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**Border enforcement policies and reforms in South Africa
(1994-2020)**

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Abstract

Prior to 1994, South Africa was infamous for its racialised policies and seemingly limitless measures of social control through a regime of apartheid, or racialised separation. Its unforgiving approach of previous, white-minority governments extended to mainly black foreigners, including refugees from the civil war in Mozambique from 1977–1992. After democratic elections in 1994, South Africa's immediate post-apartheid migration regime was still largely oriented around an unreconstructed, apartheid-era approach of controlling the admission into, residence in, and departure from South Africa.

This dire situation triggered a call for reform, to which policymakers were very slow to respond. Ultimately, in its efforts to develop and implement a border management and migration framework, the South African government has heavily relied on legal frameworks, border control policies, strategies and technologies transplanted from Europe and the United States. But, despite all this investment in a precedent-based yet foreign machinery, the government still struggles with its porous borders and irregular immigration.

As a result, attempts to manage migration through policy reforms in South Africa have been fraught with challenges and contradictions. Particularly from around 2008, South Africa has not only embraced a spate of ever-more restrictive policies and laws that aim to sift out the desirable from the undesirable migrants, it has defied court judgements that have found the government to be in contravention of the law and the Constitution and obliged it to change. This has culminated in an explicitly deterrent and security-oriented approach that continues to lack effective judicial oversight.

In this Working Paper, we present a comprehensive overview of South African migration and Border Control policies over a 25-year period. In a separate paper, which builds on this thick description, we argue that South Africa's efforts to deter immigrants has not been framed by globally-accepted principles, based on South Africa's ratification of international treaties governing refugees and migrants in particular, but rather has continued to be a policy of rather arbitrary enforcement is a sad reflection of deep-seated governance problems that the country faces generally.

Keywords

Migration, refugees, South Africa.

Acronyms

ACA	Aliens Control Act
BCOCC	Border Control Operational Coordinating Committee
BMA	Border Management Authority
BMAA	Border Management Authority Act
CABC	Collective Approach to Border Control
CCSI	Cabinet committee on Safety and Intelligence
CLETG	Customs Law Enforcement Task Group
CoRMSA	Consortium for Refugees and Migrants in South Africa
DA	Democratic Alliance
DHA	Department of Home Affairs
HRW	Human Rights Watch
ICOC	National Intelligence Coordinating Committee
IA	Immigration Act
INS	US Immigration and Naturalisation Service
LHR	Lawyers for Human Rights
NIDS	National Inter-departmental Structure
RAA	Refugees Amendment Act
SADC	Southern African Development Community
SAHRC	South African Human Rights Commission
SANDF	South Africa National Defence Forces
SAPS	South African Police Service
SARS	South African Revenue Services
UNHCR	United Nations High Commissioner for Refugees
WPIM	White Paper on International Migration

Border enforcement policies and reforms in South Africa (1994-2020)¹

1 Introduction

This working paper presents a thick description of migration and border control policies in South Africa from a period of transition and political negotiations in the early 1990s, culminating in the country's first democratic elections in 1994, up until 2019.

During the 1980s, very large numbers of unrecognised Mozambican refugees fleeing civil war were the most notable feature of the migration landscape, though their entry and residence was hardly regulated at all, and they also did not feature in official statistics (Dolan 1995 and 1998). This notwithstanding, actual numbers of migrants entering South Africa, particularly from neighbouring Zimbabwe and Mozambique during the 1990s, have been heavily contested, ranging from conservative estimates of several hundred thousand, to heavily exaggerated figures ranging into the 'millions' (Kotzé and Hill 1997: 21). Such claims were reinforced by what late 1990s scholars fiercely critiqued as 'pseudo-scientific' data and in particular the absence of reliable statistics (Crush, 1997). What was clear, however, was that the general character of regionally-based migration had been 'circular', with most migrants engaging in small-scale trading, and expressing little wish to remain permanently (Crush 1999: 128).

But, despite the reality of migrants making a positive economic contribution through mainly circular migration, popular perceptions were that there was a flood of foreigners, reinforced by brazen newspaper headlines such as 'Kick Them Out!' (The Citizen 1997; Danso and McDonald 2001).

Post-apartheid South Africa was experiencing a wave of migration, both regulated and extra-legal (Seda 2015). However, this was not at the level portrayed by the media and the small number of researchers paying attention to the issue. By 1994, neighbouring Mozambique was regarded as having achieved a degree of political stability since the maintaining of a Peace Accord in 1992, although the country was beset with a crippling economy that – like its support for anti-government rebels during the civil war – South Africa had contributed to undermining (Matonse 1992: 31). Moreover, environmental disasters generated new waves of forced migrants, including devastating floods that displaced hundreds of thousands in 2000 (Christie and Hanlon 2001).

¹ Elements of this Working Paper were previously contained in Handmaker and Singh (2002) 'Crossing Borders: A comparison of US and South African Border Control Policies', RULA Working Paper, Johannesburg: Law Faculty, University of the Witwatersrand.

As we highlight in this chapter, the South African government's attempts to manage migration through policy reforms have been fraught with challenges and contradictions. In embracing a liberal democracy, the South African government undertook to respect constitutional and international obligations that widely recognized the rights of everyone in South Africa, as well as its regional commitments to free movement within Southern Africa and Africa generally (SADC 2005). However, in practice, it has fallen far short of these commitments (Ntlama 2018: 40).

In presenting an overview of migration policy developments between 1994 and 2018, it is worth mentioning that Handmaker worked as a legal advocate and researcher on migration policy, norms and practices as a legal practitioner in South Africa from the 1990s to the early 2000s and so much of what is contained in this review is based on direct observations, while Nalule's work as a researcher in South Africa has focussed on subsequent reforms to South Africa's migration laws and policies.

In section two, we highlight the pre-democratic context in which South Africa's border control policies emerged, prior to successive phases of policy reforms. In sections three and four, we explain the first phase of these reforms, namely rudimentary asylum procedures and the transplantation of US-styled policy approaches to immigration and border control. This was followed by a more concerted effort at policy reforms took place over a twenty-year period, from 1998 until 2018, in three separate phases.

This working paper is a descriptive backdrop to a subsequent article that we are writing that explains how South Africa's efforts to deter immigrants has not been framed by globally-accepted principles, based on South Africa's ratification of international treaties governing refugees and migrants, but rather has been a policy of arbitrary enforcement that has been 'deployed in everyday legal governance' (Valverde 2005: 55).

2 A turbulent history

The history of migration policies and border control practices in South Africa has been turbulent, including after the country gained political independence with democratic elections in 1994. Throughout the pre-1994 period of racialized apartheid up until the coming into force of a Refugees Act in 2000, border controls and migration policies in South Africa were effected through rigid external measures (at the border) and arbitrary internal measures (primarily in urban areas). The profiling of undocumented migrants on the basis of racialised criteria led to a number of persons being apprehended and taken into detention when they possessed a valid visa or permit to reside (SAHRC 1999, Handmaker and Parsley 2001).

