



# LIVING IN LIMBO

RIGHTS OF ASYLUM SEEKERS DENIED

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**Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.**

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Amnesty International



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*Cover photo: Asylum seekers queue outside the Cape Town Refugee Reception office Jennifer Wells*



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# ACRONYMS

<b>CT</b>	Cape Town
<b>DG</b>	Director General
<b>DHA</b>	Department of Home Affairs
<b>DRC</b>	Democratic Republic of Congo
<b>FGD</b>	Focus Group Discussion
<b>LGBTI</b>	Lesbian, Gay, Bisexual, Transgender, Intersex
<b>LHR</b>	Lawyers for Human Rights
<b>LRC</b>	Legal Resource Centre
<b>PE</b>	Port Elizabeth
<b>RAB</b>	Refugee Appeal Board
<b>RRO</b>	Refugee Reception Office
<b>RSD</b>	Refugee Status Determination
<b>RSDO</b>	Refugee Status Determination Officer
<b>SA</b>	South Africa
<b>SASA</b>	Somali Association of South Africa
<b>SAHRC</b>	South African Human Rights Commission
<b>SCCT</b>	Scalabrini Centre of Cape Town
<b>SCA</b>	Supreme Court of Appeal
<b>SCRA</b>	Standing Committee for Refugee Affairs
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UN</b>	United Nations
<b>UNHCR</b>	United Nations High Commissioner for Refugees

# EXECUTIVE SUMMARY

South Africa has a strong legal and human rights framework on refugees and asylum seekers' rights. However, the failed asylum management process, which has been well documented over the years, shows that the implementation of existing laws and policies, as well as court orders, is starkly lacking.

Amnesty International South Africa embarked on research in 2018 to gather its own data on the experiences of asylum seekers attempting to exercise their rights to seek asylum and remain regularized in South Africa during the determination of their asylum applications. Amnesty spoke to 88 people through focus group discussions (FGDs) and one-on-one interviews in four locations: Cape Town, Port Elizabeth, Johannesburg and Durban.

What Amnesty International found is an asylum management system that is failing rights holders. Aside from being in contempt of court orders, for years, to reopen the Cape Town (CT) and Port Elizabeth (PE) (recently reopened) refugee reception offices (RROs), a range of factors make it extremely difficult for asylum seekers to claim refugee status and receive international protection when they are entitled to it.

The rights of asylum seekers and refugees, which are prescribed in law and policy, are being denied in various ways. Amnesty found that the asylum process is not explained properly to asylum seekers when they arrive, and translation is either lacking or of poor quality. Asylum seekers have recently fled their countries of origin and many are unable to speak and understand English, which puts them at a major disadvantage in being able to claim refugee status without prejudice. This is compounded by the fact that most asylum seekers do not have legal representation to assist them with their claims if they are rejected.

Poor decision-making, including mistakes of fact and lack of sound reasoning, has led to a 96% rejection rate, resulting in a massive backlog of appeals and reviews. This has kept some asylum seekers in the asylum system for as long as 19 years. Institutional xenophobia and anti-migrant bias are rife, exacerbating the vulnerable position of asylum seekers.

Closure of three of the urban RROs, in Johannesburg, PE and CT, has put additional strain on the asylum management process, and has had dire consequences for many asylum seekers who have to travel great distances to their nearest RRO to remain documented. The closure of the RROs in PE and CT have been challenged in court since they were closed in 2011 and 2012. Long court processes resulted in the PE RRO being reopened in October 2018, but the CT RRO remains closed despite a Supreme Court of Appeal order that it be reopened by 31 March 2018.

The consequence of the failures in the asylum management system is that asylum seekers live in limbo, without permanent status, for up to 19 years. The effects of this are multifaceted, and include financial, physical and psychosocial elements. They regularly have to travel long distances (900 – 1,900 km every one to six months) to renew their asylum seeker permits in order to remain documented. This affects their ability to get decent and permanent work, which can make them vulnerable to unscrupulous business people and land them in precarious employment situations. Inability to remain documented hinders their rights to access basic education and healthcare, and makes them vulnerable to harassment, arrest and detention.

The White Paper on International Migration adopted in July 2017 articulates a shift to a risk-based approach to international migration rather than one that recognises the right to protection as the underlying purpose of South Africa's asylum system.

Another major and worrying change is the establishment of asylum processing centres at the northern border posts. This is where asylum seekers will be 'accommodated' while their asylum claim is being considered. Asylum seekers will no longer have the automatic right to work, conduct business and study while their status is being determined, which is a restriction with respect to the current refugee law.

The current asylum management process system is failing everyone. In persisting with a broken system, the government is causing a divide and ongoing tension between South African citizens and fellow Africans.

If rights protection is not put at the centre of the asylum system, it will continue to result in violations of asylum seekers' rights, undermining the intentions of the Refugees Act as well as the South African Constitution, which protects the rights of every individual in the country.

Amnesty International is calling on the South Africa government, in particular the Department of Home Affairs (DHA), to ensure a safe, fair and efficient asylum management process and to create a united South Africa that welcomes those in search of safety. It should comply with court orders to reopen the Cape Town RRO, and effectively resource all of the RROs and ensure that the refugee status determination process is administratively and procedurally just and fair.

The words and actions of our leaders matter. We are calling on South Africa's leaders to stop promoting divisive political narratives and start uniting people around shared values that build a more inclusive society. Political and cultural leaders must be held accountable for irresponsible and divisive political narratives that fuel xenophobic violence.

## BACKGROUND

Theoretically, South Africa has a progressive asylum management process that entitles asylum seekers to enter the country and enjoy the right to work and access basic health care and education.

While the Constitution and the Refugees Act of 1998 provide for the protection of asylum seeker and refugee rights, ‘including the right to administrative actions that is lawful, reasonable and procedurally fair’<sup>1</sup> the DHA asserts that the majority of asylum seekers are in fact economic migrants attempting to abuse the asylum system.<sup>2</sup> The fact that the DHA does not have accurate and reliable statistics on the number of refugees and asylum seekers in the country makes it difficult to corroborate these claims.

Government officials assert that South Africa is inundated with migrants <sup>3</sup> official statistics, however, show this to be inaccurate. According to the 2011 Census, an estimated 2.2 million (4.2%) people said they were born outside of South Africa.<sup>4</sup> The Community Survey conducted in 2016 registered a decrease to 1.6 million (2.8%).<sup>5</sup> According to recently released 2019 mid-year population estimates the estimated population of South Africa stands at 58.78 million, with a migrant population of just over 1.64 Million (2,8%). There is a conflation of asylum seekers, refugees and migrants into one category referred to as migrants – either ‘legal’ or ‘illegal’ which further complicates the issue.

Amnesty International’s research revealed discrepancies in data provided by the government to the United Nations High Commissioner for Refugees (UNHCR) on asylum seeker cases. Discrepancies include large and sudden fluctuations in refugee numbers as well as pending asylum claims between 2013 and 2016. For example, according to UNHCR Global Statistics, at the end of 2015,<sup>6</sup> the number of asylum claims in South Africa had risen from 463,900 in 2014 to 1,096,063. In 2016 the number of refugees and people in refugee-like situations decreased from 121,645 to 91,043 and there was a reduction of 877,764 in pending asylum seeker claims<sup>7</sup> (see table 1 below). These figures are also vastly different from the Refugee Status Determination (RSD) 2011-2015 statistics from the DHA.<sup>8</sup>

Table 1: UNHCR Global Statistics<sup>9</sup>

UNHCR STATS	2013	2014	2015	2016	2017	2018
Refugees and people in refugee-like situations	65,881	112,192	121,645	91,043	88,694	89,285
Pending asylum seeker cases	232,211	463,940	1,096,063	218,299	191,333	184,203
<b>Total population of concern</b>	<b>298,092</b>	<b>576,132</b>	<b>1,217,708</b>	<b>309,342</b>	<b>280,027</b>	<b>274,488</b>

It is not clear from the UNHCR Global Trends Reports what the reason for the variations was, other than that the variations were “largely due to statistical changes in methodology”.<sup>10</sup> The Special Rapporteur on the human rights of migrants also noted this lack of data. He observed during his mission to South Africa (24 January-1 February 2011) that the lack of information

<sup>1</sup> The Constitution of the Republic of South Africa, Act 108 of 1996, article 33

<sup>2</sup> Presentation to the portfolio committee of Home Affairs, slide 21 [http://sihma.org.za/news\\_item/2015-asylum-statistics-south-africa/](http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/)

<sup>3</sup> Following the release of annual crime statistics in 2018 Police Minister Bheki Cele and national police commissioner Khehla Sithole said, at a media briefing,<sup>3</sup> that the country needed more police for the 57,3 million population, 11 million of which, they said, were people who visited South Africa and never returned to their own countries.

<sup>4</sup> Statistics South Africa, 2012, Census 2011 Statistical release P0301.4, p28

<sup>5</sup> Statistics South Africa. Community Survey 2016, Statistical release P0301, p34

<sup>6</sup> UNHCR Global Trends Force Displacement in 2015 Report

<sup>7</sup> UNHCR Global Trends Force Displacement Reports (2013 p42; 2014 p46; 2015 p59; 2016 p63)

<sup>8</sup> Presentation to the portfolio committee of Home Affairs, slide 21 [http://sihma.org.za/news\\_item/2015-asylum-statistics-south-africa/](http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/)

<sup>9</sup> UNHCR Global Trends Force Displacement Reports (2013 p42, 2014 p46, 2015 p59, 2016 p63, 2017 p66, 2018 p67)

<sup>10</sup> UNHCR Global Trends Force Displacement Reports 2016 p45

may lead to more discriminations.<sup>11</sup> Africa Check<sup>12</sup> also found asylum seeker data to be “flawed, inaccurate, and sharply contradictory”.<sup>13</sup>

Over the years there has been a sharp drop in approval rates for asylum claims, from 15% in 2011 to 4% in 2015.<sup>14</sup> In 2017, only 479 asylum-seekers without family already in South Africa were granted status in their first interview, while 25,713 were rejected.<sup>15</sup> Closure of RROs, long delays in processing claims and appeals, and officials who are overtly xenophobic<sup>16</sup> have resulted in a massive backlog of pending asylum claims, causing hundreds of thousands of asylum seekers to live in limbo for years on end. The lack of credible data makes it difficult to determine the actual number of pending asylum seeker claims, as estimates have ranged from between 130,000<sup>17</sup> to 400,000.<sup>18</sup> The UNHCR 2018 Global Report puts the number of pending asylum cases at 184,203.<sup>19</sup>

South Africa has laws and policies to regulate the rights of refugees and asylum seekers, but political will and capacity are lacking. This research examines the effects of the lack of implementation of laws and policies, and the closure of the RROs, on the lives of asylum seekers in South Africa, and the challenges they face in remaining documented.

## METHODOLOGY

This report is based on desktop research and fieldwork carried out in South Africa between January and December 2018. Researchers gathered evidence from research reports by other organisations working directly on asylum seeker and refugee rights, government law and policy, public documents and statements, legal proceedings, press reports and reports by global bodies such as the United Nations High Commissioner for Refugees (UNHCR).

