BEYOND CONTROL: IMMIGRATION & HUMAN RIGHTS IN A DEMOCRATIC SOUTH AFRICA

EDITED BY JONATHAN CRUSH
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ACKNOWLEDGEMENTS

In June 1997, the Department of Home Affairs published a Draft Green Paper on International Migration calling for two new pieces of legislation to replace the Aliens Control Amendment Act of 1996: a Refugee Protection Act and an Immigration Act. In order to constructively support the process of developing new legislation, the Southern African Migration Project (SAMP) commissioned a series of analytical papers from lawyers and immigration experts to critically examine the act as currently applied. This publication contains edited versions of those commissioned papers.

Ms Raesibe Mojapelo, formerly of Idasa, helped conceptualise this volume, prepared a consolidated version of the amendment act and undertook a review of the act. Her work towards this publication was invaluable. The Law Review Project also provided an analysis and opinion of the act. I wish to thank the contributors for their insightful contributions and patience with the editorial process.

I owe a debt of gratitude to my colleagues in SAMP especially David McDonald, Wilmot James, Vincent Williams, Lutando Myataza, Faranaaz Veriava, Lovemore Zinyama, Luis Covane, John Gay and Thuso Green. Anne Mitchell and Linda van de Vijver provided administrative assistance and Moira Levy and Bronwen Dachs Müller editorial help. I would also like to thank Dr Suzanne Fortier, Dr John Holmes and Dr Bruce Hutchinson of Queen’s University for their support of this project. Personnel and programme officers in the Southern Africa division at the Canadian International Development Agency (CIDA) and the South African High Commission have been extremely helpful.

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PREFACE

Immigration law is an underdeveloped field in South Africa. Few of our law faculties offer serious training in immigration law and not many of our legal practitioners would regard themselves as immigration specialists. Many other democratic societies have a lively jurisprudence in the immigration area, as individuals exercise their constitutional and legal rights to contest the decisions of immigration officials in the courts; and to challenge the decisions of the lower courts in the higher courts. One can number the immigration cases that have been adjudicated by our courts on the fingers of one hand. Given South Africa’s long history of immigration, this may seem somewhat puzzling.

The answers must be sought in our country’s troubled past. Apartheid immigration laws were forged in the crucible of racial exclusion. All immigrants had, by law, to be “assimilable by the white population”. Since whites could emigrate to South Africa virtually at will, there was nothing for them to contest in the courts. Black people were simply precluded from immigrating. Even if they came, and they certainly did, they had no legal standing from which to challenge deportation and other official decisions. And if anyone, black or white, did feel inclined to take the immigration authorities to court, the law prevented them from doing so. Until the removal of the infamous “ouster clause” in 1991, the courts were prevented from exercising any jurisdiction over immigration matters.

With our new Constitution and bill of rights, all of that has been swept away. There are the touchstones for an immigration law embodying the core values of transparency, accountability and basic human rights which we wish to uphold and promote. We are also now signatories to various international conventions and are committed to enshrining these in domestic law. Our government has recently published the draft Green Paper on International Migration, which proposes a fundamental restructuring of our immigration statutes, including a new Refugee Protection Act and a new Immigration Act. Our courts have recently begun to take and adjudicate immigration cases. One can now foresee an active jurisprudence developing in this most controversial and thorny of areas.

In order for this to happen, we need three things. Firstly, we require definite constitutional judgment on a series of issues regarding the rights of non-citizens who are legally and illegally present in the country. Secondly, we need more of our law faculties to teach immigration law, and more of our students to specialise in it. And thirdly, we need to cultivate a broader literacy in jurisprudence and the law among the public. I therefore warmly welcome this particular publication by the
Southern African Migration Project for it will act as a stimulus to concrete and corrective action in all three areas. A few years from now, when we look back on how we changed our inherited immigration system, we could well earmark this volume as an indispensable signpost on the road to transformation.

Dullah Omar
Minister of Justice
INTRODUCTION

IMMIGRATION, HUMAN RIGHTS AND THE CONSTITUTION

JONATHAN CRUSH

Is migration to South Africa out of control? That is the first question raised by the title of this book. It is certainly the questionable argument of those who would like to see a US-style investment of resources in what would be a futile effort to seal South Africa’s 7 000 km-long border. Apartheid immigration policy imagined that sealed borders were not only feasible but desirable. Policy was built on principles of control and deportation, not management and service. The Aliens Control Act of 1991 (still in force) is an omnibus piece of legislation purporting to control all facets of immigration and migration to South Africa.
The title of the book is thus meant to highlight the urgent need to move beyond the paradigm of control towards a new rights-regarding management of immigration.

The Aliens Control Act was passed in the dying years of apartheid and has been variously described as a “draconian apartheid throwback” and “apartheid’s last act”. The vast majority of the act’s provisions were not new in 1991, deriving rather from pre-existing legislation, which was consolidated in the new act. Even the name was unoriginal. For a beleaguered white government, ostracised and condemned by the rest of the world, every outsider, every “alien”, was an actual or potential threat. Immigration was about control and deportation, not planning and managed entry. The apartheid government had never had an immigration plan – unless an uncritical obsession with allowing anyone with a white skin into the country and keeping out anyone with a dark skin can be called a “plan”.

The first chapter in this collection describes the history and development of South African immigration legislation. The roots of the Aliens Control Act are deeply racist and anti-Semitic. The 1913 Immigration Act and the 1937 Aliens Act are the foundational legislation. Neither was enacted by a representative government. Both were passed in a climate of racial and religious paranoia. Both emphasised control and exclusion rather than managed entry and incorporation. Both gave wide-ranging discretionary powers to the minister and his bureaucracy. Both shunned transparency, administrative justice and accountability. Both contained exemption clauses which allowed politically powerful employers (such as the mines and white farmers) to devise their own “immigration policy” in league with state officials and neighbouring colonial governments. Neither would withstand a modern-day test of constitutionality.

Some have argued that the patently unconstitutional aspects of the 1991 act were purged in a review process which began in 1994, culminating in the Aliens Control Amendment Act of 1995. Certainly there was some positive tinkering at the margins, but the primary purpose of the amendments was to “ensure more effective control over the admission to, sojourn in and departure from the Republic of aliens”. The amendment act was not preceded by the usual process of comprehensive policy review (the green and white paper process), public consultations and the enactment of legislation consistent with the vision laid out in a white paper. The Parliamentary Portfolio Committee on Home Affairs did attempt to co-ordinate public input on the amendment act but there was no time to do this in a systematic and comprehensive manner.
The Green Paper on International Migration recommends the abolition of the current Aliens Control Amendment Act and the development of a new immigration act to give effect to a new policy framework for immigration and migration to South Africa. This publication is designed to support and further the process of legislative reform initiated by the Green Paper. We believe that a comprehensive review of the shortcomings of existing legislation is a vital first step. Drafters of a new act can be alerted to the faults and failings of existing legislation and avoid repetition of these shortcomings.

We aim here, then, to critically review existing South African immigration legislation from a variety of legal and non-legal perspectives. We do not, at this point in the policy process, prescribe what should take its place. However, we believe that the analyses offered provide a solid foundation on which to build, as well as a set of warning signs to the drafters of new legislation.

The publication is structured, in the spirit of the Constitution, as a series of informal “tests” of the act. Each chapter develops one or more tests and then analyses how well the act measures up. The remainder of this chapter highlights the main results of these “test matches” between an apartheid act and the country’s new democratic and constitutional order.

A HUMAN RIGHTS TEST

South African immigration legislation, like all apartheid law, was animated by principles antithetical to the protection and preservation of human rights. The immigration field presents governments with one of their sternest tests in the human rights area. All nation-states are territorial beings and all governments define the protection of territorial integrity as their raison d’être. There are no modern states that adopt an open door policy towards all-comers. By definition, immigration policy is discriminatory, in the broadest sense of denying some people the right to enter, live and move, in the name of protecting the rights of others to do all three. A few find this logically and morally indefensible. Human rights—such as freedom of movement—are, they argue, universal and universality means that rights are to be protected and enjoyed in a way that is independent of place and location. In South Africa this position has been forcefully presented by Steven Friedman, who has suggested that “current forms of control are a greater threat to human rights and democracy than the presence of immigrants.”

A somewhat messier lower-case position is that countries that recognise the inevitability of human movement and seek to profit by it
should adopt universalist criteria in their decisions about who should be allowed entry. This, of course, cuts across the whole thrust of modern immigration policy, which explicitly rejects universalist criteria in immigrant selection. Self-interest (no matter how enlightened) demands that states develop criteria that are, or are perceived to be, selective. Race and national origin were the great guiding principles of 19th- and 20th-century immigrant selection. In South Africa, as Maxine Reitzes points out, being able to assimilate into the white population was virtually the only criterion for immigrant selection until as recently as 1986. Although the statute has disappeared, a more general restrictionist policy since 1990 has seen limited opportunity for anyone at all to immigrate to the country.

Reitzes argues that the Aliens Control Act violates "a wide range" of human rights. Indeed, the act contains only one reference to human rights guarantees. Section 58 of the amendment act acknowledges a person's right to "freedom and security" in the context of the execution of a "warrant to enter upon and conduct a search of any premises". Her primary concern, however, is with the treatment of potential legal immigrants and those who enter or remain in the country outside the terms of the act. She discerns an official drift towards the position that people give up all rights when they enter a territory unofficially. Furthermore, unauthorised immigrants are seen as "a major threat to the rights of South African citizens". Rights are non-portable and immigrants have few, if any, rights unless they fulfil the official criteria for living in South Africa. Reitzes argues that there are inherent dangers in setting citizens' rights against non-citizens' rights as if they were always antagonistic and mutually exclusive:

If it is argued that any human rights that foreigners crossing our borders may have should be balanced by those of South African citizens and denied if those of the latter are imperilled, far more evidence than is now available would be needed to substantiate the claim that such a conflict does exist. And this means that it is possible that the evidence points in the opposite direction, to the conclusion that there is, in reality, no conflict between the rights of immigrants and the rights of South Africans. On the contrary, conflict may exist between South Africans' interests and the denial of human rights to undocumented migrants.

Reitzes raises questions about the failure of the Aliens Control Act to extend various "negative rights" to non-citizens on issues of mobility and economic opportunity. She concludes that there need to be clear-headed decisions about what rights immigrants (both potential and actual, legal
and unauthorised) are entitled to and how these rights can be reconciled with the idea of state sovereignty and national interest. The position that people have rights only where they are domiciled denies that people have certain inalienable rights that are not lost simply by crossing state borders. None of these issues, it has to be said, concerned the original drafters of South African immigration legislation. Reitze's basic point is that human rights entitlements, whatever these are judged to be, are too fragile to be left undefined, unarticulated and unprotected in the construction of immigration policy and legislation.

A CONSTITUTIONAL TEST

The adoption of the final Constitution and Bill of Rights has profound implications for immigration law in South Africa. In Jonathan Klaaren's words, while constitutionality appears to be "catching" across broad areas of South African life, immigration policy seems immune. Those quite happy with extending broad rights to citizens become distinctly queasy when the issue of rights for immigrants is raised. By knowingly coming to or being in a country in contravention of immigration regulations, it is implied, a person voluntarily surrenders entitlement to constitutional guarantee or protection. The Bill of Rights is nothing like as restrictive: an array of rights is extended to "persons", not just citizens. This is no oversight, as the Bill of Rights clearly reserves certain rights to "citizens" only. Although the courts will give definitive interpretation to these clauses, it seems unlikely that all of these rights can be summarily denied to non-citizens, whatever their legal status.

In anticipation of this process, Klaaren's chapter puts specific clauses and provisions of current immigration and citizenship legislation under the microscope and discovers some significant flaws. Citizenship and immigration laws are not generally bracketed together in South Africa, as they should be. Klaaren concludes that, while most of the clauses in the South African Citizenship Act would pass constitutional muster, some are of more dubious provenance. Citizens, in particular, could bring forward challenges to an act that metes out harsher treatment to citizens by naturalisation than citizens by birth or that violates constitutional protection against discrimination on the basis of sexual orientation. A strong, if indirect, equality claim also exists for black immigrants without permanent residence status who came to South Africa when racial immigration laws explicitly reserved the offer of permanent residence to whites only.

The Aliens Control Act lays itself open to a much broader swathe of constitutional challenge. Klaaren argues that the procedures of the
Immigrants Selection Boards could conflict with the guarantee of administrative justice. The procedures for declaring a person to be prohibited also appear to violate the standards of administrative justice, as well as potentially violating the prohibition of discrimination on the grounds of disability, gender and freedom of expression. Much of the current concern over the constitutionality of the Aliens Control Act is directed at its removal provisions, and “rightly” so.\(^6\) He gives details of five major ways in which a person may become subject to deportation from South Africa and concludes:

> As they presently exist, the removal provisions of the act are riddled with constitutional problems. This is so for at least three reasons: as presently drafted, the removal provisions have a high risk of removing citizens (especially black citizens), they lack adequate procedural protection, and they are applied in a discriminatory manner.\(^7\)

The media has already reported cases of South African citizens, permanent residents and legal temporary residents being summarily arrested by the police as “illegal aliens” and subjected to a gamut of measures that are not only unconstitutional but violate the Aliens Control Act itself.\(^8\) Persons subject to deportation currently have no room for administrative appeal or review beyond “appeal to the minister” (a vague and toothless form of protection). The only other recourse is the Supreme Court. This is unavailable to many, given the cost involved and the rapidity with which removals are effected. The method of detention of suspected illegal immigrants is also a matter for great concern, despite several amendments in the 1995 act. Other clauses of the act which require constitutional scrutiny include its discretionary nature, its search and seizure provisions and its attempt to shift the onus of proof in court proceedings.

While most of the provisions of the act deal with immigration proper, some focus on policy towards immigrants and non-citizens inside the country, including employment. These provisions were designed to deter entry, but they also directly regulate the position of immigrants within the country. The act is only one of a multitude of statutes and regulations that deal, directly or indirectly, with policy towards immigrants. Klaaren argues that “much of this law is highly restrictive to the rights of (legal) immigrants”.\(^9\) Much of it is also clearly open to challenge based on the equality provisions of the Constitution. A second category of constitutional challenges to policy towards immigrants could be based on more specific rights such as freedom of movement, residence and economic activity.
Klaaren's verdict is blunt: there are "major and significant constitutional failings" in current immigration legislation and policy.\textsuperscript{20} The logical next step would be to subject the relevant clauses of the Aliens Control Act to a real series of constitutional challenges in the courts. If the act were to remain on the books in its present form, that is precisely what would happen. A second alternative would be another series of amendments, removing or modifying any clauses that might be deemed unconstitutional. The logic of the analyses presented here is that there seems little point in going that route. The more pro-active and productive alternative is to construct a new constitutionally sound legal framework from first principles.

**AN INTERNATIONAL TEST**

Immigration law, as Melvin Weigel points out in his chapter, has been solidly within the sphere of national sovereignty for as long as there have been nation-states. Immigration legislation is therefore inseparable from the discourses and practices of modern nation-state building. Immigration legislation gives judicial effect to the notion of the nation as a bounded territory and provides the legal and policy instruments to preserve the real and imagined threat to the integrity of that territory posed by outsiders. Hence, as Peter van der Veer argues, immigration legislation attempts to resolve the contradiction between the notion of territoriality inherent to nationalism and the "transgressive fact" of migration.\textsuperscript{21} The connections between nation-building and immigration have re-emerged in South Africa with unexpected force since 1991. Current policy measures are justified by ill-defined appeals to the "interests of South Africans". Immigrants are seen as the harbingers of everything anti-social and criminal.\textsuperscript{22}

As both Weigel and David Jacobson point out, the absolute sovereignty view in immigration matters has been tempered in the 20th century by international law and domestic human rights legislation.\textsuperscript{23} South African immigration legislation has a curious, indeed ironic, relationship with global immigration law. The 1913 Immigration Act and the 1937 Aliens Act were not very different from legislation passed in other white settler societies at the time. Previous generations of South African legislators even looked to these models for the spirit and wording of their own legislation. In the post-1945 period, these states shifted uneasily away from racially-based immigration policies, while South Africa grimly set its face in the opposite direction. Because domestic human rights legislation was non-existent there was little to concern the government there. The tempering effect of international law was also resisted by ignoring some international conventions, such as those of the
United Nations, and manipulating others, such as those of the International Labour Organisation (ILO).

The extent to which South African immigration law ought to be tested in the court of international or comparative immigration law is a moot point. Defenders of the Aliens Control Act have sought to justify many of its more draconian provisions by referring to comparative examples. The Human Sciences Research Council, for example, claims that the act compares favourably with equivalent legislation in the USA, the United Kingdom and Canada, as well as several other Southern African Development Community states.24 How could this be? The answer is in a style of analysis that ignores the full text and context of the other countries’ legislation and battens on to enforcement provisions. In fact, it is unlikely that South Africa’s enforcement and control measures would withstand an expert comparative legal analysis.

Weigel draws our attention to a number of international human rights instruments that, for the most part, do not distinguish between citizens and non-citizens with respect to fundamental rights. They include the International Covenant on Civil and Political Rights, the African Charter on Human and People’s Rights, three relevant ILO conventions25 and the 1990 UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The last convention has been signed by only a handful of states, although Weigel predicts its eventual widespread adoption. There is plenty in this convention that the old South African government would have feared, as it would cut away at the roots of the contract labour system to the mines. But the present government has little to fear as there is generally a good relationship between many of the provisions of the convention and South Africa’s Constitution, policy objectives and new labour legislation.

Weigel identifies five areas in which inherited South African immigration law and policy might be found to be in conflict with the relevant international conventions. He then discusses several problem areas within the Aliens Control Act where South African legislation does not measure up well to a comparative test. The first is the area of administrative justice. A minimalist position would be that a non-citizen is allowed judicial review of the legality of a decision. Most legal experts, and immigrant-receiving states, would also grant the right to a hearing on substantive issues. Many countries have specialised administrative or judicial tribunals for this purpose. The general principle is that the greater the appellant’s interest in the outcome, the less summary the hearing and review procedures ought to be. The absence of such a review and appeal mechanism in South Africa even “shortchanges people who have been lawfully admitted to the country”.26
Other areas of concern include the poor access to information and policy guidelines (there is reference here to a bureaucracy still "steeped in a culture of secrecy" rather than service), the issue of temporary permits, immigrant selection, search and seizure provisions, migration consultants and family reunification. In each case there is no single international norm or common standard. No country is a "model of perfection". But, holding up a mirror to South Africa's "worst practice" legislation, there is hope that the country can develop its own legislative and policy instruments in a way that blends domestic needs with international "best practice".

A JUDICIAL TEST

The annotated version of the Immigration Act of Canada contains fewer than 200 pages of legal text and more than 800 summaries of benchmark immigration decisions by the Canadian courts. As the editors point out, the interpretation of any law purporting to define any relationship between individuals within Canada and the Canadian government is subject to the provisions of the Canadian Charter of Rights and Freedoms. The result is a voluminous immigration jurisprudence, as appeals of administrative decisions are taken beyond the Immigration and Refugee Board to the courts. For most, this a healthy sign of a vigorous democracy at work. In South Africa, the prospect of "clogging" an overburdened justice system with immigration cases seems to cause undue alarm. In truth, there is little choice if South Africans are serious about rights, justice and due process.

The appeal procedures of the Aliens Control Act are seriously defective. The 1991 act contained an astonishing clause, which specifically ousted the jurisdiction of the courts "to review, quash, reverse, interdict or otherwise interfere with any act, order or warrant performed or issued under the act". This ouster clause was judiciously removed in the 1996 amendment. Ouster clauses are one reason why there is little immigration jurisprudence in South Africa. Most deportees are either not made aware of their rights or cannot, for lack of resources or time, exercise them in the High Court.

As Anton Katz points out, the courts have recently insisted on dealing with the small number of disputes referred for adjudication. Lee Anne de la Hunt notes that "the record of the judiciary is as disappointing as that of the legislature in protecting the rights of immigrants within South Africa". Katz reports on several recent cases in order to assess how the courts are handling immigration cases. He tells of one decision, pertaining to the aiding and abetting of illegal
immigration, in which a 51-year-old woman was imprisoned and her appeal turned down. Among the fundamental issues raised is the entitlement of non-citizens to legal aid, to bail, and to language and interpreter facilities.

Three challenges of decisions by officials of the Department of Home Affairs were recently rejected by the court. All the decisions, around the simple issue of whether the department is obliged to give reasons for its administrative decisions, are heavily criticised here and elsewhere. One legal expert pillories them as “archaic” and an endorsement of past “authoritarian” and “arrogant” attitudes in dealing with immigrants. Katz contends that “it may be justifiable to fail to give reasons in certain circumstances on grounds of administrative convenience, but never in immigration circumstances” (my emphasis). If there is no such obligation, “arbitrariness, discrimination and corruption” all breed.

A landmark case – the first in what is hoped will become a lively jurisprudence in this area – is the case of Foulds v Minister of Home Affairs. The judge used case law from other jurisdictions and found that Foulds’s application for permanent residence had not been dealt with in “a lawful and procedurally fair manner”. Part of the problem was the refusal of the department to provide reasons for the decision. Katz speculates that the “profile of the bench” (a judge with an anti-apartheid reputation) may have contributed to the decision. Whatever the contributing factors, the decision is welcome.

More troubling is that South Africa still has no legislation dealing specifically with refugee affairs. Applicants for refugee status and asylum are dealt with under the Aliens Control Act. The implications of this unacceptable situation are discussed at length by Katz and De la Hunt. Katz looks at three refugee cases. In Pembele and Others v Appeal Board of Refugee Affairs, the court ordered the department, on constitutional grounds, to provide reasons for the refusal of all applications for refugee status and asylum. The obvious question is why such an obvious and fair obligation should have had to be referred to the courts at all. The case of S v Johnson raises troubling questions about the treatment of refugee claimants within the prison system. The court found that Johnson’s rights had been seriously violated: “Eighteen months in prison, of which 14 are without trial for the potential ‘crime’ of not telling the truth about one’s origins, hardly fits into a culture of respect for the rule of law and human rights.” Nonetheless, there are persistent reports that similar treatment is still meted out to some asylum seekers.
A Protection Test

The Department of Home Affairs, at last seemingly cognisant of the problems inherent in dealing with refugees under the Aliens Control Act, prepared a new draft refugee bill in late 1996. This bill was the subject of at least one public workshop organised by the Human Rights Commission but was then “put on ice” pending the recommendations of the Green Paper on International Migration. The green paper makes recommendations for a refugee protection system that focuses on rights as well as solutions. The acceptability of this model to the public and policy-makers will obviously have a major impact on what kind of refugee bill finally emerges. But the paper concludes that immigration and refugee affairs are separate issues that should be dealt with in separate ways, using different legislative instruments, and therefore the draft bill is likely to form the starting point for discussion of new refugee legislation in South Africa. However, the bill is not consistent in many respects with the recommendations for the refugee protection system advocated in the green paper.

The Aliens Control Act has been, and remains, a wholly inadequate piece of legislation for refugee protection. The act itself never mentions refugees or asylum seekers and offers no guidance at all on refugee determination procedures or the obligations of the government in this regard. Refugees and asylum seekers are dealt with as a class of “prohibited persons”. The reason is simple: the apartheid regime steadfastly refused to recognise refugee claimants or provide refugee protection. This cynical and inhuman policy reached its nadir in the 1980s. South Africa’s destabilisation of Mozambique created a massive refugee burden for other countries in the region. Most were prepared to shoulder that burden. South Africa, on the other hand, erected electrified fences on its borders, which killed an estimated 200 refugees a year.

Between 200 000 and 300 000 Mozambican refugees are estimated to have remained in South Africa. As the chapter by Nicola Johnston and Caetano Simbine suggests, many have since become victims of the campaign to arrest and deport “illegal aliens”.


There is, as De la Hunt points out, almost no information available to refugees about their rights or asylum procedures. Certainly the Aliens Control Act is totally unenlightening on that score, even for those with access to its tortuous legalese. Refugee claimants, treated as “prohibited persons”, have been tarred with the same brush as illegal immigrants by officials and the public. Asylum seekers are regularly held in common
prisons and even summarily deported, in one case because an immigration officer reportedly held that someone from Zanzibar must, by definition, be an “illegal alien”. The failure of the Aliens Control Act to “provide the necessary checks to ensure that the rights of refugees are not abused” is obvious.35

Using regulation and consultation with the United Nations High Commission for Refugees, rather than statute, the Department of Home Affairs put asylum procedures in place in 1994. The number of applicants has been small compared with the Mozambican influx of the 1980s but the applicants come from a much wider assortment of states. De la Hunt examines the department’s ad hoc system and finds it wanting in several crucial areas, particularly in terms of rights to administrative justice and access to information. On the other hand, the system does accord asylum seekers and refugees important rights (employment, free movement, free medical care) that are not universally enjoyed. In the final analysis, however, South Africa has not yet developed an adequate refugee system consistent with the minimum standards of international law.

A TEST OF DUE PROCESS

The debate on administrative justice and due process has focused, to date, on the inadequacy of existing review and appeal procedures for immigration decisions. As a number of the following chapters suggest, there is a need to look closely at the procedures sanctioned by or permitted within the Aliens Control Act for determining “prohibited status”. There is much evidence of widespread corruption and human rights abuse at this level. The tactics of those charged with making arrests under the act in, as they put it, “sniffing out illegals” bear all of the hallmarks of the enforcement of the pass laws and influx controls in times past.36 These tactics – including arrest on the basis of vaccination marks, accent, pronunciation of words, lack of knowledge about South African history or geography, skin colour, and so on – hardly constitute “reasonable grounds” in anyone’s lexicon.

No one has systematically set out to document the pervasiveness of official malpractice, but we include two chapters that take the reader much closer to the ground-level reality of enforcement of the Aliens Control Act. The first, by Sheena Duncan of the Black Sash, is based on the reports of a stream of aggrieved people seeking advice on official injustice. For Duncan it is all too reminiscent of an earlier and much darker time, of the “old days” when “South Africans and foreigners were equally subject to arrest in terms of the Urban Areas Act. Then they never went out without R10 in one pocket to pay off the black
policeman who wanted to arrest them and R20 in the other to fork out if he was white.  

Duncan goes on to detail a series of complaints about the behaviour of police and immigration officers (often one and the same under the act).

The chapter by the Wits Rural Facility takes us even closer, through a sample of transcripts of interviews with Mozambicans conducted by the Wits Rural Facility in 1995 and 1996 in Mozambique and Johannesburg. The facility has gone furthest in efforts to provide a “voice” for the victims of official malpractice. The veracity of these stories has never been tested in a court of law. Indeed, we know of no case where suspected “illegal aliens” have been permitted to take their “sniffers” to court. We reproduced them here, with that qualification, because we believe they have a ring of authenticity.

What the testimony reveals, first of all, is the almost complete disrespect for due process and the rule of law among some of those charged with enforcing the Aliens Control Act. Every person’s testimony contains at least one example of flagrant abuse of powers and failure to extend basic constitutional guarantees. One of the primary problems permitted by the act is the blurring of responsibility among different departments, particularly the Department of Home Affairs and the police. More than 300 police officers also serve as immigration officers, which means that the same individual can be responsible for detaining, holding a hearing and deporting a suspected illegal immigrant. This is a serious problem for which the green paper suggests several remedies.

The sub-text in the interviews with Mozambicans concerns the way in which they interpret and make sense of their own experiences. For many, there is an overwhelming sense of betrayal as they see earlier solidarities with black South Africans disintegrate. The actions of the authorities are also interpreted by the interviewees (and by some of their captors, it seems) in party political terms as a campaign waged by the Inkatha Freedom Party (IFP) against former African National Congress (ANC) supporters.

This would probably be repudiated by most politicians, but it does raise the more general question of the relationship between party politics and immigration policy within a government of national unity. Future historians will ponder the impact on post-1994 immigration policy of the appointment of IFP leader Mangosuthu Buthelezi to the immigration portfolio in an ANC-led government. Another fraught political issue, on which the act gives no guidance, concerns the involvement of high-profile ANC women in a departmental contract for a detention centre for deportees on the West Rand. The field report by Duncan on conditions at the Dyambu Accommodation Centre, reproduced here, is
reasonably positive. Others paint a much bleaker picture. Two broader
questions with implications for administrative justice are also raised by
Duncan: first, what role, if any, should privatised detention centres be
playing in the deportation system and how should this be regulated? And
second, are detention centres of this kind not a waste of resources and an
“exercise in futility”?

A CONSIDERED VERDICT

Is the Aliens Control Act, as Duncan contends, “bad law”? The
contributors to this book would certainly concur, for the
fundamental reason that bad policy makes bad law. South African
immigration policy has been variously described as confused,
incoherent, reactive, defensive and lacking in vision. This was not
always the case. Previous governments had a clear vision of the role of
immigration in (white) nation-building and in bolstering white
supremacy. They also had a carefully managed migration policy, designed
to utilise cheap labour from outside the country and dump it back over
the borders when it was no longer wanted. Policy and legal instruments
were finely tuned to fit these purposes. The Aliens Control Act was for
white immigrants; bilateral contract labour agreements were for black
migrants. There was no such thing as a refugee. And there was no reason
why a non-accountable government should be obliged to give reasons for
its decisions and actions. So it didn’t.

The Green Paper on International Migration tries to articulate a
quite different and pro-active vision of the role of immigration and the
value of immigrants to South Africa. Central to that policy vision are
far-reaching suggestions for the institutional and legal transformation of
the current system. The green paper suggests the need for two new pieces
of legislation to replace the inherited Aliens Control Act. The first is a
refugee bill to give effect to the proposal for a rights-oriented temporary
protection system. The second is a new immigration act to govern the
conditions of entry and exit of both immigrants and migrants (temporary
residents) in the country.

There is great symbolic value in dispensing with an act with such
clear roots in South Africa’s racial past. But, because symbolism alone is
not a sufficient motivation, the green paper advances a number of
pragmatic reasons why a new immigration act is needed:

- The Aliens Control Act is extremely opaque in its language and
  structure, so that it is difficult to decide what procedures should
  be followed or what rights detainees hold. It also confers an
  unacceptable level of administrative discretion. Procedures used
  to process applications are not contained in the act, or in
regulations made under the act, but in internal documents that are not publicly available or legally binding.

- The labour market-driven system of immigrant and migrant selection proposed by the green paper cannot be accommodated within the existing act without major and substantial amendment.
- The risk of arbitrary and unconstitutional action by the South African Police Service, South African National Defence Force and immigration officials is increased by the absence of clear procedures and guarantees set out in the legislation.
- Various provisions of the Aliens Control Act may be unconstitutional and contrary to the protections offered by the Bill of Rights.
- All facets of immigration and migration should be regulated by a single, inclusive piece of legislation. Temporary admission should not be regulated by exemption and exception, as is the case at present.

The essays in this book give substance to many of these objections. They are published here in the hope that the very act of criticising the old will clear the ground for new legislation: a new immigration act that is consistent with a new policy vision of the role of cross-border movement in the construction of a new South Africa.

NOTES

1 Contract migration falls outside the act. Migrant labour to the South African mines is regulated by bilateral agreement between South Africa and the supplier states; see Crush, J, Jeeves, A, and Yudelman, D, 1991. South Africa’s Labor Empire: A History of Black Migrancy to the Gold Mines, Westview and David Philip, Boulder and Cape Town. The bilateral agreements are the subject of a separate SAMP Migration Policy paper.
5 A small number of written submissions were received from legal experts and human rights groups. Most were very critical of the act. The Black Sash’s submission is referred to by Sheena Duncan in Chapter Seven.
10 Cornelius et al, Controlling Immigration.
13 Ibid., p. 50.
14 Ibid., p. 41.
15 Ibid., p. 48.
17 Ibid., p. 64.
19 Klaaren, J, (in this publication), p. 68.
20 Ibid., p. 70.

27 Ibid., p. 109.
32 Ibid., p. 84.
33 Ibid., p. 88.
37 Duncan, S, (in this book), p. 152. French-speaking Africans say that the standard bribe for avoiding arrest is R200 in Johannesburg. (Dr Antoine Bouillon, personal communication.)
CHAPTER ONE

ROOTED IN RACISM: THE ORIGINS OF THE ALIENS CONTROL ACT

SALLY PEERDY & JONATHAN CRUSH

Immigration legislation is a tool used by governments to determine who they will allow to become new members of the nation and on what terms. By definition, immigration legislation is discriminatory, drawing boundaries between “us” and “them”; between “insiders” and “outsiders”. The question is: who is excluded from and included within these boundaries and “frontiers of identity” and why?

A secondary question concerns how states treat those who are designated as “outsiders” but wish to become temporary or permanent “insiders”. In South Africa, the politics of inclusion and exclusion have
varied considerably over time. Throughout the 20th century, immigration legislation has discriminated between people on such grounds as national origin, class, gender and, particularly, race. The record of previous South African regimes on the treatment of its primarily black “outsiders” is extremely poor.

This chapter provides an overview of South African immigration, from the passage of the Immigration Act in 1913 through to the Aliens Control Amendment Act of 1995. The analysis focuses on the pillars of immigration legislation: immigrant selection, state powers, immigration boards and the role of the judiciary. South African immigration policy, and many of the actual clauses and prescriptions in the current legislation, are deeply rooted in South Africa’s racist past.

Our analysis stresses three recurrent themes:

1. South African immigration legislation is a product of colonialism, segregation and apartheid. The predecessors of the 1991 Aliens Control Act were designed to serve the racist and anti-Semitic designs of its architects. Can legislation born under such circumstances survive the test of constitutionality, transparency and accountability?

2. In the past, only whites could be immigrants. Apart from a brief period in the late 1980s and early 1990s, Africans (whatever their skills or potential contribution to the country) have never been welcomed as immigrants to South Africa. They were seen as migrants — temporary sojourners who could be dumped back over the border when they were no longer useful.

3. The history of South African immigration legislation shows a steady expansion of state powers in the formulation and implementation of immigration policy and a growing disregard for accountability, transparency and due process. The question is whether the instruments of immigration policy designed in a non-democratic state are appropriate for a democratic one.

All immigration legislation shows continuity over time. The core aspects of an act often survive many subsequent amendments and policy shifts. The Aliens Control Amendment Act of 1995 amends the Aliens Control Act of 1991. The 1991 act consolidated the 1913 Immigration Regulation Act, the 1937 Aliens Act and subsequent amendments to both. The 1995 amendment act contains some progressive amendments but the bulk of the act is an inheritance from South Africa’s racist past. This raises troubling questions about its legitimacy and appropriateness for governing immigration in a democratic South Africa.
**INDIAN IMMIGRATION AND THE IMMIGRATION REGULATION ACT OF 1913**

South Africa's first nation-wide immigration legislation was the Immigration Regulation Act, passed in 1913. Before the Union was formed in 1910, each of the provinces had its own legislation. The Union government took three years to devise a comprehensive policy agreeable to the provinces, to Parliament and the colonial British government. The primary provisions of the act were:

1. **Creation of a Department of Immigration (Clause 1).** The act created a separate Department of Immigration, which was later subsumed in the Department of the Interior and, much later, Home Affairs. The formation of an entire government department to control immigration reflected the importance placed by the new state on immigration.

2. **Immigration Board.** The 1913 act established an Immigration Board whose members were appointed by the minister. The board's purpose was to hear appeals by people who had been declared prohibited immigrants. The sweeping powers given to the board posed a severe challenge to the rights of prospective immigrants and prohibited persons and established a precedent that persists to the present.

3. **Criteria for entry.** The act laid out the requirements for prospective permanent residents (and therefore citizens) to gain entry. People who did not meet the criteria were called "prohibited immigrants" under the act. Immigration officers made the decision at the port of entry. The act prohibited entry of "any person or class of persons deemed by the minister on economic grounds or on account of standards or habits of life to be unsuited to the requirements of the Union" (Section 4(1)(a)). The latter phrase gave the minister sweeping powers of exclusion. The phrase "class of persons" enabled the minister to exclude groups of people and not just individuals. People unable to read and write a European language were excluded. An immigration officer could declare a person a prohibited immigrant if he or she was likely to become a charge on the state, was undesirable for political reasons, was a prostitute or someone living off the earnings of prostitution, had a criminal record, was mentally or physically disabled, or carried a "contagious" or "loathsome" disease.

4. **Appeals against prohibition.** On notification of being declared a prohibited immigrant by an immigration officer, a person had
three days to lodge a written appeal (together with a deposit to cover their return fare). Unless the board decided otherwise, the act stipulated that they were not required to hear oral evidence. If the board upheld the decision of the immigration officer, the individual had no right to appeal against the decision in any court of law, except on a point of law. Thus a potential immigrant or prohibited immigrant was denied any right of access to the judicial system of South Africa as well as any right to appeal against the board’s decision. Also, the act stipulated that the burden of proof lay with the potential immigrant and not with the state, which meant that people were considered guilty until they could prove themselves innocent.

5. Powers of detention. The act gave immigration (and police) officers the right to arrest and detain prohibited immigrants, or those suspected of being prohibited immigrants, without a warrant of arrest “if there is reason to believe that the delay occasioned by obtaining a warrant would enable such a person to evade the provisions of this act”. These officers also had the right to remove (deport) prohibited immigrants under warrant. The act gave the power to issue a warrant to magistrates.

6. Exemptions to the act. The act gave the minister discretion to allow entry to certain groups of people who would otherwise be declared prohibited immigrants. The government wanted to prevent Africans immigrating to South Africa, while retaining access to their labour power. The exemption clauses meant that systems of migrant contract labour could be organised and maintained by other arrangements, such as treaties and conventions. The South African mining industry was, in effect, exempted from many of the provisions of the act.

A second exemption was for wives and dependants of male immigrants. Under the act, women and children were assumed to be the dependants of their husbands and fathers. This meant that, provided they were not mentally or physically disabled or carrying a contagious disease, the wives and children of men admitted as permanent residents were allowed entry without having to meet the primary clauses governing prohibition. However, a husband could not enter South Africa under this exemption. The same conditions did not apply to Indian women and other women married under customary or Islamic law, or any religious law allowing polygamous marriages. The clause was used to exclude the wives and children of Indian immigrants.

Like subsequent immigration legislation, the 1913 act reflected the racial anxieties of the time. So anxious was the government to build up the
white population that European immigrants were given virtually free access to the country, while the act was used to control Indian immigration. The first Indians came to Natal in 1850 as indentured labourers. By 1911 the Indian population had grown to just over 152,000. On completion of indenture, labourers could return to India, take a grant to buy Crown land, or re-indenture. Most chose to stay in South Africa as "free" Indians. They, in turn, attracted other Indian immigrants, mainly Muslim traders and family members.\footnote{7}

The expanding Indian population alarmed a racist white government and white businessmen who saw the traders as a threat. Introducing the 1913 Immigration Regulation Act in Parliament, the minister said that, while Indians were not explicitly named, "everyone knew it was the intention of South Africa to exclude Asians".\footnote{8} The minister said that Indian and all other non-white immigrants were "unsuited to the requirements of the Union" and were therefore prohibited immigrants. Only 12 days later, the first Indians were declared prohibited immigrants under the act.

The 1913 act also maintained and reinforced internal barriers to the movement of black South Africans. Previous provincial laws had restricted the movement of South African blacks between provinces and prohibited their entry into the Orange Free State. These restrictions were incorporated into the 1913 act. Thus, black South Africans were defined, not as full citizens with rights of free movement, but as "non-citizens", as "aliens" subject to the same piece of legislation that governed entry to the country by non-South Africans.

