LHR

Lawyers for Human Rights

JUNE 2012

MONITORING IMMIGRATION DETENTION IN SOUTH AFRICA

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Human Rights
detention conditions
humane enforcement Refugee Protection
Detention Monitoring end to child detention
immigration enforcement

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LHR AND IMMIGRATION DETENTION CASES

Lawyers for Human Rights is a national non-profit organisation with its Head Office in Pretoria, South Africa. LHR's principle aims and objectives are to promote, uphold, foster, strengthen and enforce all human rights in South Africa.

One of LHR's specialised human rights programmes is the Refugee and Migrant Rights Programme which operates out of Johannesburg, Pretoria, Musina and Durban. Through this programme, LHR supports and engages in litigation on behalf of refugees, asylum seekers and other migrants. Since 2000, this programme includes a Detention Monitoring Unit. This unit provides *pro bono* assistance and carries out consultations with asylum seekers, refugees and other migrants purportedly detained in terms of the Immigration Act and/or the Refugees Act and seeks to realise the rights of as many detained individuals as its resources and capacity allow.

LHR is the only non-governmental organisation regularly and consistently working in immigration detention centres around the country. With its twelve-year track record and ongoing direct contact with large numbers of detainees, LHR has unique first-hand information on detainee experiences, conditions of detention, immigration trends and shifts in immigration policy and practice. This is especially important given the lack of other independent monitoring of immigration detention facilities.

CONTENTS

detention conditions
humane enforcement Refugee Protection
Detention Monitoring end to child detention

INTRODUCTION

This report summarises the work of Lawyers for Human Rights' Immigration Detention Monitoring Unit from February 2011 to March 2012, based on consultations with detainees and litigation brought against the Department of Home Affairs on their behalf.

Despite the legal protections afforded to asylum seekers, refugees and other migrants in South Africa, the detention and deportation of foreign nationals continues to be regularly carried out in an unlawful manner. Lawyers for Human Rights has been representing clients in immigration detention for twelve years and has documented disturbing continuities over time in the disregard for the processes and protections built into the law. This is in spite of repeated engagements with the Department of Home Affairs, as the department mandated to carry out and oversee detentions and deportations in terms of the Immigration Act (No. 13 of 2002 as amended), to encourage and support the improvement of immigration detention and deportation systems.

This report is intended to inform a range of actors concerned with immigration detention:

- The Department of Home Affairs, as the Department mandated to manage the process and ensure it is conducted in a lawful manner, can use this report to improve its internal systems of oversight with the aim of increasing efficiency and effectiveness and reducing unnecessary costs and legal challenges;
- The Human Rights Commission, as the Chapter 9 institution mandated to monitor immigration detention facilities, can use the report to prioritise its own monitoring commitments;
- Oversight mechanisms within the Government of South Africa, including the Home Affairs Portfolio Committee in Parliament, the Department of Monitoring & Evaluation in the Presidency and the Public Protector, as well as other peer-review mechanisms such as the African Union Peer-Review Mechanism and the United Nations Human Rights Council Universal Periodic Review, can use the report to inform their oversight of substantive and administrative justice by government actors;

- The justice system, including the Department of Justice, judges, prosecutors and lawyers (including private lawyers and those working in pro-bono legal organisations) can use the report as context for litigation relating to individual clients and class action cases;
- Non-governmental organisations concerned with refugee and migrant rights, rights in detention and the general maintenance of human rights and administrative justice in South Africa can use the report to inform their advocacy strategies.

As in previous years, LHR's detention cases in 2011-2012 have shown a high incidence of unlawful detention, including substantive and procedural contravention of the law. The main substantive concerns are the **detention and deportation of asylum seekers and refugees** (amounting to *refoulement*[1]) as well as the denial of opportunities for asylum seekers to register an asylum claim if they have not yet been able to access documentation. There also continue to be cases of the **detention of children** for purposes of deportation in inappropriate facilities.

The main procedural concerns remain **detention periods beyond the statutory limit** of 120 days as well as detentions beyond 30 days without the necessary warrants or court orders. Conditions at detention facilities, including at the Lindela Repatriation Centre, shelters detaining children and women, and especially detention facilities in the Musina area near the Zimbabwean border, also remain well below minimum standards.

In addition to not putting in place internal systems to address and reduce such long-term substantive and administrative failures, it is particularly concerning that the Department of Home Affairs seems to have little regard for the courts. Lawyers for Human Rights has repeatedly taken the Department of court over the detention of individual asylum seekers and refugees, winning over 95% of cases with costs, but the Department continues to detain such individuals and continues to attempt to fight these cases in court, resulting in significant aggregate costs to the tax payer. Most significantly, procedural precedents and principles established and interpreted by the courts about the detention process more generally are regularly ignored.

A recent decision by the North Gauteng High Court may change the Department's approach to litigation, as it holds senior Home Affairs officials personally accountable for the Department's failure to comply with court orders. The Judge found the Department to be in contempt of court (in this case, an order to issue a South African with an ID book) and is holding the Director General of Home Affairs, Mkuseli Apleni, directly accountable by sentencing him to three months imprisonment if the order is not immediately carried out, as well as imposing a punitive cost order.[2] We have observed that some private attorneys also seem to have realised the potential of representing unlawfully detained

1 Refoulement is the return of an asylum seeker to a country where he/she might face persecution or harm. The prohibition on refoulement is a central tenant of international law.

2 Venter, Z. 2012. 'Home Affairs DG faces jail time over ID delay', IOL News, 10 May 2012, http://www.iol.co.za/news/crime-courts/home-affairs-dg-faces-jail-over-id-delay-1.1293485

clients at Lindela, as such cases are easily won with cost orders. Such urgent court applications relating to cases of detention at Lindela have recently increased to the extent that a Johannesburg High Court judge made a visit to Lindela in early 2012 to investigate the reasons for these cases. While there is technically no legal framework for judicial oversight over Lindela as an administrative detention facility (in the way there is for prisons as criminal detention facilities), such a judicial focus on Lindela is welcome, not least because it draws attention to the scale of administrative injustice as well as the cost implications of avoidable court processes for the tax payer.

A further concern is the continued lack of independent monitoring of immigration detention facilities. Lawyers for Human Rights has consistently represented clients at the Lindela Repatriation facility and other detention facilities, especially in the Musina area, but has not been given access to observe general conditions of detention. In 2009, the African Centre for Migration and Society (then called the Forced Migration Studies Programme) was allowed to interview detainees at Lindela (the findings of this study are discussed below)[3] but were denied access to the inside of the detention facility, and permission to conduct interviews was withdrawn half-way through the research. Other NGOs who have requested permission to monitor detention conditions have been denied access. When Médecines Sans Frontiers (MSF) requested access to Lindela to conduct an independent medical assessment of the state of health care provision in November 2011, this request was turned down for the reason that the Department was satisfied with the health care arrangements currently in place.[4] An epidemiologist of the Office of the United Nations High Commissioner for Refugees (UNHCR) who sought to evaluate health care provision at Lindela in November 2011 was also denied permission to interview detainees and visit the inside of the facility. The South African Human Rights Commission, which is the only organisation formally mandated to regularly monitor immigration detention, has not issued a public report since 2000 and there has as yet been no public report on a Lindela visit the SAHRC conducted in early 2012.

