

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**An analysis of the South African legal framework applicable to the arrest and
detention of immigrants due to their illegal status.**

A mini-thesis submitted in partial fulfilment of the requirements for the degree of Master of Law (LLM)

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DECLARATION

I declare that '*An analysis of the South African legal framework applicable to the arrest and detention of immigrants due to their illegal status*' is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Wendy Nomzamo Sango



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Praises to the almighty God for carrying me through this journey, it was not easy the trials and tribulations were at times unbearable, but the Lord did not forsake me.

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DEDICATION

Dedicated to my beautiful, loving daughter Lisakhanya Reoatlotla Sango, I am deeply indebted to you. To my amazing grandmother, I pray that her dream of attending my graduation will be finally fulfilled, thank you for believing in me Mamthembu.



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Keywords

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Discretion



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ABBREVIATIONS AND ACRONYMS

SAPS	South African Police Service
STATS-SA	Statistics South Africa
SADC	Southern African Development Community
ACAA	Aliens Control Amendment Act
SANDF	South African National Defence Force
DHA	Department of Home Affairs
IPID	Independent Police Investigative Directorate
NPA	National Prosecuting Authority
SAHRC	South African Human Rights Commission
NGO	Non-government organisation



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CHAPTER I

INTRODUCTION AND OVERVIEW OF THE SOUTH AFRICAN LEGAL FRAMEWORK APPLICABLE TO THE ARREST AND DETENTION OF IMMIGRANTS DUE TO THEIR ILLEGAL STATUS

1. INTRODUCTION

The word ‘immigration’ is derived from the word ‘immigrant’ and denotes the act of a foreign national person entering a country to attain permanent residence.¹ The correlative term ‘emigration’ denotes the act of such persons leaving their former or home country.² Despite these clear terms, there are unfortunately, some South Africans who use derogatory terms such as ‘amakwerekwere’ towards immigrants to indicate ‘other’, and they do so frequently.³ Persons who use these terms in reference to foreign nationals usually do so irrespective of the person’s actual legal status in the country.

Arguably, the use of derogatory terms may be an indication of a xenophobic attitude towards foreign nationals from other African countries as they are not used in respect of nationals from other continents. It also seems that in discriminating against Africans from other countries no distinction is made between documented and undocumented foreign nationals.⁴ The Immigration Act 13 of 2002 (Immigration Act) defines a ‘foreign national’ as a person who is neither a citizen nor a resident, but is not an illegal immigrant.⁵ The Immigration Act, describes an ‘illegal immigrant’ as a foreign national who has entered South Africa without proper authorisation or by fraudulent means.⁶ It adds that an illegal immigrant is someone who remains in South Africa beyond the date specified by his

¹ Bouvier J ‘A law dictionary, Adapted to the Constitution and Laws of the United States’ (1856).

² Loue S ‘Defining the Immigrant: Handbook of Immigrant Health’ (1998) 30.

³ Nixon R ‘Port Elizabeth South Africans Only’ available at The Atlantic 1 November 2001 2 available at <https://theatlantic.com/magazine> (accessed 5 May 2020).

⁴ Schaeffer P & Mulugeta S ‘A theoretical note on the relationship between a documented and undocumented migration’ (2011) A documented foreign national is a person who is in the country legally and has followed the correct and legal procedure to enter the country. An undocumented foreign national is a person who does not possess the valid legal documents to enter the country.

⁵ Section 1 (xvii), Immigration Act 13 of 2002.

⁶ Section 1 (xviii), Immigration Act 13 of 2002.

or her visa or permit, or who engages in activities beyond the scope of what is duly authorised by his or her permit.⁷

In 2019, the Ministers of Home Affairs, Public Works and the South African Police Service (SAPS)⁸ met to reassess the Immigration Act and to discuss their respective roles and responsibilities as well as to consider legislation regarding foreign nationals who are illegally in the country. The said legislation could not be passed without consideration of its viability for implementation, given resource and capacity constraints.⁹ The aforementioned departments denoted that there was insufficient public resources to accommodate foreign nationals who were illegally in South Africa.¹⁰ Each department had challenges which hinder the improvement of the processes for arrests, detention and accommodation issues for illegal foreign nationals.¹¹ This might be the cause of foreign nationals enduring poor treatment at state facilities as there are insufficient funds for these purposes and the facilities exceed their capacity. These challenges may cause frustration to law enforcers and can affect how they treat foreign nationals.

The Public Works Minister had to move towards purpose-built state-owned properties to reduce costs of leasing premises from private entities.¹² It was envisaged by the Public Works Department that the purchasing of properties would improve the maintenance and management of the facilities and reduce overcrowding. Funds that were previously used to pay rent would be used for the development of the state-owned facilities. The SAPS indicated that it experienced budget strains as they had to provide meals to the rapidly increasing number of foreign nationals in detention.¹³ The Minister of the SAPS further stated that the rapidly increasing number of foreign nationals who are illegally in the country became a challenge requiring real attention.¹⁴ The process of the arrest and detention of foreign nationals has been affected due to the depleted state resources.

⁷ Section 26, Immigration Act 13 of 2002.

⁸ Parliamentary Monitoring Group Report 'Immigration Amendment Bill' 28 May 2018 2 available at <https://democracyworks.org.za> (accessed 15 April 2020).

⁹ Parliamentary Monitoring Group Report (2019) 3.

¹⁰ Parliamentary Monitoring Group Report (2019) 4.

¹¹ African News Agency 'South African government to deport foreign nationals' 6 November 2020 2 available at <https://www.polity.org.za> (accessed 15 December 2020).

¹² Parliamentary Monitoring Group Report (2019) 5.

¹³ African News Agency (2020) 3.

¹⁴ Parliamentary Monitoring Group Report (2019) 5.

Recently there have been media reports that there are long queues of ‘illegal’ foreign nationals at the Beitbridge border post in Musina. They were without Covid-19 certificates and passports but wanted to enter South Africa.¹⁵ Such reports may cause fear and a sense of antipathy towards foreign nationals, who may be perceived as a threat to already limited available resources and the health of citizens. These fears may also contribute to the poor treatment of foreign nationals when they are arrested and detained. There are many cases which illustrate the aforesaid. One recent example, is when many Zimbabweans, during the December 2020 lockdown occasioned by the Covid-19 pandemic, headed to South Africa to access essential goods.¹⁶ One Zimbabwean man in detention, who asked to remain anonymous for his safety, told a news reporter how he illegally entered South Africa out of sheer desperation and was later arrested and detained.¹⁷ The man stated that he and 19 other foreign nationals are detained in inhumane conditions in a single cell at Loop Street police station as they await deportation to their home countries.¹⁸ The major pressure which the influx of foreign nationals puts on state resources, is clearly a contributor to (though not a justification for) their poor treatment when arrested and detained.¹⁹

The Zimbabwean man mentioned above appeared in court and was sentenced to three months imprisonment with the instruction from the Department of Home Affairs that he be deported back to Zimbabwe after his release.²⁰ He explained his horrific experience at the holding cells as he was sharing a cell with sick people who needed medical attention. He further stated that they did not receive basic essentials such as clothes and toiletries and they were not allowed any visitors. This is one of many cases which demonstrate that the arrest, detention and general treatment of foreign nationals who find themselves illegally in South Africa, is often inhumane and in violation of the most fundamental rights of persons.

¹⁵ Daniels L ‘South Africa reopens Beitbridge-but Zimbabwe’s latest lockdown extension keeps travel ban in place’ Business Insider South Africa 16 February 2021 2 available at <https://www.businessinsider.co.za> (accessed 15 March 2021).

¹⁶ Patrick A ‘Beitbridge chaos subsides as thousands of Zimbabwe residents re-enter SA’ Times Live 8 January 2021 1 available at <https://www.timeslive.co.za> (accessed 10 March 2021).

¹⁷ Bhengu L ‘More than 40 illegal foreigners arrested in Cape Town’ Sowetan Live 28 April 2020 2 available at <https://www.sowetanlive.co.za> (accessed 15 May 2020).

¹⁸ Kunene N ‘Illegal immigrants held in police cell for months’ The Witness 9 January 2019 2 available at <https://www.news24.com/witness> (accessed 15 March 2020).

¹⁹ The United Nations Refugee Agency ‘South Africa: Treatment by society and authorities of Black Africans’ (2018).

²⁰ Bhengu L (2020) 3.

Foreign nationals who are illegally in South Africa, are to be detained for not more than 48 hours at police cells and then have to await their deportation process at the Lindela Center that accommodates foreign nationals.²¹ Failure of following this procedure is a violation of foreign nationals' human rights. It is the lack of following due procedures that leads to state officials abusing foreign nationals while in detention. The Constitution states that everyone must be treated with dignity.²² This includes foreign nationals.

2. BACKGROUND

Many immigrants come to South Africa and for economic reasons.²³ Despite the criticism of xenophobic attacks in the country, economists state that South Africa with its huge and highly developed economy, remains Africa's biggest magnet for migrants.²⁴ While many work and reside in South Africa, there appears to be an increase in the number of immigrants either entering the country or working without the required documents.²⁵ Recently, at the Beitbridge Border Post, foreign nationals illegally entered South Africa. They alleged that they only came to buy basic supplies as goods are expensive and inaccessible in Zimbabwe. Though the aforementioned justification for the entry into South Africa may be understandable given the dire situation in Zimbabwe, their presence in South Africa is still illegal if they lack the required documentation to visit the country. They will therefore be treated as illegal immigrants. Furthermore, they may also be regarded by some as persons who are solely in the country for their own economic reasons and therefore deserving of poor treatment. Unlike legal residents, immigrants who are illegally in the country tend to live under desperate conditions that may have economic, social and especially psychological ramifications.²⁶

According to Statistics South Africa (STATS), the number of foreign-born people living in South Africa in 2020 was around 3.9 million. This includes both the documented and undocumented foreign nationals.²⁷ Despite the dearth of reliable sources, academics estimate that in a population of 47

²¹ Munyarazi N 'Strategies Migration Services South Africa' (2017) 14.

²² Section 10, Constitution of the Republic of South Africa (1996).

²³ FIDH 'Undocumented and other vulnerable migrants in South Africa' (2008) 9.

²⁴ Francis A 'South Africa's xenophobic attacks: Why migrants won't be deterred' BBC News 26 September 2019 3 available at <https://www.bbc.com/news/> (accessed 10 November 2020).

²⁵ FIDH (2008) 9.

²⁶ Kunene N (2019) 3.

²⁷ Clifford C 'Fact check: Are there really 15 million undocumented foreigners in South Africa?' Eyewitness News 16 March 2021 available at <https://www.ewn.co.za> (accessed 4 June 2021).

million, 500 000 thousand are undocumented foreign nationals.²⁸ Most migrants entering South Africa, whether legally and illegally, come from countries of the Southern African Development Community (SADC).²⁹ The highest numbers come from Mozambique, Zimbabwe and Lesotho, with an increase of Zimbabweans in recent years due to the political situation in their country.³⁰ There is thus a notable number of foreign nationals in South Africa, many are undocumented and they hail mostly from the above mentioned countries as well as from Swaziland, Malawi and Namibia.³¹

Since it appears that many immigrants may be residing in South Africa illegally there is a need for some regulation. The Aliens Control Amendment Act (ACAA) 76 of 1995 was adopted in 1995 primarily to serve this purpose. During the apartheid era South Africa had a strict border security programme to control entry into the country. The country's land borders had electric fences and regular army patrols.³² However, the strict border security was not limited to keeping foreign nationals from entering the country. It also restricted Black South Africans from entering the country.³³ The ACAA was repealed as it considered people from the former homelands Transkei, Ciskei, Bophuthatswana and Venda, foreign nationals and thus discriminated against them.

The ACAA was replaced by the Immigration Act 13 of 2002, almost six years after being tabled in Parliament.³⁴ In the post-apartheid era South Africa had to address the history of discrimination and simultaneously had to involve the South African National Defence Force (SANDF) to guard the ports of the country. SANDF is, however, not the only government institution that deals with matters of border security. Various other government institutions also play vital roles in border control and security including the Department of Home Affairs, Trade and Industry, Transportation, Health, SAPS and Agriculture. The legislative changes seem to reflect the seriousness with which the South African government strove to implement a humane and fair immigration policy.³⁵ Yet, despite these significant changes in the law, there has not been notable improvements in the way in which immigrants are treated as arrestees and detainees. Countless media reports attest to this. It therefore

²⁸ Crush, Williams and Peberdy, 'Migration in Southern Africa' (2005) 12.

²⁹ Oucho J 'Migration in Southern Africa: Migration Management Initiatives for SADC Member States' (2007) 8.

³⁰ FIDH (2008) 12.

³¹ Moyo K, 'South Africa Reckons with its status as top immigration destination, apartheid history and economic challenges (2021) 2.

³² Department of Home Affairs, 'Boarder Management Authority' 2021 (4).

³³ Klaaren J & Ramji J 'Evaluating South African Immigration Policy after Apartheid' (2001) 48 36.

³⁴ Section 10, Immigration Act 13 of 2002.

³⁵ Campbell EK 'Reflection on Illegal immigration in Botswana and South Africa' (2006) 21.

becomes necessary to analyse these laws to understand their appropriateness in regulating illegal immigration in the real circumstances we face in contemporary times.

The Immigration Act, presented many ways in which to obtain temporary residence in South Africa for purposes of work, study, visiting, meeting relatives, applying for asylum and doing cross-border travels.³⁶ Despite these legitimate ways to obtain residence in South Africa, many immigrants enter the country illegally and are undocumented.³⁷ A starting point at understanding the reason why foreign nationals often avert these laws may be to analyse them closely. The reality is that many foreign nationals are arrested and detained at the Lindela repatriation centre.³⁸ This has happened on a continuous basis. Undocumented migrants awaiting deportation are initially detained in what have been termed repatriation centres, deportation centres, and detention centres.³⁹ While there is no clear distinction (in law and practice) between the three facilities, they however do serve the same purpose which is to house undocumented migrants who are awaiting deportation.⁴⁰

An undocumented migrant may be detained in any of these centers as there are no required conditions to be in a specific centre. This too requires further research which falls outside of the scope of this thesis. This notwithstanding, there is a need to create awareness around the issue. Many immigrants endure difficulties when they are detained under the immigration laws, awaiting deportation in repatriation centers and are unable to contest the validity of their detention as they do not have access to legal aid.⁴¹ Immigrants' rights are infringed upon at the repatriation centres.⁴² They are deprived of their basic essentials to live with dignity while in detention.⁴³ These reported conditions resemble the conditions of prisons in South Africa. While the argument is not that immigrants deserve better treatment as they are strictly speaking not convicted offenders, cognizance must be taken of the fact that in South Africa persons who are in conflict with the law are often subjected to very poor living conditions and treatment inconsistent with their fundamental rights. Immigrants are further victimised

³⁶ Immigration Act 13 of 2002.

³⁷ Velcamp T & Shaw M 'Please GO HOME and BUILD Africa': Criminalising Immigrants in South Africa, *Journal of Southern African Studies* (2016) 4.

³⁸ FIDH (2008) 20.

³⁹ Kaziboni A 'The Lindela Repatriation Centre, 1996-2014. Applying theory to the practice of human rights violations' SA Crime Quarterly Report (2018) 49.

⁴⁰ Kaziboni A (2018) 50.

⁴¹ FIDH (2008) 22.

⁴² FIDH (2008) 20.

⁴³ Kunene N (2019) 5.

and ill-treated because of their nationality.⁴⁴ This occurs even though the right to human dignity applies to everyone despite their nationality.⁴⁵

The poor treatment and violation of immigrants' fundamental rights is ironic in South Africa, where the supreme Constitution, particularly section 35, applies to everyone who is in conflict with the law, including immigrants. Furthermore, immigrants should be made aware of their rights in terms of section 35 of the Constitution of South Africa.⁴⁶ This was confirmed by the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs and Others*.⁴⁷ The Court declared section 34(1)(b) and (d) of the Immigration Act invalid and inconsistent with sections 12(1) and 35(2)(d) of the Constitution.⁴⁸ It held that these sections of the Immigration Act had unconstitutionally permitted the detention of foreign nationals for a period of 30 days without automatic judicial intervention, and an extension of the initial period of detention without the detainee appearing before the court in person.⁴⁹

The Court's decision may be supported as the Constitution provides that no one may be detained for more than 48 hours before appearing before a court. This fundamental right may not be limited because of nationality or legal status in a country. The existence of provisions like section 34(1)(b) and (d) is surprising in the light of South Africa's criminal justice history where practices like detention without trial which were used as instruments of oppression, are heavily criticised. The fact that these provisions in the Immigration Act were only challenged and declared unconstitutional in recent years speaks volumes about the lack of progress insofar as South Africa's immigration laws are concerned.

The Constitutional Court ordered that any foreign national person detained under section 34(1) of the Immigration Act must appear before a court in person within 48 hours of the time of arrest.⁵⁰ The Court further ordered that foreign nationals who are in detention at the time of its order be brought

⁴⁴Campbell EK (2006) 22.

⁴⁵ FIDH (2008) 19.

⁴⁶ Section 35, Constitution of the Republic of South Africa, 1996.

⁴⁷ *Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT38/16) [2017] ZACC 22.

⁴⁸ *Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT38/16) [2017] ZACC 22.

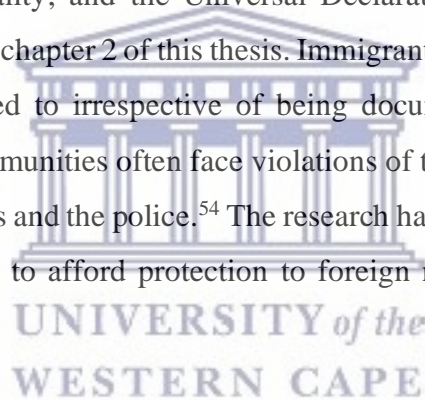
⁴⁹ *Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT38/16) [2017] ZACC 22.

⁵⁰ *Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT38/16) [2017] ZACC 22.

before a court within 48 hours of the order or on such later date as may be determined by a court.⁵¹ This is a stentorian order and means that foreign nationals will not be kept at holding cells unlawfully as they are protected by the law against such acts. This is essentially an enforcement of the rights in section 35 of the Constitution.

Arguably, immigrants also have the right to have a legal practitioner assigned to them by the state and at the states' expense if they cannot afford one for themselves.⁵² This puts foreign nationals on the same footing as South Africans and this denotes the court's message about the fundamental duty to protect the rights of vulnerable foreign nationals.

Apart from protection in terms of domestic law, immigrants are protected by international law. The following instruments are just some of the many, which affords foreign nationals in a country protection against discrimination: the African Charter on the Rights and Welfare of the Child; the European Convention on Nationality; and the Universal Declaration of Human Rights. Greater discussion of these laws follows in chapter 2 of this thesis. Immigrants ought to enjoy the fundamental rights that every citizen is entitled to irrespective of being documented or undocumented.⁵³ In practice, however, immigrant communities often face violations of their rights and are the victims of abuse from immigration authorities and the police.⁵⁴ The research has thus sought to critically analyse the legal framework which ought to afford protection to foreign nationals when they are in state custody due to arrest or detention.



3. PROBLEM STATEMENT

Immigration officers, police officers and members of the South African Defence Force (SANDF) do not always follow the proper procedures during the arrest and detention of immigrants.⁵⁵ Given the vulnerable position in which many immigrants find themselves in South Africa, this issue warrants closer scrutiny. In terms of section 34 of the Immigration Act, an immigration officer may arrest an

⁵¹ Gordon S 'Immigration policies that include or exclude: A South African public opinion study of immigration policy preferences, *Social Dynamics*' (2016) 42 446.

⁵² Section 35(2)(c), Constitution of the Republic of South Africa 1996.

⁵³ Gordon S (2016) 446.

