

**CONSORTIUM FOR REFUGEES AND  
MIGRANTS IN SOUTH AFRICA**



# **Protecting Refugees & Asylum Seekers in South Africa**

## **2007**

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**Consortium for Refugees and Migrants in South Africa**

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## **About the Consortium for Refugees and Migrants in South Africa**

The Consortium for Refugees and Migrants in South Africa (CRMSA), formerly the National Consortium for Refugee Affairs (NCRA), is a Non-Profit, Non-Governmental Organisation committed to the promotion and protection of refugee and migrant rights. It is comprised of member organisations and individuals dedicated to protecting the life and welfare of refugees, asylum seekers, and other international migrants entering or living in the Republic of South Africa.

The CRMSA uses its membership network to advocate for rights-based refugee and immigration policies and laws and to promote best practice models and compliance with minimum international and national constitutional standards. In order to achieve these objectives the CRMSA programme includes advocacy, research, public awareness, capacity building and networking.

The consortium currently includes the following members:

- Amnesty International, South Africa Chapter
- Cape Town Refugee Forum
- Centre for the Study of Violence and Reconciliation
- Coordinating Body of Refugee Communities
- Durban Refugee Forum
- Forced Migration Studies Programme, University of the Witwatersrand
- Jesuit Refugee Services
- Lawyers for Human Rights
- Musina Legal Advice Centre
- University of Cape Town Law Clinic
- University of the Witwatersrand Law Clinic
- Planned Parenthood Association of South Africa
- Refugee Pastoral Care
- South African Red Cross
- Tutumike Refugee Network, Cape Town
- Zimbabwe Tortured Victims/Survivors Project

Membership in the organisation is open to any South African-based organisation or individual with an established record of work on behalf of refugees, asylum seekers, or other migrants in the country.

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## List of acronyms

ART	Anti-Retroviral Treatment
BCOCC	Border Control Operational Coordinating Committee
CCMA	Commission for Conciliation, Mediation, and Arbitration
DRC	Democratic Republic of Congo
DHA	Department of Home Affairs
DSD	Department of Social Development
JRS	Jesuit Refugee Services
LHR	Lawyers for Human Rights
MCC	Mennonite Central Committee
NCOP	National Council of Provinces
NCRA	National Consortium for Refugee Affairs
NGO	Non-Governmental Organisation
NIB	National Immigration Branch
PSIRA	Private Security Industry Regulatory Authority
RAB	Refugee Appeal Board
ROC	Republic of Congo
RRO	Refugee Reception Officer
RSDO	Refugee Status Determination Officer
SADC	Southern African Development Community
SAPS	South African Police Services
SAQA	South African Qualifications Authority
UAMS	Unaccompanied Minors
UNCTD	United Nations Convention Travel Document
UNHCR	United Nations High Commissioner for Refugees

## Summary of key findings and recommendations

Issued to commemorate World Refugee Day (20 June), this report assesses South Africa's compliance with its legal and ethical obligations towards asylum seekers and refugees. As this is the Consortium for Refugees and Migrants in South Africa's second annual report, it begins by measuring progress on the recommendations made in last year's report. In doing so, it identifies persistent gaps between obligations to protect refugee, asylum seeker, and migrant rights and actual protection afforded by the South African government, the United Nations, and South African society. It concludes by outlining a series of recommendations and benchmarks for action. Many of these are included in this summary.

Since 1994, South Africa has become a primary destination and point of transit for people from across the African continent and beyond. These are a mix of people who come seeking protection, prosperity, or passage. A small but important number of these are refugees and asylum seekers: people who have been forced to flee their own countries and are seeking safety in South Africa. According to the Department of Home Affairs (DHA), approximately 53,361 new applications for asylum were registered during the year at the Department's five Refugee Reception Offices. Of these, the vast majority, 41,437 (77.7%) were men. By far the greatest number of those who sought asylum in 2006—more than 18,000 of the new applicants—were people from Zimbabwe, with others coming from the Democratic Republic, Somalia, elsewhere on the African continent, and South Asia.

While the number of asylum seekers and refugees has increased substantially in the last five years, it remains small in comparison to those in countries such as Tanzania, Uganda, and Kenya. Indeed, between 2000 and 2006, South Africa granted asylum (i.e., refugee status) to approximately 30,200 people in total out of close to 200,000 applications. Some of these have returned to their countries of origin while others are living elsewhere. However, most of the 200,000 in this 'backlog' are still waiting for their cases to be adjudicated, creating a group of people living in limbo, unsure of what their future holds.

The Department of Home Affairs has publicly committed itself to reducing this backlog, but little progress has been made. In fact, problems only seem to be getting worse. Of the 53,361 new applications received by the DHA in 2006, approximately 5,000 (less than 10%) were effectively processed during the year. Of these, only 796 were initially accepted for refugee status. The remainder were rejected, occasionally for spurious or *ad hoc* reasons; many will undoubtedly appeal their decision to the Refugee Appeal Board. Rather than providing improved services, limited capacity and poor administration have contributed an additional 48,019 cases to a backlog that already numbers over 80,000. The numbers would undoubtedly be higher if the Department's Johannesburg office had not been closed to new arrivals for much of the year. Inefficiencies and irregularities within the refugee status determination process are among the greatest barriers to meeting the country's legal and humanitarian obligations.

Despite the misgivings of many South African leaders and citizens, the presence of non-citizens in South Africa should be seen as a testament to South Africa's prosperity, stability, and commitment to protecting the human rights of all people. In many instances, non-nationals make important contributions to South Africa's economy: by bringing valuable skills, capital, and a willingness to work. Although some migrants come with criminal intent, there is no evidence that foreigners are disproportionately involved in crime. Rather, they are disproportionately victims of criminal activity and abuse—both physical and psychological—at the hands of criminals, police, employers, and South African citizens. Such treatment stands in opposition to South Africa's commitments to preserve and promote the human rights of all people living in the country.

Unfortunately, the country's legislative framework and moral commitments are not supported by the necessary human and financial resources to secure basic protection to asylum seekers and refugees. In many instances, there has been a lack of political will for institutional or legislative reforms that could secure the rights of non-nationals. The rights of asylum seekers and refugees are further hampered by high levels of xenophobia in the country and a tendency amongst key government departments to extend

services and programmes to citizens at the expense of other groups such as asylum seekers and refugees.

There have been improvements in certain areas, with local authorities and others making fresh moves to incorporate refugees and asylum seekers into South African communities. Similarly, efforts to promote the rights of immigrants, refugees, and asylum seekers are increasingly evident in South African legislation and policy. CRMSA is particularly encouraged by refugees' inclusion in programmes providing medical care for HIV patients. However, while there have been important improvements in policy and practice towards refugees, asylum seekers, and other migrants—particularly by local government—rights are severely compromised by administrative incoherence, ignorance, and discrimination throughout the public sector. In almost all areas there has been minimal progress in addressing the concerns and recommendations made in last year's report. Indeed, the Immigration Amendment Act did not seek to improve opportunities for people to migrate legally to the Republic. This will result in further burdens on the asylum system and delays in refugee status determination as economic migrants attempt to use the system to regularise their stay in South Africa.

CRMSA is particularly concerned about the following findings:

#### **Access to the asylum process and status determination**

- Due to problems within the DHA, poor communication between the DHA and security services and the overzealous enforcement of the Immigration Act, the refugee reception process often breaks down, resulting in illegal government actions and the transgression of migrants' rights. Foremost among these is the continued closure of the Johannesburg refugee reception office;
- Third parties, including agents and interpreters, exert undue influence on who gains access to the country's five refugee reception offices. These agents often work in collusion with DHA officials. As a result of their actions, refugee protection is only available to those who are lucky or those can pay;
- Refugee status determination is often made without adequate information. Decisions are often hasty, and frequently use arbitrarily, non-legal, or *pro-forma* reasoning.

#### **Access to documentation**

- Delays and inefficiency within the DHA's bureaucracy directly and negatively impact on refugees and asylum seekers' abilities to earn a livelihood;
- The reception offices continue to issue faulty documents to asylum seekers and refugees and the document production system remains open to abuse and corruption.

#### **Arrest, detention, and deportation**

- Asylum-seekers and refugees are regularly and illegally arrested and detained despite being in possession of valid documents. Many are then illegally held at the Lindela repatriation facility. Some are deported, a violation of both domestic and international law;
- Detainees at Lindela have been subject to violent abuse.

## **Access to government-funded social services**

- There has been little progress in ensuring that refugees, asylum seekers, and other migrants are able to access rights to health, education, and other social services. The provision of basic social and economic rights is critical to non-nationals living healthy lives of dignity that allow them to contribute to the communities in which they live;
- There is no coordinated or coherent programme for improving service access for non-citizens;

## Health

- While everyone in the Republic is entitled to life-saving medical care, many refugees, asylum seekers, and other non-citizens report being refused access to treatment at clinics and hospitals;
- Health care workers may refuse services due to confusion about who is entitled to services, the fees they must pay, or due to outright discrimination;
- Despite improvements in promoting access to HIV services, refugees and asylum seekers and other migrants encounter significant challenges in accessing the anti-retroviral treatments (ART) to which they are entitled.

## Education

- The right of all children to basic education, independent of nationality or legal status, is strongly codified in international and domestic law. Nevertheless, many non-citizen children are excluded from education;
- Refugee, asylum seeker, and other migrant children are excluded from school due to poor documentation; problems of fee exemption and other expenses; language, age; and outright discrimination.

## Social assistance

- In 2003, the Constitutional Court granted permanent residents the same rights to all social grants as citizens. The implementation of grant registration and payment for permanent residents has generally been smooth;
- Although permanent residents are currently entitled to social assistance, CRMSA is concerned at the continued delays in establishing the Department of Social Development's proposed Refugee Relief Fund, a resource that would provide short-term relief to newly arrived asylum seekers as well as recognised refugees.

## Accommodation

- While recognising the pressures on available public housing, the exclusion of refugees, asylum seekers, and other migrants from various national housing policies is a major obstacle to migrants' social and economic integration;
- Refugees and service providers report that landlords often take advantage of migrants by extracting higher rents, refusing to maintain property, and failing to return security deposits;
- Refugees and asylum seekers are often unable to resist evictions because they are either unaware of their rights or are denied access to the legal mechanisms for claiming them.

## Employment

- The DHA's failure to determine refugee status and issue appropriate documentation acts as a major hindrance to securing employment;
- Many potential employers do not recognise Section 22 or Section 24 permits or the maroon refugee identity books;
- Many highly qualified asylum seekers, refugees, and other migrants are underemployed because they are unable to have their qualifications recognised. This not only reduces their opportunities, but prevents them from contributing their valuable skills to the communities in which they live. This is especially evident in the education and medical professions;
- Refugees and asylum seekers have been unjustifiably excluded from the private security industry and are regularly disadvantaged by programmes intended to improve conditions in informal sector businesses, street trading, hospitality, and farm work.

## **Violence against foreign nationals**

- CRMSA is witnessing an increase in the number and severity of violent crimes aimed specifically at non-citizens living in South African communities;
- In many instances of anti-foreigner violence, police officers have either been directly involved or stood by while violence continued. In some instances, local officials and councillors have been implemented in fomenting the violence;
- Rather than serving as instruments of ongoing mediation and conflict resolution between nationals and the foreign-born, the South African Police Services, the Community Policing Forums, local municipal governments and councillors often do nothing, lack the tools to do so, or actively contribute towards the violence.
- The failure of the Human Rights Commission and other official bodies to intervene actively to protect the rights and property of foreigners has not generated an environment that promotes the integration of refugees into South African communities.

## **Unaccompanied minors**

- There is growing evidence that children from neighbouring countries are coming to South Africa without their parents or other guardians. Some arrive seeking asylum while many more come with the hope of earning enough money to help themselves and their families at home. In almost all cases, unaccompanied minors coming to South Africa face the risk of exploitation and receive almost no protection from government;
- Evidence gathered from interviews with authorities and service providers working near Musina suggests that the most vulnerable children may find it the most difficult to reach the urban centres where refugee reception offices are based. Indeed, few children have enough money to reach the urban centres in order to apply for asylum leaving them without documentation and vulnerable to arrest and deportation;
- Minors seeking asylum who are not accompanied by parents or guardians are being turned away from the reception offices and social workers continue to be unwilling to deal with cases of foreign unaccompanied minors, especially in assisting them to receive documentation.
- Unaccompanied minors on the border of Zimbabwe are frequently deported by the police in spite of the fact that the police have no authority to carry out deportations. Children are detained with adults while in police custody.

## **Women and gender-based persecution**

- While women globally represent close to 50% of the adult refugee population, in 2006 the Department of Home Affairs reported that only 20.2% of asylum seekers in South Africa were women;
- The Refugees Act states that persecution on the grounds of gender can qualify one for refugee status. Discussions with lawyers acting for refugees indicate that this criterion has seldom been recognised. Given the level of gender based violence taking place elsewhere on the continent, this finding suggests that either women are receiving protection through other channels or are simply not able to claim the protection to which they are entitled;
- Indications show that refugee and migrant women are regularly refused medical care when in labour and find it difficult to access ARV treatment following rape and to prevent mother to child transmission of HIV.

## **Recommendations**

In order to address the problems and challenges raised above, CRMSA offers the following recommendations. Few of these are for new or specialized programmes to assist refugees, asylum seekers, or other migrants. Rather, they are intended to assist the Government and other bodies in fulfilling their existing legal and ethical obligations. Reflecting the slow pace of progress, many of these recommendations also appeared in last year's report:

### **Department of Home Affairs**

- Immediately re-open a refugee reception office in Johannesburg at a location that is accessible and protects the interests of refugees, asylum seekers, and neighbouring communities;
- Ensure that all of the country's five refugee reception offices remain open and fully functional. Where necessary, increase the number of refugee status determination officers at the offices to prevent a further backlog of asylum applications. Also ensure that all offices are capable of issuing appropriate documentation;
- Extend current initiatives to provide interpretation services not only for the Backlog Project but also to assist all asylum seekers who enter the asylum procedure in order to reduce the possibility of abuse and corruption and enable asylum seekers to provide accurate information in their applications;
- Improve the refugee database system and provide additional computer equipment to process asylum applications and to facilitate communication among the refugee reception offices and the directorate in Pretoria;
- Keep records of the success and failures of the cases of women and children as groups most likely to be disadvantaged in the asylum system;
- Educate service providers, other government departments, the public sector, and potential employers about refugees rights and documentation;
- Clarify the procedure for dealing with unaccompanied children;
- Ensure the immediate release of undocumented asylum seekers and any other unlawfully detained person when so informed;

- Investigate cases of abuse at Lindela and put pressure on SAPS to stop illegal and irregular deportations;
- Inform local authorities of plans to open offices, change their operations, or undertake other immigration and asylum related activities. To improve coordination, involve local authorities in decision making and policy reviews and provide them with relevant statistics and policy documents;
- Design and implement reform of procedures based upon the 'Process Engineer's Report', particularly as regards a) the establishment of accessible, adequately equipped RROs; and b) the introduction of an integrated database and documentation system.

### **Department of Education**

- Facilitate information materials on school registration procedures, exemptions from school fees and other important issues affecting children's education, in languages such as French and Swahili to assist caregivers of asylum seeker and refugee children who are not conversant in English to play a more involved role in their children's education.
- Until the policy of 'free schools' has been completely implemented, ensure that non-citizens who are unable to pay for school fees have equal access to school fee exemptions as indigent South Africans, and introduce means of subsidizing the 'hidden costs' of schooling such as transport, uniforms and materials.