Prior to 1994, South Africa was infamous for its seemingly limitless measures of social control through a regime of apartheid, or racialised separation. These racialised policies and measures extended to how South Africa controlled migrants at its borders (Handmaker and Singh 2002). Despite much external pressure, from the United Nations in particular which was continually denied the opportunity to establish a presence in South Africa despite large-scale flows of Mozambicans from the civil war, the government was stubbornly resistant to change. Instead, South Africa reinforced its control through police and security forces that were ‘always in the front line in the enforcement of apartheid ... (and) ensured that black South Africans were kept in their places in segregated and inferior institutions’ (Cawthra 1993: 1).

This unforgiving and racialised approach of previous, white-minority governments extended to mainly black foreigners, including refugees from the civil war in Mozambique from 1977 – 1992, who braved a collection of horrors, including dangerous wild animals in Kruger National Park (which borders both countries) and a fence generating a lethal electric voltage, in their desperation to avoid border control officials and reach relative safety in neighbouring South Africa (HRW 1998: 67).

South Africa’s immediate post-apartheid migration regime was still largely oriented around an unreconstructed, apartheid-era approach of controlling the admission into, residence in, and departure from South Africa. Described as ‘apartheid’s last act’, the ominously named Alien’s Control Act of 1991 transmitted most aspects of the apartheid migration and border control regime into the post-1994 regime in South Africa (Crush 1996; Peberdy and Crush: 2001). And reforms did not come quickly, buttressed by the nativist views of scholars at the time (Minaar and Hough 1996). For example, it was maintained that while ‘South Africa clearly has a responsibility to assist with the development of the region, this will have to be carefully defined and weighed against the domestic exigencies of the new era’ (Kotzé and Hill 1997: 25).

These ‘domestic exigencies’ meant that from long-before democratic elections in 1994, until the Immigration Act came into force in 2002, gaining access to South Africa’s territory was maintained through a ‘two gates’ system, namely the ominously-titled Aliens Control Act and various bi-lateral treaties between South Africa and neighbouring countries concerning temporary migrant workers (Crush 1997).

In the early years of South Africa’s post-apartheid migration and border control policies, coinciding with legal and political transition from minority-led authoritarianism to a liberal democracy, the South African Police Service (SAPS) was primarily responsible for enforcing internal controls, a situation that led to a number of allegations of corruption and abuse of power (Pretoria News 1998). Just as it did during the period of apartheid, the SAPS played the most substantial enforcement role in comparison with other key border enforcement agencies terms of manpower, enforcing internal control measures (detecting, apprehending, and detaining suspected undocumented migrants) and manning several of the land border posts. This included the Lebombo border post, one of the most important land border-crossings, known as the Maputo corridor, where high levels of bribery have been reported, although migrants (mostly small-scale entrepreneurs) report to have otherwise been treated favourably (Peberdy and Crush 2001: 121). In addition to regulating the movement of persons, the police have also been responsible for detecting illegal smuggling of goods and prohibited items (drugs, weapons, etc.) and, together with Customs, regulating the transport of legal goods.

Meanwhile, the second key border enforcement agency, the Department of Home Affairs (DHA) has been primarily responsible for policy-making, controlling the entry and exit of people through the borders, including more complicated determinations on residential status (temporary permits and permanent residence permits) and refugee status. As Belvedere (2007) has argued, the immigration function of the DHA, and particularly asylum management, has always been in tension with its civic services function, which includes the registration of births and deaths, issuance of National IDs, passports, among others.

Finally, the function of the third key border enforcement agency, the South Africa National Defence Forces (SANDF) has broadly been to secure South Africa’s borders. This role has been especially contested given the violent border conflicts of the 1980s. As we discuss later in section 4, after some hesitation from 1994 until the late 2000s, the role of the military substantially increased from around 2010.

Once South Africa held its first democratic elections, caught up in the euphoria of the new-found democracy and embracing a rights-based constitutional order and a concurrent commitment to international human rights norms, the importance of immigration policy reform became glaring. The apartheid-era

Aliens Control Act had evolved only marginally, from a punitive regime based on racialised exclusion, to a punitive regime based on racialised deterrence. 1995 amendments to the Aliens Control Act 96 of 1991 had eliminated some of the more extreme measures, such as ouster clauses that made it impossible to judicially-challenge a decision of an immigration officer (Klaaren 1996; Klaaren and Ramji 2001; Handmaker 1999: 294). But this didn't go nearly far enough.

As we discuss in the next section, attention to bringing the country's migration and border control policies in line with human rights was initially focussed on the asylum system through ad hoc, rudimentary measures and culminating in a Refugees Act that was passed in 1998.

3 Rudimentary asylum procedures (1994–2002)

A rudimentary refugee policy in South Africa was initially framed by the broader, restrictive migration policy framework of the Aliens Control Act. Following democratic elections in 1994, South Africa was under increasing pressure, not least internationally, to produce a more progressive regime on migration generally, with the refugee policy initially receiving greater priority. In the absence of a solid legislative basis, from 1991 until April 2000 when the Refugees Act came into force, the South African government formally regarded asylum seekers as exceptions within the framework of the Aliens Control Act.

It was initially required by this policy that one lodge their asylum request at the border. From the early 1990s, officials were trained by UNHCR to recognise potential asylum applicants. Later on, provisions were put in place for refugee status determination based on internal departmental circulars and a Basic Agreement signed between the Government of South African and the UNHCR (Handmaker 1999). Implementation, however, had its fair share of problems, particularly regarding the wide discretion afforded to immigration and border control officials to take decisions on refugee status, with limited to no managerial or judicial oversight (Handmaker 1999: 294-299).

Following a well-organised lobby on the part of NGOs, a Refugees Act was passed at the end of 1998. However, expectations of a more progressive approach towards refugees were quickly diminished. Regulations, which did not come until two years afterwards in April 2000, made clear that the South African government intended to severely limit access to refugee protection through restrictive interpretations and to reduce the reception conditions of asylum seekers in a bid to discourage migration more generally. This was notwithstanding the fact that persons genuinely fleeing persecution would have had little, if any, means to survive on their own, and that those intending to enter on non-Refugee Convention grounds would have been no less discouraged, since their intention was simply to gain entry to South Africa in the first place. Further, proposed amendments to the Act would have had the effect of diluting the rights contained in the Refugees Act even further (Klaaren, de la Hunt and Handmaker 2008; Handmaker 2001).

Among many concerns that NGOs had, the fundamental principle of international refugee law that an asylum seeker ought not be punished for his/her illegal manner of entry (e.g. for having transited via a country perceived to be ‘safe’) was routinely violated. South African NGO Lawyers for Human Rights successfully challenged the government’s ‘safe country’ policy in 2000 (Handmaker 2001: 104). However, enforcement of this decision, like many other judgements, proved to be very difficult. The DHA has persistently defied these court judgements (Landau and Amit 2014). Hence, in 2011, LHR was compelled to challenge the policy again (LHR and CoRMSA 2011: 5-6).

An even greater concern that NGOs have had concerns the South African government's general tendency towards blanket refusal of entry, or non-entrée (de la Hunt 2000). This has been reinforced by restrictive entry requirements, a limited capacity on the part of NGOs to provide legal assistance and long distances between the borders and refugee determination processing centres. All in all, it has been extremely challenging for asylum seekers to gain access to asylum determination procedures in South Africa, let alone be afforded due process or receive basic social services (Handmaker, de la Hunt and Klaaren 2001 and 2008).