It is significant that 2011-2012 was a year in which immigration detention could have seen positive developments. Due to the moratorium on the deportation of Zimbabweans from April 2009 – September 2011, the overall pressure on the immigration detention and deportation system was radically reduced in this period, while the capacities to manage the system remained the same. Unfortunately, this did not translate into improved adherence to substantive or procedural justice for detainees. Even though deportation numbers have not yet returned to pre-2009 levels,[5] it is likely that pressure on the detention system will increase again, and institutions should be ready to provide adequate services in this context.

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3 Amit, R 2010. 'Lost in the vortex: irregularities in the detention and deportation of non-nationals in South Africa'. Available at http://www.migration.org.za/sites/default/files/reports/2010/Lost_in_the_Vortex-_Irregularities_in_the_Detention_and_Deportation_of_Non-Nationals_in_South_Africa_0.pdf

4 Per letter from Modiri Matthews, Head of the Immigration Inspectorate on 21 December 2011

5 The International Organisation of Migration report that 19000 persons were deported to Zimbabwe from January – April 2012, which is much lower than the average of 17000 persons per month just prior to April 2009. Minutes of Protection Working Group Meeting, 8 May 2012

METHODOLOGY

LHR conducts regular (usually weekly) visits to Lindela to consult with detainees. This includes initial consultations and follow-up meetings with those detainees whom LHR has taken on as clients. LHR then represents these clients in court. More than 95% of immigration detention cases represented by LHR resulted in the release of the claimant.

From 2009, the Department of Home Affairs provided the SAHRC with the list of detainees at Lindela, showing those in detention for more than 20 days. LHR collected this list weekly on behalf of the SAHRC and this information was valuable as a source of information. It also enabled LHR to direct assistance to those detainees in prolonged detention. Since September 2010, LHR has been denied access to these statistics. Appeals to the SAHRC in 2010 and 2012 have not been successful in regaining access to these statistics. LHR's consultation list is therefore based on referrals from friends and family of detainees, along with referrals from other NGOs who do not have regular access to the facility. Lindela officials only allow access to detainees with two days' notice and on the basis of name, surname and nationality. Although priority is given to cases involving the detention of refugees and asylum seekers, LHR also endeavours, when possible, to assist wrongfully detained persons including citizens, permanent residents, stateless persons and detainees with straightforward immigration problems, as these individuals may have no other access to cost-free legal assistance. In the period March 2011 - March 2012, LHR launched 18 urgent High Court Applications for the release of detained asylum seekers or unlawfully detained migrants. As most of these cases involved more than one client, a total of 41 persons were released as a result of these court applications. Given the level of need and LHR's limited capacity, however, only a small number of persons brought to LHR's attention at Lindela can be taken on as clients and potential clients on LHR's consultation list have often already been deported before LHR can consult with them. Increased legal representation capacity is therefore urgently needed.

LHR also conducts daily visits to the SMG detention facility in Musina. The organisation informs detainees of their rights, ensures that they are taken to the Refugee Reception Office to apply for asylum when necessary and that individuals with valid documents are released. In addition,

LHR intervenes in the detention of vulnerable detainees, such as unaccompanied minors and pregnant women.

LHR has used the following strategies to improve conditions, advocate for improved conditions and enforce the implementation of the law for detained foreign nationals:

- Regular visits to detention facilities with the aim of preventing abuses and unlawful actions;
- Litigating on behalf of 41 detainees between March 2011 and March 2012.
- Making oral submissions to the South African Human Rights Commission requesting their intervention regarding unduly long detentions at Lindela.[6]
- Making a joint submission to the SAHRC to investigate the state of health and provision of health care services at Lindela.[7]
- Making a submission to the UN Special Rapporteur on the Rights of Migrants.[8]
- Making a joint submission with the Consortium of Refugees and Migrants in South Africa (CoRMSA) to the Universal Periodic Review Mechanism of the United Nations in November 2011 (for debate in May 2012), including consideration of conditions at Lindela Repatriation Centre.[9]

6 29th February 2012 Presentation to the SAHRC Section 5 Committee on Migration which is chaired by the Chairperson of the SAHRC, Lawrence Mushwana

7 Joint letter submitted on 28th May 2012 by LHR, MSF, Section 27 and PASSOP

8 This 31 January 2012 submission is available at http://www.lhr.org.za/publications/lhr-submission-special-rapporteur-human-rights-migrants

9 http://www.lhr.org.za/publications/joint-lhrcormsa-submission-south-africas-universal-periodic-review-mechanism-2011

THE LEGAL FRAMEWORK

The legal framework governing the detention of foreign nationals in South Africa is discussed in detail in LHR's 2010 Detention Monitoring report[10] and so is not presented again here. In South Africa, the detention of foreign nationals is only envisioned in relation to a contravention of the Immigration Act (13 of 2002, especially section 34), e.g. when a person becomes an 'illegal foreigner' and in limited circumstances of the Refugees Act (130 of 1998).[11] This stands in contrast to other countries where asylum seekers and refugees are detained as a routine element of their asylum application processes. South African law protects the right of free movement for asylum seekers and refugees once they have entered the country and started the asylum process. This is in accordance with the Refugees Act 130 of 1998 (the Refugees Act) as well as the South African Constitution (Act 108 of 1996).[12]

South African case law has further interpreted existing legal instruments regarding how detainees should be treated. Several cases have established that the Constitutional right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause, is so important that procedural safeguards must be absolutely adhered to when depriving someone of this right through detention. In the case of S v Coetzee 1997 (3) SA 527 (CC), O'Regan J held that section 12 (1) of the Constitution consists of two components:

10 Snyman, G. (2010). Monitoring Immigration Detention in South Africa. Pretoria, Lawyers for Human Rights

11 LHR's detention related work only relates to cases of administrative detention under the Immigration Act, and does not include foreign nationals detained in relation to criminal matters. LHR will also extend assistance to persons detained in terms of the Refugees Act.

12 This principle has been confirmed in the case of *MAA v Minister of Home Affairs 2010 (7) BCLR 640 (SCA)*

> *'[there are] two different aspects of freedom: the first is concerned particularly with the reasons for which the state may deprive someone of freedom; and the second is concerned with the manner whereby a person is deprived of freedom…Our Constitution recognises that both aspects are important in a democracy: the state may not deprive its citizens of liberty for reasons that are not acceptable, nor when it deprives its citizens of freedom for acceptable reasons, may it do so in a manner which is procedurally unfair.'* [13]

This position has been confirmed in two cases dealing with the detention of asylum seekers. In Jeebhai v Minister of Home Affairs 2009 (5) SA 54 (SCA), Cachalia JA held that '*for deportation to be carried out lawfully, the action or procedure used to facilitate an illegal foreigner's removal from the country must be done in terms of the Act.*' 14 In *Bula and 18 others v Minister of Home Affairs and others SCA 598 / 2011* the court held that strict compliance with Regulation 28 is required. It stated that '*the sub regulation15 is couched in peremptory terms. It involved the liberty of an individual and must be strictly construed…there is no room for the 'substantial compliance approach'*.'[16]

In spite of this legal context, this report documents extensive and regular contravention of the law in how asylum seekers, refugees and other migrants are detained.

