



**south african
human
rights
commission**

**MIGRATION
AND CIVIL AND
POLITICAL RIGHTS
IN SOUTH AFRICA**

2022/23



Migration and Civil and Political
Rights in South Africa

A Research Brief
prepared by the Research Unit

2022/23

ACRONYMS AND ABBREVIATIONS

BMA	Border Management Authority
Commission/SAHRC	South African Human Rights Commission
Constitution	Constitution of the Republic of South Africa, 1996
DHA	Department of Home Affairs
DoJ&CD	Department of Justice and Constitutional Development
NAP	National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances
RRO	Refugee Reception Office
SANDF	South African National Defence Force
SAPS	South African Police Service
ZEP	Zimbabwean Exemption Permit

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1. INTRODUCTION

Migration in South Africa has a history of discriminatory practice. The earliest laws regulating migration, the Native Land Act of 1913 and the Native Urban Areas Act of 1923 were specifically enacted to limit the mobility of black Africans while encouraging the immigration of white Europeans to distort the demographic makeup of cities in favour of whites. In 1937 the Aliens Control Act was enacted with the requirement that immigrants be “likely to become readily assimilated” with the white European population in the country. Later, the growing mine industry required the importation of labour from neighbouring countries through a system that permitted these black labourers to temporarily live in the country.¹

South Africa has seen a steady rise in the xenophobic discourse since the dawn of democracy. This discourse has become widespread and manifests in various ways which include blaming migrants for the spread of disease and economic downturns including unemployment, poverty and lack of prosperity. Xenophobia and discrimination against migrants are endemic in the South African context and are particularly strong against irregular and intra-African migrants. This discrimination has an adverse impact on the ability of migrants to enjoy access to justice and just administrative action. In 2008, a tragic set of events occurred where more than 60 people believed to be ‘foreigners’ were murdered, approximately 700 were wounded and over 10 000 were displaced.² Since then, there have been a number of outbreaks in xenophobic acts where people believed to be foreigners were threatened, wounded and killed.

The Department of Home Affairs (DHA) is the primary state department tasked with the control, regulation and facilitation of migration and the movement of persons across the borders of South Africa. The DHA performs a range of other functions which include national birth, marriage and death registrations, the issuing of identity documents and passports and the keeping and maintenance of a national population register.

This brief presents an overview of developments in the migration space, the work of the South African Human Rights Commission (SAHRC/Commission) in this regard, and instances of human rights violations, both systemic and singular, relating to migration status that have taken place recently. It then issues a number of recommendations to relevant parties. This brief intends to contribute to the growing literature on migration and human rights by through its recommendations to state departments which will provide greater protections to migrants.

¹ J Crush “Covert operations: clandestine migration, temporary work and immigration policy in South Africa” (1997) SAMP Migration Policy Series No 1.

² L Landau (ed) *Exorcising the demons within: xenophobia, violence and statecraft in contemporary South Africa* (2011) 189.



2. MANDATE OF THE COMMISSION

Section 184 of the Constitution of the Republic of South Africa, 1996, establishes the Commission as an institution to support constitutional democracy. It mandates the Commission to –

- a) promote respect for human rights and a culture of human rights;
- b) promote the protection, development and attainment of human rights; and
- c) monitor and assess the observance of human rights in the Republic.

To fulfil its mandate, the Commission must investigate and report on the observance of human rights; take steps to secure appropriate redress where human rights have been violated; carry out research; and educate. It is in fulfilment of this mandate that the Commission produces this research brief.





3. METHODOLOGY

The sources of information that were considered when preparing this research brief included government, academia and relevant civil society organisations.

The methodology used was:

- Desktop review of relevant information including international and regional material; international, regional and domestic legal frameworks; relevant government policy documents and cabinet decisions, together with Parliamentary responses; studies from research centres and civil society organisations; and case law.
- Stakeholder meetings were held with academics, state officials and/or professionals working in the area of migration, both within and outside the Commission.
- Questionnaires were sent to the DHA and the Border Management Authority (BMA).