Following the 1998 Refugees Act, which came into force in April 2000, the South African government then turned its attention to the management of border controls, which as explained in the next section, has involved a great deal of policy transplantation from the USA.

4 Transplantation of US-styled policies

While policies regarding refugees proceeded in a relatively progressive fashion, general policies on immigration and border control were motivated largely by security concerns that were echoes of the previous regime (Crush and Tshitereke 2001). It soon transpired that this lurch towards securitization was due to extensive involvement of the US government and reliance on advisors seeking to transplant security-oriented United States (US) migration policy and border control mechanisms.

The US had taken a major interest in South Africa's policy development since at least 1996/97, when it sent over a team of border control officials to review South Africa's air, land and seaports. Later, the US established an office in Johannesburg, joining officials of the United Kingdom who had been investigating cargo operations in Durban (Sunday Independent 1997). Following their review of border crossings in South Africa, US government officials made recommendations, conducted training of South African officials and eventually even participated in government task teams developing policy. This is notwithstanding the fact that border management systems in the US at the time that were being transplanted to South Africa had not only consistently failed to achieve their stated objectives but had raised a number of serious human rights concerns as well (HRW 1995 and 1997).

In 1997, a report by an Inspection Team from the US Immigration and Naturalisation Service (INS) was released, 'pursuant to a request from the South African Government to the United States Department of State' (US INS 1997: 2). According to the report, which was accompanied by a report by the US Customs (1997), the request was in relation to the South African Government's efforts 'to assist that government combat the growing crime problem' (US INS 1997: 2). The INS Inspection Team, which was composed of border control and inspections officials from various sea, air and land border posts in the United States, was split into four teams, making assessments of selected land borders, seaports and airports in South Africa. Its aim was (in part) to 'provide a working methodology by which other problems can be identified and attacked' (Ibid: 12). The report strongly encouraged the South African government to prioritise 'control of illegal immigration (as) one of its top priorities' (Ibid: 4)

The US INS Report also made a nebulous recommendation that 'the community' be more involved in border policing, based on an unsubstantiated claim that 'the community has a vested interest in border control' (Ibid: 7). Emphasis was also placed in the US INS Report on holding train, ship and airline companies accountable for border control, through a comprehensive system of fines, based on a contention that this would be a 'force multiplier to border control' (Ibid: 8). Moreover, the report claimed that 'numerous intelligence documents, both national and international, had concluded that the illegal alien situation in South Africa (was) out of control', though the 'tremendous pressure' the authorities in South Africa were facing was acknowledged, ranging from

increasing air traffic to porous land borders. These pressures, the report argued, arose from '(p)eople (who had) become refugees by weather changes that affect agricultural production and political changes that affect human rights' (sic, *Ibid*: 12).

The 1997 US report became the basis of a National Inter-departmental Policy called the 'Collective Approach to Border Control' (CABC) (NIDS 1997). The CABC represented a sharp turn away from a rights-based approach towards securitisation that had been strongly advocated by South African and international migration scholars as well as South African human rights advocates, contained in a 1997 Green Paper on International Migration (Handmaker 1999: 299). The CABC policy became the core document regulating the co-ordination of border control between the four South African agencies responsible for immigration and border control: South African Defence Force (Military), Revenue Service (Customs), Police Service and Home Affairs, with Home Affairs as de facto the lead agency. Additional role players in the National Inter-departmental Structure (NIDS) with complementary functions included: the National Intelligence Agency, South African Secret Service and the Departments of Trade and Industry, Health, Agriculture, Foreign Affairs, Environmental Affairs & Tourism, Correctional Service, Transport, Public Works, Justice and Welfare.

According to Piet Grobler, then Provincial Commander (Western Cape) in the Border Police section of the South African Police Services, and a former member of the NIDS, the CABC sought to get beyond a previously disjointed approach and create a border control command structure that was both unified and accountable (Grobler 2001). The CABC addressed the various aims and functions of various levels of border control officials, from the national level to the port of entry level (NIDS 1997: 10-11). It recommended a phased programme of action, planned to take place over a one-and-a-half-year period, from mid-1997 until the end of 1998, in order to bring the three main agencies (Customs, Immigration and Police) 'under one roof', allocating existing staff to new positions and assigning new roles rather than hiring additional staff (*Ibid*: 15).

The Report was to be followed by a 'Business Plan', to be drawn up by an Inter-Agency Structure. It was communicated in 1997 to Handmaker by a well-placed source that requested to be anonymous that there were also other proposals submitted to the NIDS Task Team for consideration, though not made publicly available, including:

- a National Intelligence Coordinating Committee (ICOC) Report to the Cabinet committee on Safety and Intelligence (CCSI).
- the Customs Law Enforcement Task Group (CLETG) document for the Executive Head for SA Revenue Services' and

- a draft document prepared by Mr I Lambinon (the Director-General) for the Department of Home Affairs.

However, it became clear that the US-styled NIDS report was the most influential, despite the fact that its rigid approach to border control did not adequately take into account human rights ramifications. In particular, as discussed in the next sub-section, an especially pressing issue of human rights concern became the detention and deportation of migrants, including asylum seekers, refugees and even South Africans.

5 Detention and deportation

Particularly under the Aliens Control Act, but also incorporated into subsequent legislative provisions, such as the Immigration Act (2002), it has been, administratively-speaking, a straightforward measure to detain and deport any suspected undocumented migrant. This sweeping power to detain and deport has also swept up South Africans deemed to be too black. For a great many years in the post-1994 democratic period, suspected persons were sent to Lindela Repatriation Centre, a privately-run holding centre in Gauteng Province in which government officials held financial interests, prior to their deportation (SAHRC 1999). Asylum seekers who entered the country without documentation were often detained pending a decision on their asylum application, even though the stated policy of the department was not to hold such persons if it appeared that the application would take ‘unreasonably long to process’ (Handmaker 1999: 295).

It was only after 1995 Amendments were made to the Aliens Control Act that detention could be even reviewed by a judge, initially in terms of section 55 of the Aliens Control Act, a provision specifically provided for in respect of asylum seekers in terms of section 29 of the Refugees Act. However, in practice such reviews rarely took place (SAHRC 1999: 14).

Eventually, according to the Immigration Act (2002), the DHA gained the power ‘to apprehend’ detain and deport any ‘illegal foreigner’, regarded as a non-South African citizen who was in South Africa in contravention of the Immigration Act and included a prohibited person (IA, 2002: section 3(1)(g)). The IA (2002: section 29) set out the categories of prohibited persons, which included: those carrying infectious or communicable diseases, persons wanted for the commission of serious crimes such as genocide, terrorism and other enumerated in the section, anyone previously deported and not rehabilitated, a member of a group advocating for racial hatred, or utilising crime and terrorism, and anyone found with a fraudulent visa, passport permit or identification document.