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13 See paragraph 159

14 See paragraph 20

15 Referring to Regulation 28 (4)

16 See paragraph 84 of the judgment of Bula and others v Minister of Home Affairs and others (589/11) [2011] ZASCA 209 (29 November 2011)

THE WILL TO CHANGE?

Before describing the substantive and administrative justice abuses which continue to characterise the immigration detention system, it is of concern that there appears to be little political will to address these abuses systematically. Evidence for this includes South Africa's report to the 2012 United Nations Human Rights Council Universal Periodic Review regarding conditions at Lindela, neglect of the UN Special Rapporteur on Migrants' 2011 Report, and Home Affairs high ranking officials' contempt of court in relation to detention-related orders.

South Africa's submission to the Universal Periodic Review of the United Nations Human Rights Council for 2012 acknowledges that "the Lindela Repatriation Centre has been a source of concern where allegations of torture and ill-treatment had been sharply and consistently raised" (para 23), but it claims that "the Lindela Repatriation Centre is fully compliant with all the minimum standard rules for treatment of persons deprived of their liberties" (para 26) and only notes that "the smooth and prompt deportation is sometimes impeded by delays in the verification of identities and nationalities of deportees as well as acquisition of travel documents from the country of origin" (para 23). The report continues: "In the event that these delays should extend beyond requisite prescribed time frames, government is required to apply to a competent court for extension and obtain an appropriate court order in this regard", with no recognition of substantive or administrative problems in fulfilling these requirements.

Finally, the government's submission claims that "the Lindela Repatriation Centre is equipped with a fully serviced medical centre operated by qualified health professionals with backup support from a nearby hospital. All the patients at the centre enjoy unfettered access to medical care and supplies on a non-discriminatory basis. The South African Human Rights Commission, recognised lawyers associations representing deportees, relevant international

institutions and United Nations agencies also have unfettered access to the facility and deportees consistent with their mandates. The facility is well managed as attested to by the Special Rapporteur on the rights of migrant workers during his visit to South Africa in February 2011." (para 25). The claims regarding health care access and monitoring access are in direct contradiction of evidence presented in this report and elsewhere.[17]

Most importantly, the reference to the Special Rapporteur's report is misleading and suggests that the substantive recommendations of this report have been ignored by the South African government. The report includes significant criticisms of the arrest and detention process. As the report states, "the Special Rapporteur found that the biggest challenge was the absence of monitoring and oversight in existing procedures with regard to immigration, including detention. While the detention of other categories of detainees is supervised by the Judicial Inspectorate for Correctional Services under the control of the Inspecting Judge, persons detained under the Immigration Act do not benefit from such oversight." (para 57) Furthermore, "although at the time of his visit the Centre seemed properly run and managed, concerns could be raised about the accessibility of persons detained and awaiting repatriation to be able to claim asylum or protection under the Refugee Act, especially if contact with Home Affairs officials is limited, given that interactions take place with the private company managing the facility." The Special Rapporteur "reminds the Government that, as mentioned in previous reports, detention of irregular migrants should only be used as a last resort, and that migrants should not be treated like criminals." (para 58)

The Special Rapporteur concludes: "With regard to the Lindela Immigration Detention Centre, the Special Rapporteur recalls that that the Working Group on Arbitrary Detention, in its report on its visit to South Africa in 2005, expressed concern at the situation of foreigners detained under immigration laws, as the procedure did not make it possible to effectively challenge the lawfulness of detention and places the burden on the person concerned to prove the right to remain in the country. Legal aid was not available for immigration matters,

[17] See detailed evidence regarding health care access concerns listed in LHR, MSF, Section 27 and PASSOP joint letter to the SAHRC, submitted on 28th May 2012

and the conditions of detention in the Centre did not meet international standards.[18] Six years later, those concerns remain. The Special Rapporteur would therefore welcome more cooperation with civil society so as to allow monitoring visits to detention centres. Also, he calls upon the Government of South Africa to end all arbitrary and unlawful detention and to improve the conditions at detention facilities."[19] (para 59)

Returning to the Universal Periodic Review process, it is significant that two of the five issues raised in response to South Africa's public presentation on 31 May 2012 regarded the treatment of migrants,[20] illustrating the extent to which South Africa's international reputation is connected with this issue.

The Department of Home Affairs' approach to court orders regarding unlawfully detained migrants is further illustrated by a 2010 case in which a Pretoria High Court Judge found Deputy Director General of Home Affairs Jackie MacKay guilty of contempt of court for "blatantly ignoring" an order to release an unlawfully detained woman despite two orders by the judge to do so. As reported by the Sunday Times "the judge not only had to issue two urgent court orders in as many days to secure Lin Gui Lan's release, but was forced to personally phone MacKay. This after several pleas by his registrar - who was "laughed off" by officials - and Lin's lawyers were ignored... The officials dismissed one of the court orders as 'just a piece of paper'. Their attitude led to the judge's phone call - only for him to have the phone slammed down on him. The judge said in his judgment: 'I then spoke to MacKay, who told me that he knew the law better than any judge did and that he was not going to release the applicant. He also summarily terminated the telephone call by putting the phone down.' MacKay was lucky to escape a jail sentence and, instead, got away with a stern warning. The department, however, was hit with a hefty order of costs for the 'arrogant' attitude of its officials." The Judge concluded that MacKay had "shown a clear and unarguable disdain and disrespect towards the courts."[21] There are other cases where court orders to release unlawfully detained migrants have been ignored, including cases where persons were illegally

18 E/CN.4/2006/7/Add.3, para. 85.

19 UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante - Addendum 4 - Mission to South Africa, 2 May 2011, A/HRC/17/33/*Add.4, para 52-59, available at: http://www.unhcr.org/refworld/docid/4eef11ec2.html [accessed 7 June 2012]

20 http://www.ohchr.org/EN/HRBodies/UPR/Pages/Highlights31May2012pm.aspx

21 'Official slated for sneering at Judge', Sunday Times, 17 October 2010

returned to countries where they faced the danger or persecution (*refoulement)* in spite of a specific court order for that person's release.[22]

Given that the leadership of the country and of the responsible department do not seem willing to acknowledge the problems in the immigration detention system, and do not treat existing oversight mechanisms, whether international or domestic, with respect, it is not surprising that the everyday functioning of the system remains riddled with unlawful actions. The next sections of this report document these in detail for the Lindela Repatriation Facility as well as other detention facilities.

