests that differentiation is lawful if 1) it is in pursuance of a legitimate aim 2) it does not lack an objective justification 3) reasonable proportionality exists between the means and the end.<sup>130</sup>

Blatant racial or religious discrimination would not be allowed as part of a migration policy. Article 2(1) of CERD could cause confusion as it states that:

This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.

General Comment 42 of the CERD Committee clarifies that non-nationals are still protected under the general provisions and that states may not discriminate against people of a certain nationality.<sup>131</sup>

It seems that South Africa’s disproportionate targeting of black Africans might be an example of blatant discrimination. The state’s argument would be that it is a reasonable and proportional to target Africans as they comprise the majority of illegal immigrants. Thus it is in accord with the legitimate aim of controlling illegal immigration. This reasoning is flawed as statistics (of the numbers and nationalities of illegal immigrants) act as self fulfilling prophecies; the more Mozambicans, for example, who are targeted the more Mozambicans appear in the statistics of illegal immigrants. This is dangerous given the trend of creating illegality as discussed in the previous chapter. As in the US case of *Wilkins* it was observed that, although only 17% of drivers in the Maryland area were black, over 72% of those stopped by traffic officials were black.<sup>132</sup>

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<sup>126</sup> Tiburcio, C (n 119 above) 96.

<sup>127</sup> Human Rights Committee, General Comment 15, 27<sup>th</sup> Session, para 2. HRI/GEN/Rev.1 (1986) <[www1.umn.edu/humanrts](http://www1.umn.edu/humanrts)> (accessed 22 September 2004).

<sup>128</sup> Martin, D ‘The authority and responsibility of states’ in Alienikoff and Chetail (eds) (n 14 above) 32, 35.

<sup>129</sup> Fitzpatrick, J ‘The human rights of migrants’ in Alienikoff and Chetail (eds) (n 14 above) 171, 172.

<sup>130</sup> Goodwin-Gill, G (n 16 above) 78.

<sup>131</sup> *Yilmaz-Dogan v the Netherlands* Committee on the Elimination of Racial Discrimination, Communication No. 1/1984, UN Doc. xx at xx (1984) also lends support to this interpretation.

<sup>132</sup> *Wilkins, et al. v. State of Maryland* quoted in Tanovich, D ‘Using the Charter to stop racial profiling: the development of an equality-based conception of racial profiling’ *Osgoode Hall Law Journal* vol 40 number 2. <[www.yorku.ca](http://www.yorku.ca)> (accessed 23 September 2004).

The targeting of people on the basis of arbitrary criteria cannot be a reasonable and proportional measure to the aim of controlling illegal foreigners. This amounts to discrimination and the government should cease to affect its immigration policy on the basis of these distinctions.

#### **4.2.3 Movement**

Everyone has the right to leave a country and to enter one's own country. The obligation on a state to take back its own nationals has been seen as the correlative of the ability to decide whether or not to accept foreigners.<sup>133</sup> Only the ACHPR includes a limitation clause to this right for public order or national security in article 12(2).

Academics have argued that this right should extend to encompass aliens who have been lawfully resident in the country for a long time in terms of the doctrine of legitimate expectations or through claiming that they fall within the phrase 'his own country' in article 12(4) of the ICCPR. The AB seeks to place permanent residents in the same category as foreigners and which would deprive them of this right. It is arguable that long time farm and mine workers who would have been entitled to amnesty should have legitimate expectations.

#### **4.2.4 Mass expulsion**

The articulation of the prohibition against mass expulsion under the ACHPR differs from the ECHR and ICCPR. The former refers to 'mass expulsion' and refers to a group of aliens where that group is homogenous in terms of nationality, race, ethnicity or religion. The latter refers to 'collective expulsion' of a group of aliens in the absence of individual review. This difference in semantics does not mean the rights differ. It has been argued that even if group expulsion without individual determination takes place, under the African system, of a group that is not homogenous on the listed grounds it would still fall under the prohibition due to the right to due process.<sup>134</sup>

The right was explained by the African Commission on Human and Peoples' Rights (African Commission) in a communication involving the expulsion of West Africans from Zambia. Zambia contended that the expulsions were not 'en masse' as the deportees had been arrested over a period of time at different places and served with deportation orders on different dates.

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<sup>133</sup> Martin, D (n 14 above) 41.

<sup>134</sup> Henkaerts, J-M (n 19 above) 22.

The African Commission found they had not been given an opportunity to challenge the deportation before a court (article 7) and had been held at a camp, not an ordinary prison thus it was impossible to contact their lawyers.<sup>135</sup>

The ambit of the prohibitions on mass expulsion includes where the individual examinations are cursory and there is no access to judicial redress. Thus the mass deportation of Southern African's in the absence of judicial review could qualify as mass expulsion given the lack of access to lawyers and free phone calls as well as the fact that people are not informed of their rights and interviews to determine their status have been brief and incomplete. In the current form of section 8 the legislation passes international standards but should it be removed as is advocated in the AB the lack of appeals procedures will render the legislation as well as the practice subject to censure.