The research set out to examine the status of RROs in South Africa, but inability to gain access to the open RROs created a shift of focus to the effects of the closures of two of the urban RROs (Cape Town and Port Elizabeth) on the lives of asylum seekers. The field research focused on two of the closed RROs, in Cape Town and Port Elizabeth, and the Durban RRO which was turning away new applicants in 2018.

The study included Focus Group Discussions (FGDs) and one-on-one interviews. Amnesty International spoke to 88 people in total: 54 women and 34 men. Amnesty International conducted 26 one-on-one interviews. We spoke to 62 people in five FGDs, four of which had between 5 and 10 participants. One of the FGDs was larger than the recommended size with 32 participants. Of the 26 people we interviewed individually, the majority were asylum seekers; only three had refugee status and one a South African identity document.

Amnesty International also conducted interviews with members of civil society organisations working on refugee and asylum seeker rights as well as members of the Refugee Appeal Board (RAB) and the Standing Committee for Refugee Affairs (SCRA). Numerous meeting requests were sent to various DHA officials to no avail.<sup>20</sup>

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<sup>11</sup> Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante Mission to South Africa, p12

<sup>12</sup> Africa Check is a non-profit organisation set up in 2012 to promote accuracy in public debate and the media in Africa. The goal of its work is to raise the quality of information available to society across the continent. <https://africacheck.org/about-us/>

<sup>13</sup> <https://africacheck.org/reports/south-africa-home-million-refugees-numbers-dont-add/>

<sup>14</sup> Presentation to the portfolio committee of Home Affairs, slide 21 [http://sihma.org.za/news\\_item/2015-asylum-statistics-south-africa/](http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/)

<sup>15</sup> DHA, 2017. *Asylum Seeker Management, 2017 Annual Report*, p30

<sup>16</sup> This is explained in detail in the chapters below.

<sup>17</sup> <https://scalabrini.org.za/the-cape-town-refugee-reception-office-closure-case-explained/>

<sup>18</sup> <https://africacheck.org/reports/south-africa-home-million-refugees-numbers-dont-add/>

<sup>19</sup> UNHCR Global Trends Force Displacement Reports 2018 p67

<sup>20</sup> Five attempts were made by email to set up a meeting with DHA Deputy Director General Immigration, Jackson McKay on 02/07/2018, 03/01/2018, 04/24/2018, 06/05/2018 and 09/05/2018.

# LEGAL AND HUMAN RIGHTS FRAMEWORK

The South African Constitution's Bill of Rights guarantees, among others, the rights to equality, dignity, freedom of movement and residence, freedom and security and just administrative action for all persons in South Africa.<sup>21</sup>

The Refugees Act of 1998, with amendments (October 2015), is the principal legislation governing refugee and asylum seeker rights and sets out the State's obligations in relation to these rights. It lays out the asylum application process including reviews and appeals, as well as the structures and mechanisms required to implement the Act. The Act also gives effect to relevant international legal instruments, principles and standards relating to refugees.<sup>22</sup>

However, in July 2017 the DHA published a White Paper for International Migration,<sup>23</sup> certain elements of which are inconsistent with the protection and acknowledgment of human rights. The White Paper uses language that focuses on national security and securitisation of borders rather than applying a human rights-based approach. The proposed removal of the automatic right to work and study, and the establishment of 'Asylum Seeker Processing Centres' on South Africa's northern border, where asylum seekers must stay while their asylum claims are being processed, contravenes South African law and will severely restrict their rights.

The White Paper proposes broadening the reasons for denying asylum to include applicants who have not applied for asylum in safe countries en-route to South Africa.<sup>24</sup> This seems to be modelled on the practice of "safe third countries", whereby countries of destination send asylum applicants back to third countries where they have transited or to which they have a connection, for their asylum applications to be processed there. The "Safe Third Country" principle is currently not recognised under South African legislation and South Africa has no bilateral agreements with any other countries that would make it enforceable.<sup>25</sup> Amnesty International therefore is concerned that the proposal in the White Paper would violate both national and international law.

The Universal Declaration of Human Rights (UDHR, 1948) is the foundation of international human rights. Article 14 of the UDHR stipulates that everyone has "the right to seek and to enjoy in other countries asylum from persecution", as well as other rights including the right to life, physical integrity and nationality, among others.

Section 6 of the Refugees Act requires that the Act be interpreted and applied with reference to international human rights instruments relating to refugees. South Africa is a state party to a range of international protocols and commitments in relation to the rights and protections of refugees and international migrants, including the UN Convention Relating to the Status of Refugees (1951), the UN Protocol Relating to the Status of Refugees (1967), the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) and the International Covenant on Civil and Political Rights (ICCPR) (1966).

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<sup>21</sup> The Constitution of the Republic of South Africa, 1996, Chapter 2, sections 9, 10, 12, 21 and 33.

<sup>22</sup> According to Section 3 of the Act a person qualifies for refugee status for the purposes of this Act if that person-  
(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or  
owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or  
(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or  
(c) is a dependant of a person contemplated in paragraph (a) or (b).

<sup>23</sup> The White Paper provides a policy framework that will guide the comprehensive review of international migration and related legislation.

<sup>24</sup> South Africa Department of Home Affairs. White Paper on International Migration. July 2017. Available at: <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf>

<sup>25</sup> Lawyers for Human Rights Legal Brief on "First Safe Country" Principle, 1 June 2011 [https://www.lhr.org.za/sites/lhr.org.za/files/lawyers\\_for\\_human\\_rights\\_brief\\_on\\_the\\_first\\_safe\\_country\\_principle\\_final\\_doc\\_0.pdf](https://www.lhr.org.za/sites/lhr.org.za/files/lawyers_for_human_rights_brief_on_the_first_safe_country_principle_final_doc_0.pdf)

# 1. RIGHTS DENIED: POLICY VS PRACTICE

***“They gave me no explanation for why they rejected me other than that they have to reject a certain number of people”***

An asylum seeker speaking to Amnesty International in Durban

Research by Amnesty International and others<sup>26</sup> shows that while South Africa has progressive policies and law, implementation and compliance are inconsistent and lacking in some cases.

The Refugees Act of 1998 was the first piece of legislation to provide a protection framework for asylum seekers and refugees, which was lauded by the former UNHCR Chief Antonio Guterres in 2007 as “one of the most advanced and progressive systems of protection in the world.”<sup>27</sup> The Refugees Act<sup>28</sup> provides for reception of asylum seekers, regulation of applications and recognition of refugee status.

Chapter 2 of the Act provides for the establishment of RROs, the SCRA and the RAB, which form the asylum management system. Chapter 3 of the Act lays out the asylum application procedure, and Chapter 4 details the review and appeals process. Chapter 5 provides for the rights and obligations of refugees. The Refugee Regulations (Forms and Procedure) 2000, lays out how the Act should be implemented.

While the Act and regulations clearly outline how the asylum management process should work, in practice there is a lack of compliance with the procedures and timelines. The laws and regulations require that the status determination interview generally take place within 30 days (1 month) and a decision generally be issued within 180 days (6 months) of launching the application.<sup>29</sup> Amnesty found that this does not happen in practice.

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<sup>26</sup> No Way In: Barriers to access, service and administrative justice at South Africa’s Refugee Reception Offices, Roni Amit (2012); All roads lead to rejection: Persistent bias and incapacity in South African Refugee Status Determination, ACMS (2012); No Refuge: Flawed Status Determination and the Failures of South Africa’s Refugee System to Provide Protection; Queue here for Corruption, ACMS and LHR (2015); South Africa Flawed Asylum System - <http://www.lhr.org.za/news/2013/south-africas-flawed-asylum-system> (2013)

<sup>27</sup> <https://www.unhcr.org/news/latest/2007/8/46cf10634/unhcr-chief-commends-pretorias-refugee-policy-pledges-cooperation.html>

<sup>28</sup> No 13 of 1998

<sup>29</sup> Section 3 of the Regulations to the Refugees Act (2000)

In its 2008 Report, *“Talk for Us Please” Limited options facing individuals displaced by xenophobic violence*<sup>30</sup> Amnesty International highlighted some key areas of concern around procedural irregularities in refugee status determination including lack of legal assistance, absence of interpreters, a high rejection rate (98%), inability to claim asylum, poor quality of decisions and mistakes of fact and lack of access to appeals. Below are some of the violations identified in the asylum management process in our recent research.

## **INCORRECT AND INCONSISTENT APPLICATION OF THE LAW**

The Refugees Act prescribes the application process and requirements including how the application should be made and the duties of the Refugee Status Determination Officer (RSDO) in relation to this process. Asylum seekers may enter the country but are required to present themselves at an RRO within five days of arrival. The Act requires the RSDO to accept the application form, ensure that it is properly completed and must assist the applicant in this regard. The officer may conduct an inquiry to verify the information and must submit the completed application form to the RSDO. The applicant is required to give fingerprints and two recent photographs.

### ***Undocumented - Turning asylum seekers away at the RROs***

According to Section 22 of the Refugees Act, the RSDO is required to issue the asylum seeker with an asylum seeker permit, which legalises their stay in the country while awaiting their status determination. This permit may be extended from time to time, while status determination is still on-going.

However, the DHA started implementing practices that effectively deny asylum seekers access to the asylum process by turning asylum seekers away at the RRO, leaving them undocumented. This practice has been challenged in court a number of times.

In *Tafira and Others v Ngozwane and Others*,<sup>31</sup> seven applicants approached the court on the issue of whether the requirement to make an appointment to see a refugee reception officer put in place by officers at Marabastad and Rosettenville RROs, to deal with applications for asylum, were lawful in terms of domestic and international law. The process, called “Appointment System” required that when an asylum seeker first attended an RRO, they would not be seen by a RSDO to assist them in completing the necessary application. Instead they would be given an appointment slip with a date for their return to the RRO. Such appointments could be from six months to almost a year into the future, during which time the asylum seeker would have no legal protection. The court found that “an appointment slip is of no legal force or effect and affords no protection to the applicant for asylum at all”, and therefore determined this procedure to be unlawful and unconstitutional.”<sup>32</sup> More than 10 years after this decision, this practice is still happening at the RROs.

In various cases, many asylum seekers have failed to access the RROs. For example, in 2006, the High Court found that the Cape Town RRO’s treatment of a group of asylum seekers who had repeatedly attempted, but failed, to get their asylum seeker status, painted a “graphic and debilitating picture of the gross inhumanity” meted out to asylum seekers because of the failure of the South African Authorities to fully adhere to international instruments on the

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<sup>30</sup> Amnesty International, September 2008, AFR 53/012/2008

<sup>31</sup> (12960/06) [2006] ZAGPHC 136 (12 December 2006)

<sup>32</sup> In *Tafira and Others v Ngozwane and Others* (12960/06) [2006] ZAGPHC 136 (12 December 2006), p21 )

treatment of refugees.<sup>33</sup> In this case, the failure of the RRO to act on their applications expeditiously resulted in a group of seven people living precariously as illegal foreigners. The court ordered the DHA to put measures in place to ensure access to the CT RRO. Despite the litigation, these practices continue. There is litigation pending in Cape Town and Durban on this issue.

