

LAWYERS FOR HUMAN RIGHTS

Additional Submissions to the Ministry of Transport on the Road Accident Benefit Scheme Bill

In reference to Lawyers for Human Rights (LHR) and the Consortium for Refugees and Migrants in South Africa (CoRMSA) submissions dated 1 December 2017, the LHR and CoRMSA felt it necessary to provide the contextual basis for the submissions in relation to the current asylum process and its challenges. This will also be addressed further during the parliamentary submissions during our presentation.

Kindly accept the attachments:

1. Submissions to the South African Human Rights Commission for the National Dialogue on Social Cohesion and Combatting Xenophobia February 2018. Marked hereto as LHR 1.
2. Parliamentary responses by the Minister of Home Affairs on the state of refugee appeals and the backlogs. Marked hereto as LHR 2 and LHR3.

We trust this will be in order.

Submitted on 21 May 2018 by:

Kayan Leung
Lawyers for Human Rights

kayan@lhr.org.za

LAWYERS FOR
HUMAN RIGHTS

SUBMISSIONS BY LAWYERS FOR HUMAN
RIGHTS:

**SAHRC National Hearing on Social Cohesion
and Xenophobia in South Africa**

7-8 February 2018

Drafted by:

Sharon Ekambaram

sharone@lhr.org.za

083 634 8924

Kayan Leung

kayan@lhr.org.za

078 302 7887

Introduction

Lawyers for Human Rights (LHR) is an independent human rights organisation with a 39-year track record of human rights activism and public interest litigation in South Africa. LHR uses the law as a positive instrument for change and to deepen the democratisation of South African society. To this end, it provides free legal services to vulnerable, marginalised and indigent individuals and communities, both non-national and South African, who are victims of unlawful infringements of their constitutional rights. Established in 1996 LHR's Refugee and Migrant Rights Programme is a specialist programme that advocates, strengthens and enforces the rights of asylum-seekers, refugees and other marginalised categories of migrants in South Africa.

LHR welcomes the South African Human Rights Commission (SAHRC) National Hearing in investigating, assessing and monitoring issues in advancing social cohesion and preventing xenophobia and appreciates the opportunity to make submissions to the SAHRC in finding a durable solution.

Recommendation 1: Accountability and ethical leadership at all levels

Leadership at all levels must conduct their offices in a manner which do not incite violence or cause division. Transgressions must be dealt with swiftly through mechanisms to ensure public accountability.

The egregious manner in which leadership at various levels have perpetuated negative stereotypes against migrant communities and the impact thereof on social cohesion and xenophobia cannot be downplayed. Leadership must be called to exercise their powers and influence in an ethical manner with respect to beliefs, values, dignity and rights of all. Furthermore those who make inflammatory comments which incite division and violence must be held accountable and the public should see that such behaviour should not be allowed to take place with impunity. Justice must be seen to be taking place. There can be no doubt that there is a direct correlation between the inflammatory statements by senior public figures and the increased levels of xenophobic violence in South Africa over the past decade.

Such examples include the inflammatory comments made by King Goodwill Zwelethini at his moral regeneration event in Pongola, KwaZulu-Natal in 2015¹; Mayor Herman Mashaba's consistent reiteration of foreign nationals living in hi-jacked buildings and in particular, the dealing with the 'rot of undocumented migrants' living in the city in 2017²; Deputy Minister

1

http://www.academia.edu/25601868/Report_of_the_Special_Reference_Group_on_Migration_and_Community_Integration

² <https://www.timeslive.co.za/politics/2017-09-01-mashaba-da-using-xenophobia-like-trump-says-rights-group/>

Mkongi's July 2017 public remark on surrendering the city to foreign nationals and Gauteng Provincial Commissioner Lieutenant-General Deliwé de Lange reportedly claimed that about 60% of suspects arrested for violent crimes in the province are illegal immigrants. These are unsubstantiated figures with no empirical evidence; they are made in contravention of the constitutionally guaranteed rights to equality, human dignity and contribute to creating a culture of xenophobia³. LHR refers the Commission to the submission made by the Hate Crimes Working Group which provides a detailed outline substantiating these points.

Regrettably, the behaviour referred to above, is not limited to political leaders. Sometimes, certain sections of the media is also complicit by perpetuating negative anti-foreigner stereotypes when they selectively highlight the nationality and migrant status of alleged perpetrators for the purpose of sensationalism, thus feeding into the narrative of South African communities that the presence of migrants and foreign nationals contributes to the high levels of crime.