#### **4.2.5 Family and children**

Two interrelated rights that place some of the most significant constraints in deciding migration policy are the rights to family life and the rights of the child. The family is the natural and fundamental building block of society and therefore is protected from arbitrary interference. A state may be able to make out a case for non-arbitrary interference in a given circumstance.

A note should be made about the position of refugees as concerns this right. The vulnerable position of a refugee means that similar status must be accorded to the family of the refugee.

The jurisprudence under the ICCPR seems to suggest that where expulsion is threatened for mere immigration violations as opposed to criminal convictions it will be difficult to justify separating a family.<sup>136</sup> In *Winata v Australia* the HRC found in favour of the right to family unity where an Australian girls parents were long time illegal residents.<sup>137</sup> This aspect has not been canvassed, despite the long history of migrant labourer that established families in South Africa.

The right to family reunification is much stronger for a child in reliance on the CRC (article 10(1)) which is not limited except in the child's best interests. In terms of expulsion the interests of the child in not being separated from its parents is codified in article 9 of the CRC. Detention of children for immigration violations has been condemned as inhumane and illegal.<sup>138</sup> The asylum claims of children

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<sup>135</sup> *Recontre Africaine pour la Defense des Droits de l'Homme v Zambia* communication 71/92 Institute for Human Rights and Development (IHRD) *Compilation of decisions on the communications of the ACHPR* (2002) 367.

<sup>136</sup> Jastram, K 'Family unity' in Alienikoff (n 14 above) 185, 192.

<sup>137</sup> CCPR/C/72/D/930/2000 < www.bayefsky.com > (accessed 24 September 2004).

<sup>138</sup> Jastram, K (n 136 above) 199.

are accorded too little emphasis as they are often unarticulated. This can be seen from the denial of opportunities to make such claims such as the example of the Rwandan siblings in the previous chapter.

#### **4.2.6 Property**

The prohibition on arbitrary deprivation of property is included in all the instruments. Deportation often results in the abandonment of property, thus removals without opportunity to collect belongings are an arbitrary infringement on the right to property.<sup>139</sup> This was confirmed by African Commission in the case of Zambia and Angola where illegal immigrants were made to abandon property and lost jobs due to deportation.<sup>140</sup>

#### **4.2.7 Arbitrary detention**

The major instruments prohibit arbitrary detention regardless of status as an illegal foreigner. The ECHR expressly permits the detention of alien's incidental to the enforcement of immigration laws but to avoid arbitrariness this would have to be only for a reasonable amount of time necessary to decide the status of the person. The person should also be informed of the reasons for such detention and allowed access to legal assistance, family and consular relations. The HRC has stated that detention of immigrants must be proportional, thus prolonged detention without periodic review will be arbitrary.<sup>141</sup>

South Africa fails to meet the international standard in that reasons are seldom given for the arrest or detention and a person is left to his/her own devices in contacting legal and other assistance without facilitation by the DHA, the police or Lindela officials. The practice shows that people are habitually detained for longer than 30 days without judicial review and for 48 hours for purposes other than deportation.

#### **4.2.8 Procedural Rights:**

The rights to due process are included in the ACHPR and in detail in the ICCPR. The safe guards provided by these conventions include the right to a fair trial before an independent tribunal, the right to effective legal remedy, freedom from arbitrary arrest and detention, etc.

Most of these provisions apply to 'everyone' within the territory of the state. However certain of these rights relate specifically to migrants. Article 13 provides that an alien lawfully in the country may only be expelled in pursuance of a decision in terms of law by a competent body. He/She must have the

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<sup>139</sup> Academic opinion about the Ugandan mass expulsion asserts that due to the short time frame given within which to leave the country it amounted to an expropriation of property, Henkaerts, J-M ( n 19 above) 20.

<sup>140</sup> *Union InterAfricaine des droits de l'Homme and Others v Angola*, Communication 159/96 IHRD (n 135 above) 10.

<sup>141</sup> UN Commission on Human Rights Working group on Arbitrary Detention, 'Body of Principles of the Protection of All persons under any Form of Detention or Imprisonment Regarding the Situation of refugees and Asylum Seekers', UN Doc.No E/CN.4/2000/4/Annex 2 (1999) < www.unhchr.ch > (accessed 24 September 2004).

opportunity of presenting reasons against expulsion; have access to review procedures and a representative.

Some authors assert that the benefits of article 13 should extend to illegal immigrants because it is hard to reconcile the deprivation of such procedural rights as against the right to effective remedy granted in the ICCPR. The decision to expel someone might involve determination whether that person is an undocumented migrant, i.e. when a person asserts South African citizenship; it does not make sense to then deny such a person the rights under article 13.<sup>142</sup> The ICMW which is not binding on South Africa has a clear statement that all aliens enjoy the same procedural rights.