Mfubu (2018: 182) has argued that in terms of this legislation, a person became prohibited by ‘operation of law’ and not by an ‘administrative act’. In other words, the latter action preserved for Minister and Director-General to declare persons as undesirable became a legal assumption rather than an arbitrary measure. Accordingly, a person could be declared ‘undesirable if they (we)re likely to become a public charge, are identified as such by the Minister, have been judicially declared incompetent, have been ordered to depart in terms of the Act, are a fugitive from justice, they have a previous criminal conviction without the option of a fine, or have overstayed the prescribed number of times’ (IA 2002: section 30(1)). Moreover, prohibited person status would normally pre-empt one’s entry or admission into South Africa (Mfubu 2018: 183), while a declaration of undesirability disqualified one from being granted a visa, entry, or admission into South Africa (Mfubu 2018: 185). In any event, either category of person could be subject to detention and deportation. Some measures in the IA

were even more rigid than before. For example, ignoring earlier Amendments to the Aliens Control Act that allowed one to request that his or her detention be confirmed by the court upon apprehension furthermore, under the IA 2002, a detained foreigner could be detained for 30 days without recourse to court. The Constitutional Court eventually held these provisions to be unconstitutional and ordered an amendment in compliance therewith (LHR 2016).

Detentions and deportations of those deemed ‘illegal foreigners’ or ‘undocumented persons’ in South Africa have raised serious concerns among scholars and a highly-visible campaign against deportations by human rights activists, with one scholar referring to South Africa as a ‘prolific deporter’ (Vigneswaran 2019: 8). After 2013, the number of deportations went down, following a so-called Special Dispensation for Zimbabweans (WPIM 2017: 30, Van Lennep 2019a). According to the DHA (2019), deportations had peaked at 113,079 in 2013, while 24,266 deportations took place during the 2018-19 reporting cycle. According to Amit (2012b: 27-39), the DHA has been violating both the Immigration Act and the 1996 Constitution by detaining persons beyond the acceptable 48 hours before they could ascertain their immigration status and detaining persons that are protected under the Refugees’ Act. In an open letter to the President of the Republic on World Refugee Day 2018, Lawyers for Human Rights summed up the situation thus:

... it appears that the immigration system does not now operate as it should. It has come to the attention of the public that people are wrongfully and unlawfully detained under the current immigration legislation; that the process of arrest and detention of would-be immigrants is arbitrary and, therefore, violates the rights of citizens and other residents; that corruption and bribery are rife; that those detained in cells in South Africa’s main awaiting-repatriation detention facility are often subjected to inhumane treatment and indignity; [i]f the composition of the population at the Lindela repatriation facility is anything to go by, it would suggest that only people of African origin are arrested and deported as illegal aliens... (LHR 2018).

These findings remained of concern in 2020, including a notably ‘high frequency in the detention of minors’ (LHR 2020: 11, 31). Despite a number of court actions challenging the DHA’s detention practices, there has been little change and indeed blatant disregard on the part of the DHA in relation to court orders against it (Landau and Amit 2014: 539). A similar situation has plagued other forms of South Africa’s migration regime, including permanent residence. While most migrants’ very presence in the country is very precarious, rendering them constantly subject to arrest, detention and deportation, in the next section we turn to the other end of the policy spectrum, in which South Africa’s immigration policy has allowed one to firmly secure their residence in the country.

6 Access to permanent residence and citizenship

As observed earlier, it was well established by the late 1990s that the type of migration to South Africa was predominantly circular in nature; as Crush stated, 'very few migrants have any intention or wish to settle permanently in South Africa' (Crush 1999: 128). Nevertheless, for persons who had been resident in South Africa for decades and whose children may have been born and grown up in South Africa, there was a need for a more robust, and certainly less ad hoc / discretionary policy on access to permanent residence.

Once the 'exclusive domain' of certain white immigrants to South Africa, permanent residence has gradually broadened to larger groups of people. By the late 1990s, there were three main formal routes for obtaining permanent residence, namely the 'amnesty' programmes that regularised the status of former miners, SADC citizens and former Mozambican refugees as discussed earlier.

Apart from amnesty, the second formal route was through an application to the Department of Home Affairs, normally following a period of 5 years temporary residence in the Republic and the lack of a criminal record. Alternatively, one could apply for permanent residence on the basis of 5-years residence and marriage to a South African citizen or (after 1999), 'same-sex life partner' relationship with a South African citizen. The latter provision was the outcome of the case National Coalition for Gay and Lesbian Equality (and others) v. Minister of Home Affairs (and others) (CCT 10/99), decided by the Constitutional Court on 2 December 1999. Attempts to introduce an exorbitant fee to spouses of South African partners were struck down by the courts as unconstitutional following the Dawood (and another) v. Minister of Home Affairs (and others), (CCT 35/99), which was decided on 7 June 2000.

The third route for obtaining permanent residence came about through the Refugees Act in 1998, although not enforced until Regulations came into effect in 2002. Section 27(c) of the Refugees Act provided that a refugee:

is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.

Consistent with its reluctance to grant refugee status in the first place, the government has shown itself to be highly reluctant to extend permanent residence to refugees; and hence refugee status in South Africa had, with few exceptions, generally been granted as a temporary, renewable measure (Handmaker 1999: 299). Fifteen years later, the Department reported that between 2014 and 2016, it had issued a total of 46,100 permanent residence permits (PRPs) with the highest percentage being issued to spouses (35%), workers (18%) and persons with extraordinary skills (9%) (WPIM 2017: 27).

A mere 1,929 PRPs were issued to refugees, constituting 4% of the total issued (WPIM 2017: 27).

As of 2020, the immigration regime made acquisition of permanent residence even more arduous, particularly for refugees. Applications for PRPs had to be submitted through the Visa Facilitation Service (VFS), which handled all immigration-related applications on behalf of the DHA. Once the VFS verified that all application documents were in order, it was expected to forward them to the DHA to process. It is at this point that applications usually tended to get stuck. This inaction by the DHA prompted court action. For instance, in the case of *The Director General of the Department of Home Affairs & others v De Saude Attorneys & another*, (1211/2017) [2019] ZASCA 46 (29 March 2019), the Supreme Court of Appeal upheld the judgment of a lower court and ordered the DHA to determine and deliver decisions on some 473 cases that were the subject of the case, of these 94 were applications for permanent residence. The Court strongly criticised the DHA's behaviour describing it as 'unconscionable', 'disgraceful', and 'sloth on a grand scale'. And yet, like many court orders in relation to detention, the government has been slow to implement, if it implements these court orders at all.

For refugees, according to the Refugees Act (section 27) they are eligible for applying for permanent residence only after the Standing Committee for Refugee Affairs has certified that they 'shall remain a refugee indefinitely'. They can only be eligible if they have held refugee status for ten years (it was previously five years changed under the RAA 2017). In Nalule's interactions with refugees in South Africa in November 2019, four refugees anecdotally informed her that they were still awaiting to hear back from the Standing Committee for Refugee Affairs, more than two years after they had applied for certification. One had applied for permanent process and was yet to receive any response from the DHA more than five years later.

Faced with all of these challenges as outlined in sections 2-6, South Africa's problematic policy environment cried out for reform, which as discussed in the next section initially gained traction in the mid-1990s in relation to the government's policy on refugees. Once again, US government influence continued when INS officials were represented on a policy "Task Team" that produced a White Paper on International Migration, released for public comment on May 1999, followed by internal discussions around subsequent, Draft Immigration Bills. In other words, the Immigration Bill / Act superseded the previous border control arrangements but were heavily influenced by them.