4. PREVIOUS WORK OF THE COMMISSION ON MIGRATION

The Commission began its work on migration-related discrimination and violence against migrants as early as 1998.³ Since then, it has published a number of reports and statements concerning the rights of migrants including their detention, their access to basic and fundamental human rights, and xenophobia.⁴

Following the outbreak of xenophobic violence in 2008, which led to the loss of lives, injury and displacement of thousands of people suspected of being foreign nationals, the Commission launched an investigation into the matter and issued a number of recommendations which remain relevant.⁵

The SAHRC released a report on the human rights situation at Lindela Repatriation Centre in 2015 where it found evidence of abuse, overcrowding, lack of compliance with hygiene standards and the detention of migrants beyond the permissible 120 days.⁶ A set of recommendations was then issued in that report which included the requirement for the DHA to provide migrants with written information concerning their rights in a language that they understand,⁷ in order to facilitate access to justice.

In February 2018, the SAHRC convened a National Investigative Hearing on Migration, Xenophobia and Social Cohesion. This hearing invited input from government, constitutional bodies (Chapter Nine institutions), civil society organisations,

migrant interest groups and research institutes. The information provided to the Commission during these hearings indicated that, first, the State has contributed to the creation of a culture of xenophobia. Second, that the legislative framework created conditions for statelessness. Third, that the asylum system is broken and subjects people to illegality. Fourth, migrants have difficulty accessing health care services and education. Fifth, there was widespread corruption within the DHA and there is a lack of trust between communities (both local and migrant) and law enforcement.⁸

In 2020, the SAHRC convened an inquiry into violence against non-nationals working in the long-distance trucking industry following allegations that truck drivers who are non-nationals were attacked by South African truck drivers. The inquiry invited presentations from state departments, non-governmental organisations and migrant interest groups. Evidence presented during the inquiry indicated that the Department of Transport was predominantly focused on having undocumented migrants arrested, instead of identifying and addressing the causes of violence against non-national truck drivers and making arrests where possible.⁹ There appears to have been an assumption that truck drivers who were subjected to xenophobic violence were undocumented,¹⁰ which indicated a non-expressed form of collusion between government and perpetrators of xenophobic violence.

3 See generally South African Human Rights Commission *Braamfontein Statement on Xenophobia* (1998).

4 See South African Human Rights Commission *Report into the Arrest and Detention of Suspected Undocumented Migrants 19 March 1999*; *South African Human Rights Commission Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals* (2010);

5 South African Human Rights Commission *Report on the SAHRC Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals* (2010).

6 South African Human Rights Commission *Investigative Report Vol. 4* (2015).

7 *Ibid.*

8 South African Human Rights Commission *National Investigative Hearing on Migration, Xenophobia and Social Cohesion* (public hearings) (2018).

9 South African Human Rights Commission *Inquiry into violent attacks targeted towards non-nationals: with a focus on long distance truck drivers* (2020). (Unpublished and on file with author).

10 *Ibid.*



5. INTERNATIONAL, REGIONAL, DOMESTIC LEGAL AND DOMESTIC POLICY FRAMEWORK

5.1. International and regional law

The Universal Declaration of Human Rights provides that '[e]veryone has the right to life, liberty and security of person.'¹¹ South Africa acceded to the Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees (Refugee Convention) which both affirm that refugees must be treated no less favourably than other foreign nationals in the same circumstances and are, therefore, entitled to a number of fundamental rights including employment, education and association. Importantly, the Refugee Convention includes the principle of non-refoulement which forbids State to send back refugee to countries from which they are fleeing.¹²

South Africa ratified the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (African Refugee Convention) on 15 December 1995, which includes the principle of non-refoulement. The African Refugee Convention provides an extended definition of refugees by including people fleeing foreign occupation. It determines that its member states 'shall use their best endeavours, consistent with their respective legislations, to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality'. It also provides a framework for the cessation, exclusion and voluntary repatriation of refugees.

5.2. The Constitution

The Constitution of the Republic of South Africa, 1996 (Constitution) guarantees everyone the rights to human dignity, equality, access to healthcare services, education, freedom of movement, security of the person etc. In *Saidi v Minister of Home Affairs* the Constitutional Court discussed the duty of Refugee Reception Officers to extend asylum seeker permits and recognised that such permits enable

“the enjoyment of employment opportunities; access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference.”¹³

Access to employment, social and basic services, and freedom and security, are essential for the enjoyment of the right to human dignity.

