



## Report

On a seminar held jointly by the African Policing Civilian Oversight Forum and the African Centre for Migration Society at Wits Graduate Seminar Room, Southwest Engineering Building, East Campus, University of the Witwatersrand, Braamfontein, Johannesburg on Friday 23 June 2017 at 10.00 am

### Present

Eriak Massoud	ACMS/EMMIR
Nora van Kitznig	ACS/EMMIR
Heather David	ACMS
Sean Tait	APCOF
Patricia Makroti	NPA
Robert Freeman	SAIFAC
Nolwandle Qaba	Dept of Home Affairs -IMS
Pandelis Gregoriou	SAHRC
Kwanele Pakati	SAHRC
Amanda Strayer	SAHRC
Nkumisa Willie	SAHRC
Michael Cecil	SAHRC
Loren Landau	ACMS
Sijma LC	SAPS Visible Policing
Elizabeth Warn	IOM
Ingrid Sinclair	UNISA
Palesa Madi	WITS - Centre for Applied Legal Studies (CALS)

## **Welcome**

Sean Tait and Alexandra Hiropoulos welcomed everyone to the event.

APCOF and ACMS have been undertaking research to assess the nature and extent to which national and international procedural and conditional safeguards are being upheld during the arrest and detention of non-nationals in South Africa.

The round table will discuss the outcomes of the research and specific recommendations aimed at strengthening the protections for arrest and detention of migrants as well as strengthening the monitoring and oversight of migration detention.

## **Opening Remarks**

Pandelis Gregoriou of the South African Human Rights Commission (SAHRC) provided opening remarks.

=Executing its constitutional mandate, the SAHRC instituted legal proceedings against the DHA in 2012 relating to the systemic and persistent practices of unlawful detention of migrants in South Africa in contravention of provisions of the Immigration Act at the Lindela Repatriation Centre. In the *South African Human Rights Commission v Minister of Home Affairs*, the court directed the Minister of Home Affairs and Bosasa to provide the SAHRC with access to the Lindela Repatriation Centre and detainees on a regular and at least quarterly basis. The court also directed the DHA to provide the SAHRC with a written report on a regular and at least quarterly basis which must include the steps taken to comply with the court order on an on-going basis and in particular the steps taken to ensure that no person is detained in contravention of this order; full and reasonable particulars in relation to any person detained at the Lindela Repatriation Centre for a period in excess of 30 days from the date of that person's initial arrest and detention.

Continuing, he said that based on the SAHRC observations including from visits and interviews with detainees as well as review of the Dept. Home Affairs and Bosasa (a private company contracted by Home Affairs to manage the facility) issues of continued detention longer than the prescribed 48 hours before being charged, unaccompanied minors, problems around access to health care and poor conditions of detention remain a challenge.

In response the SAHRC continued to engage with Home Affairs to address immediate challenges brought to its attention as well as longer-term policy development. An immediate issue for the Commission was to expand their monitoring brief and ensuring sustainability of comprehensive regular oversight of all places of detention.

## **Review of the Application of the South African Legal Framework on Arrest and Detention and its Impact on Migrants**

Alexandra Hiropoulos of the African Centre for Migration and Society presented the preliminary findings of her research.

She said the 2002 Immigration Act regulates immigration by enabling permits for skilled migrants, students, tourists and other categories of permanent and temporary migrants. Still in place, this legislation retains the strong security and sovereignty-centered agenda of the Aliens Control Act, influenced by the dominant themes of security, border control, and the use of law enforcement to manage migration.

The 2002 Immigration Act also regulates arrest and deportation, which have been the South African government's primary response strategy to the increase in immigration. According to the Act, the South African Police Service (SAPS) has a duty to provide support to the Department of Home Affairs (DHA) regarding the implementation of immigration laws, especially in the arrest of those violating the provisions of the Act, such as entering the country without legal documents. Section 41 of the Act empowers police officers to detain, without warrant, a person suspected of being an illegal foreigner in order to verify their status. The person may be detained for up to 48 hours while their status is verified, provided there are reasonable grounds for such detention. According to immigration regulations, where it cannot be immediately verified, an immigration officer should be called in person to determine the status of the individual.