### **Department of Health**

- Ensure the standardisation of administrative procedures to ensure that asylum seekers and refugees are able to access public health care services;
- Enhance capacity building and training of administrative and health care workers to include specific components addressing issues of xenophobia and the rights of different groups of foreigners to access health care services;
- Consider procuring interpreters to enhance the ability of asylum seekers and refugees to communicate their ailments;
- Ensure that refugees have access to voluntary testing and counselling for HIV and that HIV-positive refugees have access to anti-retroviral treatment.

### **Department of Housing**

- Recognise the South African government's obligation to provide housing assistance to asylum seekers and refugees as a specific group of foreigners and possibly review the National Housing Code;
- Further clarify the terminology adopted in existing housing policies and ensure the explicit inclusion of asylum seekers and refugees as a separate category of foreigners;
- Explore the extension of emergency housing assistance programmes to destitute refugees, following the example of the Department of Social Development in relation to social assistance grants for vulnerable refugees.

## **Department of Justice**

- There is a need to improve non-citizens' access to legal services. This includes strengthening the Legal Aid Board and Justice Centres' ability and willingness to assist and protect migrants.

## **Department of Labour**

- Work with the Department of Home Affairs, South African Qualifications Authority (SAQA) and other certification bodies (such as the Nursing Council) to develop a consistent approach to recruiting skilled refugees and asylum seekers into employment sectors identified as needing scarce skills. Qualified persons already in the country should be recruited before expensive recruitment campaigns are held to bring in people from other countries;
- Work with SAQA to reduce or waive fees for certification of qualifications for recognised refugees;
- Work with the Commission for Conciliation, Mediation and Arbitration (CCMA) and other bodies to ensure that refugees, asylum seekers and other minors have access to mechanisms to protect their employment rights;
- Consider the position of non-citizens working in the employment sectors where Sectoral Determinations are introduced. Engage in awareness-raising with employers so that asylum seekers, refugees and other documented migrants have the right to be employed on the same minimum standards as citizens under the Sectoral Determinations.

## **Department of Social Development**

- Enhance awareness raising activities with social workers to ensure the protection of unaccompanied asylum seeker and refugee children;
- Finalise the comprehensive plan to extend social assistance grants to recognised refugees and ensure that the documents issued to recognised refugees are lawfully recognised as valid forms of documentation for the purposes of social assistance grants;
- Ensure the operation of the Refugee Relief Fund Board and publicise timelines for future activities and its operating procedures to enable asylum seekers and refugees to access emergency relief where necessary;
- Ensure that capacity building and training explicitly incorporates the treatment of unaccompanied foreign children and other migrants;

## **Department of Provincial and Local Government and Local Authorities**

- Further strengthen initiatives to integrate asylum seekers and refugees into urban development programmes;
- Continue engaging organisations working with migrants and refugees to gather information required for further action and to engage in in-depth discussions about the integration of these groups into South Africa's metropolitan areas;

- Motivate national government for a revision of policies that limit the ability of asylum seekers and refugees to be fully integrated into the cities in which they live;
- Review street trading registration policies to (a) enable both asylum seekers and refugees to register, without disadvantaging asylum seekers on the basis of the short duration of their permits; and (b) give new traders the opportunity to register to trade in commercial areas, rather than renewing the permits of the same traders indefinitely;
- Ensure that evictions undertaken in the name of urban-regeneration adequately consider the rights and welfare of refugees, asylum seekers, and other migrants.

### **South African Police Services and Metro Police**

- Immediately cease illegal deportations in the Musina area and the arrest and deportation of unaccompanied minors;
- Continue initiatives to sensitise its members to the rights and obligations of asylum seekers and refugees and to combat xenophobia within the police force;
- Work to protect the property and security of all community residents, regardless of nationality. To do this effectively, the police must train all officers on the rights of those foreigners living in their communities. Where there is evidence of discrimination or bias, these incidents should be investigated and the relevant officers punished;
- Ensure that asylum seekers and refugees are not detained at the Lindela Repatriation Centre, not even for identity verification purposes.

### **South African Human Rights Commission**

- Follow-up on the Public Hearings on Xenophobia that it hosted in late 2004 to assess any progress made in combating xenophobia;
- Follow up on the Public Hearings on Access to Health Services held in May 2007 to ensure that (1) the Department of Health acts upon the concerns raised relating to the challenges encountered by migrants, refugees and asylum seekers, in attempting to access public health care services, including ART; and (2) the Departments of Health and Labour acts upon the recommendation that refugee and asylum seeker health professionals can work in the South African public health system, thereby assisting in reducing the current skills shortage;
- Conduct hearings or undertake other advocacy work to ensure that all refugees and asylum seekers have access to the refugee reception offices and receive reasonable and fair treatment that conforms to domestic and international law;
- Heighten its visibility by participating actively in forums and networks that strive to further the realisation of the rights of asylum seekers and refugees;
- Wherever possible, support the work of civil society by using the Commission's good offices to facilitate access to information;
- Investigate and take strong action against those perpetrating violence against foreigners.

## **Parliament**

- Follow up on the Public Protector's Office's 2004 report regarding conditions at the Johannesburg refugee reception office to ensure that problems are permanently remedied. This should include a formal progress report to Parliament on implementing the Process Engineer's recommendations;
- Exercise greater oversight over the DHA and its partners to ensure that processes adhere to legal standards and that the rights of refugees and asylum seekers are respected. This includes taking active steps to avoid detention and deportation of refugees;
- Dedicate adequate resources to the Department of Home Affairs Refugee Directorate and to the Legal Aid Board to ensure that applications for asylum are processed quickly and effectively and that refugees and asylum seekers have access to legal representation.

## **United Nations High Commissioner for Refugees**

- Provide assistance to refugees wishing to convert their professional qualifications from countries of origin into qualifications recognised in South Africa;
- Provide additional support to legal and paralegal services throughout the country to ensure refugees and asylum seekers have access to legal assistance;
- Place additional pressure on the Departments of Education and Health to ensure that public services are available to refugees. Where necessary, provide resources for translation and training;
- Continue lobbying the National Department of Health for clarity on the status of asylum seekers for access to both general health services and ARV treatment.

## **Chambers of Commerce**

- Promote entry into trading markets rather than close this avenue to those who have few other options.
- Encourage the participation of foreigners in community forums so as to promote trust and collective conflict resolution.

## **Civil Society and the Consortium for Refugees and Migrants in South Africa**

- Provide additional legal assistance to refugees and asylum seekers at all stages of the application and appeal process while enhancing efforts to coordinate ongoing litigation;
- Conduct regular monitoring of the Refugee Reception Offices, Lindela Repatriation Facilities, and of proposed regulations and practices to ensure that refugee rights are protected;
- Strengthen existing local networks to be inclusive of key local representatives from Refugee Affairs; the Immigration Inspectorate; Departments of Health, Education, and Social Development; the Metro Police and SAPS to ensure horizontal information-sharing on asylum seekers and refugees across government departments;
- Monitor and advocate based on the recommendations in all of the sections outlined above;
- Undertake additional research into emerging or under recognised crisis areas including, but not limited to, the condition of Zimbabwean refugees and asylum seekers; unaccompanied minors; women and gender-based violence claims to asylum; refugees and asylum seekers living in small towns and rural areas.

## 1. Introduction

Since 1994, South Africa has become a primary destination and point of transit for people from across the African continent and beyond. These are a mix of people who come to the country seeking protection, prosperity, or passage. A small but important number of these are refugees and asylum seekers—people who have been forced to flee their own countries and are seeking safety in South Africa. These people come from across the world, but the largest numbers are from the Democratic Republic of Congo (DRC), Somalia, Ethiopia, Angola, Burundi, Republic of Congo (ROC), Rwanda, and more recently Zimbabwe. **While the number of asylum seekers and refugees has increased substantially in the last five years, it remains small in comparison to those in countries such as Tanzania, Uganda, and Kenya. Between 2000 and 2006, South Africa granted asylum to approximately 30,200 people in total out of close to 200,000 applications.** Many of those who have been offered asylum have no doubt returned to their home countries or are now living elsewhere.

Due to continued insecurity in the DRC, ongoing political and economic crisis in Zimbabwe, and conflicts elsewhere in the world, South Africa saw a steady stream of asylum seekers enter the country in 2006. According to the Department of Home Affairs (DHA), approximately 53,361 new applications for asylum were registered during the year at the Department's five Refugee Reception Offices. Of these, the vast majority, 41,437 (77.7%) were men with the remaining 10,769 (32.3%) being women. **By far the greatest number, more than 18,000, of the new applications were from Zimbabwe.** The table below reflects the top ten countries of citizenship for asylum seekers during 2006.

### Top Ten Countries of Citizenship for New Asylum Seekers

	Country	Total
1	Zimbabwe	18 973
2	Malawi	6 377
3	Democratic Republic of Congo	5 582
4	Ethiopia	3 916
5	Bangladesh	3 074
6	Somalia	3 024
7	Tanzania	1 838
8	Pakistan	1 363
9	Republic of Congo	1 207
10	India	1 175
		<b>46 529</b>

Source: Department of Home Affairs

As in past years, the Johannesburg office was the busiest of the five despite significant operational problems in the office. These reflect deeper problems of access to the asylum process, as well as problems within the refugee status determination procedure. **Indeed, of the 53,361 new applications during 2006, only about 5,000 were effectively processed during the year.** Of these, 796 were accepted for refugee status at the first stage. Many of those who have been rejected will undoubtedly appeal their decision to the Refugee Appeal Board. **As a result of undercapacity and poor administration, the Department has contributed an additional 48,019 cases to a backlog that already numbers over 80,000.**

Asylum seekers and refugees—even those who have not yet received documents from the South African government—are those who have been compelled to leave their countries of origin due to a well-founded fear of instability, violence, oppression, or persecution. These people are guaranteed special protections under both domestic and international laws. These include:

- The South African Constitution, Act No. 108 of 1996;
- The Refugees Act of 1998 and the Refugee Regulations, which came into force on 1 April 2000;
- The Immigration Act of 2002, as amended in 2004, with respect to entry into the Republic, the treatment of illegal foreigners and application for permanent residence;
- The 1951 United Nations Refugee Convention Relating to the Status of Refugees and its 1967 Protocol, to which South Africa became a signatory in 1995;
- The 1969 Organisation of African Unity's Convention Regarding the Specific Aspects of Refugee Problems ('OAU Refugee Convention'), to which South Africa became a signatory in 1996.

**These laws and conventions are intended to guarantee the asylum seekers and refugees' physical security, access to critical social services, and access to courts and due processes of the law.** The laws also prohibit South Africa from returning refugees to countries where their lives could be in danger, a process called *refoulement*. In addition to prohibitions on the return of asylum seekers and refugees, South African law assigns refugees the social, economic, and civil rights necessary to ensure a life of dignity. These include the ability to engage in wage-earning employment, to obtain basic education and health care services, to access public relief and assistance, to be issued with identity papers, and to safeguard their freedom of movement. **South Africa does not presently maintain any refugee camps or purpose-built settlements for refugees, a sign of its commitment to protecting the freedom and dignity of all people.**

In addition to refugees and asylum seekers, many more people come to South Africa searching for economic opportunities or the chance to travel elsewhere. **Regardless of their nationality or legal status, South African and International Law guarantees all people basic civil and political rights.** Under the International Covenant for Civil and Political Rights, which South Africa ratified on 10 December 1998, even undocumented migrants (i.e., not refugees, asylum seekers, or legal migrants) have the right to be free from arbitrary arrest or detention (s5); the right to be treated with humanity and with respect (s9); the right to equality before the courts and tribunals (s10); the right to be recognised everywhere as a person before the law (s14); and the right against arbitrary deportation (s16).<sup>1</sup> Domestic law, including the Constitution, reaffirms many of these commitments while extending the right of education to all children and ensuring access to life saving medical care for all people in the country.

Despite the misgivings of many South African leaders and citizens, the presence of non-citizens in South Africa should be seen as a testament to South Africa's prosperity, stability, and commitment to protecting the human rights of all people. In many instances, non-nationals make important contributions to South Africa's economy: by bringing valuable skills, capital, and a willingness to work. Although some migrants come with criminal intent, **there is no evidence that foreigners are disproportionately involved in crime. Rather, they are disproportionately victims of criminal activity and abuse—both physical and psychological—at the hands of criminals, police, employers, and South African citizens.** Such treatment stands in opposition to South Africa's commitments to preserve and promote the human rights of all people living in the country.

Unfortunately, **the country's legislative framework and moral commitments have not been supported by the necessary human and financial resources needed to offer basic protections to asylum seekers and refugees. In many instances, there has been a lack of political will for institutional or legislative reforms that would protect the rights of non-nationals.** The rights of asylum seekers and refugees are further hampered by high levels of xenophobia in the country and the tendency amongst key government departments to focus primarily on extending services and programmes to citizens at the expense of other groups such as asylum seekers and refugees.

There have been improvements in certain areas, with local authorities and others making fresh moves to incorporate refugees and asylum seekers into South African communities. Similarly, efforts to promote the rights of immigrants, refugees, and asylum seekers are increasingly visible in South African legislation and policy. However, these have largely been undermined by the inability of many would be asylum seekers to even access Department of Home Affairs offices, increased violence against foreigners, exclusion from social services, and the deportation of refugees and asylum seekers.

## **Purpose and structure of the report**

In fulfilling its mandate to protect the rights of refugees, asylum seekers, and other non-citizens living or working in South Africa, the Consortium for Refugees and Migrants in South Africa (CRMSA) monitors national and local policies and laws and promotes compliance with international and national constitutional standards. **This report helps identify gaps that exist between obligations to protect migrants' rights and implementation by the South African government and other bodies; draws attention to the positive and negative efforts of those working with, for, or against non-nationals in South Africa; and informs advocacy activities by the CRMSA and its partner organisations by outlining a series of concerns and benchmarks for action.** These recommendations will be particularly important as the South African government continues to review its immigration and asylum legislation.

This is the second annual report issued by the CRMSA considering the rights of refugees, asylum seekers, and other migrants. Issued in commemoration of World Refugee Day, the report concentrates on the rights of refugees and asylum seekers while recognising that these are often inseparable from the rights of other international migrants.

This year's report focuses on key elements of refugee and migrant rights protection in South Africa: documentation and access to basic services. It begins by reviewing the degree to which the South African government and other actors have addressed recommendations made in last year's report. It then provides a review of key legislative and legal decisions affecting refugees and other migrants living and working in South Africa. The report then turns to issues of implementation and rights protection. It first considers asylum seekers and refugees' ability to access legal documents to protect their physical security and help safeguard them from possible arrest, detention and refoulement. It then addresses concerns over migrants and refugees' ability to access a number of key social services including health, education, social assistance and housing. The report then turns to four issues not discussed in our previous report. The first of these is access to employment, something critical in an environment where refugees receive little or no direct assistance. We then draw attention to the seeming increase of violence against foreigners, some of which has resulted in murder, the ultimate human rights violation. In other instances, such violence has resulted in the effective ethnic cleansing of particular communities. We then move on to two issues that were not adequately considered in our previous report: the position of unaccompanied minors as they travel to and reside in South Africa and the ability of women to access protection on the basis of gender-based violence or persecution. We end by providing a series of recommendations and conclusions.

Working through CRMSA's partners across the country, we compiled the information for this report over a three-month period using in-depth interviews and a review of relevant documents, legislation and policies. We conducted in person and telephone interviews with officials and service providers in Johannesburg, Pretoria, Durban, Cape Town, and Port Elizabeth and in border areas near Mozambique and Zimbabwe. The report also draws on extensive engagement with migrants across the country.

