
The Impact of the Criminalisation of Migration on the Protection of Human Rights

Submission to the Special Rapporteur on the Human Rights of Migrants

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1. Introduction

Policies regarding migration in South Africa feature an unusual contrast. On one hand, South Africa has an exemplary refugee policy providing for freedom of movement and work and study rights for asylum seekers. On the other hand, South Africa's immigration policy aims at attracting highly skilled workers but provides for few means of low skilled immigrants or those without sufficient resources or passports to legalise their entry and stay in the country. The result of this is that South Africa has by far the highest number of new asylum applications in the world each year. In 2009, the figure was 222,324 and in 2008 207,206. This is not necessarily a reflection of large numbers of people fleeing persecution in the region but rather large numbers of people applying for asylum as it provides for a *de facto* work permit - given the rights provided to asylum seekers as well as the many delays in processing asylum applications.

In addition, many people remain undocumented in South Africa. Many of those undocumented have tried to apply for asylum on previous occasions but given up due to the long queues and low numbers of people being processed by South Africa's Refugee Reception Centres previously. Others are Zimbabwean nationals for whom a new temporary permit was promised in April 2009 but has yet to be implemented. And many more are simply those who have moved to South Africa on a short or long term basis seeking work but not finding the necessary available channels within the current immigration regime to do so.

This submission examines the situation in South Africa and reflects on the impact of the criminalisation of migration in terms of the human rights of migrants. It also examines some good practices that have developed as practical ways around the challenges posed by the restrictive immigration regime.

2. Impact of the criminalisation of migration on the enjoyment of human rights

South Africa's Immigration Act regards those without the necessary documents to be in the country to be 'illegal foreigners'. The Act allows for police and immigration officials to conduct immigration document checks and arrest and detain foreigners for this purpose, and imposes a penalty on those who 'aid or abet illegal foreigners'.

a. Immigration Detention

Immigration detention is still used as primary tool for immigration control, the rationale being that detention is the most effective means for carrying out deportations. Any undocumented migrant stopped by police or immigration officials is subject to arrest, detention and deportation - despite the courts having held repeatedly that the discretion to detain must always be applied in every individual case.

The detention of so-called undocumented migrants also extends to asylum seekers, despite no legal framework for the mandatory detention of asylum seekers. This is the result of poor information sharing and lack of fair (and mandatory) administrative procedures at Refugee Reception Offices resulting in the unlawful, arbitrary and unnecessary arrest of asylum seekers at the Refugee Reception Offices. It is also the result of asylum seekers not always being able to access Refugee Reception Offices and therefore being left vulnerable without documentation. The detention of these asylum seekers effectively criminalises any non-compliance with permit conditions, which is often the result of language barriers and poor understanding due to the administrative failures of the system – whereby immigration detention is used as punishment for these asylum seekers. Once detained, in a few cases where asylum seekers have access to legal representation, they are able to continue their asylum process in detention and seek assistance from the courts for their release – but in the majority of instances the detention of asylum seekers results in their deportation and possible *refoulement*.

In addition, the inadequate admission procedure to detention, which does not provide for any verification process or explanation of rights, and the lack of any subsequent screening process and compliance with strict legal safeguards, renders the majority of detentions unlawful, and arbitrary – without any judicial or independent oversight.

Despite the courts consistently upholding the rights of asylum seekers not to be detained, upholding that a discretion must be applied individually to every undocumented migrant before electing to detain him/her, and upholding that every detention must be in strict compliance with every legislated procedural safeguard including judicial review - these decisions of court upholding the legal framework, are not applied across the board, and only a small minority of detainees are able to enforce their rights on a case by case basis if they have access to legal assistance.

b. Limited Access to Social Services

Key to accessing many social services in South Africa is the presentation of a South African identity document. Advocacy by local and international organisations has recently improved the access of documented asylum seekers and recognised refugees to such services but even those with legal documentation report being denied access from time to time on the basis of ignorance of civil servants or, on occasion, the denial of services based on a civil servant's personal prejudice against foreign nationals.

Undocumented migrants therefore have far less access to social services such as health care, education, social security or the like. This impacts on their ability to integrate meaningful and provide for their own well-being.

c. Lack of Police Protection, Police Abuse and Lack of Access to Justice

A further major human rights challenge is that of a lack of police protection of undocumented migrants. Section 41 of the Immigration Act allows police to conduct checks on the immigration documentation of foreign nationals. Neither the Act nor the Regulations to the Act give specific guidelines regarding the conditions under which police may conduct such checks and therefore there is little distinction in the role of the detection of 'illegal foreigners' between the police and immigration officials (who operate under the mandate of the Department of Home Affairs).