⁵⁴ Gordon S (2016) 448.

⁵⁵ Hiropoulos A, 'Migration and detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals' (2017) 15.

‘illegal immigrant’ or cause him or her to be detained pending the deportation process.⁵⁶ Given persistent complaints about inhuman treatment and harassment, it must be questioned whether granting immigration officers’ such powers in the absence of any other clear directions, do suffice.

Section 34 further states that when an immigrant is arrested and detained, they are to be informed in writing of the decision to deport them and should be informed of the right to appeal this decision.⁵⁷ Immigrants ought to be informed of their rights upon arrest or immediately after arrest in a language that they understand.⁵⁸ There, however, appears to be a loophole in this section because the detained immigrant has no automatic right to appear before the court within 48 hours of being arrested. In terms of section 34(1)(b), a detained foreigner himself ‘may at any time request’ of an officer that his detention for the purpose of deportation be confirmed by warrant of a court. Such warrant, if it is not issued within 48 hours of such request, shall result in the immediate release of such foreigner.⁵⁹ This is problematic as not many detainees will know that they have the right to make such a request. Additionally, such requests have not been complied with for many years.⁶⁰ The same holds true of the failure of an immigration officer to comply with other provisions too. Section 7(3) criminalises an immigration officer’s failure to provide in writing the rights of an immigrant prior to deportation. On conviction such an officer may be liable to a fine or imprisonment not exceeding 12 months.⁶¹ The violation of immigrants’ rights persists. This too ought to be analysed to determine why the law appears to be ineffective.

At first glance these provisions appear to afford protection to immigrants, but non-profit organisations have confirmed that the procedures are in fact not strictly followed, as immigrants have made allegations that certain rights are infringed upon.⁶² To this end, it seems that the legal provisions may be inadequate or inappropriate for the purpose of protecting immigrants’ rights. A closer analysis of the law as well as other relevant issues which may contribute to the infringement of rights, become necessary.

⁵⁶ Section 34, Immigration Act 13 of 2002.

⁵⁷ Strategies Migration Services South Africa ‘The rights of illegal foreigners not to be detained for more than 48 hours and without just cause’ (2017) 7.

⁵⁸ Section 34(1)(c), Immigration Act 13 of 2002.

⁵⁹ Strategies Migration Services South Africa (2017) 10.

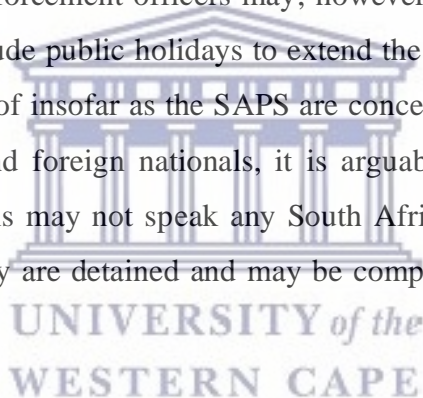
⁶⁰ Hiropoulos A (2017) 17.

⁶¹Section 7(3), Immigration Amendment Act 19 of 2004.

⁶² Crush J. & Williams V eds ‘Policing Migration: Immigration Enforcement and Human Rights in South Africa’ Waterloo, ON: Southern African Migration Programme. SAMP Migration Policy Brief No. 14 (2004) 10.

In terms of the Immigration Act, an ‘illegal’ immigrant must be informed in writing that he/she is to be deported.⁶³ The notice must be in a language that the immigrant understands and the reason for deportation must be provided.⁶⁴ The detainee must be aware that he/she may appeal the decision for deportation in a court of law.⁶⁵ These provisions are reasonable, but they do not provide any guidance in instances where suitable translators are not readily available. The issue of non-compliance is also not addressed. This is a significant omission given the extent to which these provisions are said to be overlooked by immigration officers.

Despite the Court’s ruling in *Lawyers for Human Rights* that a person who is detained for the purposes of deportation must be brought before a court, in person, within 48 hours from the time of arrest or the time at which they were taken into custody there is often non-compliance with this ruling.⁶⁶ A delay is only legally permissible when the 48 hour period falls on a day that is a public holiday or after court hours.⁶⁷ Some law enforcement officers may, however, deliberately choose to conduct arrests during periods, which include public holidays to extend the detention period of immigrants. Similar practices are not unheard of insofar as the SAPS are concerned. While such practices may be unlawful towards nationals and foreign nationals, it is arguable that the latter may be more vulnerable. Some foreign nationals may not speak any South African languages, have no support networks to assist them while they are detained and may be completely unaware of their rights in South Africa.



Once an illegal immigrant appears before the court, the court’s warrant officer may or may not confirm the detention.⁶⁸ Should the detention not be confirmed the immigrant must be released immediately.⁶⁹ Should the immigration officer want to extend the detention period an application to the court must be made.⁷⁰ There is some vagueness about this provision which may impact negatively on the immigrant. Upon making such application, the detainee must be informed of the extension and

⁶³ Section 34(1)(c), Immigration Act 13 of 2002.

⁶⁴ Section 34 (1)(c), Immigration Act 13 of 2002.

⁶⁵ Section 34(1)(a), Immigration Act 13 of 2002.

⁶⁶ Chapman J ‘Migration-Related Arrest, Detention, and Deportation’ Scalabrini Institute for Human Mobility in Africa 4 August 2019 available at <https://www.sirhma.org.za> (accessed 20 July 2020).

⁶⁷ Section 34(2), Immigration Act 13 of 2002.

⁶⁸ Section 34(1)(b), Immigration Act 13 of 2002.

⁶⁹ Section 34(1)(b), Immigration Act 13 of 2002.

⁷⁰ Section 34 (1)(d), Immigration Act 13 of 2002.

may in writing apply to appear before the court.⁷¹ This may be an indirect tactic to keep the immigrant in detention especially when the immigrant is illiterate or lacks the knowledge or means to apply to the court for an appearance. There will also be no state official appointed to help with the drafting the applications.

The immigration officer must provide reasons in good faith as to why the period should be extended and should the court decide to extend it; the period for detention must not exceed 120 days.⁷² The question that arises then is, is this an appropriate period given the extensive impact that the limitation of the right to freedom of movement has on detained persons in general. It seems that the discretion given to the immigration officer is too broad and this does not prevent malicious motives. Perhaps the legislation needs to be more prescriptive of the instances in which extended detention may be justifiable. The South Gauteng High Court has further clarified in *Kumah and Others v Minister of Home Affairs and Others* that deportation cannot be delayed because of administrative incapacity on the part of officials.⁷³ The detainee during this period has the right to look for legal advice or representation. When the deportation process is finalised, the detainee must be informed, and the detainee can be deported.⁷⁴

If a person is deported from South Africa, they are likely to be declared an ‘undesirable person’ by the Director-General of the Department of Home Affairs and this means the person would be banned from re-entering South Africa for between twelve months to five years.⁷⁵ This is a harsh penalty which may have serious implications for the rights of an immigrant who may have established familial and other roots in the country. The law should therefore make adequate provision for an immigrant who faces this risk to assert his rights. A need for such provision was demonstrated in *Nandutu and Others v Minister of Home Affairs and Others*. *In casu*, the immigrant was issued a visitor’s visa in terms of section 11(1) of the Immigration Act in Uganda to enter South Africa on condition that her visit would not exceed 30 days.⁷⁶ She was already three months pregnant when the visa was issued and the purpose of her visit was to join the father of her child, a permanent resident of South Africa. Within the 30 days prescription the couple got married and the woman applied for a spousal visa in

⁷¹ Section 34(1)(a), Immigration Act 13 of 2002.

⁷² Section 34(1)(d), Immigration Act 13 of 2002.

⁷³ *Kumah and Others v Minister of Home Affairs and Others* 2016 4 All SA 96.

⁷⁴ Section 35, Immigration Act 13 of 2002.

⁷⁵ Section 30, Immigration Act 13 of 2002.

⁷⁶ *Nandutu and Others v Minister of Home Affairs and Others* [2019] ZACC 24.

terms of section 11 (6) of the Immigration Act.⁷⁷ It was in the interests of justice that the spousal visa be granted for familial roots, in addition the court emphasised the importance of differentiating between different visas that attach different requirements, serve different purposes, and affect holders differently.⁷⁸ The case demonstrated the complexities which people may face when officials do not apply their mind to the real implications of their decisions regarding immigrants' plight.

Immigrants are often not informed that when an immigration officer has found a person to be an illegal foreigner, the person may upon receipt, review this decision within 10 working days to the Director-General.⁷⁹ The Director-General shall review the matter and confirm, reverse or modify the decision made by the immigration officer.⁸⁰ Further, if the immigrant is not satisfied with the decision of the Director-General for grievances purposes the immigrant may within 10 days appeal to the Minister of Home Affairs.⁸¹ There are a number cases where the immigrants' application to appeal for deportation was rejected by the Minister of Home Affairs. In *Ruta v Minister of Home Affairs*, Mr Ruta was a national of Rwanda who entered South Africa illegally.⁸² More than a year later he was arrested in Pretoria for road traffic violations.⁸³ He was tried and imprisoned for these offences, while in prison, the Department of Home Affairs found that he did not have a visa therefore he had to be deported back to Rwanda.⁸⁴ He countered this decision by applying for asylum status under the Refugees Act 130 of 1998, but his application was opposed.⁸⁵ In addition, a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority and a detained person shall be entitled at any time to take proceedings before a judicial or alternatively, any other law authority to challenge the lawfulness of his/her detention.⁸⁶ These provisions may be essential to the fulfilment of some immigrants' most fundamental rights. It is however not clear how the law ensures the awareness and understanding of these provisions in respect of immigrants.

⁷⁷ *Nandutu and Others v Minister of Home Affairs and Others* [2019] ZACC 24.

⁷⁸ *Nandutu and Others v Minister of Home Affairs and Others* [2019] ZACC 24.

⁷⁹ Section 8(4), Immigration Amendment Act 19 of 2004.

⁸⁰ Section 8(5), Immigration Amendment Act 19 of 2004.

⁸¹ Section 8(6), Immigration Amendment Act 19 of 2004.

⁸² *Ruta v Minister of Home Affairs* [2018] ZACC 52.

⁸³ *Ruta v Minister of Home Affairs* [2018] ZACC 52.

⁸⁴ *Ruta v Minister of Home Affairs* [2018] ZACC 52.

⁸⁵ *Ruta v Minister of Home Affairs* [2018] ZACC 52.

⁸⁶ United Nations Human Rights Office of the High Commissioner Annual report: Administrative detention of migrants (2003) 34.

The above constitutes only some of the issues in one of the main pieces of legislation which deals with immigrants in South Africa. There are more issues which the study explores. Beyond the legislative framework which deals with immigrants, Chapter 2 of South Africa's 1996 Constitution guarantees to all persons, including citizens and those documented and undocumented, fundamental and procedural protections. Chapter 2 also, expansively delineates the rights of immigrants, and provides for their protection from unconstitutional conduct and human rights violations.⁸⁷

The persistent violation of the fundamental rights of immigrants raises a question of how the immigration laws in South Africa can be effectively implemented to uphold the rights of immigrants. States do have the right to regulate migration and to deport immigrants if they are in the country illegally, but this right is not absolute.⁸⁸ This right must not be contradictory to domestic laws and the international standards. Hence all the procedures need to be adhered to and exhausted before the deportation process is initiated. The failure to follow the procedures makes it easier for the Department of Home Affairs together with the public officials involved in the arrest and detention of immigrants to manipulate the system and take advantage of immigrants by victimising them. Police use of lethal and excessive force, including torture, resulted in several deaths.⁸⁹ Police officials even request bribes to release foreign nationals to escape the deportation process.⁹⁰ While deportation may in many instances be inevitable, it need not occur in violation of the fundamental rights of any person.

During 2017, the Independent Police Investigative Directorate (IPID) received 7,014 complaints ranging from killings to assault, recommended prosecution in 1,140 cases, and arrested 124 police officers.⁹¹ Of the cases recommended for prosecution, the National Prosecuting Authority (NPA) prosecuted nine cases, dropped 26, and left 1,105 pending at year's end.⁹² These are statistics from the year 2017/2018 and they are rather alarming as this demonstrates that of the cases that involve public officials less than ten percent are prosecuted. These statistics were released after the Constitutional Court judgment in the *Lawyers for Human Rights* case was handed down.⁹³ This may

⁸⁷ Constitution of the Republic of South Africa, 1996.

⁸⁸ Note on migration and the principle of non-refoulement (2018) 304.

⁸⁹ South Africa Human Rights Commission Report (2017) 2.

⁹⁰ SAHRCR (2017) 8.

⁹¹ SAHRCR (2017) 13.

⁹² SAHRCR (2017) 14.

⁹³ *Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT38/16) [2017] ZACC 10 BCLR 1242 CC, SA 480.

leave room for police officials to take advantage of the system as there appears to be negligible repercussions for their actions.

The victimisation of detained immigrants increased at detention facilities in 2018.⁹⁴ Foreign nationals struggled to access justice services and police protection.⁹⁵ Interviews were conducted with the detainees at the Lindela Centre where it emerged that detainees were only served with notices of deportation months after their arrest and detention.⁹⁶ Most people had been detained at police stations for a significant period and their cases were often not properly documented before being transferred to Lindela repatriation centre.⁹⁷ A similar situation was observed by the South African Human Rights Commission (SAHRC) with persons released from correctional facilities who, upon release, were made to wait for a month at the Lindela centre before they were collected for deportation by immigration officers.⁹⁸ This is in contravention of the legally prescribed time-frames.

Detention periods appear to continue to be incorrectly calculated despite directives from the courts on this issue in the case of *Lawyers for Human Rights*.⁹⁹ The SAHRC observed that the number of days is calculated as commencing on the date on which the undocumented migrant was served with a notice of deportation in terms of the Regulations. The 30-day period should commence when the person is first arrested and detained.¹⁰⁰ This detention period is applicable when a person is taken into custody for examination for a period not exceeding 48 hours, unless that period falls on a non-court day.¹⁰¹ Immigrants are also not informed about their rights in a language that they understand, therefore this makes it easier for police officials to detain them for long periods of time with the immigrant unaware of what procedures to follow to be released.¹⁰² The research considers the treatment of foreign nationals in South Africa in instances when they are arrested and detained due to their illegal status in South Africa.

⁹⁴ McDonald W.F 'The criminal victimization of immigrant' Springer (2018) 8.

⁹⁵ Hiropoulos A (2017) 14.

⁹⁶ SAHRCR (2017) 60.

⁹⁷ SAHRCR (2017) 56.

⁹⁸ SAHRCR (2017) 98.

⁹⁹ *Lawyers for Human Rights v Minister of Safety and Security (5824/2009) [2009] ZAGPPHC 57.*

¹⁰⁰ SAHRCR (2017) 102.

¹⁰¹ Hiropoulos A, 'Migration and detention in South Africa: A review of the applicability and impact of the legislative framework on foreign nationals' (2017).

¹⁰² SAHRCR (2017) 116.

4. RESEARCH QUESTIONS

Published reports continuously emphasise the inhumane treatment that is experienced by immigrants at the Lindela repatriation centre and detention centres.¹⁰³ Immigrants have on several occasions alleged that the detention centres are overcrowded, with poor sanitation and hygiene and most endure hostile treatment by police officials.¹⁰⁴ A closer perusal of the laws relevant to illegal immigrants raises the following questions:

- (1) How may the laws applicable to illegal foreign nationals who are arrested and detained, afford them reasonable protection which is consistent with their fundamental rights?
- (2) How may the law reasonably ensure the accountability of state officials involved in the enforcement of immigration laws?

5. SIGNIFICANCE OF THE RESEARCH

The research is aimed at focusing specifically on the arrests and detention of illegal immigrants and related issues which arise due to the applicable laws. Though much research exists on xenophobia and even immigration laws, the study is significant due to its focus on issues of detention which appear to stem from the law and cannot be solely attributed to the enforcers of the law.

6. LIMITATIONS OF STUDY

Though issues relating to xenophobia may be referred to, the primary focus will be on custodial issues related to immigrants who are illegally in South Africa. Issues pertaining to children of undocumented immigrants, may be referred to, but in-depth discussions are beyond the scope of this thesis.

7. METHODOLOGY

The research is desktop based. International law instruments and domestic laws will be considered. Relevant policies and secondary sources will also be used to support the study.

¹⁰³ Morten LM, 'Living for home: policing immorality among undocumented migrants in Johannesburg' (2004) 63 *African Studies* 175.

¹⁰⁴ Morten LM (2004) 188.

8. LITERATURE REVIEW

An 'illegal immigrant' is a person who enters a country of which he/she is not a citizen without demonstrating at the port of entry that he/she possesses legal documents that justify such entry.¹⁰⁵ For years, some South Africans have labelled people from African countries as 'illegal foreigners' irrespective of whether or not they have legal status in South Africa. When referring to illegal foreigners, some South Africans tend not to distinguish between documented and undocumented immigrants.¹⁰⁶ This was visible in 2008 when xenophobic attacks erupted, and immigrants were physically attacked by some South Africans following allegations that people from neighbouring countries are only in South Africa to 'steal jobs'.¹⁰⁷ Several immigrants were brutally murdered during these attacks. Immigrants' shops were looted.¹⁰⁸ These attacks indicated the hostility by some South Africans, and it is possible that these sentiments are shared by some state officials who work in the field of immigration. According to the Immigration Act an 'illegal foreign national means a foreigner who is in the Republic in contravention of this Act and includes a prohibited person'.¹⁰⁹ Though the legal definition is important, it does not justify the violation of human rights of anyone.

Prior to the introduction of the Immigration Act, many assumed that South Africa will be a peaceful country that will show humanity towards all people, yet many immigrants experienced grave violations of their rights in South Africa.¹¹⁰ Black Africans endured police brutality through Operation Crackdown, which was a crime blitz that began in March 2000.¹¹¹ The operation was an initiative by SAPS to 'clean up' the streets of certain crime-infested areas.¹¹² This initiative focused mainly on the Gauteng province, where police officials arrested a number of illegal immigrants. The operation resulted in the arrests of immigrants and suspected Black South Africans, many of whom reported that they were abused and tortured.¹¹³ The issue escalated and the South African Human

¹⁰⁵ Campbell EK (2006) 12.

¹⁰⁶ Chapman J (2019) 5.

¹⁰⁷ Cook M & Griffith K 'Introduction to a special issue on the impact of immigrant legislation initiatives: International prospective on immigration and the world of work' (2018) ILR Review 71(4) 812.

¹⁰⁸ Cohen M 'Xenophobic attacks in South Africa leave migrants living in fear' (2009) 5.

¹⁰⁹ Immigration Act 13 of 2002.

¹¹⁰ Klaaren J & Ramji J 'Evaluating South African Immigration Policy after Apartheid' (2001) 48 42.

¹¹¹ Klaaren J & Ramji J (2001) 40.

¹¹² Crush J & Williams V 'Policing Migration: Immigration Enforcement and Human Rights in South Africa' Waterloo, ON: Southern African Migration Programme. SAMP Migration Policy Brief No. 14 (2004) 12.

¹¹³ Klaaren J & Ramji J (2001) 41.

Rights Commission assisted with the increasing number of cases as the majority of the immigrants complained that their rights were infringed upon during the Operation Crackdown.¹¹⁴ Operation Crackdown provided a rather stark example of the similarities between South Africa's current migration policing techniques and the policing of the pre-1994 apartheid state.¹¹⁵ It was alarming and concerning that the police raids affected the township areas, which predominantly consisted of Black South Africans.