### **4.3 The South African Constitution**

#### **4.3.1 Introduction**

The South African Constitution has been described as a ringing and decisive break from the past. It represents a negotiated settlement which embodies the aspirations and values of the people. It contains civil and political as well as socio-economic and cultural rights as fully enforceable rights making the constitution unique and progressive.

#### **4.3.2 Non-discrimination**

The right to equality in section 9 is reflective of international law in that it provides that all persons are equal before the law as well as providing grounds on which discrimination is prohibited. The clause reflects South Africa's particular history by including a right to substantive equality. Although not a listed ground, alienage has been recognised as an analogous ground in the case of *Larbi-Odam*.<sup>143</sup> It was stated that non-citizens are minorities and vulnerable to being overlooked and having their rights infringed

#### **4.3.3 Family**

Although the constitution does not contain an explicit right to family life it has been read into the constitution by the Constitutional Court through the right to dignity in the *Dawood* case.<sup>144</sup> The case concerned a large fee prescribed for applications for a foreign spouse to immigrate as well as the requirement that the application be made while the spouse is outside the country. The court balanced the states objectives in preventing false marriages and illegal immigration against the right to family life and found that the legislation violated the right to dignity of the spouses concerned.

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<sup>142</sup> Henkaerts, J-M (n 19 above) 28.

<sup>143</sup> *Larbi Odam v MEC for education (North-West province)* 1998 (1) SA 745 (CC).

<sup>144</sup> *Dawood v Minister of Home Affairs* 2000 (1) SA 997 (CC).

#### 4.3.4 Life

This right is unqualified in the South African constitution and the death penalty has been found to be incompatible with this right in the *Makwanyane* case. The Constitutional Court has also condemned the illegal extradition of a person wanted for the Nairobi bombings to the USA where he would face the death penalty. He was arrested on immigration charges and handed over to the FBI without a formal request for extradition.<sup>145</sup>

#### 4.3.5 Freedom and Security of the Person

Section 12 guarantees the right to freedom and security of the person. The right deals with arbitrary deprivation of freedom, detention without trial, violence, torture, cruel and inhumane punishment. In *De Lange V Smuts NO* the substantive aspect was set out that an individual cannot have his liberty deprived without satisfactory and adequate reasons.<sup>146</sup> A rational connection to an objective purpose should exist but this reason must in addition be 'just'. The fact that the trial must be fair is implicit in the section but did not mean that all the guarantees under s 35(3) had to be complied with.

These criteria indicate that arresting someone simply because they look foreign or have an accent cannot be satisfactory and adequate reason particularly when they have not been given the opportunity to fetch their documentation or have had their documentation disregarded. Thus although there is an objective purpose i.e. immigration control the reason for the detention must be just. This entirely excludes detention in order to illicit bribes.

#### 4.3.6 Privacy

The right to privacy is guaranteed in section 14. It includes a general right to privacy as well as four prohibitions on having: your person or home searched; your property searched; your possessions seized or privacy of your communications infringed. Sachs J in the case of *S v Zwayi* listed the power of police and state officials to stop people and demand their passes as an example of unfettered discretion in the context of the right to privacy. This means that a person may have the right to refuse an officer requesting documentation especially in the light of the pass-like requirements and the very broad discretion accruing to officials.<sup>147</sup>

The case of *S v Mistry* illustrated when a search enabling law will be unconstitutional.<sup>148</sup> The powers given to inspectors under the Medicines and Related Substances Control Act 101 of 1965 were unconstitutional as they could enter any place or private dwelling where they reasonable suspected such

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<sup>145</sup> *National Director of Public Prosecutions v Mohamed* 2002 (4) SA 843 (CC).

<sup>146</sup> 1998 (3) SA 785 (CC) para 22-24.

<sup>147</sup> 1998 (2) BCLR (CC) as quoted in Currie, I, Dewaal, J and Erasmus, G (eds) *The Bill of rights handbook* (2001) 276.

<sup>148</sup> 1998 (4) SA 1127 (CC).

medicines to be. No safeguards or guidelines were provided. It was decided that the extent of the invasion of the privacy was disproportionate to the purpose of the act. The explanation of section 33 in the previous chapter shows a curtailed and guided process for searches. It only allows searches of private dwellings with a warrant. However, the practice is less than exemplary with warrants not shown to the inhabitants and the searches taking place late at night and without due regard for the dignity and privacy of those concerned.

#### **4.3.7 Citizenship**

The provisions on citizenship require brief mention in that section 20 of the constitution expressly states that ‘no citizen may be deprived of citizenship’. In the light of the testimonies in chapter 3 of the deprivation of identity documents and denial of opportunities to verify citizenship there may be a practice, albeit small, of deprivation of citizenship.