¹¹ United Nations General Assembly, Universal Declaration of Human Rights, 1948, Article 3.

¹² 1951 Convention Relating to the Status of Refugees.

¹³ 2018 (4) SA 333 (CC) para 18.

5.3. Legislation

The Immigration Act 13 of 2002 (Immigration Act) regulates immigration to South Africa and provides for the different available categories of permits and visas, the process for exemption from the available migration pathways and the processes related to immigration detention and deportation. The Immigration Act creates different pathways which facilitate regular migration and ensures access to justice in the migration services. However, its primary function is the prevention of irregular migration and the promotion of skilled labour migration. It provides no migratory pathway for low-skilled workers or so-called 'economic migrants'.

The Refugees Act 130 of 1998 (Refugees Act) regulates the ability of non-nationals to attain asylum seeker and refugee status. Under the Refugees Act, persons who intend to apply for refugee status are required to present themselves to a Refugee Reception Office (RRO) where their application will be considered. They may be granted asylum seeker status while their applications for refugee status are being determined. Refugees and asylum seekers are entitled to a number of socio-economic rights which are available to 'everyone' under the Constitution. The Refugees Act has undergone a number of amendments, the latest of which will be discussed below as it has significant implications.

5.4. Amendments to the Refugees Act

South Africa offers robust legal and human rights protections for refugee and asylum seekers in law, but the practice and implementation of these protections vary. Due to stringent limitations on available pathways (visas) to migrate into South Africa under the Immigration Act, many people reportedly opt to use the refugee and asylum seeker process.¹⁴

This has led to a 96% rejection rate of asylum claims. The DHA submitted to the Commission that this is largely because a predominant number of asylum claims are not legitimate.¹⁵ In 2018, it was reported that South Africa hosted 89 285 recognised refugees and 184 203 asylum seekers who primarily came from Zimbabwe, Pakistan, Nigeria, the Democratic Republic of Congo (DRC), Ethiopia and Bangladesh.¹⁶ There are systemic backlogs in the asylum application system, and it has become common for asylum seekers to wait years and, at times, decades before their status is determined and a final decision on whether to award refugee status is made.¹⁷ The delays in decision-making adversely affects the ability of asylum seekers to enjoy human rights as everyone has the right of access to justice and just administrative action. The status of a refugee affords greater protections than that of an asylum seeker. Therefore, unreasonable delays in decision-making unreasonably limit the rights of people who are entitled to the status of refugee.

The Refugee Amendment Act of 2017 (Refugee Amendment Act) contains four main changes concerning the withdrawal of refugee status; access to asylum; access to employment and limitations on political activities. The amendments establish additional grounds under which asylum seekers or refugees may lose their status¹⁸ thus rendering their status more precarious.

Under the amended Act:

- the Minister of Home Affairs may 'cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status';
- refugee status may be withdrawn where a refugee returns to visit their country of origin;
- refugee status may be withdrawn where a refugee engages with their country of origin's consular authorities without the permission of the Minister;

¹⁴ Ibid 59.

¹⁵ This information was provided to the Commission during our 2018 two-day national investigative hearing on migration, xenophobia and social cohesion (transcripts on file with author).

¹⁶ United Nations High Commission on Refugees 'Global Trends: Forced Displacement in 2018' <https://www.unhcr.org/afr/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html>.

¹⁷ In December 2019 the DHA reported to the Portfolio Committee on Home Affairs that it had 186 210 asylum seekers awaiting refugee status determination and 60% of these asylum seekers have been awaiting status determination for more than five years. 'Answer to Parliamentary Question NW1586 of 9 December 2019', available at <https://pmg.org.za/committee-question/12936>.

¹⁸ Refugees Act (as amended) s 5(1)(h) and (d).