Schneider and Ingram identify the construction of target populations as 'cultural characterisations or popular images of the persons or groups whose behaviour and well-being are affected by public policy'.¹¹⁶ Groups so constructed are soft 'targets' because public officials can inflict punishment on negatively constructed groups who have little power to retaliate.¹¹⁷ During apartheid, Black South Africans were considered a target hence it was easier for police officials to suspect, a Black person to be an illegal immigrant. Scholars such as Schneider and Ingram believe that groups such as the African Black foreign nationals are 'soft targets' for oppression because public officials can inflict punishment on them because they have little power to retaliate.¹¹⁸ Unfortunately, Operation Crackdown did not only affect foreign nationals, South Africans were also suspected of being illegal immigrants and in some instances, they had to provide identity documents to prove that they were citizens.¹¹⁹ South African legislation does allow for the arrest of suspected illegal immigrants, however, this has to be based on reasonable grounds.¹²⁰

If the laws dealing with illegal immigrants were founded on *Ubuntu* all people would be much better protected. Our legal approach to immigrants ought to align with the ethos of our nation. It is vitally important that laws which seek to protect the most vulnerable must be underpinned by *Ubuntu*. The preamble of the South African Constitution is based on the principle of *Ubuntu*; this principle is about humanity.¹²¹ Some scholars such as Swartz opine that ubuntu offers a unifying vision of community

¹¹⁴ Klaaren J & Ramji J (2001) 45.

¹¹⁵ Crush J. & Williams V (2004) 11.

¹¹⁶ Smith F 'A nation that welcomes immigrants-An Historical Examination of United States Immigration Policy' (1995) *Davis Journal of International Law & Policy* 35.

¹¹⁷ Schneider A and Ingram H 'Social Construction of Target Populations: Implications for Politics and Policy' (1993) *American Political Science Review* 87 334.

¹¹⁸ Schneider A and Ingram H (1993) 334.

¹¹⁹ Gordon S 'Immigration policies that include or exclude: a South African public opinion study of immigration policy preferences, *Social Dynamics*' (2016) 42:3, 446.

¹²⁰ Crush J. & Williams V (2004) 18.

¹²¹ Constitution of the Republic of South Africa, 1996.

built upon compassionate, respectful, interdependent relationships and that it serves as a rule of conduct, a social ethic, and the moral and spiritual foundation for African societies.¹²² *Ubuntu* envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation.¹²³ The arrest and detention of illegal immigrants ought to be viewed through this lens, yet there is currently no research to this effect.

The majority of immigrants come to South Africa for economic reasons.¹²⁴ Southern Africa has been the most targeted region in sub-Saharan Africa due to its relatively high level of economic and social development. The most attractive countries in the region are South Africa, Botswana and Namibia.¹²⁵ Obtaining legal status in South Africa is a lengthy and complex process. Often the process requires immigrants wait in long queues for many hours without getting any assistance from Home Affairs.¹²⁶ According to Gordon some immigrants do attempt to renew their documents before the expiry date, however, due to the difficulties they experience and the poor system to renew documents many give up on the process.¹²⁷ This is the reason why many are arrested and detained as they do not have valid documents. More needs to be done to document the circumstances which eventually leads to their legal plight. Any foreign national who contravenes the Immigration Act may face arrest and deportation. Though much has been said about the treatment of immigrants as arrestees and detainees, there has not been any close scrutiny of the laws aimed at protecting their rights.

Lindela Center was established in 1996 and it is a privately administered facility by African Global Operations also known as Bosasa.¹²⁸ Bosasa is responsible for the administration of the Centre including catering, security, health issues and other services on behalf of the Department of Home Affairs. At the time of writing, the company was implicated in the Zondo Commission for corruption allegations and was declared a liquidated company.¹²⁹ The liquidation and corruption charges may

¹²² Swartz S 'A Long Walk to Citizenship: Morality, Justice and Faith in the Aftermath of Apartheid' (2006) *Journal of Moral Education* 551.

¹²³ *S v Makwanyane* [1995] ZACC 3 1995 3 SA 391 (CC).

¹²⁴ *Cishahayo Saidi and Others v Minister of Home Affairs and Others* CCT 107/17 [2018] ZACC 09.

¹²⁵ Campbell EK (2006) 14.

¹²⁶ Gordon S (2016) 446.

¹²⁷ Gordon S (2016) 446.

¹²⁸ Chapman J (2019) 7.

¹²⁹ Chapman J (2019) 8.

likely have a negative impact on immigrants, as the state of the facility may be neglected. The facility is still under the process of full administration by the state with the Department of Home Affairs having full responsibility concerning administration and other services.¹³⁰ Reports at the time of writing show that the Center can only cater for a maximum of 4000 detainees yet more than 7000 immigrants are awaiting deportation at the Center.¹³¹ The Center is clearly overcrowded. The composition of the population at Lindela suggest that only people of African origin are arrested and deported.¹³² A report published five years ago stated that ‘ no person that was interviewed was white nor were they aware of any white person held at Lindela during the period of the interviews’ . A total of 149 Black foreign nationals were interviewed.¹³³

Due to the recent eruption of xenophobic attacks in Durban many immigrants handed themselves over to be deported and were placed at the Lindela Center as they feared the unknown.¹³⁴ The Sunday Independent, a South African newspaper, reported that the police arrest all the immigrants indiscriminately, without regard of the status of the asylum seeker.¹³⁵ It may thus be contended that there is a need to analyse the relevant legislation and its enforcement.

9. CHAPTER OUTLINE

This dissertation comprises the following chapters:

Chapter 1

This chapter introduces the thesis. It gives the background to the study, the problem statement, what the study aims to achieve and the significance of the study.

Chapter 2

This chapter sketches the domestic legal framework, which provides the immigration process. The applicable international law in this regard is also discussed.

Chapter 3

¹³⁰Parliamentary Monitoring Group Report (2019) 10.

¹³¹ Chapman J (2019) 12.

¹³² Kollapen J, Klaaren J, Rens A, Schneider J: ‘South African Human Rights Commission. Report into the Arrest and Detention of Suspected Undocumented Migrants’ (1999) 25

¹³³ Southern African Catholic Bishops Conference Parliamentary Liaison office, briefing paper 374 (2015) 35.

¹³⁴ Mabhiza L ‘Latest xenophobic attacks reported in Durban South Africa’ available at <https://www.hrw.org/news> (accessed 19 May 2020).

¹³⁵ United Nations Yearbook of the International Law Commission (2010) 188.

This chapter deals with the strengths and challenges (if any) which exist in the implementation of laws applicable to illegal immigrants and particularly the issue of deportation.

Chapter 4

This chapter makes a comparison between immigration policies of the United Kingdom and Botswana as both these countries are major immigrant destinations. This is to compare the various laws and policies with the view of gauging whether the weaknesses in our system is similar to that of other countries and if any we could take some guidance from them.

Chapter 5

This chapter makes recommendations on how South Africa can improve regulations and policies and conclusion.



CHAPTER II

IMMIGRATION PROCESSES: THE INTERNATIONAL AND DOMESTIC LEGAL FRAMEWORK.

2.1 INTRODUCTION

Since the start of democracy in South Africa, there has been an influx of foreign nationals entering the country.¹ South Africa is a destination for many nationalities from the African continent as well as from countries such as China, Pakistan, and Bangladesh.² The supreme Constitution of South Africa which holds promises of political stability, freedom, peace, and economic development is a major attraction.³ These guarantees are undoubtedly not the premise upon which many African states are founded.⁴ This may be especially true for those who face war, persecution, and profound poverty in their home countries.⁵

It is important to understand that there are different categories of foreign nationals and that they all come to South Africa under different circumstances. Broadly, there are three different categories of foreign nationals who tend to live in South Africa namely, refugees, asylum seekers and migrants. A 'refugee' is someone who has left their home country and is unable to return home because there is a serious threat to the person's life or freedom.⁶ Refugees are also protected from the foreseeable return to their countries of origin, and this is known as the non-refoulement principle which will be discussed later.⁷ An 'asylum seeker' can be defined as someone who is seeking international protection and in some countries the legal definition would be someone who applied for refugee status, but has not yet received a response to their application.⁸ It is possible for an asylum seeker's application to be rejected and the person will need to return home.⁹ A 'migrant' is someone who chooses to move not because there is any serious threat to their life or freedom, but moves to find work, education or for

¹ Ditsebe M & Mukhuba T, 'Illegal immigration and the challenge of border control in South Africa' (2018) 128.

² Mukonza R, 'Immigration and refugee policies: unpacking policy dilemmas in South Africa' (2011) 6.

³ Okyere D, 'Economic and social survival strategies of migrants in Southern Africa: A case study of Ghanaian migrants in Johannesburg, South Africa' (2018) 48.

⁴ Okyere D (2018) 86.

⁵ Ighobor K, 'Work in progress for Africa's remaining conflict hotspot Africa Renewal 23 December 2019 2 available at <https://www.un.org/africarenewal/magazine/> (accessed 18 February 2020).

⁶ Article 1, Refugee Convention (1951).

⁷ Frances N & Kumin J, 'A guide to international refugee protection and building state asylum systems' (2017) 120.

⁸ Frances N & Kumin J (2017) 75.

⁹ Frances N & Kumin J (2017) 156.

other personal reasons.¹⁰ Migrants continue to enjoy the protection of their own government even when they are abroad and can return to their country of origin.¹¹

This chapter will analyse and discuss the international legal framework focusing on the rights of foreign nationals and the protection afforded to them. Some of the international instruments that will be discussed are the Universal Declaration of Human Rights (UDHR), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. Furthermore, regional law instruments will be discussed. Such instruments specifically include European and African instruments which protect immigrants, refugees, asylum seekers and where possible reference to foreign case law will be made. Lastly, the domestic laws of South Africa dealing with immigrants, refugees and asylum seekers will be thoroughly discussed.

2.2 THE INTERNATIONAL LEGAL FRAMEWORK RELEVANT TO THE PLIGHT OF IMMIGRANTS

South Africa's Constitution recognises the importance of adhering to the principles of international law. The Constitution recognises that 'customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.¹² South Africa is a party to The Universal Declaration of Human Rights (UDHR), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which are known as the international bill of human rights. All the states that have ratified these instruments including South Africa need to ensure that they respect the rights of all individuals within their territory without discrimination and this includes immigrants, asylum seekers and refugees.

[A]lthough international human rights law recognises the right of states to control their borders and to restrict entry within their territory, the fact that a person has entered a country illegally does not affect his or her rights to life, security of the person, equality before the law or other basic civil and political rights'.¹³

¹⁰ Frances N & Kumin J (2017) 189.

¹¹ Mukonza R (2011) 15.

¹² Section 232, Constitution of the Republic of South Africa (1996).

¹³ South Africa's obligations under international and domestic law available at <https://www.hrw.org/legacy/reports98/> (2021).

This is a powerful statement and it is necessary to analyse the instruments below to test its accuracy.

2.2.1 The Universal Declaration of Human Rights (UDHR)

The UDHR is a milestone in the history of human rights.¹⁴ It was after the horrific experience of the Second World War that the declaration was adopted by the United Nations General Assembly on the 10th of December 1948.¹⁵ World leaders with different cultural and legal backgrounds drafted the declaration, which for the first time set out fundamental human rights that need to be universally protected. This paved the way for the adoption of more treaties that are applied today at global and regional levels.¹⁶ The UDHR emphasises the term ‘everyone’ and does not separate people according to nationality, race or colour. A cursory reading of the UDHR makes it clear that every individual’s right ought to be universally protected. It provides that ‘all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood’.¹⁷ The UDHR promotes the spirit of unity. As already mentioned, the UDHR inspired many other instruments. Some of which will be discussed below. The UDHR set the foundation to protect asylum seekers before the principle of non-refoulement was adopted. Article 14 of the UDHR states that

Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.¹⁸

2.2.2 Convention Against Torture And Other Cruel, Inhuman Or Degrading Treatment (CAT)

In 1951, the principle of non-refoulement was adopted in article 33 of the Convention Relating to the Status of Refugees (Convention on Refugees).¹⁹ Although the principle has been recognised in many international human rights treaties and several scholars have considered it a norm of customary international law, the precise scope of protection afforded by the different provisions has not been well defined.²⁰ The non-refoulement principle is defined in article 3(1) of the CAT which reads, ‘[n]o

¹⁴ United Nations, ‘Peace, dignity and equality on a healthy planet’ available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (accessed 5 July 2021) 2.

¹⁵ United Nations (2021) 5.

¹⁶ United Nations (2021) 7.

¹⁷ Article 1, Universal Declaration of Human Rights (1948).

¹⁸ Article 14 (1)-(2), Universal Declaration of Human Rights (1948).

¹⁹ Convention against torture and other cruel, inhuman, or degrading treatment (1954).

²⁰ Boeles P, ‘Non-refoulement is part of EU’s qualification Directive invalid’ (2017) 10.

State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture'.²¹

The principle of non-refoulement protects refugees and asylum seekers from being extradited back to their home country, where there are reasonable grounds to suggest that the person will be in danger upon return or will be tortured. This principle protects immigrants who escape the violations of war and conflict in their home country and find refuge in peaceful countries.

The case of *T.M and Others v Russia* demonstrates how the international courts apply the principle of non-refoulement as guaranteed in article 3 of the CAT. *In casu*, the applicants were nationals of Uzbekistan. They were charged in Uzbekistan with religious and politically motivated crimes, their pre-trial detention was ordered even though they did not attend the court proceedings and international warrants were issued by the authorities.²² The applicants could not attend the court proceeding because they fled to Russia to find refuge. Upon the issuing of international warrants, the Russian authorities decided to extradite the applicants to Uzbekistan, despite consistent claims that the applicants would face a real risk of ill treatment and torture which is prohibited by article 3 of the CAT.²³

The applicants applied for interim measures to prevent their extradition using the non-refoulement principle. The Court had to determine whether there were substantial grounds for believing that the applicant faced a real risk of ill-treatment. The Court previously established that the individuals whose extradition were sought by either Uzbek authorities constituted a vulnerable group facing a real risk of treatment contrary to article 3 of the CAT if they were sent to Uzbekistan.²⁴ The Court was therefore satisfied that the applicants presented the Russian authorities with substantial grounds for believing that they faced a real risk of ill-treatment in Uzbekistan.²⁵

The Court also had to consider whether there is a duty to assess claims of a real risk of ill treatment through reliance on sufficient relevant material and the existence of the danger to life. The Court held

²¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (1987).

²² *T.M. and Others v Russia* (2017).

²³ *T.M. and Others v Russia para 8* (2017).

²⁴ *T.M. and Others v Russia para 19* (2017).

²⁵ *T.M. and Others v Russia para 22* (2017).

that the Russian government failed to adequately assess the risks that the applicants would be exposed to and therefore concluded that extraditing the applicants under the circumstances would be in violation of article 3 of the CAT.²⁶ The European courts appear to apply the principle of non-refoulement consistently, and a number of asylum seekers have been protected from extradition because of the principle.²⁷

2.2.3 International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families (CRMW)

The CRMW was adopted by the UN General Assembly in 1990 to guarantee dignity and equality in an era of globalisation for immigrants.²⁸ Prior to the adoption of this CRMW, immigrants were often treated inhumanely, or tortured and worked under unfavourable conditions. The CRMW protects legal and 'illegal' immigrants. This is evident from its reference to 'illegal immigrants' as 'non-documented' persons, because they do not have the legal papers to work in any country they migrate to.²⁹ The use of 'non-documented' persons as opposed to 'illegal immigrants' denotes respect for the dignity of the person. Workers who are non-documented are frequently employed under less favourable conditions, than other workers as some employers seek such labour in order to reap the benefits of unfair competition.³⁰ The exploitation of non-documented persons motivated the urgent passing of the CRMW. The latter was passed immediately as no voting had to be conducted, in order to save immigrants from being exploited by companies.³¹ The problems involved in migration are even more serious in the case of non-documented immigrants. Consequently, appropriate action should be encouraged to prevent exploitation of migrant workers, while assuring the protection of their fundamental human rights.³² The CRMW compels all states parties to

Undertake, in accordance with the international instruments concerning human rights, to respect and to ensure to all migrant workers and members of their families within their territory or subject to their jurisdiction the rights provided for in the present Convention without distinction of any kind such as to sex, race, colour, language,

²⁶ *T.M. and Others v Russia para 30* (2017).

²⁷ Boeles P (2017) 12.

²⁸ International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990).

²⁹ Article 5 of CRMW (1990).

³⁰ Migration and Human Rights 'The United Nations Convention on Migrant Workers Rights' Cambridge University 2 December 2010 5 available at <https://www.cambridge.org/core/books/migration-and-human-rights> (accessed 2 August 2021).

³¹ Migration and Human Rights (2010) 6.

³² Migration and Human Rights (2010) 9.

religion or conviction, political or other opinion, national, ethnic or social origin, nationality, age, economic position, property, marital status, birth or other status.³³

Unfortunately, none of the above-mentioned instruments do not deal with the issues of arrest and detention of undocumented immigrants explicitly. The instruments, however, provide principles which ought to afford protection to immigrants who face arrest and detention. The importance of the protection of fundamental human rights is emphasised by all the instruments. Although every country is given the discretion to deal with undocumented immigrants within their territory, the fundamental human rights of dignity and equality must be protected. This means that all forms of unfair discrimination are prohibited by international law. The issue of deportation is briefly dealt with by the CAT and specifically in relation to the non-refoulement principle. It must be noted that this principle is silent on whether or not it applies to non-documented immigrants. Non-documented persons may also leave their countries of origin because of political wars and conflicts and not have the means to apply for asylum or refugee status due to economic reasons. The non-refoulement principle does not extend its protection to asylum seekers and refugees who are found guilty of committing criminal acts and contravening the immigration laws of the destination countries. This is understandable, given that states have a duty to keep everyone in their territory safe.

2.3 REGIONAL LAW RELEVANT TO IMMIGRANTS

States had to develop regional laws and standards that complement the international refugee protection regime. The European and African instruments to protect refugees will be discussed below.

2.3.1 European Instruments

The European Union assists people who flee their country of origin due to fear of persecution or serious threat of harm to their lives.³⁴ To be granted asylum is a fundamental right of persons and an international obligation for countries, as recognised in the 1951 Geneva Convention on the Protection of Refugees.³⁵ The Common European Asylum System (CEAS) promotes open borders, freedom of movement and guarantees high standards of refugee protection.³⁶ European countries have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring that everyone is treated

³³ Article 7 of CRMW (1990).

³⁴ Bigo D, 'Immigration controls and free movement in Europe' (2018) 12.

³⁵ European Commission 5 March 2020 2 available at <https://ec.europa.eu> (accessed 5 June 2021).

³⁶ European Commission (2020) 3.

fairly and that every asylum application is dealt with in terms of legal procedures.³⁷ It is reported that outcomes of the applications for asylum seekers are the same in all the EU countries and that there are consistency, but statistics suggest a contradictory picture. Across the European Union in 2015, there was a backlog of over 1.8 million applications and in 2019 the numbers decreased to 142 000 which is a decrease of 92%.³⁸ Over the years the European legislation has improved the system through a number of different constructive approaches. The approaches include but are not limited to the reception directive, Eurodac Regulation, and qualification directive.³⁹

Whenever asylum seekers apply to the European countries, the CEAS ensure that they are treated with respect and equally in an open and fair system. The system of the European Union is governed by five legislative instruments and one agency.⁴⁰ The first is the Asylum Procedures Directive which is aimed at ensuring that the asylum seeker applications are carried out in a quick and fair manner, taking priority of asylum seekers with special needs, unaccompanied minors, and victims of torture.⁴¹ The Reception Conditions Directive is more focused on the humanitarian side as it helps to ensure that asylum seekers have dignified standards of living. This is done by ensuring that the basic needs such as housing, access to health care, food, clothing, and education are provided as these are fundamental rights.⁴² The Qualification Directive clarifies grounds for international protection and provides integration measures for beneficiaries of international protection.⁴³ The Dublin Regulation ensures that asylum seekers are still protected during the period when their applications are being examined by the relevant states. During this period the system also detects early problems that may arise when approving national asylum and addresses these problems before they develop into uncontrollable crises.⁴⁴ The Eurodac Regulation applies after the problem has been detected under Dublin regulation, and permits law enforcement authorities to access the European Union database of the fingerprints of asylum seekers to prevent or investigate serious crimes such as murder or terrorism.⁴⁵ The European Asylum Support Office supports the implementation of the CEAS by

³⁷ Elspeth G & Valsamis M, 'Immigration and Asylum Law and Policy in Europe' (2021) 15.