The wording of the government announcement that Operation Fiela Two will address '*the safety concerns of the citizens of the country*'⁴, echoes the same xenophobic and exclusionary process which took place in 2015, when hundreds of foreign nationals were unlawfully arrested and detained across the country. It is these sentiments which perpetuate the belief that undocumented people are the cause of crime, fuelling the hatred that is witnessed in violence targeting black foreign nationals. Use of military words like "Operation" – is reminiscent of "state of emergency" under apartheid, when the rule of law was suspended and repression and force was used to counter political opposition⁵. LHR takes note of the research done by the Social Justice Coalition and the unequal allocation of daily policing resources to poor communities. Neglecting adequate police resources with a temporary operation does not create safe neighbourhoods. The Khayelitsha Commission of Inquiry had found that "a system of human resource allocation that appears to be systematically biased against poor black communities survived twenty years into our post-apartheid democracy"⁶. The approach of random arbitrary military style operations will not deal with the real problem of an imbalance of policing in poor communities. LHR calls on the government to consult with stakeholders in the communities to create more effective relationships with the police and for consistent and fair allocation of policing resources to all communities.

Misconceptions about the impact of migration on the South African economy and sustained myths that foreign nationals steal jobs and take away Government resources from citizens often ignite violent attacks, looting and widespread criminality and heighten tension within

³ <https://www.dailymaverick.co.za/article/2017-11-29-iss-today-do-foreigners-really-commit-sas-most-violent-crimes/#.WngbNCVuaM8>

⁴ <https://www.gov.za/speeches/government-launches-operation-fiela-ii-pretoria-19-jan-17-jan-2018-0000>

⁵ <http://www.lhr.org.za/news/2018/press-release-lhr-expresses-its-concern-over-announcement-cabinet-justice-cluster-operatio>

⁶ http://www.sjc.org.za/open_letter_to_pcop

communities. Instead, research supports the contrary⁷ and in studies show how migrants contribute positively to the South African economy.⁸

On a positive note, the Peoples March against Xenophobia on the 23rd April 2015 rallied the support of tens of thousands of predominantly South Africans to denounce all forms of xenophobia. It described itself as follows *“Peoples March Against Xenophobia is an emergency coalition convened to confront the horrors of xenophobia in South Africa, taking a stand to denounce the violence and embrace unity. We endorse the message that no-one is ‘illegal’ and call on all people living in South Africa to unite against unemployment, inadequate housing, rising crime and bad schools, instead of turning against people seeking refuge in the country for political and economic reason”*⁹. The march was supported by the Gauteng Province leadership including Premier David Makhura. This kind of leadership, that promotes constitutional values, will result in changing prejudiced attitudes and will contribute to building social cohesion.

Recommendation 2: Thoroughly developed plan to implement recommendations of SAHRC’s report

Recommendations made previously by the SAHRC in their 2010 report must be incorporated and then implemented into a well developed Standard Operating Procedures which will engage all stakeholders.

In 2010, the SAHRC published a report in response to the widespread xenophobic attacks in 2008.¹⁰ In this report, the Commission made a number of recommendations which LHR believes is of great value. LHR reiterates the need for these recommendations to be implemented. Extracts of key recommendations are included below:

- 1. The SAHRC specifically requests that responses to this investigation be guided not by defence of specific actions or positions but by the spirit in which this investigation was undertaken: to protect and promote the human rights of affected communities through institutional action to combat impunity and promote justice and the rule of law in vulnerable communities in South Africa.*
- 2. Non-nationals resident in South Africa are all the more likely to fall prey to violence, as South Africans often blame them for crime and unemployment, and view them as responsible for depriving “more-deserving” citizens of jobs, housing, and other economic goods. Outsiders are, therefore, often subject to intense discrimination and hostility from local communities.*

⁷ <https://www.businesslive.co.za/bd/national/2017-03-06-business-day-tv-all-immigrants-make-notable-contribution-to-an-economy/>;

⁸ <http://www.gcro.ac.za/media/reports/SAMP71.pdf>

⁹ <http://section27.org.za/2015/04/peoples-march-against-xenophobia/>

¹⁰ https://www.sahrc.org.za/home/21/files/Non%20Nationals%20Attacks%20Report_1-50_2008.pdf