The act was amended several times before World War II. In 1913 the Natal Indian Congress (NIC) under Mahatma Ghandi used passive resistance to oppose the immigration act and other regulations that restricted the ability of Indians to move freely between provinces and to trade with whites on equal terms. This campaign resulted in an agreement between Smuts and Gandhi: the NIC suspended its campaign of passive resistance and Smuts agreed to introduce the Indian Relief Act of 1914. This act lifted an onerous and hated head tax on Indians and amended the 1913 act to recognise marriages drawn up according to any religious faith. Thus, the wives and children of many Indians resident in the Union who had been excluded under the 1913 act could now enter the Union, but restrictions on movement between provinces were largely maintained.

The Immigration and Indian Relief Act of 1927 revised the Indian Relief Act of 1914 and the 1913 act. Amendments to the 1913 act extended the power of immigration officers to set the amount to be paid by those appealing against prohibition, allowed appeals on points of law to be taken beyond the Supreme Court to the Appellate Division of the
Supreme Court, denied entry to unaccompanied children, and added tuberculosis to the medical conditions under which prohibition could be declared. The 1927 act also clarified the definition of "domicile" in the original act. Under the 1927 amendment, a person had to be permanently resident in the Union for three years (but not on a temporary permit) to acquire domicile.

The 1931 Immigration Amendment Act clarified the language of certain sections of the act and extended the list of criminal offences that would render a person a prohibited immigrant. A 1933 amendment repealed the section of the 1913 act that allowed illiterate European artisans, unskilled and domestic workers to enter the Union. The Depression, the economic crisis in South Africa and the growth of the "poor white" problem prompted the government to temporarily restrict entry by unskilled or semi-skilled whites.

**JEWISH IMMIGRATION AND THE IMMIGRATION QUOTA ACT OF 1930**

The 1913 Immigrants Regulation Act had proved an effective tool to exclude immigrants who were not white. In the 1920s, fear of Indian immigrants was increasingly replaced by another racial anxiety. After World War I there was a rapid increase in the numbers of people arriving in South Africa from Lithuania and other countries in Eastern Europe. The overwhelming majority of these new immigrants were Jewish. The anti-Semitism of the South African government was fuelled by the introduction in 1920 of a Quota Act in the United States, which drastically cut the number of Jews allowed to enter the USA. The South African government feared an influx of rejected immigrants.

In 1920, the government tried to use the 1913 act to exclude Jewish immigrants. In 1921 the Secretary for the Interior issued secret instructions that the regulations of the act should be "rigidly enforced" against Polish and Russian immigrants. In April 1922, the minister stated publicly that Clause 4(1)(a), the clause used to exclude non-whites, would now be used to exclude Eastern Europeans. He noted in private that he was:

> putting in force a clause in the immigration act which enables the minister to bar anyone whom he deems unsuitable ... The victims are of course all Jews ... I am very doubtful if much can really be done to stop the stream ... but they are really coming in much faster than we can assimilate them.

The use of Clause 4(1)(a) against European Jews was fiercely contested by the local Jewish Board of Deputies.
The government claimed that "the restrictions are applied indifferently and without discrimination to Jewish and non-Jewish immigrants".\textsuperscript{11} To maintain the shroud of secrecy it refused to provide reasons for denying people a visa.\textsuperscript{12} Subsequent governments, up to the present, have made similar claims about a lack of discrimination in their policy and then obscured their real intentions by refusing to provide reasons for immigration decisions.

In 1930, a second major piece of immigration legislation, the Immigration Quota Act, was introduced. The act, although short-lived, formed the foundation of the more significant Aliens Act, which replaced it in 1937. The quota act was introduced to control Jewish immigration to South Africa. Jews were increasingly viewed as "different" from the original white inhabitants of South Africa and, therefore, a threat to the future of the nation.\textsuperscript{13} An internal Department of the Interior document, titled "Immigration of Hebrews into South Africa", noted:

One in every four who has entered the Union this year is a Hebrew, generally of a low type ... The European population of the Union is small and every possible endeavour should be made to strengthen it and to ensure the quality of any additions to it in order to preserve its position in relation to the hordes of native and coloured inhabitants. The existing conditions under which ... the better class of the European section is being depleted, cannot be allowed to continue indefinitely without seriously affecting the standing of the European population as a whole.\textsuperscript{14}

In the late 1920s, following the example of the United States and Australia, the idea of quotas to control Jewish immigration to South Africa was mooted. The Immigration Quota Act of 1930 gave effect to this by distinguishing between potential immigrants from desirable and undesirable countries as follows:

1. \textit{Scheduled and unscheduled countries}. The act introduced a two-tier system of "scheduled" and "unscheduled" countries.\textsuperscript{15} There were no limits on the number of immigrants allowed to enter South Africa from scheduled countries. All other countries were called unscheduled countries and each was given a quota of 50 immigrants a year. A further 1,000 places were allotted to immigrants from non-scheduled countries, primarily wives, children and other dependants of people already resident in South Africa.

2. \textit{Restrictions on Jewish immigration}. The act stated that nationality would be decided by country of birth, not citizenship. The
purpose of this was to exclude Eastern Europeans who could otherwise have claimed German nationality.

3. **Valid passport.** The act also required immigrants to hold valid passports or “other recognised documents of identity”. Many Eastern Europeans, particularly Russians and Poles, could not obtain passports.

4. **Immigrants Selection Board.** The act established the board to screen all applications to which quotas would apply. The board was also responsible for allocating the 1 000 additional places allocated to unscheduled countries. All decisions of the board were final and no provisions were made for appeals.

The Immigration Amendment Act of 1937 amended the 1913 act in two ways that affected black migrants:

1. **Regional migration.** The act removed the restrictions on recruiting for the mines north of 22 degrees south latitude, which had been in place since 1913. The amending act stipulated that those entering under this section of the act could not count time spent in South Africa towards domicile in the Union. The act also noted that these migrants would lose their status if they changed or left their employment. In this way, the government entrenched the system of migrant labour that, until 1995, did not allow Africans with long residence in South Africa to claim any rights of domicile.

2. **Powers of immigration officers.** The act extended these powers. The 1913 act had made entering South Africa without permission an offence punishable by three months imprisonment or deportation under a warrant issued by a magistrate. The 1937 amendment gave immigration officers without a warrant the power to arrest a person who they believed had entered the country illegally, even if the person had not yet been found guilty of the offence. The immigration officer was also given the right to detain a person, or “cause” a person to be detained, while waiting for the warrant to be issued.

**ANTI-SEMITISM AND THE ALIENS ACT OF 1937**

The 1930 quota act succeeded in stemming Jewish immigration from Eastern Europe, but the rise of fascism in Europe resulted in a new wave of Jewish immigration, this time from Germany. The 1930 act did not apply to German citizens. Also, most German Jewish applicants were literate, often professionals, and thus met the requirements for entry under the 1913 act. The
government did not want to admit Jewish immigrants but, at the same time, it did not want to restrict non-Jewish Germans from emigrating to South Africa. The result, after much private and public debate, was the Aliens Act of 1937, which did not name Jewish people and, like the 1913 and 1930 acts, was on paper a non-racial act. But its intent was all too clear.

The 1937 Aliens Act, together with the 1913 act, has formed the basis of all subsequent immigration legislation in South Africa, including the 1991 Aliens Control Act. For the first time, the word “alien” was entrenched in legislation and public discourse to describe unwanted immigrants. Thus, the language of aliens and alienation originally carried a strong anti-Semitic message.

1. **Definition of aliens.** The act defined an alien as a person who was not a “natural-born British subject or a Union national”. Under the act, potential immigrants were required to apply for a permit to enter South Africa before they could be considered for permanent residence. Applicants for a permit had to meet certain conditions laid down in the act, besides those contained in the 1913 act.

2. **Assimilation.** Conditions of entry were drawn from the 1930 act. The applicant had to be “readily assimilable with the European inhabitants of the Union” and become a desirable inhabitant of the Union within a reasonable period after “his” entry into the Union.

The act was introduced in a political climate rampant with xenophobia and anti-Semitism. Introducing the bill in Parliament, the minister noted that “we will prevent aliens entering this land in such quantities as would alter the texture of our civilisation. We intend to determine ourselves what the composition of our people shall be”.\(^\text{(16)}\) Prime Minister Jan Smuts said that the principal reason for the Aliens Act was the “increasing bitterness against the Jews in this country” and that South Africa “runs the danger of being flooded by undesirable elements of all kinds”.\(^\text{(17)}\) He could have been speaking in the 1990s, so similar was his provocative and misleading language to that heard today.

3. **Immigrants Selection Board.** The Aliens Act established an Immigrants Selection Board of three to five members to be appointed by the governor-general. The board dealt with applications for permanent residence. As in the quota act, the applicant had no means to appeal the decision of the selection board, nor was the board required to provide reasons for rejection.
The act was used almost immediately to deny applications for permits to enter for the purpose of permanent residence. The board let it be known in March 1937 that they had rejected almost all applications from German refugees fleeing nazism. In the two months after the act was promulgated they denied permission to apply for permanent residence to more than 2,000 applicants already living in South Africa on temporary permits. Almost all were German Jews.

4. *Temporary permits.* The act gave immigration officers the power to issue temporary permits. If people remained in the country after the permit had expired, or failed to comply with the conditions imposed by the permit, they could be declared prohibited immigrants under the 1913 act, even if they would not normally have been considered prohibited immigrants. The application form for a permit under the Aliens Act required applicants to disclose their race. The categories used as examples for the question on the form were “Slav, Czech, Hebrew, Asiatic etc.”

The Aliens Registration Act of 1939 signalled a shift in the purpose of South Africa’s immigration legislation. The primary purpose of previous legislation was to establish laws to control the entry of particular racial groups. The 1939 act and subsequent legislation extended the state’s control and surveillance of immigrants within the country. The act therefore introduced several provisions which would be developed and incorporated into later legislation.

When the act was introduced in Parliament, the government made it clear that its purpose was to provide the government with more knowledge of the whereabouts of immigrants, as well as to control their movements. The minister said that:

> owing to the extent of the borders of our country, it is easy for aliens to enter from Angola, from Bechuanaland and from Southern Rhodesia or from Lourenco Marques ... We know that there are a great number of aliens in this country who are not legally here.18

What he neglected to point out was that there was no way they could be legally there under existing legislation.

The minister also claimed that people were overstaying their temporary permits and taking up employment and that the act was necessary to enable the government to know where “aliens” were. The act, said the minister, was “to help us put our hands on any alien in the country”.19
5. **Registration.** The act required all “aliens” (as defined in the 1937 act) to register within 60 days of the act being passed or within 14 days after arrival in South Africa. They had to register in the district in which they were staying. The act required them to inform the registration office two weeks before moving or changing employment. If the district changed they had to register in the new district. The minister was given the power to appoint registration officers, assistant registration officers and inspectors of immigrants. On registration the officer would issue the immigrant with a certificate valid for three years.

The act introduced sections that would be developed in later apartheid legislation. Under the act, the occupier of premises where an “alien” or a “suspected alien” was living or staying (in furnished or unfurnished accommodation) was required to give notice to the registration officer. Also, an employer or business partner of an “alien” was required to inform the registration officer within seven days after the person had started work, giving the person’s duties and pay.

6. **Powers of arrest.** The act gave police and immigration officers, registration officers and inspectors the power to arrest a suspected person without a warrant. The burden of proof lay with the person arrested and not with the state.

Some misgivings were expressed in Parliament about the extension of such sweeping powers to policemen. However, the minister argued that it was necessary to include a clause which “enables a policeman to touch you on the shoulder one day and say 'come along and show me that you are not an alien'”.20

7. **Ministerial powers.** The act gave the minister the power to deport any person he deemed to be harmful to the welfare of the state. The minister was also given the power to exempt individuals or a “class of persons” unconditionally, or under specified conditions.

8. **Citizenship and marriage.** The act made an important concession to women who were South African nationals but had married non-South Africans. Formerly women were held to have taken the nationality of their spouse on marriage. The act exempted women considered to be “aliens” by marriage from meeting the conditions of the act, provided they were born and lived permanently in the Union.

In the shadow of World War II, the government had dramatically increased its powers to exclude whole categories of people, while at the same time extending its domestic powers over non-South Africans. South African legislation in the period before apartheid was therefore driven by a combination of racial anxiety, white nationalism and anti-
Semitism. There were no democratic or constitutional checks and balances on the system. The minister, his officials and the police were given wide powers of arrest and deportation. The courts were largely shut out of the process.

Fundamentally, however, immigration was defined as a “white issue”. Immigrants were, by definition, white. The government distinguished between desirable and undesirable whites in formulating its policies. There was no immigration policy for Africans from outside the country. Africans were migrants and they had to return home when they were no longer of use to South African employers.

No further immigration legislation was passed until the Aliens Registration Amendment Act was introduced in 1949. The act merely clarified certain sections of the 1939 act concerning records of the whereabouts of non-citizens and non-British subjects in the country. The amendment required property owners to keep a register of “all persons staying at the property”.

**Immigration Under Apartheid**

Immigration policy after 1948 reflected the tensions between the Afrikaans- and English-speaking communities and their political loyalties. In 1946, the United Party government had initiated an immigration drive in Britain. The influx of British immigrants led to vociferous objections from the National Party, who accused the United Party of attempting to bolster the English-speaking electorate. Immediately after the 1948 election, the National Party reversed the pro-British immigrant recruiting policy and focused instead on recruiting German and Dutch immigrants.

The National Party amended the 1913 and 1937 acts in 1953 and again in 1956. In a trend that was to continue into the 1990s, the 1956 amendment extended the powers of the minister and the state:

1. **Ministerial powers.** The act gave the minister wide-ranging powers to issue a warrant “under his hand” for the deportation (and detention pending deportation) of any person if he considered it to be “in the public interest”. The dependants of a person being deported under this section could also be included in the warrant. The act also gave the minister the power to declare a person who was not a South African citizen by birth or descent, who had yet to acquire domicile (three years residence), and who was convicted of any offence in the Union an “undesirable inhabitant” and to deport the person under a warrant.
2. **Visas.** In 1960 a further amendment to the 1913 act required persons entering the country to hold a valid visa or authorisation.
The minister was given the power to exempt individuals and any "class of person" from this clause.

In 1961 another short amending act was introduced, which renamed the 1913 act the Admission of Persons to the Union Regulation Act. The titles "prohibited immigrant" and "immigration officer" were changed to "prohibited person" and "passport control officer".

Two other pieces of legislation that affected the movement of people into and out of the country were passed during this period: the Population Registration Amendment Act of 1950 and the Admission of Persons to the Union Regulation Amendment Act of 1961. The population registration act divided the population into four racial categories: white, black, Indian, and coloured. People were required to carry ID books that stated their race and place of birth. While the purpose of the act was to lay a foundation for subsequent apartheid legislation, it also provided a means to control or identify immigrants inside the country. During the parliamentary debate around the introduction of the act, the then Minister of the Interior stressed the administrative advantages of the act for controlling illegal immigration (as well as crime and tax evasion). Thus, the amendment introduced the idea of using ID documents as a tool to identify and control immigrants within the country. The apartheid strategy of demanding that people carry and show identity documents on pain of arrest is still used today in dealing with African immigrants. Some observers have remarked that current immigration policy in South Africa is simply a new form of pass law.

The admission to the union amendment act of 1961 reflected South Africa's increasing paranoia about the longstanding movement of Africans from the neighbouring states to and from South Africa. Until then, movement had been relatively free between South Africa and its Customs Union partners. The act's implementation was accompanied by a brutal effort by the police to rid South Africa of immigrants from these countries, many of whom had been here for decades. It is still possible to find elderly people, especially women, in these countries who remember the indignity and brutality of this form of forced removal, often accompanied by the confiscation and destruction of property.

In the early 1960s, the apartheid government changed its immigration policy. Resistance campaigns, the Treason Trial, as well as the Sharpeville massacre and the declaration of a state of emergency in 1960, not only discouraged people from coming to South Africa but led to the departure of an unprecedented number of white South Africans. In June 1960 the government announced a drive to encourage white immigration. In January 1961 the government indicated its new commitment to immigration and a Department of Immigration opened.
on 1 April that year. The six immigration offices already in Europe were expanded and various immigrant subsidy and assistance schemes were put in place. White immigration increased by 300% in three years. Whites leaving newly independent African countries also found welcoming arms in South Africa.

The 1950s and 1960s thus saw little change to South Africa’s immigration legislation but major policy shifts. The apartheid government, initially hostile to any kind of immigration that would dilute Afrikaner power, reinstated the racist immigration policies of pre-1948 governments. Skilled, white European immigrants were actively recruited and encouraged to emigrate to South Africa, while Southern Europeans, less skilled and predominantly Roman Catholic, were not. Once again there were two levels of prejudice at work: policy favoured white immigrants over black and, among potential white immigrants, distinctions were made on the basis of background and religion.

The Commonwealth Relations Act of 1961 turned South Africa into a republic. The act made changes to both the 1937 and 1939 aliens acts, primarily by bringing British nationals, who had enjoyed special status, under this legislation. New citizens now had to make an “oath of allegiance” to the Republic. In another extension of the powers of the minister, he was given the authority to withdraw South African citizenship from anyone holding dual nationality.

Instead of a single Immigrants Selection Board operating from Pretoria, a 1961 amendment gave the board the authority to set up committees to operate inside and outside South Africa. The committees were given the power only to accept applications. Any applications they felt should be refused had to be referred to the main Immigrants Selection Board in Pretoria. The establishment of committees in recruiting centres in Europe shortened the application process, prevented delays and also signalled a significant shift to a pro-active immigration policy.

1. **Passport control officers.** A 1963 amendment gave officers the power to arrest people, without a warrant.

2. **Permanent residence.** In 1967, the Immigrants Selection Board was authorised to grant permanent residence to a person who had entered South Africa under a temporary permit and was still resident.

The Admission of Persons to and Departure from the Republic Regulation Act of 1969 reflected the increasing centralisation of state power and dismissal of human rights in immigration policy.

1. **Ministerial Powers.** This act significantly extended the arbitrary power of the minister, who was given the authority, if he considered it to be “in the public interest”, to order the removal
of any person who was not a South African citizen. The decision of the minister could not be appealed against or reviewed in any court of law and the minister did not have to give any reason for his actions. The act also gave the minister the power to appoint passport control officers and to give them such powers or duties as he deemed necessary.

2. Powers of arrest. The act widened the range of people able to issue a warrant. The minister could authorise any person or class of persons in the public service, as well as police officers, to arrest suspected prohibited persons without a warrant. This removed the entire administrative process from the judicial system.

3. Border controls. The 1967 Border Control Act made it a punishable offence to fail to enter the Union through an official port of entry (unless exempted) and to appear before a passport control officer.

In 1972 the government consolidated the 1913 act and its amending acts into the Admission of Persons to the Republic Regulation Act. The discretionary powers of the state were extended still further on matters of immigration, although persons appealing immigration decisions could now secure legal representation.

1. Immigration boards. The state president was given the power to appoint as many immigration boards to hear appeals as he deemed necessary. Each board was to have three or more members with a magistrate as its chairperson. The 1972 act also gave the person appealing against the decision the right to appear before the board and to be represented "by counsel, an attorney or law agent".

2. Role of courts. The act stated that, except on a point of law, no court of law could have "any jurisdiction to quash, reverse, interdict" or "interfere with" any proceeding, act, order or warrant of the minister or board, passport control officer, or master of a ship carried out under the act.

The Aliens Amendment Act of 1978 also vested greater powers in the hands of a state now focused on military destabilisation of the region and sealing its borders to the north:

1. Employment of immigrants. The act made it a criminal offence to employ, enter business with, or harbour an "alien" who did not have a permit allowing him or her to work or reside in the Union under the 1937 act. It also made it an offence for an occupier or owner of any premises to allow an "alien" to live on premises owned or controlled by them.
The Aliens and Immigration Laws Amendment Act of 1984 reinforced domestic controls on immigrants:

1. *Employment of immigrants without documentation.* The act extended the prohibition on the employment and accommodation of immigrants without valid permits.

2. *Department of Immigration.* The act acknowledged the administrative abolition of the Department of Immigration in 1979 and its successor, the Department of the Interior. A Department of Internal Affairs was created.

3. *Homeland citizens.* The act clarified the position of people from "independent" homelands. People who were resident there lost their South African citizenship and so could have been declared "aliens".

4. *Black immigration.* A further amending act in 1986 removed the definition of "European" from section 4(3)(b) of the act which had required all immigrants to be "assimilable" with the European population.

   The removal of the word European and the yardstick of assimilability meant that, for the first time, black people could officially immigrate to South Africa. This racial restriction, long the cornerstone of immigration policy, was gone. Why it remained for so long is not a mystery given the history of racism in South African immigration policy. Why it was lifted in 1986 had more to do with political strategy than moral enlightenment. South Africa’s homelands wanted to benefit from a growing brain drain of black skills from the rest of Africa. This amendment opened the door for skilled African immigrants to come legally to South Africa.

**CONCLUSION: TOWARDS THE ALIENS CONTROL ACT OF 1991**

The apartheid government introduced its only major piece of immigration legislation, the Aliens Control Act, as recently as 1991. Like much legislation passed in the dying years of apartheid, the act attempted to entrench the policies of the past and set the parameters within which reform and reconstruction would take place.

The act consolidated the numerous acts controlling the entry and lives of immigrants into a single omnibus piece of legislation. Many of the act’s provisions were inherited from existing legislation, which had been passed by governments of the apartheid and pre-apartheid eras to serve racial and other imperatives and to extend the absolute powers of the state, unfettered by democratic checks and balances.
The act also entrenched the "two gates" policy, which distinguished between white immigrants and black migrants. Section 41 retained the exemption clauses that allowed white farmers and the mining industry to recruit migrant labour outside the country under special dispensation.

South Africa's current immigration legislation is deeply rooted in the country's fraught racial and political history. The 1913 Immigration Regulation Act and the 1937 Aliens Act, which stipulate the grounds on which people have been allowed to enter South Africa, were both explicitly racist and discriminatory in intent. These acts, even after their consolidation in 1972 and 1991, remained essentially unchanged. The 1939 act (now repealed) and the amendment acts did nothing but introduce clauses tightening the control of the state over immigrants and further erode the rights of legal and illegal immigrants and migrants.

The 1995 Amendment Act has made some substantive changes to the 1991 act, removing some of the more blatant violations of the rights of undocumented immigrants. Despite these changes, serious questions need to be asked about whether the new democratic and non-racial state of South Africa should be promulgating and implementing legislation which is so deeply rooted in policies whose purpose was racial exclusion and domination and the extension of unfettered state power.

The analysis presented here leads us to make a number of recommendations drawn from the lessons of the past:

1. Present immigration legislation – and the Aliens Control Act in particular – is compromised by its past. A new Immigration Act should be the cornerstone of a new immigration policy.

2. South Africa needs to formulate a coherent, positive, pro-active, alternative vision of the role of immigration that recognises that immigration, properly managed, can be of great economic, social and cultural benefit to a country. As Collinson points out: barriers against the entry of 'unwanted' migrants may certainly prove effective as a short-term protective measure, but if introduced in the absence of more positive steps to implement a system of managed (albeit limited) immigration, receiving states are in the end likely to weaken, rather than strengthen, their hold over the migration process.33

3. The need for new mechanisms of immigration governance. This is one positive lesson to take from the past. Comparative experience and South Africa's own history suggest that immigration is too important an issue to be relegated to one of a number of line functions of Home Affairs. One possibility is a renamed Ministry of Immigration and Citizenship designed specifically to implement government policy in this pivotal area.


Notes


3 The 1913 Immigrants Regulation Act and its amendments were previously consolidated in the Admission of Persons to the Republic Regulation Act, 1972.

4 Cape Act No. 2 of 1883; Natal Act No. 18 of 1905; Transvaal Ordinance No. 46 of 1902; Ordinance No. 1 of 1903 of the Orange River Colony.

5 Section 9.

6 See Section 5(d). For several years preceding the introduction of the 1913 act, mineworkers from Nyasaland (Malawi), northern Mozambique and Rhodesia (Zimbabwe) had been dying in large numbers. Most died of pneumonia, many in the reception centres before they even reached the mines. The decision was based on racial ideas about their perceived innate physical irability to resist disease; see Packard, R, 1993. "The Inventor of the 'Tropical Worker': Medical Research and the Quest for Central African Labour on the South African Gold Mines, 1903-1936", *Journal of African History*, 34, pp. 271-92.


8 Hansard, 30/4/1913, col. 2050-2051.

9 Ironically, the minister (Patrick Duncan), who was in opposition in 1913, had fought for an assurance that this clause would never be used against Europeans.

10 Patrick Duncan, quoted in Bradlow, *Immigration into the Union* p. 204.

11 Central Archives, Pretoria, BNS 1/1/380 200/74 vol. 4., Duncan to Jewish Board of Deputies, 12 December 1922.

12 Ibid., memo by Secretary of the Interior, 11 December 1922.


14 Central Archives, BNS 1/1/684 1/60A, "Immigration of Hebrews into South Africa", 1926. Although Jewish people were now constructed as newly arrived outsiders who were not part of the original white population of South Africa, they had been among
some of the earliest white settlers and formed part of the group of 1820 settlers. By 1911, almost 50 000 Jewish people were living in the country. Most had arrived from Russia between 1850 and 1910.

15 Scheduled countries included the territories of the British Commonwealth, Austria, Belgium, Denmark, France, Germany, Holland, Italy, Norway, Portugal, Spain, Sweden, Switzerland, and the United States.

16 Hansard, 13 January 1937, col. 104.
17 Hansard, 18 January 1936, col. 262-3.
18 Hansard, 3 May 1939, col. 3954.
19 Ibid., col. 3956.
20 Ibid., col. 3957.
22 The act repealed all of the 1937 act (except the section referring to name changes); the 1939 act; the 1972 act; the 1955 act; as well as the 1964 and 1967 acts and all amending acts.
CHAPTER TWO

IMMIGRATION & HUMAN RIGHTS IN SOUTH AFRICA

MAXINE REITZES

Since the 1994 national elections, the issue of immigration has become increasingly topical and controversial in South Africa. A cost-effective, enforceable and morally defensible policy response continues to elude policy-makers. Official reactions over the past two years have been based on the assumption that immigration is primarily a non-military security issue and that immigrants have a negative social and economic impact. Many South African citizens and elected representatives, most notably Minister of Home Affairs Mangosuthu Buthelezi, perceive immigrants as a threat to the successful implementation of the Reconstruction and Development Programme. Immigrants are said to exacerbate already high
levels of unemployment and be disproportionately involved in crime. An alternative, although less developed and popular, approach is to address immigration as a human rights issue.

**HUMAN RIGHTS AND THE NATIONAL INTEREST**

Human rights issues and social security issues are not mutually exclusive. The extent to which rights are guaranteed and protected by the state has a direct bearing on an individual’s life. The nature and extent of individuals’ social and economic impact is inextricably linked to the rights that they are guaranteed. The ANC chairperson of the Parliamentary Portfolio Committee on Home Affairs is aware of this, and has said that “the end of apartheid created a new vision of hope in our region. The creation of the Southern African Development Community gave birth to a new vision, where ‘security’ would no longer be a military issue. Instead, security would relate to the protection of human rights, and to economic well-being and social justice” (my emphasis).²

The greater the protection of human rights, the greater the possibility that individuals who enjoy them will make a positive contribution to society. Also, the extent to which a state guarantees certain rights is directly related to prospects for democracy and the recognition of its authority.

Immigration policy is based on criteria of inclusion and exclusion that are determined by the state and conform to its perceptions of its national identity.

A state’s conception of who should be its members depends on its conception of itself, of the kind of polity it thinks it is and how it believes itself to be constituted and held together. Its immigration policy is therefore an expression of, and ultimately grounded and legitimised in terms of, its definition of its identity.³

Membership criteria are often also informed by the state’s perceptions of its “national interest”. Previously South Africa’s immigration policy reflected the apartheid state’s self-image and the interests of white supremacy. Until 1986, there was an explicitly racial character to the legislation, since successful applicants for permanent residence or citizenship by naturalisation had to be “readily assimilable by the white inhabitants”. The authorities also had to satisfy themselves that immigrants did not threaten “the language, culture or religion of any white ethnic group”.⁴ This ensured that permanent resident status or citizenship was not conferred on black foreigners. The then government encouraged white immigration, principally from Europe but also, in response to political changes, from the former Portuguese colonies, Angola and Mozambique, and later from Zimbabwe, both to reduce skills shortages and to bolster the numerical strength of the white population.

A more moderate, if not progressive, immigration policy, which could
reasonably have been expected from the post-apartheid ideological shift, has not materialised. The ANC, the majority party in government, has a tradition of stressing respect for human rights. It waged a long battle against a system that was vilified because it abused human rights. It was supported in this struggle in a variety of ways by the international community, particularly African and Southern African states that had experienced the negative consequences of the regionalisation of apartheid. Furthermore, South Africa now has a Bill of Rights embedded in its constitution, and, as a member of the United Nations, is committed to the Universal Declaration of Human Rights.

Thus, a revised immigration policy that considered the protection of human rights as a fundamental criterion could have been expected. But the reverse has occurred. South African citizens and decision-makers appear to have hardened their attitudes towards immigrants, who are aware of the growing xenophobia. Often, acts motivated by such xenophobia result in the violation of human rights, which immigrants themselves perceive the South African state as having an obligation to protect.

Although the racial criteria were removed in 1986, the primary legislation governing immigration to South Africa, the Aliens Control Act, has become increasingly restrictive, and remains implicitly racist. Immigration officials are entitled to request a deposit from applicants for temporary residence permits. Although this stipulation is non-racial and, in practice, some black people have acquired residence, it makes it extremely difficult for most immigrants from elsewhere in Africa to qualify, because few possess the required sum.

There are a number of possible explanations for the non-liberalisation of immigration policy. The policy-makers do not seem to have adequate information about the extent and nature of immigration to South Africa. Numbers are unreliable and claims about the negative socio-economic impact of undocumented immigrants are largely unsubstantiated. Statistics seem to show a dramatic increase in clandestine immigration since 1992: official figures range from two million to eight million. But quantification is beset by difficulties. Given that the persons “counted” are “illegal” and that their entry into the country is therefore often clandestine and undocumented, there is no reliable means of calculation. In 1995, George Orr of the Department of Home Affairs claimed that three million was a reasonable estimate. This figure was derived by taking the 600 000 people who have entered legally but temporarily, but of whose departure there is no record, and extrapolating this in terms of a complicated formula. But the formula and the calculation it produces seem largely speculative. The fluid nature of the migrant community, the confusion between the definition of refugees and “illegal”
immigrants, corrupt practices among officials charged with implementing the act, the assumption of South African identities by immigrants, and their vulnerable and insecure status, which makes them reluctant to be “counted”, all contribute to the dubious nature of statistics.

Much the same can be said of claims by persons in authority about the cost to the country of hosting “illegal immigrants”. These figures give no idea of the assumptions on which they are based, nor is it clear how reliable calculations can be made if we do not know how many immigrants there are and what they do. The only amount that can be quoted with certainty is the cost of implementing immigration policy. According to Buthelezi, R12 million was spent on repatriating Mozambicans in 1995. Attempting to assess the socio-economic impact of undocumented migrants is extremely difficult because very little reliable information is available. This point is worth stressing because much of the debate starts with the assumption that we know the effect of migration and immigration. These calculations, however, raise a point of principle: they may be based on a crude and misleading understanding of the economic cost of immigration, where immigrants are seen only to be consumers of resources and opportunities. The possibility that they may be producers of both is not considered.

A slightly more sophisticated variant of the approach that assumes that immigrants inevitably reduce the availability of resources to South Africans, acknowledges that many or most are engaged in labour. However, it identifies this as precisely the cause of the problem, since they are said to be “taking” jobs or trading opportunities that are needed by South Africans. Presumably in implicit answer to the suggestion that this complaint betrays South Africans’ inability or unwillingness to compete, some argue that foreigners will work for lower pay and under less favourable conditions than South Africans. Because they do not apply for trading licences or are not protected by labour legislation and are therefore more likely to be hired, they are seen to be competing unfairly.

The second point betrays a circular argument: foreigners, because of their illegal status, are undercutting South Africans and, therefore, their status must remain illegal. More importantly, the complaint suggests a static concept of economic opportunity. It implies that there are a defined number of jobs and commercial opportunities and that, if foreigners appropriate a portion of these, there are less left over for South Africans. But new entrants to trade may create new wealth, while new entrants to the job market may introduce new skills and capacities. The USA’s industrial economy was, to a large degree, built on immigrant entrepreneurship and labour, which expanded opportunities across the economy and society.

Recent studies conducted in the South African context find that the
same phenomenon is evident here. They conclude that undocumented immigrants in Gauteng are not depriving locals of opportunity but creating opportunities, and suggest that South Africans can benefit from the immigrant presence by forming joint ventures with foreigners. And, whatever their contribution to wealth creation, immigrants clearly do consume goods and services provided by the market. As they pay for these, they are increasing the demand for locally produced goods, which contributes to economic growth.

These hypotheses, although they are supported by what evidence is available, cannot be backed by comprehensive data. However, they do suggest that the implicit conflict between rights and the economic interests of South Africans is not as self-evident as it seems.

The combination of spurious statistics and untested assumptions concerning the negative social and economic impact of immigrants serves to construct an image of immigrants as a major threat to the rights of South African citizens. This perception was articulated by Buthelezi in his address to Parliament during his department’s budget debate in June 1996:

> Existing immigration policy is directed towards protecting the rights of the South African citizens and permanent residents by reserving employment opportunities for them. The policy is broadly aimed at allowing work permits and residence only in deserving instances ... The effect that ... illegal aliens can have on the infrastructure and services of the country cannot be underestimated ... The department is confident that the influx of illegal immigrants who pose a threat to the RDP and the prosperity of citizens can be stemmed, but only if the central and regional governments as well as all political parties are willing to support the department in its actions ... The future of our country and children depends on us in this regard.

Another explanation of the perceived hardening of attitudes towards immigrants since 1994 may lie in the ambiguities of the nation-building project. Most South Africans who were previously politically and territorially excluded from the rights and entitlements enjoyed by white South Africans are now included. The association of South African citizenship with national boundaries may have resulted in identification of the “other” as existing beyond these boundaries.

For some, the newly perceived threat to the rights and entitlements of citizenship is the foreign “other” who does not share their citizenship and is therefore not legally entitled to these rights and entitlements. South African citizens and the state now face the challenge of redefining their identity. In pursuit of national reconciliation, they must now work out
what they hold in common in the midst of diversity. In the early days of
 democracy, the one identifying feature they can all acknowledge is
 shared citizenship, which bestows on them equal legal status and rights.
 Because, for some, this is the only identifiable characteristic that signifies
 who “we” are, it also designates “them”. It seems that the identification
 of “them” is easier and more obvious than the definition of “us”.
 However, anti-immigrant sentiment seems to result largely from the
 stated concern that foreigners represent unfair competition for scarce
 economic opportunities and resources, rather than anxiety over their
 possible contamination of a national identity and South African “way of
 life”. These two explanations are not easily separated. For, if “they” are
 not only constructed as “foreign”, but also as a threat to South Africans’
 recently acquired rights and entitlements, the relationship between “us”
 and “them” is necessarily going to be adversarial.

 The argument is not purely speculative. During the 1993
 constitutional negotiations, ANC negotiator Pennuel Maduna, who
 became the new government’s deputy minister of Home Affairs, opposed
 a suggested clause in the Constitution which appeared to extend the
 right of free economic activity to people from beyond our borders,
 describing himself as a “nationalist”. And, in a study conducted of
 South African expectations of the new government, most respondents
 spontaneously cited “illegal immigrants” as the major obstacle to their
 realisation. No longer able to blame an illegitimate government for
 their deprivation, the poor have now turned on immigrants as the
 scapegoat. There have also been incidents of violence against immigrants in
 Alexandra township, north of Johannesburg, and in the Ivory Park informal
 settlement at Midrand.

 Although this growing hostility has been publicly opposed by some
 ANC leaders in government, most notably Deputy President Thabo
 Mbeki, the general trend in all parties is towards greater control. Stricter
 immigration legislation was passed by Parliament with the support of all
 government parties in 1995, and provisions which allowed African
 migrants to vote in the general election were not extended to its 1995
 local equivalent.

 SOVEREIGNTY, CITIZENSHIP AND HUMAN RIGHTS

 The extent to which negative perceptions and hostile attitudes
 result in immigration policies and practices that undermine
 human rights must be discussed within the context of an
 understanding of human rights. Immigration policy is
 informed by understandings of the concepts of political and territorial
 state sovereignty, citizenship and rights. Thus, the issue of human rights
has to be understood in relation to the rights of politically and territorially sovereign states and citizens.

States are the central organisational principle of international relations. Their political identity is based on sovereignty, and sovereignty constructs boundaries. The authority of the state is territorially circumscribed. States have a responsibility to protect the rights of their citizens and the authority to prescribe the criteria in terms of which non-citizens may reside within their borders, and what rights and entitlements they may enjoy. The interests of those who are legally entitled to reside within a state’s borders are represented by their respective governments. The relationship between citizens and states is contractual and the legitimacy of government derives from citizens’ consent.

In theory, states do not have unqualified licence. International law seeks to constrain the actions of states in the interests of the protection of the rights of their own citizens and all human beings. The guarantee of human rights, which transcend state boundaries, is intended to curb sovereign rights. Thus, borders become sites of struggle for competing rights claims: those of the state, of its citizens and of universal human rights.

Classical liberal human rights transcend state boundaries and consist of a set of “natural” rights that coincide with the negative civil and political liberties of first-generation rights granted to citizens of states. They include the rights to life, freedom of movement, habeas corpus, freedom of association, freedom of speech, freedom to own property, freedom to participate in economic activity and the like. Nowadays, they exist a priori and are not granted, but assumed to be recognised, guaranteed and protected by states. These rights cannot be claimed from the state as they are not the state’s to give, and all human beings are entitled to resist any agent, including the state, if it violates these rights.

Thus, human rights cannot depend either on majority opinion or on a particular state’s conception of its “national interest”. They are inalienable if they are rights at all. Indeed, it is more consistent with human rights concerns to see the state as an agent created to protect the human rights already possessed by those resident within its borders, than as one that decides which rights those living within its borders are entitled to claim. However, given that the state is a social organisation based on the use of force, power relationships between the state and those whose rights it may violate are extremely unequal. Some governments also grant their citizens and residents so-called second-generation rights or welfare rights. These translate into policy entitlements concerning housing, education, health care, employment and other claims to service and material benefits.
There exists an inherent tension between the rights of sovereign states and human rights. Although the protection of human rights can be interpreted as an attempt to curb states’ sovereign rights, states remain the primary arbiters between these two sets of rights claims. There is no compulsion for states to observe human rights, other than the moral ethos of the international community. As Jackson argues:

Human rights in current international law are subject to the consent of sovereigns ... The cosmopolitan society of humankind is legally – not to mention politically – inferior to the international society of sovereign states. ... Although there is a growing moral imperative in international society to protect human rights which derives from the domestic standards and international influence of Western democracies, sovereign rights still have priority over human rights in international law (my emphasis).16

Not only is there an apparent tension between human and sovereign rights, but conflict also arises between human rights and citizenship rights. As sovereign authorities, states have the right to control their borders. Those who are excluded from citizenship or other legal residence rights – such as illegal immigrants – are arguably also automatically excluded from the state’s recognition of their human rights, if it has not granted them the right to reside within its borders to begin with. So, although all human beings are bearers of universal human rights, it remains the prerogative of states to decide whether or not to recognise these rights – sovereign might triumphs over universal right.