- an application for asylum is considered abandoned if the asylum seekers ‘fails to present him or herself for renewal of the visa after a period of one month from the date of expiry of the visa’; and
- refugee status may be withdrawn where a refugee ‘stands for political office or votes in any election ... of ... country of nationality without the approval of the Minister’ or ‘participates in any political campaign or activity related to ... country of origin or nationality whilst in the Republic without the permission of the Minister’.¹⁹

The Refugee Amendment Act limits access to asylum by placing additional conditions which would render a person ineligible for asylum, including:

- where a person ‘enjoys the protection of any other country in which he or she is a recognised refugee, resident or citizen’
- where a person ‘has committed a crime in the Republic which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine’²⁰
- where a person ‘has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit’²¹
- where the persons are ‘fugitives from justice in another country where the ‘rule of law is upheld by a recognisable judiciary’²²
- where a person has ‘entered the Republic other than through a designated Port of Entry and fails to satisfy an RSDO that there are compelling reasons for doing so’²³
- where a person ‘has failed to report to the RRO within five days of entry into the Republic ... in the absence of compelling reasons...’²⁴

Under the Refugee Amendment Act asylum seekers who wish to access the right to work are required to prove that they are unable to sustain themselves and their dependants; thereafter they may be ‘endorsed’ to work.²⁵ The right to work is, therefore, limited as it is a right which one can only access after determination of eligibility. These amendments, viewed in combination, indicate a marked shift in South Africa’s commitment toward protecting the rights of refugees. It is anticipated that these amendments will be the subject of litigation in the coming years; the Commission will continue to monitor these changes and their impact on the enjoyment of human rights.

In February 2023, the Western Cape delivered a judgment on the *Scalabrini Centre of Cape Town v Minister of Home Affairs*²⁶ case where it declared sections 22(12) and 22(13) of the Refugees Act unconstitutional. The provisions of these sections are that asylum seekers who have not renewed their asylum seeker visa within one month of its expiry date are considered to have abandoned their claim and must be dealt with as illegal foreigners in terms of Section 32 of the Immigration Act. This would mean that they may be arrested, detained and refouled. The Court found this provision to be a violation of the principle of non-refoulement outlined in Article 33 of the Convention on Refugees and declared it unconstitutional for violating various rights in the Bill of Rights, including the right to a fair hearing.

The Commission is concerned that the amendments, considered in their totality, have the impact of unreasonably limiting the right to asylum and may be a violation of various human rights. The right to asylum may enjoy the status of *jus cogens* in international law and is essential in South Africa’s constitutional dispensation, and should therefore, be protected. The Commission will continue to monitor the impact that these changes have on the ability of refugees and asylum seekers to enjoy their human rights.

19 This amendment constitutes a significant limitation on the political participation of refugees and will undoubtedly have an adverse impact on refugees who are fleeing countries in transition or refugees from countries experiencing changes in government and may therefore wish to participate in such changes.

20 Section 4(1)(e). This Amendment is concerning as committing a crime would ordinarily require a person to be prosecuted and imprisoned rather than have their refugee status withdrawn.

21 Section 4(1)(f).

22 Section 4(1)(g).

23 Section 4(1)(h).


24 Section 4(1)(i).

25 Section 22(8)(a).

26 *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* (5441/20) [2023] ZAWCHC 28 (13 February 2023).

5.5. Policies

The 2017 White Paper on International Migration Policy stresses the importance of knowing a person's identity and civil status to national security and public safety. It also acknowledges that –



vulnerable migrants pay bribes and are victims of extortion and human trafficking [in South Africa]. This increases levels of corruption and organised crime.²⁷

Government policy acknowledges the presence of corruption in immigration services and the permeability of South African borders by people who may be criminals.

A National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerances (NAP) was approved by Cabinet in 2019. The NAP aims to raise awareness against discrimination, promote access to justice, support victims of discrimination and undertake a number of anti-discrimination measures to achieve greater equality and justice. This plan is intended to directly combat xenophobia which is one of the prevailing forms of discrimination in the country. Importantly, it includes an Early Warning System and a Rapid Response Mechanism intended to respond promptly to, and prevent acts of, xenophobia. However, these elements are yet to be operationalised.