3. *Governments may respond to the fear of “illegal immigrants” through disproportionate emphasis on security measures in immigration management – such as biometric scanners at airports – at the expense of other pressing rights issues, such as that of liberty for recognised refugees detained at the Lindela Repatriation Centre, due to the lack of technology to confirm an immigrant’s status without their physical documents.*
4. *A common misconception that this investigation and related research has unearthed is the “myth” that immigration status precedes the Constitution in determining the rights of people living in South Africa. On the contrary, the Preamble to the Constitution of 1996 declares that the country “belongs to all who live in it,” not just its citizens. It states that human rights are applicable to “all people” – these include the rights to life, freedom and security of person, freedom from discrimination on any grounds, and freedom from arbitrary eviction or deprivation of property.*
5. *The report demonstrates, the actions of some officials treated the provisions of the Immigration Act 2002 as superseding Constitutional imperatives. Where this occurred, it was a regrettable violation of the principle of equality before the law.*
6. *Another important finding emerging out of the investigation is the alarming curtailment of the rule of law in the general governance of informal settlements. Here, poor infrastructure, under capacitated police and privatised, authoritarian leadership structures may intersect to create conditions where the rule of law barely exists and impunity reigns for rogue leaders and common criminals alike. The effective privatisation of governance is difficult to separate from widespread frustrations about the nature and extent of service delivery, employment and housing, which leaves residents of these areas convinced that they are on their own in dealing with social problems. Issues of the rule of law, justice and impunity in informal settlements must be seen embedded in an holistic context, where interventions in each component of the whole could generate improvements in the rule of law over time – not only as it relates to violence against non-nationals, but also as regards other forms of civil unrest, such as protest related violence.*

Outbreaks of Xenophobic Violence: 2015, 2016, 2017 –

What steps can be taken to continuously advance social integration and ultimately reduce inequalities associated with exclusion in national identity? Which actors are best placed to take these steps?

This part of the submission is based on the direct experiences of LHR through its Refugee and Migrant Rights Programme. Since its founding, this program has become the largest legal service provider to the refugee and migrant community in South Africa offering legal assistance and support to more than 10 000 refugees and asylum seekers annually through our law clinics in Johannesburg, Pretoria, Durban and the border town of Musina.

LHR has intervened directly in outbreaks of xenophobic violence in 2015, 2016 and 2017. Based on this intervention, the submission will include recommendations on where the gaps are in the response of SA to outbreaks of xenophobia, and it will speak to recommendations on interventions which made a positive impact.

Problems accessing basic civil, political and socio-economic rights are not limited to asylum seekers and refugees. In a country with a high unemployment rate, high levels of illiteracy and where the majority of the population is expecting the government to deliver on basic services (such as water, housing, electricity, land, amongst others), facilitating access to justice for vulnerable and indigent individuals is fundamentally important. Thus, besides building on the work carried out by LHR's Refugee and Migrant Rights Programme, the Strategic Litigation Unit at LHR, has taken on litigation on issues affecting destitute South Africans such as evictions, disability, cultural rights, infringement on religious freedom, social security, and public participation.

In 2013, LHR facilitated access to emergency social assistance for refugees displaced through xenophobic violence. 2015 was characterized by another flare up on xenophobic attacks reminiscent of 2008. LHR was heavily involved in the monitoring of the violence and legal assistance to displaced and affected persons. LHR also maintained a wide media and advocacy presence throughout the crisis and was involved in restorative talks aimed at reconciliation and reintegration efforts.

Riots that took place during the week of 20 June 2016 in and around Pretoria

From 20–23 June 2016 violence and protests hit the City of Tshwane. Although the riots were sparked by political discontent within the ANC, Somali, Ethiopian and other foreign owned shops and micro enterprises were targeted for looting and a number of foreigners were attacked. Being located in Pretoria, the LHR Refugee Clinic was exposed to the ramifications of the outbreak of violence and the office took on responsibilities beyond its capacity to play the role of a coordinating mechanism in the unfolding mayhem.