Natural law theory sees citizenship rights as natural and universal rights to which any human being is entitled as a member of a political community. In practice, however, the provision of the formal legal protection and the positive benefits associated with citizenship is regulated by the modern political code, which is a functional code hinged on the requirements of “security” and “regulation of fear”. This qualifies universal rights through both rules of exclusion and rules of subordination. In principle only the members of a national political community are citizens, in opposition to the “foreigners”.17

One of the troubling implications of this statement is that states inevitably fail to guarantee human rights in practice, because these rights are inextricably linked to, rather than distinguishable from, citizenship and residence rights that are afforded by the state. If the protection of all rights is, in reality, the sole prerogative of the state in which human beings reside, the notion of human rights becomes fiction, and the granting of rights by states to non-citizens reduces them to entitlements or privileges.
The following section, based on an analysis of the Aliens Control Act, illustrates that this is indeed the case with South Africa's current immigration policy. As mentioned above, this policy is designed to protect the rights of South African citizens, which immigrants are perceived to violate; and immigrants are seen as having few if any rights unless they fulfil the criteria for acquiring official permission to live in South Africa.¹⁸

**HUMAN RIGHTS AND THE ALIENS CONTROL ACT**

In terms of the act, “illegal immigrants” are defined negatively and exclusively in terms of what they are not: South African citizens. By implication, they are not entitled to enjoy the rights and entitlements guaranteed to South Africans. However, it is their claims to human rights that the act fails to recognise. This is reinforced by the act’s definition of “domicile”, which means:

the place where a person, in relation to the exercise of his rights and the fulfilment of his obligations, is in law deemed to be permanently present, even though he (sic) may in fact be absent there (my emphasis).¹⁹

Thus, the recognition of rights, which are not distinguished in terms of human rights and citizenship rights, are exclusively attached to the occupation of territory and legally recognised residence. This formulation disregards the portability of human rights, which transcend state boundaries. Similarly, section 22 (1) states that:

any person who in terms of the provisions of any law ceases to be a South African citizen, loses his (sic) domicile in the Republic at the same time.

And, by implication, his or her rights.

Human beings who are not recognised as being legally domiciled in South Africa, or who have contravened certain provisions of the act, are “prohibited” under section 39 of the act. If they are still outside the country’s borders, they “shall not be permitted to land in or enter or sojourn in the Republic” (section 9(1)(a)).²⁰ Not only is free movement into South Africa denied, but prospective immigrants’ freedom of movement within the country is restricted. The regional committees of the Immigration Selection Boards “shall not consider an application ... unless the applicant intends taking up permanent residence within the province in respect of which that regional committee has been appointed”.²¹ Temporary residents are denied employment, residence and education or training in any part of South Africa, other than that in which they have been granted residence.²² Any person who employs an
"alien" in another province is deemed to be in contravention of the act. This condition is presumably intended to ensure South Africans' employment opportunities by guarding against job displacement. Other sections of the act have the same intention.

Section 25(4)(a) of the 1995 Aliens Control Amendment Act specifies the criteria on the basis of which the "regional committee concerned may authorise the issue to the applicant of an immigration permit". The applicant must be "of good character"; be deemed to be "a desirable inhabitant of the Republic"; "not likely to harm the welfare of the Republic" and should not, nor be likely to, "pursue an occupation in which, in the opinion of the regional committee, a sufficient number of persons are available in the Republic to meet the requirements of the inhabitants of the Republic". The definition of a "prohibited person" includes "any person who is likely to become a public charge ... because he is not in possession of sufficient means to support himself and his dependants that he brings or has brought with him into the Republic".

These conditions and definitions are open to a wide range of interpretation. As suggested above, the dominant perception of many citizens and decision-makers is that immigrants are likely to harm the welfare of the Republic. And how does one establish whether or not people are able to support themselves and their dependants? If granted the permission to reside in the country, they may well not only fulfil this condition, but also make a positive economic contribution. Also, the likelihood of establishing whether or not "a sufficient number of persons are available in the Republic" to pursue certain occupations is highly questionable.

This attempt to protect South Africans' economic rights (implicitly at the expense of the foreigners' human rights, which include that to free economic activity) is reinforced by section 26 of the amendment act, which deals with various categories of permits, and by section 56.1(n) which allows the minister to make regulations relating to "the steps to be taken to ensure proper exploitation of the local labour market before a work permit or workseeker's permit is issued under section 26(1)".

Recently, Buthelezi announced that:

Cabinet decided ... that a renewed appeal be made to foreign companies operating in South Africa to demonstrate their support to the RDP by refraining from appointing alien employees to positions which could be filled by South African citizens or permanent residents of the country, unless this was absolutely necessary.

He concluded by stressing that:

within the framework of existing policy and legislation and against the background of the government being duty-
bound to protect employment opportunities of its citizens wherever possible, the Department of Home Affairs welcomes any investment from foreign companies and is not averse to granting work permits where key or highly skilled personnel are concerned.25

These stipulations and appeals appear, on the surface, to be obvious means of protecting local jobs. In reality, this may not be so, either in practice or in principle. The way the system works is that the Department of Labour informs the Department of Home Affairs of the number of registered unemployed people who possess the same skills as the applicant. This rests on the highly dubious assumption that all unemployed people who are seeking jobs register with the department. Since they do not, the effect may be to frustrate the intentions of those who seek control by granting jobs to immigrants where locals are indeed available. But it also assumes that among those who have registered will be found people both willing to take the job and equipped to perform it. Neither assumption necessarily holds, since formal qualifications are not the only criteria that employers take into account, and the unemployed do not automatically take any job they are offered, even if it is appropriate to their qualifications.

In principle, the system rests on very questionable assumptions about the nature of the labour market. Let us assume that an employer hires a highly competent and energetic foreigner in preference to a South African who is less so. The effect may well be to increase the pool of jobs available to South Africans by allowing the company to acquire a manager or technician whose skills would create jobs. The converse clearly also holds, as employing the less competent South African may reduce job opportunities, profits on which tax is payable, or income which translates into greater demand for goods and services – itself an employment creator. If immigrants were able to apply freely for jobs, it is not clear why an employer would favour a foreigner who would need to become accustomed to local conditions over South Africans familiar with them – unless the immigrant was a significantly greater potential asset. The present system may, therefore, retard the acquisition of skills that the country needs to ensure economic growth and meet the job needs of South Africans.

While the often-repeated claim that immigrants are willing to work for less than locals under less favourable conditions is backed by substantial evidence, it begs several questions. Firstly, it is not necessarily undesirable that people work harder for less, if they do so voluntarily. The evidence suggests that undocumented migrants who work in formal jobs tend to perform low-paid work that requires few skills, such as agricultural labour or work in the hospitality industry. The claim that
South Africans are seeking these jobs is not proven. In case it seems illogical to assume that local people are not interested in these jobs, consider that during the apartheid era, the mining industry opened a recruitment office in Soweto and received only a handful of applications. This suggests that there are jobs that will be rejected by some people even if they are the only ones available.26

Secondly, immigrants will continue to work under these conditions as long as they enjoy no legal status as, under these circumstances, their employment cannot be regulated. If it is considered desirable that minimum wage and working conditions be set, immigrants would be unable to undercut these if the minima applied to them too. Under these conditions, there would again be no incentive for employers to choose immigrants over locals unless the immigrants were more competent.

A study on immigrants in the Winterveld suggests that some immigrants do not perceive themselves as displacing South Africans from jobs. One said: “Immigrants have not asked people whom they meet on the side of the road digging trenches to hand in their shovels; neither have they gone to owners of companies and asked them to employ only immigrants.” This implies an understanding of economic participation as contingent on free and equal competition, the supply of job opportunities and the demand for labour. It also suggests a rejection of national identity as a criterion for the guarantee of human rights, including economic activity and access to employment opportunities.27

Finally, given South Africa’s attempts to become more internationally economically competitive, Buthelezi’s request to foreign companies is inherently contradictory. South Africa cannot achieve this goal while simultaneously closing its domestic labour market. This appeal also runs counter to global trends, which indicate that labour follows goods and capital. Attempts to tell foreign companies who they may employ could discourage much-needed investment in South Africa.

If it is argued that any human rights that foreigners crossing our borders may have should be balanced by those of South African citizens and denied if those of the citizens are imperilled, far more evidence than is now available would be needed to substantiate the claim that such a conflict does exist. And this means that it is possible that the evidence points in the opposite direction to the conclusion that there is, in reality, no conflict between the rights of immigrants and the rights of South Africans. On the contrary, conflict may exist between South Africans’ interests and the denial of human rights to undocumented migrants.

Section 26.1 of the 1995 amendment specifies six distinct categories of temporary residence permits: visitors, work, business, study, workseekers and medical. Also, to ensure compliance with the conditions under which the permit is issued, an applicant may be required:
to deposit ... an amount fixed by the immigration officer, not exceeding an amount generally determined by the director-general, or to lodge with him or her in the prescribed manner, a guarantee by a bank ... for the amount concerned.²⁸

This requirement erects barriers to the entry of foreigners, particularly Africans and others from developing countries, who may not be able to afford the deposit but who may possess skills, acumen and energy that would contribute to the economy.

In terms of amendments to the act, the Minister of Home Affairs may prescribe the fees “that may be charged in respect of the application for and issuing of visas”.²⁹ Such fees are likely to repel legal immigration.³⁰ This strategy could backfire as it may force those who wish to enter the country legally, but cannot afford to do so, to enter clandestinely. This would necessitate, at considerable cost, greater border control and internal policing. It may also bar the entry of those who possibly could make an economic contribution, including skilled foreigners who may be discouraged from applying to work and invest in South Africa and those already here “who may consider leaving if faced with a R5 580 permanent residence application”.³¹ Finally, buying a forged residence permit may be cheaper than applying for one legally. Thus these prohibitive fees might encourage corruption among state officials charged with implementing the act, undermine the legitimacy of immigration policy and degrade democracy in general.

Another way in which the act attempts to circumscribe the rights of immigrants is through the provisions concerning the “prohibition of certain acts in co-operation with, or in respect of, certain aliens”. Such acts include the employment of undocumented migrants in contravention of the provisions of the act; the provision of instruction or training; and the letting or selling of immovable property. Contravention of these prohibitions constitutes an offence and employers of “illegal immigrants” are subject to a fine not exceeding R40 000. In terms of section 58.2 of the amendment act, anyone convicted of contravening section 32 is:

liable to pay to the state the amount of the costs incurred or required by the state in detaining and removing the alien concerned from the Republic.

These conditions not only undermine the right to free economic activity and property ownership, but also result in a number of strategies designed by employers to circumvent them. Such practices often further undermine human rights. For example, research has unearthed a case in which officials, in effect, sell immigrant labour to farmers who retain the immigrants’
Furthermore, this does not necessarily require the state to extend to immigrants the social goods and services it provides to its citizens. The argument advanced here extends only to “negative” rights, which prescribe what the state may not do. It does not necessarily apply to the provision of free schooling or health care, welfare payments or housing subsidies, which are “positive” rights that describe what the state should do.

As noted above, there is a strong perception among migrants that they have a right to live and work within South Africa’s borders, but not that they are entitled to anything from the government. This attitude is consistent with both the application of human rights and the pursuit of South Africa’s national interest.

This view raises almost as many questions as it seeks to answer. Citizenship is not, even in our current law, extended only to people born in a particular state: immigrants who acquire citizenship are entitled to all goods and services that the state extends to its citizens. This raises the question of the criteria in terms of which citizenship should be extended. This issue cannot be resolved here. States do possess the right to decide who should receive citizenship and, in principle, its denial to persons born outside the state’s borders is not a violation of human rights.

NOTES

1 I am grateful to Steven Friedman for his assistance.
2 Lockey, D, 1996. “Perspectives from Parliament: Policy Options and Directions”, presentation at conference on Migration and the Rainbow Nation, University of the Western Cape. To date, there has been scant evidence of the translation of some elected representatives’ declarations of intent into legislative reality.
5 For a more detailed discussion of immigrants’ perceptions of South Africans’ attitudes towards them, see Reitze, M, and Bam, S, 1996. One Foot In, One Foot Out: Immigrants and Civil Society in the Winterveld, Centre for Policy Studies, Johannesburg, research report no. 51.
7 Aliens Control Amendment Act (ACAA), section 26.4(a).
9 *Natal Mercury*, 3 September 1996.
18 Although I would argue that the Aliens Control Act violates a wide range of human rights, such as the rights to privacy and dignity of the person, only those that relate directly to the debate concerning the social and economic impact of illegal immigrants and undocumented migrants will be addressed in this chapter.
19 Aliens Control Act (ACA), section 1(v).
20 See also ACAA, section 11(1).
21 ACA, section 11.2(b).
22 ACA, section 32(3).
23 ACA, section 32.5(c).
24 ACA, section 39.2(a).
27 Reitzes and Bam, p. 21.
28 ACAA, section 26.4(a).
29 ACAA, sections 56.1(j) and 5.
30 The new fees, which were introduced on 1 July 1996, include: "A non-refundable tariff of R5 580 ... from each individual or family applying for permanent residence in SA. A family is defined as a breadwinner, spouse and two dependants. Additional dependants will cost the applicant R360 each. Applicants for temporary work, work-seeker or study permits will be expected to pay R360 each time they apply for permits or seek extensions – with the permits renewable every 12 months ... The tariffs will not be refunded, whether the application succeeds or fails. The same fees and conditions apply to applicants who want to extend their immigration permits or extend or alter their temporary residence permits, or to permanent residents seeking permission to change their occupations. Applications for re-entry, visitor or transit visas, or visitor, business and medical permits will cost R108." Financial Mail, 21 June 1996.
31 Ibid.
32 Reitzes, Divided on the 'Demon': Immigration Policy Since the Election, p. 6.
33 Reitzes and Bam, p. 21.
34 ACAA, section 44.1(d).
35 Reitzes, Mindsets and Migrants, p. 37.
36 Ibid, pp. 5-6.
CHAPTER THREE

IMMIGRATION AND THE SOUTH AFRICAN CONSTITUTION

JONATHAN KLAAREN

Is a culture of constitutionality beginning to catch on in South Africa? To answer such a question in relation to immigration policy, this chapter aims to accomplish two tasks. Firstly, it locates and summarises the primary South African legislation relevant to immigration policy. Secondly, it identifies constitutional problems with that legislative regime and possible solutions. These issues obviously involve considerations of justice and policy and demand further research and attention. The focus here is on legal doctrine. The article briefly indicates the probability of success of the constitutional challenges that are identified, but does not examine these questions in any depth.
The term “immigration legislation” includes two different types of laws:

1. Laws relating to immigration proper, especially the admission of persons to and removal of persons from the territory of South Africa.
2. Laws dealing with policy towards immigrants, including the regulation of non-citizens who are inside the borders of the country.

The central piece of legislation is the Aliens Control Act (ACA) 96 of 1991. For the most part, the provisions of the act relate to immigration proper although, as I will point out below, a few provisions deal with policy towards immigrants and resident non-citizens. The act consolidated the plethora of South African immigration statutes in 1991 and has itself been amended several times, most recently by the Aliens Control Amendment Act 76 of 1995, most of which came into effect on 1 July 1996. With the passage of the Home Affairs Rationalisation Act 41 of 1995, the act became applicable throughout the country, including the former homelands. The other important piece of immigration legislation is the South African Citizenship Act 88 of 1995, which regulates access to citizenship status.

CITIZENSHIP, PERMANENT RESIDENCE AND THE CONSTITUTION

There are three main categories of people entering or attempting to enter South Africa, and each is controlled to some extent by the ACA:

1. Migrants from neighbouring countries such as Mozambique can enter as contract workers on the basis of conventions with the governments of those states or in accordance with a scheme of recruitment and repatriation approved by the Minister of Home Affairs. These persons are exempt from being considered “prohibited persons” for the period of their employment.
2. Immigrants with permits in two main categories: persons with temporary residence permits in terms of section 26 and with immigration permits (formerly permanent residence permits) in terms of section 25.
3. People who have entered South Africa but who do not have a permit to reside within. This category is made up primarily of people who have entered the country and stayed beyond their temporary residence permits or who have entered the country clandestinely.

As well as these three main categories, immigration legislation also
regulates citizens in relation to their admission to and departure or removal from South Africa.

**Citizenship and the Constitution**

South African citizenship is granted in three ways: by birth, by descent and by naturalisation. Citizenship by birth is currently limited to a child of a South African citizen or to a child whose parents are both permanent residents. A child born in South Africa to one parent with permanent residence and the other with temporary residence would not be a citizen. This has an important result: almost all children born within South Africa to non-citizens cannot themselves claim citizenship.

This bar against citizenship for a large class of persons born in South Africa makes the conditions for obtaining naturalisation and permanent residence of interest, since it is only through these legal routes that they have a chance of becoming citizens. In order to be naturalised, a person must be:

1. over 21,
2. admitted for permanent residence,
3. continuously resident for one year before applying for naturalisation,
4. ordinarily resident for at least four of the eight years preceding the application,
5. of “good character”,
6. intending to continue to reside in the Republic,
7. able to communicate in one of the official languages, and
8. aware of the responsibilities and privileges of South African citizenship.

Minors admitted to permanent residence may be granted citizenship without these conditions. In the case of permanent residents married to South African citizens, the only requirement for citizenship is residence with the citizen spouse in South Africa for two years. Naturalisation thus depends on prior admission for permanent residence.

Permanent residence is governed by the ACA. Since 1 December 1996, a permit for permanent residence (now termed an immigration permit) has been available to an applicant who is of good character, who will be a desirable inhabitant of the Republic, who is not likely to harm the welfare of the Republic, and who does not and is not likely to pursue an occupation in which there are already sufficient numbers of persons available in the Republic. Other provisions allow for (but do not mandate) immediate permanent residence without conditions for
destitute, aged, or infirm family members and for spouses or dependent children of permanent residents and citizens.¹⁴

Citizens automatically lose their citizenship if they acquire the citizenship of another country by engaging in some voluntary and formal act other than marriage.¹⁵ If they also have the citizenship of another country, they may be deprived of South African citizenship by the minister on a number of grounds, including being sentenced to a period of at least 12 months in jail for an offence or making use of the nationality or citizenship of another country.¹⁶ Moreover, the minister may deprive such a dual citizen of citizenship if he or she “is satisfied that it is in the public interest that such citizen shall cease to be a South African citizen”.¹⁷ Citizens by birth or descent who have lost their citizenship may apply directly to the minister for its resumption if they intend to permanently reside in South Africa. Citizens by naturalisation in a similar situation may apply for resumption only after succeeding in an application for a permanent residence permit.¹⁸

As is clear from the above, the current citizenship and naturalisation laws make many substantive distinctions among various classes of people. Although one could argue against these distinctions on the ground of equality, it appears that most of them would pass constitutional muster under whatever limitations clause the Constitutional Court would adopt. The conditions of good character, desirability, and non-likelihood of harming the welfare of South Africa are imprecise standards pushing the bounds of the Constitution (section 33(1)).¹⁹ But, if applied consistently, they may be given adequate specificity to satisfy such requirements.²⁰

Nonetheless, some of the provisions are clearly of dubious constitutionality. Some successful claims would be based on the rights of citizens. For instance, the loss of citizenship provisions for dual citizens apparently violate the rights of citizens.²¹ Likewise, the harsher treatment meted out to non-citizens who were formerly citizens by naturalisation as opposed to citizens by birth or descent in the ACA (section 11(3) and section 13(3)) is an apparent violation of the rights of citizens since it subjects one class of citizens to a stricter potential sanction. Other successful substantive claims can be based on equality. For instance, section 26(5) provides that a spouse, child or employee of a person granted a temporary residence permit may be granted a temporary residence permit if the spouse, child or employee “accompanies or resides with the first-mentioned alien”. By not providing a similar avenue for same-sex partners, the section violates the constitutional protection against discrimination on the basis of sexual orientation.

Even further-reaching equality claims may be successfully raised concerning the distinction between people with permanent residence and those without permanent residence (many of whom were in South
Africa as contract workers). Until 1986, South African immigration legislation was explicitly racial, requiring that applicants for permanent residence be “readily assimilable by the white inhabitants”. Especially from 1960, the government recruited white skilled workers, offering them permanent residence, but continued to prohibit recruited black workers from counting their time of employment towards naturalisation. The effect of these policies was that permanent residence status was reserved for whites. As the law of naturalisation (as well as other legislation) depends on permanent residence status, a strong, if indirect, equality claim thus exists. Any effective distinction between immigrants with permanent resident legal status and immigrants without such legal status who came to South Africa while the racial bar was in place is based, in part, on race and open to constitutional challenge.

Such an equality claim and related claims could cut a wide swath through many provisions of South African immigration legislation. Parliament could remedy these problems statutorily by mandating that such persons who otherwise would have qualified for permanent residence should be regarded as having such status at least for naturalisation and other purposes. To fail to do so would be to perpetuate the effects of state-sanctioned racial discrimination.

The Immigrants Selection Board and Administrative Justice

The administrative procedures for application for permanent residence are also set out in the ACA. The Immigrants Selection Board consists of a central committee and regional committees with responsibilities divided by province. Under the amended act, the members of the board are to be chosen by a transparent and open process and the administrative work is to be done by the Director-General of Home Affairs.

The regional committees consider each application for permanent residence together with information furnished by the director-general. The regional committees consider only applications from persons intending to take up permanent residence in that province. As pointed out above, the regional committees may attach an employment or any other condition “which the committee may deem necessary”. If the regional committee rejects an application, the applicant is barred from re-applying for one year although the director-general may request reconsideration if there is new information relating to that application. The applicant may request review of the decision of the regional committee by the central committee, which may either confirm or set aside the decision of the regional committee after receiving comments from the chairperson of the regional committee. Reasons for the decision
do not have to be supplied and the applicant does not have the opportunity of seeing or refuting the comments made by the chairperson of the regional committee to the central committee.

Some aspects of this procedure appear to conflict with the constitutional guarantee of administrative justice. As the decision of the regional committee to deny the application would be final if not reviewed, it seems clearly to be administrative action within the meaning of section 33 of the Constitution. Applicants for immigration permits are therefore entitled to a statement of reasons for the decision in terms of section 33(2). Moreover, while the regional committee is considering their application, applicants are entitled to see adverse information and policy considerations relevant to their case. Finally, in terms of the procedural fairness guarantee of section 33(1), the applicant may be entitled to have access to the comments of the chairperson of the regional committee made in terms of regulation 15(c).

PROHIBITED PERSONS

The ACA and the amendment act provide a long list of grounds for declaring persons to be prohibited:

1. persons likely to become a public charge,
2. persons deemed to be undesirable by the minister from information received through diplomatic or official channels,
3. persons who have lived on the earnings of prostitution,
4. any person convicted of one of a schedule of serious criminal offences,
5. disabled persons without security for permanent support,
6. persons with communicable diseases,
7. persons who have been removed from the Republic under warrant,
8. persons who have been removed from the Republic in terms of the act,
9. other persons treated by the act as prohibited persons, and
10. persons entering South Africa without a valid passport and visa, unless they are South African citizens.

In some cases, the declaration of a person as a prohibited person occurs at the border under section 9. Where a person has been declared a prohibited person, there is no right of appeal to an independent board. However, there is provision in section 52(1) to request – in writing within three days – the minister to review the declaration. The section 10 procedures differ only slightly from those of section 9. There is no declaration that a person is a prohibited person but rather a decision that a person is a prohibited person. However, this decision is subject to the same written review procedure by the minister.
The act distinguishes three legal categories of prohibited persons: a person declared prohibited in section 9, a person declared prohibited in section 10, and a person statutorily deemed to be a prohibited person in section 39 or elsewhere in the act without any application of discretion. The procedural protections apply only in relation to the first two categories. One might question why the structure of the act retains the category of “prohibited person” at all. It largely seems to serve to indicate that persons in these categories do not have any rights at all, but only privileges extended by the state. The act should be reformed to eliminate the category of prohibited person.

A number of constitutional questions can be raised about these grounds for declaring a person to be prohibited. For example:

1. Section 39(2)(e), providing for exclusion of certain categories of disabled people, may violate the Constitution’s prohibition of discrimination on the grounds of disability.
2. Declaring persons prohibited in terms of prostitution would indirectly violate equality on the grounds of gender.
3. Persons deemed to be undesirable may have some protection on the grounds of a constitutional right to freedom of expression.

Procedurally, it is unclear whether the act’s section 52 provision of a right to request a review by the minister of a declaration as a prohibited person would satisfy the standards of administrative justice. Where the issue is refusal of admission at a port of entry, such a procedure is very likely to satisfy requirements of administrative justice. However, where the exercise of state power over the individual is more substantial, such as where removal from the country or detention by the state is at issue, such a procedure would probably not be considered constitutional. When the fact that there is no provision for a person declared to be a prohibited person to be given reasons for that declaration is taken into account, the Constitution probably requires a more substantial and effective right of review or appeal.35

Admission to and Removal from South Africa

The admission procedures use the act’s categories of prohibited persons to exclude persons from entering the country. The act requires immigration officers, when they are satisfied that a person is not a prohibited person, to allow persons to enter South Africa.36 If a person cannot satisfy the immigration officer that he or she is not a prohibited person, the immigration officer must declare that person a prohibited person and not allow that person to “land in or enter or sojourn in the Republic”.37 Alternatively, the immigration officer may issue the person suspected of being a prohibited person with a provisional
permit with conditions and limitations in order to provide time for investigation of the matter and, after such investigation, declare the person to be a prohibited person if the investigation reveals such evidence. In this case, the person suspected of being a prohibited person is allowed to enter the Republic while the investigation is under way.

While there are few safeguards in the investigation process for persons seeking to enter South Africa, it is unlikely that much procedural protection will be offered by the courts via section 33 of the Constitution, beyond perhaps a requirement for provision of reasons for decisions, which is likely to be limited. People seeking to enter are subject only to very limited (if quite definite) forms of state power and thus have a claim to very limited protection. Indeed, such people are not held in the custody of the state. Furthermore, while evidence for such arguments would need to be developed, cost arguments advanced by the state would be likely to weigh heavily in the balancing process.

Much of the concern over the constitutionality of the Aliens Control Act is rightly directed at the removal provisions. While some of the provisions overlap, the act provides five major ways in which a person may become subject to deportation:

1. The category of "prohibited persons" is mandatorily subject to removal (section 44(1)(a)). This apparently includes both people who are declared to be prohibited persons under section 9 and people who are deemed to be prohibited persons under section 39 and elsewhere. If those who are declared prohibited persons under section 10 fail to obey an order to leave, they are also subject to removal under warrant from the minister. In an important exception to the mandatory removal of prohibited persons, they may be issued with temporary permits under section 41 to enter and reside in the Republic. This process has been used for people applying for asylum or political refugee status and to regulate the status of undocumented workers in sectors such as agriculture.

2. The violation of some condition of a permit such as a provisional section 10 permit. Such persons are also subject to a criminal conviction but are not declared prohibited persons. This can also happen to persons issued with a section 41 permit. If they overstay the permit or violate its conditions they are subject to removal under warrant of the minister, on an additional ground to their status as prohibited persons. Also included in this second route to removal is removal via invalidity or cancellation of a permit and a subsequent order by the minister. This occurs where there is fraud in a permanent residence permit or where a condition of the permit is violated or where a recent marriage is
terminated. If the order is not complied with, the person may be dealt with as a prohibited person. Likewise, section 51 provides for the removal of persons who were exempted from, for instance, the public charge exclusion upon admission but have since violated the conditions of their exemption. Section 51 also provides for the removal of persons who fail to comply with the inspection investigation of section 7.

3. **Presence in the country without a permit.** Immigrants without permits are required to present themselves to an immigration officer or an officer of the Department of Home Affairs in one of its offices. If they fail to present the particulars “then and there” to enable the officer to consider issuing a temporary residence permit, they are guilty of an offence and liable to be removed. A visa-overstayer or violator may also be dealt with and removed as a prohibited person. The enforcement provisions with respect to people in the country without a permit should be noted. Section 53(1) provides that a person may be stopped by either an immigration officer or a police officer “who suspects on reasonable grounds that a person is an alien”. A person stopped is required to produce documentary evidence in support of a claim to be in the country lawfully. If a person stopped fails to satisfy the officer that he or she is entitled to be in South Africa, the officer may take the person into custody and detain the person. Such a person is then subject to the same investigatory procedures as persons crossing the border. Such a person is not declared a prohibited person but, under section 53(2), if “it is established” that a person is not entitled to be in the country, that person is guilty of an offence and can be removed.

4. **Committing a criminal offence.** The act itself provides for criminalisation in sections 43 and 44(2). Section 43 subjects persons previously deported or refused permission to enter or staying after having been ordered to leave to a fine or imprisonment and to removal under warrant of the minister. Section 44(2) subjects those persons who return after being deported or who fail to comply with an order to leave or who enter after having been refused permission to a fine or imprisonment as well as to deportation. Persons convicted under these two sections may be released from imprisonment and removed before the expiry of their sentence. This pre-expiration of sentence removal procedure also applies to two other categories of persons convicted of crimes under laws other than the Aliens Control Act. Persons convicted of a wide range of crimes (broader than the range of crimes making one liable to
declaration as a prohibited person) and sentenced to imprisonment of at least 12 months may be removed under Section 45(1). In addition, under Section 46(1) a person admitted for permanent residence who commits any offence within three years of admission may be removed if deemed by the minister to be an undesirable inhabitant of the Republic. 56

5. Section 47(1) allows the minister “if he considers it to be in the public interest” to order the arrest and removal from the Republic of any non-citizen “by warrant under his hand”. This route is perhaps the least constrained by law.

Except for the section 47 public interest removal, which apparently requires the personal attention of the minister, the statutory standard for the removal process is the same in each of these five ways: removal under warrant issued by the minister. However, the removal warrants issued under sections 45, 46 and 47 have some special features. Firstly, they may be suspended or even withdrawn. Secondly, section 48 (allowing for removal of a permanent resident who has committed any offence in the discretion of the minister) allows the minister to include in the removal warrant of a family head other family members who are not citizens.

As they presently exist, the removal provisions of the act are riddled with constitutional problems. This is so for at least three reasons. As presently drafted, the removal provisions (a) have a high risk of removing citizens (especially black citizens), (b) lack adequate procedural protection, and (c) are applied in a discriminatory manner.

Firstly, the high risk of removing citizens stems from the act’s present doctrinal structure and from potential problems in its application. There is a statutory bar against citizens being declared prohibited persons in terms of sections 9 and 10 and a similar safeguard in section 44(2) and sections 45, 46 and 47. However, there is no such provision in section 53. Therefore, a citizen could apparently be a prohibited person under section 39(2), arrested under section 53(1), and subject to removal under section 53(2) within the terms of the act. Moreover, the onus of proof in relation to the establishment of the citizenship status of a person is not entirely clear in these sections. Since the standard in section 53(2) is whether the person is or is not “entitled to be in the Republic” the onus may be interpreted – at least as a matter of practice – to lie with the person rather than with the department. Such an onus may be a difficult one to discharge for black citizens without proper documentation. Indeed, black citizens are commonly approached by police and asked for their documents. This risk to citizens should be kept in mind in assessing the appropriate protections to offer persons subject to the removal process.

Secondly, a number of steps in the arrest and removal procedures are
also subject to constitutional challenge. In terms of persons arrested on suspicion of being in the country without a permit, the standard of “reasonable grounds” must comply with the Constitution. Stopping persons for an impermissible reason such as solely on the basis of race would clearly violate constitutional guarantees of equality. It is also doubtful whether the police practice of stopping all persons with certain vaccination marks is permissible discrimination within the meaning of the Constitution. Immigration law enforcement officers will need to justify their law enforcement techniques but will be allowed to follow such techniques once justified.

The removal process itself is nearly entirely devoid of procedural protection. The section 52(1) procedure granting the right of written representations to the minister covers only the declaration of persons as prohibited persons. While persons declared prohibited persons are indeed subject to removal, declaration as a prohibited person is only one of five statutory routes as detailed above. Like prohibited persons, persons subject to removal via the other routes are covered by no administrative appeal or review procedures. They are protected only by judicial review in the Supreme Court. Judicial review is unlikely to be widely available given the rapid timing of the removals and the financial circumstances of many of the persons subject to removal. On the grounds of the lack of internal safeguards alone, the removal provisions as presently drafted probably violate the administrative justice clause as applied to persons arrested in terms of section 53(1).

Finally, an analysis of the deportation statistics has shown that a discriminatory pattern of removal of violators exists: “[i]f you are going to violate South African immigration law, it seems that it is a whole lot better to be white than black – and certainly not to be black and Mozambican”. Mozambicans who violate the immigration laws are removed at disproportionately high rates compared with visitors from countries such as the United Kingdom, Germany and the United States who violate the immigration laws. Such a pattern of discrimination in immigration law enforcement is at least on its face a violation of the guarantee of equality in section 9 of the Constitution.

Detention is a matter of constitutional concern as well. In each of the above cases, the person may be detained in a manner and place determined by the director-general pending removal. By statutory command, detention is not supposed to last longer than 48 hours. However, if a section 7 preliminary examination has not finished, sequential periods of detention of 48 hours are permitted after furnishing the person in question with reasons for the re-detention. More importantly, detention pending removal is statutorily exempt from the 48-hour limit.
By itself, such a provision would be clearly unconstitutional. However, several statutory limits on this prolonged detention are provided. \(^{51}\) Firstly, the statute itself places a substantive limit on such detention by providing that such detention shall “not be for a longer period than is under the circumstances reasonable and necessary”. \(^{52}\) Secondly, any detention exceeding 30 days shall be reviewed by a High Court judge as shall any detention subsequently extending for periods of 90 days. \(^{53}\) As implemented by the regulations, the automatic judicial review procedures make only provision for written input by the detainee in reply to the immigration officer’s reasons for detention. Additional safeguards that may be constitutionally required include the availability of translators, the opportunity to consult with a legal practitioner, and an opportunity to respond to the underlying decision, if any, that the detainee be removed from the country.

The detention itself is, of course, additionally subject to constitutional review in a division of the High Court. Constitutionally guaranteed conditions of detention include the right to consult a legal practitioner as well as to be detained under conditions consonant with human dignity and to have visits by family members. Persons detained under the act thus have the right to challenge the lawfulness of their detention in person before a court of law. \(^{54}\)

At least as they are written in the legislation, the detention procedures are likely to meet constitutional standards. In particular, the provision for automatic judicial review has the potential to serve as an adequate safeguard against arbitrary or substandard detention. However, these procedures will need to be fully implemented in order to provide such insulation from constitutional challenge.

MINISTERIAL DISCRETION, SEARCH AND SEIZURE, ONUS OF PROOF

This section discusses the constitutionality of some other significant features of the ACA: its discretionary nature, its search and seizure provisions, and its attempt to shift the onus of proof in court proceedings. However, it should be noted that this article gives only passing attention to the criminal scheme of the act and to its provisions relating to ships in port. Further research in these areas is needed.

There are many places in the act where the minister is given broad discretion. For instance, in section 36 the minister may exempt any category of persons from the requirement of a passport when leaving the country. However, it must be recognised that the exercise of this discretion is subject to the Constitution. Thus, the minister could not constitutionally make an order declaring white citizens but not black
citizens exempt since such a distinction could not be justified. As with the discriminatory pattern of enforcement identified with respect to removals, the exercise of discretion is subject to constitutional restraints.

The act contains search provisions that were updated on 1 July 1996 to include a general requirement for a warrant. However, the warrant may be dispensed with where the officer reasonably believes that a warrant would be given and the delay in seeking the warrant would defeat the purpose of the search.\(^5\) It is an open question whether this limitation on the right of privacy is constitutional.

The act purportedly places the onus of proof on the person to prove that they did not enter or remain in the Republic in contravention of the act in any proceeding where that question arises.\(^6\) Such a provision is unlikely to be constitutional. Where a criminal offence is directly at stake, such an onus of proof is unconstitutional.\(^7\) Further, where the person is faced with removal, declaration as a prohibited person, continued detention or some other similarly significant exercise of state power (unlike refusal of admission), such an onus of proof would likely violate constitutional guarantees of fair procedure.

**Immigration and the Constitution**

As noted, some of the provisions of the ACA deal not with immigration proper but rather with policy towards immigrants and non-citizens who are inside the Republic. For instance, the act regulates the employment of immigrants. Sections 32(1)(a) and (b) prohibit anyone who is in contravention of the act to be employed or to receive instruction or training. Sections 32(2) and (3) prohibit any person from employing a temporary resident outside the conditions of his or her temporary residence permit. Additionally, section 33 requires employers and educational institutions to provide lists of immigrants to the Director-General of Home Affairs on request. Finally, the act purports to regulate domicile in section 22. While these provisions arguably also serve the goal of deterring the entry of immigrants, they clearly more directly regulate the position of immigrants who have entered.

In this respect, however, the act is only one law among many. Most of the law dealing with policy towards immigrants is spread among scores if not hundreds of statutes, regulations, and ordinances of different levels of government.\(^8\) Some law is contained in acts of Parliament passed before 27 April 1994. Other law is contained in national departmental regulations. Still other law is contained in provincial administrative practices. In addition to parliamentary and provincial laws, there may be similar regulation by local government by-laws.\(^9\)
While inadequate research has been done to confidently generalise, it would appear that much of this law is highly restrictive of the rights of legal immigrants. For instance, in terms of acts of Parliament, the Social Assistance Act of 1992, which came into effect on 1 March 1996, restricts social grants to South African citizens. An example of regulations made under a statute occurred when the Minister of Education reportedly required that applicants for teaching posts be South African citizens. At the provincial level, the Free State provincial department of education has considered whether children of non-citizens are eligible for public schooling. Some of these restrictions may be in response to a letter that the Minister of Home Affairs is said to have written to his colleagues in the Cabinet in February 1996, requesting them to stop “rendering government-subsidised services” to anyone lacking proper documents.60

Legislation and other law, such as regulations or administrative decisions, in this category of policy towards immigrants are clearly open to constitutional challenge. The most obvious legal challenge is that based on the equality provision of the Constitution. Indeed, at least two such challenges have already been heard by divisions of the Supreme Court under section 8 of the interim Constitution.61

Although they differ in outcome, the two decisions agree on at least one crucial point: non-citizens can have rights. As have all other courts to pass on the issue, both the Baloro court and the Larbi-Odam court read the term “person” as used in the Bill of Rights to include such persons.62 Non-citizens are thus bearers of constitutional rights under the South African Constitution.63 In the Bill of Rights in the interim Constitution only the rights of citizens and political rights are limited to citizens. In the Bill of Rights passed by the Constitutional Assembly the rights of freedom of trade, occupation and profession and of residence are also limited to citizens.64 Apart from these rights, all other rights entrenched in the Constitution are enjoyed by non-citizens.

The above-mentioned cases decided under the interim Constitution also help to explore two further important questions with respect to judicial scrutiny of immigration legislation. The first is the issue of whether discrimination against non-citizens is protected in terms of the equality provision. Without much consideration, the Baloro and Larbi-Odam cases both decide that “alienage” is a protected ground under section 8 of the interim Constitution.65 However, as reported, neither judgment discusses the fact that the terms “alienage” or “national origin” are not to be found explicitly in section 8. Nor did the cases examine whether the expression “ethnic or social origin” in section 8(2) could be read to include “national origin”. Nor did the cases consider the possibility that alienage or national origin could be read into the
protection of section 8(2) as a non-listed ground. Without considering these doctrinal issues, the cases simply held that discrimination against non-citizens was protected by the equality clause.\textsuperscript{66} While their reasoning leaves much to be desired, the Baloro and Larbi-Odam cases nonetheless indicate that courts are willing to subject classification on the basis of alienage to some scrutiny under the equality provision of the Bill of Rights.\textsuperscript{67}

The second issue the cases point to is the precise character of that scrutiny. Given that non-citizens are constitutional rights-bearers and assuming that alienage is a protected ground of discrimination, determining in any specific instance whether such discrimination may be justified in terms of the limitations clause will involve “a proportionality exercise”.\textsuperscript{68} This apparently involves a balancing process. Included as factors in this exercise with respect to non-citizens may be the ties of the class of non-citizen to the national community, the obligations expected of them, the nature and character of the legal instrument at issue, the extent of discrimination, the purpose of the differentiation, the importance of that purpose, and the possibility of alternative (and less restrictive) methods of achieving the same purposes.\textsuperscript{69} However, it is difficult to predict what the result of the balancing will be in any particular case.

