

# South African Human Rights Commission

## Report into the Arrest and Detention of Suspected Undocumented Migrants

Launched in Parktown, Johannesburg, 19 March 1999

*"Everything is not okay here. We are not treated like people."  
- Libisi Donald (Interview #92 (08/05/98))*

### Table of Contents

<b>Acknowledgements</b>	<b>3</b>
<b>Executive Summary</b>	<b>4</b>
<b>Preface</b>	<b>6</b>
<b>Introduction</b>	<b>8</b>
<b>Investigation</b>	<b>8</b>
<b>Investigation Methodology</b>	<b>10</b>
1. Resources	10
2. Fact-Finding Process	10
3. Working Paper	12
<b>Overview of the Lindela Interview Sample</b>	<b>13</b>
1. Race, Age and Gender	13
2. Country of Origin	13
3. Legal Status (Graph)	14
4. Circumstances of Apprehension	15
5. Release from Detention	16
<b>Findings</b>	<b>17</b>
<b>Conditions relating to apprehension</b>	<b>17</b>
1. Legal Framework for Apprehension	18
2. Destroying, Ignoring & Failing to Allow Access to Identification Documents	21

3. Failure to Give Reasons for Apprehension	23
4. Abuse of power: corruption and extortion	24
5. Violation of Right to be Treated with Human Dignity	27
6. Identification of Refugees/Asylum-Seekers (Apprehending Officers)	28
7. Assault by Apprehending Officers	29
<b>Length and Condition of detention</b>	<b>30</b>
1. Periods of Detention in Police Cells	31
2. Detention Without Judicial Review Beyond 30 Days	32
3. Detention Without Examination by Immigration Officer Beyond 48 hours	33
4. Detention with Criminal Suspects	34
<b>Basic Conditions of Detention While Awaiting Identification and/or Repatriation</b>	<b>35</b>
1. Bribery/Extortion at Lindela	35
2. Prolonged and Unlawful Detention at Lindela	39
3. Assault/III-treatment in Detention at Lindela	40
4. Adequacy of Facilities/Conditions at Lindela	42
5. Degrading Treatment & Intimidation at Lindela	44
<b>Practices and problems relating to border posts</b>	<b>44</b>
<b>Practices and problems relating to removal procedures</b>	<b>47</b>
1. Forced Abandonment of Personal belongings	47
<b>Recommendations</b>	<b>48</b>
<b>Notes</b>	<b>51</b>

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**This report was jointly authored by:**

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## **Executive Summary**

Growing hatred and ignorance about the rights and realities of refugees and migrants has become an increasingly serious blight on South Africa's human rights record. Against this background, the South African Human Rights Commission and the National Consortium on Refugee Affairs (NCRA) convened a consultative conference on xenophobia and racism in late 1998 that contributed substantially to the adoption in December of the Braamfontein Statement. The Commission and the NCRA are currently overseeing the implementation of a National Plan of Action to Combat Xenophobia.

Beyond this important public awareness campaign, the Commission recognised the need for a more systematic investigation of the treatment of people in the immigration system. From April to May 1998 149 detainees, along with 40 friends and family of detainees, were interviewed at Lindela. These interviews form the basis of this report.

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

Other findings related to persons detained in the immigration system. A significant number of persons with apparently valid cases for asylum did not have their cases investigated or decided. Some persons reported detention in police cells and at Lindela for periods longer than allowed by law, as well as being detained alongside criminal suspects. There were widespread reported incidents of bribery or extortion during detention, as well as incidents of assault. Common complaints about the conditions at Lindela included lack of adequate nutrition, inadequate medical care, and interrupted sleep, as well as being subjected to degrading treatment or intimidation. Almost all persons were denied the opportunity to retrieve personal belongings before repatriation.

In far too many cases, arresting officers and other immigration system officials were thus reported to act as a law unto themselves, exercising their power with tragic disregard for the human rights of those subject to their control.

The Commission has made recommendations which, if implemented, will ensure the development of a legal regime that remains consistent and loyal to our obligations under international and national obligations.

We are particularly pleased that both the Department of Home Affairs and the proprietors of the Lindela Repatriation Centre have reacted positively to the various recommendations made and we do believe that collectively we can ensure the speedy implementation of the recommendations we have put forward.

While the Commission recognises the need for government to regulate immigration, the interview excerpts published in this report provide compelling accounts of the unnecessary and unlawful suffering which current enforcement procedures are exacting on foreigners and South Africans alike. If a society's respect for the basic humanity of its people can best be measured by its treatment of the most vulnerable in its midst, then the treatment of suspected illegal immigrants, detailed in this report, offers a disturbing testament to the great distance South Africa must still travel to build a national culture of human rights.

## Preface

South Africa is no longer a *pariah* state. The new and democratic South Africa is no longer shunned by the peoples of the world as a destination for visiting and for migration. In fact, it has now become a very attractive tourist destination and immigration statistics evenly match those of emigration. South Africa has assumed this status at a time when social, political and economic uncertainty and insecurity has become pronounced in a growing number of states which are neighbours to South Africa: Lesotho, Zimbabwe, Angola, Namibia, Swaziland, Angola, Zambia, and the Democratic Republic of the Congo to name only some. Beyond our region, refugees continue to flow across and within borders as wars in Sierra Leone, Ethiopia, and Congo Brazzaville continue. Within this complex of regional pressures, it appears that South Africa has become a destination of choice not only for refugees, but also for economic migrants.

South Africa is a sovereign state based upon a Constitution. Its democratic principles embody universal standards of human rights and the rule of law. Law in South Africa, therefore, must be upheld. That means that the government of South Africa must govern guided by the Constitution and the law. And the government must provide for law and order including an immigration policy.

What appears to have happened, though, is that the country was not prepared for the inflow of immigrants and refugees post 1994. We can also now testify to the fact that the law enforcement agencies have not assimilated the full implications of the new democratic order. Practices of the past era continue to prevail. Suspicion about foreigners undermines the proper ordering of social practice. For a while there was no appropriate policy framework to be applied to these issues. Government did not adopt the Draft Green Paper on International Migration. A new process of setting immigration policy in place is presently underway. The Refugees Act, 1998, though imperfect in many material respects, nonetheless sets an acceptable framework and procedures for the determination of asylum status.

This report, however, deals with a chronic pathology in the system. Often there is scant respect for the differentiation between asylum-seekers and migrants. Many incorrectly refer to economic refugees where in fact a refugee is *per se* someone involuntarily driven from her or his country by factors other than poverty and economic pressures. In any case, both refugees and voluntary migrants ought to be governed by an immigration system that is predictable and fair. In the case of asylum-seekers and refugees, there are binding international instruments that outline their rights in South Africa. Additionally, both refugees and economic migrants enjoy, or should enjoy, most of the rights and protections in the South African Constitution.

Unfortunately it appears that the immigration system does not now operate, as it should. It has come to the attention of the public that people are wrongfully and unlawfully detained under the current immigration legislation; that the process of arrest and detention of would-be immigrants is arbitrary and, therefore, violates the rights of citizens and other residents; that corruption and bribery are rife; that those detained in cells in South Africa's main awaiting-repatriation detention facility are often subjected to inhumane treatment and indignity. In other words,

many aspects of the enforcement of existing immigration law are associated with violations of human rights. Because of the complaints that have reached the Commission and other monitors within civil society, the Commission decided that it was necessary to undertake an empirical investigation. Several partners joined the Commission in this effort. The result of this combined effort is that a credible and scientific study has been produced.

This report contains both findings and recommendations which flow from the testimony of witnesses and which seek to bring the current system in conformity with the Bill of Rights and the law. It is our hope that this study will contribute towards the improvement of the immigration and refugee regime in South Africa, one which does not bring shame but pride to us South Africans. Secondly, we hope that this study will contribute to our efforts towards the eradication of xenophobia. We believe that once law enforcement agencies including immigration officers understand and apply the law fairly and justly, they could limit the abuse of the system and protect the rights of those who, legitimately, are entitled to the protection of the law.

I warmly commend this work to the people of South Africa. Hopefully, this will contribute to a fair and just application of the law and ensure that refugees and migrants can be received and treated in a fair, just and humane manner in our country. It will also bring clarity and certainty to the system so as to eliminate arbitrary application of the law, which lends itself to bribery and corruption.

Finally we wish to thank all those involved in this project, particularly Commissioner Jody Kollapen who led it on behalf of the Commission and our partners led by Jonathan Klaaren of the Centre for Applied Legal Studies at Wits, Andrew Rens of the Wits Law Clinic and James Schneider (who has worked with the Lawyers for Human Rights' Refugee Rights Project). In addition the assistance of students from the Faculty of Law of the University of the Witwatersrand and from the University of Pretoria's LLM programme was most invaluable.

**N Barney Pityana**

**CHAIRPERSON**

**Johannesburg**

**20 February 1999**

## Introduction

### Investigation

*"The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us that all of us can be secure that our own rights will be protected."*

S. v. Makwanyame 1995 (3) SA 391 (CC) at para 88, 431 E-F per Chaskalson P.

This investigation continues the South African Human Rights Commission's longstanding work in the field of human rights protection for those persons within the migration system. This work began when the Commission made two fact-finding trips to the Lindela detention facility. The first visit took place on 26 February 1997 and investigated the conditions of detention<sup>1</sup>. The second follow-up visit took place on 28 October 1997<sup>2</sup>. The report of this visit covered conditions of detention at Lindela as well as broader issues of corruption and "questions on the *modus operandi* of the South African Police Services (SAPS) in effecting arrests of illegal aliens."<sup>3</sup> As that report noted, "[i]f 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>4</sup>

The period since these reports has seen increasing reported violations of human rights during the apprehension, detention and removal from the Republic of South Africa of persons under the authority of the Aliens Control Act 96 of 1991. Some of these allegations have been made in the media.<sup>5</sup> Allegations of the infringement of constitutionally guaranteed rights have also been reported to or investigated by local non-governmental organisations (including Lawyers for Human Rights and the University of the Witwatersrand's Law Clinic and Centre for Applied Legal Studies), which have considered these allegations credible. One international human rights organization has similarly reported widespread violations of human rights in this area.<sup>6</sup>

The Commission has also received several complaints relating to the constitutionality of the administration of aspects of the Aliens Control Act.

Two particularly tragic recent events have unfortunately underlined the necessity of investigation of human rights violations affecting both South Africans and non-South Africans. While neither specifically involved the arrest or detention of persons with a view towards deportation, both indicate the severity of the issue for the persons whose human rights are at risk of being violated.

First, on Thursday, 3 September 1998, three Senegalese nationals were murdered on a crowded Pretoria-Johannesburg train. Investigations conducted



by groups working with refugees and asylum-seekers have revealed that hate-motivated attacks such as these suggest that non-nationals may be more vulnerable to violent attacks than nationals. For example, the Cape Town Refugee Forum has reported a sharp rise in anti-foreigner motivated homicides within the last year.<sup>7</sup> And, during the course of investigations conducted by Lawyers for Human Rights into the 3 September 1998 incident, another Senegalese national died after allegedly slipping from a balcony window in the presence of several SAPS officers. Members of the Senegalese community in Johannesburg have reported unusually high rates of deaths from 'other than natural causes.'<sup>8</sup> Second, in October 1998, eighteen persons were killed in Botswana by suffocation in a truck in which they were being transported with a view towards illegal entrance into South Africa.<sup>9</sup>

Against the background of these events, the Human Rights Commission decided to hold a consultative workshop on racism and xenophobia. This workshop was held on 15 October 1998. It has given critical momentum to a public awareness campaign to combat xenophobia, co-ordinated through the National Consortium on Refugee Affairs, an organisation hosted by the Human Rights Commission. Based on a further workshop on 18 November 1998, the national plan of action for this campaign was launched on 9 December 1998.

However, this public awareness campaign to combat xenophobia is only part of the Commission's efforts in this field, which are longstanding. One aspect is legislative. The Commission has continued to play an important role in monitoring and advocating the passage of comprehensive parliamentary legislation regulating the determination of persons as refugees and their subsequent treatment.<sup>10</sup> At the time that this report was being written, the Refugees Act 130 of 1998 had not yet commenced.

This report is part of another aspect of the Commission's efforts in this field, to investigate human rights violations against aliens. In February 1998, the Commission decided to exercise its powers in terms of section 9 of the Human Rights Commission Act 54 of 1994 and institute an investigation.<sup>11</sup> The scope of this investigation was limited. It had two primary goals. The first was to establish the patterns of practise relating to arrest via both qualitative and quantitative interviews with individuals detained under the Aliens Control Act. The second was to establish the legal position of the Department of Home Affairs, the South African Police Service and the South African National Defence Force (SANDF) relating to their criteria for enforcement of the Aliens Control Act in terms of apprehension, detention and removal of suspected prohibited persons. A secondary goal was to monitor the conditions of detention at the holding facilities including the Lindela Repatriation Facility.

In the view of the Commission, several constitutional rights were at risk of being infringed including equality (section 9), dignity (section 10), freedom and security of the person (section 12(1)(a)), freedom of movement and residence (section 21), just administrative action (section 33), and the rights of arrested, detained and accused persons (section 35). The persons affected included undocumented migrants, documented migrants (especially recognised refugees and asylum-seekers) and certain classes of South African citizens (especially certain identifiable groups of black citizens).

## **Investigation Methodology**

### **1. Resources**

The investigation was resourced in part by non-governmental and academic organisations. In particular, the resources of the Faculty of Law of the University of the Witwatersrand (the Centre for Applied Legal Studies, the Law Clinic, and the School of Law) were utilised.