[22] In LHR's 2009 *B v Minister of Home Affairs* case, there was a contempt proceeding instituted by the bench. In spite of having issued papers and being given a court date, the client was deported two days before the scheduled court appearance. LHR were only informed when they appeared in court to argue the matter. Judgment in the contempt matter has still not been received.

LINDELA REPATRIATION FACILITY

The Lindela Repatriation Facility outside Johannesburg is the primary detention centre for immigration detention in the country. Persons deemed 'illegal foreigners' are detained here while they await deportation. The Department of Home Affairs has contracted its daily management to the private company Bosasa. As in previous years, LHR's monitoring has found extensive substantive and procedural irregularities in the detention and deportation practices at the Lindela Repatriation Facility. These practices persist in spite of LHR's and others' repeated engagement about these irregularities with the Department of Home Affairs through dialogue and litigation.

Substantive irregularities

The substantive reasons for detaining people at Lindela often fall short of the law. A particularly egregious contravention of the law is the detention of asylum seekers and refugees for purposes of deportation.

In 2010, the Supreme Court of Appeal in the case of *M A Arse v Minister of Home Affairs 2010 (7) BCLR 640 (SCA)* held that asylum seekers have the right to sojourn in South Africa outside of detention, pending finalisation of all appeal and review procedures related to their asylum claims, including judicial review. In practice, however, asylum seekers are often detained before they are able to submit an asylum application, while they are waiting for their applications to be adjudicated, and while they are waiting for appeals to be completed or reviewed.

During the period March 2011 to March 2012, LHR litigated on behalf of 35 detainees in urgent High Court applications who identified themselves as asylum seekers and had not yet been able to apply for asylum at the time of being arrested and detained at Lindela. This litigation resulted in court orders for release as well as judgments elucidating the rights of asylum seekers.

In all of these matters, LHR wrote to Lindela officials prior to instituting litigation, setting out that the detainees in question sought an opportunity to apply for asylum. These letters elicited no response.

There are no internal procedures at Lindela that afford detainees the opportunity of communicating effectively to officials regarding their desire to apply for asylum. The view of the Department of Home Affairs has consistently been that once someone is arrested and detained for deportation, they cannot apply for asylum.[23] This is, however, against the law, as confirmed by the two judgements summarised below.

Bula and others v Minister of Home Affairs and others *(589 / 2011) [2011] ZASCA 209 (29 November 2011)*

On 9 November 2011, the Supreme Court of Appeal (SCA) ordered the release of 19 Ethiopian asylum seekers from immigration detention at the Lindela Holding Facility in Krugersdorp. They were being detained for purposes of deportation to Ethiopia. They had been in detention since July 2011. The SCA ordered that the 19 Ethiopian asylum seekers be afforded 14 days within which to approach a Refugee Reception Office in order to apply for asylum.

In the written judgment from the SCA handed down on 29 November 2011, the SCA held:

- It is not for a court to determine the merits of an asylum application;
- It is not the duty of a court to decide whether an intended asylum application is unfounded;
- It is abundantly clear from the Refugees Act that it is for a Refugee Status Determination Officer to determine the merits of an asylum application.[24]
- Once a person has expressed an intention to apply for asylum, the protections in the Refugees Act kick in;
- Regulation 2 (2) does not require an applicant to express his or her intention to apply for asylum immediately on being encountered. Where a person does not express their intention to apply for asylum immediately on being encountered, the SCA held that they should not be precluded from doing so thereafter;
- Strict compliance with the Regulations to the Refugees Act is required. The argument of the Department that '*substantial compliance*' is sufficient was rejected by the Supreme Court of Appeal.[25]

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23 See Speaking notes for weekly media briefing by DHA Director General, 5 April 2012

24 See paragraph 74.

25 See paragraph 84.

J M v Minister of Home Affairs and Others 21599 / 2011
(Unreported judgment delivered on 21 July 2011)

In this case, Lawyers for Human Rights represented an asylum seeker from Rwanda. He had fled his country of origin due to political persecution. He was arrested shortly after entering South Africa before he had an opportunity to apply for asylum. He was charged with being an illegal foreigner under section 49 of the Immigration Act. He was convicted of being an illegal foreigner and sentenced to 10 days imprisonment, where after he was transferred to Lindela for purposes of deportation. At the time of his conviction as an illegal foreigner, the asylum seeker was afraid to disclose his reasons for fleeing his country of origin in open court.

LHR was successful in securing the release of the asylum seeker from detention; halting his deportation; and securing an order that he be afforded an opportunity to apply for asylum.

The case was heard before Rautenbach AJ who handed down a judgment in the matter on 21 July 2011. Importantly, the judgment confirmed the flexible interpretation of applying for asylum '*without delay*' when he released the Rwandese asylum seeker from immigration detention. The judgement held that the asylum seeker had not been in South Africa for 'an extraordinary long period', being one month, before applying for asylum. The judgment held further that '*lip service would be paid to the Refugees Act if the Applicant was not at least afforded the opportunity of making an application for asylum*'. The Court also held that '*it cannot and will not view the Immigration Act 13 of 2002 in isolation*.'

An independent research report published in June 2010 by the African Centre for Migration and Society (ACMA and formerly the Forced Migration Studies Programme) at the University of the Witwatersrand also detailed extensive substantive irregularities in detaining and deporting foreign nationals.[26] While LHR only interacts with detainees who have experienced problems, the ACMS report is based on a survey of randomly sampled detainees, therefore reflecting the overall conditions of detention and the prevalence of procedural irregularities. The findings of the ACMS research are consistent with experiences that detainees at Lindela have described to LHR over the past year. The ACMS research findings are based on a survey administered to 734 detainees over a ten month period beginning in March 2009.

The ACMS detention report states that 40% of the interviewed detainees responded that their lives would be at risk should they return to their country of origin: this means they can be

[26] Amit, R 2010. 'Lost in the vortex: irregularities in the detention and deportation of non-nationals in South Africa'. Available at http://www.migration.org.za/sites/default/files/reports/2010/Lost_in_the_Vortex-_Irregularities_in_the_Detention_and_Deportation_of_Non-Nationals_in_South_Africa_0.pdf

classed as asylum seekers.[27] Such a high level of eligibility to apply for asylum among detainees is confirmed by the experiences of LHR in litigating on behalf of detainees.

The ACMS report details that 39% of those interviewed tried to explain their fear of returning to their country of origin to officials at Lindela. On explaining their fear to officials, 51% of these report being ignored; 4% report that officials did not believe them; and 4% were told they would not be deported.[28] The ACMS report notes that some detainees were assisted by officials to apply for asylum. [29] LHR's recent monitoring has not found any cases where detainees have received help to apply for asylum from Lindela staff.

As noted above, not allowing asylum seekers to apply for asylum contravenes South Africa's international obligations not to send any person back to a country where they face a risk of persecution. This obligation is also enshrined in the Refugees Act which gives effect to South Africa's international obligations.[30] Current practice at the Lindela Repatriation Centre is therefore in contravention of domestic and international law.