Migrants who have to carry copies of their immigration papers to prove their legal status in the country are often unlawfully arrested and detained. Many times, the processes leading to deportation occur outside of the law and violate the procedural guarantees put in place by both domestic and international law. In many cases, this has entailed heavy-handed immigration raids as well as the extortion and victimisation of undocumented and other migrants by members of SAPS. Such arbitrary and unlawful detentions occur regularly in contravention of international and domestic human rights guarantees and these abuses are exacerbated by the difficulties involved with monitoring the various locations where foreigners are detained, including immigration detention centres and police stations.

The 1996 Constitution's Bill of Rights gives all persons (documented and undocumented foreigners as well as citizens) fundamental and procedural protections and expansively delineates the rights of immigrants, protecting them from unconstitutional conduct and human rights violations. These include rights to life, dignity, equality before the law, administrative justice, basic education and health care, and labour rights. South Africa has also signed a number of international treaties guaranteeing additional rights to migrants. Overall, South Africa's constitutional guarantees of basic rights are among the most expansive and progressive in the world.

Despite this legal framework, many of South Africa's policies and actions to control immigration have been inhumane and unconstitutional, leading legal organizations to regularly turn to the courts to ensure that migrants' rights are realised. Undoubtedly, international migrants have encountered an unwelcome environment since the mid-1990s while public discourse has focused on the economic impact and increase in crime associated with migration. Non-nationals in South Africa are remarkably vulnerable to socio-economic exclusion, corruption and harassment from police and immigration officials, and violence and intimidation by government officials and citizens.

The objective of this review is to assess the nature and extent to which national and international procedural and conditional safeguards for apprehended persons are being upheld while in detention, with particular focus on migrants held for alleged infringements of the Act. Specific recommendations are suggested with the aim of strengthening the protections for arrest and detention of migrants as well as strengthening the monitoring and oversight of migration detention.

The standards set out in South Africa's national framework, as well as in regional and international legislation the country has ratified, serve as a reference point in reviewing compliance with the legal framework surrounding arrests and detention of non-nationals for infringements of the Immigration Act.

Based on public reports between 1999 - 2017 by the South African Human Rights Commission (SAHRC) on the arrest and detention of suspected undocumented migrants, research by academic institutions and civil society, and reports on site visits to detention facilities by government officials and civil society, this review highlights endemic non-compliance with procedural and conditional safeguards for apprehended non-nationals in South Africa. More specifically, non-compliance was found with respect to:

- Arrests of migrants
- Procedural rights
- Detention at police stations
- Detention at Lindela Detention Facility, including
  - Unlawful and arbitrary detention practices
  - Use of force, corruption and conflict management
  - General hygiene
  - Access to healthcare
  - Living conditions
  - Access to phones
  - Visitation
  - Late-night searches

The review also highlights numerous issues with regards to the arrest, detention and deportation of non-nationals that warrant concern. More specifically, the review highlights the following issues:

- Persistent non-compliance by the SAPS

- Persistent non-compliance by the DHA
- Missing information
- Victimization of non-nationals
- Arrests and deportations
- Lack of independent complaints mechanism at Lindela
- Lack of oversight
- Collapse of asylum system
- New Border Authority and White Paper on International Immigration

While the DHA is responsible for immigration services and deportations, multiple government departments are involved in the administration of these services. The main government institutions responsible for the care and management of non-nationals detained in terms of the Immigration Act include the police, judiciary, legal aid, health services, Department of Home Affairs and others. As noted by the SAHRC, numerous departments are in a position to provide key services based on inter-departmental service-level agreements and their respective responsibilities. Broad recommendations are therefore set out for the DHA, DoJCS, DoH, DSD, DIRCO and SAPS. All of these departments play a role in assisting the DHA to comply with the law and it is recommended that government departments actively participate and engage on issues of collective interest and responsibility.