Control and supervision of the investigation remained solely with the Human Rights Commission. On a day-to-day basis, the investigation was managed by a four person team chaired by Jody Kollapen, Commissioner of the Human Rights Commission. The team included Jonathan Klaaren, Centre for Applied Legal Studies of the University of the Witwatersrand, Andrew Rens of the Law Clinic of the Faculty of Law, and James Schneider.<sup>12</sup>

One noteworthy aspect of this process was the training of law students in human rights investigation methodology as well as the substantive law of the arrest and detention of persons with a view towards deportation. Most of the interviews were conducted by students of the Human Rights course conducted by the School of Law of the University of the Witwatersrand. At Wits, the students were drawn from third- and final-year students studying for the LLB degree. At the University of Pretoria, the students were drawn from LLM level. These interviews provided the data necessary to make the findings reported herein. The students from Wits and from the University of Pretoria were given training in terms of the goals and objectives of the investigation. Members of the investigation team also conducted workshops with the students to discuss methods for conducting primary research interviews. Furthermore, at Lindela, members of the investigating team reminded the students of the interviewing guidelines. The students received no compensation for their work although their work did count as part of their course and thus as part of their progress to an academic degree.

The training and use of volunteer students provided resources beyond those of the Commission for the purposes of the investigation. It also created potentially significant spin-off and long term benefits by producing a cadre of trained and at least minimally experienced human rights workers from a variety of law schools and faculties. The structure of the investigation may serve as a model for future investigations by means of similar strategic associations with identified non-governmental organisations and academic institutions.

A full set of completed interviews and a selection of the other documentation associated with the investigation are available in Historical Papers, William Cullen Library at the University of the Witwatersrand.

### **2. Fact-Finding Process**

An overview of our sample of interviewees is given below. This section details the primary fact-finding process of the investigation. Interviews were conducted with 151 detainees in the immigration system.

All the interviews used in this investigation were conducted at the Lindela Repatriation Facility in Krugersdorp.<sup>13</sup> Nonetheless, the single location for the interviews does not detract from the nearly national character of the interviews. As the central holding facility, Lindela functions in some respects as a magnet of the Home Affairs detention system. Many persons who are initially apprehended as far away as Mpumalanga or the Western Cape eventually find their way to Lindela.

The primary fact-finding method used was through interviews using a standard form.<sup>14</sup> An essentially random scheme for identifying interviewees was developed before the interviews took place. This involved obtaining an up-to-date print out sheet of all detainees held at Lindela on the day of the interviews. The Lindela officials (who work for the private body that operates the detention facility) cooperated with this process and were able to supply this printout. Individuals were then marked at a pre-determined number on the list (eg. every twentieth person). These individuals were called over an intercom system and asked to volunteer to participate in the survey. Before interviewing, the individuals were then cross-referenced through their Lindela identification documents to ensure that those interviewed were in fact those called.

Not all persons who were called either responded or agreed to participate. However, of those who responded, only a few did not wish to participate in the project once they were informed about the purpose of the interviews.

There were numerous incidents of persons who were not called joining the group of volunteers. The reasons for this phenomenon varied. They included persons with similar names to those called; friends of those persons called coming along with their friend; and a variety of personal reasons for 'self-selection' such as individuals who affirmatively wished to report irregularities experienced. Where individuals 'self-selected' they were generally not interviewed. In the one case where an interview did take place, this person's interview was excluded from the quantitative analysis.

Language was an issue in the interview process. A general rule was adopted that interviews should not be mediated via an interpreter. In at least 95 percent of the cases, this rule was respected. This was made possible by the multiple language skills of the students who conducted the interviews. The languages used by the interviewing students included English, Afrikaans, Zulu, Sesotho, Xhosa, Setswana, Xitsonga, Portuguese, French, West African Pidgin English, Swahili, and Kikuyu. Where communication was not sufficient for an effective interview to take place the interview was discontinued and a replacement interviewee selected. On certain days there was in fact a difficulty in matching languages of interviewers with interviewees.<sup>15</sup> The language factor is probably the root cause of a significant feature of our sample: a smaller than representative sampling of Mozambican detainees.

In the end, the sample was under-inclusive by comparison with a random sample. We estimate the combined non-participation rate was not greater than 50 percent. Apart from language, we were unable to detect any systematic reason for non-response and non-participation.

Ethical issues surrounded the interviewing process. In short, many of the interviewees wished to have their particular cause investigated and advocated by our interviewers. However, the rationale of the investigation was to engage in research on the position of these persons as a group rather than as individuals. Thus, interviewers were instructed to explain to each interviewee the purposes behind the investigation. In particular, each interviewer explained to the interviewee that the interviewer would not be able to individually follow-up the particulars of each case.

Nonetheless, during the course of a few interviews, interviewers became aware of allegations of serious human rights violations that rose to a level of demanding immediate investigation. These cases were addressed by means of a follow-up form. Of the 149 total interviews used, there were several cases that needed such follow-up. The circumstances that warranted investigation included interviewed persons who expressed a desire to apply for refugee status; individuals who claimed citizenship but were unable to contact friends or family to assist with their identification<sup>16</sup>; and health-related concerns. We also intervened in some matters that could be attended to immediately. For example, the project regularly intervened to secure access to one free telephone call to interviewees who wished to make such a call but had been refused such access.

Perhaps the most serious of the follow-up issues related to an incident of non-observance of the procedures of section 55(5) of the Aliens Control Act.<sup>17</sup>

Beyond the 149 interviews of detainees at Lindela, an additional 40 interviews were conducted just outside of the Lindela Facility with family and friends of detainees. We had originally intended to interview substantially more individuals in this category but our researchers found that most people with family or friends being held at Lindela were extremely reluctant or unwilling to discuss their reasons for coming to the Lindela Facility.

### **3. Working Paper<sup>18</sup>**

The investigation did not solely consist of fact-finding by means of the interviewing method. As noted above, its second goal was to establish the legal position of the Department of Home Affairs, the SAPS and the SANDF relating to their criteria for enforcement of the Aliens Control Act in terms of arrest, detention and removal of suspected prohibited persons. Towards this end, a working paper on constitutional issues surrounding the arrest and detention of persons with a view towards deportation was written. The Commission to the Department of Home Affairs and the Secretariat of the Department of Safety and Security circulated this working paper. No formal response was received from either, although the Safety and Security Secretariat participated fully in a workshop on the arrest of persons with a view towards deportation held in Pretoria on 16 July 1998, where the working paper provided a legal framework for the discussion of these issues.<sup>19</sup>

The lack of response from the Department of Home Affairs in particular is troubling. The Commission decided to engage in this investigation in order to clarify among the state institutions charged with enforcing the Aliens Control Act the legal standards governing arrest of persons with a view towards deportations

and the application of those standards in a number of factual situations. It is clear from this report that there are many and deep problems that remain to be addressed.

## **Overview of the Lindela Interview Sample**

A total of 151 in-depth interviews were conducted at the Lindela Repatriation facility with detainees. Of these interviews, 149 were included in our quantitative analysis.<sup>20</sup> This section provides an overview of the sample with regard to race, age, and gender, country of origin, legal status, and circumstances of apprehension.

### **1. Race, Age and Gender**

No person that we interviewed was white nor were we aware of any white person held at Lindela during the period of our interviews.

However, the 149 persons included in the quantitative analysis were a varied group in terms of age and gender. Ages ranged from 15 to 60. The mean age was 25,8 years. The sample was heavily male: 117 (or 84 percent) were men; women constituted 23 of the persons interviewed (16 percent).<sup>21</sup> As noted above, the investigation also visited Johannesburg Central Prison. We had understood from some officials that female detainees were no longer held at Lindela and instead were held at the Prison. This turned out not to no longer be the case. Nonetheless, there appeared to be fewer female detainees held at Lindela during the period of our interviews than during previous investigations in 1997. This partially explains why our sample is heavily male.

We noted that there were a number of infant children detained at Lindela, apparently with their mothers. However, we were shown no official records accounting for the presence of these children, other than in some cases notations on the body receipts that the Lindela Facility uses to record persons received.

### **2. Country of Origin**

One of the questions we asked our detainee sample group was their country of origin. We found that in terms of reported countries of origin, the sample group broke down as follows:

South African	10,1
Mozambique	10,1
Zimbabwe	47,0
Malawi	10,1
Lesotho	8,7
Other	14,0

Included in the category of 'Other' were persons claiming the citizenship of a wide range of countries. We found more than one person claiming citizenship from Swaziland, Angola, Kenya, and Ethiopia. The remainder claimed citizenship from

Tanzania, Namibia, Somalia, Rwanda, Liberia, Zambia, Botswana, and Pakistan and Bangladesh. The significant number claiming South African citizenship is discussed below.

We also obtained overall statistics from the Lindela Facility on the number of persons detained at Lindela and their countries of origin. The overall statistics available for the countries of origin of persons listed as "illegal aliens" accommodated at Lindela from August 1996 to October 1998 were as follows:

Mozambique	63,9
Zimbabwe	26,8
Malawi	3,6
Lesotho	2,7
Swaziland	0,6
Botswana	0,2
Other	

We were unable to obtain from Lindela a breakdown of the detainee population by country of origin for the specific period during which our interviews were conducted. However, there are only small monthly variations in the breakdown of countries of origin of detainees held at Lindela.<sup>22</sup>

Comparing our sample with the overall country of origin statistics available from Lindela, it is clear that our interviewee's sample diverges significantly from the overall Lindela detainee population. There are a number of potential reasons for this variation. Some variation may result from our different categorisation of detainees.<sup>23</sup> Undoubtedly one reason is language. In particular, the preponderance of Zimbabweans and the dearth of Mozambicans might, for example, be explained by a linguistic selection filter. While all spoke English, few of our interviewers were able to conduct interviews in Portuguese or other Mozambican languages and therefore we had to exclude many Mozambicans initially identified through our random sampling from our survey. Similar linguistic selection filters may account for the other variants in terms of proportionality between the country of origin of the detainees in our survey group and that recorded in the overall statistics provided to us by Lindela.

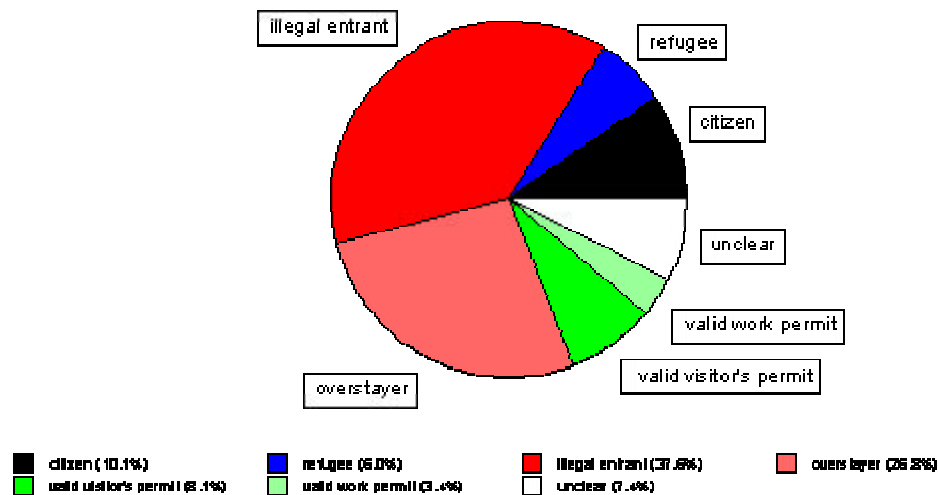
### **3. Legal Status**

Most of the persons we interviewed were being detained at Lindela pending repatriation. These interviewees thus had already been subjected to a section 7 examination by an immigration officer in terms of the Aliens Control Act. However, some of our interviewees had not yet had a section 7 examination. Indeed, the Lindela detainee population does include persons who have not yet had a section 7 examination. It is also possible that some were in the midst of section 10 proceedings (used for persons claiming South African citizenship) but our data does not show that.

We asked the sample detainee group about their initial legal status in the country. 37,6 percent of the sample acknowledged their initial status as illegal entrants.

This was the largest group. Another 26,8 percent claimed to be over-stayers. Thus, nearly two-thirds of the group admitted their illegal status.

## Claimed Legal Status of Sample Group



A significant number claimed to be non-nationals in the country legally. 8,1 percent claimed to have a valid visitor's visa. 3,4 percent claimed to be in the country on a valid work permit. Thus 11,5 percent of our sample claimed to have been detained despite being legally in the country.<sup>24</sup> Moreover, 10,1 percent claimed South African citizenship.<sup>25</sup>

Disturbingly, 6,0 percent claimed to be undocumented refugee applicants. That is, they claimed to have a case for asylum but did not have documents as an asylum seeker. In these nine individual cases, we took action with respect to the Home Affairs officials at Lindela.

The status of 7,4 percent of the sample could not be clearly determined from our interviews.

### 4. Circumstances of Apprehension

We asked our group of interviewees questions relating to the place and agent of apprehension. We found that the group was very dispersed in terms of place of apprehension. 22,8 percent were apprehended in the jurisdiction of central Johannesburg police stations. Including this first group, 51,2 percent were arrested in greater Johannesburg. Finally, persons arrested within the whole of Gauteng accounted for 59,3 percent.

As to who is doing the apprehending, the sample was clear that the vast majority (83,2 percent) were apprehended by the South African Police Services. Only 7,4

percent were apprehended directly by Home Affairs (and over half of those, 4,0 percent, were apprehended directly at the Home Affairs offices). 5,4 percent were apprehended by the SANDF. The remaining 4,0 percent were apprehended by other law enforcement officials<sup>26</sup> or by officials unknown to the interviewee. SAPS clearly provide the country's primary immigration enforcement capacity.<sup>27</sup>

Of our sample, 78,5 percent reported that this was their first time in the deportation system. By the same token, 21,5 percent thus reported encountering immigration enforcement previously. Of this 21,5 percent, most had been either apprehended without detention or detained without eventual deportation. 12,1 percent (that is over half of those with previous encounters) had been stopped and released for reasons including bribery and carrying identification. 8,6 percent had been apprehended and detained before. Only two persons (1,3 percent) reported to have been deported and to have returned to South Africa.