5.6. Cancellation of the Zimbabwe Special Exemption Permit

In 2009, the South African government created a 'special dispensation' for Zimbabwean nationals who were undocumented migrants in South Africa after having fled the violence and instability that was occurring in Zimbabwe. An exemption was then granted to Zimbabweans in terms of Section 31(2) (b) of the Immigration Act and took various forms over the year. Ultimately it became known as the Zimbabwean Exemption Permit (ZEP) in 2017. Since then, around 178 000 ZEPs were granted.²⁸ The last extension to the exemptions were granted in 2017, with the expiring date of 31 December 2021. The Minister of Home Affairs (Minister) directed the 178 000 permit holders to apply for other visas provided for within the Immigration Act within 12 months. This has since been extended by a further six month and the permits will expire on 30 June 2023.²⁹ In its presentation to the Portfolio Committee, the DHA stated that the ZEP was intended to be a temporary measure, pending the improvement of the political and economic situation in Zimbabwe.³⁰ However, the political and economic situation in Zimbabwe has not improved and high levels of violence, repression, food shortages and economic instability remain.³¹ It is also worth noting that the Minister did not engage in a process of public consultation before making this decision that adversely affects at least 178 000 people.

The cancellation of the ZEPs is a cause of instability as it brings about sudden change in the lives of vulnerable groups. The decision to withdraw the ZEP puts holders at risk of becoming undocumented, losing their employment, separating from their families, losing access to education, healthcare and social services and forcibly returning to Zimbabwe, which remains politically and economically unstable. It is also particularly concerning because the Basotho special permit is also set to expire at the end of 2023 and, thus, another large group of vulnerable persons will be subjected to this sudden change in living conditions. It is important that Government meaningfully engage with migrant groups prior to making decisions which have the impact of upending their lives and limiting their human rights.

²⁷ Department of Home Affairs "White Paper on International Migration Policy" (2017).

²⁸ Portfolio Committee on Home Affairs 'Zimbabwe Exemption Permit; implementation of Ministerial Permit Review Report; suspensions of senior officials; Shepard Bushiri matter, with Ministry' (13 September 2022).

²⁹ Ibid.

³⁰ Ibid.

³¹ <<https://www.worldbank.org/en/country/zimbabwe/overview>>



6. HUMAN RIGHTS AND BORDER CONTROL

The Border Management Authority (BMA), through its establishing legislation, was recently established as a 'special branch' within the DHA but will become an independent Schedule 3(A) public entity from April 2023. The primary functions of the BMA will be to facilitate and manage the movement of persons through ports of entry, to conduct border law enforcement and coordinate and cooperate with South African Police Services (SAPS), South African Revenue Services (SARS), South African National Defence Force (SANDF) and border communities. The BMA is considered to be the solution to South Africa's 'porous' border challenges as the previous border management regime was characterised by high levels of fragmentation which created loopholes for corruption,³² including from SANDF officers servicing international borders.³³

The DHA divides its operations into four different programmes, namely, administration, civic affairs, immigration affairs and institutional support and transfers. It concedes that the immigration affairs programme has consistently been its worst performing programme. During the 2020/2021 financial year it achieved only 50% of its planned targets. This notwithstanding, the department increased its law enforcement operations/inspections annual target from 220 in 2021/2022 to 540 in 2022/2023 indicating a marked increase in its focus on detecting undocumented persons. The DHA states that the 'indicator is intended to ensure that those who work illegally (with no correct visas or immigration permits to do so) or employ such persons in violation of legislation, or are here illegally, are either charged or deported' and that 'the target seeks to locate or trace illegal foreign nationals in South Africa and ensure that the resulting enforcement, be it prosecution or deportation, is undertaken.'³⁴ This is indicative of the move to securitise the border environment, and prosecute and deport foreign national, thus departing from the goal of regulating safe, orderly and regular migration. Emphasis will be placed on the surveillance and targeting of foreign

nationals and, possibly, at the expense of guaranteed civil rights. SAPS has conducted a number of joint operations with partner departments which resulted in the detention of hundreds of people. In 2019, there was one such operation which led to a standoff between business owners and law enforcement, indicating a lack of trust between residents and law enforcement.³⁵

The Constitutional Court in *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others*³⁶ previously ruled that such warrantless searches in the City of Johannesburg, where law enforcement officers entered private residence and businesses demanding identification and then arresting and deporting people en masse, were 'cruel, degrading and invasive'.³⁷ It found the searches which 'systematically persecute the residents of a neighbourhood branded as "undesirable"' to be discriminatory and unconstitutional.³⁸