In Cape Town, Amnesty International researchers saw evidence of long queues and were told about asylum seekers having to come back numerous times without gaining access.

In 2018 Amnesty International learnt that, in the last quarter of 2017, the Durban RRO had begun turning away asylum seekers and using an appointment system. So instead of being assisted by a refugee reception officer to complete the application and being provided with a Section 22 permit, also known as an 'asylum seeker permit', they were turned away and told to come back at a later date or go to one of the other RROs. In 2018 asylum seekers from the DRC and Burundi were only being given appointments for March 2019. This is a violation of the Refugees Act and puts them at serious risk as they remain undocumented, which makes them vulnerable to being arrested for being 'illegal' migrants and sent back to their countries of origin. It also prevents them from accessing rights to education, health and work.

While the PE RRO was reopened in October 2018, at the end of that year the office started implementing the appointment system, with asylum seekers only receiving a flimsy appointment slip, clearly stating that it does not afford the bearer any rights to stay in South Africa, with appointments scheduled for up to 10 months into the future.

When asked about the appointment system, authorities informed researchers that asylum seekers should go to the closest RRO to where they entered. The RROs referred to are all hundreds of kilometres away. These arguments ignore the fact that asylum seekers generally go to areas where they have family members or contacts or where there are established refugee communities. In *Minister of Home Affairs & Others v Somali Association of South Africa & Another* the court noted: "The suggestion by the relevant authorities therefore that asylum seekers freely choose to live and work in Port Elizabeth or the Eastern Cape and can likewise freely choose to live and work near one of the remaining RROs is untenable".<sup>34</sup>

The appointment system has dire effects on asylum seekers as an appointment slip does not give the holder any protection against arrest and deportation, nor affords them the right to work and study.<sup>35</sup> Asylum seekers that Amnesty International interviewed in Durban explained how they are being targeted by the police for being undocumented and are required to pay bribes to the police or be arrested.

### **Requesting travel documents or proof of country of origin**

Nowhere in the Refugees Act or the Regulations does it stipulate that asylum seekers are required to produce a valid passport or travel document in order to be granted an asylum seeker permit, yet Amnesty International heard accounts of asylum seekers being required to present their passports in order to receive an asylum seeker permit in terms of Section 22 of the Act.

Asylum seekers often leave their homes urgently, under threat, and are forced to abandon their belongings. Others lose or have their belongings, including documents, stolen along the way, which makes this requirement impossible for some asylum seekers to comply with.

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<sup>33</sup> Kiliko and Others v The Minister of Home Affairs and Others (279/05) [2008] ZAWHC 124 (4 March 2008)

<sup>34</sup> Ibid

<sup>35</sup> In *Tafira and Others v Ngozwane and Others* (12960/06) [2006] ZAGPHC 136 (12 December 2006), p20

On 16 August 2017, Lawyers for Human Rights,<sup>36</sup> submitted a complaint to the Office of the Human Rights Commission on this unlawful practice. The complaint arose from the finding in *Dabone & Others v Minister of Home Affairs & Another*<sup>37</sup> when the court found that asylum seekers would not be required to produce passports in order for their claims to be assessed.<sup>38</sup> Amnesty International nonetheless found that officers at RROs still asked for passports.

*“They asked for a passport; they asked me ‘how will we know you’re from the DRC?’ ”*<sup>39</sup>

In one case at the Durban RRO, officials confiscated an asylum seeker’s passport and told her that she would need to relinquish her asylum permit to have her passport returned to her. An official at the Durban RRO admitted that the RRO required asylum seekers to present passports to prove their country of origin. According to officials, passports are confiscated in exchange for asylum permits as they believe asylum seekers will use their passports to apply for study permits, while also holding asylum permits.

### **Renewal length and appeal delays**

While the regulations stipulate the adjudication process, time periods and conditions, Amnesty International found a lack of consistency in the time periods for renewals, which seem to be arbitrarily decided by the RSDOs. Of the asylum seekers who we interviewed, renewals ranged from one to six months, with no explanation as to why a certain renewal period had been given. Newcomers were being given one and three month renewals rather than the standard six months, with no explanation as to why. Short renewals cause hardship for asylum seekers who are expected to go to the RROs at which they originally applied, which in some cases are hundreds of kilometres away. In all these cases, asylum seekers experience hardships, including having to part with hundreds of rands in transport costs, among other barriers to completing the process.

*“It also can be personal, you go there today this one gives you one month and then the other is giving six months, it is not consistent”*<sup>40</sup>

An interviewee in Cape Town explained how he had to let his permit lapse because he was unable to pay for transport to Durban to renew and pay the late renewal fee. He had travelled 680 km from Mpumalanga to the Durban RRO eight times since he first entered the country in June 2016, only being given three-month renewals at a time.

An interviewee in PE also told us how she was only being given three-month renewals, but that she was “happy because some only get one month”.

Half of the people Amnesty International spoke to were asylum seekers who had been in the system for between six to 10 years. Eight had been waiting three to five years and one interviewee still does not have a final determination of their claim for refugee status after 19 years in the country. One interviewee had been waiting for his RAB hearing for over 10 years.

Long delays and regular renewal requirements effectively leave asylum seekers living in limbo for years, often resulting in them not being able to find permanent work. The challenges faced by asylum seekers due to these delays are discussed in detail in Chapter 3.

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<sup>36</sup> LHR is an independent human rights organisation that uses the law as a positive instrument for change and to deepen the democratisation of South African society. It provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African, who are victims of unlawful infringements of their constitutional rights

<sup>37</sup> 2003(11) SA11

<sup>38</sup> Lawyers for Human Rights. Compliant against the unlawful and unconstitutional practices being implemented by the Department of Home Affairs at the Desmond Tutu Refugee Reception Office submitted to the Office of the Human Rights Commission on 16 August 2017

<sup>39</sup> Woman interviewed in PE

<sup>40</sup> One-on-one interviewee in Johannesburg

### **Late renewal fines**

The research found inconsistency on how late renewal or 'overstay' fines are administered. While the DHA issued directives on asylum seekers without permits, it does not specify the amount of the fine. Amnesty found inconsistencies in the price of the fines, with asylum seekers paying between R1,000 (\$65) and R2,500 (\$165) for late renewal. This additional financial burden can push asylum seekers to become undocumented. Researchers found that it is quite common for women to fail to renew their permits because they are pregnant and cannot travel, which then also has an effect on the child getting documentation.

One interviewee from the DRC, told us that after two renewals at the CT RRO she was told on her third renewal that she was required to travel to Durban to renew her permit. She explained: "They told me to go back to Durban because my file is there, but the renewal date was Christmas Day, so I didn't go to renew, because I knew Home Affairs would be closed and then I was charged a R2,500 (\$165) fine for late renewal." The interviewee stated that she could not afford to travel to Durban, which is approximately 1,600 kilometres away. She remains undocumented and as a result cannot find permanent work. She is a single mother so she cannot apply for night jobs. She lives in temporary housing and because she does not have a valid permit, neither of her children are documented, which results in them not being able to attend school.

## **LACK OF EXPLANATION AND INTERPRETATION**

Many asylum seekers cannot speak English or any other local languages when they arrive in South Africa. According to Section 5 of the Regulations to the Refugees Act, provides that "where practicable and necessary, the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process".<sup>41</sup>

Most of those interviewed said that they were not given effective interpretation and that the process and decisions were not explained to them. In some cases, no interpretation was provided, and in others the quality was often poor, with applicants not understanding the translation and stories being relayed incorrectly or distorted.

Almost all of the asylum seekers and refugees interviewed said that the status determination process was not clearly explained to them, putting them and their asylum claims at risk due to a lack of understanding of the whole asylum process, including their rights and duties. Decisions and reasons for rejection were not clearly explained to asylum seekers, with legal jargon and provisions of the Act being used in the written notice, making it difficult for asylum seekers to understand. The majority of interviewees do not know what the current status of their claim is. In some instances, we were told that no explanation was given other than 'the decision came from above to reject.'<sup>42</sup>

A woman from Somalia, who we interviewed in PE told us: "The translator was from Kenya, so spoke a different dialect [of Somali] which was difficult to understand."

In Cape Town, an interviewee from the Democratic Republic of Congo (DRC) who spoke French, told researchers that she was given a Somali translator. The translator recorded her story incorrectly and then she was asked to sign a form in English to say that the story was true, which she didn't understand. While her husband has been in the country for longer and has a South African identity document, neither she nor her two children have received formal

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<sup>41</sup> Regulations to the SA Refugees Act, Regulations 4 and 5

<sup>42</sup> Somalian woman interviewed in PE. A man from DRC interviewed in CT told Amnesty International that on rejection he was told by an official that "Zuma says that nobody from a SADC country is allowed status".

recognition of refugee status. She and her children have been awaiting a decision about their claims since 2011 and have had to renew their asylum permits 17 times.

One female Somali asylum seeker that Amnesty interviewed in PE, who fled the civil war in 2001 and lived in a refugee camp in Kenya from a young age until she came to South Africa in 2014, had her claim rejected in 2015 as fraudulent. She was told it was because of what was on her form, but she was unable to understand this as it was in English.

The absence or inconsistency in the availability of credible interpreters places asylum seekers at serious risk of rejection. In order to avoid breaching its obligations towards asylum seekers and refugees needing protection, the DHA needs to ensure that it follows the correct procedure to provide adequate translation to ensure that decisions in status determination are made based on the correct facts.

Lack of any legal representation throughout this complex process is another obstacle for asylum seekers. According to the RAB, less than 10% are represented by legal counsel.

## FLAWED DECISIONS AND DELAYS

There have been increasingly lower refugee status approval rates, down from only 15% in 2011 to a mere 4% in 2015 (a 96% rejection rate).<sup>43</sup> This is substantially lower than the global refugee recognition rate of approximately 37%, according to the United Nations High Commission for Refugees (UNHCR) Global Trends Force Displacement in 2015 Report.<sup>44</sup>

Table 2: Refugee Status Determination (RSD) Outcomes 2011-2015<sup>45</sup>

RSD OUTCOME	2011		2012		2013		2014		2015	
		%		%		%		%		%
<b>Total</b>	<b>43953</b>		<b>63228</b>		<b>68241</b>		<b>75823</b>		<b>60640</b>	
Manifestly unfounded	20275	46%	31965	51%	35402	52%	36958	49%	44048	73%
Unfounded	16875	38%	25037	40%	25553	37%	29545	39%	14093	23%
<b>Approved</b>	<b>6803</b>	<b>15%</b>	<b>6226</b>	<b>10%</b>	<b>7286</b>	<b>11%</b>	<b>9320</b>	<b>12%</b>	<b>2499</b>	<b>4%</b>

Some government officials and politicians have publicly stated that migrants are coming to South Africa to seek economic opportunities or are criminals.<sup>46</sup> Interviewees confirmed this attitude among officials they have encountered: “The attitude of border patrol [officials] is an assumption that everyone who crosses at the border is an economic migrant; their aim is to detain and deport.”<sup>47</sup>

A Zimbabwean man Amnesty International interviewed in Johannesburg, who came to South Africa in 2004, said that, “Every claim is dealt with in a different way; there is no consistency in how decisions are made.”