7 Policy reforms from the late 1990s – 2018

By the late 1990s, the pressure from scholars and NGOs to reform South Africa's migration and border control regime reached boiling point. As discussed earlier, the country managed to pass a Refugees Act in 1998, thus carving out the promise of a new open and welcoming regime from an otherwise repressive and control-oriented regime. But, setting aside the lack of commitment to this promise of a new regime, the remainder of South Africa's migration and border control regime was mostly unchanged.

Two principal factors led to the first wave of policy reform in the late 1990s that continued in various phases until 2018. The first was a lack of formal regulation in 1994, with the exception of rudimentary asylum procedures that had been negotiated with UNHCR in the early 1990s to facilitate a voluntary repatriation of several hundred thousand, former Mozambican refugees from the civil war who had never been formally admitted to South Africa. The second were growing (perceived) pressures on the migration and asylum system following democratic elections in 1994.

7.1 Limited formal regulation

Despite the multiple agencies mandated to administer border control in the late 1990s, there was very limited actual regulation by South Africa of its borders with neighbouring countries at the time of democratic elections in 1994. With regard to the second of the 'two-gates' referred to earlier, South Africa's approach to spontaneous arrivals of migrants was essentially one of zero-tolerance, whereby they would be treated as prohibited persons, accompanied by a range of nebulous exceptions that were mostly at the discretion of immigration officials. Moreover, none of these decisions were externally reviewable due to so-called ouster clauses that prevented judicial review of a decision taken under the Aliens Control Act.

Those entering without documentation, or whose temporary documentation had been revoked for contravening a condition (for example, staying beyond the period designated in the permit without applying for a renewal) were by default designated under the Aliens Control Act as prohibited persons. The Act did provide for temporary entry of persons for a variety of conditions, primarily: work, business, tourism, study, and medical reasons. The Act also provided the possibility of one applying for permanent residence. But all of this was done on a discretionary basis. The advantage of such discretion is that it was utilised in the immediate post-apartheid years on a large scale to regularise the status of long-term undocumented persons in two separate programmes of amnesty, the first aimed at miners who had lived and worked in South Africa for at least five years, the second extended more generally to persons from SADC countries who had been employed for the last five years (Crush and Williams 1999; Handmaker 2009). Later, it also became possible for former Mozambican refugees to regularise their prohibited person status, although this particular programme of

implementation was fraught with a profound lack of due process and accountability (Handmaker and Schneider 2002); Handmaker 2009: 121-149). In addition, giving effect to Basic Agreements signed between the South African government and UNHCR in 1991, persons who had applied for refugee status received a ‘section 41’ permit, prior to the coming into force of the Refugees Act 1998 in April 2000 (Handmaker 1999: 296).

As Crush (1999) argued, the deeply racialised nature of this policy meant that things had not moved on very much since the days of apartheid. In practice, this meant that for those who spontaneously presented themselves at the border during this period had little formal guarantee that they would be allowed in, although already corruption was endemic, and many people who could afford a bribe did get through (Peberdy and Crush 2001). Further, as was indeed the case prior to 1994, the majority of migrants post-1994 bypassed the border post altogether. The control of South Africa’s lengthy and porous borders was largely managed by an electric border fence had been constructed in the 1980s at the border with Mozambique by the South African apartheid regime, ostensibly to deter militant groups (Kotzé and Hill: 20). The fence, known vernacularly as the snake had two modes – detect and lethal – and required a cabinet decision to switch to lethal mode (Ibid; HRW 1998: 67).

Those who did manage to cross the border and enter South Africa in an unregulated manner, whether through a border post, or through a gap in the fence, particularly from Mozambique and Zimbabwe, were generally confronted with a hostile reception (Seda 2015: 62). This included Francisco Chiure from Mozambique, who declared on 16 March 1996: ‘(t)hey just say: “Go, you brought nothing with you.” The people who come back are often killed at the border. We are killed trying to get to our families after we are sent back here alone’ (Johnstone and Simbine, 1998: 170). While typical of the realities of migration globally, and the desperation of those who would do anything to cross the border for a perceived improvement of their lives, such experiences, which post-1994 scholars began paying increasing attention to, shattered the idealistic vision that many migrants had of South Africa when it became a liberal democracy.

Post-1994 migration to South Africa has been attributed to various factors, including the demise of apartheid in South Africa and end to a decades-long civil war in Mozambique (Seda 2015: 47-49). However, this perceived increase did not take into account the hundreds of thousands of Mozambican refugees who fled the civil war for South Africa, some of whom were later repatriated with assistance from UNHCR (Dolan 1998), others who later applied for regularisation of their status (Handmaker 2009: 124).

In any event, by the late 1990s, there was a growing perception amongst policymakers, politicians and the general public that South Africa was being inundated with migrants perceived to be undesirable. In particular, economic immigrants who, in an effort to regularize their status, were perceived to be

overwhelming the country's otherwise liberal asylum system (which was the only part of the DHA's cumbersome migration and border control regime that systematically began to gather statistics from the mid-1990s).

As with any perception, there is frequently a kernel of truth to it. As the next sub-section shows, with the exception of Mozambique in the 1980s and Zimbabwe in the late 2000s, and based on rudimentary statistics available from the mid-1990s, the principal pressures on the asylum system have been broadly confirmed as coming from a small handful of countries, though nowhere near the millions of migrants that Minaar and Hough reported in 1996 as part of their ominous-sounding book *Who Goes There?*.

7.2 Growing pressures on the asylum system

Statistics on migration should always be regarded with some scepticism and South Africa hardly an exception to this (Danso and McDonald 2001: 124). This is particularly the case when there is a high level of conflation between refugees and other legal-conceptual categories of migrants. Since democratic elections in 1994, the South African government recorded a statistical increase of asylum seekers from particular countries. At the same time, the majority of migrants arriving in South Africa came from neighbouring countries, although it was not widely understood, let alone acknowledged, that these migration flows were mostly adopting a circular pattern (Crush 1999). Few migrants from neighbouring countries applied for political asylum; hence, the real pressures on the asylum system, with the exception of Mozambicans who had fled to South Africa during the 1980s, came from elsewhere, as confirmed by statistics by the South African Department of Home Affairs that they began to systematically gather from the late 1990s.

In 1999, out of a total of around 22,000 applicants for political asylum, more than a third (34%) were from three countries that would have been broadly-regarded at the time as presenting a valid claim for refugee status, namely: Somalia, Zaire and Angola (DHA 1999). These statistics also revealed very large numbers of applicants (21%) from Nigeria, India and Pakistan, about which there was general scepticism, reinforced by the UNHCR that was increasing its presence in South Africa, about the validity of these claims. This is not to say that there was no possibility of one successfully lodging a claim from these countries, but the starting assumption on the part of the Department of Home Affairs, which UNHCR, IOM and others reinforced, was that they should not be regarded as refugees.

The already dubious gathering of statistics worsened by the 2000s, whereby the only statistics that were available were cumulative (i.e. gathered over a period of several years), and which only highlighted countries in respect of which there was reason to believe persons had a valid claim (DHA 2005). To be sure, this was a period in which the UNHCR was funding a substantial backlog of

applications (Handmaker 2008). Despite UNHCR's considerable investment in attempting to reduce the backlog, their efforts didn't appear to improve the situation very much and by 2015, the backlog in asylum applications had reportedly reached nearly a million (Masuku 2020).