#### **4.3.8 Children**

Children have the right not to be subjected to neglect, abuse or degradation. Section 42 of the Child Care Amendment Act 94 of 1996 places a duty on ‘any person employed by or managing a children’s home, place of care or shelter’ to report child abuse. This would include Lindela as children have been detained there regularly.

Children’s rights are granted under section 28. By extending the rationale of the *Grootboom* case, since refugee children may be unaccompanied and vulnerable the state owes them an absolute obligation to provide shelter and care.<sup>149</sup> Section 28(1)(g) states that detention of children should be as a last resort and that they should be detained in conditions taking account of their needs and age. They should also be kept separate from adults. Thus as confirmed by the court decisions mentioned in the previous chapter Dyambu has acted unconstitutionally

#### **4.3.9 Administrative justice**

The right to administrative action is given content by PAJA. The relationship between the PAJA and section 8 has been discussed in the previous chapter. In its current form section 8 would pass constitutional muster although the timeframes allowed by the regulations should admit more flexibility. The translation of these rights into reality by the enforcement agencies needs to be made a priority and streamlined.

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<sup>149</sup> *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC).



#### **4.3.10 Information**

The right to information is given effect to by the Promotion of Access to Information Act (PAIA). This entails the right of detainees to know the reasons for arrest, detention and their right to humane conditions of detention, visitation, and access to one free phone call etc.

This is not the full thrust of the right to access to information. This right is essential in a democracy for accountability and transparency. People have a right to know what is happening in the immigration sphere. It is possible that Dyambu could refuse to release information as they are a private entity. However section 1 of PAIA defines a public body as including:

- (b) any other functionary or institution when-
- (i) exercising a power or function or performing a public function in terms of any legislation.

Section 3(1)(g) of the IA mentions detention as one of the functions of the DHA. Since this function is being carried out by Dyambu it is obliged to provide transparency. The final obligation lies with the DHA in terms of the doctrine of state responsibility.<sup>150</sup>

#### **4.3.11 Arrested, detained and accused persons**

South Africa has detailed rights guaranteed to arrested, detained and accused persons. The particular right will depend on whether the individual is an arrested, detained or accused person. Mostly people arrested for the purposes of deportation are not accused persons. Thus they are not entitled to the rights in section 35(3).

A person arrested or detained in terms of section 34 of the IA on immigration grounds would be entitled to the rights that accrue to arrested and detained persons. The question then arises whether they are entitled to remain silent or be brought to court within 48 hours. The rights under detention are more certain these include the right to be informed of reasons for detention.

A detainee also has the right to legal representation and to be informed thereof; this right is essential to exercise the right to challenge the lawfulness of detention. Section 35 also includes the right to have visitors and to communication, such as family, religious leaders and legal assistance as has been discussed above.

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<sup>150</sup> Crawford, *J International Law Commission's articles on state responsibility* (2003) 165.

#### **4.4 Conclusion:**

It can be seen that the South African practice more so than the legislation is seriously out of conformity with both international and national human rights norms. The lack of a human rights focus in the legislation lends itself to these abuses. The proposed amendments in the AB erode many of the progressive steps taken since the ACA in protecting the rights of what has been recognised as a vulnerable group.

## **Chapter 5: Conclusion and Recommendations**

### **5.1 Conclusion:**

As can be seen from the preceding chapters the deportation process remains riddled with human rights abuses. This is due to two reasons; firstly the legislation has effected only minor changes but adhered closely to the scheme of the ACA in major respects. The second reason informs the first. There is a lack of political will to change the system. South Africa is steadfastly adhering to the tried and tested immigration policies of control.

By focusing on control a 'police state' ethos is created which necessitates harsh arrest and deportation provisions and is indeed the driving factor behind the moves to, for instance, remove section 8 in the AB. This ethos facilitates in some way the human rights violations perpetrated against foreigners and South Africans. The public, caught up in xenophobia, is less likely to peer into the goings on at Lindela which seems to be considered a necessary evil.

The recommendations focus on ways in which the legislation and practice could be changed to prevent human rights violations in the future but it should be remembered that the best solution would be to move away from this ad hoc approach towards immigration and shift the policy towards a more humanitarian human rights friendly policy as envisaged in the Green paper on migration which would effect the entire way that the enforcement bodies conduct themselves. This would be by focussing on the management and use of immigration as a tool for economic development within the region.

### **5.2 Recommendations:**

#### **5.2.1 Legislative amendments**

The arrest provision should include criteria that would be the basis of a reasonable suspicion. It should contain a clear prohibition on racial profiling. It should make it mandatory for a police officer to allow a person to go free once they have displayed some form of identification or allow them reasonable opportunity to fetch their documents. The onus should also be shifted off the person onto the enforcement agency to prove he/she is not entitled to be in the country.