³⁸ Bigo D (2018) 8.

³⁹ European Commission (2020) 8.

⁴⁰ Mantu S & Minderhoud P & Elspeth G, 'EU citizenship and free movement rights' (2020) 47.

⁴¹ Grutters C & Mantu S & Minderhoud P, 'Migration on the Move' (2019) 42.

⁴² Elspeth G & Valsamis M, 'Immigration and Asylum Law and Policy in Europe' (2021) 20.

⁴³ McMahon A, 'The role of the state in migration control' (2016) 40.

⁴⁴ Grutters C & Mantu S & Minderhoud P (2019) 43.

⁴⁵ Mantu S & Minderhoud P & Elspeth G (2020) 47.

Member States, by developing trainings, capacity building, emergency assistance, information and analysis, and third country cooperation activities.⁴⁶

The rights of an asylum seeker who commits murder or terrorism crimes in Europe are not protected and immediate deportation must be approved.⁴⁷ The case of *Feilazoo v. Malta* demonstrates the aforementioned. The applicant, a Nigerian national, was convicted on drug related charges and sentenced to 12 years imprisonment.⁴⁸ After his release in 2018, he was informed that he will be taken to the Immigration Office to await deportation to Nigeria on the basis of national immigration laws on criminal-related removal.⁴⁹ The applicant resisted going to the immigration office and in the process assaulted the police officers and he also sustained several injuries. The police opened a criminal case of assault against him, and he was sentenced to a fine. He was unable to pay the fine and was therefore detained for a period of five months.⁵⁰ Upon his release he had to be transferred to a detention centre to await his deportation and he was not informed of his deportation date back to Nigeria.⁵¹

The applicant lodged a complaint with the European Court of Human Rights alleging that the conditions of detention violated article 3 and 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1948. In terms of Article 3 of the aforementioned Convention, everyone has the right to life, liberty and security of person.⁵² Hence the Court placed significant emphasis on the 75 days that the applicant spent alone in a container without any access to natural light and no possibility for exercise during the first half of it and the fact that the government did not give sufficient explanation and evidence to refute this claim. Although accommodation in a container might not necessarily violate article 3, the limited light and ventilation are important factors in this assessment.⁵³ The applicant was later placed in a facility for isolation where new asylum seekers were placed for Covid-19 quarantine. This quarantine lasted for almost seven weeks and there was no reason to

⁴⁶ McMahon A, 'The role of the state in migration control' (2016) 40.

⁴⁷ Bigo D (2018) 14.

⁴⁸ ECtHR, *Feilazoo v. Malta*, Application no. 6865/19, (2021).

⁴⁹ ECtHR, *Feilazoo v. Malta*, Application no. 6865/19, (2021).

⁵⁰ ECtHR, *Feilazoo v. Malta*, Application no. 6865/19, (2021).

⁵¹ ECtHR, *Feilazoo v. Malta*, Application no. 6865/19, (2021).

⁵² Article 3, Convention for the protection of human rights and fundamental freedoms (ECHR) (1948).

⁵³ ECtHR, *Feilazoo v. Malta*, Application no. 6865/19, (2021).

believe that the applicant needed it. This measure could have posed a risk to the applicant's health and cannot be considered as complying with basic sanitary requirements.⁵⁴

Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1948 states that no person may be subjected to torture or cruel, inhuman, or degrading punishment.⁵⁵ The applicant complained that his detention was unlawful as his deportation is likely to happen soon. The Court held *inter alia* that the applicant was detained for fourteen months with a view to his deportation. There were no pending legal proceedings to delay the applicant's deportation, but the only step that the authorities took was to contact the Nigerian authorities for the issuing of a passport.⁵⁶ When the Nigerian authorities visited the applicant, they had doubts about his identity and therefore could not issue a travel document. This matter proved challenging as the Maltese authorities cannot demand travel documents from another country. The authorities were aware of the lack of prospects of deportation.⁵⁷ The Court ruled that indeed articles 3 and 5 were violated and the applicant had to be compensated, however, the Maltese authorities had to find means to deport him back to Nigeria and he will be kept in detention until the deportation date. Undue delays may constitute violations of this instrument. The deportation of a person should not be preceded with treatment which constitutes violations of his rights.

Since 1999 the European Union has continued to develop and implement different programmes to help with the protection of asylum seekers. As seen in the case of *ECtHR Feilazoo v. Malta*, the European Courts attempt to protect asylum seekers, however, when they commit a crime, they may cease to be protected against deportation. Every 10 years the European countries have consistently developed the refugee legislation.⁵⁸ In September 2020, the European Commission adopted a New Pact on Migration and Asylum, containing a number of solutions through new legislative proposals and amendments to pending proposals to put in place a system that is both humane and effective for migration.⁵⁹

⁵⁴ *ECtHR, Feilazoo v. Malta*, Application no. 6865/19, (2021).

⁵⁵ Article 5 of ECHR (1948).

⁵⁶ *ECtHR, Feilazoo v. Malta*, Application no. 6865/19, (2021).

⁵⁷ *ECtHR, Feilazoo v. Malta*, Application no. 6865/19, (2021).

⁵⁸ European Commission (2020) 5.

⁵⁹ European Commission (2020) 6.

The European Union has impressive legislative instruments and agency that deal with asylum seekers, refugees, and undocumented immigrants. Immigrants are treated in a respectful and dignified manner irrespective of race or colour. This is demonstrated by how victims of torture, unaccompanied minors and people with special needs are prioritised when dealing with asylum applications. The European system is more focused on the humanitarian aspect when dealing with immigrants. The legislative instruments protect fundamental human rights through the reception conditions directive which ensures that asylum seekers have a dignified standard of living. Each legislative instrument has different functions and duties which interlink which each other. Hence the European system is fast, effective, and efficient when dealing with asylum applications. The refugee legislation is consistently developed which is an advantage for the country to implement rules and regulations that will deal with immigration challenges.

2.3.2 African Instruments Relevant To Immigration

At the end of the colonial era in Africa there were many conflicts that arose, and it is due to these unresolved conflicts that a large scale of refugee movements developed.⁶⁰ Africa tried to control these movements by drafting and adopting the Organization of African Unity (OAU) of 1969.⁶¹ The aforementioned Convention was drafted to protect the rights of refugees in Africa. The definition of a refugee remains the same in the OAU as the internationally recognised instruments, however, there are certain circumstances where the refugee or asylum seeker will not be protected in terms of the OAU. A refugee shall cease to be protected if he or she has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee.⁶² The refugee may be repatriated back to his or her country of origin because they will not be protected by the non-refoulment principle, and a person will be guilty of contravening the OAU. A refugee who voluntarily returns to their country of origin will also cease to be protected.⁶³

The OAU shall not apply to an asylum seeker when there is reason to believe that the person has committed a crime against peace, war crime or a crime against humanity.⁶⁴ The Rome Statute of the

⁶⁰ Frances N & Kumin J (2017) 158.

⁶¹ Organization of African Unity (OAU) 1969.

⁶² Article 4 (f) of OUA (1969).

⁶³ Article 4 (a) of OUA (1969).

⁶⁴ Article 5 (a) of OUA (1969).

International Criminal Court defines crimes against humanity as a systematic attack directed at civilians with the knowledge to murder, torture, rape, and any other inhumane acts of similar character intentionally causing great suffering, or serious bodily injury.⁶⁵ Many crimes against humanity occurred in Africa. A relevant example is the genocide that happened in Ituri. The violence that emerged in Ituri province, North Eastern Congo displaced more than 100 000 people including 40 000 asylum seekers and refugees who fled to Uganda.⁶⁶ This is after the ethnic militias in Congo raped and killed people from 2017 to 2019 and many were placed in refugee camps within Ituri province. These acts were considered as genocide and crimes against humanity by the United Nations.⁶⁷ The attacks were carried out by the Lendu community against the Hema, a larger political group, but weaker compared to the Lendu community.⁶⁸ The barbarity with which the attacks were perpetrated reflects ‘the desire of the attackers to inflict lasting trauma on the Hema communities and to force them to flee and not return to their villages’.⁶⁹ It was reported that the police did not do enough to stem the violence.⁷⁰ The OAU emphasises that for reasons of security, countries of asylum must as far as reasonably possible settle refugees at a distance from the frontier of their country of origin to avoid crimes against humanity.⁷¹ It is important to understand some of the circumstances from which many people flee as this may possibly shed light on how their arrest and detention may affect them if conducted contrary to their human rights.

The European Union (EU) has played a critical role in the development of the African migration policies.⁷² Since 2000 the African Union (AU) have worked with the EU and adopted various frameworks on migration. One of the frameworks is the Cairo Action Plan which was enacted to focus on the causes of migration and asylum seeking as well as to combat racism and xenophobia.⁷³ In 2006, the AU and EU adopted the Euro–African Dialogue on Migration and Development. This process has four pillars, namely organising mobility and legal migration, improving border

⁶⁵ Article 7 (1), Rome Statute of the International Criminal Court (1998).

⁶⁶ Bearak M, ‘Eastern Congo killings, rape may amount to genocide and crimes against humanity’ 10 January 2020 2 available at <https://www.washingtonpost.com/> (accessed 28 June 2020).

⁶⁷ Bearak M (2020) 3.

⁶⁸ Bearak M (2020) 3.

⁶⁹ Bearak M (2020) 4.

⁷⁰ Bearak M (2020) 4.

⁷¹ Article 2 (6) of OAU (1969).

⁷² Migration policy frameworks in Africa- *Institute for Security Studies Report* (2017) 10.

⁷³ Migration policy frameworks in Africa (2017) 15.

management and combatting irregular migration, strengthening the synergies between migration and development and promoting international protection.⁷⁴

Despite working with the EU, African immigration policies are showing significantly slow development rates. There is clearly something lacking when crimes against humanity continue to happen on the continent. The incidents that occurred in Ituru province in Congo shows the failure of the OAU. Similarly, while an action plan to combat racism and xenophobia was enacted, South Africa continues to struggle with these issues. The OAU is silent on many issues which affect immigrants. This includes issues commonly experienced during arrest, detention and deportation. African instruments relevant to immigration thus still have a long way to go to combat the issues affecting immigrants.

2.4 DOMESTIC LAW RELEVANT TO IMMIGRANTS

The South African government has passed the Immigration Act 13 of 2002 and the Refugee Act 130 of 1998 to address issues of immigration. Based on the definition of an illegal immigrant as mentioned in chapter 1 of this thesis,⁷⁵ the focus will be on three main categories of undocumented immigrants, namely, (1) foreign nationals who enter the country without legal documents and manage to justify such entry, (2) foreign nationals who enter the country legally and continue to reside in the country after the expiry date of their documents and (3) asylum seekers and refugees whose application for permanent or temporary permit status has been refused.⁷⁶

2.4.1 Undocumented Immigrants

The number of undocumented immigrants in South Africa is increasing.⁷⁷ It is uncertain how many undocumented migrants there are in South Africa, or where they come from.⁷⁸ Ryan and Prayag explain that sometimes undocumented immigrants do not have the means to acquire legal travel

⁷⁴ Migration policy frameworks in Africa (2017) 22.

⁷⁵ Immigration Act 13 of 2002.

⁷⁶ Masiloane T, 'Dealing with an economic crisis: the difficulty of policing illegal immigrants in South Africa' (2010) 12.

⁷⁷ Ramoroka V, 'The determination of refugee status in South Africa: A human rights perspective' (2015) 6.

⁷⁸ Tendero C, 'Immigrants and illegality in South Africa' (2016) 5.

documents and the push and pull factors have a negative impact on them.⁷⁹ The push factors are political, social, economic, poverty, unemployment in their own country which forces them to migrate for better opportunities and safety reasons. ‘Illegal migrants’ are ‘pulled’ to the host countries such as South Africa in pursuit of better living conditions and economic stability.⁸⁰

Many migrate to South Africa because they believe they will have better and more opportunities to make a living.⁸¹ Indications are that an estimated 2.9 million migrants resided in South Africa at mid-year 2020.⁸²

Undocumented immigrants endure hostile treatment not only from the citizens, but from police officials and immigration officers.⁸³ As mentioned in chapter 1 of this thesis, it is important to note that when dealing with undocumented immigrants all the legal procedures must be adhered to in terms of the Immigration Act. The fundamental rights of immigrants should not be violated by public officials. This became evident in the case of *Okafor v Minister of Home Affairs and Others*. The applicant, Mr Okafor Lawrence, was granted power of attorney to bring an application on behalf of the detainee. He made an urgent application for his release from detention at the Lindela Holding facility where he was held as an alleged undocumented immigrant awaiting deportation.⁸⁴ The applicant sought that the detainee’s detention be declared unlawful, for the Minister of Home Affairs (the respondent) to release the detainee and that the respondent be interdicted from deporting him until his refugee status is lawfully determined.⁸⁵

In the founding papers it is alleged that the detainee had to flee from Nigeria in 2001 because of political persecution and in fear of his life.⁸⁶ He only applied for asylum in 2013, 12 years later. He was therefore an undocumented immigrant because he entered South Africa without the legal travel documents. The asylum permit was granted in terms of section 22 of the Refugees Act 130 of 1998

⁷⁹ Ryan C & Prayag G, ‘The relationship between the push and pull factors of a tourist destination: the role of nationality-an analytical qualitative research approach’ (2011) 4 *Taylor & Francis Online* 128.

⁸⁰ Ryan C & Prayag G (2011) 135.

⁸¹ Ryan C & Prayag G (2011) 130.

⁸² Migration data in the Southern African Development Community (2021) 15.

⁸³ Migration data in the Southern African Development Community (2021) 20.

⁸⁴ *Okafor v Minister of Home Affairs and Others* (26145/2020) ZAGPJHC 383 (2020).

⁸⁵ *Okafor v Minister of Home Affairs and Others* (26145/2020) ZAGPJHC 383 (2020).

⁸⁶ *Okafor v Minister of Home Affairs and Others* (26145/2020) ZAGPJHC 383 (2020).

in 2013, the same year in which he applied for it.⁸⁷ In 2015, the permit expired and in the same year the detainee was convicted and sentenced to 10 years imprisonment for the crime of dealing in drugs.⁸⁸

In 2018 the detainee was due for parole, and he received a notification of his deportation. He stated on the documents that he does not wish to appeal against the deportation order.⁸⁹ The detainee willingly signed these documents and the immigration officer informed him that he has the right to make representations to the Director of Home Affairs to review the deportation decision within 10 working days.

Various warrants for the detention of an undocumented immigrant were authorised by the immigration officer in terms of section 34(1) of the Immigration Act and the magistrate signed and confirmed the deportation.⁹⁰ An immigration officer may arrest and cause immediate deportation of an undocumented immigrant without a warrant. The undocumented immigrant is only entitled to request his or her deportation to be confirmed by warrant of a court in terms of section 34(1)(c) of the Immigration Act.

The issue in this Court was that the warrants were issued without the detainee appearing in court, his detention was extended to a further 90 days and he was not informed about this. In terms of the Immigration Act a person may be detained without appearing in court, but the immigration officer must inform the undocumented immigrant of his deportation in writing and the detention may be extended on good and reasonable grounds.⁹¹ The Court referred to the matter of *Lawyers for Human Rights v Minister of Home Affairs and Others* and found that section 34(1)(b) and (d) limited the rights of a detainee as contemplated in sections 12(1)(b) and 35(2)(d) of the Constitution.⁹² The Constitutional Court found that section 12(1)(b) of the Constitution affords a person the right not to be detained without a trial and that section 35(2)(b) afforded a detained person the right to challenge the lawfulness of his detention in court and in person.⁹³ The warrants were therefore considered as

⁸⁷ *Okafor v Minister of Home Affairs and Others* (26145/2020) ZAGPJHC 383 (2020).

⁸⁸ *Okafor v Minister of Home Affairs and Others* (26145/2020) ZAGPJHC 383 (2020).

⁸⁹ *Okafor v Minister of Home Affairs and Others* (26145/2020) ZAGPJHC 383 (2020).

⁹⁰ See section 34(1) in this regard.

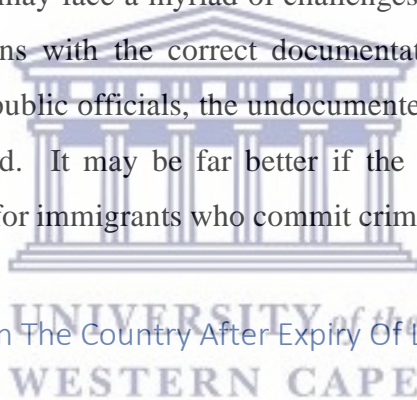
⁹¹ Section 34(b), Immigration Act 13 of 2002.

⁹² *Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT 38/16) ZACC 22 (2017).

⁹³ *Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT 38/16) ZACC 22 (2017).

unconstitutional and the detainee had to be released immediately. The legislature's failure to pass corrective legislation has now caused legal uncertainty as the detainee remains an undocumented immigrant despite being released from detention.⁹⁴ The Court held that the applicant could, however, not interdict the Minister of Home Affairs from deporting him as there were no legal grounds to do so.

The *Okafor* case proves that the immigration laws in South Africa is inadequate as it pertains to certain immigrants. The apparent vacuum in law results in uncertainty for the immigrants as well as the state. For example, it is not clear how the police will locate the detainee for deportation now that he has been released from detention. There is also a major indictment on the dignity of the immigrant whose legal status in South Africa is uncertain. Some may argue that the detainee will enjoy freedom of movement in the country despite his lack of legal documentation and pending deportation. While this may be true, the lack of legal documentation in all likelihood means that his existence in South Africa must be precarious and he may face a myriad of challenges. He does not qualify for any of the protections afforded to persons with the correct documentation. Thus, if the correct legal procedures were followed by the public officials, the undocumented immigrant and the state would not face the challenges mentioned. It may be far better if the legislation is amended to allow deportation without undue delays for immigrants who commit crimes in this country.



2.4.2 Immigrants Who Remain In The Country After Expiry Of Legal Travel Documents

A foreign national may only enter the Republic of South Africa by producing to an immigration officer his or her passport that will be valid for 30 days after the expiry of the intended stay.⁹⁵ Temporary residence permits may be issued in terms of the Immigration Act upon application and prescribed examination. The temporary residence permit will be deemed to be of force and effect after an admission.⁹⁶ There are several temporary residences permits that may be issued. They include a visitors permit; diplomatic permit; study permit; treaty permit; business permit; and work permit.

⁹⁴ *Okafor v Minister of Home Affairs and Others* (26145/2020) ZAGPJHC 383 (2020).

⁹⁵ Section 9(4) (a), Immigration Act 13 of 2002.

⁹⁶ Section 10 (3), Immigration Act 13 of 2002.