Despite our best efforts, there are undoubtedly issues and concerns not fully addressed in these pages. **Issues deserving additional attention include the continued challenges of Zimbabweans in accessing asylum in South Africa; the potential repatriation of Angolans and Congolese; and the possibility of building a 'transit' facility for all new asylum seekers.** Moreover, while encouraged by more sympathetic media reports on the conditions of refugees and other migrants, **we are nevertheless concerned by the role of the media in promoting xenophobic discrimination and violence.** Despite

these omissions, CRMSA believes that the study's findings are generally representative of the experiences of asylum seekers and refugees in the country. Moreover, since the study aims to provide an informed assessment of the level of government compliance with its national and international obligations towards asylum seekers, refugees, and other migrants, this report does not provide a detailed account of the different types of assistance provided by NGOs and other organisations within civil society to asylum seekers and refugees. NGO interventions are highlighted only where relevant to the issue being addressed.

## 2. Review of compliance with recommendations from 2006 report

As the following pages suggest, **there has been minimal progress in addressing many of the recommendations made in last year's report.** Particularly around access to the asylum process and documentation, problems have worsened despite a well-intentioned but ineffective campaign by the Department of Home Affairs to improve services. However, we have seen considerable progress with Local and Provincial governments becoming increasingly involved in protecting the rights of migrants and promoting their integration into South African society. These efforts are a start, but to be effective, such symbolic efforts must be supported by will and the necessary financial and human resources. At the risk of sounding self-congratulatory, we are also pleased to report that South African civil society has increased their ability to work on behalf of refugees, asylum seekers, and other migrants. Some of these improvements stem from a growing awareness and interest in migrant rights, while others are due to a multi-year, multi-million rand investment in the migrant rights' sector by the Atlantic Philanthropies. However, there is still a long way to go and far too many organisations continue to overtly exclude non-nationals from their programming.

This section offers a scorecard on how relevant bodies have addressed selected recommendations made in the 2006 report. As with other reports of this sort, an 'A' represents an excellent performance with an 'F' indicative of worsening conditions. The award of a 'C' indicates there has been no noticeable change for better or worse. The rationale for our decisions is included in the following pages. Unfortunately, many of last year's recommendations appear again in this year's report.

<b>Department of Home Affairs</b>	
Eliminate the pre-screening and appointment process for asylum applicants.	<b>B</b>
Facilitate immediate receipt of applications for asylum and the issuance of Section 22 permits.	<b>F</b>
Increase the number of Refugee Status Determination Officers at Refugee Reception Offices.	<b>C</b>
Institute human resources and administrative improvements to prevent a further backlog of asylum applications.	<b>F</b>
Extend current initiatives to provide interpretation services not only for the Backlog Project, but also to assist all asylum seekers who enter the asylum procedure, in order to reduce the possibility of abuse and corruption and enable asylum seekers to provide accurate information in their applications.	<b>C</b>
Improve the refugee database system and provide additional computer equipment to process asylum applications and to facilitate communication among the Refugee Reception Offices and the directorate in Pretoria.	<b>D</b>
Ensure all asylum applicants and refugees have appropriate interpretation services.	<b>D</b>
Establish accessible, adequately equipped refugee reception offices that are capable of issuing appropriate documentation.	<b>D</b>
Educate service providers, other government departments, and the public sector about refugee rights and documentation.	<b>E</b>

<b>Department of Home Affairs (continued)</b>	
Clarify the procedure for dealing with unaccompanied children.	<b>C</b>
Ensure the immediate release of undocumented asylum seekers and any other unlawfully detained person when so informed.	<b>B</b>
Heighten the profile of the Public Education Unit by engaging in public information campaigns, through the use of printed and visual media (including radio adverts) to enable the acceptance of smart cards and asylum seeker permits and to inform asylum seekers about the current backlog project.	<b>C</b>
Reaffirm its commitment to work with NGOs by engaging in a consultative process to identify blockages in the asylum determination procedure and thus avoid additional legal challenges at taxpayers' expense.	<b>C</b>

<b>South African Police Services and the Metro Police</b>	
Continue its initiatives to sensitise its members to the rights and obligations of asylum seekers and refugees and to combat xenophobia within the police force.	<b>E</b>
Work more closely with the Immigration Inspectorate, and preferably only through joint operations, before effecting arrests of asylum seekers and refugees.	<b>D</b>
Ensure that asylum seekers and refugees are not detained at the Lindela Repatriation Centre, not even for identity verification purposes.	<b>C</b>

<b>Department of Health</b>	
Ensure the standardisation of administrative procedures to ensure that asylum seekers and refugees are able to access public health care services.	<b>C</b>
Enhance capacity building and training of administrative and health care workers to include specific components addressing issues of xenophobia and the rights of different groups of foreigners to access health care services.	<b>D</b>
Consider the procurement of interpreters to enhance the ability of asylum seekers and refugees to communicate their ailments.	<b>C</b>
Ensure that refugees have access to voluntary testing and counselling for HIV and that HIV-positive refugees have access to anti-retroviral treatment.	<b>B</b>

<b>National Department of Education</b>	
Institute the policy of 'free schools' as soon as possible to enhance the ability of asylum seekers, refugees, and destitute South Africans to exercise their right to basic education.	<b>C</b>
Strengthen the inclusion of refugee-related topics and discussions about xenophobia into the school curriculum.	<b>C</b>
Facilitate information materials on school registration procedures, exemptions from school fees and other important issues affecting children's education in languages such as French and Swahili to assist caregivers of asylum seeker and refugee children who are not conversant in English to play a more involved role in their children's education.	<b>C</b>

<b>Parliament</b>	
Follow up on the 2004 report by the Public Protectors Office regarding conditions at the Johannesburg refugee reception office to ensure that problems are remedied and not repeated.	<b>D</b>
Exercise greater oversight over the DHA and its partners to ensure that processes adhere to legal standards and that the rights of refugees and asylum seekers are respected. This includes taking active steps to avoid detention and deportation of refugees.	<b>D</b>

<b>South African Human Rights Commission</b>	
Renew efforts to work actively with NGOs to monitor the respect for the rights of asylum seekers and refugees, in line with its mandate, not only at facilities like the Lindela Repatriation Centre but also at refugee reception offices, main clinics, hospitals and schools.	<b>B</b>
Follow-up on the Public Hearings on Xenophobia that it hosted in late 2004 to assess any progress made in combating xenophobia.	<b>C</b>
Heighten its visibility by participating actively in forums and networks that strive to further the realisation of the rights of asylum seekers and refugees.	<b>D</b>

<b>Department of Housing</b>	
Recognise the South African government's obligation to provide housing assistance to asylum seekers and refugees as a specific group of foreigners and possibly review the National Housing Code.	<b>C</b>
Clarify the terminology adopted in existing housing policies and ensure the explicit inclusion of asylum seekers and refugees as a separate category of foreigners.	<b>C</b>
Explore the extension of housing assistance programmes to destitute refugees, following the example of the Department of Social Development in relation to social assistance grants for vulnerable refugees.	<b>C</b>

<b>Department of Provincial and Local Government and Local Authorities</b>	
Strengthen its initiatives to integrate asylum seekers and refugees into city plans and facilitate the production of global cities.	<b>B</b>
Engage organisations working with migrants and refugees to gather information required for further action and to engage in in-depth discussions about the integration of these groups into South Africa's metropolitan areas.	<b>B</b>
Motivate national government for a revision of housing policies that limit the ability of asylum seekers and refugees to access housing and be fully integrated into cities.	<b>C</b>
Review its street trading registration policies to (a) enable both asylum seekers and refugees to register, without disadvantaging asylum seekers on the basis of the short duration of their permits; and (b) give new traders the opportunity to register to trade in commercial areas, rather than renewing the permits of the same traders indefinitely.	<b>C</b>

<b>United Nations High Commissioner for Refugees</b>	
Provide assistance to refugees wishing to convert their professional qualifications from countries of origin into qualifications recognised in South Africa.	<b>B</b>
Provide additional support to legal and paralegal services throughout the country to ensure refugees and asylum seekers have access to legal assistance.	<b>C</b>
Place additional pressure on the Departments of Education and Health to ensure that public services are available to refugees. Where necessary, provide resources for translation and training.	<b>C</b>

### 3. Litigation and legislative updates

In 2006 and 2007, the Department of Home Affairs and the Parliament of South African began a process of reviewing the country's immigration and asylum laws. This is an immensely positive process that can help bring the country's laws further in line with its human rights commitments and economic development priorities. The CRMSA supports this long-term process involving consultations with civil society, business, and other government departments. However, **we are concerned that revisions to law and policy will reflect current preoccupations with security and economic development while neglecting due protection of human rights.** We also wish to reiterate that it is the implementation of existing laws and not the laws themselves that currently presents the greatest human rights challenge to immigrants, refugees, and asylum seekers. As the process of legal reforms continues, we urge parliament to grant adequate resources and sufficient oversight to ensure that whatever proposals are ultimately passed into law are practicable and consistently applied.

The Department of Home Affairs has yet to issue a draft of its amended Refugees Act and we hope that submissions made by civil society have been considered and that this is visible in the proposed changes.

President Mbeki and the Minister of Home Affairs Mapisa-Nqakula have recently acknowledged that undocumented migration is a problem and CRMSA hoped that these problems would be addressed in the Immigration Amendment Act. However, neither leader has alluded to any government attempt to proactively address undocumented migration and the law does little to improve conditions. Similarly, Home Affairs has stated that they are working towards reciprocal visa waiver regimes with SADC countries, but there appears to be no strict time lines for the completion of this process.

Despite some positive reforms and statements from political leadership, **the Immigration Amendment Act has not considered nor provided opportunities for people to migrate legally. Mechanisms that address this are required especially for citizens of SADC countries. The absence of these mechanisms will only encourage increased illegality in the immigration process and abuse of the asylum system while heightening opportunities for corruption, violence, and exploitation.**

The challenges of effective and contradictory implementation are reflected in ongoing litigation against the Department of Home Affairs and other Government departments and agencies responsible for providing services and protection to South Africans and non-citizens living in the republic. These include important decisions and ongoing court action in the following areas:

#### **Social grants for disabled refugees<sup>1</sup>**

Disabled refugees in South Africa are excluded from accessing government-provided social assistance grants. Following a Constitutional Court judgement that held that the exclusion of permanent residents from the welfare scheme is discriminatory and unfair and infringes the right to equality, Lawyers for Human Rights (LHR) pursued the extension of grants to disabled refugees by challenging the constitutionality of this exclusion.

In April 2007, LHR provided a draft order to the Department of Social Development (DSD) where it requested that by 3 August 2007, the DSD would gazette regulations stating that a refugee identification document or a Section 24 Recognition of Status Permit are sufficient for the purposes of obtaining social assistance grants, since the Identification Act does not recognise refugee documents as valid documents. LHR is awaiting a response from the DSD.

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<sup>1</sup> *Scalabrini Centre of Cape Town and Five Others vs. The Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another*, Case No. 32054/ 2005, High Court of South Africa, Transvaal Provincial Division, 19 September 2005.

The Court has granted Government until October 2007 to file a comprehensive Social Assistance Plan for Refugees. The plan should provide for disabled refugees to be able to receive disability grants to the same value as social grants received by South Africans. We estimate that disability grants should be available to all disabled refugees by mid-2008. Once this grant is available to refugees, it should then follow logically that all social assistance grants be made available to refugees and that to continue to exclude refugees would be discriminatory.

## **Employment in the private security industry**

The Private Security Industry Regulatory Act of 2001 came into force in 2002 and effectively banned the employment of all non-nationals, including legally recognised refugees, in the security industry. Until this point, the industry provided employment to approximately 20% of all economically active asylum seekers and refugees. Given the sector's importance to many recent arrivals in South Africa, this act represented a fundamental threat to the livelihoods of hundreds if not thousands of people. Recognising this, LHR and other partners levied a Constitutional challenge to the total exclusion of recognised refugees from the private security industry of South Africa in early 2003. On 26 May 2006 the Pretoria High Court dismissed our clients' application. Subsequently, an application for leave to appeal was lodged with the Constitutional Court, which was heard on 29 August 2006.

In its judgement in December 2006, the Constitutional Court found that the citizenship requirement contained in Section 23 (1)(a) was not unconstitutional. However, the Court highlighted the fact that the Private Security Industry Regulatory Authority (PSIRA) cannot totally bar refugees from working in the security industry solely on the basis that they are not citizens or permanent residents. The Court held that refugees may apply to be exempt from the citizenship requirement by using the procedure provided for by Section 23 (6) of PSIRA Act. The Court also ordered the security industry to provide all potential refugee applicants with information on the exemption procedure and gave guidelines on the information that a refugee applicant must provide to PSIRA when applying for this exemption.

The Constitutional Court judgement clearly states that all potential applicants must be advised of the exemption and be informed of the procedure to follow to apply for such. Many months after the Constitutional Court judgement, however, PSIRA has not complied with this requirement and LHR is in the process of establishing how PSIRA intends to comply with it. This leaves many asylum seekers and refugees without the means to support themselves, while those who continue to work in this sector are vulnerable to exploitation.

## **Access to the Department of Home Affairs' asylum application procedure<sup>2</sup>**

Since the implementation of the Refugees Act in 2001, newly arrived asylum seekers in South Africa have faced tremendous challenges in accessing the Department of Home Affairs' asylum determination process (see the following section). Lawyers and other refugee advocates have achieved some success in addressing this unsatisfactory situation with two court applications launched during 2005 and 2006.

Pursuant to these applications, in November 2005 the Pretoria High Court ordered the Department of Home Affairs to procure the services of more staff. It also ordered the services of an independent process engineer to assess and make recommendations to ensure that newly arrived asylum seekers have proper and lawful access to South Africa's asylum procedures, provided for by sections 21 and 22 of the Refugees Act. More specifically, the Court ordered the Department to re-open a Refugee Reception Office in Johannesburg and ensure that asylum seekers would be received at a facility in Johannesburg from 3 January 2006 onwards.

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<sup>2</sup> *Somali Refugee Forum v Minister of Home Affairs, Director General of Home Affairs and Chairperson of the Standing Committee for Refugee Affairs, High Court of South Africa*

The Court also ordered the Department to file a report detailing the steps that it had taken to ensure adequate access. The Department filed a plan during March 2006 and very slowly took steps to procure the services of an independent process engineer, who was finally appointed in December 2006. The Department eventually reopened the Rosettenville Refugee Reception Office in the south of Johannesburg for a few months, but adopted the practice of hindering access to newly arrived asylum seekers in Johannesburg towards the end of 2006. This practice effectively forced asylum applicants to approach the Refugee Reception Office in Pretoria at their own expense and with the possibility of arrest due to their lack of valid documentation.

In February 2007, the process engineer produced a draft report with recommendations to facilitate access of asylum applicants to the asylum procedure. CRMSA and other partners provided comments to the process engineer's report and met with representatives from the DHA to consider the recommendations and steps forward. However, at the time of writing a final report from the process engineer had not yet been made available. Similarly, the Department of Home Affairs has not filed this report with the court. If the Department fails to take steps to implement the recommendations emanating from the process engineer's report, LHR and other partners will be forced to return to court.