Specific recommendations are also set out for the SAHRC and other institutions with the aim of strengthening the monitoring and oversight of arrests and detention of migrants.

- **The South African Police Service (SAPS)**
  - Leadership (the Minister and Deputy Minister of police) should promote a rights-compliant approach to policing that trickles down to station commanders and all spheres of police.
  - The SAPS should ensure that arresting officers adhere to existing best practices, standing orders, policy directives, the provisions of the Immigration Act and surrounding legal framework on the arrest and detention of non-nationals while performing their functions.
  - Should implement the recommendations made by the SAHRC since 1999.
  - The recommendations of the Khayelitsha commission and the National Development Plan (NDP) with regards to professionalisation of the police need to be implemented.
  - There is a need for implementation plans of both the White Paper on Safety and Security and the White Paper on Policing with mechanisms to be implemented at national, provincial and local levels. Both have been adopted and set up clear roles and responsibilities within a shared responsibility for safety and security.
  - The Office for the Criminal Justice System Review should develop a comprehensive set of indicators to guide data collection, dissemination and analysis across the CJS chain in terms of arrest,

police custody and detention in order to identify challenge areas, potential interventions, and tracking progress made.

- The SAPS should release custody statistics annually. SAPS should facilitate release of police custody statistics that are disaggregated by age, gender, race, nationality, location (national and provincial), and where relevant, level of court and type of offence. Records should include the date of initial arrest and date of request(s) for pick-up of detainees to the DHA, as well as information on who is detained in each cell.
- SAPS should implement of stricter internal and monitoring controls. The National Police Inspectorate and its provincial divisions need to be capacitated to conduct inspections and follow up inspections at police stations, police units, clusters and provincial offices.
- As noted in the NDP, a Code of Conduct and Code of Ethics should be created. The Code of Conduct should be amended to include clear statements on the treatment of non-nationals, detainees and victims. The SAPS should actively engage all stakeholders around the content of the codes, their implementation and subsequent monitoring.

- **Department of Home Affairs (DHA)**

- Procedural safeguards should be taken seriously and be consistently applied by DHA and Bosasa. Recommendations made by the SAHRC in reports in 1999, 2012 and 2016 should be implemented. These include ensuring detainees are made aware of provisions in a language they clearly understand; ceasing all unlawful detentions (including unaccompanied minors and asylum seekers); serving detainees with notices of deportation within the prescribed timeframe; thorough screening to prevent detention of unaccompanied minors; ensuring adequate living conditions; conducting systematic health screenings; provision of adequate healthcare; and adequate provision of food.
- The DHA should investigate allegations of corruption and abuse both by DHA and Bosasa officials and respond accordingly.
- DHA should introduce an independent complaints mechanism at the Lindela Detention Facility through which detained persons may submit complaints without fear of reprisals.
- The DHA and Bosasa must co-operate with the SAHRC in all its efforts to fulfil its constitutional mandate, including the provision of timely and accurate information in response to enquiries by the Commission.
- Reports sent to the SAHRC should include information on the number of days spent by detainees at police stations before they are brought to Lindela; all incidents which warrant the use of isolation cells and how they have/are being dealt with; and all instances of the use of force and deaths.
- A clear protocol should be developed and implemented for civil society organisations to access detainees at Lindela and offer information on access to legal representation and social services.