Most of the applications received by the Department of Home Affairs are from three categories, namely the visitors permit, study permit and work permit.⁹⁷ The visitor's permit may be issued to a foreign national who holds a visa and is a citizen of a foreign state and can provide a financial guarantee for his or her departure.⁹⁸ A visitors permit may not exceed a period of three years and the Department of Home Affairs must be satisfied that the foreign national has sufficient financial resources to pay for his or her living expenses in the Republic.⁹⁹ A foreign national may participate in South Africa through research, voluntary activities or academic sabbaticals.¹⁰⁰ A foreign national issued with a visitor's permit may not be employed in the Republic.¹⁰¹

A study permit may be issued to a foreign national by the Department of Home Affairs if the person intends to study in the Republic for more than three months.¹⁰² The Department of Home Affairs, through the registrar's office of the higher institution where the foreign national intends to study, will issue the study permit.¹⁰³ The permit will be issued once the Department is satisfied that the person will have the financial resources to pay the tuition fees and that the person has been approved by and is in good standing with the institution.¹⁰⁴ The foreign national must also provide a guarantee that he or she has the financial means to pay for the living expenses in the Republic. In the case of a minor's application for a study permit a guarantee must be provided that there is a person in South Africa who is a guardian or parent.¹⁰⁵ A foreign national issued with a study permit is not entitled to work in the Republic unless he or she works during academic vacation periods whether full time or part-time and practical training in their field of study is allowed.¹⁰⁶

⁹⁷ Department of Home Affairs 'General information on visas in South Africa' 15 January 2020 2 available at <http://www.dha.gov.za/index.php/types-of-visas> (accessed 10 July 2021).

⁹⁸ South African High Commission 'Volunteer Visitor Visa' 25 February 2020 4 available at https://www.sahc.org.au/visas/Volunteer_Permit.htm (accessed 10 July 2021) Financial guarantee means to pay for the living expenses while in South Africa. Proof of sufficient funds by means of recently certified bank statements for the last 3 months. Applicant must provide proof of his/her own financial means. Financial guarantees supporting proof of funds from host / parent organisation will not be accepted.

⁹⁹ Section 11(b)(ii), Immigration Act 13 of 2002.

¹⁰⁰ Section 11(1)(b)(ii), Immigration Act 13 of 2002.

¹⁰¹ Section 11(2), Immigration Act 13 of 2002.

¹⁰² Section 13(1), Immigration Act 13 of 2002.

¹⁰³ Section 13(1)(b), Immigration Act 13 of 2002.

¹⁰⁴ Section 13(1)(i)(ii), Immigration Act 13 of 2002.

¹⁰⁵ Section 13(1)(iv), Immigration Act 13 of 2002.

¹⁰⁶ Section 13(3), Immigration Act 13 of 2002.

A quota work permit may be issued by the Department of Home Affairs, to a foreign national that falls within the categories set out by the Minister of Labour annually in the Government Gazette.¹⁰⁷ A general work permit may be issued if the prospective employer satisfies the Department of Home Affairs that he or she is unable to employ a person in the Republic with qualifications equivalent to those of the foreign applicant.¹⁰⁸ A certificate from a chartered accountant must be attached to the application that will state the terms and conditions of employment and the salary package and a copy of this certificate must be issued to the Department of Labour.¹⁰⁹ A general work permit shall lapse if within six months of issuance the foreign national fails to submit a certificate to the Department of Labour as proof that he or she is still employed.¹¹⁰

Some foreign nationals remain in South Africa even after the expiry of their permits. The reasons for deciding to stay longer than the legally permitted periods are unknown as there are no documented studies on this presently. A foreign national may reapply for a permit after the expiry date at the Department of Home Affairs and exceptions were made during the Covid-19 period in South Africa.¹¹¹ According to the regulations of South Africa, the visitor who overstays his visa does so illegally and must pay a fine for it. The amount of fine depends on the duration of their overstay.¹¹² According to the Immigration Amendment Act no 13 of 2011, the person who has overstayed his or her visa will be declared an undesirable person.¹¹³ The requirements as indicated above are onerous and allude to the fact that indigent persons may easily become illegal immigrants in South Africa. Such persons then become vulnerable to arrest, detention and deportation. According to the Immigration Act a person who is declared undesirable, must be banned from visiting South Africa again.¹¹⁴

A visitor with a legitimate excuse for their overstay, must visit an embassy or consulate for the visa extension.¹¹⁵ It is the only way to prevent the penalty. In this way, they can get an extension of 60

¹⁰⁷ Section 19(1), Immigration Act 13 of 2002.

¹⁰⁸ Section 19(2)(a), Immigration Act 13 of 2002.

¹⁰⁹ Section 19(2)(b), Immigration Act 13 of 2002.

¹¹⁰ Section 19(3), Immigration Act 13 of 2002.

¹¹¹ iVisa(BBC) 'What happens if I overstay my South African visa?' 5 May 2020 2 available at <https://www.ivisa.com> (accessed 29 June 2021).

¹¹² iVisa (BBC) (2020) 3.

¹¹³ Section 30, Immigration Act 13 of 2011.

¹¹⁴ Section 30(2), Immigration Act 13 of 2011.

¹¹⁵ iVisa (BBC) (2020) 3.

days.¹¹⁶ If an immigration officer finds that the visa has expired, then the Home Affairs Department will charge the fine of R2500 to R3000.¹¹⁷ For many foreign nationals from other African countries, these amounts are substantial given the strength of the South African currency compared to other currencies. They might not be able to pay the fine. This too may be one of the causes of people becoming ‘illegal’ immigrants.

2.4.3 Asylum Seekers And Refugees

The Refugees Act 130 of 1998 (the Act) distinguishes between an ‘asylum seeker’ and a ‘refugee’. The Act defines an ‘asylum seeker’ as ‘a person who is seeking recognition as a refugee in the Republic’¹¹⁸ and a ‘refugee’ as ‘any person who has been granted asylum’¹¹⁹ In South Africa, before a person is recognised as a refugee, he or she is already protected by the Bill of Rights. In *Lawyers for Human Rights* the Constitutional Court confirmed that the protection afforded by the Bill of Rights applies to everyone, including undocumented foreigners and asylum seekers.¹²⁰ Based on the Constitutional Court decision, asylum seekers and refugees enjoy the same rights in the Constitution except those specifically reserved for citizens.¹²¹ However, it is to be noted that once a person has attained refugee status, they will enjoy more rights. Some of the specific rights include access to healthcare, access to basic social services, right to education and freedom of movement.¹²²

The application for asylum is time-consuming due to the backlog in South Africa.¹²³ According to the Act an application must be made in person in accordance to the prescribed procedures to a refugee reception officer.¹²⁴ The refugee reception officer must accept the application form from the applicant and ensure that the application form is properly completed and where necessary must help the applicant in this regard.¹²⁵ At times the language barrier is a challenge as some asylum seekers do not understand English, the language which is used in the application form. This is exacerbated by

¹¹⁶ iVisa (BBC) (2020) 4.

¹¹⁷ iVisa (BBC) (2020) 4.

¹¹⁸ Refugees Act 130 of 1998 (iv).

¹¹⁹ Refugees Act 130 of 1998 (xviii).

¹²⁰ *Lawyers for Human Rights v Minister of Home Affairs* ZACC 22 (2017).

¹²¹ *Ramoroka V* (2015) 8.

¹²² Section 27, Constitution of the Republic of South Africa 1996.

¹²³ *Ramoroka V* (2015) 8.

¹²⁴ Section 21 (1), Refugees Act 130 of 1998.

¹²⁵ Section 21 (2) (a)-(b), Refugees Act 130 of 1998.

the fact that there are no interpreters at the offices, hence the reception officers have to carry out this duty.¹²⁶

An applicant's fingerprints must also be taken and every applicant who is 16 years and older must furnish two recent photographs of him or herself.¹²⁷ An interview will be conducted to determine the reasons for seeking asylum and then a person will be issued with a section 22 temporary permit, before returning for a second interview.¹²⁸

Ideally a person should receive a decision regarding their status within three months of the application, however the process takes longer due to the severe backlog. The applicant must return to the refugee reception office to renew the temporary permit for as long as it takes to finalise the refugee status.¹²⁹ This may prove difficult for many, given the cost implications and the imaginable anxiety which an applicant may experience with each visit to the office.

There are many cases where the asylum seeker application was unexpectedly rejected. An example is *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others*.¹³⁰ The applicants were three undocumented foreign nationals from Burundi. *In casu*, an urgent application was sought for an order that the first to forth respondent be compelled to provide the applicants, with permits in terms of section 22 of the Refugees Act, 130 of 1998.¹³¹ The applicants arrived in South Africa between 2006 and 2012 and applied for asylum in terms of the Act, but their applications were rejected in 2014.¹³² The Chairperson of the Standing Committee for Refugee Affairs relied on section 24(3) of the Act to reject the applications as manifestly unfounded. Section 24(3) provides that

The Refugee Status Determination Officer must at the conclusion of the hearing-

- (a) Grant asylum; or
- (b) Reject the application as manifestly unfounded.¹³³

¹²⁶ Refugee Status Application-South Africa refugee law available at <https://www.refugee.co.za> (accessed 28 May 2021).

¹²⁷ Section 21(3), Refugees Act 130 of 1998.

¹²⁸ Section 22, Refugees Act 130 of 1998.

¹²⁹ Refugee Status Application (2020) 7.

¹³⁰ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC (2019).

¹³¹ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC (2019).

¹³² *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 3 (2019).

¹³³ Section 24(3), Refugees Act 130 of 1998.

The Act defines a ‘manifestly unfounded application’ as an application for asylum made on grounds other than those on which an application may be made under this Act.¹³⁴ After the rejection of the applications in 2015, widespread violence broke out in Burundi and hundreds of Burundians fled the country.¹³⁵ The Burundians who remained in the country were subjected to torture, rape, oppression, and sexual violence. The applicants resisted their deportation by making a new application in which they averred that they are *sur place* refugees.¹³⁶ In *Ruta v Minister of Home Affairs* the term *sur place* was defined as an international category of refugees, entering the country of refuge on one basis. Thereafter, supervening events in their country of origin involuntarily render them refugees.¹³⁷

However, despite the new fact of *sur place* refugee, the Director of Asylum Seeker Management informed the applicants that an asylum seeker must be deported after his/her application is rejected.¹³⁸ The applicants explained that without the permits, they remained undocumented and vulnerable and that they may at any time be arrested, detained and/or deported.¹³⁹ Hence they applied for an urgent application in Court, but it was rejected. After four years, the applicants remained in South Africa without doing anything about their status. In 2018 they approached the University of Cape Town Law Clinic for assistance.¹⁴⁰ The Clinic advised that the applicants reapply for asylum as *sur place* refugees. The Court rejected this application stating that the applicants are not entitled or eligible for section 22 permits. The Court further stated that the applicants have been illegal foreigners since 2014 and remained in the Republic with impunity.¹⁴¹ ‘The applicants regrettably can no longer be classified as asylum seekers as such classification ceased in 2014 and are currently illegal foreigners’.¹⁴² It is thus incorrect to refer to them as asylum seekers as they failed in 2014 to convince the authorities that they were indeed legitimate refugees.¹⁴³ The case was dismissed with costs.

¹³⁴ Refugees Act 130 of 1998 (xii).

¹³⁵ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 4 (2019).

¹³⁶ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 5 (2019).

¹³⁷ *Ruta v Minister of Home Affairs* (2) SA 329 (CC) 51 (2018).

¹³⁸ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 5 (2019).

¹³⁹ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 7 (2019).

¹⁴⁰ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 12 (2019).

¹⁴¹ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 14 (2019).

¹⁴² *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 14 (2019).

¹⁴³ *Al & Others v Director of Asylum Seeker Management: Department of Home Affairs & Others* ZAWCHC 14 (2019).

While it is difficult to overlook the fact that the applicants remained in the country illegally for four years, deporting them is not humanitarian considering the political war and conflict they will be subjected to in their country of origin. The violation of the Immigration and Refugee Act in this case overweighed the humanitarian aspect of the case. It seems the Court failed to uphold the fundamental rights of the applicants in the name of the letter of the law so to speak. That the challenges they experienced in legitimising their stay were beyond their control, were simply not given due consideration.

Once the refugee status has been determined the asylum seeker is issued with a section 24 of the Refugees Act 130 of 1998 permit that is valid for two years, renewable three months before expiry.¹⁴⁴ After being issued with a permit an asylum seeker may apply for a refugee identity document and a travel document that replaces the refugee passport. If an application has been rejected, a person may appeal the decision within 30 days.¹⁴⁵ The 30 days might not be sufficient time for appeals due to the delays and backlogs in the Department of Home Affairs already mentioned in this chapter.

Often, asylum seekers find it hard to reach the refugee reception offices as there is no co-operation between the Immigration Officers, the SAPS, and the functionaries in the refugee reception offices.¹⁴⁶ The Immigration Amendment Act has reduced the days from fourteen to five, for asylum seekers without valid documentations to reach any refugee reception office.¹⁴⁷ Since refugee reception offices are located only in five cities in the country, these have conditioned asylum seekers and refugees to stay and make their living in those cities as they are required to frequently renew their permits. The Director-General may establish as many refugee reception offices in the Republic as he or she can.¹⁴⁸ The Director General has not used this discretion despite a shortage of Refugee Reception Offices in the country. The closure of some of the refugee reception offices like the Johannesburg refugee reception office has caused a major concern to asylum seekers and refugees.¹⁴⁹

¹⁴⁴ Refugee Status Application (2020) 9.

¹⁴⁵ Refugee Status Application (2020) 12.

¹⁴⁶ Ramoroka V, 'The determination of refugee status in South Africa: A human rights perspective' (2015).

¹⁴⁷ Ramoroka V, 'The determination of refugee status in South Africa: A human rights perspective' (2015).

¹⁴⁸ Section 8(1), Refugees Act 130 of 1998.

¹⁴⁹ Ramoroka V, 'The determination of refugee status in South Africa: A human rights perspective' (2015).

2.5 CONCLUSION

South Africa should develop the immigration system and implement a practical approach to deal with the plight of immigrants and refugees. The system approach used by European countries is more advanced making it easier for the country to keep track of immigrants. The EU has different stages or approaches in their system that deals with immigrants and fundamental rights are considered in these approaches. Furthermore, thorough investigation is conducted when an application for asylum is made and the arrest, detention and deportation of immigrants is detailed. Basically, there are different Departments each dealing with their own duties and responsibilities. The separation of responsibilities allows for a flexible, fast and efficient system. The system allows sufficient transparency and accountability, thus it is less likely for undocumented immigrants to institute legal proceedings in the country.

In South Africa the Department of Home Affairs is tasked with several duties and responsibilities which appear to cause a major backlog in the system. South Africa lacks proper administration and there is no proper system or approach in place to deal with immigration policy, hence there are high numbers of undocumented immigrants in the country. The regulations on arrest, detention and deportation need to be properly implemented to avoid litigation occasioned by public officials not following proper legal procedures. Training programmes are required to guide/educate public officials about Immigration and Refugee legislation. The deportation system has to be reassessed to allow immediate deportation for foreign nationals who are found guilty of committing heinous crimes. Advanced immigration systems, task committees and the amendment of legislation will help South Africa implement friendly, welcoming, and effective immigration policy.

CHAPTER III

THE IMPLEMENTATION OF LAWS APPLICABLE TO UNDOCUMENTED IMMIGRANTS DURING ARREST, DETENTION AND DEPORTATION.

3.1 INTRODUCTION

South Africa has been a preferred destination for many foreign nationals especially those from the Southern African Development Community (SADC) countries.¹ It has been asserted that asylum seekers and refugees find South Africa attractive because of its commitment to upholding and the protection of human rights.² The continuous increase of immigrants in the urban areas have, however, increased the pressure on the South African government to extend its resources to non-citizens including undocumented immigrants.³ The government is therefore seen to be failing to improve the socio-economic welfare of citizens who were racially segregated during apartheid.⁴ The aforementioned belief also contributed to xenophobia in South Africa.

It has been proffered that the South African government had the political will to accommodate refugees, asylum seekers and undocumented migrants, but that the economic crisis experienced by the country, impelled government to amend immigration laws frequently.⁵ The legislation significantly changed experiences for immigrants as more restrictions were passed by the government. The specific laws shall be discussed in greater detail in this chapter. At this juncture it is important to mention that the limitations which occurred had to be introduced within the parameters of the Constitution. In terms of section 12 (1) of the Constitution, everyone has the right to freedom and security.⁶ This right includes the right not to be deprived of freedom arbitrarily or without just cause, not to be detained without trial and not to be treated in a cruel and inhuman or degrading manner.⁷ Arrest is a serious restriction of a person's freedom of movement and can affect his or her right to dignity and privacy.⁸ Consequently, it is crucial that every arrest is regulated by legislation.

¹ Anthony N & Ferdinand C, 'Unspoken inequality: how Covid-19 has exacerbated existing vulnerabilities of asylum seekers, refugees and undocumented migrants in South Africa' (2020) 141 *International Journal for Equity in Health* 3.

² Vigneswaran D, 'The complex sources of immigration control' (2020) 54 *International Migration Review* 5.

³ Alimohammadi E& Muller G, 'The illegal eviction of undocumented foreigners from South Africa' (2019) 19 *African Human Rights Law Journal* 15.

⁴ Malega R & Darden J & Stallings R, 'Social and economic consequences of black residential segregation by neighbourhood socioeconomic characteristics: the case of Metropolitan Detroit' (2019) 56.

⁵ Anthony N & Ferdinand C (2020) 9.

⁶ Constitution of the Republic of South Africa, 1996.

⁷ Constitution of the Republic of South Africa, 1996.

⁸ Independent Monitoring of Police Custody in South Africa-African Policing Civilian Oversight Forum (2019) 38.

The aim of an arrest is to bring the arrested person before the court. When dealing with undocumented migrants, the purpose of arrest may be to ensure their later deportation.⁹

It has been alleged that police officials abuse their power by conducting unlawful arrests. The question thus arises as to when the arrest of an undocumented immigrant is lawful. For this purpose, the requirements of a lawful arrest in terms of South African Criminal Procedure Act 51 of 1977 (CPA) will be briefly referred to. This chapter also outlines the challenges in the implementation of laws applicable to undocumented immigrants and deal particularly with the issue of deportation. Case law will be used to illustrate which factors courts take into consideration prior to deporting immigrants. It is important to note that a refugee or asylum seeker may be deported when there are reasonable grounds to believe that they committed a crime or no longer has legal documents to remain in the country. Despite the legal status of a migrant and whether or not they may be deported, it is contended here that how migrants and particularly undocumented migrants are treated in South Africa substantially reflects the true nature of the state. Most migrants are vulnerable. How they are treated albeit prior or during deportation must be informed by our constitutional values.

3.2. CHALLENGES IN THE ENFORCEMENT OF LAWS

3.2.1 Unlawful Arrest And Deportation

In South African law the purpose of arresting a suspect is to bring the person before a court of law. The CPA permits an arrest with or without a warrant provided it is properly authorised and there needs to be a statutory provision that authorises the arrest.¹⁰

There are certain instructions that need to be adhered to for a lawful arrest when dealing with undocumented immigrants and this is regulated by the Immigration Act 13 of 2002. These instructions help police officials to deal with undocumented immigrants in a non-confrontational manner and without delay.¹¹ An arrest with or without a warrant must be properly authorised and there needs to be a statutory provision that authorises the arrest.¹² Force during the arrest may be

⁹ Independent Monitoring of Police Custody in South Africa (2019) 43.

¹⁰ Section 43, Criminal Procedure Act 1977.

¹¹ Independent Monitoring of Police Custody in South Africa (2019) 49.

¹² Section 43, Criminal Procedure Act 1977.

used only when there are reasonable grounds which make it necessary. Unfortunately, SAPS do not always follow protocol when arresting undocumented immigrants causing some arrests to be unlawful. When an arrest is challenged the court decide whether or not to deport an undocumented immigrant. Discretion is given to the court and every judgment passed either increases or decreases the deportation numbers of undocumented immigrants in South Africa.