There should be explicit application and enumeration of the human rights that apply to the situation of arrest, detention and actual deportation. In terms of arrest the rights contained in the current legislation the provisions regarding rights and notification of these rights are adequate but do not translate into practice.

A glaring omission from the act was the setting out of the contractual nexus between Dyambu (now Bosasa) and the DHA. This absence of regulation has been exploited by both Dyambu and the DHA to

avoid responsibility for abuses that occur. The act should mention the ability of the DHA to contract out certain functions but that the final responsibility remains with them. It should encompass list of the functions, powers and obligations of each. There must also be the establishment of the departmental control over Lindela as well as an independent investigatory body such as the Inspecting Judge or SAHRC. This independent body would have the ability to conduct impromptu investigations and have free access to the inmates and facilities as well as documentation.

The legislation should also clarify position of the enforcement agencies as the collective approach (involving the SAPS, DHA and SANDF) was not meant to be permanent.<sup>151</sup> Section 6 on intergovernmental cooperation is vague and weak. A provision should set out who the role players are, what each of their functions are and set up viable structures to decide policy for the enforcement agencies. The position and powers of the security staff at Lindela should also be addressed since in reality they have a considerable amount of influence over the lives of the detainees and should be constrained.

### **5.2.2 Practical suggestions**

In practice it is suggested that the DHA restructure the enforcement agents and streamline the process. Ideally a situation like Ghana, where the immigration department conducts all the enforcement and patrols the borders themselves would be welcome. In Ghana the officers are trained by the immigration department and are answerable to them. Alternatively, due to the cost factors, a border police unit under the DHA with members of the DHA, Customs and Excise as well as the SANDF could be trained. They would have knowledge of the laws and be able to conduct asylum investigations etc.

There should be regularised communication between the different bodies. It should be mandatory for police to record the date of arrest and period in detention for the purposes of the 48 hour and 30 day limits. The absence thereof should be an irregularity.

The DHA and other enforcement measures must take cognisance of the pervasive problem of corruption and take decisive measures to combat it. The focus should not only be on the people who are bribing officers but the officers themselves.

South Africa should also look into the possibility of issuing permits to people living in the border towns to travel between two countries more easily. Due to the possibility for abuse this would have to be thoroughly researched.

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<sup>151</sup> Minaar, A (n 50 above).

### 5.2.3 Accountability measures:

The SAHRC suggested several accountability measures in its report. These included the possibility of extending the judicial inspectorate to encompass Lindela as well as introducing lay-visitation schemes such as those in Hungary and community police cell inspections. I agree with the viability of these options but add these suggestions from comparative experience.<sup>152</sup>

The situation in Ghana is a good example, although the Ghana Immigration Services (GIS) is under resourced by comparison to the DHA, they manage to keep tabs on all detainees by ensuring the head of the legal department receives the inventory of detainees and reasons for removal, release or detention each morning. This was observed at the Ghana Immigration Services offices. The list of detainees could be distributed to the DHA as well as an external group such as the SAHRC to conduct spot checks.

The situation in Australia has been criticised by a number of human rights groups but in terms of a regulatory scheme has gone far in trying to be as equitable as possible towards undocumented migrants.<sup>153</sup> Firstly detailed information about the facilities is available on the website of the department. This includes pictures of the facilities, statistics, commentaries and investigative reports. This engages the public and dispels an atmosphere that would suggest they had something to hide. The website has a downloadable copy of visitation request forms.<sup>154</sup> Thus for someone conducting research or providing consular or religious services the process is certain. When processes are bewildering and unclear the possibility of corruption is heightened. In South Africa pamphlets outlining the procedures for visits and verification of identities would be more accessible and user-friendly.

The website contains the contract between the department and the company (which the SAHRC struggled to get a copy of in the case of Dyambu).<sup>155</sup> The contract includes a list of human rights and functions that the company had to fulfil and respect. A clause was also included making payment conditional on the performance of these aims. In theory this would prove a constraint on abuses.

The Australian alternatives to detention are also positive as there are different grades of detainees that qualify for different degrees of detention from centres like Lindela, to community based detentions. These would be conducive for children who are unlikely to be a flight risk. There are many NGO's and community bodies that could work in conjunction with the DHA to facilitate such a program. There is also a document outlining the treatment of women and children in detention and a statement that such detention should be as a last resort. South Africa would benefit from looking at these alternatives and of

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<sup>152</sup> SAHRC (n 21 above) 26.

<sup>153</sup> < [www.refugeecouncil.org.za](http://www.refugeecouncil.org.za) > (accessed 29 September 2004).

<sup>154</sup> < [www.immi.gov.au](http://www.immi.gov.au) > (accessed 29 September 2004).

<sup>155</sup> SAHRC (n 21 above) 56.

involving the community in this way (as opposed to involving them in enforcement) by encouraging visitation and donations and the rendering of services. This will lessen xenophobia as well.