The police's role in conducting immigration checks has resulted in a fear by many foreign nationals, documented or not, of approaching the police for protection. This is also largely to do with the various informal practices that some police officers have developed around immigration policing where immigration documents are checked on the basis of racial profiling rather than reasonable suspicion and there are regular reports of police officers extorting money from undocumented migrants in return for not arresting them on immigration charges.

In a country plagued by frequent occurrences of xenophobic violence as well as generally high levels of crime, this poses a serious problem for the protection of undocumented migrants. Currently there are threats of major xenophobic violence erupting in different locations across the country. A number of foreign nationals have been threatened with violence by various members of the public. However, many remain too afraid of reporting such threats or outbreaks of violence to the police for fear of being detained and deported. This thus contributes to a culture of impunity in cases of threats or violence against foreign nationals.

The police have played a further problematic role by leading raids on places where foreign nationals are known to live. One high profile raid occurred in January 2008 when police officers raided the Central Methodist Church in Johannesburg where large numbers of primarily Zimbabwean nationals were seeking shelter. Police officers were alleged to have assaulted a number of people during the raid and to have stolen property. Whilst a number of undocumented Zimbabweans were initially arrested, they were later released after legal interventions. Further raids have continued since then with similar allegations being made.

Finally, the criminalisation of migration has had a negative impact on access to justice for foreign victims of crime. Because many documented and undocumented foreign nationals fear being arrested on immigration charges if they approach a police officer for assistance, many crimes against foreign nationals go unreported. This is often also the case for victims of rape whilst crossing the border. As a result, in some areas, criminals continue to perpetrate crime against foreign nationals with impunity.

d. Abuse during Border Crossing

The limited opportunities to enter the country legally for those without the necessary passport or qualification for a visa mean that many migrants continue to enter the country through irregular channels. The ongoing crisis in Zimbabwe has seen large numbers of people moving backwards and forwards between the two countries with many crossing informally with the help of smugglers. There are a number of reasons for this. The costs of a Zimbabwean passport have been prohibitive for many and until April 2009, those seeking a visa had to demonstrate sufficient funds to sustain

themselves in South Africa. The introduction by South Africa of a free visa issued on arrival has assisted those who have passports to cross the border through the formal ports of entry. However, the visa is limited to 90 days within a calendar year so does not provide sufficiently for those seeking to be in the country on a longer basis. As a result, even those with passports may choose to cross through irregular channels. Finally, those fleeing state persecution have previously reported fears of being prevented from leaving the country if attempting to formally exit Zimbabwe. As a result, they too have employed smugglers to assist them in crossing the border irregularly.

The primary concern with irregular border crossings from Zimbabwe is the high number of cases of sexual or gender-based violence against both women and men. Thugs known as *amagumaguma* frequently attack those crossing the border, assaulting, stealing and raping travellers. Doctors without Borders in Musina recently reported 103 rape cases from January 2010 to April 2010 with 71 cases taking place between March and April 2010. There have been some initiatives by South African police and army officials to address these concerns but many of the attacks reportedly occur on Zimbabwean soil. Because victims of rape are often undocumented it is often difficult for them to access assistance once in Musina.

e. Administrative fines

Despite the well documented difficulties which asylum seekers face in accessing Refugee Reception Offices, and the lack of information made available to asylum seekers on the consequences of strict non-compliance with asylum permit conditions, people who do not renew their asylum permits on time, whether it is two days or six months, are subject the discretionary issuance of fines by immigration officers.

While asylum seekers do have an obligation to report at Refugee Reception Offices and ensure that their permits remain valid, there is no basis for the issuance of an administrative fine under the Refugees Act, without conviction of an offence by a competent court. Asylum seekers charged with these fines have no opportunity to make representations before a magistrate or any other designated tribunal, they are not charged with any offence which they are able to defend, and they do not receive any notice in writing which they can challenge – though the fine is punishment on admission of guilt.

There is also no schedule for the amount of a fine which is in the immigration officer's discretion and can range from ZAR500 to ZAR3000, and little regard is given to the individual circumstances of the asylum seekers including the reasons why he/she was unable to extend his/her permit on time, and his/her ability to pay a fine. Immigration officers will not extend the asylum permits until the fine has been paid leaving the asylum seeker undocumented and accordingly unable to access limited circumstances and vulnerable to arrest, detention and deportation.