In *Jeebhai v Minister of Home Affairs*, the applicant was arrested and detained after the Department of Home Affairs received a tipoff that he was an illegal immigrant. During his arrest the immigration officer was accompanied by police officials that were armed.¹³ He was arrested immediately when he failed to produce the required documents in terms of the Immigration Act. The immigration officer informed him that he was to facilitate the deportation.¹⁴ The applicant was detained in police cells, pending further investigation and other compliance formalities prescribed in the Act. He admitted that he was an illegal foreigner and written notice of his deportation to his country-of-origin Pakistan was given to him. He was informed of his right to appeal the decision and to have his detention confirmed by a warrant of the court.¹⁵ It was discovered that applicant had bribed public officials to get a fake work permit. He was subsequently handed over to officials representing Pakistan.¹⁶

The applicant later sought an order to declare his arrest unlawful and inconsistent with the Constitution. It was argued that his detention was invalid because the provision of section 8 of the Immigration Act was not complied with before the decision of deporting. It was arguably not enough to simply look at a permit to determine its illegality.

The Court considered that section 34 can be invoked under three different circumstances. Firstly, after the procedure in section 8 has been followed and exhausted; that is, once a person has, in terms of that section, been declared an illegal foreigner and his rights of review or appeal have been exhausted. A decision in terms of section 34(1) to deport the person is then taken. Secondly, once a person has been found to be an illegal foreigner in terms of the procedure set out in section 41(1) that is, after that person, following a reasonable suspicion, fails to prove that he/she is in the country lawfully after an inquiry into his/her identification. Thirdly, where the person concerned agrees, and it becomes

¹³ *Jeebhai v Minister of Home Affairs* case no 35377/05 (16 February 2007).

¹⁴ Section 34, Immigration Act 13 of 2002.

¹⁵ *Jeebhai v Minister of Home Affairs* case no 35377/05 (16 February 2007).

¹⁶ *Jeebhai v Minister of Home Affairs* case no 35377/05 (16 February 2007).

common cause, that he/she is an illegal foreigner, section 34(1) can be invoked to deport that person. The applicant fell into the third and indeed also the second scenario. Section 8 has therefore no application in his case.¹⁷

The validity of the decision to deport, and the act of deportation itself, were also challenged on the ground that the applicant was sought in Pakistan for alleged acts of terrorism for which the death sentence is a competent sanction. It was argued that the applicant should therefore not have been handed over until Pakistan had given an undertaking that in the event of a conviction and a sentence of death, he would not be executed. It was also argued that Pakistan practises torture.¹⁸ The applicant in this case should therefore be protected by the non-refoulement rule. Although the state argued that it was never aware of the risk to the applicant's life, the court ruled that deportation of the applicant was unlawful.¹⁹

This is an interesting case. The Immigration Act, *prima facie* permitted immediate deportation. All the necessary statutory procedures were followed, the applicant was informed of all his rights and right to appeal his deportation which he chose not to exhaust. The Court also did not attribute any blame to the applicant for not revealing that he faced real danger in Pakistan. This leads to the conclusion that the Department of Home Affairs, has the sole and onerous task of always ensuring that a deported person will not face danger to his safety and life. While this is a powerful outcome for the rights of immigrants, it may be practically excessively difficult to execute at all times.

3.2.2 Poor Administration System

The South African Refugees Act provides the right for asylum-seekers and refugees to work and study, to access medical services and life-saving treatment and freedom of movement.²⁰ These rights partly account for the influx of asylum-seekers and refugees in the country. Additionally, the failure of the Department of Home Affairs to have an effective immigration system in place has negatively impacted the country. Factors such as corruption have caused lack of personnel capacity within the Department of Home Affairs.²¹ Corruption is an increasing and uncontrollable problem in the South

¹⁷ *Jeebhai v Minister of Home Affairs* case no 35377/05 (16 February 2007).

¹⁸ *Jeebhai v Minister of Home Affairs* case no 35377/05 (16 February 2007).

¹⁹ *Jeebhai v Minister of Home Affairs* case no 35377/05 (16 February 2007).

²⁰ Section 27, Refugees Act 130 of 1998.

²¹ Parliamentary Monitoring Group-Impact of illegal migrants on cities (2019) 8.

African immigration system. In high-density migrant areas, police bribery to avoid arrest or to be released from detention is not uncommon.²² Many applicants at the refugee reception offices admitted to bribing officials to accelerate the process of getting their papers.²³ Their admissions are shocking given the risk that it may pose to obtaining their papers. Possibly this is not a sign of ignorance or brazenness, but rather of their need for authorities to understand their desperation.

The case of *Dunwell Property Services CC v Morgan Sibande*, though it dealt with a labour matter illustrates the power of officials and the hardship which their corrupt behaviour can cause to foreign nationals. Sibande, an employee of Dunwell Property Services CC for three years, was dismissed with immediate effect on the basis that the Department of Home Affairs will deport him as he is allegedly an illegal immigrant. Sibande challenged this before the Commission for Conciliation Mediation and Arbitration.²⁴ The matter was subsequently referred to arbitration where the Commissioner ruled that the dismissal was fair.²⁵ Sibande further challenged this decision in the Labour Court on the grounds that the award was materially and legally defective.²⁶ He contended that he was not an illegal immigrant or prohibited person as alleged by the Department of Home Affairs.

In the Labour Court, Sibande contended that the Director of the appellant instigated his dismissal due to a disagreement they had.²⁷ The Director thus colluded with an immigration official to have Sibande deported on the ground that he was as an illegal immigrant.²⁸ Sibande stated in court that his employer did not conduct a proper investigation about the allegation that he was an illegal immigrant. The only proper investigation would have been the holding of a misconduct enquiry. Sibande's dismissal was therefore procedurally unfair.²⁹ He was dismissed on an allegation which was never proved. The Court ruled that Sibande had to be reinstated. It also transpired that he was indeed legally in the country. The immigration officer consequently had to face criminal charges for fraud.

²² Sutton R & Vigneswaran D, 'A Kafkaesque state: deportation and detention in South Africa' (2015) 15.

²³ Sutton R & Vigneswaran D (2015) 15.

²⁴ *Dunwell Property Services CC v Morgan Sibande* case no: JA7/10 (15 September 2011).

²⁵ *Dunwell Property Services CC v Morgan Sibande* case no: JA7/10 (15 September 2011).

²⁶ Labour Relations Act 66 of 1995.

²⁷ *Dunwell Property Services CC v Morgan Sibande* case no: JA7/10 (15 September 2011).

²⁸ *Dunwell Property Services CC v Morgan Sibande* case no: JA7/10 (15 September 2011).

²⁹ *Dunwell Property Services CC v Morgan Sibande* case no: JA7/10 (15 September 2011).

The case shows how corruption and the abuse of power by public officials can impact upon foreign nationals. Imaginably this must be even worse in respect of refugees, asylum seekers and undocumented immigrants. The greed, lack of accountability and transparency make it easy for undocumented immigrants to bribe public officials.³⁰ Arrests, detentions, and deportations constitute major disruptions in migrants lives and are often physically violent, economically disastrous, and emotionally traumatic experiences.³¹ Hence it is important that there must be reasonable grounds to suspect a person of being an illegal immigrant and thorough investigations must be conducted swiftly. Unnecessary investigations such in the case of Sibande exacerbate the backlogs in the system and places further strain on the immigration system. It also contributes to many people remaining undocumented or not being able to access the documents they need to live a better life.³² Moreover it increases their risk of being arrest, detained and even deported.³³ Their life in South Africa thus remains precarious.³⁴

Fear of prosecution and detention causes foreign nationals to evade the law. Not many will report abuse at the hands of government officials and even citizens. However, arrests of undocumented immigrants have increased significantly during the period of March 2020 to February 2021.³⁵ Organizations working with foreign nationals during the COVID-19 pandemic lockdown have raised concerns regarding the arrest and detention of undocumented immigrants.³⁶ The closure of the Department of Home Affairs during hard lockdown made many foreign nationals vulnerable to

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³⁰ Bhengu L, 'Manager at AG's office in Pretoria held for allegedly offering Home Affairs official a bribe' 3 June 2021 2 available at <https://www.news24.com> (accessed 15 December 2021).

³¹ Vigneswaran D, 'The complex sources of immigration control' (2020) 54 *International Migration Review*.

³² Masuku S 'How South Africa is denying refugees their rights: what needs to change' The conversation 12 May 2020 4 available at <https://theconversation.com/how-south-africa-is-denying-refugees-their-rights-what-needs-to-change-135692> (accessed 8 September 2021).

³³ Consortium for Refugees and Migrants in South Africa-Protecting refugees, asylum seekers and undocumented immigrants in South Africa. Johannesburg 8 February 2008 5 available at www.cormsa.org.za (accessed 8 September 2021).

³⁴ Choane M, Shulika LS, Mthombeni M, 'An analysis of the causes, effects and ramifications of xenophobia in South Africa' (2016) 3.

³⁵ South African Government News Agency 'President Ramaphosa announces a nationwide lockdown' | SA news; 15 March 2020 6 available at <https://www.sanews.gov.za/south-africa/president-ramaphosa-announces-nationwide-lockdown> (accessed 8 September 2021).

³⁶ Ntshidi E, '130 people arrested in Soweto for breaching lockdown laws, other offences' Eye witness news 25 April 2020 2 <https://ewn.co.za/2020/05/11/police-arrest-130-people-in-soweto-for-breaching-lockdown-laws> (accessed 8 September 2021).

harassment and extortion by law enforcement officials. This is despite the temporary prohibition on arrests of all those whose permits expired during the lockdown.³⁷

The closure of the refugee reception offices is not an issue associated with the Covid-19 pandemic exclusively. In *Minister of Home Affairs & others v Somali Association of South Africa & another* (Somali Association case) the respondents challenged the closure of the refugee reception office in Port Elizabeth (PE RRO) because the Director General did not consult with the relevant parties about the closure.³⁸ During the court proceedings it was discovered that the PE RRO was scheduled to close permanently on 30 November 2011 and that no new applications would be processed with effect from 21 October 2011.³⁹ On the same day, attorneys at the Nelson Mandela Metropolitan (NMMU) Refugee Rights Centre received telephonic confirmation from one of the employees at Home Affairs that indeed the PE RRO will be closed. A letter of demand was sent by the attorneys of Lawyers for Human Rights (LHR) to the Department of Home Affairs to describe the unlawful nature of the closure, but the DG did not respond to this letter. The failure to respond was inconsistent with the principles of responsiveness, participation and transparency that must govern public administration.⁴⁰ The DG's failure to consult other interested parties in the decision to close the PE RRO was not founded on reason and was arbitrary and unlawful. It is well established that an incident of legality is rational decision-making. It is also a requirement of the rule of law that the exercise of public power should not be arbitrary. Decisions must therefore be rationally related to the purpose for which the power was given.⁴¹ Rationality entails that the decision is founded upon reason in contradiction to one that is arbitrary which is different to whether it was reasonably made.⁴²

According to the DG, the Department of Home Affairs decided upon new strategic direction namely to close some marginal urban based RRO's such as the PE RRO and to establish a new refugee office

³⁷ Mahtani S, 'We need to decongest Africa's prisons urgently. For everyone's sake. - African arguments. African arguments' 31 March 2020 3 <https://africanarguments.org/2020/03/30/decongest-africa-covid-19-prisons-urgently/> (accessed 8 September 2021).

³⁸ *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015).

³⁹ *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015).

⁴⁰ *Minister of Home Affairs and others v Scalabrini Centre and others* 2013 (6) SA 421 (SCA) para 71.

⁴¹ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2002 (2) SA 674 (CC) para 85.

⁴² *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015).

at the Lebombo border post in Mpumalanga.⁴³ The Court ruled that the decision to close the PE RRO is reviewable and falls to be set aside for material mistake of fact and irrationality under the doctrine of legality. The closure of the PE RRO and two other RRO's in the country is more than a slight inconvenience for asylum seekers, who would have to travel to Durban as this will be the closest RRO. Most asylum seekers would not be able to afford the travel and accommodation costs. The Court dismissed this case with costs upon the Minister of Home Affairs.⁴⁴ This case indicates that when legal and rational decisions are not made regarding issues that concern immigrants, deportation becomes a real threat. Poor administration also affects the deportation process as the number of deported undocumented migrants has decreased recently, statistics show that only 11,787 people were deported in 2020/2021 thus far.⁴⁵ This means that many others are possibly detained in conditions that violate their most basic rights.

3.2.3 Weak Border Control System

The South African borders are 'porous' and thus attract illegal migration.⁴⁶ After the end of apartheid, South African border restrictions became more relaxed. During the apartheid era the land borders were fortified with electric fences and regular army patrols were conducted daily.⁴⁷ This highly militarised border control function was primarily handled by the former South African Defence Force (SADF) and the quasi-military SAPS.⁴⁸ However, after 1994 a new policy had to be introduced and it had to align with the Constitution. SAPS had the responsibility to guard the borders. The new government withdrew the services of the SADF from the border areas.⁴⁹ As a democratic country, South Africa became part of the international community and its relations with other countries required that the borders no longer be highly militarised. The borders needed to be more user friendly to allow for movement of people and goods entering the country.⁵⁰

⁴³ *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015).

⁴⁴ *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015).

⁴⁵ Global detention project-Immigration detention in South Africa: Stricter Control of Administrative Detention, increasing criminal enforcement of migration (2021) 9.

⁴⁶ Ngomane T, 'The socio-economic impact of migration in South Africa: A case study of illegal Zimbabweans in Polokwane municipality in the Limpopo province' (2012) 22.

⁴⁷ Dithebe V, 'Illegal immigration and weak border controls in South Africa' (2018) *Journal of Gender, Information and Development in Africa (JGIDA)* 12.

⁴⁸ Dithebe V (2018) 15.

⁴⁹ Dithebe M & Mukhuba T, 'Illegal immigration and the challenge of border control in South Africa' (2018) 8.

⁵⁰ Elden E, 'Is border enforcement effective: What we know and what it means' (2017) 4.

According to Elden, border security is indicated territorial sovereignty by implementing boundaries and protecting these boundaries through permanent surveillance that includes technological systems that will allow government to trace the movement of people within the national territory and this can result in data on people and goods in the national territory.⁵¹ This contention may be supported as South Africa ought to implement more effective laws to control border security. Although new legislation was recently passed in the form of the Border Management Authority Act 2 of 2020 there is still no development on how to increase security at the border points taking into consideration technological systems that may be implemented to provide better protection.⁵²

3.3 CONCLUSION

The international, regional and domestic legal frameworks pertaining to foreign nationals who are undocumented, asylum seekers and refugees afford a strong protection of their basic human rights in principle. The enforcement of these laws are, however, compromised by systems which are weak and plagued by poorly trained and/or corrupt law enforcement and immigration officials. The legal status of a person in a country ought not affect how they are treated. Treatment during arrest, detention and even deportation must be in line with human dignity and equality. Arrest and detention can make major inroads to these rights generally. These acts must therefore be executed by persons who are trained and knowledgeable on the applicable legal regime so as to minimise the impact on the lives of immigrants. The integrity of such enforcers ought also to be above reproach.

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⁵¹ Elden E (2017) 5.

⁵² Border Management Act No.2 of 2020.

CHAPTER IV

THE IMMIGRATION POLICIES OF SOUTH AFRICA: A COMPARISON WITH THE UNITED KINGDOM AND BOTSWANA.

4.1 INTRODUCTION

In the preceding chapters of this thesis, the South African immigration policies are critically analysed whilst focusing on the international, regional and domestic legal framework immigration processes including the laws applicable to the arrest, detention and deportation of undocumented immigrants. Based on the aforementioned discussions two questions arise. The questions are: (1) How may the laws applicable to undocumented immigrants in South Africa, who are arrested and detained, afford them (illegal immigrants) reasonable protection which is consistent with their fundamental rights? And (2) How may the law reasonably ensure the accountability of state officials involved in the enforcement of immigration laws?

This chapter will compare the immigration policies of South Africa with that of the United Kingdom and Botswana as these countries accommodate high numbers of undocumented immigrants.¹ Some of the main internationally recognised principles that need to be considered when drafting immigration laws will be used as guidelines for the comparison. There are four principles which will be discussed namely the protection from violence and exploitation, access to justice, border governance, and immigrants arrest and detention procedure.² These principles are selected because they often appear to be ignored or not fully complied with in the South African context. The aim is to determine if there are lessons to be learned for South Africa to enhance its own compliance.

Human rights are inalienable, indivisible and interdependent.³ The international human rights framework emphasises the protection of human rights and upholding the principle of non-discrimination.⁴ States parties to international human rights treaties have an obligation to establish

¹ Article 2, International Covenant on Civil and Political Rights (1966).

² Article 2 of ICCPR (1966).

³ The issue of Legal Aid in South Africa is rather complexed as many who are indigent not have access to legal aid. An in-depth discussion of the issue is beyond the ambit of this thesis, but the problems related to legal aid are acknowledged. It is contended here, however, that the limitations of access to legal aid does not preclude a discussion of the legal principles at international law which afford the right to foreign nationals too.

⁴ Global Migration Group- Principles and Guidelines supported by practical guidance, on the human rights protection of migrants in vulnerable situations 17 February 2017 14 available at <https://www.ohchr.org/> (accessed 20 April 2020).

domestic measures such as legislation that protects immigrants- This may be gleaned from discussions in Chapter 2 of this thesis. There are many fundamental legal principles which must be taken into consideration when drafting immigration laws. Such principles include *inter alia* access to justice, the protection from violence and exploitation, border governance and immigrants' arrest and detention procedures.⁵ In terms of international law, all states parties must ensure that immigrants have access to qualified, competent legal practitioners.⁶ Lawyers are needed to give legal advice and to represent immigrants during legal proceedings that directly affect them. Competent and free legal aid should be made available to immigrants, in accordance with international standards in terms of Article 2 of the ICCPR.⁷ Furthermore, states need effective mechanisms to receive, investigate and monitor allegations of human rights violations of immigrants.⁸

The border governance principle compels states parties to take reasonable measures to minimise the time during which immigrants are at the borders or other crossing points on their journey.⁹ It is encouraged that humanitarian assistance should be provided for immigrants prioritising children, pregnant woman, older persons, and persons with disabilities during border delays.¹⁰ Humanitarian assistance includes shelter, water and sanitation, medical care, and food. The manner in which immigrants ought to be treated during their journey and when they experience delays at borders denote that their dignity, well-being and security of the person must be respected at all times. Their fundamental rights do not become less important by virtue of their legal status in a country.

Unfortunately, undocumented immigrants are often exploited because of their status. Hence, strong protection is required, and the international law emphasises that states need to investigate and prosecute any alleged act of violence against immigrants whether the alleged perpetrator acted in a private or public capacity.¹¹ The issue of arbitrary arrest and detention must also be considered by the states when drafting immigration laws. States parties must ensure that procedural safeguards are

⁵ Article 2 of ICCPR (1966).

⁶ Article 2 of ICCPR (1966).

⁷ Article 14 (3)(d) of ICCPR (1966).

⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, General Assembly resolution 60/147, para. 15.

⁹ United Nations Human Rights- Recommended Principles and Guidelines on Human Rights at International Borders, guideline 2 (13).

¹⁰ Global Migration Group (2017) 46.

¹¹ Committee on the Elimination of Racial Discrimination-general recommendation No. 31, paras. 2 and 10.

implemented effectively. As mentioned in chapter two the safeguards are that immigrants must be informed of the reason for their arrest in writing or orally and in a language which they understand, if necessary, the assistance of an interpreter may be required.¹² It is important to note the Human Rights Committee's General Comment No 31 in this regard where it states that

Immigrants deprived of liberty have prompt access to an independent lawyer, who should be able to visit and communicate with their clients, both to make effective a migrant's right to challenge the lawfulness of their detention, and as a safeguard against torture and other cruel, inhuman or degrading treatment and enforced disappearance.¹³

The arrest and detention of an immigrant thus give rise to rights that are aimed at protecting their dignity and freedom. The fulfilment of their rights, in turn requires assistance from the government.