In Pretoria, LHR had over 360 non-nationals attend our offices from 23-30 June 2016. All were victims of the lootings that took place during the riots of 20 June 2016. Reports included incidents of *shops run by non-nationals being looted by SA citizens and SAPS officers; the majority of the non-nationals' documentation was either destroyed or lost; certain SAPS stations refuse to open dockets and investigate and accused the non-nationals for being "the reason for the public violence"; non-nationals lost their livelihood and have no means to support their families and fear to return to the locations; non-nationals have been injured during the riots and are not receiving adequate medical treatment; non-nationals are in need of protection.*

Our law clinic in Pretoria procured additional offices where individual consultations with each of the non-nationals took place. High volumes of clients of approximately 40 were

consulted with daily and assistance was obtained from interns from ProBono.Org and the SAHRC due to capacity and space constraints.

Letters were drafted to DHA for non-nationals to approach the Refugee Reception Offices (RRO) to request the reprinting of their permits that were lost during the riots. We advised recognised refugees to apply for social security grants and we referred asylum seekers to Future Families, a social assistance organisation, to apply for social assistance with referral letters. We also had 32 clients who indicated that they are in need of trauma counselling and therefore we referred them to the Centre for the Study of Violence and Reconciliation (CSVR). All non-nationals who enquired about resettlement were provided with the UNHCR contact details. It was problematic for LHR that Future Families requested a referral letter for each victim that sought social assistance and a need for response between all stakeholders to emergency situations was identified. Measures need to be put in place to manage a situation where large crowds of people seek help and access especially during outbreaks of violence.

Anti-Immigrant march – January 2017

January 2017 saw the spectre of xenophobic violence raise its ugly head once again in Gauteng in South Africa. The Mayor of Johannesburg, Mr Herman Mashaba, made public statements blaming migrants and foreign nationals for the problems that people living in informal settlements were experiencing. This played a role in fuelling violence that broke out in Rosettenville and spread to townships in Pretoria West. Once again informal traders who were foreign nationals were targeted. At the same time a group calling themselves Concerned Citizens of Mamelodi applied for permission to hold a march to protest against immigrants. LHR played a role in facilitating a joint effort through the Protection Working Group (PWG) which convened daily meetings leading up to the march. These meetings included representatives of the Tshwane local government, representation from the mayor's office, the SA Police the UNHCR and other representatives from civil society. Through this process the heavy presence of police was negotiated both during the march and also in the townships from which the marchers originated. This was a deterrent and was a contributing factor in limiting the extent of looting of foreign owned shops and violence. At the same time LHR worked with faith based organisations and other key partners including representatives of the Diaspora to ensure that there was a "contingency plan" in the event that there was violence and displacement. The march was attended by approximately 200 people and it was monitored by 60 peace marshals. Freedom House has also been part of the partnership working with civil society which included the training of peace marshals. There was a marked presence of the police. LHR worked with community representatives from the affected townships – Mamelodi and Atteridgeville – to organise an anti-xenophobia march. Approximately 200 people attended, and the significance of this march is that it was predominantly supported by residents from those townships who were South African citizens.

This intervention has continued through the engagement of LHR both in the PWG and its sub committee. The SAHRC has been invited as part of the initiative to ensure that in the event of xenophobic violence and displacement of people including damage to property and loss of lives, that relevant stakeholders including local, provincial and national government are able to trigger a contingency plan to mitigate against violence and loss of life. Currently a draft document outlining Standard Operating Procedures has been drafted. This process has been endorsed by the UN Country Team and includes the relevant UN agencies present in the country. It is recommended that the SAHRC facilitate the process ensure that the SOPS are adopted formally and enforced by all partners including the State, private sector and civil society. Critical to ensure that there is an effective response to xenophobic violence are the following:

1. An early warning mechanism which includes a scientific based system to verify reports of incidents of xenophobic attacks and related violence, including the capacity to respond to immediate medical needs related to the outbreak of violence.
2. A mechanism to trigger a response which will include the availability of resources.
3. The role of peace keepers – learning from the role that Black Sash played in mitigating and witnessing repressive violence of the apartheid state and its agents. And strengthening the work done through the intervention of Freedom House referred to above.
4. Building democratic organisations to build solidarity in the struggle for social justice to hold government accountable at all levels and to strengthen this democracy in enforcing the Bill of Rights. This is a critical role for Chapter Nine institutions in carrying out its mandate to strengthen constitutional democracy in South Africa.