Another important substantive irregularity is the detention of minors in facilities intended for adults, which is unlawful.[31] LHR represented and achieved the release four minors in this reporting period, three of which were released through litigation.[32] As discussed below regarding detention facilities in the Musina area, children are often detained and deported with adults, even though this is against the law. LHR's experience is that screening processes for new detainees are not effectively oriented at identifying minors (or indeed other vulnerable groups such as pregnant women, women with small children who were left behind when they were arrested, persons with severe or chronic medical needs, persons with disabilities, etc.) and diverting them to alternative service providers. This means that children are often only identified if an independent monitor visits the detention centre and puts pressure on the detention facility to release them. In response to such detentions, several human and refugee rights organisations launched a campaign against the detention of minors at the Lindela Repatriation Centre and elsewhere. It has been reported that between October and December 2011 South Africa deported 86 children between the ages of 2-17 years to Zimbabwe.[33]

27 Amit 2012, pages 46 and 47

28 Amit 2012, page 47

29 Amit 2012, page 48

30 Act No 130 of 1998

31 Centre for Child Law and Another v Minister of Home Affairs and Other 2005 (6) SA

32 *SHH v Minister of Home Affairs and Others 24237 / 2011*, Case launched on 28 June 2011; court order 7 July 2011

33 http://www.thezimbabwean.co.uk/news/zimbabwe/57416/campaign-to-end-detention-of....

Procedural Irregularities

The procedures to be followed in detaining an individual for purposes of deportation are set out clearly in section 34 of the Immigration Act, read together with the Act's Regulation 28.[34]

As noted above, screening processes for persons arrested on charges of being 'illegal foreigners', in advance of their detention for purposes of deportation, are a logical correlate of regulations prohibiting the detention of certain groups. Such screening should therefore be integrated into the standard admissions process. In addition to ascertaining that a person is indeed an illegal foreigner, and not a documented or undocumented asylum seeker or refugee, such screening should ensure that children, pregnant women, women with children and persons with acute communicable diseases are not detained. Lindela is theoretically connected to the Department of Home Affairs' online movement control system (including finger print recognition) but it does not appear to be connected to DHA's asylum records which would allow it to verify a potential detainee's asylum status before admitting a person to the facility. LHR's experience at Lindela and at other detention facilities in the Musina area are that there are standard screening processes in place but these are inadequate and do not take place in any consistent or coherent manner. These screening mechanisms also do not take into consideration the age of persons who are admitted as children have been unlawfully admitted to detention on several occasions[35].

Once a person has been detained as an illegal foreigner, the Immigration Act sets out that no person may be detained for longer than 48 hours, unless it is for the purpose of deportation. Should a person be detained for the purpose of deportation under the Immigration Act, any detention exceeding 30 days must be confirmed by a Magistrate's warrant, which warrant must be secured before the expiry of 30 days in detention, according to Regulation 28 of the Regulations to the Immigration Act.[36] The further extension can be for a maximum of 90 days (being a total of 120 days). A detainee has the right to be notified of the Department's intention to apply for the extension of his or her detention, as well as the right to make representations as to why such detention should not be extended.[37]

During the period February 2011 to March 2012, most detainees encountered by LHR were being detained without adherence to the procedural safeguards in the Immigration Act. This included persons detained for more than 30 days without a warrant and without being informed of the extension or being given the opportunity to make representation in relation to the extension.

34 GNR.616 of 27 June 2005

35 *Inter alia* DK v Minister of Home Affairs, SGHC case number 21399 of 2012

36 See Regulation 28 (4) (a); also see the case of *AS & 8 others v Minister of Home Affairs and Others* (101/2010) SGHC (17 March 2010), the court held that a warrant obtained after the detention had already extended beyond the thirty days could not serve to subsequently legalise a previously unlawful detention.

37 See Regulation 28 (4) (b)

LHR also continued to encounter detainees who have been in detention in excess of the 120 day statutory limit provided for in the Immigration Act.[38] This statutory limit of 120 days on detentions for the purpose of deportation has been confirmed by the courts.[39] LHR has also seen clients who were released and immediately re-arrested, possibly to "re-start the detention clock" so that detentions in excess of 120 days are more difficult to detect from a review of detainee records. This practice was also confirmed by the independent research conducted by the African Centre for Migration & Society in 2010,[40] and has been explicitly disallowed by the courts.[41]

Detainees embarked on a hunger strike in January 2012 in protest of the prolonged periods of detention. Detainees advised LHR that they had been in detention for periods of 5 - 9 months and that they wanted to be deported, yet Lindela could not advise them when these deportations would take place. This strike is not an isolated incident; strikes and riots (such as in June 2012) in protest of unduly long stays are commonplace at Lindela.

This failure to adhere to procedural safeguards in the detention and deportation of foreign nationals is not a new phenomenon in South Africa. Previous LHR monitoring has documented this since 2003,[42] as has the South African Human Rights Commission in 2000.[43] The 2010 ACMS detention report also detailed extensive procedural irregularities in detaining and deporting foreign nationals.[44] According to the ACMS detention report, of those detainees interviewed at Lindela:

- 92% did not receive notification of their classification as an illegal foreigner;
- 75% were not aware of the right to request the court to review their detention;
- 77% did not receive a Notification of Deportation;
- 71% of those detainees who signed a Notification of Deportation, report not understanding what they were signing;
- 5% of detainees had been in Lindela in excess of the 120 day statutory limit on immigration detention for purposes of deportation;

38 See section 34

39 MAA v Minister of Home Affairs 2010 *(7) BCLR 640 (SCA)*

40 Amit 2010

41 MAA v Minister of Home Affairs 2010 (7) BCLR 640 (SCA)

42 Lawyers for Human Rights, *Report on the Monitoring of the Lindela Repatriation Centre* (December 2003), Lawyers for Human Rights, *Monitoring Immigration Detention in South Africa* (December 2008). See http://www.lhr.org.za/sites/lhr.org.za/files/LHR%20detention%20monitoring% 20report%2010%20Dec%2008.pdf

43 South African Human Rights Commission, *Lindela At the Crossroads for Detention and Repatriation, An Assessment of the conditions of Detention by the South African Human Rights Commission* (December 2000).

44 Amit 2010

- 18 people interviewed were released from Lindela and then immediately re-arrested, presumably to evade the administrative recording of detention beyond the 120 day statutory limit.[45]

Conditions in detention

As set out in the Immigration Regulations, Annexure B, minimum standards for conditions in immigration detention facilities include the following:

Every detainee

- Shall have access to basic health facilities (Section 1(a)).
- Shall be provided with a bed, mattress, and at least one blanket (Section 1(b)).
- Shall be provided with an adequate balanced diet (Section 2(a))
- The diet shall make provisions for detainees who require a special diet because of their physical condition (Section 2(b)).
- Food should be served at intervals not less than four and a half hours and not more than 14 hours between the evening meal and breakfast during a 24 hour period (Section 2(d)).
- The Department shall provide the means for every detainee to keep his or her person, clothing, bedding and room clean and tidy (Section 3).[46]

Basic conditions of detention are long-standing concerns at Lindela, as documented by LHR, the SAHRC and others as mentioned above. LHR's consultations with detained clients in the period covered by this report have once again confirmed that conditions remain inadequate.