<sup>43</sup> Presentation to the portfolio committee of Home Affairs, slide 21 [http://sihma.org.za/news\\_item/2015-asylum-statistics-south-africa/](http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/)

<sup>44</sup> UNHCR Global Trends Force Displacement in 2015 Report, p43

<sup>45</sup> Source: Presentation to the portfolio committee of Home Affairs, slide 21 [http://sihma.org.za/news\\_item/2015-asylum-statistics-south-africa/](http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/)

<sup>46</sup> Home Affairs director of asylum seeker management Mandla Madumisa and advocate Maemo Machete were addressing a two-day hearing, by the South African Human Rights Commission (SAHRC), into the causes and effects of xenophobia on South Africans and immigrants. They said that most refugee status appeals are not from people fleeing war-torn countries for safety, but are made by young males seeking better economic opportunities. In a speech in the National Assembly, Haniff Hoosen MP and the opposition Democratic Alliance shadow Minister of Home Affairs, said that ‘the employment of illegal and undocumented immigrants has a direct impact on our job creation abilities as a country.’ While he speaking at his 100 days in office event, Herman Mashaba, Mayor City of the City Johannesburg, said that foreign nationals are involved in criminal activity in Johannesburg, because they arrived in the city illegally.

<sup>47</sup> Zimbabwean man interviewed in Johannesburg

The flawed and ineffective asylum management system in South Africa has been well researched and documented, showing how decisions related to status determination often lack sound reasoning.<sup>48</sup> Decisions seem only to include a brief statement of the claim, a standardised analysis of the law and very brief country of origin information and conditions.

Interviewees explained some of the flawed decisions to Amnesty International.

In some cases, the RSDOs use incorrect information when adjudicating claims, which suggests negligence in the process. One interviewee from Burundi was rejected using DRC country information, while another man who we interviewed in Durban told us that his wife was rejected because her nationality was falsely recorded as Ethiopian when she is from Eritrea. Amnesty International heard accounts of people being told that there was no war in Somalia or the DRC and that they should go back to their countries.

In another instance, a gay man and LGBTI activist from Uganda<sup>49</sup> who was forced to flee persecution in 2016, as Uganda strictly prohibits homosexuality, was wrongly recorded and rejected in terms of Section 3(b) of the Act.<sup>50</sup> In fact, the man had applied in terms of Section 3(a) of the Act. This section refers to people who flee their country due to a well-founded fear of being persecuted by reason of their race, tribe, religion, nationality, political opinion or membership of a particular social group. The RSDO therefore recorded his story incorrectly and rejected his asylum application based on an incorrect section. This is a crucial error and unjustly jeopardises his asylum claim. He is currently awaiting a date for his appeal. He has since had to relocate to Durban so that he does not have to travel 1,600 km from Cape Town to Durban every one-to six- months. He is unable to find permanent work and relies on the kindness of others to survive.

A Zimbabwean man Amnesty International interviewed in Durban asked, “Do we have the right people sitting in those offices? They’re programmed already to dismiss you. I’d like it if they would follow the law.”

## AN INSURMOUNTABLE BACKLOG

Incorrect decisions result in appeals and reviews, which have contributed to a massive backlog of asylum applications. The Refugee Appeal Board (RAB) and the Standing Committee for Refugee Affairs (SCRA) are independent bodies mandated by the Refugees Act to determine whether an application was correctly rejected by the RSDO. The RAB is responsible for reviewing all unfounded applications and appeals and the SCRA is responsible for reviewing fraudulent claims and manifestly unfounded decisions taken by the RSDOs.

In 2008, following the Zimbabwe elections, South Africa saw a large number of Zimbabweans seeking asylum, up from around 500,000 in 2000, to approximately 1.25 million in 2008,<sup>51</sup> which contributed to a breakdown of the asylum system. This along with the lack of capacity within the DHA running at 30% staff rate, has resulted in a combined backlog of approximately 190,000 outstanding decisions.<sup>52</sup> The high rate of rejection of RSDO’s

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<sup>48</sup> No Way In: Barriers to access, service and administrative justice at South Africa’s Refugee Reception Offices, Roni Amit (2012); All roads lead to rejection: Persistent bias and incapacity in South African Refugee Status Determination, ACMS (2012); No Refuge: Flawed Status Determination and the Failures of South Africa’s Refugee System to Provide Protection; Queue here for Corruption, ACMS and LHR (2015); South Africa Flawed Asylum System - <http://www.lhr.org.za/news/2013/south-africas-flawed-asylum-system> (2013)

<sup>49</sup> Interviewed in Durban

<sup>50</sup> Section 3(b) applies to people who flee due to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of their country of origin or nationality

<sup>51</sup> Jonathan Crush and Daniel Tevera, 2010. Zimbabwe’s exodus: crisis, migration, survival. Exiting Zimbabwe

<sup>52</sup> Interview with RAB and SCRA, 15 June 2018; and UNHCR Global Trends: Forced Displacement in 2017, p 46, [191,300 claims pending http://www.unhcr.org/5b27be547.pdf](http://www.unhcr.org/5b27be547.pdf)

decisions (40-50%) is a big contributing factor to the backlog as decisions are sent back to the RSDO for review who, in most of the cases, rejects them again. Decisions are then sent back to SCRA, and so on thereby creating a cycle that can go on for years.

*“People are awaiting asylum status for 11, 12 years. They're losing out on life.”<sup>53</sup>*

Many decisions are sent back to the RSDO because of interpretation problems and a lack of accurate country of origin information. If more accurate and evidence-based decisions were made by RSDOs, some of the backlog could be alleviated. According to Nigel Holmes from the RAB,<sup>54</sup> 99% of cases in court are there due to procedural malfunction.

The RAB and SCRA are each made up of three members, but the Refugees Act does not prescribe how many members of the RAB and SCRA should make decisions. Prior to 2013, one member could make a decision on an asylum claim. Civil society, however, questioned the potential discriminatory nature of this system as decisions are left only to one person. In 2013 following strategic litigation,<sup>55</sup> the decision was made that RAB and SCRA each have to have a quorum of three members to make decisions. They are also required to travel, at least once every two months, to the RRO locations across the country (Musina, CT, Durban, PE, Pretoria), to make decisions on applications in those centres. They deal with 30-40 cases per visit. While this ensures that decisions are fair because they are not adjudicated by one person only, the system presents logistical and timing problems in trying to coordinate the schedules of the three standing members, which also contributes to the ongoing backlog.

Amnesty International confirmed through interviews that asylum seekers have been waiting for their RAB hearings for up to 10 years. In many cases they were given dates for their hearings, but the authorities did not honour these dates. Instead, asylum seekers were given further appointments which, in many cases, were also not honoured.

## INSTITUTIONAL XENOPHOBIA

According to the DHA the big drop in asylum approval rates between 2011 and 2015 (down from only 15% in 2011 to a mere 4% in 2015), affirms their assertion “that most new asylum applications are not genuine asylum seekers, but rather persons seeking employment or other socio-economic opportunities in the country”.<sup>56</sup> This reasoning is problematic, unfounded and is a worrying indication of the government’s biased stance towards asylum seekers. According to research conducted by Lawyers for Human Rights (LHR) and the African Centre for Migration and Society (ACMS), ‘All Roads Lead to Rejection - *Persistent Bias and Incapacity in South African Refugee Status Determination*’, “The belief within the DHA that the still high demand at the refugee reception offices stems from the abuse of the system by economic migrants has given rise to an anti-asylum seeker bias that is evident in the status determination process”.<sup>57</sup>

Myths and inaccuracies about asylum seekers, refugees and migrants dominate the media. Politicians and leaders make claims that foreign nationals are pouring into South Africa through porous borders, undermining the country’s security, stability and prosperity.<sup>58</sup>

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<sup>53</sup> Burundian man interviewed in Durban

<sup>54</sup> Nigel Holmes Interviewed 15 June 2018

<sup>55</sup> Harerimana V Chairperson Of The Refugee Appeal Board And Others (10972/2013) [2013] ZAWCHC 209; 2014 (5) Sa 550 (WCC) (11 December 2013)

<sup>56</sup> Presentation to the portfolio committee of Home Affairs, slide 21 [http://sihma.org.za/news\\_item/2015-asylum-statistics-south-africa/](http://sihma.org.za/news_item/2015-asylum-statistics-south-africa/)

<sup>57</sup> All Roads Lead to Rejection - *Persistent Bias and Incapacity in South African Refugee Status Determination*, 2012, p10

<sup>58</sup> “I feel sorry for law enforcement agencies that are actually failed by political leadership in this country, with porous borders where South Africa is made to be a haven for criminals.” - Herman Mashaba, Mayor of the City of Johannesburg,; Thembelani Ngubane, Secretary General of the African Basic Movement says that “Joburg CBD is full of these foreigners who are distributing drugs for free because they are on a mission to destroy the youth and take over the country in a few years.”

Yet, according to the 2011 census,<sup>59</sup> South Africa is not overwhelmed with immigrants, with some 2.2 million international migrants (about 4% of the population) in the country in 2011. Statistics South Africa's Community Survey of 2016<sup>60</sup> puts the number of foreign-born people at 1.6 million, out of a population of 55 million when the survey was done.

Utterances by some government officials, political and cultural leaders<sup>61</sup> have affirmed this anti-immigrant stance and comments have often been factually incorrect or inciteful. Arguably, this has further fuelled xenophobic violence and entrenched the notion that all refugees are criminals or economic migrants are here to take jobs from South African nationals. There have been ongoing spates of xenophobic violence targeted at refugees for decades, with the worst outbreak of this taking place in May 2008<sup>62</sup> when many houses were burnt, 342 shops were looted and 213 burnt down, and 62 people were killed<sup>63</sup>

Addressing community members in Pongolo, in KwaZulu-Natal during a moral regeneration event on 20 March 2015, King of the Zulus, King Goodwill Zwelenthini, said: *"As I speak to you, you find there are unsightly goods hanging all over our shops. They dirty our streets. We cannot even recognise which shop is which. They are all blocked by foreigners."* This statement arguably had the effect of inciting hatred of foreigners as shortly after he made this statement there was a renewed spate of attacks on foreigners.

On 14 July 2017, Deputy Minister of Police, Bongani Mkongi, said of Johannesburg: *"How can a city in South Africa be 80 percent foreign national? That is dangerous. South Africans have surrendered their own city to the foreigners."* On 17 July 2017, the South African Human Rights Commission (SAHRC) condemned the statement saying it was inaccurate and could fuel xenophobia. The SAHRC called on leaders to exercise caution when addressing the public so as to not instigate xenophobic violence.