### **Pre-screening procedures and the legality of the appointment system and the issuing of appointment slips**

An application brought by Wits University Law Clinic<sup>3</sup> challenged the legality and constitutionality of the procedures and processes put in place by the Department of Home Affairs at the Rosettenville Refugee Reception Office and the Marabastad Refugee Reception Office (Pretoria) in respect of people wishing to apply for asylum as required by the Refugees Act (1998).

The court held that the decisions taken by officials in the Department of Home Affairs rejecting certain applicants for asylum were to be reviewed, as these applicants were rejected on the basis of a pre-screening procedure that is not provided for in the Refugees Act. The court set aside the decisions to reject their asylum applications because of this procedural irregularity. The Department of Home Affairs was directed to issue asylum seeker permits to these individuals in accordance with the provisions of the Refugees Act. The court further declared that the pre-screening policy adopted by the Marabastad and Rosettenville Offices was unlawful. Home Affairs was accordingly directed to receive and process applications for asylum in a non-discriminatory and fair manner in terms of the provisions of sections 21 and 22 of the Refugees Act.

The Department of Home Affairs was further directed to advertise in a place that would be visible to members of the public at both the Marabastad and Rosettenville Refugee Reception Offices. The court stated that the procedures employed to process applications for asylum at the Marabastad and Rosettenville Refugee Reception Offices since November 2005 were unlawful and that any person who was subject to such procedures is entitled to have his or her application for asylum re-assessed.

### **Appeals to the Refugee Appeal Board**

#### *Atrocious past persecution as sufficient grounds for refugee status*

LHR represented a client who was atrociously tortured in Angola, his country of origin. After he applied for asylum in South Africa, the Department of Home Affairs took more than 2 years to determine the client's status and reach the decision to reject his asylum claim. Thereafter, the Refugee Appeal Board also dismissed his appeal against the rejection of his asylum application.

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<sup>3</sup> *Tafira v Minister of Home Affairs and others, High Court of South Africa, Transvaal Provincial Division Case No: 12960/2006*

The Appeal Board held the view that the conditions in Angola had improved to such an extent that it was possible for Angolans to return there. Although the Board was aware of the fact that this person was receiving psychological treatment as a result of the past persecution that he experienced, and even expressed sympathy for him, it still held that the Refugees Act did not provide for the granting of asylum on humanitarian grounds. After the Board dismissed this asylum application, LHR assisted the client to apply for permanent residence, advancing that there existed special circumstances to grant such status. The Minister of Home Affairs refused him permanent residence without providing any reasons for her decision.

LHR launched an application for review of both the Refugee Appeal Board's and the Minister's decisions by the High Court. LHR argued that the Refugees Act does in fact provide for the granting of refugee status, even under circumstances where the conditions in a refugee's country of origin have improved significantly. LHR argued, in the alternative, that the unlawful delay in deciding the client's asylum application, coupled with the psychological trauma which the client still experiences and which will be exacerbated should he be forced to return to Angola, constitutes special circumstances which make it appropriate for the client to be granted permanent residency in terms of section 31(2)(b) of the Immigration Act No.13 of 2002.

The court overturned the decision of the Refugee Appeal Board and granted him refugee status. **The case confirms that a person can be considered to be a refugee because of past persecution, even if country conditions have changed to the extent where it would be safe for refugees to return.** The case is significant for extending the grounds whereby a person may claim refugee status. **It is also important in that it shows willingness by the judiciary to deal with special circumstances and aspects of refugee status determination that were dismissed by the refugee status determination officers and the Refugee Appeal Board.** In doing so, the judiciary demonstrated a more flexible and humane approach to asylum applications.

## 4. Access to the asylum process and status determination

“It is worse now, compared with my own case in 2002/2003. Back then I had to come early, but I could get in without a problem. Now it is worse. There is no order in the cue. Now newcomers are waiting to only get an appointment to get a permit. Now it is impossible to get an appointment. Even those who have an appointment are not being seen.”

Reverend Albert Nbenga  
Empowerment Centre for Integration (25 May 2007)

Migrants fleeing their countries of origin rarely have the time or resources to legalise their terms of stay in destination countries. In South Africa, this means that asylum seekers often enter the country as undocumented migrants who are vulnerable to arrest by the police for offences under the Immigration Act. The Refugees Act attempts to prevent this outcome by providing asylum seekers with the means to promptly verify their status. This section examines the implementation of these provisions at each stage of an asylum seeker’s exposure to the immigration regulatory processes: beginning with entry, going on to access of permits, and finishing with possible arrest, detention and deportation. **Due to problems within the DHA, poor communication between the DHA and security services, and the overzealous enforcement of the Immigration Act, the refugee reception process often breaks down, resulting in illegal government actions and the transgression of migrants’ rights. These issues also impact upon the human rights of undocumented migrants, and the report gives some attention to their concerns.**

### Entry to the Republic of South Africa

The Immigration Act recognises that the Department of Home Affairs is responsible for controlling the entry and exit of people through the borders. It is mandated to fulfil these obligations in conjunction with other departments and government bodies including the South African Police Service (SAPS) and the South African Defence Force (SANDF). DHA, SAPS and SANDF officials regularly arrest large numbers of migrants at the borderline on suspicion of contravening the country’s immigration laws. These acts often lead to transgressions of the international principle of non-refoulement by returning refugees and asylum seekers to conditions where they may be at risk of persecution or violence.

Section 2 of the 1998 Refugees Act contains a, ‘general prohibition of refusal of entry, expulsion, extradition or return’ to another country if the refugee or asylum seekers would face persecution or conflict. The Regulations state that, ‘any person who entered the Republic [of South Africa] and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a refugee reception office to complete an asylum application.’

The 2006 Report outlined some of the procedures and rights of asylum seekers pertaining to border crossing, but did not provide a detailed assessment of the problems associated with protection on the border. Monitoring conducted by the Forced Migration Studies Programme at Wits University and Lawyers for Human Rights shows that South African border control practices complicate and frustrate asylum seekers’ attempts to make their claims:

- Asylum seekers are subject to exploitation and abuse by government officials;
- Officials are insufficiently trained in refugee laws and procedures to ensure that migrants are given adequate opportunity to indicate their intention to claim asylum;

- *Ad hoc* procedures for removing suspected 'illegal foreigners' from South Africa limit the opportunity for migrants to indicate their intention to claim asylum;
- Punitive measures to deter illegal migration also discourage asylum seekers from reporting to officials to indicate their intended claims.

The South African government has sought to tackle some of these problems by fostering collaboration amongst the various agencies responsible for border controls. For example, the Department of Social Development (DSD), in conjunction with the International Organization for Migration (IOM), recently held a workshop with governmental stakeholders at the Zimbabwean border town of Musina. This provided useful guidance for social workers, police and immigration officials on how to generate a rights regarding border control policy. The workshop also indicated that there are many challenges in this particular border zone:

- There is insufficient awareness of the various categories of migrant rights and/or the appearance and status of asylum seeker and refugee documentation;
- There is insufficient collaboration amongst Departments to ensure that vulnerable migrant groups (unaccompanied minors, the sick, the mentally ill, migrant workers, victims of trafficking) are afforded adequate protection;
- There is a tendency, most prevalent amongst SAPS officers, to regard procedures guaranteeing migrant rights as either too cumbersome, time consuming or irrelevant given the more pressing priority of protecting the borderline.

**There is a need for further collaborative training efforts at the Zimbabwe border and in other border zones to ensure that the rights of migrants are adequately respected.** In particular, the government of South Africa should consider including these types of exchanges in the mandate of the Border Control Operations Coordinating Committee that has thus far focussed its interdepartmental exchanges exclusively around security issues. Furthermore, **attention should be given to training magistrates on immigration issues, since many of them do not realise that the Refugees Act contemplates and permits illegal entry into the country by asylum seekers.**

## **Access to the status determination process**

Once an asylum seeker has crossed the border, they are required to report to one of the country's five refugee reception offices. The Refugee Act (1998) compels the DHA to ensure that adequately trained refugee reception officers staff these offices. These officers are mandated to accept applications, help applicants to complete applications, conduct inquiries to verify information provided and submit received applications to a suitably trained refugee status determination officer (RSDO). It is important that the South African government ensure that applicants for asylum can lodge their claims in an efficient and fair manner in order to ensure that asylum seekers are immune from arrest and deportation and free to work and study while their claims are being adjudicated. The 2006 Report noted that the Department had failed to meet its obligations in a number of ways. These practices were the subject of formal representations and legal challenges by civil society leading to several court orders and a Public Protector's report specifying the DHA's responsibilities to provide access. The DHA also undertook to modify the application procedure to ensure both efficiency and fairness (see Legal and litigation updates). This section gauges what progress has been made in meeting these obligations, as well as reviewing the general performance of the Department in providing access to the asylum system.

Obligation 1: Review the reception offices' operations, develop a uniform, national policy and procedure of access, and report to Parliament on its progress:

- CRMSA welcomes the DHA's progress in drafting a set of Standard Operating Procedures for its Refugee Reception Offices and in appointing a process engineer to review the performance of the RROs;
- The Standard Operating Procedures have yet to be finalised. Staff at the regional offices appear unsure as to whether this document exists and/or their responsibilities to begin implementing it;
- The final draft of the Process Engineer's report is now with the Minister and awaiting her response, but has yet to be publicly released (see Legal and litigation updates section);
- The DHA has not yet reported back to Parliament on its progress.

Obligation 2: Cease using an illegal 'pre-screening' process at the reception offices and cease limiting the number of applicants allowed entry into the offices:

- CRMSA is pleased to report that pre-screening processes have been discontinued at all reception offices;
- Despite abandoning pre-screening, the DHA still limits the number of applications it receives at all offices to a pre-determined number and continues to use appointment slips to delay the application process.

Obligation 3: Cease compelling asylum seekers to return to the same reception office to renew their permits:

- Due primarily to the incompatibility of case and file management systems at the Refugee Reception Offices, asylum seekers continue to be compelled to return to the same office for renewals, limiting their freedom of movement within South Africa and adding to burdens at the primary offices in Gauteng. These offices have proved unable to cope with existing, let alone, additional responsibilities.

Obligation 4: Re-open the Johannesburg reception office and receive asylum seekers at all offices six days per week:

- CRMSA welcomes the fact that all offices reviewed were open six days a week, a factor with the potential to improve access for first time asylum seekers and recognised refugees;
- The Johannesburg Refugee Reception Office closed on 21<sup>st</sup> August 2006 after reaching a mutual agreement with local businesses who claimed that the offices were causing unease amongst their customers;
- The Pretoria office at Marabstad recently began receiving additional applications in *lieu* of the Johannesburg office's responsibilities. While CRMSA welcomes the move to increase overall numbers of applications accepted, this solution is likely to exacerbate queuing and related problems at Marabstad office and does not constitute fulfilment of the requirement to re-open the Johannesburg office.

Obligation 5: Improve the physical location and infrastructure of refugee reception offices to cater for additional staff and the existing numbers of asylum seekers and to ensure asylum seekers are received in a pleasant environment:

- There have been no substantial changes in the location and infrastructure of offices. Basic improvements suggested in previous monitoring reports, such as the use of adequate signage to indicate where to queue and/or submit forms, have not been implemented.

Obligation 6: Deploy queue managers at each office and engage the Ministry of Safety and Security to consider employing the services of South African Police Services (SAPS) in all the refugee reception offices:

- There have been no significant improvements in the management of queues with each office deploying its own queue management system and often selecting entrants arbitrarily;
- **Third parties (agents and interpreters) exert undue influence on queue management, determining who gains access for a fee. These agents often appear to work in collusion with Departmental officials;**
- Asylum seekers continue to suffer beatings, abuse and extortion while waiting in queues;
- Asylum seekers wait for inordinate amounts of time in the queues. People are reported to arrive in the early hours of the morning and often have to take time off work (or surrender jobs) in order to wait in lines.

Obligation 7: Recruit new refugee reception officers and employ suitably qualified and registered South African interpreters:

- The Department has introduced a languages training programme for some refugee status determination officers;
- There has been no significant progress in the recruitment of officers and suitably qualified interpreters;
- Asylum applicants are required to fill forms without adequate information or guidance as to their content.

Obligation 8: Separate admissions services for new applicants from adjudication services.

- There has not been any significant change in the practice of using the same facilities to receive admissions and conduct adjudications.

The 2006 Report also noted that many of the problems in the status determination process stemmed from capacity issues. The Draft Report of the Process Engineer noted a variety of problems with practices at the reception offices, including:

- Inadequate staff levels;
- Poor record-keeping and management practices (particularly statistics);
- Poor take-up of new Information Technology systems;
- Insufficient space to cater for applicants;
- Failure to accord funds to build new offices.

The Report also notes a request made by the Director of Refugee Affairs to the Director General for changes to the reporting lines and for the allocation of additional human resources. At this stage the Department has not implemented any of these recommendations.

## Refugee status determination (RSD)

Once an individual has formally lodged a claim for asylum, the DHA is obliged to promptly make a determination regarding the validity of their claim. The Refugee Act requires that the Department hire and train Refugee Status Determination Officers (RSDOs) to fulfil this purpose. These officers are mandated to process applications, in accordance with the rules on 'just administrative action' outlined in the Constitution, to reach a decision to grant asylum, reject asylum, or refer cases, on points of law, to the Standing Committee for Refugee Affairs. This process, involving receipt of testimony and evidence, use of interpreters, and consultation with the UNHCR is laid out in the Refugees Act and its implementing Regulations. If the claim is rejected as manifestly unfounded—that it bears no merit and may be rejected without further consideration—it must be reviewed by the Standing Committee. All applicants have the right to appeal rejection decisions to the Refugee Appeal Board (RAB).

CRMSA welcomes the formation of a research unit within the Refugee Affairs Directorate that has bolstered the RSDOs' capacity to access information regarding their cases. Nevertheless, the same problems noted in the 2006 Report continue to plague the status determination process.

- Applicants have often not been interviewed with adequate interpreter facilities. **Many of the decisions are taken hastily, using arbitrary, non-legal or *pro forma* reasoning;**
- Third parties appear to be exerting increasing undue influence on the interview process. Asylum seekers have complained of translators on occasions misinterpreting or misrepresenting their stories, or simply taking over the interview. The same agents that help asylum seekers access the offices also appear to play a role in procuring favourable decisions;
- There appears to be an unresolved tension between the offices of the Backlog Project (initiated by the Department to process outstanding claims) and the offices for determining new claims. There was an impression on the part of some DHA officials and some of our partners that an inordinate amount of resources had been devoted to the backlog project to the neglect of the existing offices, particularly as regards working conditions and quantity of human resources.