The DHA should actively engage with the criticisms and think creatively about the problems it faces. Human rights cannot be realised if it is on paper only as with section 2 of the AI, it must be backed with the conviction and compassion to sustain a human rights based approach to deportation in reality.

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## **Annexure A: Interview methodology and questionnaires**

### **(1) Methodology**

The process of finding interviewees involved randomly approaching people explaining the research being conducted and getting permission to conduct an interview. If they did not have any experiences which were helpful the interview was discontinued. Through this process 22 people were interviewed. In accordance with guidelines gleaned from the reports of the SAHRC I did not interview anyone who approached me and did not ask leading questions about assault, sexual harassment, bribery, xenophobia etc. I ascertained whether the person would mind me using the information as well as whether they wanted to remain anonymous. It was important for the person to trust me enough to speak frankly about their experiences. It was also necessary to paraphrase these questions when the person had difficulty understanding the question.

The interviewees disproportionately represent Ethiopian nationals due to their presence in large numbers in Jeppe Street and Marabastad and represent too few Mozambican nationals due to the language barrier faced and the unavailability of a Portuguese or Tsonga translator. There is also an under representation of women as they should comprise 20% of the detainees at Lindela but I interviewed three woman just over 13% of the sample group.<sup>156</sup>

### **(2) General questionnaire:**

- 1) What is your name, nationality, age, occupation?
- 2) How long have you been in South Africa?
- 3) What is your status in South Africa?
- 4) How did you come to South Africa?

### **(3) Arrest questionnaire:**

- 1) Have you ever been approached by the DHA/SAPS or SANDF (if they entered through a land border)?
- 2) What was your experience?
- 3) Have you ever been arrested for immigration offences?
- 4) If yes, where you told the reasons for your arrest?
- 5) What was your experience?
- 6) Where you given the opportunity to prove entitlement to be in the country?
- 7) General comments.

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<sup>156</sup> (n 90 above)

**(4) Detention questionnaire:**

- 1) Have you been detained on immigration grounds?
- 2) If yes, where were you detained and what was the duration of the detention?
- 3) Were you informed of the reasons for the detention?
- 4) Where you given an opportunity to make a free phone call or contact family/ lawyer/friend?
- 5) Where you given the opportunity to prove your status (if any)?
- 6) Where you warned of the right to challenge the lawfulness of the detention before the courts?
- 7) What were the conditions of detention?
- 8) How where you released?

**(5) Search questionnaire:**

- 1) Has your home/person/premises ever been searched on the basis of immigration law?
- 2) If yes, where you given a warrant?
- 3) Was it during the day or night?
- 4) Did you consent to the search?
- 5) Was anything seized/ anyone arrested?
- 6) General comments.

## **Annexure B: Interview transcripts**

### **18 July 2004: Marabastad**

- 1) Mr K, Kenyan, 28, hairdresser. In South Africa since 2001 he is a visa over-stayer. He came to South Africa to find work and opened a salon in Pretoria with Mr T. He had not been arrested on immigration charges as he stated he was not too dark and that he had picked up the slang used in South Africa such as 'Sharp' and 'Moja' and since they greeted the policemen in such a manner they evaded detection.
- 2) Mr T, a 32 year old Tanzanian works with Mr K he agreed but pointed out that because Marabastad is an area which is only now becoming a haven for foreigners they did not experience the harassment that happens in areas like Sunnyside.
- 3) Mr S, 32, Ethiopian, shop owner, refugee. He stated that he had never been personally approached or arrested but that his 16 year old brother was arrested in Pretoria and taken to the police station even though he asked to be taken to his house to get his refugee papers. The boy was detained for only a few hours and was allowed one free phone call to his brother who arrived with his papers. At first they would not release him until the papers were verified but when the brother contacted his lawyer this 'scared' the police into releasing him. He stated that the conditions were not bad in the police cells and that his brother had not been there very long but was scared nonetheless. He commented that refugees are supposed to feel safe here but do not.

### **20 July 2004**

#### **Jeppe Street**

- 1) Jabu (1), Malawian, 34, Illegal, shop assistant. He stated that he has been in South Africa for 8 months and that when he was here for about 3 or 4 months he was approached by the police on Jeppe Street who asked for his papers. Since he did not have any he was arrested and put into a police van they drove around for a while and after he paid them R300 he was released. (This interview was conducted with the assistance of a translator).
- 2) Mekonen Bireda Essa (Mike), Ethiopian, 31, Asylum seeker. He has been in South Africa for 4 years and is in possession of a permit in terms of section 22 of the Refugee Act which he showed me. He stated that he has been approached about 5 times by the police and that despite possessing a valid permit he had to bribe them each time to avoid arrest (when he was in Yeoville, Berea, Belleville as well as Jeppe). He stated that 'they arrest people to get money' and volunteered further that he knew of people who had their documents confiscated and he also

made a gesture of paper being torn up . He opined that the police were corrupt, unprofessional and did not know their jobs. When asked about whether he has been detained he stated that he was taken to a police holding cell once and because he was well dressed they demanded R2000 from him or he would be taken to ‘sun city’ the colloquial name for Johannesburg prison. He said he ‘bargained’ them down to a reasonable price and was released. He volunteered that he had never been injured or assaulted.