By 2009, statistics on asylum applications that were reported by UNHCR (2010), based on data from the DHA, appeared to improve, or at least became more transparent. This not only revealed a peak of around 220,000 applications, ten times more than a decade earlier, but a more detailed breakdown of applicants confirmed earlier statistical trends (in relation to particular countries). But there were some notable differences as well. By the late 2000s, Zimbabweans fleeing widespread civil disorder accounted for the single largest group of migrants post-1994. However, unlike the Mozambicans of the 1980s who had also arrived in large numbers as Convention refugees, but were never recognised as such, these Zimbabweans could apply for refugee status. This was confirmed by official statistics in 2009; those applying for asylum were overwhelmingly from Zimbabwe (67%), followed by Malawi (7.1%), Ethiopia (4.8%), DRC (2.8%), Bangladesh (2.2%); India (1.6%) and Somalia (1.6%).

The reliability of statistics appears to have improved further in the 2010s, and again confirmed some general statistical trends established at the end of the 1990s, with the exception of asylum applicants from Zimbabwe. According to STATS-SA (2015b), the majority of asylum seekers still appeared to come from Zimbabwe, although fewer than before (17,785), followed by Ethiopia (9,332); Nigeria (6,554); DRC (6,355); Bangladesh (3,331); Pakistan (2,596); Malawi (2,372); Somalia (2,079); India (2,064); Ghana (1,778).

While statistics and migration trends can be readily challenged, and often have been in the large volume of research conducted on South African migration, albeit of varying quality, the elusive vision of South Africa being a welcoming country of refuge and opportunity undeniably became constrained. Indeed, in reforming the country's antiquated migration and border control policies, the post-1994 government was torn from, on the one hand, between its domestic and international human rights obligations and, on the other, with growing pressure to address a perceived immigrant problem.

8 Three phases of migration policy reform

Rudimentary attempts to overhaul South Africa's migration policies and bring the Aliens Control Act more in line with the country's new constitution began tentatively in 1995, with the Aliens Control Amendment Act. However, these still fell far short of constitutional expectations (Klaaren 1998). More substantial reforms, which started in the mid-1990s, eventually took place in three phases: the first was the 2001 Immigration Bill, the second was from 2004 until 2010 and the third from 2017 until 2020.

8.1 First phase of reform: 2001 White Paper and Bill

Beginning with a process that started in the mid-1990s, which has been referred to earlier, by 2001, the South African government issued a Migration White Paper and Immigration Bill, which urged greater involvement of the community in border control:

In this White Paper administrative and policy emphasis is shifted from border control to community and workplace inspection with the participation of communities and the cooperation of other branches and spheres of government... an interdepartmental committee will be established to coordinate law enforcement and community action (WPIM, 1997: Executive Summary).

This approach seemed to be motivated by a belief that the community not only had a 'vested interest' (see below) but was in fact responsible for contributing to border control efforts, in the same way that they are responsible for reporting crime.

it is possible to promote a different management of migration issues which makes a community responsible for cooperating with internal policing actions to ensure that illegal immigrants are not attracted to South Africa (WPIM, 1999: section 4.4.1).

In other words, the approach of the South African government attributed violations of the country's immigration laws as quasi-criminal acts, allowing for a broad scope for arrest and detention, which a decade later scholars began referring to as crimmigration (Stumpf 2006; Hernández 2015).

Finally, while the policy documents continued to stress reliance on 'the community' to assist in detecting undocumented migrants, there was tacit recognition of the danger that such an approach would lead to an increase in xenophobia:

The (Immigration Service) should enforce immigration laws within each community and cooperate with police structures and community interests to ensure that illegal aliens are not harboured within the community and that the community does not perpetrate crimes against aliens or display xenophobic behaviour (WPIM, 1999: section 5.3).

Moreover, emulating approaches in Europe and North America (Mudde 2010), this approach also drew on nativist sentiment.

Theoretically, the migration policy could choose to shape the future composition of the South African population by giving preference to certain types of individuals who are deemed to be more desirable as members of our national community than others (WPIM, 1999: section 7.1).

This notwithstanding, as explained earlier, the reasons for such widespread xenophobic harassment, discrimination and violence were arguably more complex than that (Landau 2010). However, such an approach had strong resonance with the recommendations of the INS, based on experiences in the USA that the community was a crucial component in enforcing migration control. Eventually, this ad hoc approach formally gave way to the Immigration Act 2002, which came into force by way of implementing Regulations (Immigration Regulations, 2004).

As already mentioned, the Immigration Act 2002 (IA) was not a radical departure from the ACA, and in some respects (such as the ability to review one's detention) it was even harsher, although it did contain some more progressive provisions, the inclusion and shaping of which have been attributed to civil society input (Klaaren 2018: 33). This resulted in some of the IA's key stated objectives to establish a new system of immigration control, 'performed within the highest applicable standards of human rights protection'. In tension with this, the IA sought to ensure that 'security considerations were fully satisfied', that 'border monitoring is strengthened and illegal immigration through them is detected, reduced and deterred' and that 'immigration laws are effectively and efficiently enforced thereby reducing the pull factors of illegal immigration' (IA: Preamble).

One of the linkages that had been associated with the ACA, was its 'national rather than a provincial framing of migration regulation' (Klaaren 2018: 33) and therefore only slightly departed from the strategy expressed in the WPIM, 1999. For instance, the Act established an Immigration Advisory Board composed of representatives of various government departments (Trade and Industry, Labour, Tourism, Finance, Safety and Security, South African Revenue Services, Education, Foreign Affairs, Defence, and Home Affairs); civil society representatives, and specific experts appointed by the Minister (IA, section 4). Provincial or municipal governments did not have any representation on this Board. The IA also established a temporary permit system that aimed at attracting financially self-sufficient persons or those with skills so much needed on the South African labour market (IA, sections 10, 19-21). Eligibility for permanent residency was dependent upon assurance of employment and having lived in South Africa for a period of five years. Under the Act, a foreigner would be considered an 'undesirable person', should they become or be likely to become a 'public charge' (IA, section 30). The Act further prohibited rendering assistance to an 'illegal foreigner', and as such employers, learning institutions

and property owners were obliged to ensure the legality of one's status lest they face penalties (IA, sections 38-42, 49).

Unsurprisingly perhaps, another wave of migration reform came soon afterwards in 2004, with Amendments to the IA.

8.2 Second phase of reforms: 2004-2010

In 2004, less than a year after the 2002 Immigration Act came into force, there was a second phase of policy reform. The stated objectives of the 2002 Immigration Act were expanded in 2004 to include the promotion of a human rights-based culture of enforcement. Ostensibly, this objective aimed at ensuring that South Africa complied with international obligations and that civil society would be educated on the rights of foreigners and refugees (Immigration Amendment Act (IAA) 2004, Preamble). Another change was to invest more powers in the Minister to make regulations relating to, *inter alia*, the powers and duties of immigration officers, steps to be taken to prevent the illegal entry of foreigners into South Africa and how these could be traced, identified and removed; furthermore, regulations were introduced pertaining to processes and procedures for persons entering or desiring to enter into South Africa (IAA 2004, section 7). The Amendment Act also introduced a 14-day asylum transit permit to be issued to any person claiming asylum at a port of entry. Within 14 days, a prospective asylum seeker was expected to apply for asylum, failing which he or she would be deemed an 'illegal foreigner and be dealt with in accordance with this Act' (IAA 2004, section 23). In other words, an asylum seeker would from that point onwards no longer be dealt with under the Refugees Act, but could face deportation if they failed to obtain an asylum seeker permit before the expiry of the 14 days.