Following violence in Rosettenville in February 2017, when community members set fire to several buildings they claimed were housing brothels and drug dens, Herman Mashaba, Mayor of the City of Johannesburg said, *"I feel sorry for law enforcement agencies that are actually failed by political leadership in this country, with porous borders where South Africa is made to be a haven for criminals."*

On 7 August 2018, the African Basic Movement (ABM), a newly registered political party, posted on Twitter that all foreigners should leave South Africa by the end of 2018. The party claims that foreigners plan to take over the country in a few years and must be stopped by any means. They also want to make it illegal for foreigners to marry South African citizens. Thembelani Ngubane, ABM's Secretary-General, said *"Joburg CBD is full of these foreigners who are distributing drugs for free because they are on a mission to destroy the youth and take over the country in a few years."* On 19 August 2018, the Civil Society Coordinating Collective lodged a complaint with the Electoral Commission of South Africa<sup>64</sup> against the ABM for infringement of the Electoral Code of Conduct. At the time of writing this report, no response had been received from the Electoral Commission.

While speaking about their plans to run a coalition government at the national level if they got enough votes in 2019, Mosiuoa Lekota, speaking on behalf of the Democratic Alliance (DA), the Congress of the People (COPE) and the Freedom Front Plus (FFP) said: *"An opposition*

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<sup>59</sup> <http://www.statssa.gov.za/publications/Report-03-01-79/Report-03-01-792011.pdf>

<sup>60</sup> <http://www.statssa.gov.za/publications/03-01-06/03-01-062016.pdf>

<sup>61</sup> <https://www.theguardian.com/world/2015/apr/20/south-africa-xenophobic-violence-migrants-workforce>

<sup>62</sup> Amnesty International Press Release, South Africa: Urgently Take Steps to Combat Impunity for Xenophobic Violence. 14 April 2015. Available at: <https://www.amnesty.org/en/latest/news/2015/04/south-africa-urgently-take-steps-to-combat-impunity-for-xenophobic-violence/>

<sup>63</sup> <https://www.sahistory.org.za/article/xenophobic-violence-democratic-south-africa>

<sup>64</sup> <http://section27.org.za/2018/10/civil-society-organisations-lobby-a-complaint-with-the-electoral-commission-of-south-africa-against-the-african-basic-movement/>

*coalition government would seek to allow refugees into the country and build camps for them to live in.”<sup>65</sup>*

On 15 November 2018 Health Minister, Dr Aaron Motsoaledi, said that the South African health system was overburdened by foreign nationals from neighbouring countries. He specifically referred to women giving birth and said that of 700 births in one facility, 400 were babies born to foreign nationals.<sup>66</sup> He admitted that there is no evidence for this, only anecdotal stories. In response to his statement, Amnesty International South Africa called on Minister Motsoaledi to stop this shameless scapegoating of refugees and migrants.<sup>67</sup> In March 2019, during his election campaign, President Cyril Ramaphosa joined the ranks of other politicians speaking out against migrants saying: *“Everybody just arrives in our townships and rural areas and set up [sic] businesses without licences and permits. We are going to bring this to an end.”*

None of this anti-immigrant rhetoric is based on evidence.

In addition to the institutional xenophobia asylum seekers and refugees face, almost all experience xenophobic violence in the communities in which they live. While some incidents were just put down to general criminality, Amnesty International heard of many incidents where people were targeted because of being migrants.<sup>68</sup>

A report by Xenowatch, which monitors xenophobic violence in South Africa, states that between January and September 2018, a total of 33 cases were recorded during which 11 people were killed, 12 assaulted and 1,143 displaced. There were also reports of 456 foreign owned shops being looted.<sup>69</sup>

*“Black South Africans don’t like us. They say we are here to take their jobs. They want to kill us”<sup>70</sup>*

Women believe they are soft targets because they are both migrants and women, and they expressed fear about moving around after dark. One woman in PE told us she had been robbed three times on her way home from work. She said her husband had been robbed once and their child experienced an attempted stabbing at school.<sup>71</sup> She believed these attacks to have been xenophobic and not isolated criminal acts. Asylum seekers are called *“amakwerekwere”<sup>72</sup>* and are forced out of communities by the locals living in those communities.

*“In South Africa you get killed for having a different accent”<sup>73</sup>*

Researchers observed different dynamics in the different research locations. In PE the people we spoke to in Korsten, which has a large Somali community, said they felt much safer than those living in the central part of the city. In Cape Town, our researchers noted clear racial dynamics to the violence, with interviewees telling Amnesty International that white and coloured areas tended to be safer for foreigners than areas where predominantly black South Africans live.

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<sup>65</sup> <https://www.news24.com/SouthAfrica/News/refugees-must-live-in-refugee-camps-lekota-20180711>

<sup>66</sup> <https://africacheck.org/2019/01/29/analysis-are-south-africas-public-hospitals-overburdened-by-foreign-patients/>

<sup>67</sup> <https://www.amnesty.org/en/latest/news/2018/11/south-africa-minister-motsoaledi-must-not-use-refugees-and-migrants-as-scapegoats-for-the-failing-health-system/>

<sup>68</sup> We use the term migrant here because the distinction between asylum seeker, refugee and migrant is not well understood by community members who see them all as foreign migrants regardless of status.

<sup>69</sup> <http://www.xenowatch.ac.za/> Summary of Xenophobic Incident Statistics: January to 25 September 2018

<sup>70</sup> Congolese man interviewed in Cape town.

<sup>71</sup> Congolese woman interviewed in PE.

<sup>72</sup> A term used by Black people in South Africa to refer to foreign Africans.

<sup>73</sup> Ugandan man interviewed in Durban.

*“In South Africa there is no respect for human life if you are a foreigner. We might as well be animals.”<sup>74</sup>*

Xenophobic attacks are ongoing. On 25 March 2019, protests erupted in Durban, Kwa-Zulu Natal (KZN) with the main targets being foreign nationals and in particular, truck drivers and shop owners. Six people were killed and approximately 250 foreign nationals displaced in brutal violence that reportedly included the use of machetes. The attacks were linked to a video of President Cyril Ramaphosa at an election rally where he said: *“everyone [foreigners] sets up business in townships without licences and this will be brought to an end.”*

Discriminatory actions and hate speech are governed by the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).<sup>75</sup> The objectives of the Act are to prevent and prohibit unfair discrimination and harassment; promote equality and prevent and prohibit hate speech.<sup>76</sup> According to Section 6 of the Act: “Neither the State nor any person may unfairly discriminate against any person.” Hate speech are words “that could reasonably be construed to demonstrate a clear intention to – a) be hurtful; b) be harmful or incite harm; c) promote or propagate hate”<sup>77</sup> The Act provides for Equality Courts that are mandated to hold an inquiry to determine whether unfair discrimination, hate speech or harassment has taken place as alleged.<sup>78</sup>

The Government’s responsibilities for combatting and eliminating racism, racial discrimination, xenophobia and related intolerance are also outlined in the recently launched *National Action Plan (NAP) to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance*. They include the responsibility to create a legal and policy framework and effective implementation of such policies to prevent intolerances, while increasing efforts to prevent racism, racial discrimination, xenophobia and related intolerance in areas such as immigration policy, policing and administration of justice and the promotion of multiculturalism and cultural diversity.<sup>79</sup>

Political leaders must be held accountable for irresponsible and divisive political narratives that fuel xenophobic violence and incite members of the public to commit violent acts against foreign nationals. Those found guilty of inciting or committing criminal and violent acts must be brought to justice.

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<sup>74</sup> Mixed FGD in Cape Town.

<sup>75</sup> Act 4 of 2000

<sup>76</sup> Ibid

<sup>77</sup> Ibid, Section 10 (1)

<sup>78</sup> Ibid Section 21 (1)

<sup>79</sup> National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2019

# 2. IN CONTEMPT

***“The importance of the Refugee Reception Office in the scheme of the Act cannot therefore be underestimated”***

Judgement in Minister of Home Affairs & others v Somali Association of South Africa & another, 2011

According to Section 8 of the Refugees Act, “the Director General may establish as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this Act.”<sup>80</sup> RROs are facilities run by the DHA and are the contact point between asylum seekers and the government. It is where asylum seekers submit their applications for asylum, have interviews related to their claim, renew their permits and receive a decision on the status application.

In 2002, the DHA opened five RROs in five main urban cities including Johannesburg, Pretoria, Cape Town, Durban and Port Elizabeth (PE). In 2008, another RRO was opened in the northern border town of Musina, and another temporary one, Tshwane Interim Refugee Reception Office (TIRRO), was opened in Pretoria in 2009 ostensibly to deal with the massive backlog in asylum applications.

## UNLAWFUL AND IRRATIONAL

In 2011, the DHA began to close the RROs. Johannesburg was closed entirely in 2011. PE and Cape Town were closed for new asylum applications in 2011 and 2012, respectively. The TIRRO was closed in 2016.

The closure of the RROs has put severe pressure on asylum seekers who are required to travel long distances to renew their asylum permits. The remaining offices are located in Musina, Pretoria (Marabastad) and Durban, though the Durban office was also closed for new applications in late 2017. The PE and Cape Town RROs are supposed to be open for renewal of existing permits held at those RROs but Amnesty International heard of instances where this was not the case.

Since their closure, the lawfulness of the closures has been vigorously challenged in court. While the courts have ruled that the closures were unlawful, the DHA has spent many years and resources challenging court decisions, and to date has failed to reopen the CT RRO.

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<sup>80</sup> Refugees Act, S8(1)

### Port Elizabeth Closure

On 30 November 2011, the DHA closed the PE RRO for new applications. In February 2012, the Somali Association of South Africa (SASA) Eastern Cape and Project for Conflict Resolution and Development brought a case against the Minister of Home Affairs and others, challenging the closure.<sup>81</sup> The court found the decision to close the PE RRO without having an alternative office in the Metropolitan area to be unlawful and set aside the decision. It further ordered the DHA to open and maintain a fully functional RRO to provide services to asylum seekers and refugees, including new applicants for asylum in the Metropolitan area by 14 December 2011.<sup>82</sup> The DHA failed to reopen the RRO as ordered by the court and continued to only process existing asylum applications.

The DHA took the matter on appeal in 2015, but this was dismissed on 25 March 2015 by the Supreme Court of Appeal (SCA) and the DHA was directed to restore refugee reception services for new and existing asylum applications at the PE RRO by 1 July 2015.<sup>83</sup> From 15 April 2015, the court ordered the DHA to provide progress reports to all applicants, detailing the steps taken to ensure compliance with the court order. The DHA failed to comply with the order.

The SCA judgement in *Minister of Home Affairs & others v Somali Association of South Africa & another*<sup>84</sup> makes extensive reference to the DHA representative, then Director General Mr Mkuseli Apleni's assertions in his affidavit about the new strategic direction being taken by the DHA, "namely to close some relatively marginal (in comparative terms) urban based RROs such as the PE RRO and to establish a new refugee reception office at the Lebombo border post to replace the closed PE RRO...The evidence reveals that the PE RRO was considered to be closed and defunct by the DHA; the DHA proposed to have the new Lebombo RRO operational from 1 April 2012."<sup>85</sup> In April 2014 then Minister of Home Affairs, Naledi Pandor, told parliament that there would be no RRO established at the Lebombo border post despite that being one of the principal justifications for closing the PE RRO. <sup>86</sup> At the time of writing this report, Amnesty International was unable to confirm any progress in the establishment of the Lebombo RRO.<sup>87</sup>

In August 2015, the Constitutional Court refused to hear an application by the DHA to appeal the SCA judgment, on the basis that it was lodged after the deadline. This meant that the SCA's ruling declaring that the DHA's closure of the PE RRO was unlawful and ordering the DHA to reopen it, stood. Despite the court rulings and various meetings between civil society organisations and the DHA to discuss its reopening, the PE RRO remained closed and the DHA failed to furnish the applicants with progress reports as directed by the SCA.