- 3) Elizabeth Zondi, Zimbabwean, age unknown, hawker, illegal. She stated that she was here for work and that she has been here since 1998. She said she had been arrested three times and had once been deported but came back. She said that in 1998/1999 the police were worse than they are now. She said she was not told the reasons for the arrest but that she thinks it is because the South Africans think that she is stealing jobs from them but that she simply wants to live. She said they can ‘see from my face I’m not South African’. The police arrested her twice in 1999 and 2002 when she was deported. She stated they did not give her the chance to collect and pack her goods and she had to abandon them. She said she was kept in Lindela for about two weeks before deportation and would only say this about the conditions: ‘life for woman there is hard’.
- 4) Ms Sithole, South African, Nurse, 44. She stated that she had once been arrested and in police custody for two days when coming home after the night shift at work in Soweto. She stated that she had come home to find the flat she lives in was being raided and she was apprehended entering her apartment. She was questioned as to what she was doing out so late at night and when she resisted the questions and became angry she was arrested despite protesting that her ID was somewhere in her apartment. She felt they had arrested her just to ‘be difficult’.
- 5) H, Ethiopian, 40, Shop keeper, status unknown. He stated when I asked him whether he has ever been arrested on immigration charges that ‘I just open the till or give them perfumes, they like perfumes.’ He said smugly that the police were his friends and often came past his shop if they wanted anything.

### **Hillbrow/ Braamfontein**

- 1) Jabu (2) 19, Zimbabwean, student.
- 2) Dan 20, Zimbabwean, student. The arrest and incident involved both Jabu and Dan thus I interviewed them together at their behest. They stated that in February of 2003 they were walking out of the Fontana restaurant in Hillbrow when two police man greeted them in Zulu. They answered back and were then approached and asked for their ID’s. They stated they had their study permits and explained they were students at Wits Technicon. The police ignored the student identity card that Dan showed them saying that anyone can have one and refused to accompany them to their flat just up the road. They were arrested and stayed in police custody

for two days. They were of the opinion that they were arrested because they were 'cocky' and insistent with the police. They said that they saw people leaving the cells after paying the police but that they only had R40 between the two of them. They were released after the police called one of their uncles. The conditions were bad and the 'toilets were dirty'.

- 3) M, 23, South African, student. He stated that he was walking in Hillbrow when he was approached by the police and asked for his ID. The police actually asked him whether he was a Pakistani and stated that he looked like one. He said he did not have his ID with him but that he was South African. The officer then asked him to count to ten in Afrikaans when he did this successfully he was asked to say an Afrikaans nursery rhyme to 'prove you are white'. M stated that he thought the entire incident was 'ridiculous'.
- 4) G, 27, South African, Lawyer. This interviewee has some knowledge of human rights law. He stated that a search had taken place in his block of flats in Hillbrow in the weeks antecedent to the April elections. He stated that at about 2:00 in the morning the police knocked loudly on the door and scared everyone in the household. He was not shown a warrant and though he knew this was a requirement he 'knew better than to ask for one'. He said that they submitted to a search and despite the fact that members of his household could not speak English they were not even asked for identification. He stated this was because they are white. He said that he witnessed neighbours being harassed and arrested despite being in possession of valid documents. He stated that the entire exercise was a media ploy to show that the government was tough on illegal immigrants. He said the dangerous areas had been avoided. He stated that they felt their privacy and dignity had been infringed and that people who were being paraded as illegal immigrants.

### **Lindela:**

Due to the impossibility of gaining access to the facility in consultation with previous researchers I interviewed people leaving Lindela as well as those who had come to visit or have people released. I was also given some information by current researchers.

- 1) Kingsley, Cameroon, 35. This detainee said that he had his wallet with his visa in it stolen and on reporting the matter to the police was arrested. He said they arrested him because they knew he was not South African because he looks different. He said he protested with the police but they would not listen. The interviewee had knowledge of the law, which he had studied in Cameroon. He said he was taken to a police station in Roodepoort and that one of the police had hit him. He was there for 9 days exactly. He said that the police seemed ignorant of the law and procedures. He commented that Lindela was not so bad (he had been detained there for two weeks thus in total he was detained and released just before the 30 day limit was reached) the conditions were 'a bit

deplorable because of the congestion'. He said that although 'in theory there was supposed to be three meals a day you were only served two'. He noted that you didn't receive free phone calls and had to pay three times the regular price. He volunteered that 'brutalization was not as much as in the media'. He refused to explain how or why he was released stating he was just released with out reasons the same way he was arrested.