Indeed, the conflicting results in the two cases indicate the essential indeterminacy of such a balancing exercise. In Baloro, a restriction on promotion of non-citizen teachers by a university was held not to be justified. In Larbi-Odam, a restriction on permanent hiring of non-citizen teachers by a provincial authority was held to be justified. These conflicting results demonstrate that the determination of whether a restriction on the basis of citizenship can be justified is likely to be made on a case by case basis.

There is, however, at least one principle that emerges from this jurisprudence. Where the equality clause can be used in combination with the other rights protected in the Constitution, its protection will be strongest.\textsuperscript{70} For instance, education for non-citizen children would thus emerge as a clear candidate for protection. As a matter either of the equality right, the rights of the child or the education right or some combination, the right of children of non-citizens to attend public schools should be protected. In a similar fashion, the right of non-citizen children to receive health care should be protected.

A second category of constitutional challenges to policy towards immigrants would be based on several specific rights: the guarantees of freedom of movement, residence and economic activity. The act limits these rights in several potential ways. For instance, section 25(3) requires that the regional committees attach as a condition that the person granted an immigration permit must “pursue his or her occupation in the
province in which he or she intends to take up permanent residence for a minimum period of 12 months. An occupational restriction would perhaps be judged to be a reasonable and justifiable limitation of this right given the national policy of granting admission to persons who pursue occupations where there are not adequate numbers of South Africans. However, the restrictions on the freedom of movement of the immigrant are likely to fail. Such restrictions will be difficult to justify where the reference point for the regional committees in considering a permit is the nationwide availability of persons in any occupational field.

A third legal basis for challenges to this legislation on policy towards immigrants and non-citizens is based on the federalist character of the Constitution. It will be open to litigants challenging provincial or municipal legislation restricting access to benefits or procedures to claim that such legislation is precluded by the existence of central government immigration legislation such as the ACA. For instance, a municipal by-law prohibiting the employment of non-citizens by employers within the municipality might be held to be pre-empted by the employer sanctions provisions of the ACA. In such a case, the municipal by-laws would be invalid as a violation of the supremacy clause of the interim Constitution, section 4. Indeed, it may be that this basis for constitutional challenge affects the validity of the greatest number of existing laws.

CONCLUSION

This chapter started with the question of whether the culture of constitutionality is catching on in the field of immigration legislation. My survey here has necessarily been an imperfect and superficial one, leaving much room for amplification and improvement. Yet an answer to the question posed clearly appears. If we judge by the present state of legislation in this field, then there are major and significant constitutional failings. In particular, this chapter has identified both the letter and the application of the removal provisions of the ACA to be largely unconstitutional. Also, there is a lack of administrative justice safeguards in other areas. Numerous equality challenges likely to be successful were pointed out in relation to substantive classifications made by immigration legislation. And, in the area of policy towards immigrants, potential constitutional challenges based on equality, substantive rights and the provincial structure of the Constitution exist.

Of course, another version of the test of the culture of constitutionality could focus on the immediate future rather than the
present. This book is published as a long-overdue policy and legislation review process is beginning. It is the answer emerging from that process that will demonstrate whether a culture of constitutionality and human rights is truly catching on in South Africa.

Notes

1 Thanks are due to Sheena Duncan, Anton Katz and Justine White for helpful comments on drafts of this article. Of course, all errors and opinions remain the responsibility of the author.

2 This act came into effect on 5 September 1995.


4 Aliens Control Act (ACA), section 40(1)(d)(ii) and (iii).

5 An additional category would be those persons applying for refugee or political asylum status. See note 41.

6 The ACA refers to this category as "illegal aliens". In this publication the UN terms "undocumented" migrants and immigrants are preferred.

7 South African Citizenship Act (SACA), sections 2, 3, and 4.

8 SACA, section 2(2). There are exceptions for children adopted by South African citizens and (as lobbied for by the Black Sash) for stateless children registered in terms of the Births and Deaths Registration Act 51 of 1992; SACA, section 2(4).

9 In an apparent change from the previous citizenship legislation, periods of temporary residence do not count towards fulfilling the requirement of residence or ordinary residence. SACA, section 5(3)(b). Periods of stay which were in contravention of any law continue not to count. The legislation also prohibits periods of time during which someone has "conditionally" sojourned from counting, which would appear to include the employment conditions that may be imposed without any statutory limit and are often attached to permanent residence permits for three years. See e.g. ACA, section 25(3). Since this section apparently mandates a minimum employment condition of 12 months, the minimum naturalisation period is effectively six years. With a three-year employment condition, the effective period of naturalisation would be eight years. If an employment condition is imposed but not time-limited, then a permanent resident would be barred indefinitely from naturalisation. Giving effect to these distinctions among varying employment conditions would probably violate the equality clause. The reasons for placing such
conditions may bear no relation to an applicant’s fitness for naturalisation. A court should thus interpret SACA, section 5(3)(b) in order to avoid such a constitutional violation.

10 SACA, section 5(1).
11 SACA, section 5(4).
12 SACA, section 5(5).
13 ACA, section 25(4)(a). The Aliens Control Amendment Act 76 of 1995 came into operation on 1 July 1996 with the exception of sections 11 and 12, which substitute the sections of the ACA dealing with the Immigrants Selection Board and permanent residence permits. These sections came into effect on 1 December 1996. It is somewhat inconsistent that the application of this criterion of national employment availability to an applicant’s occupation is to be made by a regional committee in respect of person intending to reside in that region.

14 ACA, sections 25(4)(b) and 25(5). These sections would have to be interpreted to include citizens within the meaning of the term “a person permanently and lawfully resident in the Republic”. To allow only permanent residents and not citizens to bring in family members would be unlikely to survive an equality challenge. Section 25(6) requires that a regional committee be satisfied that a marriage was not contracted for the purposes of evading any provision of the ACA. The administrative practice of Home Affairs is to require a job offer in order for spouses to be given permanent residence. Communication from Sheena Duncan of the Black Sash, 2 November 1996.

15 SACA, section 6(1).
16 SACA, sections 8(2)(a) and 9.
17 SACA, section 8(2)(b).
18 SACA, section 13(3).
19 Constitution of the Republic of South Africa 1996 as adopted by the Constitutional Assembly on 8 May 1996. This text failed to be certified by the Constitutional Court and was returned to the Constitutional Assembly. The Constitutional Assembly adopted a second new text on 11 October 1996 which does not differ from the earlier text in terms of sections cited in this chapter.

20 For instance, the term “desirable” may mean simply that the minister has not received information through diplomatic or official channels that the person would be an undesirable inhabitant. Cf. ACA, section 39(2)(b).

21 CRSA, sections 3(2)(a) and 20.
Indeed, although the racial clause to the assimilation requirement was removed in 1986, the requirement itself remained until 1996. Moreover, it was administered by the all-white Immigrants Selection Board, a body whose membership and procedures remained secret. See “Home Affairs frustrates would-be immigrants”, Mail and Guardian, 29 March 1996.


Equality claims could be based on other racist practices of prior South African immigration legislation such as the use of individualised temporary residence permits for white contract workers and the use of bilateral labour agreements for black contract workers.

Sections 24, 25 and 26 of the ACA set out the procedures regarding temporary residence permits. Several court cases have been fought over whether the Department of Home Affairs needs to give reasons for denial of temporary residence permits. As of September 1996, no court had imposed such a requirement despite the extremely broad provision of the Constitution (section 24(c)) that reasons in writing should be given for administrative action that affects a person’s rights or interests; see Klaaren, J, 1996. “So Far Not So Good: An Analysis of Immigration Decisions Under the Interim Constitution”, South African Journal on Human Rights 12, arguing that the South African courts have adopted an unsatisfactory rights-privileges approach to constitutional immigration litigation and that statutory provision for reasons, appeals and reviews should be made in respect of temporary residence permits.

Subject to the statutory exception regarding section 26(1)(b) work permit holders, Aliens Control Regulation 14(2) (published in GG 17254, RG 5716 (28 June 1996)) provides that an application for an immigration permit may be made only from the territory from which the applicant holds a passport or in which the applicant normally lives.

ACA, section 25(3).

ACA, section 25(10). Review proceedings are referred to in ACA, section 25(11)(a) and detailed in the Aliens Control Regulations of 28 June 1996, Regulation 15.

The standard of review to be exercised by the central committee in determining whether to confirm or set aside the decision, if any, of the regional committee is not specified. See ACA, section 25(12) and 25(13)(a) and Aliens Control Regulation 15(d).
31 ACA, section 39(2).
32 ACA, section 11(1).
33 There had previously been such a statutory right of appeal but it was removed in 1991.
34 Klaaren, J, “So Far Not So Good”.
35 Section 33(1). There is a possible additional constitutional challenge to the independence of this declaration process. This would be based on the provisions of the access to court as well as the administrative justice provisions. The argument would be that an internal separation of powers is required and that where the same officer has investigated a case, he or she ought not to make a determination in that case. See Marcello v Bonds 349 U.S. 302 (1955) (no due process violation where statute bars immigration official from serving as a judge in a case where he or she has previously acted as prosecutor or investigator). However, by referring the decision to the minister who will not have investigated the case, this challenge would probably be successfully met.
36 ACA, section 8. ACA, section 5 criminalises entry at a place other than a designated port of entry unless the minister has made an exemption for such a person or a category of persons in terms of subsection 3.
37 ACA, section 9.
38 ACA, section 10.
39 ACA, section 10(3).
40 With respect to the provision of refugee status, the constitutional protection of administrative justice would require at least the safeguard of an appeal process. See, e.g., Vijaynathan and Pusparajah v France, 15 EHRR 62 (1992) (European Court of Human Rights). Under current refugee/asylum procedures, such an appeal process is provided for all asylum seekers except for those in the proximity of the Mozambican border. Applications for refugee status may be rejected in such areas by a two-official Eligibility Committee established by the Committee for Refugee Affairs for this purpose if the Eligibility Committee reaches consensus that the application is “manifestly unfounded”. See Asylum Procedures 3.9 and 5.4 of the Voluntary Repatriation Agreements to Give Effects to the Basic Agreement and the Tripartite Agreement. Without evidence on how these procedures work in practice, it is unclear whether the procedures are a valid limitation of the constitutional guarantee of administrative justice. The Department of Home Affairs circulated a draft copy
of a refugee bill for comment on 23 September 1996 which makes provision for a similar appeal procedure.

ACA, section 30.

ACA, section 27(3). Senior officials in the Department of Home Affairs have indicated that it is departmental policy not to take persons who come into the offices into custody. Department interview, 9 September 1996.

ACA, section 26(7).

Section 7(1) may also provide such arresting authority. Note that section 7 refers only to immigration officers, while section 53(1) refers to both immigration officers and police officers. Section 7(1) does not have a statutory requirement of reasonable grounds. Such a requirement may be implied in the statute in order to save it from constitutional review, although it is possible that the authority of an immigration officer at the border will be subject to a lesser standard of review than the authority of an immigration officer or police officer within the Republic.

While a conviction would seem to be necessary before a person became subject to removal, the statutory language is clear on this point only in sections 45 and 46.

In making this determination, the minister may consider the circumstances of the offence, previous convictions, and “family affairs”.

A recent case extends the applicability of the written representations to the minister procedure of section 52(1) beyond detention cases deriving from sections 9 or 10 to detention cases deriving from the provisions of section 7 where persons could be declared prohibited persons but are not and are nonetheless detained. The case might be interpreted to extend the applicability procedure to removals although it did not do so on its facts. See Eddie Johnson v Minister of Home Affairs and Another, Case No. 15630/1995 (CPD) (14 August 1996) (Chetty J).


ACA, section 55(1).

ACA, section 55(3)(c).

In addition, a recent provincial division court decision has extended the applicability of the section 52(1) procedure of making written representations to the minister to at least prolonged periods of detention. See supra, note 48.

This is the same standard that existed for all detentions before 1 July 1996. See ACA, section 55(2) (superseded).
ACA, section 55(5). It is not clear if this internal review procedure would also be applicable to any section 7 sequential detention lasting more than 30 days.

One lower court has held that detention under the Aliens Control Act is an administrative or executive act or conduct granting the Supreme Court jurisdiction over its constitutionality. See Eddie Johnson v Minister of Home Affairs and Another, Case No 15630/1995 (14 August 1996), (Chetty, J) (CPD).

ACA, section 54(8)(a).

ACA, section 59(1).

S v Zuma, 1995 (2) SA 642 (CC).

The examples given in this section are by no means comprehensive and are given only to suggest the scope of the issue. Other categories of non-citizens’ rights for further investigation include the capacity to use the courts, freedom of expression, rights to own property, military service and taxation.

To my knowledge, no work has been done on restrictions contained in municipal by-laws. An audit of provincial and local government legislation should be undertaken to determine what legal provisions bear upon non-citizens.

“Post-apartheid S Africa targets illegal migrants”, Los Angeles Times, 7 October 1996. This article quotes a senior Department of Home Affairs official as stating: “The schools, clinics, hospitals, universities, all those institutions that are [funded] by government, have been requested not to provide services to these people.”

Baloro and Others v University of Bophuthatswana and Others, 1995 (4) SA 197 (BSC) (Friedman, JP) (limitation on promotion of non-citizen teachers by university unconstitutional); Larbi-Odam and Others v Member of the Executive Council for Education and Another 1996 (4) All SA 185 (B) (Waddington, J) (limitation on permanent hiring of non-citizen teachers by former homeland constitutional).

Baloro at 247A; Larbi-Odam at 185.

See citations to other sources supporting this proposition in Klaaren, J, “So Far Not So Good”.

Sections 21(3) and 22.

At times, the Baloro court treated the grounds of discrimination broader than that of alienage, terming the discrimination at issue that of “ethnic or national origin”. Baloro at 247J and 248B. The report of the Larbi-Odam case is a summary of the judgment, but
it is clear from the summary that the court found discrimination in terms of section 8 of the interim Constitution.

66 Such a result is also supported by the anti-subordination principle that arguably underlies this section. See Kentridge, “Equality”, in Constitutional Law of South Africa, pp. 14-24. Moreover, the Constitutional Court decision of Brink v Kitshoff, CCT 15/95, supports the results of these cases. Firstly, Brink recognises the possibility of non-listed grounds of systematic discrimination (at para 41) in equality jurisprudence. Secondly, in determining the scope of section 8’s protections it also cites article 26 of the International Covenant of Civil and Political Rights (at para 34) which includes national origin on its list of protected grounds.

67 Distinctions among various classes of non-citizens will also be subject to likely constitutional review.

68 Brink v Kitshoff, CCT 15/95 at para 46. Although the Baloro court did not say so explicitly, it did a sort of proportionality exercise when it considered whether there could be a valid limitation of the right to equality (e.g. at 247D/E and at 248B).

69 Section 36(1).

70 See Neuman, G, 1995. “Aliens As Outlaws: Government Services, Proposition 187, and the Structure of Equal Protection Doctrine”, UCLA Law Review 42. One could read Baloro to support this proposition. Baloro drew strength from the ideals of academic freedom, stating “[t]he qualification for appointment to the staff of a university is, and should be, merit and suitability for the position, and not ethnic or national origin”. At 247].

71 Section 25(3) is mandatory but other provisions in the ACA such as section 10 grant discretion for the making of such conditions. ACA, section 32 could be argued to indirectly infringe the right of freedom of movement by prohibiting persons from employing a non-citizen subject to such a condition.

72 I am referring here to preclusion in terms of “covering the field”. See Klaaren, J, “Federalism”, in Constitutional Law of South Africa, 5-2 to 5-10. This form of federalism/pre-emption challenge is only one of three available. It will also be possible to argue that immigration is an exclusive competence of the national government (with the result that provinces could not argue that deterring entrance of aliens was an interest served by any restriction) although such a claim is unlikely to succeed. It seems more likely that the immigration competence is concurrent. It will also be possible to argue for pre-emption in a third sense, that the specific scheme enacted by the municipal legislation
(such as a city-specific scheme of employer sanctions) directly interferes with the national scheme of the Aliens Control Act 5-8. This challenge is likely to have substantial success.
CHAPTER FOUR

IMMIGRATION AND THE COURTS

ANTON KATZ

The question of who may enter and remain in a state is regularly a matter for the executive and legislative branches of government.¹ The judiciary's general role is to ensure that the other branches of government act in a lawful and constitutional manner. Immigration decisions bear directly on where and how a person may live, with whom and even sometimes whether a person may live at all.

On the other hand, states exist in order to serve and protect individual human beings. Immigration often involves issues regarding membership. The potential stakes are high and thus potential immigrants and the executive have strong reasons for wanting to be sure
that immigration decisions are made correctly. Courts in South Africa have certainly not been swamped by immigration matters. A range of factors may have contributed to this including government policies, a lack of desire to immigrate to South Africa, a lack of resources to put up a legal challenge by those facing deportation or repatriation and South Africa’s internal problems. A new Constitution, a new government with new policies, and now persons applying for protection as refugees in South Africa have led to several interesting court decisions. This chapter will attempt to describe how they have dealt with problems arising from the provisions of the Aliens Control Act of 1991 (as amended).

**The Jurisdiction of the Courts**

The Aliens Control Act contained a clause that ousted the jurisdiction of the court “to review, quash, reverse, interdict or otherwise interfere with any act, order or warrant performed or issued under the act”. In proceedings before courts, officials of the Department of Home Affairs have sometimes relied on the clause and argued that the court could not entertain the claim by “the alien”. However, courts are generally reluctant to be ousted from adjudicating disputes and have exercised jurisdiction in every matter that has arisen.

The Aliens Control Act provides for criminal sanction in respect of various acts performed by both non-citizens and South African citizens. However, most criminal trials take place in lower courts (Magistrates’ Courts), the decisions of which are not reported. There is no published research into the lower courts’ decisions and practices in respect of the act. The problems that Magistrates’ Courts confront when dealing with accused facing charges in terms of the act or those accused of a crime but who are not legally entitled to be in South Africa are as follows:

1. Entitlement to legal aid.
2. Entitlement to bail and, if so, in what circumstances.
3. Ability of the accused to understand the nature of the proceedings, since this is often limited as a result of language differences and a lack of interpreter facilities.

Appeals from the Magistrates’ Courts are heard in the High Court (formerly the Supreme Court) and may be reported. There is only one reported decision dealing with criminal charges under the act. A 51-year-old woman had been found guilty of aiding and abetting illegal immigration. Despite the fact that she was a first offender and in fixed employment when the trial took place the magistrate sentenced her to three years imprisonment. The Appellate Division reduced her sentence
to direct imprisonment of one year. The comments by the judges are worth noting:

[I] can well see the relative insufficiency of imprisoning an impoverished Mozambiquean (sic) who might find a short period of imprisonment well worth the risk. Any imprisonment, long or short, would cost the state money and the tendency would be to deport the prisoner after a short time. The ones to deter are the South Africans who make illegal immigration by others easier and who, unlike the illegal immigrants, would face the prospect of serving much of their sentence. One may have sympathy with an illegal immigrant such as Josiah who is, after all, but trying to make a living by his labour. But national states have the right and duty to protect their own citizens against illegal immigrants. Such an immigrant becomes another competitor for housing, hospitalisation, and many other things in short supply. He might even succeed in casting a vote.

The court found that persons who aided and abetted illegal immigration were unlikely to be moved by charity. The purpose of the aiding “was gain and not to assuage hunger”. The court found that the legislature treated the crime as serious and it was inappropriate to fine the person because a fine would probably be viewed as venture capital. Thus imprisonment was an appropriate sentence.

TRANSPARENCY AND IMMIGRATION DECISIONS

A trilogy of recent Supreme Court decisions went against the applicants in challenges to the Department of Home Affairs regarding aspects of their immigration applications. The first case involved two Chinese nationals, Xu and Tsang. Xu applied to the department for a temporary residence permit (to study in South Africa) and Tsang applied for an extension of his temporary residence permit. Both applications were refused by the department, which declined on request to supply reasons for the refusals. Xu and Tsang then launched an application to the Transvaal Provincial Division of the Supreme Court asking for an order obliging the department to furnish reasons in writing for the rejection of their application for the permit and extension. The court application was based on section 24 (c) of the interim Constitution, which provided that:

> every person shall have the right to be furnished with reasons in writing for administrative action which affects any
of his or her rights or interests unless the reasons for such action have been made public (emphasis added).

The court rejected the application to compel the department to provide reasons. Judge Stafford held that Xu and Tsang had no rights or interests that were affected by the refusal to grant them the permit and extension. He furthermore held that they had no legitimate expectation that they would be allowed to stay in South Africa and that they had no interest in continued residence in South Africa. It was within the exclusive discretion of the state who should be admitted within its territory. The court referred specifically to section 20 of the Constitution, which provides that every citizen has the right to enter and remain in South Africa. Non-citizens did not have that right and were thus not affected by the department’s administrative action in refusing to grant the permit and extension.

The court accepted for the purposes of the case that non-citizens in principle had the right to approach courts for relief in appropriate cases. Thus, it seems they are included in the term “every person” for constitutional purposes. The court concluded by agreeing with the argument of the Department of Home Affairs that chaos would break out in the department if every person – and the word “person” was emphasised – was entitled to know the reasons why their application was refused.

A similar justification for not supplying reasons for the rejection of applications for refugee status by Canadian immigration authorities was rejected by the Supreme Court in Canada. The Canadian court held that:

Certainly the guarantees of the Charter would be illusory if they could be ignored because it was administratively convenient to do so. No doubt time and money can be saved by adopting administrative procedures which ignore the principles of fundamental justice, but such an argument, in my view, misses the point.

It may be justifiable to fail to give reasons in certain circumstances on grounds of administrative convenience, but never in immigration circumstances.

The second court case involved a Bulgarian national called Naidenov. Interpol was searching for Naidenov because of his alleged involvement in a serious crime in Bulgaria. He sought to extend his temporary residence in South Africa in order to apply for political asylum. He approached the court on the basis of section 24 of the interim Constitution, like Xu and Tsang. He also relied on section 23 which provided that:
every person shall have the right of access to all information held by the state or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights.

Judge Spoelstra agreed with the Xu court in coming to the conclusion that Naidenov had no rights to exercise or protect and thus dismissed his application for an order obliging the department to provide him with all the information held by it in relation to his application for the extension.

The third case in the trilogy concerned a national of India.13 Parekh arrived in South Africa as a tourist in 1991. He applied for and was granted a permit to allow him to work on a temporary basis. The permit was extended from time to time until June 1994. He then applied for a permanent residence permit but his application was refused. Parekh’s attorneys wrote on two occasions requesting reasons for the refusal. The Director-General of Home Affairs informed him that it was standard practice that reasons for the refusal of applications for permanent residence were not provided, and that he would not be furnished with reasons. Parekh asked the court to order the provision of reasons. The court relied on Xu and Naidenov and decided that Parekh had no rights affected by the refusal to grant him permanent residence. It was held that:

once a state has an absolute discretion, it would ... never be obliged to give reasons for refusing anyone admission to its territory.14

These three decisions have all been heavily criticised.15 Pretorius argues that “the line of reasoning in this case is, with respect, archaic and a reminder of the typical executive-mindedness judges have often been accused of in the past. It appears to endorse the authoritarian and often arrogant attitude of the executive authority in dealing with aliens – and often citizens too”. Indeed, if administrative authorities have no obligation to provide reasons for their decisions there is fertile ground for arbitrariness, discrimination and corruption.

An important reversal of fortune for would-be immigrants and visitors came in the case of Foulds.16 Foulds, a citizen of the United Kingdom, made an application to the Immigrants Selection Board for a permanent residence permit in terms of section 26 of the Aliens Control Act. The board rejected his application and thereafter refused to provide reasons.

In 1982 Foulds had been granted permanent residence in South Africa, but this status had lapsed as he had been out of South Africa for a continuous period of five years. He had specialised technical knowledge regarding electromagnetic retarder technology and was recruited to come
to South Africa by a South African company. The Department of Trade and Industry supported the application for permanent residence as there were very few South Africans with the technical knowledge he possessed. Foulds applied to court for an order setting aside the board’s decision on the basis that the board had not followed a fair procedure and had not complied with the requirements of natural justice. The respondents in the case, the Minister of Home Affairs, the Director-General of Home Affairs and the Immigrants Selection Board denied that any of Foulds’s rights or interests were affected and said they were thus not obliged to furnish him with reasons for the rejection of his application for permanent residence. The decisions in Xu, Naidenov and Parekh were relied upon by the respondents.

The judge relied on foreign case law and came to the conclusion that the board was “obliged to disclose to the applicant adverse information obtained and adverse policy considerations and to give the applicant an opportunity to respond thereto. Because of its failure to do so its decision was fatally flawed”. The court set aside the board’s decision and gave instructions that the board should reconsider the application for permanent residence in a lawful and procedurally fair manner.

Judge Streicher ruled that it was unnecessary for him to rule on the constitutional law issues (the section 24 argument raised in Xu) because he could decide the matter without relying on them. He found that it was a reasonable and legitimate expectation that the board would properly and fairly consider the applicant’s application and give him an opportunity to deal with adverse information to his application. The court stated that it had no reason to believe that to require the respondents to inform Foulds of adverse information and of adverse policy considerations would constitute inappropriate judicial interference with the administration. Nor would major administrative problems be caused.

The decision is welcome. Decisions by the Department of Home Affairs must be subject to accountability, openness and transparency in the same way as other organs of state. Several factors may indicate why the individual won this battle with Home Affairs. The department’s decision was on review and the court had simply to decide whether that decision to reject Foulds was fair or not. Unlike the trilogy of cases discussed the applicant did not ask simply for an order compelling the department to provide reasons. The profile of the bench may have contributed to the decision. The judge in Foulds’s case has a reputation for having represented parties fighting apartheid laws rather than parties seeking to uphold them. Another factor may have been the argument by the respective counsel in the cases.
RECENT REFUGEE CASES

Despite the fact that in 1995 and 1996 South Africa became a party to three conventions dealing with the status of refugees, there is no legislation dealing specifically with refugee affairs. Persons who apply for refugee status and asylum are dealt with in terms of the Aliens Control Act. Persons who apply for refugee status are immediately granted a permit to remain in South Africa pending the outcome of the application for asylum. Work and study are usually authorised during this period. Two interesting decisions with respect to asylum seekers came out of the Cape Town Supreme Court.

In the first, Thomas Muhire applied for asylum in South Africa claiming to be a Tutsi from Rwanda who had fled the civil war in that country. The Department of Home Affairs accepted that he was a refugee, but refused to grant him asylum on the ground that he had arrived in South Africa via Zambia. The department was of the view that South Africa did not have an obligation to provide him with asylum as he could seek asylum in Zambia. Muhire requested access to the relevant file in the possession of the department. The request was refused on the basis of the Naidenov decision. Muhire was then told that he had 21 days to leave South Africa.

Muhire had obtained work in Cape Town and had been promoted twice. He had also enrolled as a student of engineering at a technical college. He launched an urgent application to the Supreme Court asking for an order that he be allowed to remain in South Africa pending a review of his application to set aside the decision by the department to refuse him asylum. The response by the department was that they would give him permission to remain in South Africa until the finalisation of the review, but that he could not work or study during that time. The court was thus requested to make an order directing the Minister of Home Affairs to grant permission to work pending the finalisation of the review. Review proceedings can take as long as a year to be heard and completed. The judge attempted to persuade counsel for the minister to give the sought-after permission. The minister would not give such permission.

The court relied on authority to rule that it did, indeed, have the jurisdiction to grant the order sought. Two requirements were needed in order to satisfy a court that the applicant was entitled to the relief. The applicant had to make out a strong prima facie that the department's refusal to grant him asylum would be set aside at the later review proceeding. It was also necessary to show that special circumstances existed in order to be granted the temporary relief. The court found that
the applicant had not adduced the necessary evidence to show that the
decisions made by the department should be set aside. It also found that
the applicant had not put any evidence that, because of exceptional
circumstances, the minister should be directed to issue a temporary work
permit. The court held:

There, for instance, is no evidence regarding whether his
job will remain available and whether he possesses the
necessary financial wherewithal to survive until the
aforementioned applications have been finalised.

Perhaps emboldened by this decision, the department refused to give
Kabuika and his family permission to remain in South Africa pending
the finalisation of their review proceedings.23 Kabuika and his wife and
three children were citizens of Zaire (now the Democratic Republic of
Congo) who claimed to be persecuted in that country on the grounds of
their political opinion. They sought asylum in South Africa. The
application for asylum was rejected by the Department of Home Affairs
and they were required to leave South Africa. They approached the
Supreme Court in Cape Town asking for an interdict directing the
minister and director-general to extend to them temporary permits
allowing them to remain in South Africa pending the finalisation of
review proceedings to set aside the decision to reject their claims for
asylum. The department relied on the ouster clause to argue that the
court did not have the jurisdiction to interfere with the department's
decisions.24 The reasoning in the Xu line of cases was also relied upon. It
was argued that Kabuika had no rights or interests in remaining in South
Africa and was thus not entitled to the relief he sought.

The court ruled in favour of the applicants on the following basis.
Chapter 3 on Fundamental Rights in the interim Constitution bound all
legislative and executive organs of state at all levels of government.25
The department was thus bound to apply the provisions of the chapter
on fundamental rights. The court found that the applicants’ version of
their movement in Zaire was obviously misunderstood by the department
in deciding whether or not they were refugees. The department also
misinterpreted the allegations by Kabuika that conditions in Zaire had
not improved and they accordingly would suffer severe persecution, if not
death, if they were returned at that stage. The court found this on the
basis of reports from Amnesty International and other international
bodies. The fact that Kabuika had been in South Africa for almost four
years with no apparent difficulties being raised favoured the granting of
the interdict. The minister was directed to permit the family to remain in
South Africa under the same terms and conditions that applied before
the rejection of his application for asylum.26
In a major breakthrough the Department of Home Affairs consented to an order being made that all rejections of applications for refugee status and asylum should now be accompanied with the reasons for the refusal. It seems that the policy makers in the department are at last beginning to recognise that South Africa is now a constitutional state and that provision of the reasons for decisions are part and parcel of their responsibility. This applies, at least, in the case of applicants for refugee status. It will be interesting to see whether this attitude applies equally in the case of other immigration decisions. It is also significant that it took a full-blown application to the Supreme Court for the department to agree to provide reasons. Why could the reasons for rejected applications for asylum not have been supplied without the need for recourse to the courts?

The final case to be discussed here is the Eddie Johnson case. Johnson arrived in South Africa during 1992. He claimed to have been born in the early 1970s in South Africa, left when he was three and lived in Zambia until his return to South Africa. He successfully applied for an identity document registering him as a citizen. He lived and worked in Cape Town and voted in the April 1994 elections. One day in August 1994 at 6 am “about 10” persons who later turned out to be immigration officers burst into his home in Woodstock, Cape Town. He was arrested and charged with being a prohibited person. He was detained at Pollsmoor prison pending the finalisation of four criminal charges brought against him in terms of the Aliens Control Act and other legislation. On 21 December 1994 he was found not guilty of three of the charges and guilty of one. In respect of the guilty verdict he was sentenced to a fine of R2 500 or three months imprisonment. The whole sentence was totally suspended for five years on certain conditions. This meant he could leave the court and detention and return to his job. It also meant that he would be able to spend time with his one-month-old child.

The immigration authorities believed otherwise. As Johnson attempted to leave the court building immigration officials re-detained him. His continued detention was ostensibly authorised in terms of various provisions of the Aliens Control Act. No further charges were brought against Johnson, who remained in custody throughout 1995. On 18 December 1995 the University of Cape Town Legal Aid Clinic assisted Johnson in bringing an application as a matter of urgency for his release. The Minister of Home Affairs opposed the application, contending that the detention was lawful in terms of the act and Johnson was thus not entitled to his release. Immigration officials suspected Johnson was not telling the truth about his origins. The attitude of the department was that he was the “author of his own
misfortune” and he would only be entitled to his release once “he told them where he was really from”. He was forced to undergo interviews with the Zambian and Tanzanian High Commissioners to determine if he was Zambian or Tanzanian. Neither could find that he was a national of their countries. This is hardly surprising given that Johnson’s response to questions such as “Are you Zambian?” was “No, I am not.”

On 16 January 1996 Johnson was released. The only outstanding issue was responsibility for the costs of the application for his release. Costs are usually paid by the losing party. The issue of costs could not be resolved and the Cape Town Supreme Court was required to determine who would have been successful in the application brought by Johnson. In a thorough judgment by Judge Chetty, it was held that the detention was unlawful in that it did not comply with the requirements of the Aliens Control Act. A number of sections of the act were interpreted in order for the court to conclude that Johnson was not a prohibited person. The court stated:

If the act is capable of more than one meaning a court will give it the meaning which least interferes with the right of the liberty of the individual, i.e., the meaning should be adopted in favourem libertatis.

The court also found that certain of Johnson’s rights entrenched in the interim Constitution had been violated. The court found the prolonged detention to be harsh and unjust. His rights to freedom and security were not the only rights violated. The arbitrary conduct by the minister violated his right to dignity. Johnson has sued the minister for R100 000 in damages for the unlawful arrest, and that case is now pending in the Magistrate’s Court.

CONCLUSION

Perhaps the case of Johnson needs to be juxtaposed with the comments by the Appellate Division in the aiding and abetting case discussed above. The statement that “I can well see the relative insufficiency of imprisoning an impoverished Mozambique who might find a short period of imprisonment well worth the risk” certainly applies to Johnson. Eighteen months in prison, of which 14 are without trial for the potential “crime” of not telling the truth about one’s origins, hardly fits into a culture of respect for the rule of law and human rights.

Perhaps the words of a judge from another time in South Africa’s past are worth noting when he said:
I do not think I can stress too strongly the duty which lies on officials entrusted with the administration of the immigration laws, often drastic and even harsh in their operation, of observing strictly and punctiliously the safeguards created by the act.34

The Aliens Control Act was promulgated by the government in the apartheid era. When it was drafted apartheid considerations were taken into account. While there have been human rights-orientated interpretations by courts of various provisions of the act, there is nevertheless a strong bias in favour of control in the legislation. The name of the act itself suggests an act of control rather than one which regulates and harmonises the increasing cross-border flow of human beings. The Constitution provides excellent means for courts to put a brake on arbitrary administrative and executive action in the immigration field. Surely the best solution lies in legislation which reflects a spirit of accountability, openness and transparency?

Notes


4 Section 55 (1) of the act applied to persons being dealt with as prohibited persons. The ouster clause has been substituted by the amendment, which came into force on 1 July 1996.

5 See heads of argument on behalf of the Minister of Home Affairs in two unreported decisions in the Cape Province Division of the Supreme Court, both on file with the author: Ko-Chiang Augustus CHU v Minister of Justice, case no 15598/94 and Kabuika and Others v Minister of Home Affairs and Others, [1997] 2 All SA, 335(c).

6 Aliens Control Act (ACA), sections 57 and 58.

7 There are two principal tiers in the structure of the courts in South Africa: superior courts consisting of the provincial and
local divisions of the High Court (formerly Supreme Court) and lower courts consisting of mainly of Magistrates’ Courts. Decisions of lower courts are never reported, whereas a limited number of superior court decisions are reported. Whether a particular decision is reported depends on the reporter’s discretion as guided by the judge in the case. The reporters are commercial publishers.

8  S v Motsoeneng, 1995 (1) Prentice-Hall Weekly Legal Service H.21, p. 65, 19 May 1995 (AD). The accused was found guilty of a contravention of provisions of the predecessor to the 1991 act [Immigration Laws Amendment Act 49 of 1984], but the Appellate Division acted as if the 1991 act were controlling. See S v Quita 1974 (1) SA 544 (T).

9  Xu v Minister van Binnelandse Sake 1995 (1) SA 185 (T), 1995 (1) BCLR 62 (T).

10  Re Singh and Minister of Employment and Immigration 17 DLR (4th) 423 at 469.

11  The classic example is in the field of labour. If 10 000 people apply for one position advertised, it may be justifiable that reasons cannot be supplied to all the rejected applicants.

12  Naidenov v Minister of Home Affairs 1995 (7) BCLR 891 (T).

13  Parekh v Minister of Home Affairs 1996 (2) SA 710 (DSCLD).

14  At 715 B.


16  Foulds v Minister of Home Affairs 1996 (4) SA 137 (WLD), [1996] 3 All SA 478.

17  Cases from New Zealand, Australia and the United Kingdom were cited in the judgment.

18  At pages 149 J - 150 A.

19  At 149 E - F.

20  The permits are issued in terms of section 41, which is a provision designed to “regularise” the presence of prohibited persons.

21  Thomas Muhire v Minister of Home Affairs, unreported decision of the CPD, case no. 4259/96, judgment by Van Reenen, J, on 20 May 1996. It later transpired that there was some doubt as to the accuracy of Muhire’s claim to be Rwandan, and he is no longer in South Africa.
22 Airoadexpress (Pty) Ltd v Chairman, Local Transportation Board, Durban 1986 (2) SA 663 (AD).
23 Kabuika and Others v Minister of Home Affairs and Others, [1997] 2 All SA, 335(c).
24 See heads of argument on behalf of the Minister of Home Affairs, the Director-General of Home Affairs and the Standing Committee for Refugee Affairs on file with the author.
25 Section 7 (1) of the interim Constitution provides: “This Chapter shall bind all legislative and executive organs of state at all levels of government.”
26 Authorisation to work was a term of the “section 41 permit” originally issued to the asylum seekers.
27 Pembele and Others v Appeal Board for Refugee Affairs, unreported order, Cape Provincial Division case no 15931-96.
29 Eddie Johnson v Minister of Home Affairs, 1997 (2) SA 432 (CPD).
30 Ibid., delivered on 14 August 1996.
31 Judge Chetty cited the well-known case of R v Sachs 1953 (1) SA 392 (A) at 399H as authority for this proposition.
32 See footnote 8.
33 On the assumption that he was not in fact born in South Africa.
34 Kazee v Principal Immigrations Officer and Others, 1954 (3) SA 759(w), p. 763.
CHAPTER FIVE

SOUTH AFRICAN IMMIGRATION LAW: AN INTERNATIONAL PERSPECTIVE

MELVIN WEIGEL

Immigration law – including the grant of right of entry, right to work and right to remain permanently, and the power to expel – has been solidly within the sphere of national sovereignty for as long as there have been nation-states. Blackstone in his Commentaries on the Law of England (1765) maintained that “aliens” could not own land or inherit, since these branches of the law were tied in with the concept of one’s permanent allegiance to the king under whom one was born:
An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and 20 years hence as well as now.

On expulsion of unwanted immigrants, Verzijl states that:

Expulsion is still at present a matter which is generally held to fall in principle within the discretion of the executive branch of the government – usually within the limits set by the legislature – but national laws differ as to the availability of legal means of redress by higher administrative authorities or of appeal to the courts.¹

The classical view of national sovereignty has been echoed by the US, Japanese and Canadian Supreme Courts, among others, on many occasions.² This view has been somewhat tempered by international law and domestic human rights law. Support for this process has come from a natural law framework and a moral imperative within the three world religions of the Abrahamic tradition. Both recognise the vulnerability of the foreigner and the universality of the phenomenon of migration and travel with all their causes – religious, political, economic and ecological.³ These natural law and international law arguments have never prevailed over the doctrines of national sovereignty, but they have helped to keep the sovereigntists’ and tribalists’ worst excesses in check.