South Africa's border posts, especially the Beitbridge Border Post between Zimbabwe, are characterised by high levels of congestion, especially during the December holidays due to large number of travellers. These conditions have created an opportunity for corrupt officials to extort bribes from migrants in order to permit them to jump queues as detailed further below. It was reported that there have been circumstances where drivers awaiting processing at the border had no access to food, water or ablution facilities, leading to various human rights violations.³⁹ According to reports at least 15 people died the Zimbabwe-South Africa border crossings due to delays in processing.⁴⁰ The BMA has not clarified how its One-Stop-Border Post programme will respond to these human rights concerns at the border. The Commission will monitor the policies and practices of the BMA to assess their human rights impacts. Human rights ought to be enjoyed and protected both within South Africa as well as at the country's borders.

32 BMA response to SAHRC Questionnaire (10 November 2022). (On file with author).

33 < <https://www.enca.com/videos/soldiers-implicated-border-smuggling> >

34 Department of Home Affairs 'Portfolio Committee on Home Affairs 2022/23 Budgetary Review and Recommendations Report Dated 25 October 2022' 16/304 https://static.pmg.org.za/201025pchomebrrr_1.pdf.

35 < <https://www.news24.com/News24/there-is-no-illegal-human-immigrants-arrested-in-joburg-raids-say-they-showed-police-valid-papers-20190813> >

36 2022 (1) BCLR 46 (CC).

37 *Ibid* para 1.

38 *Ibid* para 219.

39 < <https://allafrica.com/stories/202101090070.html> > < <https://www.enca.com/news/watch-beitbridge-border-human-rights-body-inspect-post> >

40 < <https://www.reuters.com/article/uk-safrica-zimbabwe-border-idUKKBN28Z0NV> >



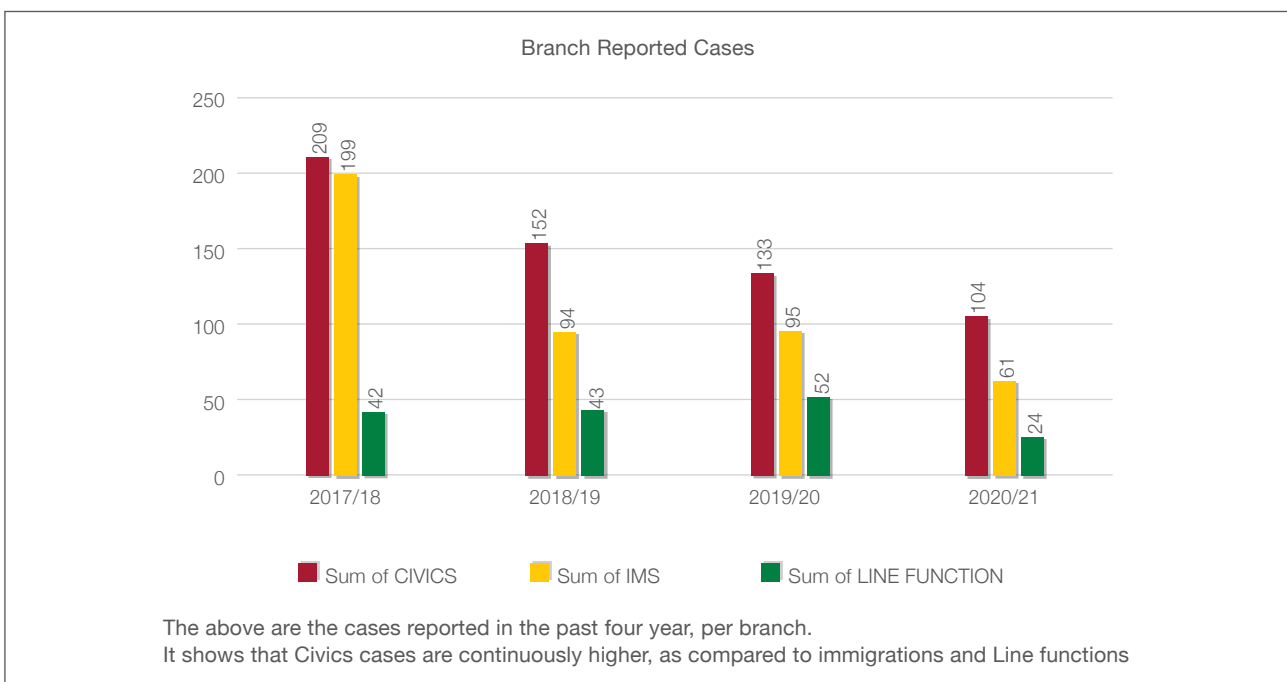
7. CORRUPTION, MIGRATION AND HUMAN RIGHTS

Migration carries significant human rights risks and impacts, which often lead to violations, abuses and denials of rights. These impacts are further compounded by corruption, lack of transparency and limited access to justice in migration assessments, visa processes and asylum applications.