4.2 COMPARISON BETWEEN BOTSWANA AND THE SOUTH AFRICAN IMMIGRATION AND REFUGEE LAWS

The Botswana Immigration Act No.3 of 2011 and the Refugee (Recognition and Control) Act of 1967 will be discussed and compared with the South African immigration policies. There are four international principles that will be used as guidelines for the comparative study as mentioned above. These principles are repeated here for convenience. They are: access to justice; the protection from violence and exploitation; border governance; and immigrants' arrest and detention procedures. These principles will be used to determine if the immigration policies of Botswana and South Africa comply with the international standards insofar as the plight of immigrants are concerned. According to Botswana Immigration Act a person who is not a citizen of the country or is declared an undesirable immigrant in the *Gazette* is classified as a 'non-citizen'.¹⁴ Consequently, we will refer to illegal immigrants in Botswana as 'non-citizens' and in South Africa as 'undocumented immigrants'.

4.2.1 Access to Justice

A person who enters Botswana must upon arrival present himself or herself to an immigration officer.¹⁵ An immigration officer may require that the person undergo an examination.¹⁶ During the examination the non-citizen must answer every question posed to the best of their ability and

¹² Human Rights Committee, general comment No. 35, para. 46.

¹³ Human Rights Committee, general comment No. 35, para. 46.

¹⁴ Section 2, Immigration Act No.3 of 2011.

¹⁵ Section 4 (1) (a), Immigration Act No.3 of 2011.

¹⁶ Section 5 (3), Immigration Act No.3 of 2011.

truthfully. The questioning is to determine if the person is a prohibited immigrant or an undesirable immigrant. In terms of the Botswana Immigration Act a 'prohibited immigrant' is a person who has a criminal record, who was detained and sentenced without an option of a fine and did not receive a presidential pardon not to be removed from the country.¹⁷ An 'undesirable immigrant' is a person who will become a public burden by reason of mental or physical incapacity and does not have the financial means to support him or herself and any dependant.¹⁸ It is mandatory that non-citizens comply with the examination. Failure to comply is an offence and a fine or term of imprisonment not exceeding 10 years may be imposed.

To remain in Botswana a person must be in possession of a valid visitor's or residence permit. A non-citizen may remain in the country for a period not exceeding 90 days.¹⁹ Similarly to that of the South African Immigration Act, foreign nationals may apply for different permits in Botswana. In Botswana the procedure to apply for asylum seeker status must be completed in terms of the Refugee (Recognition and Control) Act of 1967. Some scholars believe that the Refugee Act is control orientated and not protection orientated.²⁰ This is because the Minister of Defence and Security has the sole discretion to determine who is a refugee or asylum seeker.²¹

A non-citizen who wishes to apply for asylum seeker status in Botswana must declare their intention at the earliest possible opportunity.²² This may be done by approaching the police or The United Nations High Commissioner for Refugees (UNHCR) offices in the capital city Gaborone upon entry at the border. The applicant will apply in the presence of an immigration officer and soon thereafter an initial interview will be conducted. At the interview the applicant will be required to state their reason for fleeing his or her country of origin. After the application has been received, the applicant is considered an asylum seeker and will be transferred to the Centre for Illegal Immigrants in Francistown.²³ The applicant will reside at the centre pending the determination of his or her status

¹⁷ Section 41 (1) (a), Immigration Act No.3 of 2011.

¹⁸ Section 50 (1) (a)-(b), Immigration Act No.3 of 2011.

¹⁹ Section 19 (1), Immigration Act No.3 of 2011.

²⁰ Makhema M, 'Social protection for refugees and asylum seekers in the Southern Africa Development Community (SADC)' SP Discussion Paper 0906, *Social Protection and Labour*, The World Bank 10 (2011) 5.

²¹ Makhema M (2011) 26.

²² B Rutinwa 'Asylum and refugee policies in Southern Africa: A historical perspective' 15 May 1999 26 available at http://www.sarpn.org.za/documents/d000121_2/rutinwa/rutinwa.pdf (accessed 20 October 2021).

²³ Macharia-Mokobi E & Pfumrodze J, 'Advancing Refugee Protection in Botswana through Improved Refugee Status Determination' *African Human Rights Journal* 13 No.1 (2013) 157.

as a refugee. The application has to be forwarded to the Refugee Advisory Committee (RAC). This committee will summon the applicant for a determination inquiry where the applicant must state the circumstances surrounding them leaving their home country and if he or she is afraid of persecution upon return to their country.²⁴ The UNCHR participates as an *ad hoc* member of the RAC providing relevant country information and advice on how each case should be treated. Upon completion of the inquiry, the RAC must prepare a report for the Minister of Defence.²⁵ It is curious that the Minister of Defence is the only decision maker in this regard. Ordinarily, one would expect that the Ministry of Home Affairs would also have an input. It is unfortunate that the Botswana legislation is vague on this very important issue.

The Minister of Defence has the sole discretion to decide the outcome of an application.²⁶ When a person is recognised as a refugee by the Minister, he or she will immediately be transferred to the Dukwi settlement camp, where they will reside for as long as their refugee status is valid in Botswana.²⁷ If the application is denied, the person will be considered a non-citizen and must be removed from Botswana. In South African laws, undocumented immigrants have the right to appeal against a rejected application. They may even approach the courts. The Department of Home Affairs must also give valid reasons as to why the application is rejected. Unfortunately, in Botswana a rejected asylum applicant will be removed from the country immediately and the Minister does not have to furnish reasons for the rejection.²⁸ This is clearly inconsistent with the international obligation to respect the dignity of all persons.



The case of *Sefu and Others v The Attorney-General of Botswana* which will be discussed in greater detail below, demonstrated the lack of access to justice for non-citizens in Botswana.²⁹ Principles such as the international non-refoulement are not taken into consideration by the Minister when denying refugee status applications.³⁰ Political refugees are removed from the country when they commit an offence, although they are protected in terms of article 32 of the Immigration Act. The

²⁴ Section 4 and 5, Refugee (Recognition and Control) Act of 1967.

²⁵ Section 4(3), Refugee (Recognition and Control) Act of 1967.

²⁶ Section 8(1)(a), Refugee (Recognition and Control) Act of 1967.

²⁷ Dukwi settlement camp is a refugee camp located in the village of Dukwi, 154 kilometers North of Francistown, Botswana's second-largest city.

²⁸ In terms of Botswana's legislation the term 'removed' is used as opposed to 'deportation' which is used in South Africa, therefore for the sake of convenience I will use the terminology as used in Botswana's legislation.

²⁹ *Sefu and Others v The Attorney-General of Botswana* Miscellaneous Criminal Application No. F46 of 2005.

³⁰ Macharia-Mokobi E & Pfumrodze J (2013) 171.

Refugee Act is indeed controlled by the Minister and the courts in Botswana are more likely to concur with the Minister than to protect non-citizens.³¹

In the *Sefu* case, four nationals from the Democratic Republic of Congo (DRC) petitioned the court because their applications for refugee status were rejected by the Minister, and they were afraid of returning to their country engulfed in a war of attrition.³² Years after their asylum seeker applications were rejected the petitioners still remained in the Dukwi settlement camp. In the Court the petitioners requested bail and alleged that they were unlawfully kept in detention for 48 hours without a warrant. They alleged that their detention was occasioned by a suspicion that they had committed a criminal offence.³³

The Court held that a bail application is for an applicant who faces a criminal charge and is in detention for that reason. Bail is a security required by a court for the release of a prisoner who must appear before court at a future time.³⁴ The police denied that the petitioners were kept in detention unlawfully. The petitioners alleged that they were not given the opportunity to consult with legal practitioners regarding the criminal charge. The police did not have sufficient evidence to charge the petitioners. The Court instead raised the issue of the petitioner's application for asylum that had been rejected and that they should be removed from the country. The issues in Court were conflicting as the initial charge against the petitioners was that of theft, a criminal charge which the presiding officer ignored when the police did not have sufficient evidence to charge the petitioners. Instead, the Minister influenced the Court to deal primarily with the issue of them being non-citizens and ordered for an immediate removal.³⁵

The applicants were detained at the Centre for Illegal Immigrants until their removal. The applicants also alleged that their detention without charge and without being brought before a court violates sub sections (1), (2) and (3)(b) of section 5 of the Constitution.³⁶ However, the Court held that these

³¹ Konopo J & Ntibinyane N 'Botswana: Asylum-seekers accuse prison officials of ill-treatment and sexual assault' Daily Maverick 8 January 2018 2 available at <https://www.dailymaverick.co.za/> (accessed 20 May 2020).

³² *Sefu and Others v The Attorney-General of Botswana* Miscellaneous Criminal Application No. F46 of 2005.

³³ *Sefu and Others v The Attorney-General of Botswana* Miscellaneous Criminal Application No. F46 of 2005.

³⁴ Blacks Law Dictionary 7th edition ed at (1999) 135.

³⁵ *Sefu and Others v The Attorney-General of Botswana* Miscellaneous Criminal Application No. F46 of 2005.

³⁶ *Sefu and Others v The Attorney-General of Botswana* Miscellaneous Criminal Application No. F46 of 2005.

provisions would be applicable if the applicants were not failed asylum seekers. The Court dismissed this case, and the applicants awaited their deportation.

Given that the non-refoulement principle is a principle of customary international law, Botswana had to respect it.³⁷ There is a need for legislative reform to enshrine the principle of non-refoulement into Botswana's legislation. The applicants feared persecution in the DRC, but the Court ignored this. The Botswana Refugee Act is silent on the right to legal representation. Yet the right to an attorney is fundamental to a fair trial and is recommended by the United Nations High Commissioner for Refugees. This silence suggests that Botswana's laws do not align with the international standards of access to justice. The legislation ought to be developed so as to afford protection to non-citizens. The repercussions for not affording such person's protection may become clearer from the next discussion.

4.2.2 Protection from Violence and Exploitation

Botswana has no specific provisions for the protection of refugee's human rights. Botswana acceded to the 1951 Convention relating to the Status of Refugees and its 1967 Protocol in 1969.³⁸ The country is also a states party to many universal and regional conventions that recognise individual human rights.³⁹ However, the country's domestic law does not reflect the international human rights standards. As of 30 November 2016, Botswana hosted 2,114 refugees and 731 asylum-seekers and most of them reside in Dukwi refugee camp.⁴⁰ There are also over 500 rejected asylum-seekers in detention in the Centre for Illegal Immigration out of which 271 were children as of January 2017.⁴¹

³⁷ Macharia-Mokobi E & Pfumrodze J (2013) 171.

³⁸ Report of the Working Group on the Universal Periodic Review of Botswana 11 April 2018 2 available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BWSession15.aspx> (accessed 21 October 2021).

³⁹ Submission by the United Nations High Commissioner for Refugees for the office of the High Commissioner for Human Rights- Compilation Report, *Universal Periodic Review: 3rd Cycle* (2017) 15.

⁴⁰ Report of the Working Group on the Universal Periodic Review of Botswana (2018) 3.

⁴¹ UN High Commissioner for Refugees (UNHCR), Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers, para 6, 15 May 2013 1 available at <http://www.refworld.org/docid/51af82794.html> (accessed 21 October 2021).

The process to determine the refugee status of an applicant is usually prolonged.⁴² Asylum seekers must then stay at the Dukwi refugee camp where there are limited essential services.⁴³ In terms of international refugee law encampment policies are not desirable. However, a study has shown that 46.5 percent of Botswana citizens favour the encampment of refugees.⁴⁴ Integration into the Botswana society seems unlikely thus. Xenophobia may also be a possibility.

Prison warders at the Francistown Centre in Botswana were accused of ill-treatment, sexual abuse, assault and torture of asylum seekers.⁴⁵ The Francistown Centre for Illegal Immigrants in 2002 began operating as a holding facility for non-citizens in Botswana. However, overtime this facility became a prison for offenders.

In 2017, there were reports that asylum seekers at the Francistown Centre petitioned the High Court to order the government to facilitate their return to their countries of origin.⁴⁶ They complained of unbearable conditions. This petition was dismissed as the court stated that the Botswana Constitution does not afford protection to non-citizens. An investigation was conducted by the INK Centre for Investigative Journalism and approximately 50 detainees were interviewed.⁴⁷ Most shared their horrific experiences at the Francistown Centre. Young boys recalled how they were lured to exchange sexual favours for food and the medical negligence that has caused permanent disabilities to some asylum seekers.⁴⁸ Unfortunately, the Botswana government denies all these allegations. The fact that persons would rather return to the places they escaped to save their own lives speaks volumes of Botswana's approach to immigrants' rights.

Botswana's Refugee (Recognition and Control) Act needs development to align with the international refugee law standards. While South African law on the arrest, detention and deportation of immigrants are not beyond criticism, the supreme Constitution protects everyone within the borders of the country. Admittedly, xenophobia is rife in South Africa and the government has not formally

⁴² Tshosa, O. O, 'National Refugee Laws in the Light of International Standards: Some Reflections on the Refugee (Recognition and Control) Act, 1967 of Botswana' *University of Botswana Law Journal*, 5, 60 (2007) 14.

⁴³ Tshosa, O. O (2007) 9.

⁴⁴ Oucho JO & Campbell EK 'Changing attitudes to immigration and refugee policy in Botswana' in J Crush (ed) *Migration policy series* No 28 (2003) 1.

⁴⁵ Konopo J & Ntibinyane N (2018) 3.

⁴⁶ Konopo J & Ntibinyane N (2018) 3.

⁴⁷ Konopo J & Ntibinyane N (2018) 4.

⁴⁸ Konopo J & Ntibinyane N (2018) 5.

acknowledged the problem. There are also problems with the enforcement of laws which ought to afford protection to immigrants. Despite these realities, immigrants are not banished to refugee camps in South Africa. A legislative framework, as mentioned in the preceding chapter, exists which sets out how undocumented immigrants ought to be dealt with. The non-refoulement principle is also deemed of paramount importance and this has on occasion been demonstrated by the South African courts.

4.2.3 Border Governance

According to the Immigration Act any person may be searched by an immigration officer upon entry into Botswana.⁴⁹ This is part of the examination process, and the immigration officer is mandated to take fingerprints, a photograph and palm prints of every applicant for asylum.⁵⁰ No person may refuse the examination process as the person will not be allowed to enter Botswana.

Immigration officers also have the power to search without a warrant any aircraft, vehicle, train or vessel that will enter Botswana.⁵¹ The immigration officer may in writing request a further medical examination from the applicant, to ensure that a person is not mentally or physically incapacitated.⁵² A person who is mentally or physically incapacitated is an undesirable immigrant in Botswana and his or her presence in the country will be deemed unlawful and the Minister may issue an immediate deportation order.⁵³ This prohibition is outright discriminatory and inconsistent with international law principles on dignity, equality and security of the person.

The Immigration Act provides that an immigration officer may search a vehicle or train when there is a suspicion of any illegal activity. Furthermore, immigration officers may arrest applicants at the borders without warrant should there be a reasonable suspicion of a criminal activity. In *Nabakooza v State*, the appellant was Ugandan.⁵⁴ At the border he was searched, and two custom officers discovered 28 packets of tablets in his bag. They suspected the tablets were mandrax drugs. Later, the appellant was transported to the police station to sign a document confirming the seizure of the

⁴⁹ Section 5, Immigration Act No.3 of 2011.

⁵⁰ Section 5 (a), Immigration Act No.3 of 2011.

⁵¹ Section 9, Immigration Act No.3 of 2011.

⁵² Section 8, Immigration Act No.3 of 2011.

⁵³ Section 50 (1)(a), Immigration Act No.3 of 2011.

⁵⁴ *Nabakooza v The State* Appeal from Kasane criminal case No. KS 249 of 2004.

drugs. The police officers had to send the tablets to a forensic expert to confirm whether or not the appellant was in possession of drugs. The report came back after a few hours confirming that the tablets were indeed mandrax.⁵⁵

The appellant was convicted by the magistrate's court for the unlawful possession of mandrax.⁵⁶ He was sentenced to 10 years imprisonment and to pay a fine of P15 000 and failure to do so would result in an additional three years imprisonment. He appealed both the conviction and sentence. He challenged the decision on the grounds that the evidence adduced by the prosecution was unreliable and that the witnesses were confused.⁵⁷

The appellant argued that during the search the custom officers spoke Setswana, a language that he does not understand. He was also not informed of the reasons for his arrest in a language which he understood. The Court, however, found that the witnesses for the state were credible in this regard despite the fact that there were other important details of the case which they could not recall. In essence it seemed that the court did not pay serious attention to the issue of the right to be informed of the reasons for arrest in a language which the suspect understands. In South Africa, this issue would at least have raised questions about the lawfulness of the arrest and greater interrogation would have ensued.

Botswana's outright rejection of persons with disabilities is a serious and contentious human rights issue. Though it appears to be motivated by economic interests, it seems that such interests outweigh the right to life and human dignity of non-citizens. The government of Botswana is of the view that the applicants who are mentally and physically incapacitated will not be economically active in the country as they cannot work, and they will be solely dependent on the state's resources.⁵⁸ In the South African context, though persons with disabilities do experience discrimination and lack of opportunities, there is not a general belief that they cannot work. The law certainly does not reflect such a sentiment. Though there are no statistics which prove that the South African immigration departments receive asylum seeker applications from mentally and physically incapacitated foreign

⁵⁵ *Nabakooza v The State* Appeal from Kasane criminal case No. KS 249 of 2004.

⁵⁶ *Nabakooza v The State* Appeal from Kasane criminal case No. KS 249 of 2004.

⁵⁷ *Nabakooza v The State* Appeal from Kasane criminal case No. KS 249 of 2004.

⁵⁸ Tshosa, O. O (2007) 57.

nationals, it is contended here that an automatic rejection of an applicant purely because they have a disability will not pass constitutional muster in South Africa.

4.2.4 Arrest and Detention Procedure

Asylum seekers may be subjected to unfavourable treatment and delays and still not be granted the protection they require.⁵⁹ Arguably, each case must be dealt with on their particular merits to avoid injustices. A case in point occurred in 2002 when a group of individuals from Namibia crossed the border into Botswana. Upon arrival in Botswana, they applied for political refugee status and claimed that they fled Namibia due to political reasons and fear of persecution.⁶⁰ It was later discovered that prior to fleeing the country, the group had confrontations with the Namibian authorities and had to be convicted. The group was placed at the Dukwi refugee camp while their status was being determined. The Namibian authorities filed for extradition with the Botswana government, arguing that the group were fugitives as they were involved in various acts of sabotage against the government. The group lodged an urgent application in the High Court to resist the extradition. The Court held that because the group fled the country due to political reasons they could not be extradited.⁶¹

Based on the earlier discussions of Botswana's treatment of asylum seekers, it would have been expected that the application of the abovementioned group would have been rejected. It hardly makes sense that persons with disabilities who are law-abiding are automatically rejected with no consideration for their needs or what they may offer to a country, yet persons who were directly in conflict with the law and government of a country would be given due consideration. This is not to say that the group should not have been given protection. It is contended here that every applicant should be given due consideration and that clear criteria must be established to determine who may qualify and who should be rejected. Importantly, every applicant ought to be provided with the reasons for a rejection and this should be appealable.

It should also be noted that the Minister may remove from the country, a recognised refugee. The removal may occur if in the Minister's opinion, the removal is desirable on grounds of national

⁵⁹ Tshosa, O. O (2007) 57.

⁶⁰ Tshosa, O. O (2007) 57.