Instead of lodging an application to have the DHA declared to be in contempt of the SCA judgement, the applicants sought a practical solution to ensure the reopening of the PE RRO and an application was brought by the Somalia Association of South Africa and Project for Conflict Resolution and Development in February 2018<sup>88</sup> to have a special master appointed to oversee the DHA's process of the reopening of the PE RRO. While the DHA opposed this application for the appointment of a curator, it commenced the process of re-opening the PE RRO in 2018.

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<sup>81</sup> *Minister of Home Affairs & others v Somali Association of South Africa & another*, Case No 3759/2011

<sup>82</sup> *ibid*

<sup>83</sup> *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015)

<sup>84</sup> (831/13) [2015] ZASCA 35 (25 March 2015)

<sup>85</sup> *Minister of Home Affairs & others v Somali Association of South Africa & another* (831/13) [2015] ZASCA 35 (25 March 2015), para [19]

<sup>86</sup> *Ibid*, para [21]

<sup>87</sup> Amnesty could not get an appointment with the DHA to confirm progress (see fn 22), Other partner organisations were unable to confirm progress either

<sup>88</sup> *Somali Association of South Africa Eastern Cape and another v Minister of Home Affairs and others*, Case No 3338/12

After years in court, the PE RRO was finally reopened to new asylum seekers on 19 October 2018,<sup>89</sup> though despite being reopened, Amnesty International has heard from partners in PE that the RRO is understaffed, with only two RSDOs processing applications. They are therefore unable to provide the required services reasonably expected by refugees and asylum seekers. According to Linton Harmse of the Refugee Rights Centre in Port Elizabeth, appointments for new asylum seekers are being issued for July 2020. Asylum seekers are “provided with a flimsy appointment notice, which clearly states that it does not afford the bearer any rights to stay in South Africa.”<sup>90</sup> Amnesty International was also advised by Harmse that those without any documentation (passport/ID or a non-renewable ‘asylum transit permit’)<sup>91</sup> are not assisted unless they depose to an affidavit, confirming their personal details, country of origin, reason for leaving their country and where and how entry was gained into South Africa. This is not, in fact, a legal requirement. Asylum seekers, as a result, remain undocumented and extremely vulnerable to harassment, arrest and detention. They are also unable to access basic education and/or health services.

### **Cape Town Closure**

In July 2012 the DHA closed the CT RRO for new asylum applications. This meant that asylum seekers applying for asylum after July 2012 were required to apply for asylum or renew their permits at one of the three remaining RROs many kilometres away (Pretoria (1,400km) Durban (1,600km) and Musina (1,900 km). In 2013 the Scalabrini Centre of Cape Town (SCCT), an organisation that provides assistance and advocates respect for the human rights of asylum seekers and refugees, challenged the 2012 closure of the RRO. The court found that the Director General’s decision to close the CT RRO to new applicants, who applied after 29 June 2012, to be unlawful and set it aside. The DHA was directed to open a fully functional RRO within the Cape Town Metropolitan Municipality for both new applications and existing applications.<sup>92</sup> The DHA appealed the decision and applied to the SCA, which confirmed that the closure was unlawful due to the DHA’s failure to consult with the public and relevant parties in a “meaningful” way.<sup>93</sup> The SCA ordered the Department to consult with stakeholders and make a new decision.

The DHA held a consultation meeting in Cape Town on 5 December 2013 where they heard about the practical effects of the closure on asylum seekers and refugees.<sup>94</sup> However, in 2014 the DHA made a new decision to keep the RRO closed for new applications and to be fully closed once all outstanding decisions were completed. This decision was once again challenged in court by the Somali Association of South Africa and Scalabrini Centre of Cape Town.

On 28 April 2015, the Legal Resource Centre (LRC) went to court on behalf of 450 people who had been refused renewals at the CT RRO, known as the “*Nbaya*” case.<sup>95</sup> An initial order was granted by the court on 31 August 2015 allowing for the renewal of the asylum seeker permits at the CT RRO. The matter was thereafter postponed until November 2015 for further arguments regarding the specific request that the CT RRO should renew the permits of all asylum seekers in similar situations to that of the initial 450. Parties were supposed to return to court on the 17 November 2015, but the DHA requested a further postponement to 8 December 2015. Over 3,500 asylum seekers had approached or been referred to the LRC in relation to this issue before the final argument was heard on 8 December 2015 when judgment was reserved. On 3 June 2016, the High Court handed down an order giving relief to people who were seeking to renew their asylum seeker permits at the CT RRO but were refused

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<sup>89</sup> Constitutional Court Rules Closing Port Elizabeth Office Unlawful (7 August 2015) <<http://mg.co.za/article/2015-08-07-concourt-rules-closing-pe-refugee-office-unlawful>>.

<sup>90</sup> Email correspondence from Linton Harmse of the Refugee Rights Centre in PE on 25/02/2019

<sup>91</sup> A person who enters the Republic of South Africa through a port of entry (a land border post, airport or harbour) and claims to be an asylum seeker is issued with a section 23 permits which is a non-renewable ‘asylum transit permit’ of the Immigration Act.

<sup>92</sup> as *Scalabrini Centre v Minister of Home Affairs* 2013 (3) SA 531 (WCC)

<sup>93</sup> *Minister Of Home Affairs V Scalabrini Centre, Cape Town* (735/12 & 360/13) [2013] ZASCA 134 (27 SEPTEMBER 2013)

<sup>94</sup> DHA correspondence, DHA 57. To Asylum seekers and refugees and asylum seekers and refugee stakeholders. Re: The decision of the Director General of the Department of Home Affairs on the future of the Cape Town Refugee Reception Centre.

<sup>95</sup> *Ntumba Guella Nbaya & Others v Director-General of Home Affairs & Others* (case number 6534/15)

renewals because they had made their initial application at another RRO in South Africa.<sup>96</sup> The DHA appealed this decision.

In September 2017, the SCA found that the decision to close the Cape Town RRO was “*substantively irrational and unlawful*”, because of the “decision-maker not taking into account relevant considerations, not complying with the empowering provision, acting with ulterior and improper purpose and making error of law”.

“In my opinion, given that the impugned decision is substantively irrational and unlawful, the only effective remedy is an order directing the first to third respondents to maintain a fully functional refugee reception office in or around Cape Town for the following reasons: First, asylum seekers and refugees have been prejudiced by the closure of the Cape Town Refugee Reception Office since June 2012 - more than five years. Second, the impugned decision is substantively irrational and unlawful, as opposed to *Scalabrini 1* where the decision was procedurally irrational. Third, an order remitting the impugned decision to the Director-General for reconsideration is likely to be ignored, as happened in the case of the Crown Mines Refugee Reception Office, where, six years later, there has been no compliance with the order to reconsider the decision to close that office. Finally, the order is identical to that granted in *Somali Association*, other than that the respondents have been given more time to reopen the CT RRO, and the office may be located outside of Cape Town in an area accessible by public transport. This should go a long way to reducing any complaints relating to nuisance or violations of zoning regulations, as the Director-General himself has recognised.”<sup>97</sup>

The court directed the DHA to reopen and maintain a fully functional RRO in or around the Cape Town Metropolitan Municipality by Friday 31 March 2018. To date the CT RRO remains closed and the DHA has not provided progress reports on the status of the CT RRO required per the court order.<sup>98</sup>

Instead of bringing contempt of court proceedings against the DHA, in May 2018 the SCCT and SASA EC launched a new case against the DHA regarding its non-compliance with court orders regarding the CT RRO. The new case combines two cases - the *Scalabrini*<sup>99</sup> case and the *Nbaya* case<sup>100</sup> – both of which found DHA's policies at the CT RRO unlawful and issued orders requiring DHA to comply. At the present time, both of these orders are not being implemented causing, great hardship for asylum seekers. The new application asks the court to “fashion an effective and meaningful remedy to ensure DHA complies with orders of the court. The current application seeks to remedy this pattern of non-compliance and will ask the court to:

1. Declare that the DHA is in breach of the order of the SCA with regards to the CT RRO being reopened and maintained and the order of the Western Cape High Court (WCHC) in the *Nbaya* case.
2. Appoint a Special Master to oversee the compliance of the orders, which shall include the implementation of interim measures to assist new asylum seekers prior to the full re-opening of the CT RRO and renewing the permits of asylum seekers who fall under the *Nbaya* order.”<sup>101</sup>

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<sup>96</sup> [http://centre4505.rssing.com/chan-63817274/all\\_p2.html#item22](http://centre4505.rssing.com/chan-63817274/all_p2.html#item22)

<sup>97</sup> *Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017)

<sup>98</sup> *Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017) [73](c)

<sup>99</sup> *Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017)

<sup>100</sup> *Ntumba Guella Nbaya & Others v Director-General of Home Affairs & Others* (case number 6534/15)

<sup>101</sup> *Scalabrini Centre Of Cape Town And Somali Association Of South Africa Seek Appointment Of Special Master Regarding The Re-Opening Of The Cape Town Refugee Reception Office*, Press Release, 9 May 2018

When interviewed by Amnesty International, a member of SCRA<sup>102</sup> and a Durban RRO administration officer<sup>103</sup> implied that closure of the RROs was merely an “inconvenience” for asylum seekers. This sentiment was also noted in the Supreme Court of Appeal Judgement, *Minister of Home Affairs & Others v Somali Association of South Africa & Another* which said: “The relevant authorities attempt to downplay the significance of the decision to close the PE RRO, contending its closure, coupled with the closure of two other RROs, gives rise to what it describes as ‘inconvenience’ for asylum seekers. But that may well be to trivialise the vulnerability and desperate circumstances of many asylum seekers in the country.”<sup>104</sup>

## ASYLUM PROCESSING CENTRES

The 2017 White Paper on International Migration proposes establishing Asylum Processing Centres, which will be used to “profile and accommodate asylum seekers during their status determination process” and cater for their basic needs.<sup>105</sup> This goes against current legislation which allows asylum seekers to enter the country, work, and have access to basic education, and health services while their status is determined. The intention is to build these centres close to the Zimbabwe and Mozambique border posts where officials believe most asylum seekers enter the country. The proposal of asylum processing centres relies on the assumption that these centres will deter ‘illegitimate’ asylum applications, mitigate security risks and increase the DHA’s ability to manage the asylum process.