## **5. Release From Detention**

The statistics provided to us by the Lindela reveal that, over the period August 1996 to October 1998, 16,669 out of 142,644 persons were released from Lindela after being admitted. In other words, a total of 11,7 percent of the persons admitted to the facility as "illegal aliens" were eventually released from Lindela because they were either citizens<sup>28</sup> or legally resident non-citizens.<sup>29</sup>

Of course, some of these errors have to be understood to come from good faith enforcement efforts. Reasonable police officers will make mistakes and some of the releases must be welcomed as the correct action to take in the circumstances. Nonetheless, the fact that over 10 percent of those held at Lindela, at the centre of the system, are eventually released does more than give cause for concern. The number of wrongly detained persons at Lindela is a strong indictment of the current system for the identification and apprehension of suspected undocumented migrants. This statistic alone points to systemic flaws in the current procedures and practises and represents a grossly unacceptable rate of wrongful detention.



## Findings

### Conditions Relating to Apprehension

As discussed in the accompanying paper, in order for an individual to be apprehended and detained with a view towards removal from the country certain minimum procedures, contained in the *Aliens Control Act 96 of 1991*, must be complied with. The most important clause of the Act, in this regard, is probably section 53(1). This section is undoubtedly the primary statutory authority used by immigration officers and police officers picking up persons with a view towards repatriation. It is worth quoting in full:

(1) 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 is so entitled, such officer may take him into custody without a warrant and if such officer deems it necessary detain such person in a manner and at a place determined by the Director-General, and such person shall as soon as possible be dealt with under section 7.

In addition to concerns that this clause may be unconstitutional on its face in several respects, the Commission also found that there was a substantial failure of enforcing officers to comply with even its minimal requirements. In view of the serious consequences which may flow from the administration of this clause (including wrongful detention and wrongful removal from the country) the Commission views its findings relating to the administration of this clause with extreme concern.

This clause requires enforcing officers to have a "reasonable suspicion" that an individual is a non-citizen prior to approaching such individual. The clause then requires an approached individual to "satisfy such officer" that he or she is entitled to be in the Republic. This would imply, at minimum, being informed by the said officer of the reason for being stopped and being given the opportunity to "satisfy" the officer in regard to the person's legal status in the country.

However, even if a reasonable suspicion is raised the examining officer must still make a determination whether or not the individual is illegally in the country. The onus is on the person reasonably suspected of being a non-citizen to produce proof that they are entitled to be in the Republic. At minimum this would mean that the individual should be told that they are under suspicion of being a non-citizen, illegally in the country and be given the opportunity to produce evidence to counter this suspicion.

Despite the onus, which the *Aliens Control Act* places on a person to prove their legal right to be present in the Republic, there is no legal requirement to carry identification documents on your person in South Africa, nor any similar

equivalent to the pass law requirements, which used to exist. Although practise appears to be otherwise (see below) the policy adopted by the SAPS, and which a senior official of the SAPS confirmed in a workshop held in July 1998, is consistent with this legislative dichotomy. The official policy adopted by the SAPS is that an individual should be accompanied to retrieve their ID if an officer suspects that they are illegally in the country but they allege they do have valid documents.

## **1. Legal Framework for Apprehension**

An examination of the detailed narratives given by our sample group suggests that arbitrary, or *prima facie* discriminatory, criteria were most commonly used to formulate initial suspicions by apprehending officers. In other words in the majority of cases there were no reasonable grounds for an apprehending officer to suspect that a person was a non-national.

Immigration and police officers most often use random pedestrian spot checks or area sweeps to apprehend persons with a view towards removal from the country.

Our quantitative data shows that the vast majority of initial approaches, which in law must be based on reasonable suspicion that an individual is an alien, were in fact based on random spot checks or area sweeps. By far the largest percentage of the sample, 42,3 percent, were apprehended in pedestrian spot checks. This was more than three times the number of the next largest group, the 14,1 percent of the sample who were picked up in a house or village area search.<sup>30</sup> An additional 8,7 percent of the sample group were picked up in transit searches.<sup>31</sup>

We also found 2,0 percent of our sample group had been apprehended while street trading; and 7,9 percent in a 'language/appearance' check.<sup>32</sup> In both of these categories, the apprehending officers made the initial approach based either on random criteria or because the individual "looked like a foreigner."

In addition, 9,4 percent of our sample group were apprehended at their place of employment. It appears that in some cases the apprehending officers had a prior suspicion that there may have been undocumented migrants at these places of employment.

Only 7,4 percent of the sample group were picked up at the border. Smaller percentages were pointed out to the arresting official (2,7 percent), or were discovered in the course of an alleged offence or were discovered in prison (2,0 percent), or were apprehended directly at the Home Affairs or SAPS office (4,0 percent).

These findings reveal that at least 50 percent of all apprehensions were carried out on a random basis, precluding the possibility of a "reasonable suspicion." It would also appear that at least 10 percent of the apprehensions were carried out on the basis of appearance, with nothing more. It is thus unclear in the majority of cases what criteria are being applied by apprehending officers to formulate a 'reasonable suspicion' that a person is a non-citizen.

The testimony provided by Mathole Mthandazo, who claimed South African citizenship, is illustrative of the manner in which the arbitrary practises of multiple officials operated to produce a prolonged detention:

"We were two from a spaza shop at East Bank<sup>33</sup> when a police van with two police officers, a black & white male policeman, came from behind us.... One [of] the white police [officers] came out of [the] van and grabbed me by [my] clothes from behind, [and] demanded ID. Without giving me a chance to respond, [he] pushed me into the van. I was taken to the Sentrengum Police Station. Again here nothing was asked about the whereabouts of my ID, instead I [was] locked up for two days without food and blankets for the two days. From Sentrengum, I was taken to another place - Leonville police station on the 6/5/98. Again on the same date I was transferred from Leonville police station to Lindela Camp. On arrival at Lindela I was asked by one of the Zulu authorised here where I come from. In order to prove that I was really a South African citizen, he asked me to explain a few Zulu proverbs, which I answered quite well. But instead this officer said anyway that does not mean I [am] a SA citizen but I am from Zimbabwe."<sup>34</sup>

The experience of Nelsa Baloti, who also claimed South African citizenship, accentuates problems relating to the formulation of the "reasonable suspicion" requirement as well as the other required aspects of the procedure which must be complied with before a person can be apprehended as a suspected undocumented migrant. Our investigator recorded Ms Baloti's experience as follows:

"Nelsa was apprehended in Bara, Soweto about noon on 7 April 1998, where she was selling goods. A police officer approached her and asked her for her ID. She produced her ID, and the officer then asked her where she was born. She said that she was born in South Africa, and then the officer said that she was not born in SA. She replied that he should phone her grandmother to check. The police officer asked her to show him her hands, which she did. He saw the inoculation mark on her left forearm and said that she is born in Mozambique. She started to explain to the police officer how she got the mark (a product of mixed South African and Mozambican family who moved back and forth between the countries over several generations). He told her that she lied and that she should accompany him to the police station. She gave him

her ID and did not accompany him. The police officer at Dube Police Station and Nelsa phoned her grandmother and explained the situation. Eventually, Nelsa went with her uncle, who

took her to the Dube police station to retrieve her identification document. Upon

returning to her uncle, the police officer spoke to her and said that nobody could take her. Nelsa believed that he was happy to see her as she wouldn't go to the police station. The officer spoke to her uncle ... Her uncle told the officer that he was

said that he married her aunt (father's sister). The police officer then said that

she was born in South Africa. The officer asked Nelsa to give Zulu words for various body parts and she replied correctly. The police officer then still said that she was lying and must go back to Mozambique. The officer did not want to return her ID to her, instead he took her to a small room. After she started crying & told

she must return to Mozambique. The officer then told her uncle that she should go <sup>35</sup> to check her ID and would

not be told nor was she allowed to make one free phone call."<sup>36</sup>

number of common problems suffered by suspected undocumented migrants. The first of these problems is the arbitrariness of criteria used to formulate a reasonable suspicion that an individual is a non-citizen. The second problem used appears to have been appearance. Of equal, if not greater concern is the procedure by which the apprehending officer made the evaluation that the person was identified as an undocumented migrant. In this case the officer discounted an apparently valid ID document, the testimony of the family of the individual, and the 'language test' (which was apparently 'passed'). Against these factors was the fact that the individual was a citizen of a country with which South Africa has a treaty (for which a plausible explanation was given).

Also noteworthy of this case was the manner in which the apprehending officer treated the interviewee. The power conferred by the Act, became a mechanism for the exercise of unfettered and apparently arbitrary power over the interviewee. The officer in question not only discounted the interviewee's evidence, but eventually intentionally misled both the interviewee and a member of her family with regard to the administrative procedure

## **2. Destroying, Ignoring and Failing to Allow Access to Identification Documents**

The majority of persons in our sample group did not have or claim to have valid identification documents. However, a disturbingly significant portion of the sample group did have identification documents which they claimed were either destroyed or ignored by apprehending officers or which apprehending officers prevented them from accessing.

The greatest single group of our sample, 49,7 percent, claimed to have no valid identification. Another 20,8 percent claimed that the arresting officer had not investigated their identification but that they had some type of identification. Upon investigation by our interviewers this documentation was found to be facially invalid. Often this documentation related to overstaying a visa period. Of persons who were apparently carrying valid identification, 8,7 percent had that documentation ignored, 2,7 percent claimed that it was destroyed by the arresting officer, and 1,3 percent did not show it to the arresting officer. The remaining persons had identification documents at home. Two percent asked to be able to fetch those documents and were granted the request. 10,1 percent asked and were refused to go home to fetch identification documents. Two percent had documents at home but received no offer to go home and did not ask. Two percent asked to go home but were told later and never had the request granted. One person (0,7 percent) was told that he could go home later and the request was later granted.

Given that just over 30 percent of those interviewed had, or claimed to have, valid identification, it is not surprising that a qualitative analysis of the apprehension procedures established an absence of clear or consistent criteria used by apprehending officers in their decision to take persons into custody as suspected undocumented migrants. This lack of clear or consistent practise was demonstrated through the range of conduct, which led to the apprehension of the 149 persons interviewed during this inquiry.

The allegation that apprehending officers had failed to allow an individual to access nearby ID documents was repeated again and again. A woman, who was stopped on her way to the shop, asked for an opportunity to retrieve her ID from her house. She indicated that, in response to her request, the police officers "told me that they do not work for me that they will have to take me home for me to retrieve my passport."<sup>37</sup>

During our interviews we found that, as in this case, many individuals are stopped by police officers near their homes and subsequently taken into custody for failure to produce ID. It was extremely rare for a police officer to accompany or allow an individual to retrieve their identification documents. The interviews we conducted pointed to the widespread belief among police officers that they had

complete discretion in terms of how they treated persons who were not carrying identification documents.

Many of the findings that came out of interviews with detainees were supported by interviews conducted amongst family and friends of detainees. In particular a significant number of those who had come to secure the release of a detainee were critical of police procedure in the apprehension or detention stages. For example, two of the 17 persons who reported specifically coming to Lindela to secure the release of an individual had previously brought the detainees identification documents to police cells where the detainee was initially held and had been told that they could only use these documents to secure the detainees release after the detainees transfer to the Lindela Facility.

There was strong concern expressed by several of the individuals who had come to secure the release of someone detained at Lindela that police officers acted arbitrarily in making a decision to take an individual into custody as an undocumented non-national. Several persons stated that they believed that the possession of ID documents was regularly ignored by police officers. For example, one person told us:

"The police don't care even if you have an ID with you, if they suspect you ... they just detain you."<sup>38</sup>

And another complained that:

"The way police [apprehend suspected illegal immigrants] is unsatisfactory, because even if you have ID they just tear it up, they don't want to listen to the explanation."<sup>39</sup>

Many shared these types of perceptions.<sup>40</sup>

This study did identify a very small, but never-the-less significant minority of individuals who claimed that they had valid identification documents destroyed or stolen by apprehending officers. Often linked to corruption or extortion, a full 2,7 percent of our survey group reported having had their documents destroyed or stolen by government officials.

Such incidents were either tied to refusal to pay a bribe, which was demanded, or the use of arbitrary apprehension criteria. For example, Ngwenya Sidingani made the following statement:

"I was marketing (looking for a job) in D.F. Malan Street. The police came from the back and stopped their truck. They asked me where I come from. I told them that I am from Kagiso. They asked me for my ID. I produced it and handed it to Mageza (a Venda police officer). He took it and put it in his pocket and told me that I am a

"Kalanga" (illegal). They told me to get inside the truck but I demanded my ID. They refused and told me that they want to check it in the computer. I got into the van. We moved for about 3 hours going around. From there they took me to Newlands police station. They took our fingerprints and put us in cells. I asked about my ID and they told me that it is in the car (truck). They took us from the police station to Lindela. At the police station they put that I am from Zimbabwe in my file.

"At Lindela they asked me about my ID and I told them that it is with the police who apprehended me. They told me that I can phone my wife and tell her to bring some sort of proof that I am South African. I could not because her work telephone numbers are in my ID. I don't know how I am going to get out from here and how am I going to get my ID."<sup>41</sup>

The widespread failure to consider or allow access to identification documents further bolsters the finding, above, that reasonable grounds were not present for an initial suspicion. It also suggests that decisions are regularly made to approach and to apprehend individuals as illegal aliens based either on discriminatory pre-conceptions about citizenship or for reasons outside the purposes of the *Aliens Control Act* (such as extortion).

