

## SOUTH AFRICA

South Africa is a state party to the United Nations Convention Relating to the Status of Refugees and its Protocol, as well as to the International Covenant on Civil and Political Rights, but not to its First or Second Optional Protocols. At the end of 2000, South Africa hosted approximately 30,000 refugees and asylum seekers, and the applications of 15,000 asylum seekers were pending decision.<sup>1</sup> At the end of 2001, it hosted approximately 22,000 refugees and asylum seekers, and approximately 3,000 asylum applications were awaiting final decision.<sup>2</sup> No information was available on the number of asylum seekers detained.

Detention of asylum seekers is discretionary and the majority of asylum seekers are not detained and able to move freely within the country.<sup>3</sup> Those who are detained, however, may be subject to sub-standard treatment or even abuse, as evidenced by the beating death of a detainee alleged to have escaped from the Lindela Detention Center in early 2002.<sup>4</sup> Proposals routinely to detain asylum seekers in government-run reception centers have received stiff opposition from South African civil society, according to a 2001 report.<sup>5</sup> Successful NGO lobbying efforts have led to the inclusion in the Immigration Act 13 of 2002 (not yet in force as of July 2002) of a requirement that detained illegal foreigners be held in compliance with minimum prescribed standards protecting dignity and relevant human rights.<sup>6</sup>

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<sup>1</sup> U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 2001 at 106, *available at* <http://preview.refuges.org/world/worldmain.htm> (Immigration and Refugee Services of America 2001) [hereinafter USCR WORLD REFUGEE SURVEY 2001].

<sup>2</sup> U.S. COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 2002 at 55, *available at* <http://www.refugees.org/WRS2002>. (Immigration and Refugee Services of America 2002) [hereinafter USCR WORLD REFUGEE SURVEY 2002].

<sup>3</sup> E-mail from Jeff Handmaker, Rea Hamba, to Jaya Ramji, Debevoise & Plimpton (July 3, 2001).

<sup>4</sup> Shyaka Kanuma, *The Long Wait for Freedom*, MAIL & GUARDIAN, Mar. 22, 2002.

<sup>5</sup> Frankie Jenkins and Lee Anne de la Hunt, *Detaining Asylum seekers: Perspectives on Reception Centres for Asylum seekers in South Africa*, report for the National Consortium on Refugee Affairs for the University of Cape Town Legal Aid Clinic, September 2000; Frankie Jenkins, 'Refugee camps in South Africa: panacea or protuberance?', Botshabelo August 2001, vol. 4, no. 1, Lawyers for Human Rights; Jacob van Garderen, 'Editorial' and 'Introducing reception centres', Botshabelo July-August 1999, vol. 2, no. 3.

<sup>6</sup> §34(1)(e) of No. 13 of 2002 (Immigration Act 2002); e-mail from Jonathan Klaaren, Lawyers from Human Rights, to Jaya Ramji, Debevoise & Plimpton (July 3, 2002)(on file with Debevoise & Plimpton).

Asylum seekers are not subject to mandatory detention. Pursuant to law and regulations in effect in early 2002, asylum seekers are issued temporary permits by the Department of Home Affairs (DHA) when their applications are filed. Asylum applicants may be detained if their permits have been withdrawn. Reasons for withdrawal include: “manifestly unfounded,” fraudulent, or abusive application; contravening a condition of the permit; reentry after the application is rejected; lapse of permit when leaving the country without the consent of the Minister of Home Affairs or ineligibility due to an exclusion or cessation clause. Failure to appear may also constitute grounds for detention.<sup>7</sup>

According to a 1999 report, in practice, there have been widespread allegations that the South African Police Services destroy valid permits on the assumption that such documents are fraudulent. Further, there have been numerous assertions that police elicit bribes from apprehended persons (documented and undocumented) in exchange for freedom.<sup>8</sup>

A late 2000 study indicates that asylum seekers are reportedly arrested and detained for failure to carry identity documents, on the basis of a particular physical appearance, for inability to speak any of the main national languages or for fitting a “profile” of an undocumented migrant. In practice, the burden of proof is on the asylum seekers to establish their legal status in the country. There have been allegations that neither the police nor the DHA permits persons to retrieve identification documents from their homes or allows free phone calls to contact friends or family.<sup>9</sup> Asylum seekers, refugees and South African citizens may be detained for days while their right to remain in the country is confirmed.<sup>10</sup>

New DHA guidelines, effective January 2002, may alleviate some of these concerns. The guidelines require arresting police officers to have reasonable grounds, and provide the DHA with documented proof of those grounds, to arrest a foreigner on suspicion of being in the country illegally. The proof required includes evidence that the arrestees have been given an opportunity to prove their legal status in the country. The guidelines also provide for improved communication between the police and the DHA. Ideally, such improvement will reduce the time that asylum seekers are detained while their right to

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<sup>7</sup> §§ 23, 22(5)-(6) of Act No. 130 of 1998 (Refugees Act of 1998); Government Notice (GN) R366/2000, at §§8-9.