**Human Rights Instruments**

In the post-war and post-colonial eras there have been a variety of international human rights instruments. For the most part they do not distinguish between citizens and non-citizens with respect to most of the fundamental rights. Once again there is a balance, since it is inherent in the nation-state system that some persons will be citizens and some not. However, the major human rights instruments place procedural restrictions on the power of states to limit the rights of or expel lawfully-present non-citizens. The International Covenant on Civil and Political Rights, for example, states:

- Article 12(1). Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
- Article 12(3). The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national
security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present covenant.

- Article 13. An alien lawfully in the territory of a state party to the present covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Organisation of African Unity's Charter on Human and People's Rights, known as the Banjul Charter, makes certain provisions for migrants:

Article 12.

- Every individual shall have the right to freedom of movement and residence within the borders of a state provided he abides by the law.

- Every individual shall have the right to leave any country, including his own, and to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.

- Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.

- A non-national legally admitted in a territory of a state party to the present charter may only be expelled from it by virtue of a decision taken in accordance with the law.

- The mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.4

The relevant conventions of the International Labour Organisation (ILO) include:

- Convention 602 concerning equality of treatment for national and foreign workers, as regards workmen's compensation for
accidents, 5 June 1925, modified in 1946. This convention was ratified by the Union of South Africa.

- Convention 97 concerning migration for employment, 1 July 1949. Each member of the ILO undertook to provide information on national policies, laws and regulations relating to emigration and immigration and information relating to conditions of work, to the ILO and other members.

- Convention 143 concerning migration in abusive conditions and the promotion of opportunity and treatment of migrant workers, 24 June 1974. This convention emphasises the damaging social consequences of irregular migration and explicitly includes undocumented migrant workers and their families in respect of rights arising out of past employment as regards remuneration, social security and other benefits, and requires the protection of basic human rights of all migrant workers.

Many of the other ILO conventions dealt collaterally with conditions of migrant workers. The ILO has also sponsored studies on conditions of migrant workers in areas where they are present in large numbers, for example, the Arab Gulf countries. However, there was a growing feeling that a human rights instrument of general applicability was required in the labour migration context.

On 13 December 1985 the UN General Assembly therefore passed the Declaration on Human Rights of Individuals Who Are Not Citizens of the Countries in Which They Live. After years of intense debates in the drafting committee, undocumented migrants were included in the class to be protected. This declaration was merely a prelude to the adoption in 1990 by the General Assembly of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

In this convention the term “migrant worker” refers to “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a state in which he or she is not a national”. Thus, it not only encompasses persons who enter the state as contract workers, but also those who have entered a state for reasons other than employment and worked subsequently, for example, ex-students, tourists and de facto refugees (although refugees and stateless persons are expressly excluded). It would also extend to those who have entered a state with permanent residence and not yet become naturalised. Various subcategories such as “frontier workers”, seafarers, fishermen, “seasonal workers”, “project-tied workers” and workers on offshore installations, investors, students and trainees are partially or entirely excluded.

Article 7 of the convention provides for non-discrimination for all migrant workers and their families within the territory of the state or
subject to its jurisdiction without regard to sex, language, race, political opinion, national or ethnic origin, age, economic position, marital status and so on. The convention then goes on to specify the right to freedom of religion and political opinion, the right to educate their children according to their convictions, the right to privacy and protection of the law against interference or attacks and to liberty and security of the person. Several provisions apply to both documented and undocumented migrant workers:

Article 15. No migrant worker or member of his or her family shall be arbitrarily deprived of property, whether owned individually or in association with others. Where, under the legislation in force in the state of employment, the assets of a migrant worker or a member of his or her family are expropriated in whole or in part, the person concerned shall have the right to fair and adequate compensation.

Article 16(5). Migrant workers and members of their families who are arrested shall be informed at the time of arrest, as far as possible in a language they understand, of the reasons for their arrest and they shall be promptly informed in a language they understand of any charges against them.

Article 17(3). Any migrant worker or member of his or her family who is detained in a state of transit or in a state of employment for violation of provisions relating to migration shall be held, in so far as is practicable, separately from convicted persons or persons detained pending trial.

Article 17(5). During detention or imprisonment, migrant workers and members of their families shall enjoy the same rights as nationals to visits by members of their families.

Article 17(8). If a migrant worker or member of his or her family is detained for the purpose of verifying any infraction of provisions relating to migration, he or she shall not bear any costs arising from this.

Article 20(1). No migrant worker or member of his or her family shall be imprisoned merely on the grounds of failure to fulfil a contractual obligation.

Article 20(2). No migrant worker or member of his or her family shall be deprived of his or her authorisation of residence or work permit merely on the grounds of failure to fulfil an obligation arising out of a work contract unless fulfilment of that obligation constitutes a condition for such authorisation or permit.
Article 22(1). Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.

Article 22(3). The decision (of expulsion) shall be communicated to them in a language they understand. On their request where not otherwise mandatory, the decision shall be communicated to them in writing and, save in exceptional circumstances on account of national security, the reasons for the decision likewise stated. The persons concerned shall be informed of these rights before or at the latest at the time the decision is rendered.

Article 22(6). In the case of expulsion, the person concerned shall have a reasonable opportunity before or after departure to settle any claims for wages and other entitlements.

Article 25(1). Migrant workers shall enjoy treatment not less favourable than that which applies to nationals of the state of employment in respect of remuneration (overtime, hours or work, weekly rest, holidays, termination, minimum age of employment).

Article 25(2). It shall not be lawful to derogate in private contracts of employment from the principle of equality of treatment referred to in (1).

Article 25(3). States shall take all appropriate measures to ensure that migrant workers are not deprived of any rights derived from this principle by reason of any regularity in their stay of employment. In particular, employers shall not be relieved of any legal or contractual obligations, nor shall their obligations be limited in any manner by reason of any such irregularity.

Article 27(1). ... social security ... same treatment as nationals in so far as they fulfil the requirements provided for the applicable legislation of that state and the applicable bilateral and multilateral treaties.

Article 27(2). Where the applicable legislation does not allow migrant workers and members of their families a benefit, the states concerned shall examine the possibility of reimbursing interested persons the amount of contributions made by them with respect to that benefit on the basis of the treatment granted to nationals who are in similar circumstances.
Article 30. Each child of a migrant worker shall have the basic right of access to education on the basis of equality of treatment with nationals of the state concerned. Access to public pre-school educational institutions or schools shall not be refused or limited by reason of the irregular situation with respect to stay or employment of either parent or by reason of the irregularity of the child’s stay in the state of employment.

This catalogue of rights of documented as well as undocumented migrant workers and their families listed in part III of the convention closes with the proviso:

Article 35. Nothing in the present part of the convention shall be interpreted as implying the regularisation of the situation of migrant workers or members of their families who are non-documented or in an irregular situation or any right to such regularisation of their situation, nor shall it prejudice the measures intended to ensure sound and equitable conditions for international migration as provided in part VI of the present convention.

Part IV of the convention outlines the additional rights granted to documented migrant workers and the members of their families, including equality of treatment with nationals in relation to access to educational institutions, to vocational guidance, vocational training, to housing, including social housing, to co-operatives and to participation in cultural life (articles 43 and 45). Part IV also contains other provisions concerning choice of remunerated activity, recognition of foreign qualifications, self-employment, protection against dismissal, access to public work schemes and so on.

Seasonal workers ("whose work by its character is dependent on seasonal conditions and is performed only during part of the year") are eligible for the part IV rights (presumably also part III) to the extent that these are compatible with their status. More interestingly for the Southern African situation, article 59, paragraph 2 provides:

The state of employment shall, subject to paragraph 1 of the present article, consider granting seasonal workers who have been employed in its territory for a significant period of time the possibility of taking up other remunerated activities and giving them priority over other workers who seek admission to that state, subject to applicable bilateral and multilateral agreements.
This is to be read in conjunction with article 69, paragraph 2:

Whenever state parties consider the possibility of regularising the situation of such persons in accordance with applicable national legislation and bilateral or multilateral agreements, appropriate account shall be taken of the circumstances of their entry, the duration of their stay in the states of employment and other relevant considerations, in particular those relating to their family situation.

Frontier workers (or "commuters"), project-tied workers and itinerant workers are also granted some part IV protection.

The convention also provides for the establishment of a Committee for the Protection of the Rights of All Migrant Workers. It has a reporting mechanism and a complaints mechanism. The latter, however, can only be initiated by state parties or individuals against state parties who have voluntarily agreed to submit to the jurisdiction of this committee (countries in the Arab Gulf are unlikely, even if they were to ratify the convention, to submit to this committee). Individuals initiating complaints must have first exhausted domestic remedies (unless the committee deems these are unreasonably prolonged or unlikely to bring effective relief).

Article 79 of the convention sets out the balance between national sovereignty and the limitations provided by the convention:

Nothing in the present convention shall affect the right of each state party to establish the criteria governing admission of migrant workers and members of their families.

Concerning other matters relating to their legal situation and treatment as migrant workers and members of their families, state parties shall be subject to the limitations set forth in the present convention.

There was considerable debate at the UN over whether this convention constituted a codification of customary international law or whether it would legally bind the signing parties. The former position was held by representatives of Morocco, Senegal, the Soviet Union, Algeria, and India, while the latter was held by the United States and the Federal Republic of Germany. Similarly, the United States, Canada and France emphasised that the reserved domain of state power expressed in article 79 by the word "admission" was not diminished in any way by the rights provided in the convention. On the other hand, representatives of Sweden, Cape Verde and Algeria felt that the very mention in article 79 of a reserved domain of territorial sovereignty ran the risk of jeopardising the full application of the rights provided in the convention.⁵
One could see in these ideological line-ups a reflection of the current South African government and people’s dilemma with respect to self-image and self-interest. Do they side with those who see themselves beleaguered in the fortress or the lifeboat (depending on one’s metaphor of choice) or do they side with those whose ideology and deeds were more activist in their opposition to apartheid?

In any event, one can wager that ratification by a large number of states, especially of wealthy states, will take a number of years. As of 31 December 1995 the convention had been either signed or ratified and acceded to, by only eight countries: Colombia, Chile, Egypt, Mexico, Morocco, the Philippines, Seychelles and Uganda. However, despite this slow start, I believe that the convention, if it is not already customary international law, will eventually become so (minus a few stipulations). The states that have not ratified it and have not submitted to its dispute and complaint mechanism will openly flout the rights provided for in the convention at their peril.

The reason for my affirmation is that most international human rights instruments make no distinction between citizens and non-citizens in most of the provisions on fundamental rights. The International Covenant on Civil and Political Rights requires state parties to protect persons “within (their) territory and subject to (their) jurisdiction”. All of the human rights conventions, including the European and the African, specifically use the word “citizen” in some provisions and “individual” in others. Many of the stipulations found in the convention concern levels of minimum treatment that should also be afforded to nationals.

SOUTH AFRICAN LAW AND INTERNATIONAL CONVENTIONS

Looking at international human rights conventions and the migrant workers convention, there are at least five areas where South African law or governmental practice could possibly be found to conflict with international norms:

1. The electrified fence on one or more of South Africa’s borders would be likely to conflict with a number of provisions, such as protection of life and physical security, and prohibition of cruel and unusual treatment. I am unaware of any precedents for this practice in other border areas. The United States–Mexico border has electronic sensors and several fences, but no charges that would kill or injure. The same is true of the German–Polish border. The only areas where would-be illegal immigrants regularly die in attempting to enter are where the barriers are natural, for example, Africans swimming across the Strait of Gibraltar to Spain, Haitians in small boats off Florida, swimmers
from China to Hong Kong or where the immigrants are smuggled in dangerous modes of conveyance not meant for humans (for example, Rumanians in containers bound for Canada, or in sealed trucks entering the Gulf countries). In each of these cases, where the barriers are not erected by the receiving state, there is a humanitarian duty by the receiving state to prevent loss of life where possible; a fortiori when the receiving state is itself the source of the dangerous obstacles. There is an extradition case for murder being heard in Halifax, Canada involving Rumanian stowaways who were allegedly put out to sea by the Taiwanese crew. Despite the argument over facts and over which state would have jurisdiction to try the case, it is not disputed by Canada, Rumania or Taiwan that the fact that the Rumanians were would-be illegal immigrants did not in any way imply a forfeiture of their right to life and security.

2. The Aliens Control Act (ACA) provides for selection by regional committees according to the declared province of destination. It also provides that the regional committee can authorise the issuing of an immigration permit “subject to any condition which the committee may deem necessary”. Would this include the condition that the immigrant and his or her family continue to reside in that province for a certain number of years? Article 30(2)(c) provides for the withdrawal of the permit of an immigrant by the minister. Expulsion for violation of such a condition would probably conflict with article 13 of the Universal Declaration of Human Rights, article 12 of the Covenant on Civil and Political Rights and article 12(1) of the Banjul Charter. Although the policy considerations are probably worthy – Canadian and Quebec policy makers have been struggling for years with constitutionally valid ways of encouraging settlement flows beyond Toronto, Vancouver, Montreal and Calgary – one could not say that these were considerations of public security, public order, public health or morals.

3. The provisions of the amended act, which allow for confiscation of the earnings of undocumented migrants (clause 24, new paragraphs 44(1)(d)), are very likely to clash with several provisions of the migration convention. Many states have draconian provisions – themselves subject to stringent safeguards, difficulties in application and constitutional challenges – enacting confiscation of money gained from organised crime, drug smuggling or money laundering. However, these are large sums of money and the persons involved have individually committed serious crimes. I am not aware of any other state
which has laws providing for the confiscation of the (often paltry) savings and wages of undocumented migrants.

4. Article 30(2)(d) provides for the withdrawal of a permit and expulsion of a person who, without consent of the minister, engages in an occupation other than that stated on the immigration permit within three years of the date of issue. Article 23 of the Universal Declaration (right to work, free choice of employment), and article 6 (right to gain his living by work which he freely chooses or accepts ...) of the International Covenant on Economic, Social and Cultural Rights would pose some barriers to too strict an application of this measure. Clearly, unless there was some intended fraud in the original application (the person had no intention to pursue the stated application), it would be difficult to prevent someone from earning a livelihood. Great caution would need to be exercised in how broadly or narrowly occupations are defined at the time of issuance of permits and later in how the ministerial power to allow changes in occupation is exercised. Presumably this power should not be exercised so strictly or so slowly as to prevent people from earning a livelihood.

5. Section 35 of the modified act, with the repeal of sections 37 and 38, dealing with departure from South Africa, is an improvement over the 1991 act. It allows for travel documents such as those issued by the Red Cross and other international organisations. However, it is not clear if what remains, combined with the penalty in section 57(a), is in violation of the international norm that everyone is allowed to leave a country, including his or her own, except for reasons of national security, health, public order and so on. As is mentioned in the section on family reunification below, there may be situations where practice could conflict with the Convention on the Rights of the Child.

IMMIGRATION COUNTRY OR NOT?

Every country has immigration laws. This truism leaves aside the question of whether the polity, however arranged, has given serious thought and effort to the phenomenon of migration. What is the relative number and kind of foreigners present in the country, the development of the legal system, the stability of the political system and the general attitude towards the presence of foreigners? Some countries may have millions of tourists, but relatively few foreigners of other sorts and a largely discretionary immigration law that lacks transparency (for example, Spain). A small poor country may have only a relative handful of missionaries, aid workers, diplomats and
foreign executives and technicians. Some countries may have large
populations of refugees from adjoining countries, who arrived en bloc, but
few other foreigners (such as Malawi during most of the 1980s). Modern
countries such as Finland and Japan have relatively small populations of
foreigners.

For several years, I have participated in seminars of Committee 14 on
Migration and Nationality of the International Bar Association and have
heard presentations on different aspects of the migration and nationality
laws of more than 40 countries. It has often been difficult: to find
knowledgeable speakers on certain countries where there is no
systematised body of knowledge, immigration bar or publication. "We are
not an immigration country" is the refrain, and immigration, police and
consular officials in these countries quietly go about their work, wielding
great unchecked power. Some countries have mainly one or two kinds of
migrants, for example, small countries with economic nationality
programmes such as Belize and Costa Rica, and oil-rich countries such as
Brunei, Gabon or the Arab Gulf, whose economies are run by large
foreign populations that have little or no right to settle. Included also is
Germany, which has highly developed refugee laws – despite an
acceptance rate of less than 10% after several years and levels of
decision-making – and laws relating to the social rights of foreigners and
guest workers or their children, but has few or no programmes for
selecting immigrants outside the refugee stream.

"We are not an immigration country," is often heard from continental
Europeans who refuse to recognise the obvious. Because of this, I have
tended to focus my examples and comparisons on Canada, the United
States and Australia – countries that have recognised that their history is
grounded in immigration and have a well-developed body of immigration
law concerning all streams of migrants, be they visitors, students, illegals,
temporary workers, asylum-seekers or permanent residents. I have added
the United Kingdom because it has also developed a body of legal
doctrine and practice over the entire spectrum of migration. Despite the
heated controversies (and this could be said of France as well) which dog
immigration policy in these countries, and the ebb and flow of pro and
anti-immigration sentiments, these are countries where it is implicitly
recognised that today's foreigner could well be tomorrow's fellow citizen.
This citizen, or his or her children, could perhaps even become a famous
tycoon, movie-maker or scientist.

This is the choice that any country that receives more than a trickle
of temporary visitors and workers must make. Having made a choice to
respond to the compliment paid to it by the rest of the world with a
positive attitude, the next step is to develop step-by-step a legal and
administrative immigration and nationality system. This should reflect
the needs and traditions of the country, its historic ties, who its
neighbours and trading partners are, and existing migration patterns.

RIGHTS GUARANTEED IN DOMESTIC CONSTITUTIONS

It is not only international conventions that tend to give equal
dights on most matters to persons, whether citizens or non-citizens.
There is, of course, much interplay between the concepts found in
domestic constitutions and human rights law and international
human rights law. So, many domestic legal systems provide that most
guaranteed rights – at least of political and civil rights compatible with
the state’s substantive jurisdiction to decide who to admit and who to
expel – apply equally to non-citizens and citizens.

As Gerald Neuman of Yale University wrote about the US: “The
barbarous claim that aliens are outsiders who can have no rights was
rejected early in our history and the question of government’s
responsibilities to aliens can only be answered in particular contexts.”
The US Supreme Court’s dictum in Hampton v Mow Sun Wong, 1976
426 US 88, 107, was that aliens must be “treated with the dignity and
respect accorded to other persons.” 10 In Canada the Supreme Court
found in Singh v Minister of Employment and Immigration, (1985), 1 SCR
178, that the word “everyone” in section 7 of the Canadian Charter of
Rights and Freedoms, which guaranteed fundamental justice when issues
of life, liberty and security of the person were at stake, included every
person physically present in Canada, and that such persons are by virtue
of such presence amenable to Canadian law.

It is likely that the implications of South Africa’s new Constitution
for non-citizens in the country will only gradually make themselves felt.
In Canada the Supreme Court’s finding in the case of Singh, a refugee
case, was made three years after the 1982 Charter of Rights and
Freedoms. Later cases, such as Chiarelli v Canada, (1992) 1 SCR 711,
involving criminality and security considerations, marked a refinement
of, and some would say a retreat from, the broad position the court had
taken in the Singh case.

DUE PROCESS AND FAIRNESS

There is not much agreement about the substantive content
that must be assigned to the stipulation of article 13 of the
International Covenant on Civil and Political Rights. There
someone lawfully within the territory of a state has the right “to
submit the reasons against his expulsion and have his case reviewed by, and
be represented for the purpose before, the competent authority or a person
or persons especially designated by the competent authority”.

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As we have seen, the Banjul Charter has a similar, although less detailed, provision on this point. The general concept predates the post-war and post-colonial human rights charters. The right to a hearing was given limited recognition in the code adopted by the Institute of International Law in 1892. A minimalist reading of this provision would take it that the non-citizen is allowed at least judicial review of the legality of a decision for the usual grounds, such as excess or abuse of jurisdiction. However, most authors and most (immigration receiving) states would grant the right to a hearing on substantive issues. Usually there are specialised administrative tribunals set up to adjudicate the issues relating to the expulsion of lawfully admitted immigrants.

Thus in the United Kingdom there are immigration adjudicators, usually barristers or solicitors appointed on full-time 10-year contracts or part-time one-year contracts. In the United States there are special inquiry officers who are required to have law degrees. They are under the supervision of the associate attorney general. Over them is the Board of Immigration Appeals. In Australia there is an Immigration Review Tribunal and a Refugee Review Tribunal. In Canada there is the Immigration and Refugee Board (IRB), with three divisions: appeal, refugee and adjudication. Some, but not all, of the members are lawyers. There is a greater or lesser degree of independence from the executive branch of the immigration authorities, but in all cases the persons conducting the hearing are at least partially separate in administration and line of authority from those immigration officials who investigated the case and who have sought the expulsion. Decisions of these specialised tribunals are subject to judicial review.

The other trend in practice is that the more extensive the involvement of the person in the country, the less summary the hearing ought to be. Thus a visitor intending a two-week stay is lower down the scale than a student or temporary worker with a one- or two-year permit, who in turn is entitled to less consideration than a person admitted for permanent residence. In Canada, the permanent resident who is ordered expelled has a right of appeal on issues of fact and law and even of equitable or humanitarian grounds, where those admitted for a temporary purpose would have a right to a hearing before a (lower level and single) immigration adjudicator on grounds of fact and law alone, or perhaps only a determination by a senior immigration officer (administrative procedure with no "hearing").

Thus there is justifiable concern that the ACA, as amended in 1995, provides for withdrawal of both temporary immigration permits and immigration permits, but does not set out any mechanism for a hearing, nor any body authorised to conduct such a hearing. The absence of a specialised administrative tribunal between the administrative officers of
the minister and the avenue of judicial review to the high courts leaves a
gap which shortchanges people who have been lawfully admitted to the
country, have invested time and money, are perhaps in the midst of a
business venture, or a programme of studies and have other ties to the
country. As a practical matter, the high courts are not the best place to
litigate the majority of such cases, as they have neither the time nor the
specialised training to inquire into them and could risk becoming
swamped with judicial review applications if there is no other forum in
which non-citizens can be heard.13

Judicial review inadequately addresses the fact that a non-citizen who
has been admitted for any substantial period of time has many interests
which require protection and that he or she has a legitimate expectation
of such protection.14 This is all the more so if the expulsion is not being
carried out for pressing reasons of national security. Thus the 1994
United Kingdom Immigration Rules prescribe that factors to be taken
into account include the age of the person, length of stay in the United
Kingdom, strength of connections to the United Kingdom, personal
history including character, employment record, domestic circumstances,
previous criminal record, humanitarian circumstances and any
representations received on the immigrant’s behalf. In Canada the
Appeal Division of the Immigration and Refugee Board is instructed to
examine, besides issues of fact and law, “all the circumstances of the
case”, and case law has laid down criteria similar to those listed above for
the United Kingdom. The Australian Immigration Review Tribunal has
a mandate to be “fair, just, economical, informal and quick” and is not
bound by any technicalities, legal forms or rules of evidence. It shall act
according to “substantial justice and the merits of the case”.15

The decision of the French government to arrest some 300 sans
papiers (literally “without papers”) who had taken sanctuary in the
church of St Bernard in Paris in August 1996 caused a major political
controversy. Many of these persons had lived and worked legally for years
in France, had families there and had only seen their status removed
retroactively by a previous change of law. The Conseil d’Etat, the highest
constitutional and administrative law court in France, ruled on the case
in August 1996.16 The conseil ruled that there is no right to a regulari-
sation of status. However, the government had the duty to examine each
case taking into account the particular circumstances of each case,
including family ties and health reasons as well as length of stay in
France, although this last factor was not, strictly speaking, determinative.

Thus the provisions in article 30 of the Alien Control Amendment
Act that provide for cancellation of permits of persons who have been
admitted to reside permanently in South Africa do not seem to provide
for any procedural mechanism for the person concerned to present his or
her interests, they do not provide for any appeal or review body, nor do they give any guidance as to what criteria, if any, the decision-maker should apply to balance the listed grounds for cancellation. In both substantive and procedural law this appears contrary to international practice.

**Refugees and Displaced Persons**

Another area of international law where there has been international codification of the duties of states concerns refugees and persons displaced by wars. The various Geneva conventions (so-called “Red Cross” conventions) on the humanitarian law of war provide that displaced civilians are not to be sent back into zones where their lives or security are in danger. Of course, this is irrelevant in times of peace, but it has been very realistic in the not-too-distant past, and the potential for conflict among South Africa’s neighbours could make these conventions relevant once again.

The convention with the most ink spilt over it is the 1951 Geneva Convention on the Status of Refugees and the additional protocol. Conceived in the post-World War II and Cold War environment, it has been criticised both by those who would welcome the admission of more and those favouring fewer refugees, but no consensus has been found for a new definition. The OAU Banjul Charter is often quoted as an alternative definition more suited to the conditions causing the displacement of refugees (in the wide, sociological sense) in Africa. I do not wish to join the debate on the merits of having a new refugee convention, but I would note that the refinements brought by case law have extended the convention considerably. Thus in Canada a woman who was a victim of domestic violence in a country where the public authorities were unwilling or unable to give her meaningful protection could be found to be a refugee in terms of the convention.

Refugee issues are to be dealt with in other legislation and policy papers. I will therefore pass on to other subjects after making four brief points. Firstly, both American and Canadian case law indicate that the probability of persecution need not be a certainty or even a probability beyond reasonable doubt. Secondly, the seriousness of the nature of the persecution feared is a relevant factor. Thus, to put it crudely, a 25% chance of being maimed or killed is certainly serious enough to merit protection and is more serious than a 25% chance of “softer” persecution, such as withdrawal of housing and employment benefits. Thirdly, the issues at stake in a refugee claim are such (life, liberty and security of the person) that they call for an adjudication system that is fair and in which there is a realistic possibility of review. Lastly, because the credibility of
the applicant is often decisive, it is imperative that the applicant come into direct contact with decision-makers who can thus be in a position to assess credibility.

ACCESS TO INFORMATION AND POLICY GUIDELINES

Legal systems and bureaucratic cultures ascribe varying importance to transparency and access to information by the public. Also, in any administrative department, there are policy guidelines to officials which suggest (sometimes instruct) how law and regulations are to be understood and carried out. Canada now tends to be fairly open in most areas, including immigration. Thus the biographies of all new members of the appeal and refugee divisions of the IRB (the adjudication division members are civil servants, not ministerial appointments) are released in the press. Decisions of the Federal Court and of the IRB are available (although for refugee cases the names are removed). An immigration manual is published, which gives policy guidelines to officials. There are some secret manuals, but these deal either with administrative or security issues. Operations memoranda sent from headquarters to field officers are routinely released and if not are almost always available via the Access to Information Act. In terms of this act, applicants can have copies of their files, including all officers’ notes, subject to some exceptions (if release would harm international relations, federal-provincial relations, legal opinions provided to the minister, and so on). In case of litigation the visa office file will be submitted to the court, including the officer’s notes. The principle that an applicant must be advised of adverse information received by the decision-maker from a third party is well established in Canadian law.

The proper use of policy guidelines has been a recurring issue in Canadian law. Thus policy guidelines cannot encourage an officer to do something that would contradict the act or regulations. However, applicants would have a legitimate expectation that immigration and visa officers will follow such policy guidelines. On the other hand, these guidelines are not to be read as strictly as regulations and are for guidance only. A list of suggested grounds for humanitarian consideration is to be seen as illustrative, and for the officer to read such a list as enumerative would be to fetter his or her discretion.

In the United Kingdom there is a long tradition of administrative secrecy that prevails in immigration matters as well. The Home Office does not publish its guidelines. These guidelines often contain discretionary recommendations more generous than the published regulations, but in practice these guidelines are not applied uniformly,
since only the officers and not the immigrants or their counsel are aware of them. One such guideline, concerning deportation, instructed officers on a number of situations where deportation should not be initiated, including where there was a “genuine and subsisting marriage to a partner settled in Britain”. This instruction was leaked in May 1993. Later that year the High Court ruled in the case of Benjamin Amankwah that once the Home Office had instructed itself to behave along certain lines, it must do so or at least give a reasoned explanation if it departs from its policy.\textsuperscript{18}

In the United States there is considerable transparency, although some practitioners complain that there is such a mountain of paper that it is not always easy to know where to look. Also, the degree of discretion, particularly overseas, is such that there is no ethos that policies must be carried out.

Although the 1995 amendment act in South Africa mentions the importance of transparency in the appointment of some members of the Immigrants Selection Board and the Foulds decision is a step in the right direction, my overall impression from readings and from various contacts with South African officials is that the Home Affairs administration is still steeped in a culture of secrecy. Applicants would still not know on what criteria their cases were being decided.\textsuperscript{19}

\section*{Temporary Entry: Tourists, Students, Workers}

This area of immigration policy must meet competing and sometimes contradictory aims: to encourage the free flow of commerce, investment and international trade, to encourage the exchange of ideas by the exchange of students and academics, to encourage tourism, and yet to protect the country from undesirable (whatever the length of their stay) immigrants and persons who would intend to overstay. The field can become complex. In some cases, as in the United States, where there are some 100 different categories of temporary permits, they are excessively complex.

Section 26(2)(a) of the ACA provides that applications for work or study permits shall not be made from within the Republic and such applicant shall not be allowed to enter the Republic until a valid permit has been issued. The provision that the applications must be lodged outside the country is unexceptional in international practice. However, there ought to be some consideration for more exemptions to this requirement. Canada distinguishes between applications that must be lodged at a Canadian consulate, embassy or high commission abroad (the norm), those exceptions, mainly for nationals of adjoining territories who can apply at a port of entry, and a variety of other persons who can
apply from within Canada, such as spouses of persons who already have permits, persons renewing work or study permits and refugee claimants whose claim has not yet been finalised.

It is not clear if the South African provision that no entry under another form of permit may be made while the application is being adjudicated is enforced to the letter. In Canada the courts have come up with the doctrine of dual intent, that is that an applicant can have the intent to apply for a work permit or even permanent residence, but that whether or not he has the necessary means and intent to leave when required to do so at the expiry of a visitor's permit is a matter of fact to be decided separately, and not solely upon a presumption due to the fact of a pending application for work, study or permanent residence visa. American practice is similar. The result is that American consulates in Canada are often servicing people who are in fact temporarily residing in the United States and who come to Canada, if needed, to attend an interview at the American consulate. Similarly, the Canadian consulates in the United States are servicing thousands of persons who are temporarily in Canada on some other status. This leaves open the question of how the visa-seekers living in the United States and the visa-seekers living in Canada gain temporary entry to Canada and the United States respectively. The practice varies widely from time to time and place to place but the general rule is that the country admitting the visa-seeker for purpose of attendance at an immigration interview will do its own assessment of the chance of overstay, largely based on the person's ties in the other country and the prima facie chance of success of their application. In many cases temporary permits are handled without a personal interview and there is no need for temporary entry to the "other country".

The provisions of 26(4) of the revised act providing for deposit of bonds are innovative and helpful in certain situations, providing that the practice does not become automatic and a substitute for decision-making. The wording is not too different from sections 18 and 102 of the Canadian act except that forfeiture can ensue for violation of a "term or condition", but not for non-compliance with the "purpose" of a permit. Presumably, non-compliance with "purpose" is not as cut and dried as violation of a term or condition. Although the statute is not clear, the forfeiture can also be reviewed by the courts in Canada.

The provisions for the issuance of student permits in the act and regulations are somewhat brief. A student permit may be issued to a bona fide student at any primary, secondary or tertiary institution. No mention is made, on the one hand, of the criteria for issuance or, for example, of the right of the dependants of persons issued work permits to study. In Canada and the United States, the main criteria are financial; thus the
student must show that there are means available to finance the studies. Some limited work is allowed to students in Canada (usually if it is related to the field of study, plus for one year full-time after the end of the course of studies in order to obtain Canadian work experience), the United States and France (no more than 20 hours a week, but not necessarily in their field of studies).

Discussions with South African officials invariably lead to divergent opinions as to the value of foreign students. The short- and long-term benefits of a relatively open student policy have long been recognised by many countries. The world is full of presidents, generals, cabinet ministers, ambassadors and heads of companies who attended school or university in the United States, France or the United Kingdom. The German government has convened think-tanks and made large expenditures to try to remedy the perceived shortage of foreign students in German universities and the long-term disadvantage this poses to German political and economic interests. The Japanese government has similar concerns and, mindful of the importance of trade and political ties with the Pacific Rim countries, has a policy of encouraging Chinese students to come to study Japanese language and eventually academic subjects. Australian universities and technical schools actively recruit throughout Southeast Asia. The Province of British Columbia in Canada recognises the short-term as well as long-term economic value of foreign students. At the British Columbia Education Fair, organised by the British Columbia government and held in the Taiwanese city of Taichung in January 1997, 23 educational institutions were represented. The Province of Quebec, as a measure of both self-interest and altruism, has negotiated agreements with certain countries in la francophonie to lower foreign student fees for nationals of these countries. The huge investment and the influx of professionals and business persons into Canada from Hong Kong has been traced to the long tradition of Canadian universities receiving students from Hong Kong since the 1950s and 1960s. Also, the local students’ quality of education is improved by a cosmopolitan student body.

Many South African officials seem to have a negative attitude about foreign students. Apparently the word “may” in the statute is interpreted with this negative attitude in mind. One can legitimately distinguish between short-term altruism and long-term national interest – for example, admitting students from neighbouring African countries at low cost, as the French do, or even with scholarships – and short- and long-term interest served by admitting students from other regions, such as East and Southeast Asia and the Middle East, who are willing and able to pay higher fees. In the latter case, besides a limited number of admissions to the mainstream universities, an “education industry” with a variety of
private post-secondary technical and language schools could be encouraged. South Africa, now back in the community of nations, is on a short list of English-speaking countries. One should not underestimate the demand in the world for English-as-a-second-language training held in an English-speaking country, as well as training in technical and business subjects. With a slightly lower cost of living than the United States, Australia, Canada, the United Kingdom and New Zealand, and a good climate, South Africa could nurture a mini-industry that, far from taking resources away from South Africans, would contribute money and jobs to the economy.

**Selection of Immigrants**

The subject is dealt with in section 25 of the revised act and sections 14 and 15 of the regulations of 28 June 1996. Section 14(2) of the regulations requires that the application be made in the country in which the applicant normally lives or in the country that issued the applicant’s passport. Section 25(9) of the act provides an exemption for persons already sojourning in the Republic. This is unexceptional in international practice. Canadian law provides no restriction on place of application, although administratively officials try to encourage applications to be filed in the country of residence.

What is most striking about the selection of immigrants is that the act and regulations are vague in the criteria. None are enunciated in the regulations, and section 25(4) sets out four grounds:

(a) “good character”,
(b) will within a reasonable period of time assimilate with the inhabitants of the Republic and be a desirable inhabitant of the Republic,
(c) is not likely to harm the welfare of the Republic, and
(d) is not likely to pursue an occupation of which, in the opinion of the regional committee, there are already a sufficient number of persons available.

The first three criteria listed are extremely subjective, while the fourth is similar to the notion of labour department certification in the United States and job offer validation (both involving a demonstration that a particular post cannot be filled locally) and open occupation lists, established for whole occupations, in Canadian and Quebec regulations. However, unlike in these systems, no mechanism is established to see that this criterion is applied in an objective fashion. Indeed, the evidence suggests that there is little systematic information gathering to
facilitate or permit an objective decision to be made.

All immigrant selection systems contain a mixture of subjective elements of appreciation of the personal suitability and likelihood of successful establishment of the applicant with objective factors. However, the mix in the South African act is decidedly heavy on the side of subjectivity. With respect to criminality, Canada abandoned in 1977 the notion of conviction of crimes involving "moral turpitude" for a more objective standard relating to the severity of the crimes according to maximum potential sentences and actual sentences imposed for a crime. Canada (including Quebec, which has its own selection regulations), Australia and the United States have various subcategories of immigrants: occupational and labour market-oriented, family, humanitarian and business. However, all have clearly set out regulations establishing objective criteria for positive factors, such as knowledge of English (or French), education, occupational factors (desirable and undesirable occupations) and job offers, presence of relatives and other ties to the country, age, as well as negative factors such as criminality and medical disability. All countries do leave some room for discretionary appreciation of the overall suitability of the applicant as well but this factor is balanced with the objective factors. All countries tend to get a bit more discretionary or even arbitrary when there are national security issues at play but, practically speaking, these represent one case in 10 000 or more.

Canada admits some 200 000-225 000 new immigrants a year and the United States more than 800 000 under such systems. A system that involves such a high degree of subjectivity has a high degree of risk that fairness will suffer even if the officials have the best of intentions and the numbers remain small. There is a near certainty that efficiency, and probably fairness, will suffer if the number of applicants rises above a handful.20 There is also a certain lack of fairness and transparency when there is little consensus or information available on what the rules actually are and how they will be applied. In 1995/6 I consulted two lawyers in Gauteng, both with apparent expertise in immigration matters, to request an overview of the selection rules for occupation-based and investment-based immigration. Their replies were surprisingly contradictory on several points. Telephone inquiries made to the department in 1996 often resulted in the official on the line asking the caller questions but not volunteering any information other than to say that the caller should send in his or her data and they might send back an application form.

The "South African investor, financially independent immigrant" category calls for transfer of "a guideline amount" of R1.5 million of which R700 000 must be invested for three years in South Africa in the
form of a bank deposit or real estate. The applicant must refrain from engaging in employment or establishing a business without the approval of the Department of Home Affairs.

There are investment immigration programmes all over the world. Countries are competing for applicants. Isle of Man lawyer and genealogist Tom Tyrrell divides these into "Tier I" and "Tier II" countries. At the low end, one can obtain citizenship of some Central American countries for an investment (probably not to be recouped) of US$50 000. At the high end, Irish residence and even nationality, conferring on the holder full rights to travel freely within the European Community, would require an investment of some £1 million. The United Kingdom also has a programme similar to the South African one: with an investment of £1 million the individual cannot take employment in the United Kingdom. In between are the American programme, requiring an investment of US$1 million, or in the poorer states US$500 000, and the creation of 10 jobs for two years, and the Canadian programme, requiring the investment of CAN$350 000–$250 000 for five years (through financing arrangements the investments can be discounted for a one-off payment of about CAN$100 000) and the Australian programme, A$850 000 for three years. However, the nominal amount of money to be invested is only one aspect of such programmes. The United States programme, like the South African programme, does not require any business experience of the applicant, whereas this is a key component of the Canadian programme.

Some programmes require that the money be used for some purpose; for example, in Canada and the United States there is a bonus for investing in poorer provinces and states and the money must provide benefit to the economy of the province or (in the United States) create jobs in the state. In many of the Tier II countries the money goes to the state and the "investment" is thus entirely lost. In Canada, one can discount the investment at the beginning or wait the five years and get a modest return. The United States programme has not been very successful due to its conditional character and to United States tax policy, which subjects permanent residents to income tax on their worldwide income.