In July 2022, a group of experts with the United Nations Office of the High Commissioner for Human Rights (OHCHR) issued a statement condemning xenophobic violence in South Africa and raised a number of concerns, including corruption.⁴¹ The experts indicated that they had received reports of the existence of widespread corruption in the asylum and migration system in South Africa, which compounds the vulnerability of migrants, refugees and asylum seekers.⁴² Allegations of corruption within South Africa's immigration processes have become a matter of international concern and will continue to have an adverse impact on its international relations if not adequately and promptly addressed.

A counter-corruption and security services branch exists within the DHA with a mandate to prevent and combat fraud and corruption, promote a culture of honesty and integrity in the conduct of DHA colleagues and in the systems and processes of the DHA. Its task is also to promote organisational integrity within the DHA and ensure that thorough investigation is pursued where corruption is discovered. Data from this branch shows a decrease in the number of reported cases of fraud and corruption within the DHA. It also shows that there are more cases of fraud and corruption reported in the civics branch (registration of births, marriages and citizenship) than there are in the immigration branch (management of migration and issuing of permits and visas).

Four-year Trend Analysis



41 < <https://www.ohchr.org/en/press-releases/2022/07/south-africa-un-experts-condemn-xenophobic-violence-and-racial>>

42 Ibid.

The most commonly reported cases of fraud and corruption within the DHA include:⁴⁴

- Approval of permits with fraudulent supporting documents
- Bribes to reverse stamp dates at Ports of Entry;
- Bribes to avoid long queues;
- Foreigners awaiting deportation released without official approval;
- Bribes to avoid paying fines for overstay; and
- Permits extended without approval from the Refugee Board.

All these practices identified by the DHA undermine the integrity of the immigration system, have an adverse impact on the ability of migrants to enjoy fundamental human rights and deny migrants access to justice.

‘Sextortion’ is an emerging form of corruption within the immigration system which disproportionately affects women and is a form of gender-based violence.⁴⁵ This form of corruption entails immigration officials demanding sexual favours from women seeking immigration services and places them at risk of physical and psychological harm, thus making them even more vulnerable.⁴⁶ There is a need for this form of corruption to be closely inspected, its victims to be supported and its perpetrators to be disciplined and prosecuted. Women who are migrating, especially refugees and asylum seekers, are vulnerable to various harms on their journey. Immigration officials who are tasked with assisting them should be deterred from causing them further harm.

Asylum seekers and refugee are the most vulnerable migrant groups, and yet evidence received by the Commission during its 2018 National Hearing on Xenophobia indicates that they may also be the most vulnerable to corruption. Submissions from different sources claimed the existence of corruption at every step of the asylum process, including accessing the RRO before an application can even be made.⁴⁷ In its response to the SAHRC’s questionnaire sent in 2022, the DHA acknowledged that it is difficult to identify corruption within its immigration mandate because the victims of corruption are also willing participants in the corruption processes which then deters them from reporting. There is an urgent need for the DHA to review its methods of preventing, identifying and prosecuting corruption because the current system exploits vulnerable groups, denies them their human rights and is manifestly unsustainable.

44 Portfolio Committee on Home Affairs Meeting “DHA Counter-Corruption and Security Services branch on its work and high-profile cases; with3Minister” (7 September 2021) <https://pmg.org.za/committee-meeting/33573/>.

44 A Caarten ‘The intersection of corruption and gender-based violence: Examining the gendered experiences of sextortion during migration to South Africa’ (2022) *African Journal of Reproductive Health* 50, 51.