This system does not recognise the problems within the department, or individuals' specific circumstances on a case by case basis, without specific legal intervention for individuals who are able to access legal assistance. Many asylum seekers who cannot afford the fines do not return to the offices, and remain undocumented, also rendering them vulnerable.

f. Xenophobic Violence

The final major human rights concern around the criminalisation of migration is that of xenophobic violence. In May 2008 xenophobic violence on an unprecedented scale spread across South Africa. At least 62 people were killed and over 100 000 people were displaced in violence in poorer communities where primarily immigrants from other African countries were targeted. Many of those perpetrating violence attempted to legitimate their actions by suggesting that they were helping to remove ‘illegal aliens’ – the former legal term for those without a legal right to be in the country. Whilst xenophobic violence targeted documented and undocumented migrants alike, perceptions of the lack of legal status and therefore a lack of entitlement to rights for foreign nationals certainly played a role in fuelling the violence.

Government responses to the violence were also often dependent on legal status. During an initial outbreak of xenophobic violence in March 2008, displaced foreign nationals who fled to police stations seeking shelter were instead rounded up and deported. Following a civil society outcry, the Department of Home Affairs took the progressive step of quickly announcing in May 2008 that undocumented victims of xenophobic violence would not be deported but would be provided with a permit issued by Ministerial discretion. Despite legal documentation being issued to all victims of xenophobic violence, some government departments continued to argue that those who were previously undocumented should not enjoy legal rights and attempted to limit any humanitarian assistance.

3. Impact of the criminalisation of migration on specific groups

The impact of criminalisation of migration has had a major impact on Zimbabwean nationals fleeing the ongoing crisis in the country. Large numbers of Zimbabwean nationals have been crossing the border in both directions for a number of years as the situation in the country grew progressively worse. Initially Zimbabwean nationals arriving at the Beitbridge port of entry to South Africa were being denied entry in order to apply for asylum with border officials informing them that ‘there was no war in Zimbabwe’ – thus demonstrating a simplistic understanding of the concept of asylum. Those Zimbabweans who were able to enter the country through irregular channels previously had to travel around 500km to Pretoria in order to be able to apply for asylum at the Refugee Reception Office there. During this time there were numerous reports of police arresting undocumented travellers and sending them back the border for deportation. There were also reports of police officers soliciting bribes in order to allow Zimbabwean nationals to progress to Pretoria. Those who were to be deported were held in a warehouse facility operated by the police that was later found by a court to be operating as an illegal immigration detention facility. Conditions in this facility were also far below acceptable standards for immigration detention.

The situation has improved since the Department of Home Affairs opened a Refugee Reception Office in Musina near the border in July 2008 where newly arrived Zimbabwean nationals could apply for asylum. However, the lack of capacity at the office meant that low numbers of people were being documented each day. Police had communicated that they would arrest any undocumented person who was more than 100 metres from the Refugee Reception Office and as a result, large numbers of Zimbabwean nationals began to accumulate in a dusty parking area known as the Showgrounds with around 4000 people being estimated to be there in February 2009. The accumulation of large numbers of people with mixed migration needs (some were seeking

protection, others seeking employment) resulted in a very limited response from local government actors although additional health services were made available as the cholera crisis affected the area. However there remained no concrete humanitarian intervention by government to address the various human rights needs of those waiting for documentation. Further information on this is available in the Report to the Government of South Africa on the Humanitarian Crisis in Musina available from http://www.cormsa.org.za/wp-content/uploads/Resources/Crisis_in_Musina.pdf. People were eventually forcibly dispersed from the site and the capacity of the Refugee Reception office was increased to reduce the waiting time for documentation.

In April 2009 the then Minister of Home Affairs announced the introduction of a new permit issued in terms of Section 31(2)(b) of the Immigration Act (known as a Special Dispensation Permit) to provide legal status for undocumented Zimbabweans already in the country as well as newly arrived Zimbabwean nationals intending to stay and seek work. In addition the Minister announced a moratorium on the deportation of Zimbabwean nationals as well as a free visa that would be available on arrival for Zimbabwean nationals at all points of entry to South Africa. These measures were very positive but the Special Dispensation Permit has yet to be implemented. Zimbabweans with passports can still enter the country with the free visa but their access has since been limited to 90 days within a calendar year rather than the renewable 90 day visa that was initially provided. The moratorium on deportations has continued which has been positive but the lack of a means of providing legal documentation for many Zimbabwean nationals (in the absence of the Special Dispensation Permit) has meant that many Zimbabwean nationals have simply opted to apply for asylum without necessarily having persecution-related protection needs. Many have had their applications rejected but remain in a legal limbo as they cannot be deported. Others have simply remained undocumented. This means that great anxiety continues to surround the possibility of the current Minister of Home Affairs lifting the moratorium on the deportation of Zimbabwean nationals in the absence of viable means of the majority of Zimbabweans legalising their status in the country.