Another Immigration Amendment Act 2007 (IAA 2007) was less far-reaching and largely clarified or made 'technical corrections' to a number of provisions. A third Immigration Amendment Act 2011 (IAA 2011) made more substantive changes. For present purposes, we shall only point out the amendment regarding asylum transit visas and cross-border passes. The Act reduced the validity period of the asylum transit permits, which were renamed 'visas', from 14 days to five days (IAA, 2011, section 23). Additionally, the Act repealed the provision on cross border permits that previously the DHA could issue to citizens or residents of countries sharing border with South Africa (IAA 2011, section 16). The latter repeal is significant as it happened years after South Africa had signalled its commitment to regional free movement on free movement of persons, when it signed a Protocol on the Facilitation of Movement of Persons (SADC 2005). Yet, at the time of writing, the Protocol had yet to come into force as it had not yet attained the minimum required number of ratifications. In the interim, South Africa still maintains bilateral agreements with individual SADC governments, which were a relic of the two-gates system as explained earlier.

The bilateral approach to regularising immigration status of SADC citizens was most visible in relation to Zimbabwean, Angolan and Lesotho nationals who were resident in South Africa. Under the Immigration Act (section 31(2b)), the Minister of Home Affairs may ‘grant a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision’. Accordingly, in May 2010, the government of South Africa launched the Documentation of the Zimbabweans Project (DZP) with the twin aims of regularising undocumented Zimbabweans residing in South Africa and relieving the pressure on the asylum system. Successful applicants were issued with either a study permit, work permit or business permit valid for four years (PMG 2011).

Since the expiry of the DZP (referred to earlier) in 2014, the South African government twice extended the dispensation for Zimbabweans (Moyo 2018), with the latest extension due to expire in December 2021 (DHA 2017). Meanwhile, the Angolans were offered a dispensation after the cessation of their refugee status was announced in 2013 (DHA 2013). This had long been an issue of concern (Handmaker and Ndessim 2008). For those Angolans that could not return to their home country, the South African government offered them the opportunity to apply for a two-year Angolan cessation permit which, upon expiry, was then converted to a four-year Angolan Special Permit that took effect in 2017 and was due to expire in 2021 (Scalabrini Centre 2017).

Finally, a dispensation for the Lesotho nationals, just like for the Zimbabweans, was more or less an amnesty, intended to enable those that might be residing illegally or had acquired residence permits irregularly to regularise their status (DHA 2016). At the time of writing, the Lesotho nationals’ dispensation was on its second reiteration, to expire in December 2023 (DHA 2019).

But again, these policy reforms came under fierce scrutiny, in Parliament and in the Courts, and led to a third phase of reforms beginning in 2017.

8.3 Third phase of reforms: 2017-2020

Immigration reforms of the late 2010s have taken more grounded forms, with the adoption of a Green Paper on International Migration (GPIA 2016) that was quickly followed by a proposed White Paper on International Migration, 2017 (WPIM 2017), including a proposed Border Management Authority, Refugees Amendment Act 2017 and other miscellaneous measures.

White Paper on International Migration 2017

The WPIM was noted for its security-minded overtones (Khan, Louw and Ncumisa 2018: 87). But even so, the WPIM recognised the need to position South Africa’s migration policy within the African development agenda (WPIM 2017: 15, 32). Still, the dominant emphasis was on security; the WPIM asserted

that South Africa had ‘become an attractive destination for irregular migrants (undocumented migrants, border jumpers, over-stayers, smuggled and trafficked persons) who pose a security threat to the economic stability and sovereignty of the country’ (WPIM 2017: 35).

The DHA reported that majority of the irregular migrants, based on deportation statistics between 2012 and 2016, were from neighbouring countries, i.e. Zimbabwe, Mozambique and Lesotho (WPIM 2017: 29). Part of the problem was attributed to a fragmented border management approach which ‘compromised the integrity of … the long and porous land and maritime borders’ (WPIM 2017, 35). Accordingly, the WPIM proposed a new approach that entailed the establishment of the Border Management Authority that would take over the management of South Africa’s 72 designated ports of entry. Three aspects are worth noting in particular that specifically targeted asylum seekers and refugees, notably the proposed establishment of Asylum Processing Centres (APCs) closer to South Africa’s northern land borders and two other, related measures that – respectively – proposed removal of asylum seekers’ right to work and study and restricted access to permanent residence by recognised refugees.

Seemingly inspired by European-style centres, the idea of the APCs was that all asylum claims would be processed before an asylum seeker can relocated to any other place in South Africa (WPIM 2017: 61). This move rekindled concerns dating back to earlier proposals, which would have greatly curtailed the freedom of movement and residence hitherto enjoyed by asylum seekers and face similar capacity and humanitarian problems as the notorious Lindela Detention Centre (Landau 2008: 40-42; Jenkins and De la Hunt 2008). To make matters worse, this proposed move to curtail movement and residence was exacerbated by at least four other institutional developments and proposed policy measures, all of which threatened to erase the hard-won rights that asylum seekers and refugees had gained with the passing of the Refugees Act 1998 and multiple cases brought by NGOs and others by way of public interest litigation (Handmaker 2011). At the time of writing, the APCs had yet to be implemented.

Public interest litigation on behalf of migrants and refugees, which is another paper altogether, has a longer history in South Africa, particularly from the mid-1990s (Abel 1995; Handmaker 1999, 2001, 2009, 2011). However, from 2011, lawyers systematically brought several cases once refugee reception officers were closed at locations in Johannesburg, Cape Town and Port Elizabeth. These closures appeared to anticipate the introduction of the APCs, but ended up forcing asylum seekers and refugees to apply for refugee status and/or visa extensions at the remaining offices in Pretoria, Limpopo and Durban. For many asylum seekers, these offices were hundreds of kilometres from their place of residence (Khan and Lee 2018, 1212-3). While these cases challenging the closure of the Cape Town and Port Elizabeth offices were often successful, thanks to the tenacious efforts of public interest lawyers and NGOs, at the time of writing, the DHA had yet to re-open the Cape Town office, while the Port

Elizabeth office, although re-opened was not yet providing all required services (Khan and Lee 2018, 1213-4).

The WPIM proposed the removal of the automatic right to work and study for asylum seekers (WPIM 2017: 61). This critical, hard-won right was the outcome of persistent lobbying, and ultimately litigation by NGOs in the lead up to the Refugees Act 1998 and accompanying Regulations in 2002 (Handmaker 2011: 77-79). Part of the justification for the roll back was that an applicant would be catered for in the APCs whereby all their basic needs would be provided while their application is being processed (WPIM 2017: 61). This policy statement had been given legal effect by the Refugees Amendment Act, 2017 which came into force in January 2020 (RAA 2017). Hence, at the time of writing, the law stipulated that the right to work may not be endorsed on the asylum seeker visa of an applicant who is able 'to sustain himself or herself and their dependants' for a period of at least four months', or who is 'offered shelter and basic necessities by UNHCR or other charitable organisation' financially, they would have to do so without engaging in any economic activity in South Africa., or who fails to produce a letter of employment' in attempt to extend their right to work (RAA 2017, section 22(8) as amended).