<sup>8</sup> SOUTH AFR. HUM. RTS. COMM’N, *ILLEGAL? REPORT ON THE ARREST AND DETENTION OF PERSONS IN TERMS OF THE ALIENS CONTROL ACT 23-25* (Mar. 1999).

<sup>9</sup> SOUTH AFR. HUM. RTS. COMM’N, *LINDELA: AT THE CROSSROADS FOR DETENTION AND REPATRIATION 11-12* (Dec. 2000), *available at* <http://www.gov.za/reports/2000/lindela2.pdf> (last accessed Aug. 29, 2002) [hereinafter *LINDELA*].

<sup>10</sup> *LINDELA*, *supra* note 9, at 12.

stay in the country is confirmed, and, if they are transferred from police custody to detention by the DHA, the time in police custody will be counted towards the 30-day limit on unreviewed detention.<sup>11</sup>

Many of the asylum seekers at the Lindela Detention Centre are reported to have failed to apply for asylum in South Africa prior to their arrest because they did not understand the application procedures or were afraid of being arrested. Asylum seekers are regularly arrested by the DHA while applying for asylum or renewing asylum permits, for applying or renewing too late or at the wrong office, or under the charges that documents have been forged.<sup>12</sup>

The stated policy of the DHA as of May 1999 is that detained immigrants who affirmatively claim refugee status should be taken to an asylum application office.<sup>13</sup> It has been reported that, in practice, this directive is seldom followed at the Lindela Detention Centre, as the staff does not have sufficient training to process asylum applications, and detainees are rarely allowed to apply at the nearest Refugee Reception Office in Braamfontein. Further, according to a 2000 report, the DHA does not routinely ask persons who have been arrested under the Aliens Control Act whether they want to apply for asylum.<sup>14</sup>

*Is there independent review of the detention decision? Yes.*

Under the Refugees Act, any detention over 30 days must be automatically reviewed by a judge of the High Court.<sup>15</sup> However, this provision is rarely followed in practice, despite a case won by the Law Clinic of the University of the Witwatersrand and the South African Human Rights Commission (SAHRC) in November 1999, challenging the Department's repeated failure to provide such review to detainees at the Lindela Detention Centre.<sup>16</sup> The court required that Lindela officials report the names of

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<sup>11</sup> E-mail from Emma Algotsson, Refugee Rights Project, Lawyers for Human Rights; to Emily O'Connor, Debevoise & Plimpton (Feb. 13, 2002, 02:48 EST) (on file with Debevoise & Plimpton) [hereinafter Lawyers for Human Rights Correspondence (Feb. 13, 2002)].

<sup>12</sup> E-mail from Emma Algotsson, Refugee Rights Project, Lawyers for Human Rights; to Jaya Ramji, Debevoise & Plimpton (July 24, 2001, 07:42 EST) (on file with Debevoise & Plimpton) [hereinafter Lawyers for Human Rights Correspondence (July 24, 2001)].

<sup>13</sup> Jonathan Klaaren, *A Guide to South African Refugee Law*, at 36 (January 2000).

<sup>14</sup> LINDELA, *supra* note 9, at 50.

<sup>15</sup> Refugees Act 1998, §29(1).

detainees to the SAHRC each month for compliance monitoring, but Lindela and the DHA have failed to provide such reports. The SAHRC noted on September 13, 2000 that 37 persons had been held in excess of the thirty-day limit.<sup>17</sup>

Within 48 hours of detention, the asylum seeker must be brought before an immigration officer for an investigation.<sup>18</sup> The burden of proof is on the asylum seeker to establish her eligibility to be freed from detention. If the asylum seeker fails to produce a permit to be in the country, she will be declared a “prohibited person.”<sup>19</sup> In cases of doubt, the asylum seeker may be granted a temporary permit to give her time to provide necessary documents. The investigation procedure has been criticized as unconstitutional because it places the burden of proof on the presumed prohibited person and is an administrative rather than a court procedure.<sup>20</sup>

*Are there limits on period of detention?* No.