As a result of the lack of provision of documentation, many Zimbabweans continue to face human rights challenges as set out in the previous section regarding access to services, police harassment, and lack of police protection and access to justice.

4. Examples of Good Practices

Aside from the concerns listed above, a number of positive measures have also been introduced by government departments and other actors. These have helped to offset some of the human rights challenges posed by the criminalisation of migration.

a. Special Measures for Zimbabweans

The announcement by the former Minister of Home Affairs of the introduction of a Special Dispensation Permit for Zimbabwean nationals, the moratorium on deportations of Zimbabwean nationals and a free visa on arrival to Zimbabweans with passports was very positive. Had the Special Dispensation Permit been introduced, this would have gone a long way to ensuring that Zimbabwean nationals had access to services and employment and therefore the greater protection of their human rights. Whilst the permit has yet to be implemented, discussions continue of the provision of another form of permit to perhaps on a broader basis to other nationals of Southern African Development Community countries.

The moratorium on deportations has proved very positive as it provides for some degree of protection but has not prevented harassment by police and the lack of accompanying legal documentation has prevented Zimbabwean nationals from being able to integrate and access services effectively.

b. Access to Health Care

South Africa's Constitution provides for access to emergency health care for all in the country regardless of legal status. In 2007, South Africa's Department of Health issued a directive allowing for access to health care for documented and undocumented asylum seekers and on the same fee scale as for South Africans. This provided an opportunity for those without legal documents to also be able to access health care provided that they declared themselves to be undocumented asylum seekers and also depending on the level of awareness of the directive by specific health care providers.

In addition, during the cholera crisis of late 2008 and early 2009, the then Minister of Health ordered that treatment be provided to all in need especially in the border region where a number of cholera patients were arriving from Zimbabwe. This was again a very positive measure in ensuring that emergency treatment was available to all.

c. Temporary Legal Status for Displaced Victims of Xenophobic Violence

As noted before in this brief, in May 2008 the Department of Home Affairs took the very positive step of providing temporary legal status to displaced victims of xenophobic violence. Whilst there were a number of concerns regarding the manner in which the permits were made available, the provision of legal status rather than attempts at deporting undocumented victims en masse allowed for people to receive shelter, food and other forms of assistance.

d. Police Directives Regarding Immigration Policing

Given the concerns noted above regarding the role of police in policing immigration and conducting immigration document checks, there have been progressive moves from a number of senior police officials who have issued directives to their officers not to prioritise immigration policing. These police officials have noted the significant resources that have been diverted away from tackling serious priority crimes by police officers who have focused on immigration policing. The instruction for some police officers in some areas not to prioritise immigration policing has been positive but has not been applied throughout the country.

e. Access to Labour Protection

A further positive measure has been a decision by the Commission for Conciliation, Mediation and Arbitration (CCMA), the body that assists in the protection of labour rights, to also assist undocumented migrants in claiming their labour rights. This means that undocumented migrants can be assisted in cases of unfair dismissals or unpaid wages and other labour-related matters. The Labour Court also made a progressive ruling recently when it ruled that labour rights apply to all in the country regardless of their legal status. This means that there are mechanisms for undocumented migrants to seek recourse where their labour rights are violated. Practically,

however, undocumented migrants who report labour-related cases do face the risk of being deported once their matter is finalised.

f. Policy not to Detain Children

A final positive measure has been South Africa's policy of not detaining unaccompanied foreign children in the main immigration holding facility in South Africa. This was the result of litigation against the Department of Home Affairs which did infiltrate into policy procedures whereby all foreign children must be treated as children under the law, first and foremost, regardless of their status, and assisted by the Department of Social Development to be placed at places of safety and brought before Children's Courts for their best interests to be determined. The right of children not to be held in immigration detention is mostly complied with, except in reported cases of airport detentions, and the detention facility in Musina at the border with Zimbabwe, where children are still detained amongst adults because of lack of capacity, or will, by the Department of Social Development in Musina to comply with their obligations and remove children from the facility.

5. Conclusion

South Africa's Constitution provides for basic rights for all in the country, legally or otherwise including the right to security. In practice many of these rights have yet to be realised. The criminalisation of migration continues to pose major challenges to the protection and enjoyment of human rights of migrants which is cause for concern given that South Africa is a major migration destination within the region. Despite these concerns there have been some positive measures that have been introduced, some of which have helped to alleviate some of the rights challenges experienced by migrants in South Africa.