### **3. Failure to Give Reasons for Apprehension**

One extremely troubling finding of this inquiry was that apprehended persons were often not told, or did not understand, the reason for their apprehension. A significant proportion of those taken into custody, 28,9 percent, were given no reason why they were being apprehended. This would necessarily mean that they were not given the opportunity to show that they were legally in the country (either as a citizen, or as a non-national).

The single most significant reason given for taking a person into custody was the failure to produce an identification document, at 39,6 percent of the sample. Lack of identification documents seems to have been the single most significant reason given for taking a person into custody as a suspected illegal alien. However, it is unclear what reasonable criteria would have been used in the majority of these cases to formulate a suspicion that a person was a non-national.

Approximately fifteen percent (15,4 percent) of the sample had identification documents but were told that those were insufficient. Only 3,4 percent were told they were taken into custody based on their appearance and only 3,4 percent for an alleged offence.

However, of the remaining 9,5 percent of the sample group, 3,4 percent understood that they had been apprehended either because 'foreigners were taking jobs' or because 'foreigners were responsible for crime.' Another 2,7 percent were taken into custody for reasons relating to lack of proficiency in a South African language.

The final 3,4 percent of the sample group were taken into custody after offering an insufficient sum as a bribe for their release.

Additionally, we noted that a significant percentage of our sample group, 18,8 percent, did not initially understand the language of the person apprehending them while the remaining 81,2 percent did.

#### **4. Abuse of Power: Corruption and extortion**

This investigation established that problems relating to lack of due process do not stand in isolation from the perhaps more serious and often closely tied problem of police corruption. We mentioned above the case of a woman who was denied the opportunity to retrieve her ID from her nearby house. This same woman reported that, "one girl was released. She was Shangaan. Her father bribed the police."<sup>42</sup>

Although in some cases the reasons for wrongful apprehension seemed to relate to inadequate guidelines provided to or inadequate training of apprehending officers, in others there is clear evidence of a capriciously abusive exercise of power or an abuse of power for purposes of attempted extortion.

This approach to enforcement of the *Aliens Control Act* seemed to be widespread among apprehending officers. Rather than a tool for the predictable and balanced enforcement of migration management, the Act is used as a mechanism for exercising unfettered and arbitrary power over those persons who have the "appearance" of foreigners. The finding that the Act is often interpreted by enforcing officers as giving them unfettered powers in terms of enforcement was supported by scores of interviews. Typical was one man's account of his apprehension experience:

"I was painting some flowers at the 'Friekland quarters' when two men in a van approached me and asked to produce my passport. I told them that my passport was at my place and if they could give me a chance I could collect it. They told me "go to hell". They took me to one of the police stations in Pretoria. I was given one month employment visa by my government to be in South Africa and this is my fourth week of stay. I am worried that my legal employment permit will expire."<sup>43</sup>



Extortion and bribery are extremely widespread among apprehending officers. A full quarter of the sample (25,5 percent) reported that they were requested to pay a bribe but that they had insufficient funds. 74,5 percent did not mention having been requested to pay a bribe.<sup>44</sup> There were widespread reports of the release of individuals picked up with those interviewed after those persons paid bribes.

Undocumented migrants commonly use bribery in order to secure release from the custody of apprehending officers. Extortion also seems to be routinely practised against documented migrants as well as citizens, although, without surprise, it seems to be less common in regard to citizens. As our inquiry revealed, in many cases failure to comply with demands for money resulted in detention and transfer to Lindela, regardless of whether the individual in question was in possession of a valid ID document. There is also evidence of collusion to prevent individuals who have refused the payment of bribe money from contacting family or friends who might be able to assist them in obtaining their release.

Alfred Phiri, for example, was brought to Lindela, despite claiming citizenship. He claimed that others who were picked up with him were released after paying money:

"I was arrested on the 15-05-98 by three officers. One of them was a sergeant. On their approach, they ask for an ID document. I told them that I do not have it with me and without any question they "pick me" go their car. They drive us to John Vorster Police station. They ask us for money so that they can release us. I refuse because I know that I am not an illegal immigrant, I am a South African citizen. Those who gave the police monies were released. I and others were driven to Lindela Centre."<sup>45</sup>

Eventually, Mr Phiri was released from Lindela after his wife came with his identification documents.

Many individuals who admitted in their interviews to being illegally in the country also noted that they had been given the opportunity to pay a bribe in return for their freedom. Not untypical is the following narrative recorded by our interviewer:

'It was about 21h30, while the detainee was sleeping at his home in Mabouabang. The police knocked on the door, identifying themselves and asked for his ID. All the houses in the township were searched for IDs. When he was arrested other known illegal immigrants were not arrested.... The other 5 men he was arrested with all had money on them, whereas he did not. He was placed in the van with the five other men. He was taken to the police station Rohatle. He was kept at the police station from the 23/03/98 to 30/03/98. All five other men were taken away at night, around

22h00, while he was sleeping at the police station. Then he was brought to Lindela.<sup>46</sup>

Interviewees reported direct offers of release in exchange for money, as well as the use of commonly understood euphemisms, such as "try"<sup>47</sup> and "something nice"<sup>48</sup> to signal release in exchange for a bribe. There is strong evidence of the existence of market rates for release. While these rates may vary according to police precinct and the stage of custody, we found remarkable consistency in the allegation that R50 was the minimum amount required to obtain release upon initial apprehension.<sup>49</sup> While release may be secured for as little as R50 at the initial stage of apprehension, it seems to rise to above R100 by the time an individual is brought to a police station. Many detainees who reported the existence of bribery indicated that they had been unable to afford the rate set by the apprehending officer(s). A detainee who admitted his illegal status related as follows:

"Around 7pm I got into a taxi with my brother and 4 other friends after work. We were going to the place of residence when the police stopped the taxi. They ordered us out and asked for our ID. When we failed to produce ID, they arrested 6 of us. There were 6 policemen. They asked us how much each of us had. Those who had R50 (up to R200) and more were told to go. They took me and my brother to the police station as we did not have any money on us. We stayed at Welkom Police Station for 28 days and were brought to Lindela on April 4<sup>th</sup>."<sup>50</sup>

The example of a Zimbabwean, Witness Ncube, who claimed to be legally in the country when he was apprehended was recorded by one of our interviewers, and illustrates some of these findings:

"He told the policeman that he left his passport in his room. The policeman refused to accompany him to his room to retrieve his passport. They told him that they would allow him to make a phone call to get his passport from his friends or family. He was then taken alone to a corner of the street where the policeman said he must "TRY", this would imply that the detainee must offer him a bribe and to increase the value of money (i.e. try, try more). The detainee refused him because he says he has a valid passport. He was arrested for not having an ID. He was taken with 35 other men to the police station in Jeppe. Two of the men were allowed to phone, since they "tried" i.e. gave money to use the phone. The rest of the men were not allowed to phone."<sup>51</sup>

Although most alleging the existence of bribery indicated that they simply had not been able to afford the amount, a number of those interviewed reported having paid money for their release, but were not released. An example was Zwane Elias, who claimed:

"I was arrested by two black officers and taken to Roodepoort police station. Upon arrival they told me that if I gave them money they would release me. I gave them R110 but did not release me from the cell. They promised to release me the next day but did not. I was taken to Lindela on April 4<sup>th</sup> and did not receive my money."<sup>52</sup>

Finally, the number of individuals who reported witnessing the release of others who had initially been detained with them but who had paid a bribe to secure their release adds strength to the finding that corruption among apprehending officers is endemic.

## **5. Violation of Right to be treated with Human Dignity**

The cumulative effect of the practise outlined above, in part sanctioned by the wide discretionary powers conferred on apprehending officers by the *Aliens Control Act*, is that anyone, anywhere at anytime can be stopped and required to produce ID documents. Failure to produce an ID document subjects an individual to the exercise of wide discretionary powers conferred on individual police and immigration officers. Failure to produce an ID document, on demand, may and often does result in immediately being taken into custody with a view to removal from the country. The current legislation, combined with its interpretation, has thus effectively created a pass law requirement.

It should also be pointed out that we found no white persons detained at Lindela. There was strong evidence that many citizens and legally resident non-citizens were more vulnerable to apprehension and detention under the current enforcement practises of the *Aliens Control Act* because they were black and darker skinned.

The current legislation and practise relating to its enforcement has thus created a situation under which the basic human dignity of all persons is potentially at risk, and is more particularly compromised for certain categories of persons.

In addition to this general finding, the Commission found the manner in which many of those interviewed were treated at the time of apprehension was degrading or otherwise inconsonant with their fundamental right to be treated with dignity. Certainly, incidences of extortion and physical assault were often accompanied by the use of derogatory or degrading language, which gave these incidents an additional violative aspect.

We believe that this study revealed a pattern of treatment by apprehending officers, which was inconsistent with every individual's right to be treated with human dignity. While the notion of the right to be treated with human dignity is a difficult one to quantify, the Commission has drawn particular attention to this because we feel that it underlies many other fundamental rights -- rights that are, or ought to be, afforded to every person present in South Africa. Derogatory

remarks based on reference to being "different" were often accompanied by degrading or punitive treatment, which seemed premised on an idea that 'foreigners' have fewer rights than nationals. This suggests that there is a link between the mistreatment of (perceived) foreigners and the existence of xenophobic attitudes.

One example of how these issues may effect other rights, is a pattern suggested by the sample group that those who claim to be legally resident non-citizens are more vulnerable to wrongful detention than those claiming citizenship. Non-citizens, for example, seem to have been more frequently refused the opportunity to contact friends or family in order to secure identification documentation.

Despite the finding that many apprehending officers treat suspected undocumented migrants in a degrading manner, it was also clear from our sample that in some cases apprehending officers carried out their duties in a professional and courteous manner.

## **6. Identification of Refugees / Asylum-Seekers (Apprehending Officers)**

A small but disturbing trend was the number of individuals awaiting removal from the country who had a prima facie case for asylum, which had not been investigated or adjudicated upon. Of our sample group, 6,0 percent claimed to be undocumented refugee applicants.<sup>53</sup> That is, they claimed to have a case for asylum but not to have documents as an asylum seeker. These figures may represent an inflated percentage of the detainee population.<sup>54</sup>

All persons have the right to make, and have considered, a claim for refugee status. In addition if, in the course of enforcing the *Aliens Control Act*, an apprehending officer has reasonable grounds to suspect that an undocumented migrant may fulfil the criteria for refugee status that officer has an affirmative duty to ensure that the individual is afforded the opportunity of making an application for refugee status.<sup>55</sup>

In our sample group we identified individuals who had attempted and been prevented from making a claim for refugee status, as well as individuals who had not attempted but who had at least a prima facie claim to refugee status. Elias, an Angolan, was taken into custody "at the Woodstock office" where he was going to get a permit which would allow him to stay in South Africa. When he was apprehended the apprehending official told him, "I am arresting you and taking you back to Angola."<sup>56</sup> Despite the fact that Elias told our interviewer, "I am unwilling to go back to Angola because of the war,"<sup>57</sup> he had not been given an opportunity to apply for refugee status before or during the two weeks he claims he was detained at Pollsmoor prison in Cape Town nor upon or after arrival at Lindela.

The problem of language can increase the risk of genuine refugees not being identified as such by apprehending officers. This may have been the case with Maria Angellica, who arrived from Angola with her husband. During the course of an interview conducted in Portuguese it became evident that this individual had tried to make a claim for refugee status and had been unsuccessful. She stated:

"I came with my husband from Angola, via Zimbabwe and Mozambique. I myself did not have any ID documents. We were stopped by a policeman who asked to see our passports. My husband spoke to him as I did not understand any English. He arrested us when we were unable to produce a passport. We were taken to Pongola police station where we stayed for eight days. An official took our names and fingerprints. We were brought to Lindela on 06/05/98 (two days ago). My husband told the Home Affairs officials that we are refugees or he tried to tell them and they did not understand."<sup>58</sup>

While language clearly made it difficult for this person to make a claim for refugee status, there is also evidence that officials at the Lindela facility acted to obstruct the lodging of an application for refugee status.

While an accurate quantitative evaluation may be impossible from this study, it is clear that there is a significant number of persons who are denied the right to make a claim for refugee status. It was evident from our investigation that at least some of these individuals are returned to their country of origin in spite of having a *prima facie* claim for refugee status. This amounts to *refoulement*<sup>59</sup> and is probably the most serious derogation contemplated under at least two Conventions which South Africa has acceded to.<sup>60</sup>

## **7. Assault by Apprehending Officers**

Reports of assault were not uncommon. Approximately one in five persons, or 19,5 percent of the sample, reported that they had been physically assaulted in some degree during the apprehension. A further 8,7 percent reported that they had been threatened with physical violence. 3,4 percent reported violence to others. The remaining 68,5 percent did not volunteer information on the subject of violence.<sup>61</sup>

There was a range in the intensity of reported assaults, some of which were very serious. Some individuals were apparently assaulted without reason, while others reported assaults in connection with attempted escapes or in conjunction with attempts by police officers to illicit an admission of illegal status. The case of Moyo Anderson is illustrative:

"They took me to Hanigu street police station and asked my origin. When I told them its Pietersburg they hit me with a klap and I

agreed I am from Zimbabwe and came to SA because of suffering economically.... They then took me to the cells. The blood came out of my mouth because of the klap and it was becoming painful in the cell. They also had hit me with an iron pipe."<sup>62</sup>

Reported assaults were not limited to apprehending police officers. We also recorded incidents of assault by apprehending officials of the Department of Home Affairs.