## Access to documentation

According to law, asylum seekers and refugees should be issued with documentation validating their freedom from movement controls and, in specified cases, their rights to work, study and receive other government services, at each stage of the asylum seeker process. South Africa's refugee legislation envisages a scenario in which asylum seekers proceed through a seamless administrative process that provides adequate documentation validating their right to be in the country at each stage of the application process: s. 23 transit permits to provide time for them to lodge their claims at a reception office, s. 22 permits to account for the time taken to process claims, s. 24 documents to confirm the status of acknowledged refugees; and if necessary a UN Convention Travel Document to leave the country. The 2006 report noted that breakdowns in the access and status determination process, along with a range of other capacity issues at DHA and UNHCR offices, had produced a range of problems pertaining to documentation. Our research suggests that asylum seekers are still experiencing the following:

- Transit permits, intended to protect asylum seekers from arrest in the period prior to lodging a formal claim at a Refugee Reception Office are a) not being utilised by large numbers of asylum seekers who do not cross the border at border posts; b) usually expire before asylum seekers are able to lodge a claim due to long queues and inefficiency at the offices and the temporary closure of the Rosettenville office;

- Asylum seekers continue to be compelled to return to reception offices on multiple occasions, to travel long distances and in some cases to wait overnight to renew their asylum seeker permits or secure their ID documents. **Delays and inefficiency within the DHA's bureaucracy has directly negative effects on refugees and asylum seekers' abilities to earn a livelihood;**
- **The reception offices continue to issue faulty documents to asylum seekers and refugees.** Our partners have sited documents without stamps, signatures or with incorrect numeration. This makes it increasingly difficult for migrants to prove their identity, given that other government agencies and the general public are already ignorant and suspicious of migrants' IDs;
- **The reception offices' document production system remains open to abuse and corruption.** Official stamps have been stolen and IDs scanned by criminal groups working to produce false documents. These matters impact upon public confidence in asylum seeker and refugee papers;
- The DHA's indecision regarding its choice of documentation system has meant that large numbers of applications and files have been rendered void;
- The DHA has failed to communicate changes in its documentation system to its own officials, officials from other departments and the general public, limiting their utility as identifying/validating tools.

## Recommendations

### To the Department of Home Affairs:

- **Immediately re-open a refugee reception office in Johannesburg at a location that is accessible and protects the interests of refugees, asylum seekers, and neighbouring communities;**
- Increase the number of Refugee Status Determination Officers and Refugee Reception Officers at refugee reception offices to prevent a further backlog of asylum applications and to limit the risks people face while seeking asylum;
- Extend current initiatives to provide interpretation services to all areas where officials engage with applicants or refugees. The Department should also assist all asylum seekers who enter the asylum procedure in order to reduce the possibility of abuse and corruption and enable asylum seekers to provide accurate information in their applications;
- Ensure compliance with the Public Protectors report and Court Orders pertaining to the provision of access to the asylum seeker process, particularly regarding a) the writing and implementation of Standard Operating Procedures; and b) design and implementation of queue management systems;
- Design and implement a reform of procedures based upon the 'Process Engineer's Report', particularly as regards a) the establishment of accessible, adequately equipped RROs; and b) the introduction of an integrated database and documentation system;
- Heighten the profile of the Public Education Unit by engaging in public information campaigns, through the use of printed and visual media (including radio adverts) to enable the acceptance of smart cards and asylum seeker permits and to inform asylum seekers about the current backlog project;

- Liaise with other departments and national and provincial level government to a) raise awareness about refugees' rights and the difficulties the Department experiences in documenting asylum seekers and refugees; b) monitor the performance of officials with regard to migrant rights (this is especially important for those based in border areas); c) ensure that officials responsible for enforcement are aware of correct procedures; and d) ensure that the correct procedures for arrest, detention, and deportation as set out in the immigration law are consistently followed by state officials;
- Ensure that its officials are responsible for determining the status of all individuals held in detention for deportation by, in particular, ensuring that immigration officials are permanently located at the SAPS-operated Musina detention centre;
- Increase the resources devoted to the Refugee Services Directorate Research Unit;
- **Continue to monitor and discipline corrupt officials in the RROs and to report instance of corrupt agents and interpreters to SAPS;**
- Reaffirm its commitment to work with NGOs by engaging in a consultative process to identify blockages in the asylum determination procedure.

To the South African Police Service:

- Liaise with the DHA to gain awareness of the difficulties asylum seekers face in accessing and renewing their documentation;
- Continue initiatives to sensitise its members to the rights and obligations of asylum seekers and refugees and to combat xenophobia within the police force. **Where appropriate, discipline officers for ignorance of immigration laws or for behaviour that negatively affects the rights of non-citizens;**
- Work more closely with the Immigration Inspectorate, and preferably only through joint operations, before effecting arrests of asylum seekers and refugees;
- Ensure that asylum seekers and refugees are not detained at the Lindela Repatriation Centre, not even for identity verification purposes.

To the Parliamentary Standing Committee for Home Affairs:

- Follow up on the 2004 report by the Public Protectors Office regarding conditions at the Johannesburg refugee reception office to ensure that problems are remedied and not repeated. This should include a formal report to Parliament on progress made thus far and actions taken to implement the recommendations of the Process Engineer;
- Exercise greater oversight over the DHA and its partners to ensure that processes adhere to legal standards and that the rights of refugees and asylum seekers are respected. This includes taking active steps to avoid detention and deportation of refugees.

## 5. Arrest, detention, and deportation

Section 41 of the Immigration Act (Act no 13 of 2002 as amended) requires people to identify themselves to a police or immigration officer as citizens, permanent residents, or foreigners (non-nationals). If officers have reasonable grounds to believe that someone is not entitled to be in the Republic of South Africa, they may interview a person and remand that individual to custody without a warrant. However, officers are also required to take reasonable steps to assist individuals in verifying their immigration status, after which officers may detain a person under section 34 of the Immigration Act. Immigration officers are also empowered to arrest illegal foreigners and deport them. However, before doing so they must provide written notice of the decision to deport that person under s. 34(1)(a) of the Immigration Act. The Immigration Act also provides certain time limits within which a person may be detained for the purposes of deportation

### Arrest and detention

Our partners continue to encounter a range of problems in the arrest and detention process:

- Holders of refugee and asylum seeker status are held in detention facilities for not being in possession of their documents or for having expired permits;
- **Asylum-seekers are illegally arrested and detained despite being in possession of valid documents;**
- Asylum-seekers are held in detention despite possessing documents to schedule an interview for asylum seeker papers, because police and immigration officials do not recognise this as a valid document;
- **Detainees are not being adequately informed of their rights or permitted to access their files;**
- **Refugees are illegally held at Lindela for deportation for committing criminal offences without the Minister issuing a deportation order on the grounds of national security or public order;**
- Non-nationals are being held at detention centres other than Lindela under the Criminal Procedures Act, despite having not committed any other offence than being illegally in the country;
- **Non-nationals are being deported from the detention facility in Musina without having their status determined by an immigration official;**
- The physical conditions at Lindela remain unsatisfactory, particularly as regards provision of appropriate food for minority groups, access to medical services, sanitation/hygiene, access to visitors, access to phones, exercise, and grievance procedures for inmates;
- Detainees at Lindela have been subject to violent abuse. On two occasions BOSASA employees used tear gas against detainees in locked rooms in order to force them into compliance.

CRMSA legal service providers monitor arrest and deportation practices, primarily through their dealings with individual clients. In many cases where our members have encountered persons who have been unlawfully arrested and/or detained, they have been able to secure release relatively quickly by contacting the relevant police and immigration officials. However, CRMSA remains concerned about the large numbers of other non-nationals that are unable to access our members' legal services.

In addition to these issues, CRMSA notes as a matter of concern that its partners do not have sufficient access to detention facilities to adequately monitor the rights of non-nationals in detention. This problem is exacerbated by the fact that non-nationals are increasingly being held at a variety of prisons that have not been specifically built to cater to people being detained for immigration offences (Pollsmoor (WC), Westville (KZN) and Musina (LP)). CRMSA is particularly concerned that the last of these facilities has been established by the South African Police Services without direct oversight or monitoring from the DHA.

## Deportation

An immigration officer may arrest a foreigner who is in the country illegally. Police or other law enforcement agents may arrest non-citizens if they have committed a crime. However, before the arrested foreigner is deported, the officer is obliged to provide written notice of the decision to deport that person (s. 34(1)(a) of the Immigration Act). Moreover, foreigners who feel their detention is without cause may request any officer to confirm their detention by a warrant of court (s. 34(1)(b) Immigration Act). If that person is not issued a warrant within 48 hours of such a request, the officer must immediately release the detained person. These rights must be explained to the detainee upon arrest (s. 34(1)(c) Immigration Act). The Immigration Act also provides certain time limits within which a person may be detained for the purposes of deportation. Specifically, a person may not be held for more than 30 days without a warrant (s 34(1)(d) Immigration Act). Upon request, a magistrate's court may extend the period of detention, but may not extend the period for more than 90 days. Despite clearly defined procedural guarantees, **non-nationals who are detained on immigration and other offences are frequently denied procedural rights before deportation.**

CRMSA is also concerned that **many potential asylum seekers and refugees are arrested and deported because, despite frequent visits to refugee reception offices, they are unable to obtain Section 22 permits as a result of excessive queues and insufficient staff capacity to service applications.** Until they are able to access refugee offices to obtain their permits, these asylum seekers have no legal status under the Immigration Act and are subject to arrest and detention. Once these individuals are arrested, they face deportation, often without any procedural protections. As a result, the inability to obtain an asylum seeker permit may subject *bona fide* refugees who are fleeing persecution to *refoulement*. In cases where partner organizations are unable to identify these individuals and secure their release, **legitimate refugees and asylum seekers who are deported will be returned to their home country where they may face continued persecution, torture, or even death**

Advocacy groups have previously brought legal cases challenging the lawfulness of the deportation process and the general failure to follow these procedures. Lawyers for Human Rights continues to do so to this day. CRMSA members have initiated court actions to address the barriers to access that prevent new applicants from obtaining Section 22 permits, forcing asylum seekers to live under the threat of arrest and deportation and the fear of being returned to their persecutors. **In 2006, the Cape Town High Court found that “the manner in which the [Home Affairs] Department discharges its duties and obligations to refugees not only deleteriously affects the freedom and dignity of a substantial number of disadvantaged human beings but also fails to adhere to the values embodied in the constitution.”**<sup>4</sup> Despite court orders to improve access and the appointment of a process engineer to review the process, severe barriers to access continue.

Deportation statistics suggest the gravity of the problem. In 2005, 70,625 individuals were admitted to detention. Of those, 66,724 were deported. In 2006, 55,236 were admitted and 53,732 were deported. As of April 2007, Home Affairs reported admitting 18,592 detainees and deporting 13,331. Although no statistics are available, interviews with detainees indicate that many of them were arrested not because of their own wrongdoing, but after repeated unsuccessful attempts to access a refugee office to obtain legal

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<sup>4</sup> *De Gaulle Kiliko and Seven Others vs. The Minister of Home Affairs and Two Others*, Case No. 2730/05, High Court of South Africa, Cape of Good Hope Provincial Division, Judgment, 16 January 2006, Paras. 31, 40.

documentation. **The continued arrest and deportation of refugees and asylum seekers is a violation of domestic and international law and undermines South Africa's moral authority and reputation.**

Given the grave risks from refoulement, the continued barriers to access, and the failure to implement the procedural guarantees that govern deportation, Home Affairs should adopt alternate mechanisms to protect refugees from being returned to the countries they fled—where they face continued persecution and possible death—without a chance to establish their refugee status.

## **Recommendations**

### To the Department of Home Affairs:

- Investigate cases of abuse at the Lindela detention centre and ensure that the practice of using teargas to ensure compliance is immediately ceased;
- Review procedures for detaining and deporting non-nationals for criminal offences;
- Institute procedures to identify detainees at detention centres who wish to launch asylum claims, and provide a mechanism for these detainees to launch these claims without facing the risk of deportation;
- Implement the procedural protections governing deportation as laid out in the Immigration Act;

### To the South African Police Service:

- **Immediately stop the illegal and irregular deportation of people in the Musina area;**
- Ensure that asylum seekers and refugees are not detained at the Lindela Repatriation Centre, not even for identity verification purposes.

### To the Bosasa Group of Companies:

- Institute procedures at detention centres to identify detainees who wish to launch asylum claims, and provide a mechanism for these detainees to launch these claims without facing the risk of deportation.

## 6. Access to government-funded social services

South Africa's Bill of Rights entitles all people living in South Africa to a range of social services regardless of their nationality or legal status. These include access to basic education for children and emergency healthcare for all. Refugees, asylum seekers, those on work permits, or permanent residents are entitled to these and additional services including basic primary health care, adequate housing, the right to work and study, and certain forms of public assistance in the form of social grants or other relevant services. Since our last report, **there has been little progress in ensuring that refugees, asylum seekers, and other migrants are able to access these rights. The provision of basic social and economic rights is critical to non-nationals living healthy lives of dignity that allow them to contribute to the communities in which they live.**

In order to promote access to these basic social and economic rights, the main Departments responsible for social service provision—including the Departments of Education, Health, Social Welfare, Housing and Employment—should have clear policies for the inclusion of refugees, asylum seekers and, where applicable, undocumented migrants, in their services. They should also ensure that all their front-line staff are aware of the rights of asylum seekers, refugees and undocumented migrants to access services. As the lead department entrusted with the well being of asylum seekers and refugees, the Department of Home Affairs should facilitate the integration of asylum seekers and refugees into these services.

Although CRMSA does not believe there has been adequate progress in promoting these rights, there have been some positive policy developments in the past year to increase access of non-citizens to basic social services. These include:

- The Department of Health's National Comprehensive HIV/AIDS Plan (2007 to 2011) specifically includes refugees throughout;
- As a result of advocacy efforts by legal NGOs, the Department of Social Development is developing a plan to provide social assistance in the form of disability grants to recognised refugees.

While these are positive achievements, other legal rights and pro-migrant policies are not adequately respected. We are particularly concerned with the following findings:

- The Department of Home Affairs has no mechanism in place for regular and ongoing coordination amongst key government departments to facilitate asylum seekers and refugees' access to state-funded social services;
- Although NGOs and the United Nations High Commissioner for Refugees (UNHCR) have long been working with specific departments to raise awareness of refugee and asylum seeker rights to services, **there is little evidence of consistent, systematic improvement in access to basic health care services and basic education for asylum seekers and refugees, rights they are guaranteed under South African legislation.** In practice, access remains largely dependent on the knowledge and attitudes of individual front-line staff in clinics, hospitals and schools;
- Asylum seekers and refugees remain almost fully excluded from any government-funded housing programmes for vulnerable groups.

While each service area is important, it is essential to understand how denial of access to one service can negatively affect the exercise of other rights. This is most evident where the Department of Home Affairs failures to provide documentation to refugees and asylum seekers can limit their access to basic services in health, education, social welfare, housing and employment. Moreover, **there is no coordinated or coherent programme for improving service access for non-citizens.** The development of such programmes is hindered by the Department of Home Affairs unwillingness to proactively develop regular working relationships with other departments to encourage and monitor effective service delivery to refugees and asylum seekers. Interactions between departments are generally limited to *ad hoc*

consultations on specific proposed legislation or projects, even though DHA's turn-around strategy commits it to establishing standing stakeholder fora to ensure the integration of refugees into society and to combat xenophobia. There is a similar lack of effort among the Departments of Education, Health, Housing, Social Development and Labour to monitor service provision to non-citizens. And none of these departments have effective training programmes for their own front-line staff on migrant rights.

## **Primary health care: key challenges**

The South African Constitution guarantees 'access to health care for all.' Depending on one's immigration status, there may be limits on the kinds of care to which people are entitled. That said, **everyone in the country regardless of legal status is entitled to life-saving care.** Under the Refugees Act (1998), legally recognised refugees are entitled to much more than this, as are other non-citizens who are in the country with other permits. Our 2006 report highlighted two key challenges that, in 2007, are still problematic: **Refugees and asylum seekers' continue to have negative interactions with, experiences of, and treatment by public health care providers;** and ambiguity on refugees' and, in particular, asylum seekers' rights to access health care in general and anti-retroviral treatment (ART) for HIV/AIDS in particular.