- The outsourcing relationship between the DHA and Bosasa should be examined in order to assess the level of responsibility of each institution.
  - Formulate a process to assist persons in applying for asylum at the Lindela Detention Facility. Those seeking protection and claiming asylum should have their cases dealt with under the Refugees Act and should not to be deported.
- **Department of Justice and Constitutional Development (DoJCD)**
    - Adhere to SAHRC recommendations regarding the provision of interpreters to detainees.
    - Encourage vigilant judicial oversight of cases concerning minors and immigration detention.
    - Ensure that undocumented migrants are not charged and sentenced in terms of repealed legislation and that legal prescripts are uniformly applied. It is recommended that the DHA, DoJCD and the SAPS review such cases and take corrective action.
    - Enhance efforts with the DIRCO in the ratification of the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) in order to provide for the establishment of a national protection mechanism in South Africa.
    - The DoJCD is central to improving the efficiency and coordination of the criminal justice system and is an important coordination point across the CJ chain. The DoJCD's Office for the Criminal Justice System Review coordinates the implementation of the 7-Point-Plan approved by Cabinet and endorsed by the NDP in 2013 to enhance coordination between government departments in the justice, crime prevention and security cluster (the SAPS, the DoJCD, the NPA, the DCS and DSD. DoJCD must monitor the implementation of this plan.
- **Department of Health (DoH)**
    - The DoH is a major stakeholder in the provision of adequate healthcare and monitoring at detention facilities.
    - The assessment of the provision of adequate healthcare by the DoH at Lindela is imperative.
- **Department of Social Development (DSD)**
    - There are imperative needs for age assessments to be conducted by DSD at the Lindela Detention Facility.
    - The DSD, DHA and SAPS should develop and implement child-friendly mechanisms to curb the detention of unaccompanied minors. Principles of cooperative governance should provide guidance in the cooperation between the different departments.
    - The SAHRC recommends the development of a memorandum of understanding (MOU) between the DSD and DHA to regulate the working relationship between the two departments.

- **Department of International Relations and Cooperation (DIRCO)**
  - It is recommended that DIRCO take a proactive role in facilitating co-operation and access to consular protection between the DHA and embassies respectively.
  - Ratification of the OPCAT in order to establishment a national protection mechanism in South Africa.
  
- **South African Human Rights Commission (SAHRC)**
  - The SAHRC is mandated to monitor and assess the observance of human rights in the country. It also monitors international commitments to implement human rights, including the International Covenant on Civil and Political Rights. The Commission should monitor the implementation of this covenant, including the implementation of the recommendations made by the UN Human Rights Committee in 2016 in respect of ill-treatment, torture and deaths in custody and poor detention conditions.
  - The SAHRC must ensure that the DHA reports on Lindela comply with the court order and all missing information is included in future reports. Reports should include information on the number of days spent by detainees at police stations before they are brought to Lindela; all incidents which warrant the use of isolation cells and how they have/are being dealt with; and all instances of the use of force and deaths.
  - The Commission should put effective measures in place to evaluate and follow up on non-compliance with its recommendations taking into account that most of the commission's observations have been identified and documented in the past.
  - The SAHRC make full use of existing non-compliance mechanisms, such as subpoena mechanisms to request information not provided by the DHA.
  - The SAHRC should conduct an urgent investigation into deaths at Lindela. This should include participation of a forensic expert, as well as access to all hospital records and results of potential autopsies.
  - The provincial offices of the SAHRC should be active in the monitoring and oversight of immigration detention centres as head office alone is not adequately capacitated to monitor all detention facilities determined as places of detention in terms of the Immigration Act across the country. Provincial offices should coordinate with the Legal Services Unit at head office so as to consolidate statistics nationally and identify any systemic issues if they exist.
  - The recent MOU between the SAHRC and the SAPS includes advocacy, awareness and training but lacks the desirable level of detail. This MOU should be expanded to include oversight and investigation of police activities and the requirement of reports from the SAPS and municipal police services.