"... three Home Affairs officials came and asked us for our passports... They assaulted us while interrogating us and later took us to the Humwood Police Station."<sup>63</sup>

We also found that assaults were commonly used during the apprehension procedure. This seemed to have been most common during large sweep operations, but was also common in individual apprehensions and in the course of house or spot checks. Nkomo Mlandeni's account of how he was taken into custody is typical:

"The house we were staying in was open when the police came for us. They did not knock at the door. We were five in number. All of us were in. The police who were in plainclothes and 4 in number demanded to see our ID books and passports. None of us had these. They hit us severally and pushed us into their waiting motor vehicle. They were very tough on us. They hit us and violently twisted us, pushed us into their motor vehicle."<sup>64</sup>

## **Length and Condition of Detention**

Section 53(1) of the *Aliens Control Act* empowers immigration or police officers, in respect of any person who "fails to satisfy" such officer that he is entitled to be in the Republic, to:

"...take [such person] into custody without a warrant and if such officer deems it necessary detain such person in a manner and at a place determined by the Director-General, and such person shall as soon as possible be dealt with under section 7."

Section 55 of the Act goes on to place restrictions on the manner and condition of detention. Section 55, subsection (1) outlines the general rule that:

"if any person is detained under the provisions of this Act ... such detention shall, subject to subsection (5), not be for a period longer than 48 hours from the time of his or her arrest, or from the time on which he or she was taken into custody, or from the time on which

an examination in terms of section 7 commences, as the case may be."

There are two important qualifications on this limitation on detention. The first qualification is contained within section 55, subsection (3) and allows that, where a section 7 examination has not occurred within 48 hours the immigration officer "shall" either release the person in question, release the person with a provisional section 10 permit or detain that person for a further 48 hours "after he or she has in writing in the prescribed form informed the person in question of the reason for such further detention."

The second qualification is contained in subsection (5) which stipulates that once a person is detained "pending his or her removal" in other words, once they have been subjected to a s,7 examination by an immigration officer and been determined by that officer to be illegally in the country they may be detained for a period which is "reasonable and necessary" up to 30 days. Under these circumstances detention in excess of 30 days "shall be reviewed immediately, by a judge of the Supreme Court."<sup>65</sup>

In summary, the *Aliens Control Act* requires that a person detained under its provisions be brought before an immigration officer within 48 hours of their apprehension. In addition, the immigration officer must conduct a full examination of their legal status within the 48 hours, under the provisions of section 7 of the Act. If the immigration does not complete a section 7 examination, he or she is required, at minimum, to supply written reasons for this omission to the person in question.

## **1. Periods of detention in police cells**

In terms of practise, we found that, upon apprehension as a suspected undocumented migrant, individuals are generally brought to a local police station. These individuals then remain in police cells at the local stations for an indeterminate period of time, pending removal to the Lindela Repatriation Facility. In some cases individuals are detained in police cells at more than one police station prior to transfer to Lindela. In Cape Town the common practise is to transfer suspected undocumented migrants from the local police station to Pollsmoor prison and eventually to Lindela.

The length of detention prior to removal to Lindela varies widely. Many of the most prolonged detentions prior to removal to Lindela were reported from Cape Town, and in particular Pollsmoor prison. The police stations in Gauteng generally had the shortest turnover periods (commonly ranging from same-day transfers to more than seven days in detention prior to transfer).

## 2. Detention without Judicial Review Beyond 30 Days

The length of detention in police cells is significant for a number of reasons. One of the most serious concerns relating to detention in police cells is that the Department of Home Affairs maintains no record of the length of detention prior to arrival at Lindela. This has meant that the incidence of detention (without review) in excess of thirty days rises significantly with prolonged detention in police cells.

Although the private management of Lindela has instituted a mechanism to track the length of detention of individuals at the Lindela Facility itself, there seems to be no mechanisms to ensure that individuals are not held in *cumulative* detention for a period in excess of 30 days (without the case being brought before a judge of the High Court to review the legality of the detention). There is also evidence that, despite the cooperation of the private management with officials of the Department of Home Affairs, some persons continue to be held in excess of 30 days at Lindela itself without having the legality of their detention reviewed by a magistrate. The responsibility for ensuring that no person is detained for a period in excess of thirty days without being brought before a magistrate rests with the Department of Home Affairs.

Jeremiah Banda, of Malawi, is but one example of how prolonged detention in police cells contributes to unreviewed detention in excess of thirty days. Mr. Banda was apprehended on 30 March 1998 and interviewed at Lindela on 8 May 1998. He explained:

"... I stayed at Actonville for one week ... From Actonville police station, I was moved to Brakpan police station where I stayed another three week. From Brakpan I was moved to Lindela on the 29<sup>th</sup> April 1998."<sup>66</sup>

Although, at the time of the interview he had already been held in detention in excess of 30 days, Mr. Banda had only been held at Lindela for 9 days. Under current practise this would mean that he could be detained for over 50 days before any officials of the Department of Home Affairs would even consider seeking a review of the legality of his detention.

It is of extreme concern to the Commission that the Department of Home Affairs has not taken comprehensive steps to ensure that individuals are not held in excess of 30 days under the authority of the *Aliens Control Act* (without some form of judicial review). Detention in excess of thirty days is not only a serious breach of the Act but, the Commission believes, an extremely serious breach of rights guaranteed under the constitution. Indeed the Commission believes that the thirty day maximum may itself be in excess of the minimum required under the Bill of Rights. This makes the Commission's concerns in this regard all the more pressing.



### 3. Detention without Examination by Immigration Officer Beyond 48 Hours

A second problem with prolonged detention in police cells arises from what seemed to be a failure, in at least some cases, to ensure suspected undocumented migrants were brought before an immigration officer prior to transfer to Lindela. This becomes a legal concern where the transfer to Lindela has not been effected within 48 hours. Upon arrival at Lindela all persons must be processed by an immigration officer, presumably being subject to a section 7 examination if one had not already been conducted.

However, where a person was not brought before an immigration officer prior to transfer to the Lindela Facility, and where that person was not transferred to Lindela within 48 hours, then that person would no longer be legally held in detention under the authority of the *Aliens Control Act*. In the opinion of the Commission such a breach of the Act would constitute wrongful detention.

Although the Commission cannot make a final finding in relation to such incidences we believe that this investigation gathered sufficient evidence to strongly suggest that such incidences<sup>67</sup> do occur with some frequency.

One example of the evidence gathered during this investigation is the statement given by Anston Mpofo. He was apprehended in a police street-sweep in Alexandra. He and thirty others were apprehended and moved to police cells where their names and fingerprints were taken. He related that,

"After that they put us into some cells. We stayed about 1 week and then we were delivered to Lindela, that was on Friday (the one just passed). When we stayed for the week, those having ID's which were written SA were not allowed to go out. They were brought here as well. We were all together. [However, Simbananye] Dube was released here at Lindela."<sup>68</sup>

It is difficult to understand how a section 7 investigation could have been conducted prior to the transfer of these detainees to Lindela, if some of those with SA ID documents were only released after the transfer to Lindela.

Many people interviewed in detention over the course of this investigation also told us that they had not been told the reason for them being held prior to their transfer to Lindela. Mazema Mlenga, for example, said that "we stayed in the police cell from the day of our arrest (Saturday) to the following Thursday. The police drove us [to Lindela] no one at any time explained to us why we were arrested or where we were being taken."<sup>69</sup> It is difficult to understand how an examination of the legal status of this person could have been undertaken where there is no evidence that the detainee was ever even informed of the reason for his apprehension and detention.

Jeremiah Banda was another case which suggested that a section 7 investigation had never been conducted. When interviewed, this individual related as follows:

"On 30<sup>th</sup> March 1998 I was from work at Actonville. While walking along the street I came across police vans and one black approached who pulled out a gun and pointed it at me. He asked me to produce ID. No chance to respond and I was pushed into the van (police). At Actonville police station I was never asked to prove my status in SA. .... I stayed at Actonville for one week....while at Actonville I got my R210,00 ... stolen ... [the] police came in and in the presence of us inquired of the criminal prisoners if they had got anything from the newly arrived. Of course they gave them the stolen money. From Actonville police station, I was moved to Brakpan police station where I stayed another three week. Notable thing at Brakpan, police were releasing some detainees provided they had money to pay for it. From Brakpan I was moved to Lindela on the 29<sup>th</sup> April 1998."<sup>70</sup>

This account is notable not only because the interviewee explicitly alleged he had never been asked to prove his status in the Republic, but also because it shows the possible link between failure to bring a suspect before an immigration officer and corruption as a motive for detention by apprehending or detaining officers.

#### **4. Detention with Criminal Suspects**

A final concern we have in relation to extended detention in police cells relates to the Commission's general concern that persons detained under the provisions of the *Aliens Control Act* not be detained with the criminally accused. The Commission found evidence that such detention may lead to an increased risk of assault or theft during the period of detention. The Commission finds further support for this position under the provisions of the *Convention on the Protection of All Migrant Workers and Members of Their Family*<sup>71</sup> which, although it has not yet come into force, provides a useful guideline in this respect. The Convention includes the provision that migrants and their families detained for immigration offenses must be held separately from the criminally accused or convicted.

In addition to the Commission's general concern relating to extended detention in police cells, we found a number of incidences of extended police cell detention brought about as a result of insufficient holding capacity at the Lindela Facility. In these cases, individuals were brought to Lindela and then returned to police cells due to insufficient room at the Lindela Facility. While we recognise the importance that Lindela maintain minimum standards which include the prevention of overcrowding the Commission believes that Lindela's capacity should be expanded to ensure a greater holding capacity so that persons are not returned to police cells as an alternative to detention at Lindela.

Retshidisitswe Makakana, for example, was apprehended at his place of work. Eventually he was taken to Dube police station and then to Lindela. However, because Lindela was "full" he was brought back to the Dube police station where, "police allowed inmates to search and remove valuables from Makakana and others brought in with him."<sup>72</sup>

As was the case with Retshidisitswe Makakana, more than one individual reported the theft of their valuables by cellmates during the period they were detained in police cells. In one case there was reported collusion between police officials and criminally-charged detainees held in the same cell as suspected undocumented migrants. As cited above, Jeremiah Banda of Malawi, stated as follows:

"... At Actonville police station ... I was kept arrested together with criminal offenders who had knives inside the cells. The only food I got while at Actonville police station was two slices of bread given three times a day, together with a cup of tea. I stayed at Actonville for one week. Again, while at Actonville I got my R210,00, together with another Malawian friend who had R650,00, stolen. Later on some police came in and in the presence of us inquired of the criminal prisoners if they had got anything from the newly arrived. Of course they gave them the stolen money."<sup>73</sup>

These findings point to the importance of the separation of accused criminals and those suspected of being illegal migrants. It is therefore important that awaiting repatriation facilities, such as Lindela, remain in operation. It is also important to take steps to minimize or eliminate the detention of suspected undocumented migrants with accused criminal offenders prior to transfer to Lindela.

## **Basic Conditions of Detention while Awaiting Identification and/or Repatriation**

### **1. Bribery/Extortion at Lindela**

We found widespread reported incidents of officials soliciting bribes in order to release or facilitate the processing of detainees. Twenty-seven of 149 detainees included in the quantitative analysis (18,1 percent) indicated that they had personally been approached to give, or had offered and had had accepted, a bribe at Lindela.<sup>74</sup> Another 4 persons indicated that bribery was a practise widely known to exist at Lindela, although they had not been directly involved in an illegal exchange of this nature. The majority of persons involved in bribery did so to facilitate the processing of their forms in order to facilitate their release through repatriation, or in order to obtain unlawful release from the detention facility.

This investigation found evidence that extortion and corruption were widespread among both immigration officers and the private security stationed at Lindela and that these related practises occurred in a wide range of contexts. It is also useful to see these practises within the broader scope of corruption and extortion in the stages of apprehension and detention which occur prior to arrival at Lindela.

At the time of admission of apprehended individuals, Home Affairs officials are required to register and, generally, to make an assessment of the legality of the apprehension (ie. section 7 examination). We found evidence that, during this procedure, Home Affairs officials illegally procure releases in exchange for money. Amos Sithole of Mozambique noted as follows:

"When arriving at Lindela they asked for I.D. and duplicate application or passport. When I produce my duplicate application, they said, 'It's forged; it's not mine; anyone can use it.' They said each of us should pop out R100-00 to take me/us out. I did not have. Three who had money went out. This was the second arrest [for me] to Lindela, [before] I used money to bribe and go out. I used R250-00."<sup>75</sup>

While Mr. Sithole was an undocumented migrant, this is not the only class of persons subject to extortion at Lindela. In a number of reported incidents, officials at Lindela abused their positions by extorting money from wrongfully detained individuals. In one instance an individual who alleged having been wrongfully detained explained that:

"I phoned my mother's sister who said she wanted to come with my ID but I told her that I didn't have the R150 which was required by the workers in the camp for her to be able to hand over the ID so they can cross check it."<sup>76</sup>

There is evidence that even the possession of identification documents is not always a guarantee of release from detention and the deportation/repatriation process. Melissa Ncube of Zimbabwe described the manner in which money was extorted from her as follows:

"On Friday 15<sup>th</sup> we were brought to Lindela. My boyfriend was released on Sunday when he paid R200 to someone in Lindela. He told me they accept R200, more or less, to release you if you have ID in your possession. Yesterday (18/05/98) my cousin Rose came to see me but she was told that visitors were allowed on Sundays only. A male official from Lindela took my ID to show my cousin Rose that I am detained here. That person came back and took [me] to a private office. He told me that Rose said that I should give

him all the money I have on me. I gave him R350 and he told me that he would release me in the morning (19/05/98). So far he has not showed up yet. I cannot identify him, he was wearing khaki pants and a blue shirt."<sup>77</sup>

Some of these findings were bolstered by data relating to interviews conducted among family and friends of detainees, who were interviewed at the Lindela Facility. Out of 40 people who had come to see friends or family members detained at Lindela, 17 indicated that they had come to secure the release of the detainee. A number of these persons had brought ID documents but had still not been able to secure the release of their friend or relative.