45 Ibid.

46 South African Human Rights Commission (note 26 above).

47 Ibid.



8. A HUMAN RIGHTS-BASED APPROACH TO MIGRATION

The immigration system in South Africa is characterised by fragmentation, corruption and unsustainable backlogs in processing visas, permanent residence permits and refugee and asylum seeker permits. In the *Department of Home Affairs v De Saude Attorneys and Another*⁴⁸ case the Supreme Court of Appeal described the conditions at the DHA as ‘prolonged and enduring departmental dysfunction’ resulting in year-long delays in processing applications.

The migration system ought to be characterised by the principles which are emblematic of a commitment to accountability, transparency, equality, and non-discrimination. Corruption ought to be identified, investigated and prosecuted when it occurs, and the DHA should ensure that migrants have access to justice. The Government should keep in mind that changing economic, political and climate circumstances will inevitably lead to people migrating. It is, therefore, essential that pathways are created for safe, regular and timely migration, especially in countries with whom South Africa shares a border. This can be done in a number of ways including a relaxation of visa requirements and fees.

The OHCHR developed recommended Guidelines on human rights at international borders which are highly relevant in the South African context.⁴⁹ The First Guideline calls on states to promote and protect human rights by using an information campaign and the media to protect migrants and challenge xenophobia at borders. The Second Guideline concerning legal and policy frameworks calls on the state to refrain from classifying irregular migration as a criminal offence. The Third Guideline on building human rights capacity calls on states to ensure that border authorities are adequately trained, equipped and remunerated. The Fifth Guideline requires states to provide immediate assistance in the form of food, medical care, clothing etc., as and when needed by migrants. The Sixth Guideline concerning screening and interviewing calls on states to uphold migrants’ rights to privacy when assessing their asylum and migration rights. The Eighth Guideline establishes a presumption against migration detention and calls for human right-compliant alternatives. The Ninth Guideline prohibits the refoulment of refugees and their collective expulsion. These recommended guidelines should be considered by the Government of South Africa when creating laws and policies relating to migration.

48 [2019] 2 All SA 665 (SCA).

49 Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations (8 March 2023) <https://www.ohchr.org/sites/default/files/PrinciplesAndGuidelines.pdf>



9. CONCLUSION

The recent developments in the architecture of migration regulation in South Africa present a concerning picture and may be motivated by xenophobic intent. There appears to be a policy shift aimed towards protecting South Africa from migrants and asylum seekers rather than a recognition of migration as a facilitator of development and the need to fulfil our international humanitarian obligations to provide refuge for those in need.

The DHA needs to urgently reconsider its laws, policies and practices on migration in order to be effective, efficient and sustainable. Evidence from around the world shows that migration is a common human phenomenon that can and should be managed by responding to human rights and humanitarian concerns in a manner that facilitates orderly and documented migration. Turning to securitisation as a solution to migration while reducing the available pathways for documented migration may lead to an increase in irregular migration and further insecurity for both migrants and citizens.



10. ADVISORY RECOMMENDATIONS

- The Department of Justice and Constitutional Development (DoJ&CD) should implement the Early Warning System and its accompanying Rapid Response Mechanism as envisioned in the NAP within 12 months of receipt of this report.
- The Commission should extend its human rights monitoring within the migration system to South Africa's international borders and RROs.
- The SAPS and the DHA should consider establishing a system for migrants to report corruption within the immigration system anonymously, and without prejudice to their documentation status.
- When developing the new Green Paper on International Migration, the DHA should consider additional ways to enable regular migration, especially within the Southern African Development Community region.
- The DHA should conduct a review of how immigration laws and policies within South Africa relate to the African Union on the Protocol to the Treaty Establishing the African Economic Community Relating to Free Movement of Persons, Right of Residence and Right of Establishment.⁵⁰ This must be done to ensure that the country's laws are in line with continental developments.
- The DHA and DoJ&CD should consider the recommended principles and guidelines on human rights at South Africa's entry points when developing new laws and policies concerning migration and when training border guards.

⁵⁰ <https://au.int/en/treaties/protocol-treaty-establishing-african-economic-community-relating-free-movement-persons>





south african
human
rights
commission

27 Stiemens Street,
Braamfontein, 2017

 +27 11 877 3600

 www.sahrc.org.za

 info@sahrc.org.za

 @SAHRCCommission

 SA Human Rights Commission