There continues to be confusion amongst public health care providers relating to the rights of refugees and asylum seekers to access health care. **Many refugees and asylum seekers report being refused access to treatment at clinics and hospitals.** Often, they face the same understaffing, lack of medication and long waiting times at public health care providers that many South Africans also suffer. But in many instances, international migrants also face discrimination and ignorance of their rights when they attempt to access medical services. Our research revealed that:

- Lack of official documentation from the Department of Home Affairs hinders access to health care;
- Xenophobia, especially within the public health system, results in a denial of rights to services. Frontline staff (clerks and nurses) are the most likely to turn refugees and asylum seekers away; once contact with a doctor has been made treatment is more likely to be given. This is particularly pronounced regarding treatment for routine or chronic conditions;
- Confusion exists amongst health care providers over the rights different categories of migrants have to services and the fees to be paid. For example, refugees are exempt from most fees but current guidelines are ambiguous for asylum seekers;
- Some non-governmental service providers have reported that even with the provision of free services for non-citizens, they struggle to reach refugees and asylum seekers, even if transport is provided or outreach home-based care-givers are placed in the community;
- Some NGOs report that they are required to intervene to ensure that refugees and asylum seekers access the public health system. **Without the intervention from civil society, some refugees and asylum seekers would not be able to access health services.**

## ***HIV/AIDS services***

Attempts by the National Department of Health, UNHCR and the Southern African HIV Clinicians Association have been made to clarify previous ambiguity relating to refugees' rights to access HIV anti-retroviral treatment (ART). CRMSA is pleased to report that the HIV & AIDS and STI Strategic Plan for South Africa, 2007–2011 (Department of Health, 2007a) now specifically includes refugees. Moreover, CRMSA congratulates the Department of Health for its statement clarifying that patients do not need to be in possession of a South African identity book in order to access ART. We also support the development of guidelines for ART provision for migrants and asylum seekers, a result of collaboration between

UNHCR and the Southern African HIV Clinicians Society, to supplement the National Department of Health ART Guidelines.

**Despite improvements in promoting access to HIV services, our research revealed that there are still significant challenges that refugees, asylum seekers, and others encounter when attempting to access ART.** Most of the challenges encountered require the Department of Health to take a lead in ensuring that their staff, and those of complementary departments, are fully aware of the rights of refugees and asylum seekers to access both ART and post-exposure prophylaxis (PEP). Importantly, the Department of Health must initiate awareness campaigns in migrant communities to ensure that they have access to essential public health messages relating to ART, PEP and prevention of mother to child transmission of HIV (PMTCT). The challenges encountered when attempting to access ART include:

- Ongoing ambiguity from the Department of Health relating to the rights of asylum seekers to access ART. UNHCR has engaged with the Department of Health on this issue, but at time of writing is still awaiting a response. This results in confusion from staff at public health care facilities;
- **Access to post-exposure prophylaxis (PEP) is problematic as many refugees and asylum seekers are fearful of approaching the South African Police Service (SAPS) or encounter problems when they do so.** It is not widely known that an individual can first present at a public hospital and that the hospital can then contact the police. Awareness campaigns must be initiated by both the Department of Health and SAPS within refugee and asylum seeker communities to ensure that they are aware of their rights to access PEP, and trainings must be run with health care providers and SAPS on these rights to access PEP, including ongoing experiential trainings on xenophobia;
- Refugees and asylum seekers are dispersed and often difficult to reach through public health initiatives. To be effective, it is essential that a focus on HIV prevention, including specific information delivered in innovative ways, through relevant channels, using appropriate languages, be provided for this population group, many of whom are unaware of HIV. Indeed, many refugee and asylum seeker women have never heard of prevention of mother to child transmission of HIV (PMTCT) and are currently unaware that this service exists. The Department of Health must ensure that all intake interviews for refugee and asylum seeker women in health care facilities should be HIV oriented, and that all women have the opportunity to access PMTCT. The Department of Health is responsible for ensuring that awareness campaigns on these issues are initiated within refugee and asylum seeker communities;
- A key component of ART relates to adherence and adherence support, where needs may be different for migrants than for citizens. Common support structures like a 'treatment buddy' or support groups are reported to be challenges for refugees and other migrants due to the stigma of AIDS within migrant communities and xenophobia within support groups. Innovative ways to address this include making use of a counsellor or other health care provider to act as a 'treatment buddy'. It has also been found that non-citizens prefer support groups that are not located within the community where they are residing;
- It is essential that ART provision for non-citizens be supplemented with prevention, care and support programmes, as they are for South African citizens. The Department of Health must ensure that ART is implemented as part of an integrated programme that is linked to other services, such as nutrition, food security, housing and social welfare. Multi-sectoral programming is a challenge since barriers that refugees and asylum seekers face in accessing public health care are mirrored when attempting to access other social services. It is imperative that the Department of Health takes a lead to ensure that all social service sectors work together, in an integrated fashion, to uphold their legal obligations to providing effective services for refugees and asylum seekers.

## Recommendations

### National Department of Health

- Establish and maintain strong collaborative, multisectoral links to other social service departments, namely housing and social welfare, in order to deliver a holistic public health approach to all;
- Clarify the status of asylum seekers and clarify that they should not be charged 'foreign patient' rates for health care; also clarify the status of asylum seekers so that they are able to access ART: this is urgently required;
- Provide ongoing refresher training for all health care providers relating to the rights of refugees and asylum seekers to access health care, including maternal health and ART. This should include training to combat confusion about paperwork requirements from refugees and asylum seekers;
- Provide ongoing experiential training for all health care professionals– including facility managers– on xenophobia and issues relating to the rights of refugees and asylum seekers: this is urgently required;
- Administrative procedures must be standardised across all public health care providers and referral systems must be strengthened;
- Encourage public health facilities to provide clear leadership that positively reinforces the rights of refugees and asylum seekers to access health care;
- Implement specific HIV prevention, care and treatment activities (including awareness campaigns and the promotion of VCT, ART, PMTCT and PEP) for all non-citizen groups, including refugees and asylum seekers. Failure to provide such activities continues to undermine effective HIV prevention, care, and treatment efforts currently targeted at South African citizens;
- Provide ongoing refresher training for all health care providers involved in ART provision, relating to the rights of refugees and asylum seekers to access ART. This should include training to combat confusion about paperwork requirements from refugees and asylum seekers requiring ART;
- Administrative procedures must be standardised across all public health care providers involved in ART provision and referral;
- Provide training in and use of UNHCR/Southern African HIV Clinicians Society guidelines for the provision of ART to refugees and asylum seekers, in conjunction with National Department of Health ART guidelines;
- Incorporate the UNHCR/Southern African HIV Clinicians Society guidelines into National Department of Health ART guidelines;
- In collaboration with South African Police Services, work to clarify the right for everyone, particularly non-citizens, to PEP, and ensure that this service is available. This should include ongoing experiential training for both police and health care providers;
- Continue and strengthen NGO/CBO support to the Department of Health, particularly relating to the provision of foreign counsellors (often themselves refugees and asylum seekers) who are able to provide necessary language skills that enables refugees and asylum seekers to access

VCT and ART and support in their home language. This also includes the facilitation of non-citizen support groups;

- Continue to allow refugees and migrants to use a counsellor or other health care provider as a treatment buddy in order to qualify for ART.

#### To the South African Human Rights Commission (SAHRC)

- Follow up on the Public Hearings on Access To Health Services that it held in May 2007, ensuring that (1) it acts upon the concerns raised relating to the challenges encountered by migrants, refugees and asylum seekers, in attempting to access public health care services, including ART, and (2) it acts upon the recommendations made that refugee and asylum seeker health professionals should be able to work in the South African public health system, thereby assisting in reducing the current skills shortage.

#### United Nations High Commissioner for Refugees

- Continue lobbying the National Department of Health for clarity on the status of asylum seekers for access to both general health services and ARV treatment;
- Continue working towards the integration of the UNHCR/Southern African HIV Clinicians Society ARV guidelines into the National ARV guidelines.

## **Education**

**The right of all children to basic education, independent of their nationality and legal status, is strongly codified in both international law and South African domestic law.** For example, Section 29 of the Bill of Rights in the South African Constitution<sup>5</sup> sets out that everyone has a right to a basic education. Moreover, the South African Schools Act states that ‘no child may be prevented from going to school because their fees cannot be paid’ (Section 5(3)(a)) and that school admission cannot unfairly discriminate in any way. Section 19 of the South African Schools Act explicitly states that the Act applies equally to learners who are not citizens of South Africa and whose parents hold temporary or permanent residence permits. Education is also critical to building communities out of strangers and promoting a culture of tolerance and mutual respect.

**In spite of these legal rights and ethical imperatives for providing education to all, many children of non-citizens—including refugees, asylum seekers and undocumented migrants—are excluded from education in South Africa today.** CRMSA is pleased to report that schools in many urban areas now generally recognise refugee or asylum seeker permits and do not generally discriminate against foreign children for school programmes such as feeding schemes. There are, however, numerous reports of foreign children being denied access to education. We expect these challenges may be even more acute in rural areas where teachers and school administrators may be less aware of immigrant rights.

To be fair, many of the continued challenges migrants face are because they live in areas where South Africans also struggle to access education. But **while many in South Africa struggle to access education for their children, refugees, asylum seekers, and other migrants face particular challenges due to documentation, fees, language, age and outright discrimination.**

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<sup>5</sup> Act 108 of 1996.

### Problems of access: documentation

- Although refugee and asylum seeker documents seem to be more readily recognised by schools than previously, documentation barriers to accessing education for migrant and undocumented children still exist, especially in rural areas. While all are entitled to education, children without documents are often turned away from schools or parents do not even attempt to approach schools because they do not believe their children have a right to access;
- Recent attempts to force principals to implement school access criteria more strictly have increased the exclusion of non-citizen children. Some principals believe that they will be fined or charged with misconduct for registering children without South African birth certificates, study permits or refugee papers;
- The lack of a birth certificate hinders children from registering for the national matric exam. When in 2006 some NGOs requested a consultation with the Department of Home Affairs concerning alternative documentation arrangements for asylum seeker and refugee children writing the exam, they did not receive a reply.

We are not allowed to take learners without birth certificates since 2000. The policy states clearly that a principal can't admit a learner from Mozambique or Swaziland. If you do that they can charge you with misconduct if they find out, because you are breaking the law.

*Interview with Primary School Principal in Nkomazi District, close to the Mozambican and Swaziland borders, 7 March 2007*

### Problems of access: fee exemptions and poverty-related barriers

According to the law, no child may be excluded from schooling because his or her parents cannot pay school fees. This rule is regularly ignored by schools around the country for citizens and non-citizens alike. Indeed, **the main reason given by refugees and asylum seekers why their children are not in school is their inability to pay fees.**

- Refugee or migrant parents are legally eligible to apply for a fee exemption, with the same conditions as poor South Africans, but they are less likely to request a fee exemption out of a lack of knowledge about the right or the procedure, or due to language difficulties or fear of discrimination;
- Many schools, especially in poor areas, only grant exemptions to South Africans or do not grant exemptions at all because the Department does not reimburse for lost fees. This problem may reduce in future as more schools are declared no-fee schools,<sup>6</sup> although implementation and monitoring the no-fees system has been problematic in some areas;
- Fee exemptions only cover tuition costs, while other costs like transport, uniforms and books are often much greater. Inability to pay these costs, and a lack of mechanisms for financially supporting indigent learners, hinder both migrant and South African children from claiming their right to education.

### Problems of access: language and age

- Many refugee and migrant children are unable to speak in the language of instruction, which reduces their ability to benefit from the content of education. This is also the case for many South Africans who move to areas where their native language is not spoken;
- The Department of Education has given schools the responsibility to provide for the language needs of children but there are rarely resources allocated for teachers or required materials to assist refugee and migrant children with non-South African language needs (such as French or Swahili);

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<sup>6</sup> Department of Education (2003). Plan of Action; Improving Access to Free and Quality Education for All. Pretoria, Department of Education.

- Refugee children are often disadvantaged by the Department of Education's policy of placing children together by age rather than according to their prior educational background;
- Language problems are also a significant barrier for active parental involvement in their children's schooling. This is considered an important area for intervention by NGOs, since schools expect and require parental input, for example through fee exemption applications.

#### Problems of access: discrimination

Once children are in school, their right to a substantive education is compromised if they experience discrimination and abuse in the classroom and by their peer group.

- NGOs report that foreign children are sometimes subjected to xenophobic comments by teachers or discrimination by other students.<sup>7</sup>

#### Pre-school

Pre-school education such as crèche and Grade R are not considered part of the legally mandated 'basic education' and are not subsidised by the state. Nevertheless, facilitating access to this level of education is critical for parents who depend on hawking or informal work and who do not have an extended family structure to provide childcare. NGOs report that young children are sometimes left alone in unsafe accommodation while refugee parents are out working, due to their inability to access pre-school child care facilities.

## **Recommendations**

#### National and Provincial Departments of Education:

- Revise the Schedule relating to the Admission Policy for Ordinary Public Schools to reflect the right of children without South African birth certificates to access education, and remove any penalties against school principals who grant such children their right;
- Ensure that all schools are trained to recognise the various forms of refugee and asylum documentation and grant children access on the basis of these documents;
- Until the policy of 'free schools' has been completely implemented, ensure that non-citizens who are unable to pay for school fees have equal access to school fee exemptions as indigent South Africans, and introduce means of subsidizing the 'hidden costs' of schooling such as transport, uniforms and materials;
- Include explicit mention of non-citizen children's rights in information material produced for schools and parents on admissions and fee-exemption policies;
- Facilitate information materials on school registration procedures, exemptions from school fees and other important issues affecting children's education, in languages such as French and Swahili to assist caregivers of asylum seeker and refugee children who are not conversant in English to play a more involved role in their children's education;
- Enhance capacity building and training of administrative and teaching staff in schools to address issues of xenophobia and the rights of different groups of foreigners to access education.

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<sup>7</sup> Such cases are documented in Wits Education Policy Unit (2004). The Education Rights of Refugees, Asylum Seekers and Migrants in South Africa. Johannesburg, Wits Education Policy Unit. Further cases were given by various NGOs, including Amnesty International and the Refugee Children's Project

## Social assistance

Section 27 of the South African Bill of Rights stipulates that everyone in South Africa has the right to sufficient food, water, and social security. When people are unable to support themselves or their dependents, this includes the right to appropriate social assistance. Since the passage of the Refugees Act, the rights of non-citizens to social security in the form of state welfare grants have slowly but steadily expanded. While there is still a need to extend protections to non-nationals to include child support grants and old age pensions, CRMSA welcomes the current eligibility of permanent residents for all grants and the recent eligibility of refugees for foster care and disability grants. Three recent legal cases have successfully pushed for this right to be codified with respect to permanent residents and refugees.