For example, Nomsa Khumalo came to secure the release of her brother, Nicholas Ndlovu. She told our interviewer that Nicholas was in possession of a duplicate ID form, but the officials at Lindela required R100 before he could be released. A friend of her brother's had already been released from Lindela after paying R100 to an official. She asked us if this was the correct procedure, and if it was not, how she could assist her brother in obtaining his release.<sup>78</sup> In fact, there is no fee required in order to obtain the release of a person legally resident in the Republic.

Mike Mpofo had a similar dilemma. He came to see his cousin who was being detained at Lindela. He could not understand why his cousin had been taken into custody and was now threatened with removal from the country:

"I don't know [how to secure the release of my cousin] because Patson's working permit is in order. I don't understand why Patson is being held here because his working permit is in order."<sup>79</sup>

It was significant that while 17 of 40 persons told us they had specifically come to Lindela to secure the release of a friend or family member, only 3 indicated that they hoped to do this by providing identification documents. The majority of people either refused to tell us how they hoped to secure release or gave us ambiguous answers such as, 'I will do whatever it takes.'

We found evidence that officials of the Department also extort money from detainees awaiting repatriation by delaying their removal until an apparently standard rate of R50 is paid. Interviewees reported that the amount extorted in this situation was below the amount required to secure release from the facility. Marks Baloi, of Zimbabwe, explained the procedure as follows:

"We were asked to produce and give R50 for those who want to be released or rather taken out of Lindela. Those who managed to pay the R50 were taken away. I am not sure whether they were deported to their various countries or just released. But they are not here now."<sup>80</sup>

There is further evidence that this fee refers to an amount extorted by officials at Lindela in order to finalise the processing of those who are due to be repatriated. Professor Makoka, of Zimbabwe explained that, "at Lindela we were asked to pay an amount of R50 before being deported to Zimbabwe."<sup>81</sup> Others made similar allegations, such as a Norman Mateko, who told us:

"Yesterday we were supposed to go home but they asked for money to take us home. I didn't have any money so I didn't go."<sup>82</sup>

In at least some instances bribery and assault were combined. For example, on the 24<sup>th</sup> of April, 1998, Mark Ndlovu of Zimbabwe was interviewed and indicated that the following had transpired:

"On Monday a man by the name of Joshua here at Lindela said if I give him money I can leave this place. I gave him R440,00. After I gave him the money he took 4 of us to an office at 7,00 p.m. and he hit me (another man with him). He hit me with a baton (stick) on my buttocks. And he took a plank of wood and hit me on the side of my head. After that he said he is not going to give us our money back. After that I went back to my room to sleep. Nothing else has happened. They still have my money."<sup>83</sup>

In this instance, as in some of the others referred to above, it is not clear if a Home Affairs official or an employee at Lindela, was being implicated

We did, however, also find specific evidence that employees of the private Dyambu Trust company extort money from detainees under a wide variety of circumstances. These circumstances include requiring money for finger-printing, for the use of public telephones, and in order to allow access of family and friends to the Facility. Some of the reported cases of offers of release in exchange for money may have implicated security guards.

More than one person told us that money is sometimes solicited by security guards during the fingerprinting procedure at Lindela. Mahlaba Saritiya, for example, explained that "the security guards sometimes need money before they fingerprint the detainees."<sup>84</sup> This is apparently not a large fee. One detainee indicated that R5 was extorted for this procedure to be completed.

Many individuals reported that they were not aware of the right to make one free phone call, and indeed had not been able to make one, 'because they did not have the money required.' While all persons should be given at least one free phone call, there was wide evidence that in most cases a payment was required. The issue of access to one free phone call is examined in more detail below.

This section indicates that corruption at the Lindela facility contributes to incidents of unlawful detention. In these situations individuals with the legal right to remain in the Republic are required to remain at the facility pending payment of a bribe.

## **2. Prolonged and Unlawful Detention at Lindela**

We found that 8,0 percent of the sample claimed to have been at Lindela for more than 4 weeks. As discussed above in the section on detention beyond 30 days, without judicial review, this would be contrary to section 55(5) of the *Aliens Control Act*, and amount to unlawful detention. Unlike in the case of cumulative detention (in police cells and at Lindela) resulting in detention beyond 30 days, where detention extends beyond 30 days at the Lindela facility, the Department of Home Affairs has ready and convenient access to this information.

The Commission considers this a serious breach of the legislation, as the 30 day maximum prescribed is in itself a lengthy period of detention. Steps need to be urgently taken to ensure compliance with the legislation.

In addition to these incidents of unlawful detention, there is evidence of structural practises which make it difficult or impossible for some who have the legal right to remain in the Republic to prove the legality of their stay. Many of these mistaken detentions could most easily be cured by a requirement that the apprehending officer accompany the alleged legal resident to retrieve their identification documents. However, another significant safety mechanism would be access to one free telephone call. Such a call would allow some wrongfully detained, legal residents their sole opportunity to contact a friend or family member who would be able to bring their identification documents to Lindela for examination. While the Lindela authorities have voluntarily instituted a policy of one free phone call for each detainee, this policy is not systematically enforced.

Most detainees stated that they had no knowledge of the right to make one free phone call. Many were simply told that they could make phone calls on the public telephones. For those without money this meant that they had no ability to contact friends or family. In some instances the detainee claimed that he had valid identification at home but no money with which to make a telephone call.

Some detainees also indicated that they had repeatedly requested to make one free telephone call, but had been refused. Others indicated that they requested and had been allowed to make one free telephone call. The evidence suggests that there is no consistent enforcement of the stated policy of allowing one free telephone call to detainees.

The issue of access to one free telephone call is one of the major complaints at Lindela. 65,1 percent of those persons interviewed reported that they were not

told of a free phone call and were not allowed to make one. 4,0 percent were not informed of this right but when they requested were allowed to make a call. 5,4 percent were promised a call but were not in fact allowed to make one. Only 10,7 percent were informed and allowed to make a call.

For some the issue made little difference. 6,7 percent were informed of the call but had no-one to phone. Likewise, 8,1 percent were not told of the availability but had no one to phone.

In total, 77,2 percent were not informed of the availability of a free phone call.

### **3. Assault / Ill-treatment in Detention at Lindela**

Significant numbers of those interviewed reported either having seen or having been assaulted by security or other officials at the Lindela facility, 79,2 percent made no specific mention of violence at Lindela.<sup>85</sup> But, 20,1 percent of persons interviewed did report such incidents. Six percent reported violence to themselves; 2,0 percent reported violence to others; and 12,1 percent reported violence to both themselves and to others. One person (0,7 percent) reported rumours of violence.

It should be noted that some of the reported incidents refer to the same assault and therefore the total number should not necessarily be taken as representative of the proportion of detainees assaulted. At least one incident of assault was carried out by multiple security officials and eventually led to the hospitalization of the detainee assaulted. Disturbingly, assaults appear to be largely carried out for capricious or arbitrary reasons. Several detainees reported that toilet facilities were restricted to day usage and that this restriction was enforced through a pattern of assaulting those who attempted to use the facilities after hours.

In general, the reports of ill-treatment point towards a pattern of routine, if not systematic, physical abuse perpetrated against the detainee population.

Lawrence Ncube gave this detailed account of the manner in which rules were enforced at Lindela:

"When we arrived we met security guards at the gate who then told us that we were supposed to abide by the laws here. They read us those laws and they told us that 'no- compliance' with those laws would warrant punishments. As an example to this they took one person from the 30 arrived with us and they hit him with a baton. And they started to search us. .... Sometimes we spend most of our time moving around the yard, sometimes sitting inside our rooms. We only move around the yard when allowed to do so. Security



guards are very strict, they do not allow you to go to the toilet after 7 and if they found you after this time they hit you. They use baton stick to hit us, sometimes they use a dog to bite you when they hit you on the hand. As for me, nothing had happened, I have never been beaten nor a dog been sent to bite me."<sup>86</sup>

Kemvet Vella, of Zimbabwe, gave similar testimony, providing further evidence that physical abuse at Lindela was routinely administered as a mechanism for enforcing internal rules. He testified that,

"The security staff here at Lindela randomly abuse us. They assault us. They leave us alone in the Wall and we are not allowed to go to the loo unless given permission. But since they do not enquire as regularly as they should, people often go to the loo without asking. If such a person is caught he is usually assaulted by security officials."<sup>87</sup>

Mnube Never, also of Zimbabwe, explained the manner and reasons for his assault as follows:

"The security hit me in the mouth (on 13-04-98). He hit me with his knob kerrie. The reason seems to be that he found me in the toilet and asked why am I in the toilet at that time."<sup>88</sup>

A number of detainees indicated that assault for the unintentional failure to respond to roll calls was common. For example, Alex Bento, of Mozambique, described being assaulted as follows:

"At Lindela I was beaten up. This was when I could not hear properly when my name was called. The man who issued us with cards is the one who beat me. I could not hear properly because 2 officials were calling out names at the same time. So one of the officials klapped me."<sup>89</sup>

Even more serious incidents of assault were reported by other detainees. Mathole Mthadanzo, a South African who had been in detention for several days, reported as follows:

"One notable event I observed on arrival on Wednesday (6/5/98) was the terrible beating of one of the detainee by two black and white 'securities'<sup>90</sup> of Lindela. They had initially called this detainee to enter Room 1 (one of the rooms used by detainees). From the moment he entered, they started beating him until he lost conscious[ness] and [they] carried him to [the] hospital, I assume."<sup>91</sup>

A number of detainees verified this event. Libisi Donald of Mozambique, explaining this event, stated:

"Yesterday, one guy who[se] money was stolen tried to report the matter to the guards but he was turned down and beaten until he was weak and could not walk...." <sup>92</sup>

Nelson Mthembu, of Zimbabwe, added:

"People are not beaten because of their stubbornness. The people are cooperative but the guards maltreat them...Just yesterday one guy was assaulted by more than 5 guards and now is unable to walk. They just laughed and said he has AIDS. They only took him to the hospital after many detainees were complaining, otherwise they could not have taken him there." <sup>93</sup>

Urgent steps need to be taken to eliminate incidences of assault and ill-treatment at Lindela.

#### **4. Adequacy of facilities/conditions at Lindela**

While questions relating to the adequacy of minimum standards were specifically excluded from the survey, a number of those interviewed none-the-less indicated that they had found significant problems relating to the conditions of the Lindela facility. The three most common complaints were: lack of adequate nutrition, irregular or inadequate medical care and systematic, forced interruption of sleep.

81,9 percent of those interviewed made no comment about the levels of nutrition and the adequacy of the food. One person (0,7 percent) commented without making a complaint. Most of those who complained about the food indicated that the quality was low and the amount inadequate. 12,8 percent complained about the practice of feeding the detainees only twice a day. Two percent felt that the food was either unhealthy or unappetising. 2,7 percent referred to other unspecified bad conditions.

At least one individual had asked a friend to bring him money in order to buy additional food to supplement the diet. Tito Benedetto, originally from Swaziland, was in Lindela awaiting repatriation after having served time in a South African prison for a criminal offence. He reported that nutrition levels were lower at Lindela than in the prison system. <sup>94</sup>

While 85,9 percent did not volunteer a comment, there were several complaints relating to inadequate medical care and bad health conditions. 3,4 percent felt the health conditions were bad without specifying any particular complaint. Four percent specifically mentioned bad sanitation conditions. Two persons (1,3 percent) commented on the medical care and health conditions without making any complaint. 2,7 percent of the persons felt the medical care was inadequate.

For instance, one female detainee, Caroline Ndlovu, claimed that she was aware of medical facilities, but that the female guards had warned her,

"that those health services are "improper," [and] the nurses there actually says they are tired of the 'foreigners.'"<sup>95</sup>

Another detainee, an Ethiopian, claimed that on the day when he had sought medical attention, the doctor simply, "gave everyone the same [multi-coloured, black/orange] pill."<sup>96</sup> 2,7 percent of the detainees reported to have been refused medical care.

Most commonly those who had sought medical attention simply claimed that it was inadequate.

86,6 percent made no mention of the detainee control measures instituted at Lindela. However, 10,1 percent complained of random beatings. Two persons complained of a practice of interrupted sleep. Alex Bento explained that detainees, "are ordered to wake up 3 times at night and told we are being counted."<sup>97</sup> Lebohlang Senokoane, of Lesotho, gave further detail to this practise, explaining that:

"each night at 9:00 and every morning at 4:00 they do this thing called, "two-two," where they count you, sometimes yell at you and even beat you."<sup>98</sup>

Two persons (1,3 percent) complained of more than one of the above complaints.

Other complaints relating to the facilities at Lindela focussed on the issue of unsanitary bedding. More than one in ten of the people interviewed (10,2 percent) complained of the housing conditions at Lindela. Several persons complained that blankets were filthy or that the bedding was unsanitary. Given the high turnover at Lindela, it is not unlikely that multiple persons use the same bedding before it is washed.

## **5. Degrading Treatment and Intimidation at Lindela**

In addition to allegations of corruption and physical abuse, a significant minority of those interviewed complained of being subjected to forms of verbally degrading treatment or intimidation. Eleven of those interviewed (7,4 percent) complained of such treatment.

There are consistent reports that detainees at Lindela are verbally abused during initial processing, by guards and security personnel during detention, by kitchen workers, and by medical staff. Note that this was an area of inquiry specifically excluded from the survey and thus the numbers who experienced such treatment may have been significantly higher than the findings reveal. It is also noteworthy that a number of those making such complaints were detained South Africans, who claimed they were able to understand the insults directed at them by staff.