One could conclude by saying that the South African programme is targeted a bit high by insisting on a transfer of R1,5 million. However, it is fairly generous in that, as with the American programme, there is no requirement to prove business experience or source of funds. It is also generous in that the requirement to place the money in bank deposits or real estate allows a great deal of freedom to the investor to choose where to place his or her money. However, one issue that could arise is that if the value of the assets falls, there may no longer be a value of R700 000
at the end of the three years. Also, the requirement to invest “in the South African economy”, giving the examples of a bank deposit or acquisition of real estate but forbidding investment in one’s own business, does not give precise guidance as to what is allowed or not. South Africa’s source tax system could be an attractive feature for some persons. 25

South Africa also has an “own business” programme. This is similar in structure to the entrepreneur category in Canada and to the business programme in the United Kingdom. It is reasonable not to determine in advance the amount that must be invested, as this will depend on the location and nature of the business. The requirement to create two jobs for South Africans is also similar to that in other jurisdictions.

The creation of regional committees of the Immigrant Selection Board is on balance a good thing, subject to the above provisos on subsequent mobility rights. However, the act and regulations do not give these officials any precise mandate to take regional/provincial interests and conditions into account. In the United States, labour market certification is done by regional offices of the national department, taking into account the regional as well as, in some instances, the national labour market. In Canada, the provincial governments are involved in various aspects of immigration and most provinces have a designated government department responsible for immigration affairs. Most provinces restrict their role to assessing economic benefit in the investor and entrepreneur programmes. However Quebec has its own immigration regulations and even its own officers overseas conducting selection interviews.

The provision of a mechanism for review in section 15 of the regulations is fairly generous, since most countries do not have a formal review process for selection decisions. However, the absence of clear criteria for the decision at both the initial and review stage is of concern.

**Penal Sanctions, Search and Seizure**

Section 57(c) of the ACA provides for an offence of conveying a non-citizen who does not have a passport. There do not appear to be other carrier sanctions. Canada has enacted very strict regulations on carriers, with stiff fines starting at $5,000, obliging them to verify that passengers have both visas and passports up to presentation at the port of entry. There is a defence of due diligence. Australia also has carrier sanctions referring to both visas and passports.

Section 54 of the ACA provides for powers of entry, interrogation, search and seizure by any immigration officer. The statute does not seem to contain provisions for a warrant, except in cases of emergencies or for “reasonable grounds to believe”, and the powers relate to any purpose
related to the act, not only with respect to the more serious offences. By contrast the Canadian statute, sharply criticised at home, provides for search and seizure upon warrant, except in exigent circumstances, and is mainly concerned with the offences of immigrant smuggling. In the United States, a warrantless search conducted 100 miles from the border violates an alien’s right against unreasonable search and seizure (4th amendment). Unless the officer has reasonable cause to believe that a vehicle contains immigrants, he may only search those parts where they could hide. However, owing to the number of immigrants and the difficulty in applying immigration laws, the standard of review for 4th amendment violations is relaxed\(^2\), and during a border interrogation and temporary detention there is no right to a Miranda-type warning. Excludable immigrants have no claim to a due process violation pursuant to indefinite detention. However, other immigrants, upon arrest, have rights to due process and must be advised of the reason for their arrest, their right to counsel and to remain silent.\(^3\)

France, on the other hand, to counteract the rising sentiment of Jean-Marie Le Pen’s National Front, enacted draconian and very controversial laws in the 1990s requiring that all persons carry proof of identity and status and giving police the right to verify such information based solely on the facies (the person’s face).

United Kingdom, United States and Canadian law all provide for sanctions against employers. However, except for general “aid and abet” and “harbouring” provisions, there is no stipulation akin to 32(1)(j) (rental of premises) or 32(5) (presumption against hoteliers) which specifically targets landlords or hoteliers. Australia also does not have such a detailed catalogue of ways in which one can be guilty of assisting persons in violation of immigration law. To commit the offence of “harbouring”, one must “knowingly or recklessly harbour an unlawful non-citizen, a removee or a deportee”.\(^4\)

As for seizure of documents, article 102.06(2) of the Canadian statute provides that records and documents shall not be kept more than three months unless the person from whom they were seized agrees to a further period of time, a justice of the peace is satisfied that their further detention is warranted or unless judicial proceedings are instituted in which the documents or records seized may be required. Section 54 (1)(c) of the revised South African act does not require any such continued justification of seizure.

Most countries provide for loss of resident status for commission of crimes and prior misrepresentation. There is also usually a provision for loss of residence due to absence. Both Canada and the United States use a rather nebulous definition that tends to be a grey zone, combining a variety of facts with inferences of intent. The United Kingdom sets two
years as a threshold, beyond which one must convince the authorities one is a returning resident. Article 31 of the ACA provides for loss of residence by absence of a continuous period of five years, subject to various exemptions. This period and the exemptions are precise and generous.

Migra**tion Agents and Consultants**

The South African statute provides for compulsory registration of agents in article 56(1)(l). The regulations of 28 June 1996 go into greater detail in article 18. Essentially the regulation requires that any person not an attorney who makes it his business to apply for permits on behalf of persons must comply with a registration procedure. Grounds for disqualification include false or misleading information, conviction for an offence against the act and not having a place of business within South Africa. There is also a citizenship requirement. In Australia, both attorneys and other persons intending to work as migration agents must register. The requirement that attorneys register, attacked by the Law Societies, is defended on the grounds that many attorneys are not necessarily versed in immigration (ignoring the argument that attorneys are already regulated). In the United States, with its surfeit of lawyers, the Justice Department has established a long list of acts that constitute the practice of immigration law and may only be carried out by lawyers. In theory this blocks most consultants from acting, although there are apparently many loopholes. In Canada, there is as yet no regulation of consultants, due to a lack of consensus on the issue and the fact that professions are regulated by the provinces.

Family Reunification

Most countries allow a permanent resident to bring in his or her spouse and dependent children. Most countries also disallow "marriages of convenience" entered into primarily for the purpose of facilitating immigration. However, the sponsor would usually have a right of appeal. In Britain the "primary purpose" test has been the subject of much jurisprudential controversy in its application to persons from the Indian subcontinent where arranged marriages are the norm. Where the marriage breaks up after obtaining permanent resident status the treatment would vary, but once again, removal would be unlikely without the hearing of an appeal. In Canada and the United Kingdom the main issue would be whether there had been fraud or deception initially and not the mere fact that the
marriage had not survived. Even in a case where the foreign party was admitted to Canada under a conditional visa and did not subsequently marry, the IRB would examine all the circumstances of the case. Section 25(7) of the ACA does not appear to grant a hearing to the sponsoring spouse at the time of the application; it is also not clear what access to a hearing the spouse whose permit was withdrawn has under section 30(2)(e). Section 30(2)(e)(ii) does not allow any justification for the refusal of the spouse to "pursue a normal marriage relationship..."

A more recent issue, which will surely arise in South Africa as well, has been that of the rights of children born of one or both foreign parents. Canadian tribunals have taken a hard line on this where the parent is subject to deportation. However, a recent Australian judgment, Minister of Immigration and Ethnic Affairs v Teoh, instructed officials to take into account the welfare of the children of an individual threatened with deportation and the possible splitting up of a family that a deportation would cause, in light of Australia's ratification of the United Nations Convention on the Rights of the Child, even though the convention had not yet been incorporated into domestic law.

Another positive blow for the permeability of a state's international obligations into its domestic law concerning migrants was struck in the 1994 case of Ergolu v Land Baden-Württemberg. The European Court of Justice rejected the argument of the German government, which had refused to apply a provision conferring rights on Turkish workers' children who had graduated from a university in Germany to subsequent work and residence permits. The German government had argued that the directive of the Council of Association (EC-Turkey) had not been enacted in national legislation. The European Court replied that the reference to implementing measures to be undertaken under national law was regarded as a mere clarification of the obligations of the member states which was intended to place emphasis on the obligation to implement the agreement in good faith.30

**Blooms and Bilateral Treaties**

South Africa already has bilateral agreements with its neighbours concerning temporary workers. Looking to the future, there are a number of models from around the world to evaluate. In each case immigration policy is one part of an overall programme of regional economic and political co-operation.

The European Union has as its founding principle the free movement of goods, persons and capital. Not only are EC citizens entitled to take up employment throughout its territory free of immigration restrictions, but many of the professional barriers to labour mobility are also disallowed.
Within the EC there are the Schengen countries, which allow free movement of non-citizens who have crossed the external border without having to undergo further screening at each successive intra-Schengen border. A visitor visa from the first Schengen country one visits is valid for the others. However, work permits for non-EC nationals are not necessarily transferable from one country to the next.

The Gulf Co-operation Council of six Arab states allows freedom of movements to its own nationals, but there is no common external immigration policy and a traveller intending to visit all six countries would need six visas.

The Canada-US Free Trade Agreement and the North American Free Trade Agreement (Canada-US-Mexico) have immigration chapters that benefit only citizens, not permanent residents. This applies mainly to professionals and technical personnel who still must obtain a work permit but are not subject to labour market certification/validation. These stipulations have not brought about any rush of new migrants.

**Conclusion**

My intent in this chapter has been to give persons in South Africa concerned with immigration issues some references to doctrine, policy and practice elsewhere. None of these countries is held up as a model of perfection, but there are some useful elements, both positive and negative, which can assist South Africans in their reflection.\(^1\)

**Notes**

4. *International Legal Materials* 21, p. 58, 1981. See also American Convention on Human Rights, articles 22(6) and (9) and European Convention on Human Rights (article 4 of the fourth Protocol).


7 Article 13 of the African Human Rights Charter, subsections 1 and 2 mention “citizen” with respect to rights to participate in the government and have access to the public service; subsection 3 mentions that “Every individual shall have the right of access to public property and services in strict equality of all persons before the law”.

8 I have left out the Mercosur countries, which have large second-generation immigration populations, largely because current migration flows and the legal system to channel them do not seem as active.

9 Most of the countries mentioned grant citizenship after three to five years of legal permanent residence.


12 Article 70 of the Canadian Immigration Act grants an appeal on grounds of fact and or law and also “on the ground that, having regard to all of the circumstances of the case, the person should not be removed from Canada”. Recently the Canadian government, in a move still subject to ongoing criticism and constitutional challenge, has limited these rights somewhat for persons convicted of serious crimes or considered to be a threat to national security. Article 27(2) and (3) describes loss of status for visitors (which includes students and temporary workers) and those subcategories whose expulsion would be determined by an inquiry presided over by an adjudicator from the adjudication division of the Immigration and Refugee Board (quasi-judicial format with right to counsel, to call witnesses, etc) and those, for example visitors who have remained past their authorised period
of stay, who may be expelled following an administrative determination by a senior immigration officer.

13 In Canada, although there are administrative tribunals empowered to review many matters, successive ministers and their departmental advisers have tended to restrict immigration hearings in certain matters and refuse to allow internal review by specialised tribunals, leading to immigration (especially asylum) becoming the single largest part of the case load of the Federal Court. Almost none of its judges have prior immigration experience and the court is also busy with matters such as international trade, taxation, intellectual property, competition law, admiralty, native rights and judicial review of the decisions of all other federal boards and tribunals.

14 The recent South African case of Foulds v Minister of Home Affairs and others; (1996) 2 All SA 478 (W) follows along these lines. Although it deals nominally with selection issues, the applicant Foulds had in fact been present in South Africa for some time, had been employed there and had started a business. The case decided that Foulds' legitimate expectations would include a right to be heard and to be advised of information prejudicial to him which the Immigrants Selection Board had received.

15 Section 353, Migration Act.
16 Associated Press, 22 August 1996.
17 See Lee Anne de la Hunt, Chapter Six of this book.
19 South Africa is not alone. In 1995 the author had meetings and discussions with certain Namibian officials on the topic of investment immigration and was never able to clearly ascertain from them what the norms would be for immigration on an investment basis.

20 The author heard from a South African official in Hong Kong in 1993 of how high the numbers of applications had been lately. The yearly number cited represented what the Commission for Canada in Hong Kong would receive on average in two weeks and sometimes in a day.


22 The Irish programme was recently suspended due to a court judgment.

23 South Africa has source tax, an attractive feature for this segment
of immigrants, but this attractiveness is balanced, for the moment, by the subjection to Exchange Control that immigrant resident status implies.

24 Over and above the obvious concern that the funds not come from a criminal source, which would presumably come under the "good character" provision or any more precisely phrased concept that would replace it.

25 Thus, for example, in some instances immigrants to the United Kingdom can be subject only to tax on their United Kingdom source income, making it a low-profile tax haven where a family can conduct "normal" social life, education and business, as opposed to the limited opportunities available in many island tax havens.


27 US v Henry, 604 F 2d 908 (5th Cir 1979); Navia-Duran v INS, 568 F 2d 803 (1st Cir 1977); Tartabull v Thornburgh, 755 F Supp 145 (EDL 1990); Medina v O'Neill, 589 F Supp 1028 (SD Texas 1984)

28 Section 233(2), Migration Act.

29 Establishing an objective, fair and sympathetic criterion for "dependency" is a thorny issue.


31 I wish to thank persons who have assisted in the background research for this paper, including Graeme Kirk (Bury St Edmund's, United Kingdom), Scott Borenne (Minnesota, United States), Paul Baker (Melbourne), Fernando Scornik Gerstein (Madrid/London) and other colleagues from Committee 14 of the IBA, Graham Giles (Cape Town), Yvette Zuidema, Jenifer Brault and Me Eugenie Hebert, of my office, McGill legal clinic students Frederique Amrouni, Stephanie Cartier and Candice Welsch. Thanks also to Jonathan Crush and his staff.
CHAPTER SIX

REFUGEES AND IMMIGRATION LAW IN SOUTH AFRICA

LEE ANNE DE LA HUNT

For all the weaknesses of the way in which international refugee law has been applied in practice, the absence of any legal framework whatsoever for refugee protection is potentially even more disastrous. The experience of a country, where until recently refugees enjoyed no legal protection at all, highlights the importance of both the UN and OAU conventions. South Africa was for several years host to one of the largest refugee populations in the world, without acknowledging the fact. The lack of any protection regime meant that refugees could be forcibly returned and have their rights violated with impunity.¹

Since the April 1994 elections South Africa has come to be seen as an attractive option for asylum seekers, particularly as the countries of Europe and North America increasingly restrict the numbers of refugees who are
granted asylum or accommodated in resettlement programmes. The tightening of these policies coincides with South Africa's re-entry into the world community. The arrival of new migrants and asylum seekers in South Africa has fostered a growing xenophobia, as South Africans fear that foreigners will reap the benefits of their struggle. On the other hand, there is an awareness of South Africa's debt to other countries in Africa, who for many years granted asylum to South Africans fleeing apartheid, and some recognition of the role the previous government played in destabilising neighbouring territories. As a country that has produced refugees and internally displaced people and that is an inevitable destination for migrants and refugees because of its geographical and economic position, it is in our interests to ensure that orderly arrangements are in place.

The integrity of our new rights-based legal regime needs to accommodate the fact of forced migration. In keeping with our obligations according to international law, our legal framework must provide for the consistent treatment of asylum seekers and protect the rights of refugees. It should reflect a growing human rights culture in the country and respond to the realities of forced migration in the region. Militating against this is a lack of political will as the government faces the tension between meeting the needs and expectations of South Africans and its obligations towards refugees. Many South Africans resent foreigners laying claim to limited resources, and the perception exists, as it does elsewhere in the world, that asylum procedures are abused by economic migrants and criminals, such as drug and arms dealers.

This chapter begins with a history of forced migration in South Africa and then goes on to describe the legal framework that deals with refugees. The legal framework is discussed in the light of South Africa's obligations towards refugees according to international law (in particular, the duty not to forcibly return an asylum seeker) and in the light of chapter 2 on fundamental rights in the Constitution. The record of both the legislature and the judiciary in the recent past is discussed with regard to the rights of immigrants, and I conclude by considering whether, in its present form, the draft Refugee Bill is likely to provide a framework that will ensure the consistent treatment of asylum seekers and protect the rights of refugees.

**THE LEGAL POSITION OF REFUGEES IN SOUTH AFRICA BEFORE 1993**

The movement of refugees to South Africa is nothing new. From colonisation in 1652 onwards, the area south of the Limpopo River has seen the settlement of people who left their homes further north in Africa, Europe and Asia due to religious persecution, political persecution, war, famine and economic
hardship. In recent history, South Africa has granted asylum to people forced to migrate. In the 1970s the government gave asylum to many people of Portuguese origin fleeing from Angola into what was then South West Africa before they returned to Portugal. Many other white Angolans and Mozambicans were granted rights of citizenship and permanent residence in South Africa when Portuguese colonial rule in those countries ended. However, during the civil war in the 1980s and early 1990s, the South African government refused to recognise black Mozambicans fleeing into South Africa as refugees.

During the civil war in Mozambique, many Mozambicans lived in South Africa not only as refugees but also as migrant workers, legally or illegally, as they had for decades. In October 1985 the South African Department of Foreign Affairs estimated that 63 000 Mozambicans had fled to South Africa – most went to Gazankulu and the rest to KaNgwane, Lebowa and KwaZulu. In the same year, the Minister of Home Affairs, Stoffel Botha, said that his department was repatriating 1 500 people a month. Later that year the Gazankulu administration, after negotiations with the South African government, was permitted to treat the fleeing refugees as “visiting relatives” and was able to provide a measure of protection, in that refugees in this homeland were no longer arrested and repatriated. The South African Department of Development Aid, the Gazankulu authorities and non-government organisations provided emergency aid, but at no stage were they regarded as refugees. Furthermore this regime applied only to the approximately 37 000 Mozambicans in Gazankulu, who were encouraged to live in special settlements. While not as vulnerable as refugees in “white” South Africa, refugees in the homelands, particularly those in KwaZulu, were frequently arrested and deported.

In 1993, as the repatriation of Mozambicans was beginning, the United Nations High Commissioner for Refugees (UNHCR) estimated the number of refugees in South Africa to be more than 300 000. Other agencies put the figure at half a million. Until 1993 all these people were regarded as illegal migrants without protection and liable to summary deportation. In attempting to enter South Africa, refugees had to negotiate a 63-km electrified border fence. In the period between 1986 and 1990 (when the voltage was reduced) the fence carried 3 300 volts.

The most reliable estimate of the number of people killed while attempting to cross the fence was in the region of 200 a year. Even the official death toll of 78 people between 1986 and 1990 was greater than that of attempted Berlin Wall crossings during the 28 years of the wall’s existence. Refugees tried to cross through the Kruger National Park where many, especially children, died of dehydration. Others were killed by wild animals. Once inside the park, refugees could be arrested. In
Mpumulanga refugees were often employed as casual labourers by white farmers. They were paid very low wages or no wages at all once the employers alerted the authorities to their presence. Not only did the apartheid government support the Mozambique National Resistance (Renamo) in making Mozambique ungovernable, it then refused to grant refuge to the victims of that war. In refusing to grant Mozambicans refugee status and in repatriating thousands of refugees, South Africa acted with complete disregard for the principle of non-refoulement.

**South Africa and the UNHCR**

South Africa began moving out of its international isolation in 1991 as the negotiations which resulted in the 1994 elections began. In this year the South African government signed an agreement with the UNHCR indicating its willingness to co-operate with the organisation regarding the repatriation of exiles from apartheid to South Africa. South Africa also signed a tripartite agreement with the UNHCR and the Mozambican government as part of the largest repatriation programme undertaken to date by UNHCR.

In 1993 the South African government signed an agreement with the UNHCR agreeing to the establishment of an Office of the High Commissioner and granting certain diplomatic privileges to that office. The South African government also agreed to establish procedures for determining refugee status and to grant asylum to certain refugees. The staff of the office of the High Commissioner have run training courses for officials in the Department of Home Affairs who deal with asylum seekers. In October 1994 South Africa became the 53rd member of the Organisation of African Unity (OAU) and in December 1995 signed the 1969 OAU convention governing the specific aspects of refugee protection in Africa. In January 1996 the South African government signed the 1951 United Nations convention and the 1967 protocol relating to the status of refugees.

The UNHCR voluntary repatriation programme of Mozambican refugees to Mozambique came to an end in March 1995. During the programme, attempts were made to register undocumented Mozambicans in South Africa. Each registered person was issued with a Voluntary Repatriation Administration Form in order to give him or her some form of identification and protection from deportation until that person was ready to return home. There were nevertheless reports of Mozambicans in possession of valid administration forms being deported. While many people who were voluntarily repatriated or forcibly deported remain in Mozambique, thousands have returned. It cannot be said, at least from South Africa's point of view, that the voluntary repatriation programme
has been a complete success. In early 1996 President Mandela announced a cabinet decision to grant amnesty from prosecution and deportation as “illegal immigrants” to certain Mozambicans. 17

REFUGEES IN SOUTH AFRICA SINCE 1994

The introduction of asylum procedures and the peaceful outcome of the 1994 elections saw an influx of asylum seekers other than those from Mozambique. Most asylum seekers are young men who have travelled from elsewhere in Africa, including Angola, Somalia, the Democratic Republic of Congo (formerly Zaire), Ethiopia, Rwanda, Burundi, Nigeria and Liberia. By May 1995, 3664 applications for asylum had been received, of which 383 had been approved and 512 rejected. 18 As of 31 June 1996 a total of 16967 people had applied for asylum in South Africa. Of this number 7564 decisions had been made, of which 1915 were successful. Another 3704 applications were rejected and 1945 were found to be manifestly unfounded. Fourteen months later 32510 people had applied for asylum. The number of applications processed was 12145, of which 4002 were accepted, 4725 rejected and 1393 found to be manifestly unfounded. 19

While it is to be expected that a number of claims for asylum will be fraudulent and unfounded, these statistics do not reflect people who would be entitled to apply for refugee status, but who have entered South Africa legally on work or study permits, or illegally, and have not applied. Many asylum seekers do not apply immediately on arrival. Refugees operate through informal networks in registering with the Department of Home Affairs and obtaining shelter and work. There has been very little in the media about refugees – certainly when compared with the coverage of issues relating to illegal immigrants. Because refugee advocacy and assistance programmes are in their infancy in South Africa there is almost no information available to refugees about their rights or asylum procedures. 20

REFUGEES AND THE ALIENS CONTROL ACT

The major law governing refugees and other non-citizens, with regard to their entry into and entitlement to remain in South Africa, is the Aliens Control Act, 1991 (Act no 96) as amended. 21 The stated purpose of this piece of legislation is “to provide for the control of the admission of persons to, their residence in, and their departure from, the Republic”. 22 This act is characterised by the very wide discretion given to the minister and the extensive powers which he or she is able to delegate to immigration officers and other state officials. Both the act and its
implementation have been the subject of much criticism.23

A recent article based on an analysis of the 1995 deportation statistics shows that the act is indubitably administered in a racially discriminatory way.24 The act was not drafted with asylum seekers in mind and no mention is made of terms such as "refugee" or "asylum". Instead asylum seekers and refugees are dealt with as a class of "prohibited persons".25 Although most provisions in the act apply to asylum seekers and refugees, this chapter will discuss those sections of the act which are most relevant to refugees, particularly with regard to South Africa's obligations in terms of the UN and OAU conventions.

ADMISSION TO AND RESIDENCE IN SOUTH AFRICA

The provisions that relate to the admission of persons to South Africa and govern the circumstances under which they may remain are contained in chapter 2, part 1 of the act. Section 5(5) makes entry into South Africa other than at a port of entry26 a criminal offence, punishable on conviction by a fine or by imprisonment, or by both fine and imprisonment. A person who does not contact an immigration officer before entering South Africa, and who is not exempted from this requirement, is also guilty of an offence.27 Before entering South Africa, a person must contact an immigration officer at a port of entry and satisfy the officer that he or she is not a prohibited person.28 An immigration officer who believes that a person is not entitled to be in South Africa may require the person to make and sign a declaration; produce documentary or other evidence related to the claim to enter and, if it is suspected that the person is afflicted with any disease or physical infirmity which would render him or her a prohibited person under the act, to submit to an examination by a medical practitioner.29

Chapter 3 of the act deals with residence in South Africa. Section 23 provides that no alien, or non-citizen, may enter or stay in South Africa with a view to permanent residence or temporary residence unless he or she is in possession of an immigration permit or, in respect of temporary residence, a permit for temporary residence.30 Anyone who has entered the country and who is not in possession of one of these permits must appear before an immigration officer or the Department of Home Affairs.31 The minister may, "if he or she is satisfied that there are special circumstances which justify his or her decision, exempt any person or category of persons from the provisions of section 23, and for a specified or unspecified period and subject to such conditions as the minister may impose, and may do so with retrospective effect".32
**Prohibited Persons**

The act empowers an immigration official to make a declaration to the effect that an individual person is a prohibited person.\(^{33}\) To be declared a prohibited person, or for the decision to be made that someone is a prohibited person, that individual must have either failed to enter at a port of entry, failed to contact an immigration officer, failed to produce a passport,\(^ {34}\) failed to satisfy the officer that he or she is not a prohibited person or failed to comply with numerous other conditions imposed by the act.\(^ {35}\)

Under section 39, certain individuals or groups of people may be classified as "prohibited persons" should they enter or attempt to enter South Africa. These are people who are unable to support themselves and are likely to become public charges, or people the minister considers to be undesirable inhabitants or visitors for a number of specified reasons.\(^ {36}\) Section 52(1) provides a measure of relief in granting the prohibited person three days in which to request that the minister review the declaration or decision that he or she is a prohibited person. There is no provision for reasons to be given for the declaration or decision.

Section 41(1) empowers the minister to:

- issue to a prohibited person a temporary permit on a prescribed form to enter and reside in the Republic for the purpose, and subject to any other conditions, mentioned therein.

This section refers to the taking of a deposit from a prohibited person and provides that, should a person in possession of a temporary permit not comply with the conditions it stipulates, the deposit be forfeited. It does not appear that asylum seekers have been required to provide security, except where they are in contravention of another provision of the act.\(^ {37}\)

Section 41(3) provides for the extension of the permit and the amendment of the purpose for which it was issued or the conditions stipulated.

Section 41(6) provides that anyone to whom a permit has been granted in terms of section 41(1) "and who fails to depart from the Republic before or on the date on which the permit expires, or fails to observe the purpose for which, or to comply with a condition subject to which that permit was issued, shall be guilty of an offence and, whether or not he has been convicted of that offence, an immigration officer may, if such person is not in custody, arrest such person or cause him to be arrested without warrant and remove him or cause him to be removed from the Republic under a warrant issued by the minister and may,
pending his removal, detain or cause him to be detained in the manner and at a place determined by the director-general”.

The most pernicious aspect of this subsection is that the prohibited person may be immediately expelled from the country. It is easy to see why an immigration officer, given the alternative of deportation, would have little motivation to go through the procedure of charging and prosecuting a prohibited person. If such a person were to be charged he or she would at least appear before a magistrate. While in theory a “prohibited person” could challenge in court the issue by the minister of a warrant of removal, in practice this would be extremely difficult. Clearly the risk of refoulement is great. Section 41(6)(c) empowers the minister to:

at any time withdraw a temporary permit ... and order the person concerned to depart from the Republic within 24 hours of the point in time at which that order is served on him or within such extended period as the minister may determine.

**Detention and Removal**

Section 45 provides for the arrest and removal of any person other than a South African citizen who has been convicted of an offence referred to in the first two schedules of the act and sentenced to a fine of not less than R4 000 or to imprisonment of not less than 12 months. Persons considered to be undesirable inhabitants or visitors by virtue of their having been convicted within three years of entering South Africa may, in terms of section 46, be removed from South Africa. This provision could apply to refugees who have obtained asylum and are exempt in terms of section 28 from the provisions of either section 25 or 26 of the act. Several of the offences included in the schedule are not “serious” or “capital” or “very grave punishable acts” as referred to in the UNHCR handbook.38

The act grants the minister and immigration officials wide powers of detention without trial and makes no provision for legal representation. Immigrants in general and refugees in particular would seldom have either the social network or the financial resources to obtain legal assistance within a short period of time. Prohibited people so declared are detained in police cells and prisons and access to them is often difficult.39 In many cases, there is potential for substantial injustice if a detained person is not represented. At the very least, as with many other matters involving bureaucracies, immigration officials will get through red tape and reach decisions more quickly if a lawyer or social worker is monitoring the situation.
THE ALIENS CONTROL ACT AND THE SOUTH AFRICAN CONSTITUTION

The Aliens Control Amendment Act (ACAA) of 1995 has removed or amended some of the more objectionable sections of this piece of legislation, most notably the prohibition on interference from the court in certain circumstances. The power to detain indefinitely has been removed. The act, however, still remains bad law, inefficient and certainly hopelessly inadequate in protecting the rights of refugees. It has been argued that the act is open to constitutional challenge on several aspects. There is very little in the act that would assure one of fair administrative action.

Section 59(1) states that:

If in any proceedings the question arises whether, or it is alleged that, any person entered or remained in the Republic in contravention of the provisions of this act, such person shall be presumed to have so entered or remained in the Republic until the contrary is proved.

Similarly, immigration officers are given the advantage of proceeding without proving their documents in court. Furthermore:

a certificate or written authority under the hand of an immigration officer shall in any proceedings under this act be prima facie proof of the facts stated therein, and it shall not be necessary to tender oral evidence in respect of such facts unless the court before which such proceedings are held specifically so directs, in which case a postponement shall be granted to enable the immigration officer whose presence is required to attend.

REFUGEE DETERMINATION PROCEDURES

In the absence of refugee legislation or suitable regulations under the Aliens Control Act (ACA), the Department of Home Affairs, in consultation with the UNHCR, has set up procedures for determining the status of a person who seeks asylum in South Africa. In deciding who is to be granted refugee status, the officials of the Department of Home Affairs apply the definition contained in the 1951 United Nations Convention, as well as the extended definition contained in the 1969 Organisation of African Unity Convention. The senior official at the Department of Home Affairs in Pretoria responsible for refugees is the Director for Refugee Affairs. A Standing Committee for Refugee Affairs, made up of senior department officials, whose task it is to consider the applications for asylum, meets at department offices in Pretoria, Cape Town,
Durban and Braamfontein. The regional committees can make decisions regarding the status of asylum seekers who have fled Angola, Somalia and the Democratic Republic of Congo. The cases of people who have fled other countries are at present dealt with at head office in Pretoria.

Upon reporting to an immigration official at the Department of Home Affairs, an asylum seeker's details and photograph are taken and an appointment is given. The asylum seeker is given a form granting permission to remain in South Africa until a specified date, and allowing that person to seek employment. At the appointment, an immigration official will take down further details, firstly to determine nationality. An Eligibility Determination Form is completed and the asylum seeker may make an additional statement, which may be in any language. Should the asylum seeker require an interpreter the department will undertake to provide one.

The immigration officials at Refugee Affairs prepare a file for each applicant and the file is forwarded to the Standing Committee for Refugee Affairs. The standing committee relies on the contents of this file in deciding whether or not to grant refugee status. The asylum seeker is not entitled to appear in person before the members of the standing committee, and is not entitled to legal representation at the determination meetings. Asylum seekers are not given the opportunity to respond to any information which the committee may have regarding an application, nor are they entitled to be informed of any issues of policy in the determination of their status.

The standing committee can make one of three decisions:

1. **Approve the application, grant refugee status and**
   1.1 give the individual permission to stay in South Africa (This permission will be in the form of a permit in terms of section 41 of the ACA. The permit is renewable every six months, and the refugee is entitled to travel documents.), or
   1.2 give the individual permission to stay in terms of section 23(b) of the act (In terms of this section the refugee is exempt from temporary residence control requirements and may usually stay in the country for two years. The refugee is entitled to travel documents.), or
   1.3 in exceptional cases, such as where there is no chance of the refugee ever returning to her or his country of origin, grant permission in terms of 23(a). (This means that the refugee is granted the same rights as a permanent resident and is issued a South African identity document.)

2. **Reject the application on the grounds that the applicant has not shown a well-founded fear of persecution** in terms of article 1(a)(2) of the UN convention, or that the applicant has not shown that she or he was compelled to flee her or his county of origin due to the
circumstances contemplated in paragraph 2 of article 1 of the OAU convention.

The asylum seeker is notified in writing of the decision regarding the application and, if rejected on these grounds, is further informed of the right to appeal against the decision, and that the appeal has to be lodged at an office of the department within seven days of notification. The appeal can take any form, but the letter or statement must be in English. This letter of appeal is forwarded to the department in Pretoria, where the appeal is considered by the Appeal Board.49 Should the appeal fail, the appellant is once again notified in writing and usually given 14 days in which to leave the country from date of receipt of the letter. In an application brought in December 1996 in the matter of Joao Pembele and five others v Appeal Board for Refugee Affairs, the Minister of Home Affairs and four others, the court gave an order by agreement that the Department of Home Affairs shall ensure that asylum seekers are given the reasons in writing for any adverse decisions by the Standing Committee for Refugee Affairs.50 It was further ordered that “all pending appeals against decisions of the standing committee involving asylum seekers who have not been furnished with reasons in writing shall be suspended until such reasons are furnished whereupon they shall be entitled to supplement and/or amplify their appeals within a reasonable time”.

3. Recognise refugee status but refuse to grant asylum. In making this decision, it would appear that the department is applying a rule relating to the country of first asylum.51 This decision would follow in a situation where the asylum seeker satisfied the standing committee that she or he qualified as a refugee in terms of the conventions, but failed to apply for asylum in the country or countries through which that person travelled in order to reach South Africa.52 As a matter of policy, the department considers a period of up to three months in another country to be a transit period before it will apply the above rule and refuse to grant asylum. An asylum seeker who had remained in another country for longer than three months may appeal against the decision, but would have to give compelling reasons why asylum was being sought in South Africa rather than in the first or subsequent countries of asylum.

The effect of this decision, unlike the decision to refuse the application, is that the refugee cannot be deported. The presence in South Africa of a refugee after the expiration of the 14-day period would be illegal and he or she could be arrested and fined. In theory, the refugee is protected, as a warrant for deportation
may be suspended or withdrawn by the minister, but how this would operate in practice and whether the refugee is given a document setting out his status is not clear.  

Should an immigration officer or administrative officer working in the Refugee Affairs department be of the opinion that an application is either manifestly unfounded or fraudulent, the application is sent to an assistant director at head office who decides whether or not the application is in fact manifestly unfounded or fraudulent. If not, the application is sent to the Standing Committee for Refugee Affairs. Otherwise, the decision that the application is manifestly unfounded (and therefore that the application does not enter the determination process) is reviewed by the deputy director. There is no right of appeal against this decision.

The determination procedures have been in operation since October 1993 and the appeal process since early 1996. There have been complaints that they are not consistently applied in various parts of the country. There have also been reports of officials demanding or accepting bribes and of unacceptable behaviour by officials. This does not appear to be the situation in Cape Town, where the number of applicants is relatively low and the officials particularly sympathetic. The determination procedures and their application are the subject of a judicial review proceeding yet to be heard in the Cape Provincial Division of the High Court.

As was evident from the discussion of the ACA, this act does not provide the necessary checks to ensure that the rights of refugees are not abused. Consider, as an example, the position of an asylum seeker in possession of a temporary permit and awaiting the outcome of his application for refugee status. There is no protection offered to a refugee who fails to have his or her permit renewed. The following scenario is highly likely: a refugee goes to the offices of the Department of Home Affairs at Braamfontein the day before his permit expires. For two days in a row he is not able to arrive at the office early enough to get to the front of the queue before the office closes for the day. On the third day, he falls foul of the provisions of the act and is liable to be charged with an offence in terms of the act or – a more serious consequence – to be refouled. Until just over a year ago, the letter notifying an asylum seeker that the application for asylum had been unsuccessful failed to inform the applicant of the right to appeal against the decision. In a recent case, an asylum seeker was detained in terms of section 41 of the act even though he had not exercised his right of appeal.

The facts of this case highlight the problems. On hearing that his application for asylum had been refused, the applicant stowed away on a ship bound for Europe. He was found 10 hours out to sea and returned to
Cape Town harbour, where he was detained by the port authorities. He was charged with an offence in terms of Section 35 of the act – leaving the country without a passport or permit and failing to present himself to an immigration officer – and detained in a prison pending the hearing in the Cape Town Magistrate’s Court. A senior official in the local office of the Department of Home Affairs, but from a different section, had heard about the matter and disapproved of his colleagues’ action. Although the official did not know the detainee’s name, he gave me the date of the next court appearance. I managed to track the applicant down and obtain instructions from him. At this court appearance and the first appearance, interpretation had been in Arabic, the applicant’s third language.

When the immigration officer concerned realised that the applicant was represented, he decided to remove him from the country as a prohibited person. He argued that the applicant was not entitled to appeal against the standing committee’s determination, as seven days had elapsed. The applicant was given a suspended sentence by the magistrate and a judge of the Supreme Court granted an interdict preventing his removal from the country pending the outcome of his appeal. It is now practice for the Department of Home Affairs to inform an applicant who has been rejected of the right to appeal and that this right must be exercised within seven days of receipt of the letter. In future the reasons will be given, in writing, for the rejection of the application for asylum.

Refugees and Fundamental Rights in the Constitution

The Constitution makes no provision for the right to asylum. The profile of international law has however been raised, and international human rights law is used by the courts in interpreting the fundamental rights contained in chapter 2.59 Virtually all of the rights entrenched in chapter 2 of the Constitution are rights enjoyed by all persons, rather than only citizens.60 While every person shall have the right to equality before the law and to equal protection by the law, the grounds of discrimination do not include discrimination on the basis of nationality.61 All the rights guaranteed to persons are of particular importance to refugees, who will have been denied many of these rights in their country of origin. The rights limited to citizens are the right of a citizen to enter, remain in and leave South Africa and not to be deprived of citizenship, the right to choose a trade, occupation or profession, and political rights: the right to be involved in political parties and the freedom to make political choices, the right to vote in secret and to stand for election to public office.62

Section 36(1) of the Constitution does allow for the limitation of the
rights contained in chapter 2, but only to the extent that the limitation is (i) reasonable and (ii) justifiable in an open and democratic society based on freedom and equality, and that such limitation shall not negate the essential content of the right in question. For certain rights to be limited, the limitation has to be necessary as well as reasonable. The Constitutional Court has yet to hear a case involving the rights of a non-citizen, but such matters have been heard by the High Court.\(^6\)

The right to administrative justice and the right of access to information are two rights of particular importance to an asylum seeker.\(^6\) Although refugees are such by definition, until they are able to apply for asylum and then until their status is determined, they are not able to enjoy the rights that may flow from this status. It is therefore imperative that determination proceedings are fair and that an asylum seeker is afforded the right to administrative justice from the first moment of contact with a government official. The right of access to information is equally important, particularly as an asylum seeker is at a disadvantage in making an application for asylum. Obtaining up-to-date and reliable information concerning the country of origin is difficult.\(^5\) In preparing an application on which his or her safety or life may depend, a refugee should be made aware of the criteria used by the standing committee in making the determinations, and of any adverse information which may affect the application.

The right to information provision states that:

Every person shall have the right of access to any information held by the state and any information that is held by another person and that is required for the exercise or protection of any of his or her rights.