- 2) Eric Bahcho, 24, Cameroon, petrol-pump attendant. He has been in South Africa for 2 years and was apprehended outside the shell garage where he works. He claimed that his permit was burnt in a fire and he went to the police with a photocopy to get an affidavit but he was arrested. He was in Lindela for 9 days. He stated that at Lindela they decide when you sleep and eat and that the food was bad. It was also congested making it easy for you to get diseases because there were many ill people. He said that at times there were 100 people per room. 'This place is very very very bad'. He said that he along with Kingsley had been released after paying a bribe of R800 each which was the going price for those without documents. You could give the money to either DHA officials or security guards. You could also bribe the guards to switch the lights off and allow you to scale the wall. He said he was aware of people who had been in Lindela for up to 3 or 4 months and they have not been to court.
- 3) N, 36. I also interviewed a man in the company of Kingsley and Eric. He was not there to visit any family members or friends nor was he a former inmate. He would not disclose his reasons for being at Lindela at first. He simply chatted about the negative images South Africans have about foreigners and xenophobia. He later admitted to acting as an agent between those at Lindela and the Lindela officials. He described himself as a businessman and that he also provided transport.
- 4) Cuthbert, 51, Zambian, in possession of a work permit. He stated he was in the country since 2001 and that he was here with the R800 'bail' to get his nephew out. He was waiting in a line outside the reception and there seemed a great amount of disorganisation and confusion. It was after visiting time and thus people who had been waiting to see detainees were angry and frustrated. He said he could not find the correct person to give the money to and no one would help him.
- 5) Mr Y, South African, accountant, 46. He was here to get a college out of Lindela he said he was told on his last visit by immigration officers that the procedure was an ID, permit or R800. He did not know whether his college had a permit but had brought the R800. He could not find the officer he had spoken too previously and stated that the procedure was confusing.

**29 July 2004**

**Lindela:**

- 1) Ms X, about 44, domestic worker. She was at Lindela to see her nephew from Zimbabwe. He was illegal 'had no papers' and had been in Johannesburg for only two weeks before he was



arrested. He was allowed to use the phone once and had called her. She said that inside 'there is no life'.

- 2) Musawenkosi Dube, South African, 25. He said his brother had been in detention since Monday (26 July 2004) and had been arrested on Louis Botha Drive leaving work. He had previously been arrested and brought to Lindela. He was released when his mother arrived with his ID and threatened court action. This time he was arrested after he was found without his ID. The police asked him what his name was and where he was from. When he stated he was from the Eastern Cape they asked him if he could speak Xhosa when he said no he only speaks Zulu they arrested him. They said he was lying and was from Swaziland. He said his dad was from Swaziland and his mum was Zulu and the surname 'Dube' was found in both countries. He had been at Lindela since 8:00 in the morning (I interviewed him at about 3:00 in the afternoon) and had been told by the DHA officials that he must bring his brother ID. Another security guard told him that he has to phone the DHA himself. He stated that he saw people being released and was told by one of these people that if his brother had an ID he would have to pay R200. When he finally saw his brother during visitation hours he told him he had to sell his cap to another inmate for R5 to pay the guards to charge his phone so he could call his brother. There was no access to free phone calls. His brother asked for R200 in addition to his ID to bribe the officials since Musa only had R150 he gave that to him and hoped it would be enough. He stated that this treatment was ridiculous and that his brother had lost his job because of this. The SAHRC interview guidelines state an interviewer should not get involved in an issue thus when he asked for help I referred him to the Wits law Clinic and Vaal Legal Aid Board.
- 3) Mr Z, South African, age unknown. This interviewee did not speak English very well and was extremely distraught he was also in the reception area. He stated that his brother (15) had been arrested and brought to Lindela. At first he went to the police station where his brother was held initially with his brother's birth certificate and was told he had been taken to Lindela. He made the trip all the way to Lindela to find that he was no longer there and no one knew his whereabouts. He was terrified that his brother had been deported.
- 4) Mustafa, Somali, 30, Refugee. He had just been released from Lindela and stated that he was waiting for his transport back to Johannesburg where he was staying since 1998. He said he had been arrested despite having his refugee papers and brought to Lindela because the police did not think it was real. He had been at Lindela for five days and paid R150 to check his refugee status on the computer. He said that the conditions are not so bad except for the food and the overcrowding. He confirmed that they have access to religious counsellors, reading materials but that there still was not halaal food.
- 5) Alpheus Mbathe, Mozambican, 39, builder/painter, illegal. He stated that he has been in the country since 1988. He was arrested in Nelspruit where he spent 5 days in a police station before

being brought to Lindela in a police van. He stayed at Lindela for about two weeks and would not say why or how he was released. He said he had been handled roughly by the police and they had arrested him after hearing him speak and seeing his inoculation mark. As to the conditions at Lindela he only stated that the food 'makes you sick'.