Mathole Mthandazo, a South African detained at Lindela, explained that, "the ladies that serve the food in kitchen insult us using Zulu insults. Fortunately I am a South African and can hear the insults clearly."<sup>99</sup> While most of those interviewed complained of being insulted by security officials or Home Affairs staff, more than one detainee also specifically mentioned insulting treatment from the kitchen workers.

More serious examples of verbally abusive treatment, were also reported. In at least one instance this treatment could be characterized as amounting to intimidation or cruel treatment. Ben Ncube, for example, claimed to be a South African wrongfully detained. He had repeatedly attempted to explain that his ID could be obtained from his current employer's house, where he was staying. In response, "the officials (in Lindela) asked me to phone Allen and when I told them that I did not know his numbers they swore at me, told me that I would stay in Lindela forever and took me into a cell."<sup>100</sup>

There is evidence that female detainees may at times be subjected to degrading verbal treatment which may amount to sexual harassment. For example, one female detainee, Caroline Ndlovu, stated that, "the guards sometimes tell us we are prostitutes and say all various kinds of insults."<sup>101</sup>

## **Practises and Problems Relating to Border Posts**

Although it was not a specific goal of this investigation to examine procedures and practises relating to border posts and border areas, the investigation did reveal a number of irregularities relating to border patrolling and practises at border posts.

Sibedi Kabai, of Lesotho, told us that he was apprehended in Lesotho under the following conditions:

"On the 7<sup>th</sup> of February at about 3pm I was on my way to KwaZulu-Natal from Lesotho, on foot. We know that once you cross the Tonyela river bridge you are in KwaZulu-Natal. But I was arrested before I could cross over this bridge. I was arrested by soldiers while I was still on the Lesotho side. I couldn't understand the language they were speaking - maybe it was Afrikaans. There were about more than twenty of them dressed in camouflage uniform. They first shot at us then we started to run away. They caught us. They smacked me in the face and told me to get on the helicopter. They told us to sit down. They tore my shirt and used it to tie up my hands. They boarded us into a helicopter and flew us into the Ladysmith police station. For three months [we stayed there]. Yesterday they told us that they were taking us to Lesotho, but the person who took us from Ladysmith brought us to Lindela. While in the Ladysmith prison I wrote a letter to my family informing them of the arrest and I asked a policeman to take the letter to the post office. He agreed to post it. My father came to see me at Ladysmith."<sup>102</sup>

This account is similar to that of Hlephuthi Hlephuti,<sup>103</sup> apparently he was also apprehended in the vicinity of the Lesotho - South African border. However, in this account the interviewee was not explicit in terms of the location of the apprehension.

These allegations were serious and were investigated by the SANDF.<sup>104</sup> According to their information, 25 men crossed into South Africa from Lesotho on 7 February 1998 carrying large bags. A patrol of SANDF members was then deployed by helicopter and came under fire at a point about five kilometres within the Republic. In the ensuing skirmish, one of the men from Lesotho was wounded and later died while 14 were arrested.<sup>105</sup> Twenty-two bags of dagga were recovered. Without being in a position to verify the conflicting accounts, the Human Rights Commission sees no need for further investigation at this point.

We interviewed several other individuals apprehended in the vicinity of the Lesotho border. All of the other individuals interviewed reported having been arrested within South Africa. However, we found that at least one other individual reported having been detained in prison. Kabelo Kalele gave the following account:

"On the second month of my detention at Ladysmith prison I was given prisoner's attire and kept with other prisoners. They told me that they were doing this because I had come to SA without a passport. Yesterday, on the 13<sup>th</sup>, they told me I had finished my sentence and I was being taken home. I was taken to court in Ladysmith during the 3<sup>rd</sup> month of my detention. I didn't know what

was being said. I only heard from the police that I was sentenced to one month imprisonment."<sup>106</sup>

This interview indicates the possibility of criminal sentencing of unauthorised migrants. It is of concern to the Commission that criminal sentencing may have occurred without the minimum requirements under the Criminal Procedures Act having been followed. Moreover, it is not clear on what basis it is decided to charge some unauthorised migrants with criminal offences while the vast majority are not so charged.

Also of concern were reports which amounted to serious irregularities relating to practises at border posts with Lesotho. One individual reported that it was possible to obtain a "stamp" at the border:

"When we crossed the border to SA they stamped your passport, you had to renew it on 29<sup>th</sup> June. I had to renew it again at the border gate. The stamp sometimes you pay for it, sometimes they give it for free. You can pay for it (R60) but it is supposed to be free."<sup>107</sup>

The Department of Home Affairs informed us that there is no procedure available for a national of Lesotho to obtain a valid visa to enter the Republic at the Lesotho border.<sup>108</sup> However, any person entering into South Africa with a valid visa would still have their passport stamped at the time of admission (with the date of entry). This is not a procedure requiring any payment and the alleged requirement of a payment would amount to corruption.

Finally, we interviewed a number of people who were apprehended in areas near or in Kruger National park. Several interviewees were Ethiopian nationals who were apprehended while attempting to cross illegally into the Republic via Kruger. These individuals had attempted to claim refugee status but had never been given the opportunity to do so. At least one woman had also died of malaria while in detention.

We also received a number of reports of individuals apprehended in large area sweeps in rural areas of Mpumalanga by the SANDF. Several of these persons claimed legal residence but were never afforded the opportunity to obtain identification documents which they claimed were at their homes.

Both of these findings point to the need for training and monitoring of SANDF personnel involved with the enforcement of the *Aliens Control Act*.

## **Practises and Problems Relating to Removal Procedures**

### **1. Forced Abandonment of Personal Belongings**

While the majority of the individuals we interviewed admitted that they were illegally in the country, and accepted the fact that they must be returned to their countries of origin, we found that almost all of these persons were denied the opportunity to retrieve their personal belongings before being repatriated. This was despite the fact that some persons were even apprehended at their places of residence.

The Commission believes that the Department of Home Affairs and the SAPS should take steps, wherever possible, to allow the retrieval of personal effects by those being removed from the country for contravention of the *Aliens Control Act*.

In addition to such practise conforming to a broadly humanitarian approach to immigration enforcement, it removes the existence of an additional incentive for individuals to return (in order to collect their belongings).

One of those we interviewed had even suggested that he would be willing to pay a deposit in order to be allowed to collect his belongings:

"I want to go back home, but I would like to be allowed to collect my properties, since I know I cannot come back ... [I don't] mind to pay a deposit in order to collect [my] properties."<sup>109</sup>

## Recommendations

The recommendations that follow are intended to deal with many of the unacceptable practises we have highlighted in our report. They also must be seen in the context of contributing to a legal regime that remains consistent and loyal to our obligations under international and national human rights norms and standards.

We are particularly pleased that both the Department of Home Affairs and the proprietors of the Lindela Repatriation Centre have reacted positively to the various recommendations made and we do believe that collectively we can ensure the speedy implementation of the recommendations we have put forward.

1. The Department of Home Affairs should prepare and disseminate concise guidelines to arresting officers to ensure clear and consistent criteria for determining the existence of 'reasonable grounds'. The number of persons arrested and subsequently released is unacceptably high and clearly suggests the lack of clear and consistent criteria to found an arrest and the random nature of how arrests are effected.
2. All suspects should be advised that reasonable grounds exist that they are an alien and should be advised of their right to satisfy the arresting officer that they are entitled to be in the country. Arresting officers should assist such suspects, within reasonable means, to obtain or retrieve documentation from their place of residence, employment or otherwise that would evidence their right to be present in the country. While this appears to be the official policy of the South African Police Services, arresting officers are not applying it with consistency.
3. In the arresting guidelines that we recommend above, random pedestrian checks or area sweeps should be excluded as a modus operandi in the apprehension of suspected aliens. Such methods fail to satisfy the criteria of reasonable grounds and contribute to the high rate of unfounded arrests.
4. Arresting officers should, simultaneously with arrest or as soon as is practically possible thereafter, document the date, place and reasons for arrest as well as any explanation advanced by the detainee, including details of any documentation produced. This should take the form of a sworn statement, a copy of which should be presented to Home Affairs at Lindela upon the admission of the detainee to Lindela. This recommendation aims to ensure compliance with arresting guidelines as well as to create a proper record of the arrest.
5. Where a person claims to be an asylum seeker (or where it appears to an arresting, immigration or detention officer that the person may well have a claim to asylum) the officer shall forthwith advise such a person of his/her right to apply for asylum and shall render all reasonable assistance to such a person in this regard.



6. Persons detained in terms of the Aliens Control Act should be held separately from criminal suspects during the period that they are in police custody.
7. As is required by section 55(1) of the Aliens Control Act, all persons arrested in terms of the Act should be examined in terms of Section 7 within 48 hours. Where an immigration officer conducting a Section 7 examination realises that the person was in detention for a period in excess of 48 hours before the Section 7 examination commenced, the immigration officer should immediately cause the release of such a person.
8. No person should be detained pending removal for longer than 30 days unless specifically reviewed as provided for in Section 55 (5) of the Aliens Control Act. The period of 30 days must be reckoned from the date of first arrest.
9. All detainees should be informed of their rights and obligations upon admittance to Lindela. Among other methods of information, appropriate notices detailing the rights and obligations of detainees should be displayed in prominent places in the detention facility in all the main languages of the detainee population.
10. A permanent Inspectorate should be established to visit persons held in terms of the Aliens Control Act in any police, prison or other detention facility in order to monitor compliance with arresting guidelines, the Act, and the constitutional provisions relevant to arrest and detention in terms of the Act.
11. The Inspectorate should examine the detention and treatment of children in the immigration system as there did not appear to be adequate documentation created or maintained in respect of children detained with their parents at Lindela. This investigation did not however examine the position of children comprehensively.
12. Complaints of assault, corruption or degrading treatment should be given priority and fast-track treatment during both the investigation and prosecution stages, under a similar process to that used when visiting tourists are crime victims. The fact that complainants in the immigration system are usually in the country for a very limited period of time renders them unavailable as witnesses if the criminal justice system were to handle their complaints in the normal course.
13. The Department of Home Affairs and the South African Police Service should put in place effective strategies and should use all appropriate legal means (including the investigation, prosecution and suspension of officials) to identify and eradicate corrupt practices.

14. All reasonable assistance should be rendered to persons facing deportation to allow them to retrieve personal belongings.

15. Appropriate training programmes should be formulated and presented to all persons involved with the arrest and detention of persons in terms of the Aliens Control Act, including the personnel of Lindela.

**South African Human Rights Commission**

**19 March 1999**

**Parktown**

## NOTES

1. See Appendix E: 'Lindela Report' (3 March 1997).
2. See Appendix F: 'Report on a Visit to Lindela Repatriation Centre' (28 October 1997).
3. See 'Report on a Visit to Lindela Repatriation Centre' at 7.
4. See 'Report on a Visit to Lindela Repatriation Centre' at 7.
5. See, for example: "Riot on Eve of Detention Camp Probe" (Mail & Guardian, 12-18 Dec. 1997 at 10); "Cops nab cleric as an alien" (Sowetan, 21 Nov. 1997); "Slipped bucks and blind eyes" (Sunday Times, 19 Oct. 1997 at 5); and "Stop treating people unjustly" (Sowetan, 3 December 1997 at 15).
6. See "Prohibited Persons": Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa (Human Rights Watch, March 1998) especially pp. 43-64 and 67-109.
7. "Launch of Public Awareness Campaign – 'Refugee Rights are Human Rights'". Press Release (Cape Town, Cape Town Refugee Forum, 17 December 1998)
8. Some of these deaths were attributed to 'simple' violent crime-related incidents, others allegedly involved xenophobia-related causes.
9. "Horror deaths of 18 illegals," The Star (Friday, 23 October 1998) See also "International Manhunt after 18 die," Cape Times (<http://www2.inc.co.za/Archives/1998/9810/28/deapeople2310.html>).
10. Both the Human Rights Commission and Lawyers for Human Rights participated in the work of the White paper for Refugee Affairs Task Team appointed by the Minister of Home Affairs.
11. 22<sup>nd</sup> Plenary of the South African Human Rights Commission (18 & 19 February 1998).
12. Funding for the services of the last three-mentioned persons as well as for the running costs of the investigative stages of the investigation was provided by the European Union Foundation for Human Rights in South Africa through a grant to the Centre of Applied Legal Studies at the University of the Witwatersrand. This financial assistance is gratefully acknowledged. James Schneider worked as a consultant for the Refugee Rights Project of Lawyers for Human Rights from March 1998 to February

1999. The views expressed in this report do not necessarily represent the official view of the European Union Foundation for Human Rights in South Africa.

13. However, in the course of the investigation, a visit was made to Johannesburg Central Prison. Nonetheless, since persons arrested with a view towards deportation were no longer detained there, no interviews were conducted.
14. A copy of the standard interview form is provided in Appendix B along with the supervisor's interviewing guidelines. Student interviewers were provided with a copy of the short list of ten interviewing points.
15. A copy of the language identification form is reproduced in Appendix B.
16. For instance, in one case an individual claiming to be a South African citizen was classified by Home Affairs as a Mozambican and was scheduled to be removed to Mozambique on a Wednesday. The project was able to contact his family who brought his identification document and secured his release prior to his scheduled removal from the country. See *infra* note 30 and see Leon Ntshingila, *infra*, interview #142 (22/05/98), Appendix A.
17. This is fully set out in a letter to the Department of Home Affairs and a response from the Department both reprinted as Appendix H.
18. An updated version of this working paper is published as Appendix C.
19. Minutes of that workshop are in Appendix G.
20. As explained more fully *supra*, two of the interviews were eventually excluded from the quantitative sample for methodological reasons; one interview was voluntarily terminated and the other diverged from our random sampling criteria (ie. the individual 'self-selected').
21. Men and women are detained in separate compounds at the Lindela facility. Proportionally, the number of women detained, as a percentage of the combined total detainee population is very small. Our sample is proportionally over-representative of women.
22. For example, for the month of October 1998 the percentage of Mozambicans accommodated at Lindela was 68.4 percent, indicating a variation of 4.5 percent from the mean since August 1996.
23. It may be significant that the figures provided by the Lindela authorities account only for "illegal immigrants." These statistics apparently include South African citizens detained at Lindela. The practise at Lindela is to issue all detainees with an identity card when they are first brought into the

facility. The information included on these identity cards includes the name and the suspected country of origin of the detainee. While some detainees claim South African citizenship, no detainee is recorded as having South African citizenship on these identity cards. Rather their citizenship is recorded as that which the officials presume it to be. Therefore, the overall statistics for country of origin provided by Lindela are likely to be inflated for countries such as Mozambique and Zimbabwe (the countries we found to have been most commonly incorrectly listed as countries of origin for South African citizens).