The right to administrative justice is formulated as follows:

Every person shall have the right to –

(a) lawful administrative action where any of his or her rights or interests are affected or threatened;

(b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.\(^6\)
The legislative, executive and administrative arms of government are bound by these provisions. Section 33 (Section 24 of the interim Constitution) entrenches the obligation of any executive organ of state, at all levels where the action is an administrative one, to comply with the rules of justice where the rights or legitimate expectations of a person are affected or threatened. Section 33 in effect entrenches the basic elements of judicial review. The object is to ensure that a court has the power to test all administrative action on the grounds of “illegality”, “irrationality” or “procedural impropriety”.68

The High Court has recently delivered judgments in several cases where immigrant applicants have claimed these rights.69 With one or two exceptions, the record of the judiciary is as disappointing as that of the legislature in protecting the rights of immigrants within South Africa. In the decisions where the applicant was held not to be entitled to the rights contained in chapter 2, the courts did not hold that non-citizens were not entitled to protection or relief in terms of the rights relating to administrative justice. Rather, they held that in terms of the Constitution, the applicants did not have any of the “rights, legitimate expectations or interests to trigger the protection of section 24”.70

In the case of Xu v Minister of Home Affairs, the court dismissed a request for reasons under section 24(c) of the interim Constitution for the refusal by the minister to grant a temporary residence permit in terms of section 26(1) of the ACA, on the grounds that the applicant had no constitutional right or interest in remaining in South Africa.71 The court in Parekh v Minister of Home Affairs and Another followed the Xu decision in refusing to order the Minister of Home Affairs to provide reasons to the applicant for his decision to deny an application for permanent residence.72

In the matter of Naidenov v Minister of Home Affairs, the court refused to allow an application for access to information with regard to the minister’s refusal to issue the applicant a temporary residence permit so that he could apply for asylum.73 The judge held that the applicant had no right to political asylum and furthermore no right to apply for asylum as, in his opinion, international law gave a state absolute discretion in allowing an alien’s presence in the country.74 The court held further that, as the applicant had not been detained and held for the purposes of proceeding with criminal charges, the Constitutional protection afforded to persons arrested and detained did not apply to the applicant.

While in no way underestimating the negative impact of these decisions, which are clearly wrong in many respects, a recent unreported decision in the Cape Provincial Division of the High Court, Paul Ngama Kabuika and Another v Minister of Home Affairs and Others, provides some hope.75 The judge in this matter held that the principle of
non-refoulement is a rule of customary international law and is binding on South Africa. The applicant was therefore entitled to protection from deportation. The court held that on common law grounds, the decision of the Appeal Board of the Department of Home Affairs not to allow his appeal was subject to judicial review. On the basis of this decision, it could be successfully argued that the right not to be repouled would trigger the protection of the administrative justice provisions of the Constitution.

REFugee Rights in South Africa

The UNHCR Excom Report for 1994-95 refers to South Africa's asylum policies as "liberal". Certainly at the moment both asylum seekers and refugees enjoy important rights that are not universally enjoyed: the right to seek employment, the right to move freely within the country and, once refugee status has been approved, the right to travel documents in order to travel outside South Africa, adequate determination procedures, free medical care and primary education and, in certain circumstances, social assistance. However, these rights are by no means secured. Although the High Court has recognised that the right not to be repouled is a right based on international customary law, the absence of clearly stated legislative or judicial principles creates space for abuse. Without well-defined legislation there is an increased risk of abuse, particularly at those borders from where the most serious reports of human rights abuses of immigrants have emanated.

If their hope lies in new legislation designed to address forced migration, human rights advocates in South Africa have a heavy lobbying task ahead of them. A draft Refugee Bill has been made available to non-government organisations for comment. This bill suffers from many of the inadequacies of the ACA. The drafters seem to have been unable to move away from a paradigm based on outdated notions of sovereignty, within which any immigration is seen as a threat to state security. It would appear that the drafters of the bill have no appreciation of the fact that, by acceding to international refugee treaties and to other human rights instruments, South Africa has in effect surrendered a small measure of its sovereignty.

The draft Refugee Bill gives wide powers of discretion to the minister and, in certain instances, restricts judicial review. It also allows the minister to delegate a number of important powers. An important omission is the absence of any reference in the bill to South Africa's obligations in international law and the lack of almost any reference to refugee rights. In fact, the draft bill restricts freedom of movement by giving the Minister of Home Affairs the power to make regulations in
order to establish reception centres and to provide for areas in which refugees may stay. It also grants wide powers of detention. Another example of the transitory nature of refugee rights envisaged in the draft bill is the minister’s power to impose conditions on the granting of permits to remain in South Africa. The exercise of this power could threaten the right to seek employment at present enjoyed by refugees.

Much of the draft bill is concerned with the determination procedures, and even here an asylum seeker does not have the same guarantee of independence as an applicant for permanent residence. A positive aspect of this draft bill is that it confirms the right of an applicant involved in determination proceedings to be given reasons for any decision that may affect him or her, and the right to information. A further positive aspect is the recognition of the need to accommodate mass refugee movements. Finally, the draft bill does not make adequate provision for the end of asylum, particularly in situations where refugees have lived in the country for a number of years. The need for a legal framework to provide for the recognition and protection of refugees on a non-discriminatory basis has been highlighted by the position of many Mozambicans in South Africa. While the granting of amnesty from the provisions of the ACA was appropriate and humane, the South African government must guard against bilateral and piecemeal solutions.80

CONCLUSION

The chairperson of the Parliamentary Portfolio Committee, Desmond Dockey, had this to say at a recent conference: “In the past two years we have come a long way in South Africa. We have created a new social democracy out of centuries of injustice. We have adopted a new Constitution which is the envy of the world, and we have forged a new society based on equity, equality and humanity. If we are to play the role that is expected of us in the region – and if we are to stay faithful to our own beliefs – we must seek to apply those principles to the refugee and immigration challenges that face us.”81

South Africa, however, has yet to develop an adequate refugee regime consistent with the minimum standards of international law. In a situation where there are many illegal immigrants, it may be politically popular to limit the fundamental rights contained in the Constitution where refugees and asylum seekers are concerned. We must resist the temptation to offer fewer facilities than neighbouring countries, to reduce what is called the “pull effect” or to practise and encourage “humane deterrence”.82 South Africa could act to prevent forced
migration in the region by becoming involved in the development of other states, and by challenging those states that abuse the rights of their citizens. If the victims of other failed states are further persecuted within South Africa, we would forfeit the opportunity to play the humanitarian and exemplary role described by Lockey.

Notes


3 Deputy President Thabo Mbeki was quoted in *The Star*, 13 October 1994 as saying: “Tanzania, Zimbabwe, Botswana and other countries to which we fled in the 1960s did not call us illegal aliens. They said ‘we are going to support our brothers and sisters from South Africa so that they can go home’.”

4 The Lawyers Committee for Human Rights (LCHR), *African Exodus*, estimates that at the height of the Mozambican crisis in the late 1980s there were up to 1.5 million Mozambicans living in South Africa.


7 “Mozambican Refugees”, p. 154. The LCHR gives the official figure for the deportation of Mozambicans as 61 000 for 1992. A fundamental problem with relying on deportation figures is that many refugees attempted to cross into South Africa on a number of occasions and were frequently deported, only to cross the border again.

8 *African Exodus*, p. 47 states that at first arrested Mozambicans were brought before court before deportation and were in theory entitled to legal representation; subsequently all police officers were deemed to be “passport control officers” and entitled to deport in terms of the ACA, 1973 (no 40 of 1973).

9 *African Exodus*, p. 43.


11 I was informed by a Pretoria immigration officer that this practice continues and that they are regularly contacted by managers of construction sites informing them that there are illegal
immigrants on site. The officials arrest the illegal workers who in
turn inform the immigration officials that they were due to be
paid. The contractors are obviously acting unlawfully in a
number of ways. The official informed me that prosecutors were
reluctant to proceed with criminal cases against the contractors
despite the fact that in terms of sections 32(1)(a) and 58(3) of
Alien's Control Act, 1991 the employer could be fined and
ordered to pay the costs of the deportation of the employee.

12 This principle of international customary law provides that no
state shall expel or return a refugee to a country where his life or
freedom would be threatened due to the grounds contained in the
refugee treaties.

13 For a report on the process of which repatriation from South
Africa was but one aspect see The State of the World's Refugees: In
Search of Solutions, Oxford University Press, UNHCR, 1995,
pp. 174-181.

14 A department of refugee affairs has been established within the
Department of Home Affairs.

15 The convention was ratified on 11 January 1996.

16 The UNHCR repatriation programme ended in March 1995.

17 This amnesty for illegal immigrants from prosecution and
deporation has been extended to all nationals of the Southern
African Development Community who fulfil certain criteria:
applicants must not have a criminal record and must have
entered South Africa prior to or on 1 July 1991 and must be
engaged in productive economic activity, be married to, or be in
a relationship with a South African partner or have dependent
children who were born or reside in South Africa.


19 These statistics were obtained from the UNHCR and the
Department of Home Affairs. Appeals were only heard from
January 1996 and no statistics appear to be available.

20 An alliance of NGOs, religious organisations and representatives
of government departments has been set up to co-ordinate
refugee assistance in Cape Town, Johannesburg and Durban. A
local refugee committee broadly representative of refugees in the
city is part of the Cape Town Refugee Forum. Lawyers for Human
Rights has recently set up a network of organisations known as
the Refugee Rights Consortium, which will focus on giving
advice to asylum seekers, researching the law relating to refugees
and refugee rights advocacy.

21 The Aliens Control Amendment Act, 1995 (act 76) came into
operation on 1 July 1996.
22 From the preamble to the act.
23 De Villiers, R, and Reitzes, M (eds), 1995. *Southern African Migration: Domestic and Regional Policy Implications*, Johannesburg: Centre for Policy Studies. See also submissions made by the Black Sash to the Portfolio Committee on Home Affairs, House of Assembly on The Aliens Control Amendment Bill [W54-95] in 1995, which noted that the lack of transparency in the implementation of the act did nothing to allay perceptions that immigrants, legal or illegal, from outside Africa are treated more favourably than immigrants from within Africa; also chapter 7 in this book.

24 Crush, J, “Migrancy: The Colour of Alienation”, *Democracy in Action* 10 (6). According to Crush, people are stopped and questioned, and even arrested, on the basis of skin colour, vaccination marks (or scars where a vaccination mark might have been) and according to one report “because the person walked like a Mozambican”. Not only refugees, but South African citizens risk being deported.

25 Asylum seekers and a number of refugees whose status has been recognised are granted permission to remain in South Africa in terms of Section 41 of the ACA. The act is not the only piece of legislation that refers to and impacts upon the lives of non-citizens.

26 Defined as (a) any place on the coast of the Republic; (b) any place in the Republic at or near any of the borders thereof; or (c) any airport in the Republic, designated as such by the minister and where an immigration officer is stationed (Section 1(xiii)).

27 ACA, section 5(3). In signing the 1951 UN convention, South Africa has agreed not to prosecute refugees who enter the country illegally or remain in the country illegally.

28 The burden of proof rests on the person who wishes to enter the country.

29 ACA, section 7(1). An asylum seeker who enters at a border post may be required to comply with these provisions and, in so doing, be required to make application for asylum there and then. Section 10 empowers the immigration officer to grant provisional permits to persons suspected of being prohibited persons. Such permits, which may be cancelled at any time by the Director-General of Home Affairs, may be valid for the whole or part of the country and may be subject to certain conditions. Before issuing the permit the immigration officer may require a deposit.

30 An immigration permit is granted in terms of section 25, on the authorisation of the Immigrants Selection Board.
31 ACA, section 27. This section empowers an immigration officer to obtain particulars from the person “there and then” for the purposes of determining whether or not to grant a temporary permit.

32 ACA, section 28(2). Subsection (3) allows the minister to exclude from any exemption granted to a category of persons under subsection (2) any person belonging to that category.

33 ACA, section 9.

34 ACA, section 11(1). Unless proved to be a South African citizen, every person who enters the Republic has to produce a passport and, unless exempted, a valid visa.

35 For example, if an alien is granted permission to remain in South Africa in terms of section 26 but either fails to comply with the conditions imposed or remains in South Africa after the expiry of the permit, he may, in terms of section 26(7), be dealt with under the act as a prohibited person.

36 Included would be any person who, from information received from a government through official or diplomatic channels, is considered by the minister to be an undesirable inhabitant or visitor; any person who lives or has lived on the earnings of prostitution or who has acted as a pimp; any person who has been convicted in any country of a contravention of a law relating to exchange control or of an offence mentioned in schedule 1 of the act (this list of offences ranges from “receiving stolen property knowing it to be stolen” to murder) and is considered by the minister to be an undesirable visitor or inhabitant; a person who is mentally ill, deaf and dumb, deaf and blind, or dumb and blind, or is otherwise physically afflicted, unless in such case the person concerned or the person accompanying him gives satisfactory security for his permanent support in the Republic or for his removal therefrom when required by the minister; any person who is afflicted with a contagious, communicable or other disease, or who is a carrier of a virus, as may be prescribed. The 28 June 1996 regulations no. R999 reg 21(2) prescribe cholera, pestilence and yellow fever.

37 *Kedir v Minister of Home Affairs* case no 15631/95. In this matter the applicant had left South Africa without reporting to an immigration officer in terms of section 35 of the act.


39 Staff at the legal aid clinics at the universities of Cape Town and Unisa have spent hours trying to trace individuals who have been detained. It also does not appear to be practice for immigration
officials to inform the legal representative of a detained person when he is moved to another place of detention.

40 Section 55(1) of the ACA originally read that subject to the provision that no person shall be detained for longer than is reasonable and necessary, "no court of law shall have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any act, order or warrant of the minister, an immigration officer or master of a ship performed or issued under this act and which relates to the restriction or detention, or the removal from the Republic, of a person who is being dealt with as a prohibited person”.

41 Klaaren, J, chapter 3 in this book. The provisions relating to detention are subject to constitutional review in terms of chapter 3, section 25, as are the provisions that could result in discrimination against disabled people. The regulation referred to may restrict the movement of holders of residence permits.

42 Much of the information regarding the determination process was obtained in an interview with an assistant director of refugee affairs at the departmental head office in Pretoria on 5 January 1996. The procedures are also set out in the agreement signed by the South African government and the UNHCR with regard to the repatriation of Mozambicans.

43 This is unlike the Immigrants Selection Board, which considers applications for permanent residence. Its members are appointed for specified terms and may not be in the full-time service of the state. No one not employed by the department is involved in the determination process of the Standing Committee of Refugee Affairs. The Cape Town Refugee Forum requested observer status on the standing committee but this was refused.

44 This form is issued in terms of section 41 of the ACA and a photograph of the permit holder is affixed to the top.

45 With regard to conditions in the country of origin, the standing committee relies on information from the Department of Foreign Affairs, Amnesty International and Human Rights Watch reports and information provided by the UNHCR. The refugee affairs office in Cape Town has developed a resource bank. With regard to the credibility of individual applicants, it has been suggested that members of the board ask the immigration officers who take the statements for their opinion as to the credibility of the asylum seeker. See Mail and Guardian, 13-19 September 1996. There have also been reports that UNHCR staff have advised the board on individual applications, particularly where rationality has been at issue.
46 There is nothing to stop an asylum seeker from getting legal assistance in drafting his statement or completing the eligibility determination form.

47 In the first case where I was instructed to lodge an appeal on behalf of a refugee in June 1995, I requested and obtained considered reasons for the decision to reject an application for asylum from the head office of Home Affairs. It was evident from the reasons given that the standing committee's decision was that the applicant did not need protection outside Zaïre, as he could have fled to a safer place within the country. These reasons enabled me to draft an appeal which responded to this specific issue. In subsequent matters, the department refused to give reasons, citing as justification for this position the judgment in the Naidenov case (discussed here).

48 In January 1996, two applicants were exempted from the requirements of section 23(a); an elderly Bosnian refugee whose family members had obtained permanent residence in South Africa and a man whose religious conversion rendered him liable to execution in his country of origin.

49 At the moment, the appeal board consists of one independent advocate who is paid by the Department of Home Affairs.

50 Case no 15931/96 in the Cape of Good Hope Provincial Division.

51 It was evident from my interview that the Department of Home Affairs believed that this was a rule of international customary law. The UNHCR was probably responsible for this belief. Certainly it would appear from an article written by a protection officer in the region that the UNHCR is concerned with "irregular movements" of refugees within the region. Kingsley-Nyinah, M, 1995. "Reflections of the Institution of Asylum, Refugee Criteria, and Irregular Movements in Southern Africa", International Journal of Refugee Law, p. 291.

52 It is not clear whether or not the standing committee considers whether such countries are in fact safe for the individual asylum seeker.

53 ACA, section 50.

54 This is interpreted to mean that the application is made on grounds other than those contained in the convention definitions. An example given to me by an official was a case in which an applicant stated that he had accidentally killed his neighbour's child and feared for his life should he return home.

“Desperate new arrivals seek asylum: City swells with refugees”, Cape Times, 12 December 1995. In this report, Jaco Duckitt is quoted as saying that the Cape Town office of the Department of Home Affairs sees between 50 and 60 applicants a week.

Paul Ngama Kabuika and Another vs The Minister of Home Affairs and Two Others, case no 6716/96.

Kedir v Minister of Home Affairs, case no 15631/95.

The Bill of Rights. See generally Dugard, J, 1995. “International Law and the ‘Final’ Constitution”, South African Journal on Human Rights 11, pp. 241-251. Section 231[4] states that: “The rules of customary international law shall, unless inconsistent with this constitution or an Act of Parliament, form part of the law of the Republic.” Section 35(1) states that “in interpreting the provisions of [chapter 2 on fundamental rights] a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law”.

These rights are: the right: to equality; to life; to freedom and dignity of the person; not to be subject to servitude and forced labour; to privacy; to freedom of conscience, religion, thought, belief and opinion; to freedom of expression; to freedom of assembly, demonstration and petition; to freedom of association; freedom of movement; freedom of residence; of access to court; of access to information; to administrative justice; to engage in economic activity; to fair labour practices; to acquire and hold rights in property; to a healthy environment; to language and culture; and to education. There are also special children’s rights and rights for persons who are detained, arrested and accused.

While this is not a numerous clausus, it is nevertheless an important exclusion.

Sections 19, 20, 21(3), 21(4) and 22 of the Constitution of the Republic of South Africa, 1996.

In the matter of Larbi-Odam v Minister of Education, 1996 4 All SA 185 (B), the applicant challenged regulations published by the Minister of Education that provided that no person would be appointed as an educator unless he or she was a South African citizen. The court found that there had been a violation of the applicant’s right not to be discriminated against unfairly, but that the government was entitled to limit this right, as the regulations were reasonable in light of the fact that many South African teachers were and continue to be unemployed.
Section 33 and section 32.

An example of this difficulty is information concerning the Democratic Republic of Congo, where infrastructure is virtually non-existent and communication is difficult.

Section 33 of the Constitution.

Including provincial and local legislation.


It was argued that, in terms of the interim Constitution, only citizens have the right to enter and remain within the country; Klaaren, “So Far Not So Good”.


1996 (2) SA 710.

1995 (7) BCLR 891 (T). In this matter, the applicant faced serious criminal charges of a non-political nature in his country of origin.

The court also held that any interest that the applicant may have, such as an interest in the outcome of an application for temporary residence, was not enforceable in a court of law.


In the case of Foulds v Minister of Home Affairs and Others 1996 (4) SA 137, the judge held on common law grounds that, as certain legitimate expectations were created in the
implementation of the ACA, the applicant in this matter was entitled to be informed of any adverse information which the Immigrants Selection Board had with regard to his application, and to be permitted to respond to this information.

77 UNHCR, Centre for Documentation and Research, Geneva, 1996.

78 Any attempt by Home Affairs to remove certain rights from individuals would be subject to judicial review, but this does not prevent future applicants from receiving fewer entitlements.

79 I refer in particular to the powers given to the minister to remove "undesirable" persons.

80 It must be acknowledged that the situations that gave rise to this amnesty are complex and that this particular amnesty seeks to redress the effects of past discriminatory immigration practices.

81 "Perspectives from Parliament: Policy Options and Directions", speech at Conference on Migration and the Rainbow Nation, Centre for Southern African Studies, University of the Western Cape, 29 August 1996.

82 However, there would be no difficulty in finding precedents for such actions. As Barbara Harrell-Bond has pointed out in her contribution “The Protection of Refugees in the ‘Least Developed States’” in The Living Law of Nations, pp. 47-60: “The failure of Western governments to uphold the standards of international humanitarian law has justified some of the least developed host states in also lowering their standards. This example has not only affected policies concerning the granting of asylum, but has been used to legitimate the refoulement of asylum seekers and the forcible repatriation of refugee populations long settled within their borders.”
CHAPTER SEVEN

BAD LAW: APPLYING THE ALIENS CONTROL ACT

SHEENA DUNCAN

It is not easy to write an article about the application of the Aliens Control Act. Its administration is haphazard, ad hoc, arbitrary and by no means transparent. When the Aliens Control Amendment Bill was under discussion in the Parliamentary Portfolio Committee on Home Affairs in September 1995, the Black Sash had difficulty in commenting on the bill because we regard the principal act as being bad law, and inefficient and costly in its implementation.

Because it is bad law, there is a widespread perception among the public that a person seeking permission to work temporarily or to reside permanently in South Africa will be given the required permit if he or
she is prepared to pay an official for it and that, if no money is paid
"under the counter", no permission will be granted. This perception may
be wrong but the lack of transparency in the implementation of the act,
the absence of the judiciary in the protection of people detained on the
assumption that they are "illegal aliens", the lack of published criteria
used by the Immigrants Selection Board to decide on applications for
permanent residence, and the visible presence of persons from outside
South Africa who seem to be engaged in hawking with impunity on the
pavements of South African cities lead the public to question the
honesty and openness of the Department of Home Affairs and officers of
the South African Police Services.

Current policy towards foreigners seems to be very exclusive. The
legislation ought to differentiate between citizens of neighbouring
countries (and probably of all the countries of the SADC) and citizens of
countries further afield. South Africa's past deliberate destabilisation of
other countries in Southern Africa rendered many of them impoverished
and in desperate need of reconstruction and development. South Africa
is moving towards development policies that will regard the region on a
holistic basis and towards a free market. The same should apply to the
free movement of citizens of Southern Africa across international borders
in the region. In addition, South Africa's wealth in the past was built on
the sweat equity of citizens of other countries at a time when South
Africans were not attracted to labour on the mines. The complexities of
a move towards free movement within the region should not be
underestimated, but South Africa's intention to move in that direction
should be clearly stated and legislation should reflect a preference for
citizens of other countries in Southern Africa.

Current statistics show exactly the opposite is the case. No one knows
how many "illegal aliens" are in South Africa. Estimates are wildly
inconsistent and no credibility can be given to figures that suggest there
may be up to eight million. The only remotely reasonable figure is that of
Home Affairs, which knows that approximately 750 000 people who
entered South Africa on temporary visas or permits of one kind or
another, since computerised controls were introduced at ports of entry,
have not left again through a border post.

There are undoubtedly many other persons who have entered the
country other than through a port of entry. Yet figures for deportations
show that most deportees are Mozambicans and Zimbabweans, followed
in smaller numbers by citizens of Lesotho. The number of persons
deported to countries outside Southern Africa is infinitesimal. The
inescapable conclusion is that Southern African citizens are prejudiced
against because the cost of deporting them is much less than the cost of
repatriating persons from further afield.
SCAPEGOATING OTHERS

The xenophobia that is growing so quickly among South Africans is a cause for serious concern. Senior politicians and bureaucrats in many government departments must take some responsibility for this. They repeatedly quote discredited figures for the number of "illegal aliens" said to be in South Africa and then very often go on to link those figures to the crime wave. They are abetted by some sections of the media who do not investigate but merely report inaccurate statements. The misleading message they are giving is that "criminals are aliens, aliens are criminals, and that if we could just get rid of the foreigners among us we will have resolved the crime problem".

The other part of the attack is that "they" are stealing our jobs and our houses and using our resources. There is no evidence of this whatsoever. No one knows how many of the people in the country without any kind of permit are employed in the formal sector. It is suspected that a number are employed in the farming, construction, restaurant and domestic sectors, but there is nothing to show that South Africans have made themselves available for these jobs. The only advantages that undocumented migrants have in the job market is that they forgo the protection of wage determinations and industrial council agreements on minimum wages, but this does not apply in the farming and domestic sectors, where there are no minimum wages. The fact that migrants are being given permits to work on farms in the Northern Province on the grounds that South Africans do not want to engage in this kind of labour would seem to indicate that the migrants are not unfair competition for available jobs, in this sector at least.

Many immigrants are visibly self-employed as contractors and hawkers and home-based manufacturers. There is not a fixed and static number of jobs in any economy. When people are engaged in some money-earning activity they are also consumers, and as consumers they pay their share of value-added tax as well as creating opportunities for other people who produce what the consumer wants to buy.

Undocumented migrants are not eligible for subsidised housing or for the allocation of a plot on which they can build a shelter. Both Gauteng and Free State provinces are saying they will exclude the children of immigrants from schools. Even legal immigrants with permanent residence permits are being excluded from some of the rights enjoyed by South Africans, such as the right to freedom of trade, occupation and profession and the right to social grants. These things will undoubtedly be the subject of court challenges.
CRIME AND CORRUPTION

Some foreigners obviously are guilty of crimes. The police statistic is that 14% of people convicted of criminal offences in 1994 were not South Africans. The onslaught of international criminal syndicates involved in drugs, illegal trading in guns, and vehicle theft and hijacking did take the country by surprise after South Africans became exposed to the world again after long isolation. But it is clear that the massive detentions and deportations of undocumented migrants in terms of the Aliens Control Act is doing nothing to resolve these problems. These old style “pass raids” are costly and futile. As South Africa’s police methods and investigative skills improve we can expect a greater success rate in addressing real crime and the punishment of offenders, whether they are South African citizens or nationals of other countries. There are welcome signs that the tide is just beginning to turn, but police statements continue to talk about real criminals in the same breath as those whose only offence is seeking economic survival in South Africa.

In November 1996, police called a press conference in Johannesburg to display a large collection of stolen passports and identity documents from several African states, together with forged seals used to falsify passports and identity documents. Police spokesman Andy Pieke noted that the Johannesburg Border Control Unit was not the only unit that helped in tracing illegal immigrants, but it was one of the most specialised to do the job. From January to October 1996 it had arrested 916 “illegal aliens” along with 92 employers who employed them, as well as three state officials on corruption charges.1 A reporter concluded: “The 10-man unit is woefully understaffed to deal with the investigation of cases relating to the more than three million suspected illegals in Gauteng”, thus perpetuating the notion that the number of undocumented migrants is known to the police and all are ipso facto criminals.

Corruption is rife in the whole system of aliens control — in the Department of Home Affairs and the police, and on the part of people who are not in either service but have contacts in them. At one end of the corruption scale are really grand schemes like that of a man arrested on suspicion of making more than R3 million from the sale of false residence permits to Chinese immigrants.2 At the other, the endemic small-scale corruption reminds the Black Sash advice office of the old days when South Africans and foreigners were equally subject to arrest in terms of the Urban Areas Act. Then they never went out without R10 in one pocket to pay off the black policeman who wanted to arrest them and R20 in the other to fork out if he was white. With inflation it is
doubtful if one can buy anything at all now for less than R250 but the system remains the same.

The real problem in documenting these abuses is that people who have paid for something, or have been asked to pay for something, are very reluctant to make any statements that might prejudice their applications for a permit to be in South Africa. One person who has been struggling for a long time for permanent residence was told it would go through if he paid R2 000. He declined to go this route but feared that if he reported the official concerned he might well find his application finalised and refused.

The same reluctance applies to the denial of administrative justice to applicants by the Department of Home Affairs. The cases below illustrate the gross violations of this right, which happen daily. Because the act gives such enormous discretionary powers to the department by delegation from the minister, and to the Immigrants Selection Board, people are unwilling to take action. The reluctance is understandable and underlines the need for much less discretionary power in a new immigration act and its regulations, and much clearer criteria for granting work or immigration permits.

Complaints about Home Affairs received by the Black Sash office in Johannesburg focus on the inordinate delays and lack of response to applications for permanent residence. Some people have been waiting for more than a year since first submitting their applications. These people have been in South Africa on work permits for varying periods. In one case the person concerned first applied in November 1994 and is still trying. On two occasions he was advised not to pursue the application. One explanation for this could be that Home Affairs is consulting old security police files. This applicant was employed by several peace and anti-apartheid organisations in the past and is now in the investigation unit of the Truth and Reconciliation Commission. One woman who is seeking a permanent residence permit because she is married to a South African citizen and resides with him has been waiting for months and was incensed when she went again to Home Affairs after 1 July and was told that she must pay the new charge of R5 580 for her application.

The Black Sash believes that a spouse or partner should have an automatic right to reside in the country of which the partner is a citizen or permanent resident. We understand the difficulties caused by "marriages of convenience" for purposes of obtaining residence but there has to be a better way of controlling that. Mr M is a Zimbabwean lawyer. His wife is a South African citizen living in Louis Trichardt. They were married in Louis Trichardt in September 1994. He applied for a permanent residence permit through the South African High Commission in Harare in November 1995. After endless delays he asked
a Johannesburg firm of attorneys to act on his behalf. That got nowhere. In June 1996 his wife approached the Public Protector. In August Mr M phoned the Public Protector’s office and was told that because of the backlog in that office it would take a long time before his complaint could be attended to.

After that his wife wrote to the Black Sash. His last instruction from Home Affairs was that he must have a job offer. He had applied to the Department of Justice for appointment as a magistrate. They drew his attention to the regulation which says that to be appointed as a magistrate one must either be a citizen or have a permanent residence permit. They did not raise any other difficulties regarding his job application. Thus he must have an offer of a job before his application for permanent residence will be considered but he must have permanent residence before the application for a job will be considered!

In November 1996, Mr M was still waiting, despite copies of his documents having been put in front of the deputy minister. He thinks that it is because the department is racist and he is black that he is getting the runaround. Our impression is that xenophobia is to blame, because we do not discern any difference in the treatment of black and white applicants.

The real issue seems to be how much money one brings into South Africa. Mr M compares his situation with the swift finalisation that wealthy people receive.

Mr N is a Zambian who lives in South Africa with his South African wife. He had a work permit but when he went to apply for permanent residence after 1 July 1996 he was told to pay R5 580 before the application could be lodged. He does not have that kind of money and has no way of getting it. He was told he could get a visitor's permit for which he must pay R360. He was told such a permit might be issued for any period from three days to three months. Understandably he refused to lay out money for a possible three days. (He will now obtain relief because of the 18 October 1996 amendment to the fees regulations.) An official of the department told our office that she supposed “he could try another way”. We interpret that to mean “try a bribe or find someone who is selling forged documents”.

The problem of corruption emerged in a startling fashion during the amnesty for citizens of the SADC countries. In terms of the amnesty announced in early 1996, from 1 July to 30 November 1996, citizens of the SADC countries who were illegally in South Africa, who had been here since before 1 July 1991 and who were either economically active in the formal or informal sector, or married or in a permanent relationship with a South African citizen, or had dependants born in and residing lawfully in South Africa, could apply for an exemption that would enable
them to become permanent residents. After an uncertain start, the administration of the amnesty seemed to go smoothly, although not nearly as many applications were received as the department had anticipated. The department expected about one million people to apply. Fewer than 200,000 applications were actually received.

Once the application was accepted, the applicant was issued with a temporary permit to remain in South Africa while it was processed. The department did not begin processing applications until after 30 November and by February 1997 had still only processed 20%, which seems extraordinarily slow for what should be quite a simple process.

If an applicant clearly does not comply with the conditions, she or he is to be given a seven-day permit with the instruction to leave the Republic within that time. An attorney in Durban has reported that he saw one person who came to South Africa four days after 1 July 1991 actually being arrested in a Home Affairs office. One problem is that those whose passports from their country of origin have expired are finding it exceedingly difficult to obtain urgent renewals or new passports from the diplomatic offices of their countries of origin. By far the largest number of telephonic queries received by the Black Sash about the amnesty were from people with forged identity documents showing them as either permanent residents or citizens, or forged permits in their passports. They were uncertain whether to leave the forged document at home when they applied. They also do not know whether the person to whom they paid the money to get the documents completed the whole process and entered the forged details into the population register.

There are apparently two ways in which people “buy” their way into relative security. One is to pay an official in the department to do the necessary. The other is to pay someone outside the department (but often in collusion with someone employed there) for the documents. We believe that the corruption and fraud is extensive but we have no proof. Someone who has paid for such a service is not prepared to make any statement about it.

One employer recently said that her weekly gardener had asked to borrow R800 because he had been told at the Randburg Home Affairs office that this is the charge for taking fingerprints. She refused because she knows there is no such charge and that he would qualify for the amnesty. He told her that he knows many other people who have been told the same thing. She offered to bring him to our office so we could assist him in making the application and investigate the accusation. He has never come, and later told her that he had paid, having raised the money elsewhere. Given the small rooms and congestion at the Randburg office, how could people hand over that amount of money unobserved? A report in the Star noted the presence of con men outside
the Market Street offices selling photocopied forms for R300 and offering forged records of employment to applicants.\textsuperscript{6}

Whatever the truth of the matter, Home Affairs, in co-operation with the police, should easily have been able to control interference with people waiting in their queues. The department says that applicants who presented themselves with false documents were not arrested or charged but had to be prepared to make a statement as to where and how they obtained the forgeries. The department has not disclosed how many such statements have been made.

There are several possible reasons why the number of applicants for permanent residence under the amnesty was much lower than was anticipated by the authorities. The department may simply have got the numbers wrong.\textsuperscript{7} Eligible people from SADC countries earning money in South Africa may not want permanent residence, being migrants in the true sense of the word, coming and going between family in the home country and work in South Africa. The many who have forged documents may feel sufficiently protected and not wish to rock the boat by coming forward. Many may never have heard of the amnesty because the department failed to advertise it effectively, relying mainly on intermittent press releases. The suspicion engendered from past experiences may also be a factor.

**Deportation Policy**

In 1995 the total number of people deported was 157,084, of whom 131,689 were repatriated to Mozambique and 17,549 to Zimbabwe. The repatriations cost South Africa about R12 million in air or train tickets.\textsuperscript{8} The conditions in which people awaiting deportation are held have long been of concern because of the lack of any public access to the administrative proceedings of Home Affairs inquiries and the fact that most people arrested as "illegal aliens" do not appear in court. They are arrested, held in detention and then deported. There is doubt as to whether their fundamental human rights are observed.

One recent development has been welcome. On 1 August 1996 the Department of Home Affairs contracted a private development organisation to manage a detention centre on the West Rand where large numbers of those awaiting deportation are held. Public access to the centre is not obstructed but for understandable reasons requires an appointment.\textsuperscript{9} The Dyambo Accommodation Centre is part of an old mine compound that seems to have been upgraded and renovated. There are 18 bedrooms on a large open space with well-trimmed grass. This open space was full of men playing with a football or just sitting in the shade. One group was in an informal queue outside one of the offices.
Home Affairs has a permanent office there processing the arrested persons who may be brought to the centre by police or immigration officers.

We were assured that the application forms for the amnesty are there and that everyone who comes in is made aware of this. We were also assured that they are told that they have a right to phone a family member or a lawyer. These claims need to be checked through individual interviews with the detained persons.

The private security company contracted by Dyambo to guard the centre uses unarmed guards, several of whom were joining in the football and mingling with the detained persons. There was no sense of this place being a concentration camp or a prison. The overall impression was that this was a place where human dignity was respected. Officials from the consulates concerned come regularly to interview their citizens and to assist those who have no passports or travel documents. There were 551 men in the centre the day we visited. As we left another 10 or so were brought in. The average length of stay is seven to 10 days, depending on the transport back to countries of origin. Home Affairs is responsible for escorting the detainees from the centre to the point of departure, and South African Police Services officers accompany the deportees on the trains. The centre can hold 1 000 people. Most are from Mozambique and Zimbabwe, but there was also a Japanese couple when we visited. The Mozambicans are sent home by train on Wednesdays and the Zimbabweans on Mondays. There are always a few from Lesotho who are deported by road. Some refugees who are arrested but have not yet applied for asylum have their applications processed in the centre by Home Affairs and remain there in detention while their applications are considered.

More information is required from Home Affairs as to why and whether they intend to privatise deportation centres in other parts of the country. There is a suggestion that a transit centre should be built near the border with Mozambique at Komatipoort. This is because the Mozambican authorities complain that they can deal with only 100 persons coming back a day, while the trains can carry up to 1 000.

All of this merely points to the futility of the whole exercise. If you believe there are between two and eight million "illegal aliens" in the country, as Home Affairs seems to, what on earth is the point in spending millions on deporting fewer than 200 000 of them? The R12 million for train and air fares is only one part of the total cost. Detention centres are expensive, and running full-time offices of Home Affairs in them costs money, not to mention the use of resources of police finances and personnel, which would be much better spent tracking down real criminals. The actual cost to the country of the presence of
undocumented migrants is not in the social services they consume but in this extravagant expenditure on trying to enforce the unenforceable.

EMIGRATION AND IMMIGRATION

South Africa has a very peculiar attitude to immigration and no coherent policy. Both government and the private sector bemoan the current brain drain of skilled and professional people to other countries. The official figures do not reflect the seriousness of the position because some emigrants do not declare themselves as such. They leave the country and settle elsewhere but do not always say that that is their intention, so they do not appear in the statistics issued by Central Statistical Services. Their number currently exceeds the number of those entering South Africa for permanent residence.

Not only does the Department of Home Affairs fail to deal with applications expeditiously, thus obstructing people who want to make a new life here, but it has also taken active steps to discourage immigration. New regulations regarding fees to be charged for various permits to enter the country came into effect on 1 July 1996.10 These fees range from R108 for a visa to R360 for a work permit to R5 580 for permanent residence. These fees are not a charge for the permit nor are they a deposit which will be refunded if the permit is refused. They are a charge for the processing of an application. They are a discouragement to potentially valuable immigrants. Originally there seemed to be some discretion in levying the fees, but an amendment on 18 October 1996 made them compulsory in all cases.11

CONCLUSION

The Aliens Control Act is thus a hangover from South Africa's unsavoury past. It is not a vehicle for the observation of internationally recognised human rights, nor is it a useful tool for the reconstruction and development of this country within the context of the SADC. It is not based on any coherent policy and its implementation is ad hoc, expensive and futile.
Notes

1 The Star, 7 November 1996.
2 Ibid.
3 The following section is based on complaints received by the Black Sash between March and September 1996.
4 The Centre for Applied Legal Studies and the Black Sash in Johannesburg had great difficulty in obtaining copies of the internal circulars instructing officials as to how the amnesty was to be interpreted and applied. We were told we had “no interest” in the matter. It took weeks and a threat to go to court to enforce the right to freedom of information before the circulars were made available.
6 The Star, 19 September 1996.
7 Some commentators argued that the actual numbers of eligible people were much lower than the department had predicted.
9 This account is based on a visit to the centre by the author on 25 October 1996. For a harsher view of the centre see “Twilight Zone where deportees wait”, Mail & Guardian, 7-13 February 1997, “Get out, aliens!”, Drum, 17 April 1997.
10 Government Gazette, no 17254, 28 June 1996.
11 The plus side of the amendment is that the spouses and dependants of a person residing permanently in South Africa are now exempted from the fee for an immigration/permanent residence permit.
CHAPTER EIGHT

THE USUAL VICTIMS: THE ALIENS CONTROL ACT & THE VOICES OF MOZAMBIANS

NICOLA JOHNSTON & CAETANO SIMBINE

The researchers at the University of the Witwatersrand Rural Facility have been working for several years among refugee communities in Mpumalanga and Gauteng. Since Mozambicans are the primary targets of current immigration controls, we asked the researchers for transcripts of their interviews with Mozambicans, discussing their experiences and perceptions of the Aliens Control Act. The statements are poignant and powerful and raise troubling questions about due process and the administration of justice in South Africa. They also provide important insights into how the persons targeted by the Aliens Control Act themselves perceive the legislation and those who enforce it.
INTERVIEW WITH MANUEL SIBUYI, SIMBE, MOZAMBIQUE, 17 APRIL 1996

I left here for South Africa in 1989. I was fleeing from the war. We went and lived in Pretoria. I worked there for the whites. Then my parents decided they would return and I would follow them. I continued working. One day the police arrived and searched us, and found that I had the vaccination mark and arrested me. They took us to jail where we spent three days. They sent us home on the train. When we arrived in Ressano Garcia, I fled and went back to South Africa. I wanted to collect my things. I didn't get very far. I was arrested at the border and beaten. So I came here [to Mozambique], and stayed at home.