The most common complaint by detainees is that the medical care is inadequate. The medical care provided at Lindela appears to be a 'band aid' approach where detainees are given medication but nothing is done to address the overall conditions of detention that lead to illness spreading from one detainee to the next. LHR has also received reports that the clinic at the Lindela Facility is inadequately stocked and is only able to deal with very basic health issues. The ACMS report found that 54% of the detainees at Lindela who sought medical care did not feel that their condition had been treated adequately.[47] The 28 May 2012 joint letter by LHR, MSF, PASSOP and Section 27 to the SAHRC requesting specific monitoring of health-related conditions at Lindela Repatriation Facility also sets out evidence of inadequate health care provision.[48]

45 Amit 2010, pages 38 and 44
46 See Amit 2010, page 51
47 Amit 2010, page 53
48 Joint letter submitted on 28th May 2012 by LHR, MSF, Section 27 and PASSOP

Detainees also complain of dirty bedding; lice; insufficient blankets to keep warm at night and inadequate meals being provided. These conditions appear to result in detainees suffering from a variety of illnesses. A further complaint that LHR receives from detainees is that access to basic items in detention, especially toiletries, clean clothes and towels is limited.

According to detainees, their psychological well-being is neglected in detention. There are no counsellors, psychologists or psychiatrists available for detainees on site. Even when LHR identified a person in need of psychological evaluation and attempted to refer an appropriate service provider to Lindela, she was not given access to the detainee, and referral to a state psychologist was also not facilitated by Lindela.[49] The client's psychological condition deteriorated to the point where he had to be admitted to hospital. This does not appear to be a long term solution and fails to address a number of more common mental illnesses which are common in detention, such as depression, anxiety and stress.

Most egregiously, detainees report being physically injured by the security guards and immigration officials at the detention centre. LHR has received many reports that detainees are beaten in order to sign documents showing they have 'consented' to being deported.

[49] As experienced in a case handled by LHR in 2011- details withheld due to sensitivity of the case

SHELTERS THAT DETAIN MIGRANTS

Coupled with the poor conditions at Lindela are the poor conditions at shelters that detain children. Lindela is not an appropriate facility to accommodate children. This has been confirmed by the courts.[50] Thus, women with children are detained at shelters while they await deportation. However, we receive many complaints about conditions at these shelters. The primary complaint is that detainees are often forgotten at shelters and remain detained at shelters beyond the statutory limit on detentions for the purpose of deportation. In addition, in LHR's experience the care and treatment of children is inadequate. LHR has had reports of physical abuse at shelters as well as reports of neglect of unaccompanied children.

[50] Centre for Child Law and Another v Minister of Home Affairs and Other 2005 (6) SA

IMMIGRATION DETENTION IN MUSINA

LHR has run an office in Musina, the town nearest the Beitbridge border crossing between South Africa and Zimbabwe, since 2008. Initially established to respond to the increasing number of asylum seekers fleeing Zimbabwe, it now assists refugees, asylum seekers and other migrants from all parts of the continent as well as further afield.

Beitbridge is the entry point for the majority of asylum seekers and migrants arriving in South Africa from Zimbabwe and other parts of the continent. Persons crossing the border by irregular means (often because they are denied entry through the official border crossing) are routinely picked up by the army patrolling the borderline or by the police within the border zone. Police also regularly arrest undocumented migrants on commercial farms, in Musina town, and along the main roads leading into the interior of the country. In most cases, persons arrested in the border area are not sent further into the country to Lindela, but are rather detained in and around Musina before being deported. This is especially the case for Zimbabwean nationals.

Through its regular visits to places of detention in the Musina area (including the SMG facility in Musina, the Waterpoort police station 90 km outside Musina, and other police stations in the Vhembe District Municipality), LHR has established the same three areas of concern as apply to Lindela: substantive irregularities, procedural irregularities and conditions of detention.

Substantive irregularities

The main substantive concerns at detention facilities in the Musina area are the detention and deportation of asylum seekers and the detention of children together with adults. As noted above in relation to Lindela Repatriation Facility, these are both in contravention of the law.

Given Musina's proximity to the border, there are often very short turn-around times between a person's arrest and their deportation to Zimbabwe if they are Zimbabwean nationals. In terms of the Immigration Act and Refugee Act, only Department of Home Affairs Immigration

Officers are permitted to determine whether a person is an illegal foreigner and therefore can be deported. Furthermore, only DHA Refugee Status Determination Officers can determine whether an individual has a valid asylum claim. In practice in the Musina area, however, the decision to deport people back to Zimbabwe is often made without the involvement of DHA officials and without according the individuals the opportunity of stating that they wish to apply for asylum. The result may well be cases of *refoulement*.

Children are often detained at the SMG facility along with adults. There is no social worker assigned to the facility, even though it is the social workers' mandate to assist foreign children and transfer them to appropriate places of safety. Other vulnerable groups such as pregnant women and victims of sexual and gender-based violence are also regularly detained at SMG and also do not have access to a social worker or other protection and support services.

Procedural irregularities

In addition to SMG, LHR is concerned that the Waterpoort police station is being used to detain asylum seekers and migrants. The arrangement to detain migrants at this facility appears to be based on an informal arrangement between SAPS and the DHA. The facility is run by SAPS and access to detainees by LHR and other independent observers and service providers has at times been difficult. Furthermore, Waterpoort police station is not a designated detention facility. LHR has observed lengthy detentions taking place at this facility. This is contrary to the provisions of the Immigration Act 13 of 2002 read together with the Regulations. In August 2011, the South African Human Rights Commission (SAHRC) visited the facility. It noted concerns with the manner in which the facility is being used to detain non-nationals.

Conditions of detention

The SMG facility was closed down by a court order in 2009 due to the deplorable conditions in the facility. The South African Police Services, however, continue to use the facility as an extention of their holding cells, in order to detain foreign nationals. The conditions at SMG, based on LHR's observations, remain extremely poor.

The facility is dirty. There are no proper toilet facilities at night as officials lock detainees inside the warehouse facility. There is no furniture. Detainees sleep on thin mattresses with equally thin blankets. There are no pillows. The blankets and mattresses are not regularly washed. The floor of the warehouse is dirty and there are no rubbish bins inside the facility. The roof of the facility is not in good condition and rain seeps through the roof into the facility.

These conditions are a health hazard and many detainees are in urgent need of medical attention. No medical facilities are accessible to the detainees. LHR has on a number of occasions intervened

to assist detainees to get treatment from Doctors without Borders in Musina. The food provided to detainees at SMG is inadequate, not served at regular intervals and not nutritious – consisting of slices of bread only. No provision is made for babies, young children or nursing mothers.