A third measure was with regard to obtaining permanent residency. the White Paper proposed that '[r]efugees will no longer have access to South Africa's permanent residency since the [permanent residence permit] is being replaced by a long-term residence visa' (WPIM 2017, 61). The long-term residency visa that the White Paper proposed for all immigrants was a move aimed at delinking immigration from citizenship status (WPIM 2017, 42-43). Refugees would also be entitled to apply for a long-term residency if they had continuously lived in South Africa as a refugee for at least ten years (WPIM 2017, 43). Indeed, the practice had been (and it is not expected to change) that the period taken into account in this case is the time one has been formally recognised as a refugee and not the time spent as an asylum seeker in South Africa, which for some people dragged on for a decade or longer (Fassin et al 2017).

A further measure proposed by the White paper was to extend the refugee exclusion clauses to include those asylum seekers who had failed to apply for asylum in third countries *en route* to South Africa (WPIM 2017, 62) While this proposition did not find its way into the amendments to the 1998 Refugees Act, other propositions, such as revocation of status of those who had returned to their countries and the regulations of strict conditions of travel for refugees (WPIM 2017, 62), have since morphed into law (Refugee Regulations 2019, regulation 4).

As an apparent justification for these draconian measures, the WPIM asserted that the 'asylum seeker regime was being abused by economic migrants resulting in over 90 per cent of the claims for asylum being rejected' (WPIM 2017, 59). From this, it seemed very evident that the White Paper propositions on asylum

management aimed to deter a small number of so-called economic migrants who, based on dubious, and opaque statistics, were nevertheless regarded as abusing the system, notwithstanding the fact that motivations for applying for asylum were always very mixed.

Refugees Amendment Act 2017

The Refugees Amendment Act 2017 (RAA 2017), which came into force on 1 January 2020 (Refugee Regulations 2019, Commencement statement), made it mandatory for all asylum seekers to be in possession of an asylum transit visa, obtainable at a port of entry before they could apply for asylum. The visa was valid for five days at the expiry of which one may become an illegal migrant if they had not yet applied for asylum (RAA 2017, sections 4(1)h & 15(1)a). The challenges encountered by asylum seekers and refugees in accessing refugee reception centres have been well-documented and need not be repeated here (Amit 2012a, Amit 2015, Khan and Lee 2018). One thing that is clear though from this scholarship, is that even the 14 days that the law previously prescribed for an asylum seeker to apply for asylum proved to be impracticable, due mainly to bureaucratic and administrative barriers.

An asylum seeker, upon application was issued with an asylum seeker visa that was renewable from time to time (RAA 2017, section 22). Accordingly, the asylum visa could be withdrawn for a number of reasons including rejection of one's application or if one contravenes any of the conditions of the visa (RAA 2017, section 22). According to the proposal, in the event of a visa withdrawal, an asylum seeker 'shall' be removed from South Africa (Refugee Regulations 2019, regulation 13).

The RAA further expanded the grounds upon which an asylum seeker could be excluded from refugee status, going beyond the classic grounds stipulated under international refugee law (Sivakumaran 2014). Conventionally, this provision provided for the exclusion of persons that had committed serious crimes, namely, crimes against humanity, war crimes and crimes against peace, serious non-political crimes, or has committed acts against the principles of either the United Nations or the African Union (UN Convention 1951, article 1F, OAU Convention 1969, article 1(5)). The RAA expanded upon these grounds to include a person who had entered South Africa other than at a designated port of entry and failed to provide compelling reasons for such entry, or a person who failed to apply for asylum within five days of entry into South Africa (RAA 2017, section 4).

At the time of writing, with the 2017 Refugee Law in force, the line between legality and illegality for both asylum seekers and refugees had become thinner. The timelines within which visas (formerly permits) have to be applied for have become shorter even as no significant changes have been made on the part of the bureaucracy to improve access to the asylum process or to the refugee reception centres. Moreover, as mentioned earlier, the refugee reception offices

countrywide had been closed and even some of the existing ones do not offer all the services required by refugees. As Jonathan Crush and his colleagues cynically observed, the new Refugee Laws and policies effectively rendered South Africa ‘undesirable’ for asylum seekers and refugees (Crush et al 2017).

Proposed Border Management Authority 2020

The Border Management Authority that had been proposed in the White Paper (2017) stated as its rationale ‘to create an operational balance between security, trade facilitation, tourism promotion and socio-economic development both within South Africa and the SADC region. It was intended to provide for an integrated border control with officials having a common identity under a single command structure’ (WPIM 2017: 40). This proposal received legal backing with the passage of the Border Management Authority Act (BMAA 2020).

The BMAA 2020 established the Border Management Authority (BMA) whose functions were: to ‘facilitate and manage the legitimate movement of persons within the border law enforcement area and at ports of entry’; to ‘facilitate and manage the legitimate movement of goods within the border law enforcement area and at ports of entry’; and ‘to co-operate and co-ordinate border law enforcement functions with other organs of state, border communities or any other persons’ (BMAA 2020, section 5). Hitherto, border management was coordinated by the Border Control Operational Coordinating Committee (BCOCC) which earlier on had been based within the South African Revenue Services (SARS), but in 2014 was relocated to the DHA. South Africa’s border management has been bedevilled with the fragmentation and overlap of official functions. It has been reported that:

the borders are managed by 7 different departments applying 58 different laws passed by Parliament. The departments are Home Affairs (Immigration Division), SAPS, SANDF, Agriculture, Land and Rural Development, Health and SARS (Customs and Excise). These departments have seven different command structures with different laws, work ethics and mandates (van Lennep 2019b).

It has also been reported, by the Democratic Alliance, one of the main political opposition parties to the ANC, with origins in the pre-1994 apartheid regime, that there were “approximately 18 government departments and entities that play some role in either border security or control” (DA 2018: 10). In other words, the institutional and bureaucratic struggles of the past have been persistent.

Besides coordination of border management, the BMAA (2020) had mentioned in its Preamble that the integrated and coordinated border management is necessary, among others, to:

ensure effective and efficient border law enforcement functions at ports of entry and the border; contribute to the facilitation of legitimate trade and secure travel; contribute to the prevention of smuggling and trafficking of human beings and goods; prevent illegal cross-border movement; contribute to the protection of the

Republic's environmental and natural resources; and protect the Republic from harmful and infectious diseases, pests and substances. Its overarching aim though is securing South Africa's borders and protecting national interest. It is also not clear under the Act whether provincial or municipal governments will have any role in its implementation.

The BMAA had, at the time of writing, been enacted, though did not stipulate a specific commencement date. It provided that the 'President may...determine different dates in respect of the commencement of different provisions of this Act' (BMAA 2020, section 41(2)).

As such, with still much contestation surrounding migration policies and border control practices, the situation remains very fluid.

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