Until now, my things are in South Africa and I don't know what has become of them. I haven't been able to return, but I'm okay here. I'm not thinking about going back, except to collect my belongings. If it weren't for that, I wouldn't have to.

I was arrested in 1996. When I was arrested they asked me if I was from Mozambique and I told them. I didn't need to hide that from them, they knew. They told me they were looking for us. They said it is because we steal, and other things, and because we are not needed. They said it is because we voted for [President Nelson] Mandela, and Mandela is not our president. He won the elections for our cause.

Many stayed [in South Africa]. My aunt stayed there ... I heard that many are afraid to return. Many are afraid of hunger. When you arrive here, there is not always family to receive you. Many are still refugees. You don't know who will be waiting for you. When you arrive here, you can't just make a machamba [cultivating plot] and harvest. There isn't even water here. Before, there were pumps, but now they have dried up.

The way they arrest people is not normal. I'm not sure why there are these problems. I haven't discovered yet. I don't know what is causing the misunderstanding between South Africa and Mozambique. [The police are] both whites and blacks, but the blacks like to arrest people more. Normally only men [are arrested], but women also if the opportunity arises. We are the usual victims because they find us at work.

They say it is [Minister of Home Affairs Mangosuthu] Buthelezi. He came up with these laws for arrest and deportation. He gave the idea to South Africans. [Under apartheid] people were arrested and deported, but not the way it is happening now. Before, you could work for a year without having these problems. Now, things are difficult. They arrest many people. You can't work for three weeks without being arrested. If you have bad luck you won't finish two days. Sometimes they come and arrest you the day before payday, and you lose your money. The greatest
problem is the way they are arresting people now, the way we lose our belongings. We are here and our belongings are there. They benefit from them. We are worried about how can we recover our things there. What other alternative is there? ... Going back there is not possible. If we could recover our things it would be reasonable. We wouldn't need to go back ever again.

INTERVIEW WITH ARMANDO UBISSE, MATONGOMANE, MOZAMBIQUE, 25 APRIL 1996

When we left here, we were chased out by the war. We went through the bush in Kruger [National] Park. We were arrested by the police. We tried to escape, but they said we shouldn’t. They did not want to send us back to Mozambique. They took us to Gazankulu, in Justicia. The police station there is called Mkhulu. They received us and took us to the induna, who received us and gave us food. Later we were called to Ndizima. We were given blankets and clothes and maize meal, after they had given us places to build. The amount you received depended on the number of children you had. Then we went to the place where we would build. They sell poles there, but since we were refugees we did not pay. The Shangaans of Gazankulu are our people, although they live amongst themselves as we live amongst ours. They live the same way as we live here.

We had a representative. When anything was wrong here, we would communicate with their leader. We received donations in the beginning, but later we had to look after ourselves, since we had been there a long time. When we went to look for work they said we had to go back to [the late Mozambican President Samora] Machel’s land, and arrested us and sent us back. It was worse if you had a vaccination mark, you couldn’t pass the police. At the end of the month they sent a truck to pick us all up and our wages were kept by the boss. If you had a large family it was difficult to support them. You had to buy everything, including salt. This is what we saw there. They treated us well in the beginning. It was bad when we needed to work. We couldn’t feed our family on a small sack of mealie meal.

When we went to work we were arrested and deported because we were in favour of the ANC [African National Congress]. This is why we were arrested. They said we had to go back and fight for our own government.

The time came when we heard that the war had ended. We stayed because we wanted to wait and be certain. We didn’t believe it because we had suffered so much in that war. A time came when I left alone to come here, there wasn’t enough money. I got less than R10 a day, only
R4,96, and it wasn’t possible to support my family. I decided to come here [to Mozambique]. I spoke to someone with a car who wanted 800 000 meticais. I worked and saved the money while my family was in Justicia. Someone brought my family, and when they arrived, I paid him. This is how my family returned. They returned without suffering, but I suffered trying to get the money together.

It is difficult to get money and to find work. You have to rely on yourself to get money, this is how things are. The worst are the arrests. Even if you want to work on the plantations, at the end of the month before you are paid you get arrested, you lose the wages, you are deported. If you’re not deported you are fired. You can go to another plantation and the same thing happens. It’s not possible to support your family. Eventually they become desperate. The children at school have to pay now. The first two years it was free.

Life in South Africa used to be good. We were contracted by Wenela [Witwatersrand Native Labour Association] and never arrested. We worked in the companies. The money wasn’t much, but life was good because we weren’t persecuted. When it was time, you could come to Mozambique. This is how we worked. I think it was good then. Now there is suffering. Everywhere you go you are arrested. If you have money they take it and they deport you. You arrive in Ressano Garcia, you don’t know anyone, have no family, and they call you a criminal. This happens because you have no money to go back to your village, which is far away.

We lived well in South Africa before. We were mixed together with Zulus, Xhosas, there were no problems, there were no conflicts. Now there are money problems. Maybe because of the unemployment.

Our way of working before was very good in comparison to now. Working there now is insignificant. A son who is working there sometimes comes home with only a bag in his hand. We used to bring big trunks and nobody searched us and confiscated our goods. Now when people come, their things are taken from them and they arrive with nothing. It’s not a good way to live. It was good before.

**Interview with Kaptine Simango, Simbe, Mozambique, 16 March 1996**

I went to South Africa, but the way I went, I suffered. There was war in this country. I was drafted into the army and I deserted. I went to live in Maputo. My brother called me there. Then I went to South Africa. It was difficult. On the way, we were arrested, we paid, and they let us go. The war was bad at that time. Finally, I arrived and started working. The work didn’t go well. I kept getting arrested by the police.
When I was arrested, I came back to Mozambique. I was attacked at Ressano Garcia. It was torture, because I was a prisoner there and also a prisoner here. When you complain, nobody pays attention.

In spite of all this, it was not that important for us. What disturbs me the most is when we are arrested in South Africa and we ask why and they say because you are here without authorisation. When you are arrested and you tell the police you want to go and get your things, they pay no attention. They say you came here with nothing, not even money. I left my things. I have a house. I want to get my zinc sheets. They don’t care. They want us to leave and never come back. They take you to prison, where you stay a week or two or even a month before you go. They only give you enough food so you can sleep, so you don’t die.

They take you to Ressano Garcia and, when you try to get back in, there are whites who shoot at you. It’s dangerous, some people have died, others have managed to escape. Sometimes you get there and you are arrested again right away. Nobody accepts that I have my things and I want to send them. Even though I am here now, I will get back. I will violate the border and pass, because I don’t have the necessary documents. Even now, friends of mine are prisoners. Living like this is not good. There are many Mozambicans there who went back for Mandela, so we could have freedom of access to South Africa. Now they are not considering this. We voted because they said that our situation would improve, but we are still being arrested. We want to know why. Our government should do something about it, because many Mozambicans are dying unknown. Many are killed when they try to cross the border. They should try to do something for us. A person goes there and is arrested right away, but we voted. Our votes have no value.

We are arrested because we voted for Mandela. Buthelezi says that many Mozambicans voted for Mandela, so they should be arrested. Now I heard he is the head of the police, so they are serious about it. Now it won’t be easy. It wasn’t bad before, because it [arrests] only happened in some places. You could go to work and when you came back, your neighbours would wake you up to go on patrol and watch for the Zulus. This wasn’t a big problem for us, because we were fighting to have Mandela in the government, and we succeeded. Since Mozambique is independent now, we wanted a connection so we fought to get the whites out of power so things would improve for us. But it looks like the whites are still in government. South Africa is independent now but we want there to be good relations, not like now.

Even if you have an ID it’s the same thing. When you go and come back they ask you how you went to Mozambique, if you are South African. It’s very complicated. Even with an ID you have to pay a lot of money to get back in. We don’t know exactly what they want...
in South Africa] I worked outside in the locations, for blacks. If we work for whites they say we are hiding because we have no passports. Many of us manage to work without passports, but the result of this is that we get arrested.

I managed to bring most of my things [to Mozambique], there are still some there that I will use when I arrive. Now I can’t have much there, because when you are arrested you lose everything and have to go back with nothing. You can only have necessities. Sometimes people rob you while you are under arrest, and there is nobody around to ask, no family. Even if there are, they go to work in the morning. They come in the afternoon and steal your roof and other things.

We ask that the government of Mozambique concerns itself with its citizens; they are suffering. They should legalise entrance into South Africa, because we are suffering. Even if it doesn’t affect them, they should be concerned about Mozambicans who are mistreated in South Africa. When you are arrested, people laugh at you, because they are well off. This doesn’t mean that the government is obligated to do something, but we are left with a bad image. They should create conditions for us to live freely. Whenever someone says they are police, we have to flee. We want there to be a solution between the two governments.

INTERVIEW WITH CHRISTINA CHAVANGO AND FERNANDO NTIVE (MOTHER AND SON, AGES 55-60 AND 33 RESPECTIVELY), MUINE, MOZAMBIQUE, 15 MARCH 1996

CHAVANGO: We are natives of Wanote [Magude district]. We fled from the war to Mario Kajado [also Magude]. From there we went to Mutasse. When the war reached there we went to Wachicoluane [Chokwe district]. Then we went to Maputo, on our way to South Africa. We went through Swaziland to Natalspruit. Some were arrested when we crossed the border, and sent back to Mozambique. Some time later they managed to cross and we met in South Africa. Many families lost members working there and called the rest of the family to South Africa. Here, one of my sons stayed in Maputo and another is married in Namaacha. This all began in 1983 and we ended up in South Africa in the beginning of 1991. We were repatriated in December of 1994.

In South Africa we had houses to live in and we worked to support our families. All of the brothers are concerned with rebuilding our household here. They are all coming in April to try to resolve this. There are big changes among the families here. We need to start everything from nothing, as if we are being born all over again.
NATIVE: I think that the migration situation will improve. Things are improving. We know this, but Buthelezi wants to throw out the Mozambicans. He said he didn't want to see Mozambicans marrying South Africans. The South Africans abandon their children and then we have to look after them. The police are a mixture of all the parties. The ones from Inkatha [Freedom Party] want nothing to do with Mozambicans.

Myself, I was deported. My name is “Robert” in South Africa. I was in South Africa in 1991. I had a job in Carletonville in 1984, which went well until 1991. In 1992 I finished. They told us we had to leave because they were full. They tried to find us places, and told us they would call us back. I went to Natalspruit, where I lived. While I was in Natalspruit, I decided it was not good to do nothing, so bought some equipment for cutting hair. I made a salon, and I also made clothes. This all happened in 1993. I worked at this, at a hostel ... There was the violence and I went and stayed at my parents’ place in Pretoria. I stayed there for a while and then returned to Natalspruit. When I arrived, I looked for a place to work using what I had. It went well because I didn’t need to take anything from anyone, I was well off on my own.

One day last year, in 1995, almost 1996, it was Friday the 9th, I was sitting at my workplace when I saw the police coming in a covered bakkie. I was sitting with some other guys. The police were five mabonos and two blacks. The mabonos came down to where I was sitting. They searched the boys I was with. Another mabono called me and asked me: “And you?” I said: “I am Machangana also, but my documents are at home.” They asked where I lived and I told them. The white left me and went back to the car. Then a black policewoman came and asked for drink money, R20. I asked why I needed to pay this money. He insisted that I had to give him drink money. I said I wouldn’t give it, and if he wanted my documents we could go to my house. He said: “That is not possible. Get in the car, let’s go.” I didn’t resist. I did as he said. Some other guys arrived from the area where I lived.

I left with the police, who were asking me where the drugs were. I said I knew nothing about drugs, I only work there, where you saw. That salon is mine. We continued and met some boys who were smoking mbangi. They took the two with us in the police car. We went to Katlehong. When we arrived, I asked: “Why have you taken me here and not to my home to see what you need, so you can be certain that I have documents?” The black policeman said they would drop us off on the way. Later, the black policeman who insisted on taking me was dropped off. We continued with the five whites and the black, saying they would drop me off soon. When he got out, we went a long way and I saw they were taking us to Vosloorus. When we arrived they told us to
get out to be registered and to make a statement, saying that the person who had arrested us was no longer there. We got out and entered the police station. They asked us when we arrived in South Africa. I told them I had arrived in 1981. They inquired how old I was, and I told them. Then they put us in the cell. They told us to take our clothes off. Whoever had money, bracelets and other things like rings had to take them off, as they were going to search us. I did this. I took everything off even my shoes. Then they said: “This thing [fisse] what is it?” I told them: “This is for my life.” They said to keep it with me, so no one would touch it. I asked about the other things and they said not to worry about it. So I put on my fisse [fetish cord worn around the waist or wrist] again.

They searched us and searched us and searched us. The officer who was searching us demanded R10, so I could leave. I asked him: “If I go, does my R10 make sure that I won’t be arrested again on the way home?” He said that I was making trouble and didn’t want to leave. He said: “Don’t you know that you are here without a passport?” I told him that it was true that I didn’t come with a passport, but that they wouldn’t succeed if they continued in this manner, because our grandparent’s grandparents came this way, got documents here and built this place. Even this place, Vosloorus and Natalspruit, was built by Machanganas. They would not succeed. This was a way to eat us [make us pay]. They would get nothing from me. Then they put us aside, then they searched me again.

We were five. They said we were being held because we were Shangaans. Then they took us to another building, registered us, and took our money and kept it and told us to go and get food. The food was rubbish. I didn’t take it, but the others did.

The next day the food was reasonable. The building where they had left us smelt terrible. I told them that the place smelled bad and was worthless. They said it’s a prison. I said: “Yes, but we are not here because we are criminals, we didn’t rob or kill anyone. We are only here because we are Shangaans. You should consider us differently.” Then they took us to another building. We stayed until the 15th and then we went to Boksburg. It was Tuesday when we arrived. We slept and the next day they took our names and information.

They asked me when I had arrived and I told them: “I have been here a long time.” They wanted to know what I did and I told them that I had been working and then I had opened a salon. I had been arrested at the salon. They said that I shouldn’t have been arrested, that I should have gone back there. They asked me if I had been arrested in Natalspruit, and I said yes. They said I should have gone back. I was deeply angry. I should have tried to get home. I didn’t even have police
documents to get across the border. I crossed the border and travelled here. All of my belongings are still in South Africa. If they are still okay, I don’t know. I haven’t been able to get back yet, but I will go back, because I left everything there. I arrived here as you see me now. This is how it happened.

They say [Shangaans are treated this way] because of Buthelezi, because the Shangaans killed many Zulus in the conflicts between ANC and Inkatha. The Inkatha men came out of the hostel to the locations and killed people. They didn’t choose by race, they killed women and children alike. We were invited to a meeting. We were only there to work but since we lived there, we participated. We decided that those who lived in the locality would do night patrols, to watch for danger and killers. We would show those who didn’t know who was coming to kill us, so we could confront these enemies. So we began this, because we could not run away. We fought with them, and finally they subsided, and we didn’t go after them anymore. We only threw out the ones who came around where we lived. When they fled, we didn’t go after them. The word is this: when the wars were bad, they didn’t arrest Shangaans. Now they are prisoners. When we have meetings we ask [the South Africans]: “You were our comrades whom we ran with every night, and you didn’t tell us: ‘You are outsiders and you must leave, or you may die’. You called us to help you. Now that the conflict is over, you arrest us. Why?”

They tell us that it is not them, it is Inkatha, but they are together with them now. Sometimes it happens that there is a car full of only them [Inkatha]. But ... they are authorised to enter here in the locality, and arrest you because you are Shangaan.

[We are told:] “It is those people who are after you, but still, you must try to stay with us [the ANC]. At any moment you can present your concerns and we will see what we can do. We have been trying to solve this problem, but we have not succeeded yet. We will in 1996. Some things will be resolved, but at the moment we have a mixture of people. Even the government has one Zulu leader, and he has the right to speak, this is why you Shangaans are still persecuted.”

The ANC is the majority, but Inkatha is in the Parliament and has a right to speak. This is why we Shangaans are prisoners. We know who is mistreating us. It is only they, no one else. They are also mistreating themselves. If they arrest somebody and send them home with their belongings, that would be fine, then they wouldn’t need to return. Others are arrested leaving work in their gumboots, covered with cement and don’t even have a chance to take a bath! This is why people go back. Also, there is no work here. We don’t think this is bad, we are coming out of a war. It’s like a sickness. It comes, but then there is a slow recovery. We go there only to work, for the good of ourselves and our country.
INTERVIEW WITH LUCAS NGWENYA, MUINE, MOZAMBIQUE,
15 MARCH 1996

This last December, I was planning to return to Mozambique with my family, but it was not possible. Before December I was arrested. When they arrested me they didn't even want to see my documents. They just arrived and told me I was under arrest. When I asked why, they said to go back to Mozambique. I arrived here, and I'm trying to go back for my family. I had already bought construction materials to bring home. Those things are still there with my family. They aren't being used because I have no intention of building in South Africa. At the moment, I have no way of retrieving my belongings. It is weighing on me at the moment.

It was a black policeman who took me. There were helicopters patrolling. They got me when I was at work. I left my money there, R1 200. It's bad to complain, but I have a big problem. I am here at home, but I don't feel I have returned. It's as if I have thrown one of my daughters away [referring to his wife he left in South Africa]. It is very difficult for me at the moment to go back and get her. I don't know what I can do to bring my family and my belongings. Maybe the government can help with people who have left their belongings there, to come back and reconstruct their country.

INTERVIEW WITH ALBERTO CHAUKE (AGE 50-55), SIMBE,
MOZAMBIQUE, 16 MARCH 1996

Before, we went to South Africa with contracts. When we were young, we were educated at the companies. But now, going to South Africa, running the border, there is no education possible. A person goes there, they have to find a place to live, food to eat and worry about me here at home. Sometimes we think my son is late sending things, but if there is no work, there is no money.

Before, people left here and were contracted and assigned to companies in Ressano Garcia. When they got to the company, they would meet people they knew and could borrow things, because at home there was hunger. The colleagues could lend you money to send home. You got your pay. Paid the debt and you had helped your family. This was a good education. Now there is no logic. There is no work, and we can't overcome our problems.

It happened that many of us voted for Mandela, and then it was said that the Shangaans voted for Mandela because they were bought. So what happened? Now there is this problem of arresting young people.
They don’t let them take their things, nothing. Where they are found they are arrested, without money, without food. When they are left in Ressano Garcia, those with money go right back in. The others have to come all the way home and stay, because they have no money to go back. What can we do with these boys?

He needs to work to pay lobola [pointing at a young man]. We don’t have cattle anymore to pay lobola for our sons. I am old now, I can’t do anything for him. If he wants to bring a wife home he needs to work but when he goes to work in South Africa he is arrested. What can he do? See, he’s growing a beard already, sitting there, and he has no work and no wife. Here if you want to work you have to study, it’s the only way to get a job.

**Interview with Francisco Chiure (age 45-50), Delfina Mbiza (His Mother), Rosa Mundaka (Wife) and Melina Chiure (Another Wife), Simbe, Mozambique, 16 March 1996**

**Francisco Chiure:** We voted in South Africa, because they said when we came back we could live freely. We ran there because there was nowhere else to go. A few days later we were asked things we could not answer. We were surprised, because we thought that we voted and everything would be okay, but people were questioned and put into cars. They left their things. What do you think the family does when they are deported?

They just say: “Go, you brought nothing with you.” The people who come back are often killed at the border. We are killed trying to get to our families after we are sent back here alone. As you can see, this happened to my son here. I had to lend him my trousers and shoes, because all of his things are there and mistreated.

[When they arrest you] first they look at the vaccination scar and see that you are a Mozambican. They say it is because we voted for Mandela, and when they make war against Mandela again, the Machanganas will be by his side.

**Delfina Mbiza:** We didn’t go to South Africa for fun. We lost many family members, especially children and brothers, in this war. We left here and went to Magude. It was bad, we didn’t even have time to cook. They attacked at all hours. The children were always calling, telling us to come over here, come over here [to South Africa]. We travelled well, but problems are never absent along the road. We got to Namaacha and were arrested, but the person who brought us had his way of doing things, and we escaped. We finally made it to South Africa. We saw nothing bad there, we were treated well. There, when you arrive, even if you have nothing, they bring you scarves and *capulanas* [sarongs].
But, your place of birth is your place of birth. The children decided that we would go home. We accepted because we were anxious to go home. Living in someone else's land is difficult. So we went to Rome [organisations working with repatriation] and registered and they took us in their cars. They gave us blankets, food and household equipment, and brought us here. We saw nothing bad on that journey. They left us where we had fled from and then went on their way.

OSA MUDAKA: Here [Mozambique], the only problem we had was the war. We went to South Africa and lived well. The problem was when our husbands went to work and were arrested and brought back here. There came the time when they decided we should go, and we returned. Here, we are well, but we have problems with water. We have no water close by, and we have a problem with food also. We made our machamba [plot of farming land] but hardly produced anything. We are only using hoes, all the oxen were taken away. Water is our biggest problem, this valley will dry in no time.

MELINA CHIURE: We lived well in South Africa, we were treated well. They gave us food to eat and clothes to wear. What took us away from there was our husbands being arrested when they went to work. They decided we should come back because when they were arrested we would be alone and suffer. It was the motive for our return, rather than a lack of food or conditions. Here we are also well, but we have problems of water and food, because we made our machamba with hoes, not oxen. The earth has dried. When we planted maize, it all dried. We made machambas, but only produced melons and beans. During last year we had no food. Sometimes we have to go far for water. This water here filled up when it rained after the holidays.

**Interview with Lazaro Ntive, Simbe, Mozambique, 25 April 1996**

I was arrested for having no document, and because I went to work in the city without an ID. They did this so that the next day I wouldn’t forget my ID at home, and would always put my ID in my pocket when I woke up. I told them that I had woken up late.

When I was there, in prison, they asked me where I was from. I told them Pretoria, and gave them the names of my children: “Amancio, Sipho, Sikile, Giti and Mutetwa. They were all born in South Africa. I have my house and family here. If you take me to Mozambique, who are you sending me to?”
They arrest Zulus, Swazis, Shangaans from Giyani. We are all arrested. They arrested and deported me because I am a Shangaan from Mozambique, and because I have no right to leave my house and work in the city with no ID. When they arrest people, the blacks like money, the whites just take you and check you out. When they see if you have the scar [vaccination mark] or not, they just leave you. They know if you are not from there.

The blacks, since they like money, when they see the scar they want to know where is your ID. I tell them I left my document at home.

"How did you come here without an ID?" they ask me.

"I forgot," I tell them.

"Why did you not forget to wear trousers?" they ask me.

"When did you ever see someone who forgot his trousers? I woke up late and ran to catch the taxi. I was late and forgot my ID. Sometimes you can even forget your money, you are already on the bus," I say.

"If that's the way it is, give us R300," they say.

"Where will I get the money," I say, "since you have arrested me and it's only Wednesday?"

They tell me that if I don't give them the money, I will be deported.

"Where will you deport me to?" I ask them.

"We are sending you there [Mozambique], because the Shangaans are from there," they reply.

If you want to call, you can't, they want to hide you from the others. I wanted to call my father in Germiston. When the police car arrives to take people to the train, it goes into the cellar and takes people from there, so they can't be seen. They are doing something illegal, trying to fool somebody.

I voted in South Africa with my ID. During the campaigns, they said that anyone who had been there more [than] seven years was considered a South African. Whoever didn't have an ID could go to them and get one so they could vote: a yellow card like they give children at the hospital. They wrote your name on it and gave it to you. If you were there seven or 10 years, you were considered South African. If you only had four or five years, they wouldn't give you one and you could be deported at any moment. If you had been there 10 years, you couldn't be deported; you were considered a resident.

After this they began to arrest people again. They know how to organise things when they know what they want. When things go wrong, they don't know how to organise them any more. You know why, when that man gave papers to people who had been there for seven or 10 years, he did it so he would win the vote. When he saw that he won, he began to send people back to Mozambique, saying that his own people were unemployed.
It's easy [to find work when you have an ID]. When they see you don't have the scar, and if you have an ID, they leave you alone. If they find you with the scar and without documents, even if you only get paid at the end of the month, they demand R300, because if you have no ID, you should not be in the city.

I've have had enough. I may as well stay here in Mozambique. But in South Africa, my children are in school, my wife, mother and father are there. Now that the war is over, I could go there, organise a few things and come back here. I am wearing my work clothes. They take you from wherever you are and let you bring nothing. I think when someone is arrested and about to be deported, they should have a chance to collect their things and their family and bring them here, instead of leaving everything, belongings, wife, children and parents behind. They mustn't continue doing this.

Interview with Lourenco Ubisse, Matongome, Mozambique, 25 April 1996

I left here because of the war, I went through the park and ended up in Bush [Bushbuckridge] at Justicia. We stayed there three years with those people, with no problems. There was no work in the area, so I went to Pretoria, where I found a job. The police found me and arrested me. When I asked why I was under arrest, they said that your president [Joaquim] Chissano needs you there. I didn't resist, I went along with them.

They deported me and I went back [to South Africa] through Ressano Garcia. I went to work again, and they arrested me again. I asked why and they said: "You Mozambicans are not needed here. you cause unemployment and steal our women." They deported me again and I returned again. I stayed there for a long time, until the elections. They told us that those of us who were there more than five years should have an ID and vote and there would be no more problems. We did this. They told us that if we voted, no one would come after us and say we didn't belong. We went along with this.

That day I was arrested again and deported. My wife and children are still there. I don't know how or what they are eating, or what has become of my belongings. What hurts the most is that they told us that if we voted we couldn't be arrested again, but now I'm suffering. I don't know what will solve these problems, when they leave us at the border we don't know where to go and complain. To travel here is also very risky and hard. If you have money, they beat you up and take your money on the way. How can you survive here? Here, the old people are not coping. There is no way to survive.
They have big problems in that country. When they arrest you they say: “You are stealing the women of the South Africans.” Another will tell you: “You Mozambicans bring guns here.” Some say it is because we are eating their food! If we are arrested because of guns, why don’t they arrest people who actually have them? If someone steals a woman, arrest the person who stole the woman.

What I think is strange, is the question of food ... the shops are full, everyone can buy food and eat it in their own homes. Every day, when you go to the shops, there are sacks of food, so many sacks ... it’s difficult to see what food we are finishing.

My idea is that we who are arrested and deported, we should meet and go to Chissano, so he knows that we were arrested, deported and lost, or can open the way for us to recover our families and our belongings, since the South Africans say that he needs us here. You who work with us should have a meeting or a programme for these people to meet. We need you because we have no means. You could tell the people [the deportees] to come for a meeting some place. Maybe you could help us this way, for we are suffering.

When we go to our government for passports so we can have freedom to travel, they won’t give them to us. How can we live, if South Africans can come here and we can’t go there? My brother works informally in South Africa. Many people buy things in the shops and sell them, because when they have a job, they get arrested. Even when they are selling things, they are harassed, even though they are things you can buy with your own money and sell and so can support yourself.

INTERVIEW WITH EMILIO LUBISI, SOWETO, APRIL 1995

It is difficult to get a “pasaport” [passport] in Mozambique. It is also expensive. So on our way [to South Africa] we “hi yo foňla” [we cut through the bushes]. We had clothes and blankets to cover the fence and jump over to the other side in order to avoid electrocuting ourselves. We crossed the fence next to the Nkomatipoort.

I had money myself. I should have come through the gate and bribed the officials because it is easy. My friends who were already working here in South Africa told me that it is R1 000. We were 50 when we came, but we got scattered when we arrive at “Nasport” [Nelspruit]. I’m the only one who managed to come to Johannesburg, the rest of my friends went to Mhala.

I don’t have a passport and I didn’t bother applying for a South African ID, because if the police find you with it they just tear it into pieces saying
that you are not worth a South African. They have destroyed the ID of my uncle at Tembisa because he is not a South African.

They check our body marks [vaccination]. Sometimes they are using a certain instrument to check whether it is a Mozambican mark or not. They can tell if it is the Mozambican mark or not.

INTERVIEW WITH BOAVENTURA NDLOVU, SOWETO, FEBRUARY 1995

I do not have a passport now not an ID. Last year when I was going to buy stock at Roodepoort I was caught by the police who were having a braai on the side of the road, but next to the station. As I was coming back from the shop with my stock they whistled at me saying “tsotsie kom hier so”. Since I could not have left my stock and go to them I decided to stay where I was waiting for taxis. They were three white and two black policemen. Two of them approached me and asked why I was refusing to heed their call. As I was trying to explain, the black police officer asked where was I coming from and the white policeman asked me for a passport and ID. When I produced them both, they looked at them for a minute and commanded me to carry my goods and follow them. I was thrown into the van with my stock.

When we arrived I was ordered to give them anything I had in my pockets and my watch promising me that I will get them when I go out. But after a week I was deported without my properties. The officials said they did not want to listen to anybody on the ground that they knew nothing about our arrest and properties except driving us to “your president Chissano who wants you back”.

In most cases, especially here at Protea North police station, people used to pay up to R300. But if those policemen are bankrupt they even take a mere R20. The problem with them is that if they know that you are selling something like vegetables they keep on coming to you, particularly at the end of the month. They come and threaten you with deportation knowing that you are going to give them money. During these times they usually demand up to R500.

INTERVIEW WITH JULIO SIBUI, SOWETO, APRIL 1995

I had a South African ID, but the police found me at Park Station [Johannesburg] and asked me for a passport. When I showed them an ID, they removed my picture on the first page and ordered me to their police van. When I asked why were they destroying it they said it was a “fake ID”. They also said I was “too black” to qualify for South African ID.
INTERVIEW WITH MANUEL UBISSÉ, SOWETO, APRIL 1995

The police found us around Protea Glen and arrested us after demanding our passports. They asked if we had “R300 bail” each to give them before they took us to the police station, because once we are there the bail amount was going to be very high. We told them we did not have money.

They then took us to Meadowlands police station, where we spent two days. Then we were taken to John Vorster Square, where we didn’t spend a day. We were then taken to Sun City police station, where we spent two weeks before deportation. In all the police stations except John Vorster we were persecuted by both police and prisoners.

Prisoners used to say: “They are visitors who are passing let’s use them before they see the light again.” We could not retaliate because every time we tried to protect ourselves police used to punish us severely with “Ndhuku” [sambok]. We used to eat twice a day — a little soft porridge for breakfast and a little samp for supper. We were deported at Gaxa after having been persecuted on the way by the police. And after they dumped us we started our journey back to South Africa again.

INTERVIEW WITH A PUBLIC PROSECUTOR, MALAMULELE, 28 FEBRUARY 1996

I can’t recall the exact date of their [Mozambicans] arrival. I only remember that they started arriving in the mid-’80s. I think they were given food and blankets then. I do not know who was responsible for land allocation during that period but I think the indunas were. A sudden influx of Mozambicans did not affect the locals very seriously because Mozambicans are not lazy. They like working for themselves in order to earn a living.

There are no reports of serious conflict between the locals and Mozambicans. However, there are a number of allegations that are levelled against them. For instance, Mozambican men are regarded as a serious threat to the local migrant labourers who go and work in Jo’burg. They are accused of engaging in adultery with the local migrants’ wives. A lot of them have South African IDs, though they acquired them by illegal means. This was proved during the elections in 1994. Most of them did vote and presumably for the ANC, because they wanted to install a black government that would be sympathetic to them.

I do not have any information on deportations, but I think they were done even around here. A long time ago, when a Mozambican committed a crime, he was given a sentence compatible with the offence and after he had served it, the next sentence was deportation. This
regulation was done away with immediately the former Gazankulu
government gave them some kind of status.

I think the issue of them contributing to the escalation of the crime
rate is mere exaggeration from the media. I think they are using the
Mozambicans as scapegoats. Here we have a significant proportion of
Mozambicans, but we do not see what is being said by the media.

What I have realised is that locals use them in some cases in order to
avoid trial. For example, if two local criminals involve a lone
Mozambican in their "mission", when caught they advise the
Mozambican to disappear so that it will be difficult for the court to try
them. If a case involves more than one person, and only some are
brought before the court, the case will not be tried until the others are
captured. They use them [Mozambicans] in cases which involve
housebreaking and possession of firearms. In the cases which involve
illegal possession of firearms, we discover locals are perpetrators in most
cases. Mozambicans are just used as facilitators in the process of
acquiring those arms.

In an attempt to try and curb arms smuggling by Mozambicans, some
game rangers sent a certain Mozambican to go to his country of origin to
collect a rifle and promised to give him money and employment. On his
return, he was arrested by the same rangers. Although he tried to
explain before court that he was actually sent by the very same rangers,
the court could not entertain that, because they concentrate on the
offence not on the motive for commission in such an offence.

I do not remember having any record of Mozambicans having come
to the prosecutor to open a charge against anyone. They rely on the
traditional structures to resolve conflict or problems. They only come to
court as the accused, more especially for cases of theft. In the past, they
were known for stock theft. In maintenance of minor children cases,
Mozambican women could apply for a Garnishee Order against their
husbands and use the cards which are issued by the maintenance officer
to claim the money from the accounts. Lack of IDs is our main problem
in the Department of Justice. It is not easy for the police to trace
Mozambicans. At the moment magistrates do not give bail to
Mozambicans because when granted bail they escape to other places
where they are not easily traced.

INTERVIEW WITH TWO WARRANT OFFICERS, MPHUMALANGA,
27 SEPTEMBER 1995

The officers talked initially about how much the Mozambicans suffer,
particularly in jail and on the farms. While in jail awaiting
deporation the Mozambicans were effectively subjected to detention
without trial, the officers said. If only a few had been arrested, they would have to wait until enough had been brought in to make deporting them worthwhile. This could take up to three months.

Some had gone on hunger strike in protest against the conditions of detention. There were first class and second class cells, and the Mozambicans were always put in the second class cells, which were generally lice-infested. In second class, the cooks didn’t take care in preparing the food. By contrast, in first class you could order the meal you wanted, buy newspapers and have sheets on your bed. In second class you just got a mat on the floor and torn blankets, which were also full of lice and dust.

If you were suspected of having committed an offence you could wait for a very long time (the officers cited one example of two years), after which you might suddenly be released, without explanation.

Often when a Mozambican was taken to the police, the police did not fill out the forms they are supposed to, because there were so many forms, asking so many questions that it was easier for them simply to say, for example, that the person was from Komatipoort. As a result: there were no real statistics about what proportion of cases actually are Mozambican.

The officers mentioned the case of two girls who had been caught shoplifting. When they arrived at the charge office they had asked to use the telephone and begun speaking in Portuguese. The officer concerned had then become uncertain about what to do, because normally someone caught for a theft involving less than R100 was given free bail. However, because he did not have their real address, it would be more difficult. In the end he had gone with them to the flat they were staying at in Hillbrow and negotiated with the other people there to leave the girls in their custody. However, the girls had failed to turn up in court.

One officer voiced the opinion that most of the Mozambican women in urban areas are from Maputo, rather than from rural areas, because they were pretty and experienced shoplifters. People from rural areas, he said, were less likely to be involved in theft, because they were inexperienced and “respectable”.

When people were deported, their fingerprints were taken. If sentenced to seven or more years imprisonment they were deported at the end of their sentences. This would be noted on their documents, to which their fingerprints were appended. The officers noted, however, that those who are involved in sophisticated crime do not speak Shangaan.

According to the officers, the Prohibited Immigrant Unit (PIU), which has branches in Johannesburg and Nelspruit, and is also known as “The Maputo Squad”, works in conjunction with the Department of
Home Affairs. Its job is specifically to identify, arrest and deport illegal immigrants.

As there is no branch of the unit in Hazyview, the Internal Stability Unit (ISU) was used to do its work, until Popcru (Police and Prisons Civil Rights Union) members at Hazyview told Popcru members in the ISU that the work they were doing violated the principles of Popcru by not practising "justice for all". Since then the ISU at Hazyview has not been involved in harassing illegal migrants.

The officers said deportations resulted in corruption among the officers. Apparently in the Secunda area in 1989 it was impossible to be arrested and deported if you had money. One PIU policeman in Secunda drives a Senator (3-litre) and has also bought a Toyota Venture, vehicles that he could not possibly buy or run on his police salary. He is paid monthly protection fees by people (Secunda-Embalenhle). If a person does not pay his dues he is deported.

In Randburg some PIU members would take a truck, round up Mozambicans, drive them to an isolated spot and then release them one by one upon payment of R100 each, though the amount was not fixed. This could work out as R6 000 a lorry load, shared between three.

Sometimes a truck was sent to an area known to be full of Mozambicans, yet it returned empty, so it was obvious what had happened! For women, the officers claimed, the bribe was often in the form of sexual favours rather than money. They had never seen a woman deported to Mozambique.

When people are deported to Ressano Garcia they are processed through the South African side and then left in no-man's land. They do not go through the Mozambican border, but wait in no-man's land and re-enter South Africa at night, climbing into trees and using a wooden pole to cross the electrified fence.

It appears that the farmers take advantage of the corruption, employing Mozambicans and then calling the PIU just before payday to have them deported. The farmers also sometimes go to the border, collect Mozambicans and take them to the Department of Home Affairs to obtain "blue cards", which the farmers keep. The officers stressed that Mozambicans are not treated as people, but like animals. In one area Mozambicans work from six in the morning until six in the evening and earn R60 to R150 a month.

When Mozambicans are beaten, they are too scared of losing their jobs to lay charges, or, if they lay the charges, they later withdraw them, or the white officers do not follow them up.

Apparently there are long lists of such cases. One black man was shot in the heel (as a result his lower leg was paralysed) for attempting to steal three bags of avocados. When asked to justify this shooting, the
farmer claimed the three bags were worth R50 000.

The officers had never seen a white person deported. The white Portuguese who fled in 1976 had been given citizenship and allowed to open businesses and to work. Whites were not detained, even if accused of attempted murder. They could be subpoenaed. The officers did not see why people should be treated in this way, since they were Africans, and Mozambique is part of Africa.

“What will happen if we have a civil war here and have to flee to their country?” one asked.

At a course they attended in May 1995 they had been taught how to identify Mozambicans. For example, by initially greeting them in Zulu to see how they respond, and checking the vaccination mark on the right forearm. When asked how they personally identified Mozambicans, they mentioned accent or dialect and dress, especially bell-bottoms at one time. At the course they attended one of them had pointed out that it was impossible for him to deport Mozambicans living in his area, because they had become part of the local community and had been given stands. The white man running the course had responded: “Those Mozambicans living in your area were working in Skukuza and by chance they were able to find IDs and stands here, but they are still illegals and do not belong in this country.”

Notes

1 The interviews were conducted by the Refugee Research Programme Team of the Wits Rural Facility (Caetano Simbine, Angela Mcintyre, Vusi Nkuna, Busani Selabi, Chris Dolan and Nicola Johnston) on both sides of the South Africa–Mozambique border. The areas include Mapulanguene, Simbe, Moine, Matongomane, Panjane in Mozambique and New Forest, Hluvukani, Mkhulu, Thulamahashe, and Soweto (Protea Glen, Protea North, Chiawela and Naledi) in South Africa. The transcripts have been translated from Shangaan and Portuguese into English, but the meanings have been preserved as far as possible in the translation. Those interviewed include deportees, returnees, detainees and Mozambicans residing in South Africa as well as interviews with officials who have frequent contact with Mozambicans. The real names of respondents are not used for reasons of confidentiality. All interviewers’ questions and interjections are edited out.
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