- In 2004, the Constitutional Court granted permanent residents the same rights to all social grants (including child support grants, disability grants, old age pensions, foster care grants and care dependency grants) as citizens.<sup>8</sup> The implementation of grant registration and payment for permanent residents has generally been smooth;
- Since May 2006, the Department of Social Development has been processing the foster care grant applications of refugee parents who are caring for unaccompanied children.<sup>9</sup> There were several initial technical problems with the ability of the database system to recognise refugee ID numbers, but NGOs working with refugees report that some have now received the grants. Implementation effectiveness will depend on the ability of refugees to access documentation from the Department of Home Affairs and on the streamlining of the foster care grant system in general, which is severely backlogged for South African applications as well. CRMSA welcomes the initiatives taken by the Department of Social Development in Durban where two social workers have been dedicated specifically to assist foreign children;
- In October 2006 the Department of Social Development filed a Social Assistance Plan for Refugees in response to a case by Lawyers for Human Rights in which refugees claimed the right to disability grants.<sup>10</sup> The Plan provides that disabled refugees will receive disability grants to the same value as social grants received by South African citizens and stipulates that the Government make access to disability grants generally available for all disabled refugees by the middle of 2007.<sup>11</sup> The implementation of this commitment will be monitored by CRMSA;
- As of yet, there are no sources of social assistance from the South African government for asylum seekers. CRMSA is concerned at the continued delays in establishing the Department of Social Development's proposed Refugee Relief Fund, a resource that would provide short-term relief to newly arrived asylum seekers as well as recognised refugees. Even when the Refugee Relief Fund is functional, the short-term nature of this assistance is unlikely to address longer-term needs of recognised refugees. As long as the difficulties in accessing asylum documentation from the Department of Home Affairs are not addressed, the most vulnerable new arrivals are those who have not yet been able to confirm their asylum seeker status, and who will therefore not be eligible for assistance from the Fund.

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<sup>8</sup> *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* CCT12/03 ; CCT13/03

<sup>9</sup> *Bishogo, C. and Two Others vs. Minister of Social Development and Four Others*, Case No. 9841/05, High Court of South Africa, Transvaal Provincial Division, Consent Order, September 2005.

<sup>10</sup> *Scalabrini Centre of Cape Town and Five Others vs. The Minister of Social Development, the Minister of Finance, the Minister of Home Affairs and Another*, Case No. 32054/ 2005, Notice of Motion, High Court of South Africa, Transvaal Provincial Division, 19 September 2005.

<sup>11</sup> <http://www.lhr.org.za/projects/litigation/cases.html>

## Recommendations

### National Department of Social Development

- Finalise plans to extend disability grants to recognised refugees and ensure that the documents issued to recognised refugees are lawfully recognised as valid forms of documentation for the purposes of disability grants;
- Accelerate establishment of the Refugee Relief Fund Board to enable asylum seekers and refugees to access emergency relief where necessary.

## Accommodation

Access to safe and secure housing is critical to human life and dignity. **The exclusion of migrants from various national housing policies is a major obstacle to migrants' social and economic integration into the communities in which they live.** While CRMSA does not support a policy of encampment or restrictions on where refugees and other migrant groups can live, there is a need to facilitate migrants' access to both public and private housing. However, this process must be carefully managed to avoid impressions that foreign nationals are 'taking housing away from South Africans.' Those refugees and migrants who do find accommodation must also be provided the same protection against extortion and eviction provided to South African residents.

Mbombo Lutumba, Congolese refugee and mother of nine, was evicted from her one bedroom flat in a derelict downtown Johannesburg apartment building. Since their eviction, the family has been living on the streets.<sup>12</sup>

### National Housing Subsidy Scheme

Under national and provincial policy frameworks, local government is tasked with the implementation of subsidized housing programmes for low-income groups.<sup>13</sup> Last year's CRMSA report found migrants were discriminated against on the basis of the National Housing Code's restriction of subsidies to 'lawful' residents of South Africa, meaning citizens and permanent residents.<sup>14</sup> This exclusion of migrants from the National Housing Programme persists. A number of areas are particularly problematic:

- The National Housing Code excludes migrants on the basis of their 'illegal' presence in South Africa without further elaborating who is determined to be legal or illegal and how this process occurs. It is unclear whether those who have obtained a refugee or asylum seekers permit are in fact entitled to the same housing privileges as citizens or permanent residents of South Africa, although the equivalence for recognised refugees has been established in other fields;
- The fact that migrant categories such as asylum seekers or refugees are not explicitly mentioned in the National Housing Subsidy Scheme means that decisions regarding even documented migrants are made arbitrarily. Interviews with service providers confirm that refugees are unable to access resources provided by the National Housing Subsidy Scheme;
- Refugee identity numbers are often not recognized by government databases, including for applications for housing.

<sup>12</sup> News 24.com. '2010 leads to eviction misery.' 1 May, 2007.

<sup>13</sup> For a detailed description of each of these subsidies, please refer to *Housing Code: User-Friendly Guide* available at <http://www.housing.gov.za>.

<sup>14</sup> Housing Code, Part 3, Chapter 2: 'The Housing Subsidy Scheme– General Rules', Section 2.2: 'Who is Eligible for a Housing Subsidy?', available at <http://www.housing.gov.za/Content/The%20Housing%20Code/Part%203/Part%203%20-%20Chapter%202.htm>.

### National Housing Programme for the Upgrading of Informal Settlements

The National Department of Housing provides grants to municipalities to access land, municipal services, infrastructure, and social amenities to upgrade informal settlements.<sup>15</sup> The Department of Housing's 2004 publication on upgrading informal settlements, still the most recent document at the time of this report, fosters exclusion and social fragmentation by:

- Explicitly excluding 'illegal migrants' from benefits without explaining this category and how it is determined.<sup>16</sup> The report makes no mention of asylum seekers or refugees with legal documentation to be in the country;
- Requiring municipalities to identify and report 'illegal' immigrants to the Department of Home Affairs. Since refugees and asylum seekers are not explicitly identified in the programme, they are then left at risk to be arbitrarily identified as 'illegally' resident.

### Emergency Housing Programme

The Emergency Housing Programme was developed with the intention of expediting the resolution of housing crises in emergency situations such as fire or flood by providing temporary relief to those affected and displaced by disaster. As with the National Programme for Upgrading Informal Settlements, the Emergency Housing Programme actively requires the municipality to identify 'illegal immigrants and non-subsidy qualifying beneficiaries'<sup>17</sup> and to report them to the Home Affairs Department and local police.<sup>18</sup> These methods of surveillance and reporting further compound the discrimination and exclusion migrants face in both public and private housing sectors.

### Subsidised rental in Council properties

Asylum seekers and refugees are limited in their ability to access rental housing that is owned or managed by local councils. Not only is there a shortage of this housing stock given high demand, but the National Housing Code restricts rental to citizens and permanent residents. Interviews with service providers confirmed that refugees and asylum seekers are by and large unable to access subsidized council housing. Migrants must thus rely on privately owned rental housing to secure accommodation. Refugees' ability to access private sector housing is problematic for a number of reasons:

- Refugee service providers report that landlords often take advantage of migrants by extracting higher rents, refusing to maintain property, and failing to return security deposits;
- Interviewees also report rental agencies extracting high commissions and giving migrants different housing than that agreed upon;
- Such abuses are compounded by the fact that migrants often lack information on their housing rights or do not feel comfortable seeking recourse;
- It is also difficult for asylum seekers who must renew their permit every three months to rent property which must be leased for at least one year.

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<sup>15</sup> *National Housing Programme: In Situ Upgrading of Informal Settlements*, instituted in terms of Section 3(4)(g) of the Housing Act, 1997.

<sup>16</sup> National Department of Housing, *National Housing Programme: Upgrading of Informal Settlements*, June 2004 (Version Three), (Pretoria: National Department of Housing, 2004).

<sup>17</sup> National Department of Housing, *National Housing Programme: Housing Assistance in Emergency Circumstances. Policy Prescripts and Implementation Guidelines*. (Pretoria: National Department of Housing, 2004), 38.

<sup>18</sup> *Ibid*, 61.

Evictions and overcrowding are also major issues facing refugees and asylum seekers. Though eviction is a danger faced by many South Africans living in the inner city as well, migrants are especially at risk, as they often have nowhere to go once evicted.

- The high cost of living in South Africa's cities means refugees and asylum seekers must often share a small living space with many other people and even sleep in shifts. This has potentially high costs for both physical and mental well-being and puts them at greater risk of crime and violence;
- Migrants are often unsuccessful in resisting eviction. One service provider interviewed reported cases of migrants' claims against eviction being rejected based on judges' discrimination against foreign accent or phenotype. Other service providers report instances where migrants successfully resisted eviction through the Housing Tribunal.

The exclusion refugees and asylum seekers face from both public and private sector housing means that NGO and church-provided housing, though temporary, is an important site at which refugees and asylum seekers are provided some access to housing. However, such options are inherently temporary, often overcrowded, and almost always under-resourced. There are limited spaces in most cities and virtually none in Durban, apart from a shelter dedicated to abused women. Finally, NGOs report that some shelters set up for the homeless or abused women and children refuse to accept foreigners, independently of whether they have documentation or whether they are refugees or asylum seekers.

## **Recommendations**

### National and Provincial Departments of Housing

- Recognise that the South African government has an obligation to provide housing assistance to asylum seekers and refugees as a specific group of foreigners;
- Acknowledge the human rights perspective, as stated in the Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966), that every person has the right to adequate housing, whether or not they are considered an 'illegal' immigrant;
- Review the National Housing Code for discriminatory phrasing against asylum seekers and refugees, for instance the lack of clarity around who is determined to be an 'illegal' migrant;
- Ensure the explicit inclusion of asylum seekers and refugees as a specific category of foreigners in existing and future housing policies;
- Explore the extension of housing assistance programmes to destitute refugees, following the example of the Department of Social Development in relation to social assistance grants for vulnerable refugees.

### Department of Provincial and Local Government and Local Government Authorities

- Motivate national government for a revision of housing policies that limit the ability of asylum seekers and refugees to access housing and be fully integrated into cities.

## 7. Access to employment

After Somali traders were attacked and driven out of Masiphumelele, an informal settlement outside of Cape Town, the municipality suggested Somalis relocate to Happy Valley, a 'temporary relocation area' set up by the local council where residents of informal settlements wait for permanent housing. Somali businessman, Abdi Mohammed told the *Mail & Guardian* this about his move: 'The council and police came to talk to us about moving, so we drove to Happy Valley to see. When we got out of the car, residents came over and said that if Somalis move there, they will kill us. 'We don't have enough land for ourselves and you're going to take our business away,' they said.'<sup>19</sup>

Asylum seekers and refugees are legally allowed to work in South Africa. Labour legislation and minimum labour standards are generally applicable to all workers in the country, including non-nationals, as long as they are working legally. However, there are many practical barriers for refugees and asylum seekers searching for employment. While South Africa faces an extreme skills shortage in employment sectors such as health care, education, engineering, and IT,<sup>20</sup> and there are national programmes to recruit skilled people from abroad (for example doctors from Tunisia), refugees and asylum seekers who are already in the country and possess the needed skills face almost insurmountable obstacles to contributing them to their host communities.

Neither the Departments of Labour nor Trade and Industry have significant public programmes to integrate refugees and asylum seekers into the labour market. This is not surprising, since unemployment and job-creation are highly politicised topics in South Africa and the media and some public figures regularly blame foreigners (without distinguishing between refugees, asylum seekers and other foreigners) for 'taking jobs' from South Africans. Because of public perceptions about job competition, it is also difficult for UNHCR or NGOs to mount large-scale advocacy campaigns on this issue. CRMSA, however, emphasises that research has shown that foreign migrants in inner-city Johannesburg create more jobs, on average, than South Africans do and are more likely to hire South Africans.<sup>21</sup> This suggests a level of entrepreneurship that could and should be encouraged for the benefit of the South African economy and job creation, rather than being relegated to the informal sector because of documentation constraints and discrimination.

Access to employment for professional refugees and asylum seekers is limited by the following:

- Failures within the DHA mean that many asylum seekers, refugees, and other migrants lack the documentation needed to secure employment and services such as health and education;
- Many employers do not recognize the Section 22 or Section 24 permits or the maroon refugee IDs;
- Affirmative action policies which are interpreted to only include 'previous disadvantaged' South African citizens;
- Xenophobic attitudes by potential employers or fear that hiring foreigners will attract unwanted attention from the Departments of Labour and Home Affairs;

<sup>19</sup> Pearlie Joubert, 'Unhappy Valley.' *Mail and Guardian Online*. 16 March 2007. Available at: [http://www.mg.co.za/articlePage.aspx?area=/insight/insight\\_national/&articleid=302165#](http://www.mg.co.za/articlePage.aspx?area=/insight/insight_national/&articleid=302165#).

<sup>20</sup> Manuel, T. (2006). 'Speech delivered by the Minister of Finance, Mr. Trevor A Manuel, MP, at the Institute of Personnel Management.' Retrieved 29 May 2006, from <http://www.info.gov.za/speeches/2006/06101114151003.htm>.

<sup>21</sup> FMSP (2003). Human Displacement, Survival and the Politics of Space: Joburg Study Final Results, Forced Migration Studies Programme, University of the Witwatersrand.

- Difficulties in certifying foreign qualifications. In many instances, refugees and asylum seekers do not have the documents with them. In others they simply cannot afford to have them converted. In addition, employers may be reluctant to recognise qualifications from foreign African universities or training institutes.

Because of the difficulty of securing formal employment, asylum seekers and refugees have joined poor South Africans in finding work within the informal sector. While this sector is an important source of employment, citizens and non-citizens working within it are at additional risk of exploitation by employers and of running afoul of by-laws.

CRMSA research reveals that **foreigners are often disadvantaged by most programmes intended to improve conditions in informal sector businesses, particularly the security industry, street trading, hospitality, and farm work.** While CRMSA welcomes the introduction and enforcement of minimum standards, doing so often has negative consequences for non-citizens working in these sectors, including those working legally. By raising entry costs to the sector, immigrant entrepreneurs may be unable to compete. Moreover, as soon as these sectors become more formalised, they require formal identity documentation, work permits or permits particular to the industry, which are difficult for refugees and asylum seekers to access.

We are particularly concerned with developments in the security industry and in efforts to regulate street trading. As noted earlier, the security industry remains explicitly discriminatory in requiring that all security personnel, including informal car guards, register with the Private Security Industry Regulatory Authority (PSIRA). The fact that only citizens or permanent residents can register has severely impacted on refugee and asylum seeker livelihoods. Lawyers for Human Rights has been challenging the explicit exclusion of non-citizens, specifically refugees, from the security industry in court since 2003, but the case is still pending.<sup>22</sup>

Approximately one quarter of asylum seekers and refugees in South Africa earn their livelihoods through informal street trading.<sup>23</sup> Several municipalities discriminate against refugees and asylum seekers in allocating trading permits:

- Trading legally in designated areas requires a trader's permit, which in turn requires valid identity documentation such as a Section 22 or 24 permit or a refugee ID;
- Johannesburg and Cape Town accept asylum seeker and refugee papers for both restricted and unrestricted trading areas, while Pretoria only accepts Section 24 permits and refugee IDs for the central restricted trading areas, and Durban does not accept asylum seeker documents at all, although it does accept the refugee ID.

### **Migrants and refugees in the agricultural sector**

Farm work has traditionally employed many migrants, especially in Limpopo and Mpumalanga Provinces. Given the increase of potential asylum seekers from Zimbabwe—many of whom cannot afford travel to a Refugee Reception Office—the sector remains important for those seeking protection in South Africa. In 2002, the Department of Labour introduced a Sectoral Determination for Farm Workers, setting out a minimum wage and minimum working conditions. This was updated in 2006.<sup>24</sup> Simultaneously, the Departments of Labour and Home Affairs have been tightening and consolidating requirements that

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<sup>22</sup> *Shabani Midemis Rutimba and Others vs. Director: Private Security Industry Regulatory Authority and Others*, Applicants' Replying Affidavit, Case. No.35986/03, High Court of South Africa, Transvaal Provincial Division, 22 June 2005.

<sup>23</sup> MF Belvedere, Z. Kimmie and E. Mogodi, *National Refugee Baseline Survey*, 51.