A new holding facility for irregular migrants has been established in Musina as a response to the court order to shut down the SMG facility. According to LHR's observations, this facility is a much more appropriate facility for detention than SMG or police stations in the area. This new facility could easily provide for medical personnel and social workers on site. Its officially designation as a deportation facility and commencement of operations has, however, been delayed. LHR has been advised that the main reason that the new facility is not yet operational is because it does not have electricity. LHR have attended many stakeholder meetings to enquire about the new facility and when it will be operational. We have engaged with the South African Police Services (SAPS) and the Department of Home Affairs (DHA). To date, no official answer is forthcoming as to when the facility will open. The old SMG facility appears to be no longer in use and persons awaiting deportation are detained at the Musina police station cells. These cells do have the requisite capacity to hold the numbers of Zimbabweans who are arrested and the overcrowding in the cells is a serious concern. LHR continues to monitor these detentions in Musina and lobbies for improved conditions there.

IMPLICATIONS OF PRIVATE IMMIGRATION DETENTION FACILITIES

As noted above, the Lindela Repatriation Facility is managed by a private company, BOSASA. Some other immigration detention facilities, such as at airports, are also privatised. The detention facility at OR Tambo International Airport in Johannesburg is run by a company called Aviation Risk Management (ARM). The UN Special Rapporteur on Migrants "found the practice of outsourcing the management of [immigration detention centres] to a private corporation unusual." A particular concern he expressed was "the [lack of] accessibility of persons detained and awaiting repatriation to be able to claim asylum or protection under the Refugee Act... especially if contact with Home Affairs officials is limited, given that interactions take place with the private company managing the facility."[51] A further concern with privatised detention is that some services may not be adequately fulfilled if they are not explicitly contracted. For example, Bosasa has informed LHR that the provision of medical care to detainees is no longer part of their contract. While they are continuing to run a basic clinic for the moment, the responsibility for this service in future, and the responsibility for monitoring the quality of the existing service, is not clear.

The case of *MAA and YAD v Minister of Home Affairs and Others (SCA 734/2010)* illustrates why there is a need for independent oversight of detention facilities, especially where these are run by private institutions. This case began as an urgent application in the High Court. LHR acted for an asylum seeker and a refugee from Somalia who were being detained at the Inadmissible Facility at the OR Tambo Airport. The asylum seeker and refugee had left South Africa for

[51] UN Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW), *Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante - Addendum 4 - Mission to South Africa*, 2 May 2011, A/HRC/17/33/Add.4, para 58, available at: http://www.unhcr.org/refworld/docid/4eef11ec2.html [accessed 7 June 2012]

Namibia following the 2008 xenophobic attacks in South Africa. Once in Namibia, the Namibian authorities had instituted deportation proceedings to return the two Somali nationals to Somalia. They were being deported on Kenya Airways to Mogadishu via Johannesburg.

Once at the OR Tambo Airport, the asylum seeker and refugee contacted a protection officer at UNHCR to assist them in preventing the South African authorities from refusing them entry into South Africa.

UNHCR approached the High Court on an urgent basis in order to prevent the Department from forcing the asylum seeker and refugee to board a flight to Somalia; seeking their release from the inadmissible facility; and allowing the second applicant to continue his application for asylum in South Africa. The Department argued that it had no authority to interfere with Namibia's deportation order.

The matter was dismissed in the High Court with the court finding that the applicants had not established their status as an asylum seeker and a refugee. It held further that it could not interfere with a Namibian court deportation order. The applicants were allowed to remain in the inadmissible facility pending an appeal.

LHR immediately launched urgent appeal proceedings to the Supreme Court of Appeal. The SCA found in favour of the asylum seeker and refugee and ordered their immediate release. The court also declared that the detention of the appellants was unlawful and that they were entitled to remain in South Africa pending the exhaustion of their asylum claim. Importantly the court found that persons at ports of entry who are in need of protection are protected by the South African Constitution. The court vehemently rejected the argument advanced by the Respondents that individuals who are held in inadmissible facilities at ports of entry are beyond the court's jurisdiction. The court found this argument of the Respondents to be in conflict with the Refugees Act, the UN Refugee Convention and the AU Refugee Convention. The court also found that the Appellants would face a real risk of suffering harm if they were returned to Somalia. Finally, the court criticised the manner in which the Department handled the litigation.

As this case illustrates the importance of regular monitoring of airport detention facilities, it is important to note that LHR is not aware of any oversight systems or other sources of information about detention processes at other international airports, such as Cape Town and Durban airports.

OVERSIGHT OF IMMIGRATION DETENTION FACILITIES

As the discussions above illustrate, regular independent oversight is a crucial aspect of ensuring that substantive and procedural legality and adequate conditions during detention processes are maintained. There are two forms of oversight: legal advice and representation for individual detainees, and regular monitoring of overall practices and conditions by an independent oversight agency. It is of concern that both of these mechanisms are currently only being used to a very limited extent.

Very few organisations provide legal services to persons in immigration detention. No legal advice is offered or made available to detainees as a matter of course and no information on the availability of such legal assistance is given to detainees at any point in the detention and deportation process. Legal service providers who assist persons in immigration detention require a friend or family member of the detainee to approach their offices first, before a consultation at Lindela is possible, as Bosasa will only grant access to detainees on the a named basis. This means that it depends on detainees or their families already having enough knowledge of the legal system and of organisations in South Africa to have LHR's contact details and to request legal advice.

Many people in detention however, do not have family members and/or friends in the community who are able to assist them. It is thus vital that other pro bono legal services organisations visit Lindela regularly in order to provide advice and assistance to detainees.

Regarding monitoring of the overall practices and conditions of immigration detention, including at Lindela and other parts of the arrest, detention and deportation chain (such as police stations and prisons outside Gauteng where detainees are held before they are transferred to Lindela,

shelters where women with children are held, and detention facilities in Musina), the South African Human Rights Commission is the only body that has the mandate to oversee and conduct external monitoring of immigration detention facilities. However, such monitoring has been haphazard and infrequent, with the last SAHRC public report on Lindela published in 2000. There is also no system in place for holding the SAHRC accountable for not fulfilling its mandate. Apart from the SAHRC, there are no mandated institutions in South Africa required to regularly monitor detention, including immigration detention.

Access to detainees is generally granted to legal representatives, and the International Organisation for Migration (IOM) visits detainees at Lindela to provide services to detainees. Other NGOs who have sought access in order to monitor general conditions have been denied access.

One means of addressing South Africa's dearth of detention monitoring and oversight mechanisms would be to ratify the Optional Protocol to the Convention against Torture (OPCAT). A new Prevention and Combatting of Torture of Persons Bill [B21-2012] was introduced in Parliament on 1 June 2012, which gives effect to the Republic's obligations in terms of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This means that OPCAT will hopefully soon become implementable in South Africa, including its provisions for the independent monitoring of detention facilities.