⁶¹ *Republic of Namibia v Alfred and Others*, B.L.R 101 (CA) 2004 2.

security or public order or where the recognised refugee has been convicted by a court of a serious offence. The conviction must also in the opinion of the Minister, indicate that the recognised refugee poses a danger to the community.⁶² The deportation of a person who poses a danger to society is reasonable and necessary and cannot be criticised. More detail and clarity should, however, be provided on the assessment of the risk of danger to society. This will ensure fairness and prevent the unjustifiable limitation of rights in Botswana.

The arrest and detention of foreign nationals can give rise to many problems. Despite the strict regulations there has been continuous complaints about the living conditions at the Francistown Centre for Illegal Immigrants. Unfortunately, the Minister has to date ignored the complaints. There are reports of overcrowding at the centre and when the Covid-19 pandemic outbreak occurred it was difficult to maintain social distancing.⁶³ The government announced the release of more than a hundred prisoners in mid-April. A month later, only 15 Zimbabwean prisoners were released and deported to Zimbabwe.⁶⁴

Detaining immigrants for long periods of time is a problem in Botswana. The Refugee Act stipulates that the period of detention should be 28 days, yet the duration of detention averaged between six months and five years.⁶⁵ On 13 April 2018, the High Court ordered the release of two Somali asylum-seekers from the Francistown Centre.⁶⁶ They had been detained in the Centre since the denial of their refugee status in October 2015. They arrived separately in Botswana in June 2014. Following their release, they were taken into custody at the Tlokweng police station after attempting to enter the Dukwe Refugee Camp. Unfortunately, it is after this incident that President Khama declared them to be prohibited immigrants. They were subsequently detained at the first offenders' prison in Gaborone and have allegedly since been deported.⁶⁷ This is just one example of how the prolonged detention

⁶² Section 9(1), Refugees (Recognition and Control) Act No.3 of 1967.

⁶³ Williams A , 'Botswana' Prison Insider 2 September 2020 2 available at <https://www.prison-insider.com/en/articles/afrique-coronavirus-la-fievre-des-prisons#botswana-5e909e239dbe3> (accessed 26 October 2021).

⁶⁴ Sibanda A, 'Defence ministry resumes all services – Bokole' Daily News 1 June 2020 3 available at <http://www.dailynews.gov.bw/news-details.php?nid=56461> (accessed 26 October 2021).

⁶⁵ Section 6(b), Botswana: Refugees(Recognition and Control) Act of 1968.

⁶⁶ Amnesty International Report 2017/18 - Botswana, 22 February 2018 2, available at <https://www.refworld.org/docid/5a99393da.html> (accessed 26 October 2021).

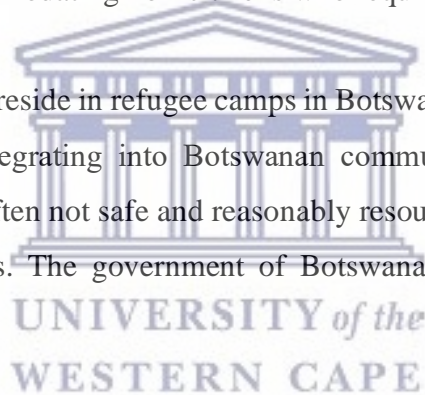
⁶⁷ Amnesty International Report 2017/18 (2018) 3.

of asylum seekers can impact upon the lives of people. Years can be spent awaiting an outcome of an application only to be deported to the place where they experienced real danger.

Both Botswana and South Africa should develop regulations to comply with the international standards and principles. There is lack of access to justice in the Botswana Refugee Act. The Act has no provision for non-citizens to access legal representation when necessary and this may contribute significantly to the long periods of unlawful detention. The conditions in which detainees are kept may have lasting and debilitating effects on them. It is ironic that Botswana rejects persons with disabilities, yet it places some immigrants in a position where they may develop physical and mental disabilities due to the conditions of their detention.

The Botswana Immigration laws are solely focused on the security and economic interests of the country. Whilst this is important, the protection of the country's interests does not justify the lack of a humanitarian approach to accommodating non-citizens who require protection.

As alluded to earlier, non-citizens reside in refugee camps in Botswana. It seems thus from the outset that non-citizens' chances of integrating into Botswanan communities are almost non-existent. Furthermore, refugee camps are often not safe and reasonably resourced places. Such camps usually signal suffering and hopelessness. The government of Botswana ought to seriously rethink the accommodation of non-citizens.



4.3 COMPARISON BETWEEN THE UNITED KINGDOM AND THE SOUTH AFRICAN IMMIGRATION LAWS

In the 21st century, immigration to the United Kingdom (UK) increased and became more diverse than at any other point in its history.⁶⁸ Statistics show that in the nine-year period from March 2011 to 2020, an average of 336 000 more non-UK nationals moved to the country each year than those who departed.⁶⁹ The European Union (EU) system had two major Acts of Parliament, namely, the

⁶⁸ Somerville W & Walsh P, 'United Kingdom's Decades-Long Immigration Shift Interrupted by Brexit and the Pandemic' (2021) 3.

⁶⁹ Elizabeth C & Harding R, 'British Social Attitudes 34 London' *NatCen Social Research* (2017) 12.

1993 Asylum and Immigration Appeals Act and the 1996 Asylum and Immigration Act.⁷⁰ The 1993 Asylum and Immigration Appeals Act were restrictive in that it created fast-tracking procedures for asylum applications considered to be without foundation, it allowed the detention of asylum seekers while their claim was decided and reduced asylum seeker benefit entitlements.⁷¹ The 1996 Asylum and Immigration Act continued in the same vein with new measures designed to reduce asylum claims, such as further welfare restrictions.⁷²

Over the years the UK government passed successive laws aimed at reducing the number of asylum applications.⁷³ The government needed to have an effective system to remove failed asylum seekers and to speed up the asylum applications process. This meant that the visa regime and financial penalties imposed on irregular immigrants had to be tougher.⁷⁴ It is to be noted that in the UK undocumented immigrants are referred to as 'irregular immigrants'. In addition to the external measures such as tougher visa regimes, the government took four main steps which will be discussed below to control irregular migration.⁷⁵ In 2008 the government began issuing Biometric Residence Permits with fingerprints and other data for all non-EU foreign residents intending to stay longer than six months.⁷⁶ Governments also imposed more severe sanctions on companies employing irregular migrants.⁷⁷ The government further, imposed measures on public services, such as restricting immigrants' access to none-emergency health care.⁷⁸ Lastly, it granted legal status to between 60 000 to 100 000 people from the years 2000 to 2009, most of whom had been in the country for 13 years or more or had long outstanding asylum claims.⁷⁹ Continued public opposition to migration was a critical driver of the 2016 Brexit vote that led to the country's exit from the European Union.

⁷⁰ Gordon I & Whitehead C, 'Economic impact on the London and UK economy of an earned regularisation of irregular migrants in the UK' (2009) 21.

⁷¹ Asylum and Immigration Appeals Act Chapter 23 (1993).

⁷² Asylum and Immigration Act 1996.

⁷³ Desmond A, 'The possibility for Regularisation in the UK in Light of the New Plan for Immigration' 28 May 2021 3 available at <https://rli.blogs.sas.ac.uk/2021/05/28/the-possibility-for-regularisation-in-the-uk> (accessed 5 August 2021).

⁷⁴ Desmond A (2021) 5.

⁷⁵ Walsh P, 'Irregular migration in the UK': There is no legal nor broadly accepted definition of an 'irregular immigrant', though the term is commonly used to refer to people who are in the UK without the legal right to do so, Oxford University 11 September 2020 2 available at <https://migrationobservatory.ox.ac.uk/resources/briefings/irregular-migration-in-the-uk/> (accessed 8 December 2021).

⁷⁶ Phillip C & Passel J, 'Europe's Unauthorised Immigrant Population Peaks in 2016: Then Levels off Washington' *Pew Research Centre* 13 November 2019 3 available at <https://www.pewresearch.org/global/> (accessed 16 April 2021).

⁷⁷ Phillip C & Passel J (2019) 5.

⁷⁸ Fernandez R, 'Citizenship and Naturalisation for Migrants in the UK: Briefing' *Migration Observatory Oxford* (2021) 6.

⁷⁹ Fernandez R (2021) 10.

There are four international principles that will be used as guidelines for the comparative study as mentioned above. These principles will be used to determine whether or not both United Kingdom and South African immigration policies comply with the international standards on the plight of immigrants. The UK policy which will be discussed is at the time of writing a proposed draft which does not cover all the relevant issues relating to immigrants as of yet. The UK government has not passed any legislation therefore not all the principles and guidelines required to drafting immigration laws may be on the proposed immigration policy. The policy will be discussed in general on the issues which affect irregular immigrants. The point-based system is the main change which affects irregular immigrants; therefore the effects of this system will be discussed in the context.

Based on the new proposed immigration policy the UK government announced that for the first time in decades they will finally have full control of their borders and how their immigration system operates. It is proposed that freedom of movement will be restricted as the new Immigration Bill will be introduced that will have a firm and fair point-based system.⁸⁰ This system is intended to attract high-skilled workers and students that will contribute to the economy, communities, and the public service. The government intends to create a high wage, high skilled and high productivity economy.⁸¹ The UK government is now more focused on the skills that a person can offer when granted access to the country and not necessarily where they come from. The new system intends to transform the way migrants come to the UK whether they want to work, visit or study. As of January 2021, migration will be reduced, and priority will be given to highly skilled applicants including scientists, engineers and academics.⁸² Experts believe that with the new system EU citizens and non-EU citizens will be treated equally as the economic activities will be on an equal scale.⁸³ This will have major implications for persons seeking asylum. However, the issue is dealt with in more detail later.

A person may apply for the visa when he or she satisfies the point-based system minimum requirements for purposes of employment or to study. Migrants will make their applications online

⁸⁰ James M, 'Migration statistics quarterly report' 25 August 2020 available at <https://www.ons.gov.uk/peoplepopulationandcommunity> (accessed 29 October 2021).

⁸¹ Impact Assessment for Changes to the Immigration Rules for Skilled Workers, 17 November 2020 available at <https://assets.publishing.service.gov.uk/government/uploads/> (accessed 2 November 2021).

⁸² James M (2020) 9.

⁸³ Migration Advisory Committee Policy Paper: 'EEA Migration in the UK: Final Report' (2018).

and facial biometrics will be required instead of fingerprints.⁸⁴ In the long-term the UK government wants to introduce an Electronic Travel Authority where a person may acquire permission to travel to the UK in advance.⁸⁵ All the applicants need to demonstrate that they received an employment offer from an approved sponsor, that the job required skill level and the applicant can speak English.⁸⁶ In addition to this requirement, the applicant must earn more than the minimum salary threshold.⁸⁷ If a person earns less than the minimum salary threshold he or she can still apply, but they need to demonstrate that they have a job offer in a specific shortage occupation as designated by the Migration Advisory Committee (MAC) and the person must have a PHD in the relevant field.⁸⁸ Each requirement has different points and to be eligible to apply a person must have 70 points in total.

For study purposes the student must demonstrate that he or she received a study offer from an approved educational institution.⁸⁹ In addition the student must be able to speak English and should have the financial means to support themselves in the UK during the duration of their studies.⁹⁰ No EU non-citizen with a criminal record will be granted access to the. The UK government will introduce a single, consistent and firmer approach to criminality across the immigration system.⁹¹

The new immigration policy of UK is more focused on border control. The point-based system is strictly enforced, and no exceptions will be made. No provision is made yet with regards to immigrants who want to enter the country to seek asylum. Exceptional circumstances to enter the UK for reasons other than to offer skills are not yet considered. There is no provision for access to justice and the reason for that may perhaps be attributed to the fact that only a specific group of immigrants will be granted access. The UK government's intended border control system will reduce the number of irregular immigrants in the country. No provision is also made with regards to the arrest and detention of an immigrant should he or she commit a crime while studying or working in the country. The proposed Immigration Policy has many issues that need to be resolved and it does not meet the international standards and principles. The reality is that the world is affected by the

⁸⁴ Impact Assessment for Changes to the Immigration Rules for Skilled Workers (2020) 32.

⁸⁵ Home Office analysis of Annual Population Survey January – December, 30 December 2019 available at <https://www.gov.UK> (accessed 5 November 2021).

⁸⁶ Migration Advisory Committee Policy Paper: 'EEA Migration in the UK: Final Report' (2018) 18.

⁸⁷ Home Office analysis of Annual Population Survey (2019) 10.

⁸⁸ Migration Advisory Committee Policy Paper (2018) 25.

⁸⁹ Impact Assessment for Changes to the Immigration Rules for Skilled Workers (2020) 50.

⁹⁰ Migration Advisory Committee Policy Paper (2018) 28.

⁹¹ James M (2020) 14.

phenomenon of persons having to seek asylum and becoming refugees. The UK's approach denote that it turns its back on persons in need of protection.

4.4 CONCLUSION

In conclusion, South African Immigration laws comply with the international standards and principles, however, there are amendments that need to be implemented. It is noticeable that both Botswana and the United Kingdom have tight security at their border points, and this is lacking in South Africa. South Africa should consider investing in biometrics and technology to improve the security at the border points to reduce the rapidly increasing number of undocumented immigrants. The Botswana Immigration laws are rigid and discriminatory towards foreign nationals and more needs to be done to promote humanitarian laws in the country. The allegations of ill treatment and abuse at the holding cells needs to be dealt with. This applies to both South Africa and Botswana. Unfortunately, with the proposed UK immigration policy more amendments need to be made for the policy to be in line with the international standards and principles.



CHAPTER V

5.1 CONCLUSION AND RECOMMENDATIONS

This thesis has two research questions that needed to be determined, and the primary focus was on the custodial issues related to immigrants who reside illegally in South Africa. Throughout the research the following questions were raised: How may the laws applicable to foreign nationals, who are illegally in South Africa and who are arrested and detained, afford them reasonable protection which is consistent with their fundamental rights? How may the law reasonably ensure the accountability of state officials involved in the enforcement of immigration laws? The following are recommendations which focus on issues of detention and enforcers of the law.

First and foremost, there is a need to amend the term 'illegal foreigner' in the Immigration Act and Refugee Act. The words 'non documented' person instead of 'illegal foreigner' or 'undesirable person' would be a positive change. The change in terminology in itself may give a realistic perspective to law enforcers. Importantly, this is to protect the dignity of the person. To be labelled an 'illegal foreigner' is more than a slight indictment on the integrity of a person. Enforcers may also then begin to understand that they are dealing with persons first and foremost and the fact that they lack documents which legalise their stay in South Africa, is a secondary consideration to the fact that they are persons with fundamental rights.

The practical steps to legitimising an immigrant's stay in South Africa must also be reconsidered. In terms of South African law an application for refugee status must be made in person in accordance with the prescribed procedures to a refugee reception officer. The refugee reception officer must ensure that the application form is properly completed and where necessary must help the applicant in this regard. At times the language barrier is a challenge as some asylum seekers do not understand English, the language which is used in the application form. They therefore experience difficulties in completing the form. This is exacerbated by the fact that there are no interpreters at the offices, hence the reception officers have to carry out this duty. It is thus recommended that interpreters be employed at the refugee reception offices to assist asylum seekers during the process of completing the applications. This is vitally important as it may encourage people to legitimise their stay in South Africa and avoid conflict with the law. In the age of advanced technology, translation and

interpretation ought not to be the major hurdle as it currently is. It should also not be a contributor to hardships and violations of human rights.

It is equally important that law should obligate officials and courts to consider the challenges in the renewal of documents before resorting to drastic measures such as arrest, detention and deportation. More should be done to eliminate these challenges in the renewal of documents to prevent arrests in the first place. The Asylum Procedures Directive which in the European context ensures that asylum seeker applications are prioritised and dealt with in a fair manner, taking priority of asylum seekers with special needs, unaccompanied minors, and victims of torture, is perhaps an element to be considered in the enhancement of the South African immigration system.

Furthermore, whilst the European system appear to be a model system, it may not be completely appropriate or even effective in the African context. This does, however, not mean that there are no lessons to be gleaned for Africa. At a minimum, it seems that co-operation between different states yields positive effects in terms of addressing immigration issues. Efforts at clarifying and creating awareness of the extant principles, standards and processes pertaining to illegal immigration may go a long way towards improving the plight of those affected. Consistent efforts must be made at developing the laws and policies affecting immigration and particularly illegal immigrants as they are vulnerable to violations of their most fundamental rights.

In South Africa, the closure of the refugee reception offices, which is responsible for renewing and issuing refugee permits, asylum permits, and residence permits, made many foreign nationals vulnerable to harassment and extortion by law enforcement agents who were likely to ignore the temporary prohibition on arrests of all those whose permits expired during the Covid-19 lockdown. The fact that some law enforcement officials could overlook the prohibition on arrests speaks volumes about the problem of the implementation of laws. There ought to be a real understanding by officials in particular that they too are subject to the law. The principle of equality before the law and that no one is above the law ought to be cemented in the ethos of law enforcement. Continuous training and conscientizing are critical interventions to ensure accountability. Like the European Union it would be a great initiative to train the public staff that deal with immigrants. The training should include thorough and in-depth lessons on the Immigration Policies of the country and how immigrants should be treated in a dignified respectful manner.

The issue of corruption and public officials accepting bribes and selling fake documents is a major problem. There is a lack of reported cases and convictions, therefore more focus should be on prosecuting corrupt public officials. This may serve to deter other officials from doing the same. The exploitation of already vulnerable persons ought to be dealt with as serious offences.

To prevent the slew of problems which immigrants eventually face when they enter South Africa illegally, better border control is needed as a starting point. Border security emphasises territorial sovereignty as mentioned in this thesis. Permanent surveillance that includes technological systems that will allow government to trace the movement of people within the national territory should be introduced. Random harassment of innocent foreign nationals by the police will then be reduced. Information is key to affording the correct type of assistance to immigrants.

Arrests, detentions, and deportations constitute major disruptions in migrants lives and are often physically violent, economically disastrous, and emotionally traumatic experiences. Consequently, it is of utmost importance that the immigration system should deal with every immigrant's application with integrity. In short, resources must be utilised wisely. Investigations must be preceded by reasonable grounds to suspect that a person is an illegal immigrant and thorough investigations must be conducted before the decision to deport is made. In most cases deportation is not the ideal situation for immigrants as they are likely to face that which they attempted to escape in the first place. If, however, deportation is the fair and just outcome of a case, it ought to be carried out in line with international law and constitutional standards. As a starting point, the law must be more prescriptive of the permissible period of detention prior to deportation. The law pertaining to their arrest should also explicitly specify that the arrestee should be brought before a court within 48 hours. Leaving this open to interpretation poses a danger to immigrants. Compliance must be closely monitored. If possible, there should also be better co-operation with the country to which the person is to be deported.

Deported persons who are declared undesirable cannot enter the country for a period of 12 months to 5 years after deportation. Although, this may be justified in certain cases, familial ties and roots established in the country should be considered in this regard. The deportation of a person who poses a risk of danger to society is necessary. However, policy guidelines on how the risk ought to be

assessed are imperative to ensuring fairness and to prevent abuse. The right to family life is after all a protected right.

In conclusion, the law on immigration ought to be based on *Ubuntu*. Understandably, arrests and detention and even deportation are warranted in many instances , but the manner in which these are carried out speaks to the ethos of our country. The values of dignity, equality and freedom may not be compromised even when deportation is legally inevitable.



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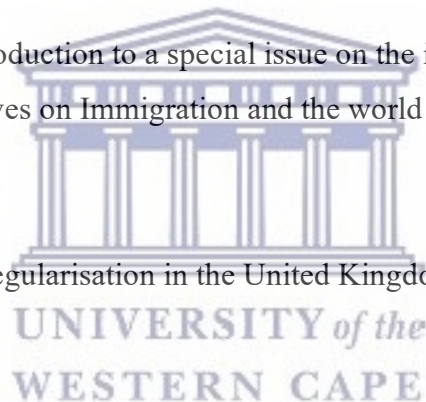
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