- **Internal and External Oversight Bodies**

- While South Africa's oversight architecture for the criminal justice system represents one of the strongest accountability frameworks in Africa, there are serious gaps and challenges that hinder the implementation of this framework. To improve coordination between the current accountability mechanisms, and to address the gaps in the current system, consideration should be given to establishing a mechanism to ensure cohesion between all accountability and oversight actors.
- The Office for the Criminal Justice System Review should establish a mechanism to promote cohesion between all accountability and oversight actors, including a shared framework for inspections and reporting.
- The Civilian Secretariat for Police (CSP) needs to strengthen its capacity at both national and provincial level to complete its oversight functions. It should also develop MoUs with the SAPS to facilitate inspections, sharing of information and compliance with reporting obligations.
- Consideration should be given to the establishment of a Lay Visitor's Scheme as part of the CSP's mandate to inspect police cells. A lay visiting scheme emerged in 1996 and was absorbed into the community policing forum (CPF) structures but few provide regular monitoring. The White Paper on Policing recommends that community policing forums move to the CSP. CPFs can play a supportive and monitoring role, especially in cases of arrest and detentions as noted by the Portfolio Committee on Police in 2016.
- The Portfolio Committee on Police should seriously consider the unlawful and arbitrary detention of migrants and put forward appropriate response mechanisms. SAPS should be required to report on the use of force (such as how many batons were used, rubber bullets, etc. in each precinct) and to make reports available to independent police institutions.
- Independent Police Investigative Directorate (IPID) investigators need to be resourced and capacitated to improve the quality and time frames of investigations. Also, legislative changes are required to clarify the relationship between the Ministry of Police and parliament. The IPID Act should be amended in order to strengthen IPID as an oversight mechanism.
- The Office of the United Nations High Commissioner for Refugees (UNHCR) should assist asylum seekers detained at Lindela, as well as any other person who wishes to apply for asylum. The UNHCR can provide technical advice regarding the process to be followed in such cases.

## **Discussion**

In the discussion to follow participants noted that since the 2010 SAHRC investigation into issues of rule of law, justice and impunity arising out of the 2008 public violence against non-nationals had called for reforms in the immigration management it appeared things had not improved significantly. The investigation resulted in recommendations to numerous government departments, including the Department of Home Affairs, that have not been implemented, such as ensuring that detainees at Lindela have access to legal counsel prior to deportation and eliminating undue administrative delays to such consultation.

Discussion took place on the importance of strengthening systems of oversight and of the importance of continued and regular training for Home Affairs officials. In the past, the UNHCR frequently visited Lindela but currently lacks of capacity to conduct frequent visits.

Access to health was discussed where important improvements in the provision of clinic facilities were noted including a monitoring role placed by the International Committee of the Red Cross. However it was noted that while clinic facilities had been established, doctors were not stationed at Lindela and not always available. Challenges were also encountered in terms of access to medicines but sometimes this was because they needed to be consumed at the clinic and couldn't be taken to the detention facilities. Oversight of the health provision was a concern as the medical staff who may uncover cases of abuse or maltreatment were employed by the facility managers and may be compromised in terms of objectivity or independence. The absence of social workers was raised. This fell within the realm of the Department of Social Development who due to resource constraints was still not able to provide this service. Additionally, the Department of Health is under-resourced and unable to assume responsibility of medical care at Lindela from Bosasa.

Challenges of age determination were mentioned with regard to some of the issues related to the unaccompanied minors.

Concerns were also raised regarding the asylum system which some referred to as in a state of collapse. There is currently 100% rejection rate of applications for asylum at Lindela. Some comments were made on the extent to which the lack of training and poor understanding of the regulatory framework by Home Affairs staff contributed to the challenges being experienced. Note was made of the extensive efforts adopted by the Department of Home Affairs to address corruption.

Finally the Home Affairs and Border Management policy development was mentioned. Concerns were raised at some of the policy proposals contained and of the importance for all stakeholders to actively engage as these policies were taken through departmental and parliamentary consultations.

At the conclusion of the discussion Alexandra Hiropoulos thanks participants and noted the report, which had informed her presentation, would be made available.

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