The Refugees Act provides that no person may be detained for a period longer than is “reasonable and justifiable.”<sup>21</sup> As noted above, any detention over 30 days is automatically reviewable by a judge of the High Court.

*Is there periodic review of detention?* Yes; every 30 days.

Legislation provides that any detention over thirty days must immediately be reviewed by a judge of the High Court. Detention must be reviewed every thirty days thereafter.<sup>22</sup> As noted above, these laws are rarely followed in practice.

The SAHRC reported in December 2000 that only one detainee with whom they met at Lindela had been informed of judicial review of her case, and she was not given the opportunity to make a written submission to the court.<sup>23</sup>

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<sup>16</sup> LINDELA, *supra* note 9, at 54 (discussing *South Afr. Hum. Rts. Comm’n and Forty Others v. Minister of Home Affairs and Dyambu (Pty) Ltd.*, case no. 28367/99 (Witwatersrand High Court); BB only gives examples of Wits. High Court pre-1910, and Wits. Local Division, post].

<sup>17</sup> Lawyers for Human Rights Correspondence (July 24, 2001), *supra* note 12.

<sup>18</sup> §55(1) of Act No. 96 of 2001 (Aliens Control Act).

<sup>19</sup> Aliens Control Act, §§ 7, 9.

<sup>20</sup> Jonathan Klaaren, *The Detention and Repatriation of Undocumented Migrants* 4 (May 28, 1999) (working paper), cited in LINDELA, *supra* note 9, at 12.

<sup>21</sup> Refugees Act of 1998, §29(1).

<sup>22</sup> *Id.*

One NGO reported in 2001 that in the Cape of Good Hope High Court division, review beyond 30 days under the Refugees Act is heard by a judge in chambers rather than in open court. No records of such review are kept, and detainees and their legal counsel are not provided with effective notice of the application to extend the detention. While the bench is displeased with this practice, which leads to rubber-stamping of the detention decision, they continue to extend detention.<sup>24</sup>

Further, the Witwatersrand High Court division has found that failure to give effective notice of an application to extend detention rendered such application unlawful. In that case, the detainee received notice of the application to extend on the same day that the case was heard. Nonetheless, the court did not render a decision improving judicial oversight of administrative detention.<sup>25</sup>

*Is there access to government-funded legal aid?* Limited.

As a result of efforts in 2001 led by the South African NGO Lawyers for Human Rights, the state-funded Legal Aid Board now funds representation for certain asylum cases.<sup>26</sup> Asylum seekers may now apply anywhere in the country for legal aid relating to applications for asylum, and in Pretoria, Johannesburg, Cape Town, Port Elizabeth, or Durban for legal aid relating to decisions by refugee status determination officers, reviews by the standing committee or appeals to the appeal board.<sup>27</sup>

*Vulnerable groups:*

The South African Constitution provides that every child under the age of 18 has a right to be detained under conditions that take her age into account.<sup>28</sup> Specifically, the Refugees Act states that detention of minors may be instituted only as a last resort and for the shortest appropriate time period.<sup>29</sup>

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<sup>23</sup> LINDELA, *supra* note 9 at 54.

<sup>24</sup> E-mail from Frankie Jenkins, Human Rights Committee of South Africa, to Jaya Ramji, Debevoise & Plimpton (Aug. 21, 2001) (on file with Debevoise & Plimpton) [hereinafter Human Rights Committee Correspondence].

<sup>25</sup> *Fei Lui v. Commanding Officer*, 1999 (3) SALR 996 (W) (concerning §55(5) of the Aliens Control Act, the predecessor to §29(1) of the Refugees Act of 1998); Human Rights Committee Correspondence, *supra* note 24.

<sup>26</sup> Lawyers for Human Rights Correspondence (Feb. 13, 2002), *supra* note 11.

<sup>27</sup> *Id.*

<sup>28</sup> S. AFR. CONST. (1996), Ch. 3 (Fundamental Rights), §28(1).

<sup>29</sup> Refugees Act of 1998, §29(2).

In 2000, it was reported that the Lindela Detention Centre does not have separate facilities for children and therefore does not admit accompanied minors under the age of 15. There are no segregated facilities available at Lindela for women with children, but adults and children sleep in the same room, eat the same food and receive the same treatment from the staff. Dyambu, the corporation that runs the Lindela Detention Centre, supplies women who arrive with small children with diapers, but women often have to ask their families to bring food and clothing for their children to the facility.<sup>30</sup>

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<sup>30</sup> LINDELA, *supra* note 9, at 70.