24. Note that the same statistical anomaly in Lindela's statistics exists in terms of legally resident non-citizens as for South African citizens. It seems that legally resident non-citizens detained at Lindela are incorrectly included in the country of origin breakdown for "illegal aliens".
25. 21.6 percent of our sample thus claimed legal status in South Africa by these two categories. By comparison, Lindela's figures for the period from August 1996 to October 1998 show that 11.7 percent of the persons admitted to the facility were eventually released on account of their lawful status. It may well be the case that legally resident non-citizens are less likely to be released from Lindela than South African citizens.
26. Other law enforcement officials include traffic police officers, railway and harbour officials.
27. Section 53(1) of the Aliens Control Act 96 of 1991 mandates officers of the SAPS to arrest persons prescribed by section 41 of the Act.
28. During our interviews we obtained direct evidence of the release of citizens wrongfully detained at Lindela. We know that at least three of the persons interviewed by us were released on the day of their interview. At least one other person we interviewed was subsequently released as a citizen. This release only occurred after we intervened by contacting his family members who were able to provide identification documents proving his South African citizenship to the Lindela authorities. At the time of our intervention this individual had been prevented from contacting his family and had been scheduled for removal from the country as a Mozambican national. See Leon Ntshingila, *infra*, interview #142 (22/05/98), Appendix A.
29. Although a number of the non-citizens interviewed by us during the course of our investigation presented to us documentation which established a prima facie legal residency, we found no direct evidence of the release of non-citizens claiming to be legally resident in the country during the course of our investigation.

30. Based on our interviews, at least some, if not the majority, of house or village area searches are carried out on a random basis. See, for example, *infra*, interviews #12, #99 and #136, Appendix A.
31. Based on our interviews, at least some of 'transit searches' were carried out on a random basis.
32. Both 'pedestrian spot checks' and 'language/appearance checks' involved individuals on foots being apprehended in public spaces. However, we separated these into discreet categories in order to show circumstances of apprehension under which there may have been at least some minimal, even if arbitrary, criteria used by the apprehending officer to formulate a suspicion that a person was a non-citizen. For example, where one of the sample group was asked 'show me your passport' rather than merely 'show me your ID' we assigned them to category 'language/appearance check' on the basis that there have been a suspicion that the person was a non-citizen based on criteria such as appearance or language spoken.
33. East Bank is an area in Alexandra Township, Johannesburg.
34. Mathole Mthandazo, *infra*, interview #89 (08/05/98), Appendix A.
35. This is an office of the Department of Home Affairs in Soweto.
36. Nelsa Baloti, *infra*, interview #6 (07/04/98), Appendix A.
37. Agnes Moleii, *infra*, interview #119 (15/05/98), Appendix A.
38. Silver Dlamini, interviewed 09/05/98. The original interview notes, recorded on "Standard Form Questionnaire - Friends/Family." The archive is available at Historical Papers, William Cullen Library at the University of the Witwatersrand.
39. Bekezela Khumalo, interviewed 09/05/98. The original interview notes, recorded on "Standard Form Questionnaire - Friends/Family" is available at Historical Papers, William Cullen Library at the University of the Witwatersrand.
40. See the full archive containing the "Friends/Family" interview forms as well as the "Standard Form Questionnaire - Friends/Family." The archive is available at Historical Papers, William Cullen Library at the University of the Witwatersrand.
41. Ngwenya Sidingani, *infra*, interview #82 (08/05/98), Appendix A.
42. Agnes Moleii, *infra*, interview #119 (15/05/98), Appendix A.

43. Daniel Motaoa , *infra*, interview #100 (14/05/98), Appendix A.
44. In order to avoid the potential of bias, our methodology specifically precluded *asking* those interviewed any questions relating to bribery or corruption. Our interviewers were also specifically trained to ensure that they did not ask any leading questions on this issue. Those who reported incidences of bribery or corruption thus did so on their own initiative. It is therefore significant to note that the figure 74.5 percent does *not* represent the figure of those who denied having been offered release in exchange for money, it represents the number of those interviewed who did not actively volunteer such information. The Commission notes that there might be a strong disincentive to report incidents of this nature amongst undocumented migrants, who would potentially benefit from the existence of such practises. We also find it relevant to note that many of the reports of corruption were by individuals who reported having insufficient funds to pay for their release. Thus the overall portion of those being apprehended and subsequently released after paying a bribe is likely much higher than our figures suggest.
45. Alfred Phiri, *infra*, interview #109 (15/05/98), Appendix A.
46. Fred Mugadza, *infra*, interview #22, (14/04/98), Appendix A.
47. See, for example, statement of Witness Ncube, *infra*, interview #27 (14/04/98), Appendix A.
48. See, for example, statement of Charles Carlit Sifunda, *infra*, interview #64 (24/04/98), Appendix A.
49. See, for example, *infra*, statements of: Ndlovu Nkosinathi, interview #135 (19/05/98); Alex Bento, interview #63 (24/04/98); Simon Jackson, interview #59 (15/04/98); Audrey Mountain, interview #67 (24/04/98); Mduduzi Dlamini interview #97 (08/05/98). A notable exception to this was reported by Phillip Khumalo who, apprehended in Brixton, reported that the SAPS apprehending officers informed him R50 wasn't enough.
50. Daniel Mhlanga, *infra*, interview #51 (15/04/98), Appendix A.
51. Witness Ncube, *infra*, interview #27 (14/04/98), Appendix A.
52. Zwane Elias, *infra*, interview #45 (15/04/98), Appendix A.
53. In these nine individual cases, we took action with respect to the Home Affairs officials at Lindela.
54. As noted in our previous section on methodology, our sample group was under representative of Mozambicans. While refugees may come from any country in the world, the general country conditions in Mozambique at the

time this report was authored were such that the number of refugees coming from Mozambique could be considered, at most, to be statistically insignificant. Thus, the proportional skewing of country of origin representivity as between our sample group and the overall Lindela population may have resulted in a statistical over representation of refugees.

55. *Passport Control Instruction No. 63 of 1994*, Procedures for Handling Asylum-Seekers and Refugees, "When an alien applies for asylum on the grounds that he is a refugee or, *if it becomes apparent during the investigation into his residence status that he may be a refugee* the following steps must be taken ...[emphasis added]."
56. Elias Tanunyenge , *infra*, interview #70 (24/4/98), Appendix A.
57. *Ibid.*
58. Maria Angellica, *infra*, interview #86 (08/05/98), Appendix A.
59. Reaffirming the UNHCR Executive Committee conclusion [Conclusion No. 6 (1977)] of "the fundamental importance of the principle of *non-refoulement* ... irrespective of whether or not individuals have been formally recognized as refugees" Guy Goodwin-Gill states: "the principle of *non-refoulement* ... applies clearly and categorically to refugees ... it also applies to asylum-seekers...." See G Goodwin-Gill *The Refugee in International Law* 2 ed (1996) 137.
60. Convention relating to the Status of Refugees (adopted 28 July 1951, United Nations; acceded to by South Africa 12 January 1996); Protocol relating to the Status of Refugees (adopted 31 January 1967, United Nations; acceded to by South Africa 12 January 1996); 1969 OAU Convention regarding specific aspects of refugee problems in Africa (adopted 10 September 1969, Organisation of African Unity; acceded to by South Africa [date]).
61. In order to avoid the potential of bias, our methodology specifically precluded *asking* those interviewed whether or not they had been assaulted or suffered physical abuse. Our interviewers were also specifically trained to ensure that they did not ask any leading questions on this issue. Those who reported incidences of assault or ill-treatment thus did so on their own initiative. It is therefore significant to note that the figure 68.5 percent does *not* represent the figure of those who denied having been assaulted, it represents the number of those interviewed who did not actively volunteer such information on the subject of violence during the apprehension procedure.
62. Moyo Anderson, *infra*, interview #80 (08/05/98), Appendix A.



63. Iiyasa Sauzande, *infra*, interview #14 (07/04/98), Appendix A.
64. Nkomo Mlandeni, *infra*, interview #36 (14/04/98), Appendix A.
65. *Aliens Control Act* (No. 96 of 1991), section 55(5).
66. Jeremiah Banda, *infra*, interview #94 (08/05/98), Appendix A.
67. One of the shortcomings of this investigation was the failure to explicitly explore the issue of whether detained persons had been brought before an immigration officer within 48 hours of their apprehension. While the interviews did include a complete narrative account of the circumstances of apprehension and detention, without having explicitly explored the issue, the Commission is unable to make a final finding in this regard.
68. Anston Mpofo, *infra*, interview #12 (07/04/98), Appendix A.
69. Mazema Mlenga, *infra*, interview #77 (08/05/98), Appendix A.
70. Jeremiah Banda, *infra*, interview #94 (08/05/98), Appendix A.
71. Adopted by United Nations General Assembly Resolution 45/158 of 18 December 1990.
72. Retshidisitswe Makakana, *infra*, interview #66 (24/4/98), Appendix A.
73. Jeremiah Banda, *infra*, interview #94 (08/05/98), Appendix A.
74. The methodology surrounding this issue was the same as that referred to above under note 15. Thus the overall incidence of bribery and corruption may well be significantly higher than suggested by this statistic. In addition to the methodological reasons for potential under reporting, the Commission notes that where bribery offers the potential of unlawful release for undocumented migrants, there would be a strong disincentive for some detainees to report incidences of corruption.
75. Amos Sithole, *infra*, interview #91(08/05/98), Appendix A.
76. Bheki Nkosi, *infra*, interview #43 (15/04/98), Appendix A.
77. Melissa Ncube, *infra*, interview #134 (19/05/98), Appendix A.
78. Nomsa Khumalo, interviewed 09/05/98. The original interview notes, recorded on "Standard Form Questionnaire - Friends/Family," is available from Historical Papers, William Cullen Library at the University of the Witwatersrand.

79. Mike Mpofo interviewed 16/05/98. The original interview notes, recorded on "Standard Form Questionnaire - Friends/Family," is available from Historical Papers, William Cullen Library at the University of the Witwatersrand.
80. Baloi Marks, *infra*, interview #38 (14/04/98), Appendix A.
81. Professor Makoka, *infra*, interview #53 (15/04/98), Appendix A.
82. Norman Mateko, *infra*, interview #151 (22/05/98), Appendix A.
83. Mark Ndlovu, *infra*, interview #72 (24/4/98), Appendix A.
84. Mahlaba Saritiya, *infra*, interview #32 (14/04/98), Appendix A.
85. The methodological considerations surrounding this issue are the same as those noted above under note [above].
86. Lawrence Ncube, *infra*, interview #30 (14/04/98), Appendix A.
87. Kemvet Vella, *infra*, interview #23 (14/04/98), Appendix A.
88. Mnube Never, *infra*, interview #25 (14/04/98), Appendix A.
89. Alex Bento, *infra*, interview #63 (24/04/98), Appendix A.
90. I.e. 'security guards'.
91. Mathole Mthandazo, *infra*, interview #89 (08/05/98), Appendix A.
92. Libisi Donald, *infra*, interview #92 (08/05/98), Appendix A.
93. Nelson Mthembu, *infra*, interview #93 (08/05/98), Appendix A.
94. Tito Benedetto, *infra*, interview #98 (14/05/98), Appendix A.
95. Caroline Ndlovu, *infra*, interview #88 (08/05/98), Appendix A.
96. Daniel "Absalom", *infra*, interview #105 (14/05/98), Appendix A.
97. Alex Bento, *infra*, interview #63 (24/04/98), Appendix A.
98. Lebohang Senokoane, *infra*, interview #99 (14/05/98), Appendix A.
99. Mathole Mthandazo, *infra*, interview #89 (08/05/98), Appendix A.

100. Ben Ncube, *infra*, interview #79 (08/05/98), Appendix A.
101. Caroline Ndlovu, *infra*, interview #88 (08/05/98), Appendix A.
102. Sibedi Kabai, *infra*, interview #101 (14/05/98), Appendix A.
103. Hlephuthi Hlephuti, *infra*, interview #107 (14/05/98), Appendix A.
104. See Communications from Maj Gen A Bestbier to South African Human Rights Commission, dated 11 February 1999.
105. According to Maj Gen Bestbier,, the SANDF records list S Robai and D Tihepudi among those arrested, names which might be considered similar to those of the two SAHRC interviewees.
106. Kabelo Kalele, *infra*, interview #106 (14/05/98), Appendix A.
107. Lebohang Senokoane, *infra*, interview #99 (14/05/98), Appendix A.
108. Telephone interview, 24 November 1998, Temporary Residence Section (Pretoria). We were informed that a Lesotho national must apply at the South African High Commission in Maseru for a visa. The application is forwarded to the head office of Home Affairs, in Pretoria, and the decision to grant or not grant a visa is then returned to the applicant via the Maseru High Commission.
109. Maxwell Mukucha, *infra*, interview #134 (22/05/98), Appendix A.