The Optional Protocol to the Convention against Torture (OPCAT) and detention monitoring

South Africa is already party to the Convention against Torture (CAT), which is mainly a reactive rather than preventative instrument. The Optional Protocol aims to prevent, rather than investigate and criminalise, torture. Its preventative strategy is based on the establishment of a system of regular visits to places where people are deprived of their liberty. OPCAT is not intended to single out or point fingers at states for wrongdoing.[52] OPCAT is intended to create constructive dialogue with states to ensure that places of detention are abuse-free.

[52] See article 15 of OPCAT

State parties under OPCAT are not burdened with further reporting requirements, as under CAT. Rather, states' obligations under OPCAT are practical. Such obligations include:

- Establishing and maintaining National Preventative Mechanisms (NPM);
- Opening up places of detention to scrutiny; such places include places of immigration detention; police cells; prisons; airport detention facilities.

ALTERNATIVES TO IMMIGRATION DETENTION

Since the inception of LHR's detention monitoring unit, the focus has been on ensuring that detentions are carried out in line with procedural and substantive standards prescribed by national legislation and international law.

In addition to looking at detentions though a lens of compliance, however, it is important to ask whether there are alternatives to detention within the process of immigration law enforcement. Alternatives to detention are "any legislation, policy or practice that allows for asylum-seekers, refugees and migrants to reside in the community with freedom of movement while their migration status is being resolved or while awaiting deportation or removal from the country."[53]

Why is it in South Africa's interests to consider alternatives to immigration detention?

1. There is no evidence to suggest that immigration detention discourages irregular migration;
2. There is no evidence to suggest that immigration detention stops people seeking asylum;
3. The human rights consequences of detention are far-reaching;
4. The financial cost of detaining migrants can be avoided by employing alternatives to detention;
5. The social costs of detaining migrants can be avoided by employing alternatives to detention;
6. Research in Australia shows an over 90% compliance rate with alternatives to detention when implemented properly.[54]

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[53] Sampson, R., Mitchell, G. and Bowring, L., There are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention, International Detention Coalition, Melbourne, 2011, p. 2, available at: http://www.unhcr.org/4dde23d49.html

[54] Edwards, A. 2011, Measures of First Resort: Alternatives to Immigration Detention in Comparative Perspective, Equal Rights Review, Vol. 7, p. 117-142

An example showing that alternatives to detention are possible, and indeed are already being used in some situations, is the case of 'Nathan'[55]. In early 2012, LHR dealt with a case where a failed Congolese asylum seeker was arrested after he had exhausted the avenues available to him in the asylum process. He spent some time in detention where after he was released and ask to obtain a travel document and bus ticket to return to the DRC. LHR assisted him to satisfy these requirements. He was asked to report regularly to Lindela to advise them of the progress of his preparations to leave the country. On production of a travel document issued by the Congolese Embassy and a bus ticket his Lindela file was closed. LHR followed up with him several weeks later to confirm that he had in fact returned to the DRC.

The existing legislative framework supports alternatives to immigration detention. International law enshrines the principle that no-one shall be subjected to arbitrary or unlawful detention.[56] This principle is also found in section 12 of the South African Constitution. Section 12 enshrines the right to freedom and security of the person; which right includes the right not to be deprived of freedom arbitrarily or without just cause. South African case law has confirmed that when an immigration official exercises the discretion to detain someone, such discretion must be exercised in favour of liberty.[57]

Alternatives to Immigration Detention – International Best Practices

There are many alternatives to immigration detention. Below are descriptions of some that have worked in other jurisdictions:

- **Reporting conditions**: the detainee is released and required to report to an immigration official periodically.
- **Bail or bond**: a third person stands surety for the release of the detained individual;
- **Designated residence**: the detainee is released but is required to remain at a designated residence for his or her duration in the country;
- **Community Assessment and Placement** (CAP): this model was developed by the International Detention Coalition.[58] It involves the release of a detainee and placement within the community, following an assessment of both the detainee and the conditions in the community.

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55 Assumed name to protect the identity of the individual

56 See article 9 (1) of the ICCPR; article 6 of the African Charter on Human and Peoples' Rights; article 16 (4) of the International Convention on the Protection of Migrant Workers and their Families to name a few.

57 In the matter of Ulde v Minister of Home Affairs (320/08) [2009] ZASCA 34, the court held that the Immigration Act does not oblige immigration officers to detain every illegal foreigner. Rather officers must use their discretion to detain and this discretion should be exercised in favour of liberty.

58 See http://idcoalition.org/cap/

- **Step 1:** presume that detention is not necessary. This step sees detention as a last resort;
- **Step 2:** assess each individual case. The needs, risks and strengths of each case need to be assessed;
- **Step 3:** assess the community setting. It looks at whether the community setting is appropriate to support the individual and ensure his or her cooperation with immigration proceedings;
- **Step 4:** apply conditions to the release of an individual, where necessary. Such conditions include monitoring and supervision of an individual;
- **Step 5:** detention where placement in the community is not an option, following the previous steps and assessments.

These mechanisms are in place in various countries already.

Canada uses bail as an alternative to detention as a way to create a financial consequence for non-compliance with release conditions. Bail is automatically considered at review of detention hearings. A bondsperson, who can either be an acquaintance of the detainee or an organisation, agrees to pay a monetary bond that is held in trust. It is only returned to the bondsperson if the detainee complies with the conditions of release.

The Toronto Bail Program is an example of a government-funded organisation in Canada that identifies eligible detainees and supports their application for release from immigration detention.

Australia has created 'bridging visas'. These are visas which give an irregular migrant temporary legal status while they wait to return to their countries of origin, or while they await the outcome of application for other visas. The bridging visas include the right to work as well as the right to basic healthcare.

The bridging visas came about as a response to migrants spending unduly long periods in detention in situations where their countries of origin were either unwilling or unable to issue them with travel documents.

Belgium allows families to remain together in the community, accommodated together at the same place of accommodation while they await their removal from Belgium. It came about as a result of a decision by the government to outlaw the detention of children. Case managers are employed in order to monitor and supervise families in this community setting.

RECOMMENDATIONS

1. The Government of South Africa should ratify The Optional Protocol to the Convention against Torture (OPCAT) and thereby establish regular monitoring mechanisms for all detention facilities in the country. This recommendation has been part of LHR's reports on Immigration Detention Monitoring since 2008. The introduction of OPCAT to Parliament as part of the Prevention and Combating of Torture of Persons Bill [B21-2012] in June 2012 is a positive indication that this recommendation will have been fulfilled before our next report.

2. The SAHRC should facilitate a process where it is able to directly provide regular monitoring of detention facilities or mandate NGOs to carry out this monitoring on their behalf.

3. In addition to monitoring by the SAHRC, Lindela and other immigration detention facilities should put in place processes through which civil society organisations can regularly monitor conditions of detention and consult with/provide legal and paralegal advice to detainees.

4. The courts should hold Home Affairs officials personally accountable for contempt of court when the Department does not carry out court orders relating to immigration detention.

5. The Government of South Africa should consider introducing alternatives to detention as part of the enforcement of the Immigration Act.

Human Rights
detention conditions
humane enforcement
Refugee Protection
Detention Monitoring
end to child detention
immigration enforcement

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