The White Paper is, however, silent on how these asylum processing centres will be resourced, which is crucial given the large budget constraints that the department has experienced over the years. The current system costs very little compared to the cost of camps.<sup>106</sup>

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<sup>102</sup> Interview with Karl Sloth Nielsen of SCRA on 15/6/2018

<sup>103</sup> Interviewed 27/11/2019

<sup>104</sup> Minister of Home Affairs & others v Somali Association of South Africa & another (831/13) [2015]ZASCA 35 (March 2015) para 28

<sup>105</sup> Department of Home Affairs, White Paper on International Migration, July 2017

<sup>106</sup> “Camps cost close to R28,000 per refugee per annum in some of their cheapest forms worldwide. So, with close to 60,000 applications for asylum per annum and a status determination period that is known to stretch into years, the White Paper’s proposal demonstrates government’s capacity and willingness to spend *much* more on the asylum regime. In other words, the economic argument (with the prioritisation of vulnerable South Africans) is abandoned by government when asylum-seekers can be detained in camps.” Van Lennep T, The State of the South Africa Refugee Protection Regime: Part II Politics and Policy, October 2018 [https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-ii-politics-and-policy#\\_ftn3](https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-ii-politics-and-policy#_ftn3)

# 3. LIVING IN LIMBO

***“The costs of travelling are too high which prohibits us from being able to renew as often as they want us to, so we are left with expired documentation.”***

An asylum seeker from the DRC speaking to Amnesty International in Port Elizabeth

The shortfalls in the asylum management system mentioned in Chapters 2 and 3 have severe consequences for asylum seekers and refugees. While they have the right to work and access basic health services and primary education, the faults in the asylum management system prevent many asylum seekers from claiming these rights and leave them living in limbo for years.

*“Without a document you are nothing”<sup>107</sup>*

## RIGHT TO WORK BUT UNABLE TO GET DECENT WORK

While asylum seekers are, by law, permitted to study and work if they hold a valid asylum seeker permit per Section 27 of the Refugees Act, the reality for many is quite the opposite. In practice there is lack of knowledge by employers about the asylum seeker permit and what it allows for in terms of employment. Some asylum seekers have been told that they have to be citizens to be legitimately employed, and business traders are required to have refugee status or a work permit.

*“The asylum permit says you can work and study, but you can't. You might as well go and live in the bush”<sup>108</sup>*

Many of the asylum seekers Amnesty International spoke to cannot find permanent employment because they need to travel so regularly (every one to three months) to renew their permits. This also places asylum seekers in precarious situations, and they are at risk from unscrupulous business people who exploit their vulnerabilities.

*“When you go to renew you have to take time off work and even if you take one day off the chances of getting your permit renewed are small. You go early but don't get in and probably get it on your third time. Even when you get inside it doesn't mean that you will get your*

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<sup>107</sup> FGD participant in Durban.

<sup>108</sup> Male FGD participant in Cape Town.

*permit renewed, you just wait all day and they say they've run out of permits and you have to come back tomorrow, or [after] one week.”<sup>109</sup>*

Those who were employed were in temporary or precarious work. Women struggle especially because they are required to care for their children in the absence of childcare facilities, while also having to renew their permits regularly.

Amnesty International spoke to a young woman from the DRC who said that she is paid R500 (\$34)<sup>110</sup> per month for working Monday to Saturday 8am – 5pm. She has been to renew her permit 14 times since she arrived in 2012.

*“You need refugee status to be employed, asylum is not enough. Women are not being employed because their permits will expire in six months or less so nobody wants to employ someone who can only legally work for a limited amount of time and who will then need time off to go and renew.”<sup>111</sup>*

While banks should accept asylum permits as identification, some banks have refused to accept them, and this has made it impossible for asylum seekers to open bank accounts, with the result that they often have to carry and keep cash. This is a well-known fact, which makes asylum seekers especially vulnerable to crimes like mugging and robbery. We heard a number of accounts of asylum seekers being robbed or assaulted on their way to and from work or after shopping.

## CHILDREN'S RIGHTS DENIED

South African law does not allow nationality to be conferred on to children born to foreign nationals. Children born in South Africa, where neither parent is a citizen, are not automatically assigned South African citizenship. They are foreigners and must apply for the appropriate documentation. According to Section 2(3) of the South African Citizenship Act, ‘children born in the country to non-citizen parents can only acquire citizenship after they turn 18’.<sup>112</sup> Amnesty International found there is a misconception among asylum seeker parents that children born in South Africa become citizens automatically.

Children born to foreign nationals do have the right to be issued with birth certificates, as required by Section 28 of the Constitution, which protects the right of every child to a name and nationality from birth.

One of the biggest challenges for parents and children of asylum seekers is documentation. While parents are provided with birth certificates (though not in all instances), almost all have no official South African identity documents. Some interviewees said that birth certificates were not being given out, all they get is a proof of birth which they then have to take to their respective embassies for certification and application for citizenship. Amnesty International heard that this was becoming more common. Lack of documentation prevents children from accessing medical care and basic education.

Renewing documentation generally falls on the mother, which means she has to travel to the designated RRO with her children as they also have to be present because they are usually on the mother's file. Some of the women explained how their permits lapsed because they were either pregnant or had just given birth. This complicates things further as the child cannot be registered because the mother does not have a valid permit.

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<sup>109</sup> Kenyan man interviewed in Johannesburg.

<sup>110</sup> Exchange rate on 30/05/2019.

<sup>111</sup> Woman in focus group discussion in Cape Town.

<sup>112</sup> Act 88 of 1995

*“If your baby is born when the mother doesn’t have documentation, mothers will have to wait until they have renewed it and paid the late fee and got documentation before you can register your child. However, legally you have to register your baby within 30 days of birth, but this isn’t done because mothers may take longer than 30 days to raise the funds to pay for their late fee.”<sup>113</sup>*

According to the Scalabrini Centre of Cape Town (SCCT), ‘the inability of undocumented parent(s) to register the child’s birth effectively functions as a form of migration control or a punitive measure towards the parents but has profound negative impacts on the child. Without a birth certificate, a child has no documentary link to the parent and therefore no eventual claim to the nationality of the parent’.<sup>114</sup>

Amnesty International found worrying examples of how laws and policies are being inconsistently implemented in relation to birth certificates for child asylum seekers and what seems to be lack of communication between different government departments, including health, education and labour, about the rights of asylum seekers.

A female Somali interviewee, spoke of how she, her husband and five of their six children have South African identity documents (ID), but the DHA in Port Elizabeth refused to register her last born, who was four months old when Amnesty International interviewed her, because they said the system was changing. As a result, he has no birth certificate. This means that the child will be unable to access free basic medical care or education.

One interviewee from the DRC in Cape Town, spoke of how after two renewals at the Cape Town RRO, she was told on her third renewal that she was required to travel to Durban to renew her permit. She explained how her renewal date was Christmas Day. As such, she did not go to renew and was then charged a R2,500 (approximately \$165) fine for late renewal. She could not afford to travel to Durban which is approximately 1,600 kilometres away. She remains undocumented and has two children who are not able to access basic health services or education.

A female Congolese interviewee explained to Amnesty International that even when the parents have refugee status, this does not mean their children will have access to basic education. She said the school her children were attending in Uitenhage were asking for a South African ID for her 14-year old son. Children in the country are not eligible for IDs until they are 16 years old. Identification documents are granted to South African citizens and those eligible to receive them, such as refugees<sup>115</sup> and permanent residents.

Amnesty International researchers observed large numbers of children, mostly girls, not attending school in the communities visited in Korsten, Port Elizabeth. Parents interviewed admitted that if they have to pay for private school, the boy child gets preference. This is a grave violation of the rights of girls to equal access to education.

In 2018 the Department of Home Affairs published new regulations to the Births and Deaths Registration Act (BDRA)<sup>116</sup> proposing to discontinue the issuing of birth certificates to foreign children. The new regulations propose that foreign children be issued with a “confirmation of birth”, which is not a birth certificate according to the new form. According to the draft regulation, children are required to present the “confirmation of birth” to their country of origin embassy in order to obtain a birth certificate.

The proposed regulations violate the rights of the child. In terms of Article 7 of the Convention of the Rights of the Child (CRC), ‘children must be registered immediately after birth and have the right from birth to a name, to acquire a nationality and all children in the

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<sup>113</sup> Woman in focus group discussion in Cape Town

<sup>114</sup> Report of the High Level Panel On The Assessment Of Key Legislation And The Acceleration Of Fundamental Change, November 2017, p354

<sup>115</sup> Section 30 of the Refugees Act 130 of 1998

<sup>116</sup> Act 51 of 1992

country who would otherwise be stateless have the right to acquire a nationality'. It also violates Section 28 of the Constitution which protects the right of every child to a name and nationality from birth. The regulation is also problematic because it requires children to present their "confirmation of birth" at the embassy of their country of nationality to obtain a birth certificate. This jeopardises their protection in South Africa, because, in many cases, they cannot approach their embassies as they fear persecution and are seeking asylum from their country of origin.

## COST OF BEING DOCUMENTED

Most asylum seekers are vulnerable due to limited access to their rights as prescribed in the Refugees Act. With most of the interviewees unable to access decent work, struggle daily to support themselves and their families.

All interviewees in Cape Town and Port Elizabeth said that the time and cost to travel to the remaining RROs in Durban, Pretoria and Musina is a huge challenge. It takes both a financial and physical toll on individuals and families, especially women.

The trip there, which ranges between 900km and 1,900km depending on the destination<sup>117</sup>, takes a day or more and the cost of travel, accommodation and food ranges anywhere from R900 (\$62) to over R5,000 (\$342) per trip. With only one or three month renewals being given in most cases, this can become financially crippling, resulting in people becoming and remaining undocumented. All the women interviewed said one of their biggest challenges was having to travel regularly with their children to renew their permits.

*"The costs of travelling are too high which prohibits us from being able to renew as often as they want us to, so we are left with expired documentation."*<sup>118</sup>

In addition, there are security risks as applicants start queuing from before five in the morning, some women told us that they had been robbed and were threatened with rape while they waited early in the morning.

While corruption was not the focus of the research, some interviewees did mention accounts of this. They said, "If you have money, you can get anything you want at Home Affairs. If you need status, you must buy it." We were told it could cost between R7,000 (\$460) – R10,000 (\$650) to get the refugee permit (as a bribe).

*"People that have money will pass more quickly. There was a broker who was taking the money and organising permits for those that could afford him"*<sup>119</sup>

## UNABLE TO CLAIM ASYLUM

Once they gain access to the RRO, asylum seekers are forced to wait for hours in long queues, often being turned away and told to return the next day or at a later date.

While the CT RRO is supposed to be open for renewals of permits held in that office, the conditions there are deplorable. Amnesty International found<sup>120</sup> no signage to indicate the building was, in fact, an RRO. About 160 people were gathered outside the RRO, many of whom

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<sup>117</sup> CT – Durban 1,600km; CT – Pretoria 1,400km; CT – Musina 1,900km; , PE – Durban 910 km; PE – Musina 1,600km; PE - Pretoria 1,100km

<sup>118</sup> Woman in FGD in Cape Town.

<sup>119</sup> Ethiopian man interviewed in Durban.