<sup>24</sup> Sectoral Determination 13: Farm Worker Sector, South Africa, February 17, 2006, Government Notice No. R. 149, <http://www.labour.gov.za/download/6331/Sectoral%20Determination%2013%20-%20Farm%20Workers.pdf>

farmers only employ documented migrants or register them through a corporate permit.<sup>25</sup> In response to these changes:

- Large-scale farmers have either shifted to hiring exclusively South African workers, or have formalised and documented all their foreign workers (to the benefit of all workers). This has pushed migrant workers without documents, including potential asylum seekers, into more marginal and exploitative positions.<sup>26</sup>

### **Refugee and asylum seeker health care workers**

South Africa's public health care system continues to struggle to meet demand. A key factor is the massive skills shortage: insufficient numbers of trained health care workers— both nurses and doctors— work within the country's public health system. Many refugees and asylum seekers present in South Africa are trained nurses and doctors, yet they face great difficulties in contributing their skills to the South African health system. Increased numbers of qualified nurses practicing within the public health system would be of benefit to both citizens and non-citizens.

- Refugee nurses currently struggle to register with the Nursing Council as most are unable to fulfil registration requirements that require documentary proof of professional qualifications and certificates of good standing from the professional nursing bodies in their home countries. Refugee nurses often arrive in South Africa without such documentation due to their sudden flight;
- Refugees are prevented from contacting governmental authorities of their countries of origin; doing so may lead to the withdrawal of their refugee status. Refugees are unwilling to contact consulates or embassies within South Africa since they perceive this as placing themselves and their families at greater risk of persecution. Therefore, refugees are often unable to access educational and professional certificates, precluding them from registering with the South African Nursing Council.

Lawyers for Human Rights (LHR), in collaboration with UNHCR, made a written submission on the Nursing Bill to the National Department of Health in October 2005, requesting that a transitional qualification programme for refugee nurses take the place of previous qualifications certificates. To date, no changes to the Bill have been made.

### **Migrants in the education sector**

South Africa suffers from a severe shortage of skilled teachers, especially in maths and sciences. While it will take years to train South African citizens to fill those posts, there are already many refugees and migrants in the country who are qualified and experienced teachers. However, there are not yet any programmes to actively recruit them into teaching. That said, the possibility of employing foreign teachers has been discussed several times— such as in the Department of Education's 2006 National Policy Framework for Teacher Education and Development in South Africa<sup>27</sup> or at a meeting of the Council of Education Ministers on 26 February 2007— but without concrete decisions or mechanisms for doing so and without specific mention of foreign teachers already in the country as refugees or asylum seekers. Although there have been reports that from April 2007, qualified Zimbabwean teachers have been allowed to work in South African public and private schools using their asylum seeker permits, this could not be verified in writing from the Department of Education in time for this report.

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<sup>25</sup> Human Rights Watch (2006). *Unprotected Migrants: Zimbabweans in South Africa's Limpopo Province*. Johannesburg. 18.

<sup>26</sup> *ibid*

<sup>27</sup> Department of Education (2006). *National Policy Framework for Teacher Education and Development in South Africa; 'More teachers; Better teachers'*. Pretoria. p. 11-12

## **Recommendations**

### Department of Labour

- Work with the Department of Home Affairs, South African Qualifications Authority (SAQA) and other certification bodies (such as the Nursing Council) to develop a consistent approach to recruiting skilled refugees and asylum seekers into employment sectors identified as needing scarce skills. Qualified persons already in the country should be recruited before expensive recruitment campaigns are held to bring in people from other countries;
- Work with SAQA to reduce or waive fees for certification of qualifications for recognised refugees;
- Work with the Commission for Conciliation, Mediation and Arbitration (CCMA) and other bodies to ensure that refugees, asylum seekers and other minors have access to mechanisms to protect their employment rights;
- Consider the position of non-citizens working in the employment sectors where Sectoral Determinations are introduced. This does not mean special consideration for non-citizens beyond the normal conditions for legal employment, but it should include awareness-raising with employers that asylum seekers, refugees and persons on corporate permits have the right to be employed on the same minimum standards as citizens under the Sectoral Determinations.

### Department of Provincial and Local Government and Local Government Authorities

- Review street trading registration policies to enable both asylum seekers and refugees to register without disadvantaging asylum seekers on the basis of the short duration of their permits.

### Department of Education

- Put in place measures to establish the number of qualified teachers among refugees, asylum seekers and other migrants currently in South Africa, and facilitate their fast-track employment, before actively recruiting teachers from outside the country.

### United Nations High Commissioner for Refugees

- To continue, with LHR, to lobby the National Department of Health and the South African Nursing Council to enable qualified refugees and asylum seekers to register as nurses to work within the South African public health system.

## 8. Violence against foreign nationals

“Somalis are easy prey. They don’t have access to the law.”

Siyad Hajir, a former Motherwell shop owner  
February 2007

“Ask your president and your government: please provide help for me ...  
Please provide help for foreigners.”

Former trader in Schweizer-Reneke  
June 2007

The fear of crime and violence haunts all South African residents. Massive economic inequalities, under-capacitated legal services, and ineffective policing strategies mean that many of the country’s residents become victims of violent crime. While crime against the wealthy has received considerable attention in the media, those who live in impoverished communities and cannot afford private security services often face even greater hazards. CRMSA hopes for improved safety of all the Republic’s residents, but is particularly concerned about **increases in the number and severity of violent crimes aimed specifically at non-citizens living in South African communities**. Among many others, these incidents include:

- August 2005: Zimbabwean and Somali refugees were beaten in Bothaville, in the Free State. The attacks on foreigners occurred after a community protest against the local municipality, and were accompanied with looting of the foreigners’ belongings;
- December 2005: Violence in Olievenhoutbosch, a community near Centurion in Gauteng Province, included groups of South Africans chasing foreign Africans living in the Choba informal settlement in the township from their shacks, shops and businesses. Several people were killed in the burning and looting. The exact numbers killed, wounded, and dispossessed vary according to different sources, as do the underlying factors to which the violence was attributed. As in other similar incidents, the motivations for violence are varied and the responses to it have been inadequate. At the time of writing, almost nothing had been done to restore the property and security of those directly affected;
- July 2006: Somali shop owners in a township outside Knysna were chased out of the area and at least 30 spaza shops were damaged. Tensions started when an 18-year-old South African alleged robber was shot by a Somali shopkeeper. After police arrested four robbery suspects and a shop owner, the community members went to all the Somali-owned spaza shops in the area and destroyed them;
- August 2006: Attacks against Somalis in the Cape Flats. During a period of just over a month, somewhere between 20 and 30 people were killed in townships surrounding Cape Town. In some instances, shops were robbed and looted. In others, people were assassinated in their shops before the killers fled empty handed. At least one Somali woman was shot, execution style, at a taxi rank. The Provincial Government of the Western Cape has officially welcomed the Somali community back to the townships from which they fled. However, many Somalis fear for their safety if they return and few have done so;

- February 2007: In Motherwell, a township close to Port Elizabeth in the Eastern Cape, violence triggered by the accidental shooting of a young South African man resulted in the looting of over one-hundred Somali-owned shops in a 24 hour period. A day later, more than four hundred Somalis had left the township in fear, most without any of their belongings. Although the original intention may have been otherwise, the incidents amounted to a form of ethnic cleansing even more severe and systematic than the widespread anti-Somali violence seen in the Western Cape and elsewhere in South Africa;
- May 2007: Similar attacks against foreign-owned businesses recently occurred in Ipelegeng, a township near the Northwest Province town of Schwiezer-Reneke. Mobs of youths destroyed and looted shops and Bangladeshi, Pakistani, Somali, and Ethiopian shop-owners were forced to flee. Although the police warned the non-nationals of imminent attacks, they did not offer protection for goods, premises or persons. Local government officials planned meetings to hear grievances but have yet to follow through. The mobs' precise motivations remain unclear.
- In other incidents, frustrations with poor service delivery or prevailing economic conditions have resulted in South Africans violently targeting foreigners.

In many of the incidents described above, police officers have either been directly involved or stood by while the violence continued. **In some instances, local officials and councillors have been implicated in fomenting anti-foreigner violence.** These incidents also reveal how local institutions frequently fail to channel citizens' and business owners' frustrations arising from foreigners' presence and business activities within the townships. **Rather than serving as instruments of ongoing mediation and conflict resolution between nationals and the foreign-born, the South African Police Services, the Community Policing Forums, local municipal governments and councillors often do nothing, lack the tools to do so, or actively contribute towards the violence.** The effective exclusion of foreigners from local chambers of commerce and the denial of access to legal representation also make foreigners easy prey. Broader underlying problems of documentation and rights awareness—concerns linked to the Department of Home Affairs and other national bodies—only exaggerate these problems. **Similarly, the failure of the Human Rights Commission and other official bodies (including the Public Protector) to intervene actively to protect the rights and property of foreigners has not generated an environment that promotes the integration and contributions of refugees into South African communities.**

## **Recommendations:**

### Local and Provincial Government

- While citizenship and asylum laws must remain national, there is a heightened need for subnational actors to take an active role in addressing issues of national, ethnic, and class diversity within their communities. South Africa need not open its borders to all who wish to come, but it will benefit economically by developing pragmatic, affordable and enforceable responses to those who find their way into the country and into its cities and communities.

### Department of Housing

- Job creation will ease tensions among South Africans and foreigners, but so too will greater transparency in allocating state resources including housing.

### South African Police Service

- The police must work to protect the property and security of all community residents, regardless of nationality. To do this effectively, the police must train all officers on the rights of those foreigners living in their communities. Where there is evidence of discrimination or bias, these incidents should be investigated and the relevant officers punished.

### Department of Justice

- There is a need to improve non-citizens' access to legal services. This includes strengthening the Legal Aid Board and Justice Centres' ability and willingness to assist and protect migrants.

### Chambers of Commerce

- Chambers of Commerce and other business organisations must promote entry into trading markets rather than close this avenue to those who have few other options. They must also encourage the participation of foreigners in community forums so as to promote trust and collective conflict resolution.

## 9. Unaccompanied minors (UAMS)

There is growing evidence that children from neighbouring countries are coming to South Africa without the benefits of parents or other guardians. Some arrive seeking asylum while many more come with the hope of earning enough money to help themselves and their families at home. **In almost all cases, unaccompanied minors coming to South Africa face the risk of exploitation and receive almost no protection from government.** This despite a 2004 Pretoria High Court finding that the protections for children found in the constitution and the Child Care Act should equally apply to foreign children. This means that if a foreign child is found in need of care they must be provided with a place of safety, their circumstances investigated by a social workers and an inquiry opened in the children's court

Despite these obligations, research for this report revealed some serious problems that endanger the lives, welfare, and rights of minors travelling into South Africa without adult guidance or protection. Our findings include:

- In 2006, the DHA reported that 2.2% of asylum applicants were children but does not record the numbers of unaccompanied children nor do they indicate whether children were the main applicants in any of these cases. Evidence gathered from interviews with authorities and service providers working near Musina suggests that those who are most vulnerable may find it the most difficult to reach the urban centres where refugee reception offices are based. Indeed, **few children have enough money to reach the urban centres in order to apply for asylum leaving them without documentation and vulnerable to arrest and deportation;**
- **Minors seeking asylum who are not accompanied by parents or guardians are being turned away from the reception offices.** Where Home Affairs officials should try to provide assistance to unaccompanied children, they are re-directed to legal advice offices or to social workers at the Department of Social Development (DSD). DSD social workers are still unable to provide services to these children that will enable them to access the asylum process;
- **Social workers continue to be unwilling to deal with cases of foreign UAMS especially in assisting them to receive documentation.** This is especially difficult in cases where the child is close to 18 years old. Social workers are reluctant to open enquiries where there is a risk that the child will turn 18 before the proceedings are finalised, as DSD will no longer have any mandate to assist the person.
- **Unaccompanied minors on the border of Zimbabwe are frequently deported by police in spite of the fact that the police have no authority to carry out deportations. Children are detained with adults while in police custody;**
- UAMS seldom attend school but cross the border and return home on a regular basis in order to work in South Africa. Because of their illegal status this work is often exploitative and involves:
  - Being paid with food or not being paid at all;
  - Being employed in very strenuous work (particularly in the construction industry);
  - Being employed before they have reached the legal age for employment (15 years) in terms of the Basic Conditions of Employment Act.

In addition, unaccompanied children who are in the urban centres continue to face the abuses documented in the 2006 report. In particular:

- The children's Bill contains no explicit provision for unaccompanied foreign children;
- Social workers do not always initiate Children's Court proceedings as required by law;
- Unaccompanied children are seldom provided with emergency accommodation.

## **Recommendations**

### Department of Social Development

- Issue a policy circular to direct their social workers to provide assistance to foreign UAMS;
- Enhance awareness raising activities with social workers to ensure the protection of unaccompanied asylum seeker and refugee children.

### Department of Social Development and the Department of Home Affairs

- Devise a system of how to assist unaccompanied minors by liaising with each other when confronted with a case. Minors should be sent with a referral note from DHA to DSD requesting the opening of Children's Court proceedings in order to assess how the child should be assisted;
- The department of Home Affairs, The Department of Social Development, and representatives from civil society organization should conduct regular spot checks of conditions of detention in border areas to identify abuses of the rights of children.

### Department of Home Affairs

- Keep proper records on unaccompanied minors seeking asylum. Access to the asylum system should be facilitated for children crossing borders alone and without the funds to reach urban centres.

### Department of Labour

- Ensure that children who are working are protected against undue exploitation.

### South African Police Service

- Immediately stop the illegal removal of children from South African territory.

## 10. Women and gender-based persecution

The United Nations High Commission for Refugees (UNHCR) reports that approximately 50% of refugees worldwide are women. Although not all women are victims of gender-based persecution or violence, many are. Almost all face particularly vulnerabilities in their home countries, as they travel to South Africa, and as they seek protection in the Republic. Research for this report revealed a number of important findings that suggest important areas for further action and research:

- **While women globally represent close to 50% of the adult refugee population, in 2006 the Department of Home Affairs report that only 20.2% of asylum seekers in South Africa were women.** Although it is not clear whether these women reported as principle applicants or dependents, it is clear that far more men apply for and receive asylum than women;
- Research from other parts of the world that have an urban based asylum system indicate that this may well reflect the assumptions of refugee reception officers who assume that it is primarily men who are engaged in politics and are likely to be persecuted. However, women may also find it difficult to reach another country as they may have fewer funds than men and may have to travel with children, making long distance travel very difficult;
- No information is available from the Department of Home Affairs about the basis of women's claims. **The Refugees Act states that persecution on the grounds of gender qualifies one for refugee status. However, discussions with lawyers acting for refugees indicate that this has seldom been used.** Given the level of gender based violence taking place elsewhere on the continent, this finding suggests that either women are receiving protection through other channels or are simply not able to claim the protection to which they are entitled;
- Indications show that that refugee and migrant women are regularly refused medical care when in labour and find it difficult to access ARV treatment needed following rape and to prevent mother to child transmission of HIV.

### Recommendations

#### Department of Home Affairs

- Keep records of the success of the cases of women and children as groups most likely to be disadvantaged in the asylum system;
- Provide training on gender sensitive interviewing for refugee status determination officers.

#### Department of Home Affairs, UNHCR, and Civil Society

- Develop campaigns to inform asylum seekers and potential asylum seekers of their rights to claim protection on the basis of gender -based violence or other forms of gender-based persecution.

## Contact information

For further information on this report or to learn more about the rights of refugees and undocumented migrants in South Africa, please contact the people listed below:

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