<sup>120</sup> Observation at the CTRRO 18 May 2018

had arrived at the office as early as 4am. They expressed concerns at the security risks of arriving at the office at that time in the morning. Most were there for renewal of permits while others were awaiting the return of documentation, they had submitted days before. Some interviewees said they had visited the office for three days in a row and were not receiving any assistance. Some said that they have been living in South Africa for as long as nine years and are only given one-month renewals each time. Others sat around the building with no clear indication of when they would be allowed into the building or receive any assistance. There were no toilet facilities for asylum seekers who were waiting outside the RRO which is a notable problem considering the number of pregnant women waiting. Amnesty International met a desperate woman crying helplessly as she had been told to come back several times and her daughter of nine had been forced to miss school for about a week.

This situation leaves asylum seekers vulnerable and puts them at further risk of arrest and harassment because they are not able to renew expired documentation. It is intensely stressful situation and causes high levels of fear and uncertainty.

The temporary closure of the Durban RRO for newcomers until March 2019 and the imposition of an appointment system, which prescribes the particular days on which the different nationalities can apply for asylum, has resulted in Congolese and Burundian asylum seekers being undocumented. High demand at the recently opened PE RRO has resulted in appointments for new asylum seekers being issued for up to 10 months into the future. This means that in the meantime they remain undocumented and therefore at risk.

## WORSE FOR WOMEN AND LGBTI PEOPLE

Amnesty International's research found that specific populations including women and LGBTI people have particular challenges within the asylum system.

Of the 15 women we conducted one-on-one interviews with, 11 were either pregnant or had a number of children and exclusive childcare responsibilities. The women told us about having to travel long distances to Pretoria, Durban or Musina every one to six months, while pregnant and with all of their children, to renew their asylum permits. This comes at financial, physical and emotional cost for parents and children alike. The RROs are hostile places for women and children. They get no preferential treatment and have to stand in queues for hours. In our focus group discussions we heard accounts of breastfeeding women and crying children being shouted at by DHA officials.

There is no security outside the RRO as they wait, often from 4am in the morning, putting them at great risk of attack and rape, accounts of which were related to Amnesty International researchers.

*"I have been assaulted by people in the queue, pushing and trying to get into the office and I was beaten with a belt by security"<sup>121</sup>*

Consensual same-sex sexual acts are still criminalised in 70 countries worldwide, with the continent of Africa hosting 44 of those.<sup>122</sup> South Africa's Constitution guarantees the rights of all people regardless of sexual orientation.<sup>123</sup> Same-sex marriage has also been legal since

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<sup>121</sup> Somalian woman interviewee in PE.

<sup>122</sup> International Lesbian, Gay, Bisexual, Trans and Intersex Association, A. Carroll and L. R. Mendos, *State Sponsored Homophobia 2019: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition*, p179. [https://ilga.org/downloads/ILGA\\_State\\_Sponsored\\_Homophobia\\_2019\\_light.pdf](https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf)

<sup>123</sup> The Constitution of the Republic of South Africa, Act 108 of 1996, S9(3)

2006 when the Civil Union Act came into force, making South Africa a desired destination for those fleeing persecution based on their sexual orientation or gender identity.

Amnesty International spoke to LGBTI people who explained how they have been discriminated against because of their sexual orientation. One Ugandan man in Durban said that despite having fled Uganda, a country known for anti-homosexuality laws and policies, he was denied asylum because the incorrect section of the Refugees Act was applied to his case. Instead of adjudicating his claim under Section 3(a) relating to fear of persecution by reason of membership of a social group, authorities applied Section 3(b), which relates to external aggression in their country compelling them to leave their country of residence. His claim was rejected because the incorrect section of the law was applied, and he has been awaiting his appeal date since October 2018. He is only receiving three-month renewals and has had to relocate from Cape Town to Durban because of having to travel 1,600km between the two cities every three months. Though he is a qualified lawyer, he has not been able to get employment, saying he is turned away for being gay, black or a foreigner.

Another Kenyan LGBTI activist,<sup>124</sup> who fled persecution from Kenya because of his sexual identity and activism work, told Amnesty International about his experience seeking asylum in South Africa: He visited the Marabastad (Pretoria) RRO eight times before he managed to secure an appointment, after paying an official R300 (\$21). On one of his visits to the RRO, he was pulled out of the group and asked questions about his sexuality. The official asked him, *“You have been living as a gay man in Kenya all your life, why have you not been arrested or prosecuted?”* He was asked this despite having presented evidence and explaining his experiences of being mobbed, arrested and detained. He said he was told by officials that his application was rejected in 2017 on grounds that it was fraudulent, that he is not an LGBTI activist, and that Kenya is a democratic country and not at war. He has been waiting for an appeal hearing date since February 2018 and has had to renew his permit six times.

He told Amnesty International that, on reviewing the written record of the interview conducted by the RSDO, he realised that the story that had been documented by the RSDO was very different to what he had actually told them. In the written version they made it appear as though he was a ‘prostitute’ in his country and had been using his sexuality to earn a living. He challenged the written version and was then told to write his own account of his reasons for seeking asylum despite this not being a requirement. He told Amnesty International that his note was taken and paraded throughout the RRO office and staff members then came to look at him after reading his note. When he questioned the process with the RSDO, his claim was rejected. He said his experiences at the RRO include being mugged outside in front of security guards who, he claims, did nothing but laugh and tell him to “man up”. His phone was stolen as well as money that he had to carry with him because he cannot open a bank account as an undocumented foreigner. On one of his visits to the RRO he was also publicly outed by RRO officials while queuing, resulting in people refusing to sit next to him and him fearing harassment. On his visit to the RRO to renew his permit for the sixth time, on 2 January 2019, he was told that he failed to prove he was gay in his interview so his asylum claim would be rejected. He is appealing the decision.

*“You are turned away from employment for either being gay, being black or being a foreigner”<sup>125</sup>*

The psycho-social effects on children and parents can be profound. In her presentation at Amnesty International’s High-Level Dialogue in July 2018, on ‘Enhancing the Rights of Refugees and asylum Seekers’ entitled *The psychosocial impact of the current refugee system*, Federica Micoli, of Sophiatown Community Psychological Services, explained some of the negative impacts the failures in the asylum process has on children and parents. Vulnerable populations are affected the most. They are vulnerable to poor health after trauma and conflict

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<sup>124</sup> Interviewed in Johannesburg

<sup>125</sup> Ugandan man interviewee in Durban

and are more likely to show severe and persistent stress reactions and are less likely to recover. The prevalence of acute and chronic psychological impairment following disasters and trauma is high. They are likely to experience dislocation nostalgia (missing the ecology of home, natural environment, habits, family, smells etc.) especially due to being forced to leave. They live with major stressors including fear, uncertainty, loss, discrimination, shunning and isolation, which can be particularly damaging to children who have a right to safety and security, as well as the right to a decent education.

Mental health is not understood at the refugee assessment level. For example, the RAB and SCRA don't give necessary training to the officers so that they understand how the refugee experience a person's entire psychological state.

# 4. CONCLUSION AND RECOMMENDATIONS

***“South Africa intends on building a regime for asylum seekers and refugees that will protect and provide for their needs in a humane and secure manner.”***

White Paper on International Migration in South Africa, July 2017

## CONCLUSION

The experiences of asylum seekers and refugees referenced in this report indicate a systemic breakdown of the asylum management system in South Africa. The illegal closure of the RROs; incorrect and inconsistent application of laws and policies; flawed and arbitrary decision-making and a massive backlog have resulted in hundreds of thousands of asylum seekers living in limbo for years on end, who are unable to realise their rights as defined in the South African Constitution and Refugees Act. With increasingly regressive shifts towards the restriction of movement, securitisation and militarisation of borders across the globe, and with South Africa looking to follow suit by using language of ‘risk’ and ‘security’ in the 2017 White Paper on International Migration, as well as increasing incidents of xenophobia across the country, addressing asylum seeker and refugee rights is more relevant now than ever before.

Amnesty International is calling on the South African government to address the systemic violation of the rights of asylum seekers in South Africa in seeking and obtaining refugee status. The South African government must acknowledge and address the systemic shortfalls in the asylum seeker management process and implement the asylum regime in a lawful manner in line with the Constitution, Refugees Act as well as International Human Rights Frameworks.

Amnesty International makes the following recommendations to the South African government:

# RECOMMENDATIONS

- Immediately comply with the Supreme Court of Appeal<sup>126</sup> orders to reopen the Cape Town RRO that was unlawfully closed and reverse the decision to close RROs.
- Effectively resource the RROs, to ensure that refugees are granted fair and efficient access to asylum procedures.
- Ensure that the refugee status determination process is administratively and procedurally just and fair and that it complies with domestic and international laws and policies, and refrain from using practices that have not been signed into law, such as issuing appointment slips instead of asylum seeker permits.
- Ensure that Refugee Status Determination Officers are trained on refugee law and relevant best practices so that they are able to undertake their duties competently and effectively.
- Provide training to RSDOs on the psychosocial effects of trauma and conflict on asylum seekers.
- As a matter of urgency, process the hundreds of thousands of pending refugee status applications and ensure that processing times for status determination are kept within the 180-day adjudication time laid out in the Refugees Act regulations.
- Design and implement mechanisms to respect, protect and promote the rights of asylum seekers and refugees, rather than emphasising a risk and security approach to migration.
- Immediately discontinue the amendment to the Births and Death Registration Act that will deny birth certificates to children born to foreign nationals.
- Local Authorities such as Municipal Councils should, as a matter of routine, convene public dialogues about refugees and asylum seekers with a view to addressing misrepresentations and reframe the national discourse on migration.
- Hold political and cultural leaders and the general public accountable for irresponsible and divisive political narratives that fuel xenophobic violence, through the mechanisms set out in the Promotion of Equality and Prevention of Unfair Discrimination Act.
- Ensure the systematic and rigorous collection of data on all forms of migration, that should be used to substantiate policy decisions, which should be based on facts.

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<sup>126</sup> *Scalabrini Centre, Cape Town v The Minister of Home Affairs* (1107/2016) [2017] ZASCA 126 (29 September 2017)

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## CONTACT US



info@amnesty.org.za



+27 11 283 6000

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# LIVING IN LIMBO:

## RIGHTS OF ASYLUM SEEKERS DENIED

South Africa has a strong legal and human rights framework on refugees and asylum seekers' rights, however the failed asylum management system, which has been well documented over the years, shows that the implementation of existing laws and policies is starkly lacking.

This report is based on research conducted in 2018 to gather evidence focusing on the experiences of asylum seekers attempting to exercise their rights to seek asylum and remain regularized in South Africa during the determination of their asylum applications.

The rights of asylum seekers and refugees, which are prescribed in law and policy, are being denied in various ways. Non-compliance with court orders, poor decision-making, including mistakes of fact and lack of sound reasoning, have resulted in a massive backlog of appeals and reviews. Institutional xenophobia and anti-migrant bias are rife, exacerbating the vulnerable position of asylum seekers.

The consequence of the failures in the asylum management system is that asylum seekers live in limbo, without permanent status, for up to 19 years. The effects of this are multifaceted, and include financial, physical and psychosocial elements. Inability to remain documented affects their ability to get decent and permanent work, hinders their rights to access basic education and healthcare, and makes them vulnerable to harassment, arrest and detention.

The report calls on the South Africa government implement recommended actions to ensure that the rights of asylum seekers and refugees are upheld as prescribed in law and policy.