Recommendation 3: Legislation and policies which promote the rights entrenched in the Constitution

*“We, the people of South Africa,
Recognise the injustices of our past;
Honour those who suffered for justice and freedom in our land;
Respect those who have worked to build and develop our country; and
Believe that South Africa belongs to all who live in it, united in our diversity...”¹¹*

¹¹ <http://www.justice.gov.za/legislation/constitution/SACConstitution-web-eng.pdf>

The Constitution of South Africa is the yardstick by which all laws should be judged. Similarly all laws, procedures and policies should be consistent with the ethos, objectives and principles of the Constitution and should give effect to the rights entrenched therein.

The **Refugees Amendment Act 11 of 2017**¹², passed on 18 December 2017, contains a number of provisions which undermine the constitutional rights and legal protection of those fleeing persecution and insecurity. During the drafting process, more than 1700 submissions were made by civil society to the Department of Home Affairs (DHA). These submissions were not registered by the DHA and there is little evidence from the Amendment Act that these were taken into account. All 1737 submissions objected to the proposed amendments. One particular concern is the severe limitations on the right to work, which is in direct disregard of court decisions the right to work and the freedom to choose a trade and occupation is intrinsically linked to the right to human dignity.¹³

The Amendment Act also creates onerous requirements for qualifying for work visa endorsements for asylum seekers, thus effectively denying them the right the work. This will impact adversely on rehabilitation of migrants and social cohesion in South Africa, since it will limit the ability of asylum seekers to become integrated and active members of society. The inability to obtain a work visa as an asylum seeker will result in increased reliance on state resources and social assistance from NGOS (such as UNHCR). This constitutes a derogation of the right to health, housing and social protection of asylum seekers in South Africa, resulting in the perpetuation of negative stereotypes of migrants depleting resources of the state and taking away resources from South African citizens.

In addition to the restriction of the right to work, the proposed processing centres for asylum seekers in the White Paper on International Migration will essentially isolate refugees and asylum seekers and further impede their integration. In a report by UNHCR on alternatives to camps, the UNHCR notes that “community-based protection activities and livelihoods and education programmes that also involve local people can promote social cohesion, reduce xenophobic attitudes and create a better protection environment. Where people work, study and play together, they are better equipped to resolve differences and live peacefully.”¹⁴

The above two points illustrate the need for all laws, procedures, practices and policies to protect and promote constitutional rights, which apply to South African and foreign nationals equally. If this is not the case we face a situation where our laws themselves will undermine social cohesion and the impunity of government officials who perpetuate racial

¹² http://www.saflii.org/za/legis/num_act/raa201711o2017g41343231.pdf

¹³ <http://www.lhr.org.za/news/2014/sca-upholds-appeal-somali-association-south-africa-5-others-v-ledet-minister-police-minist>

¹⁴ <http://www.unhcr.org/5422b8f09.pdf>

hatred and xenophobia in clear violation of constitutional rights and the principles of equality and human dignity will continue to be condoned.

LHR reiterates its call on government to respect the rule of law when conducting police operations such as Operation Fiela, and to adhere to its constitutional duties and obligations, including complying with, amongst others, section 14 of the Constitution which ensures the right to privacy. LHR calls on the SAHRC to monitor the conduct of officials in Fiela Two, to ensure that the human rights violations committed in Fiela One are not repeated. Fiela One resulted in foreign nationals being made scapegoats for crime in the inner city and further perpetuated xenophobic attitudes and hostilities. Operation Fiela One¹⁵ created an environment of fear and saw widespread human rights abuses by the police, military and immigration officials where people were denied access to legal representation and military were used to arrest undocumented migrants¹⁶.

Recommendation 4: Institutional Xenophobia - Address endemic corruption and fix the collapsed asylum system.

Resolving core challenges within the Government in their services to migrants such as corruption and the collapsed asylum system will combat institutionalised xenophobia.

Statistics

While South Africa claimed to register the highest numbers of new asylum seekers from 2008- 2010, these numbers have steadily declined to 106,000 in 2011 and 51,000 in 2012. Despite a reduction in numbers, a reciprocal improvement in the Refugee Status Determination (RSD) process or reduction of the appeal backlog has not been seen. As at March 2013, there were still 230,486 pending asylum applications; 86,833 pending Refugee Appeal Board (RAB) appeals and 58,000 cases pending before Standing Committee for Refugee Affairs (SCRA). The RAB and SCRA backlogs continue to be a bottleneck in this process and neither body has sufficient capacity to deal expeditiously with the cases before it. The most recent statistics that were shared with the UNHCR for the end of 2016 according to the Department of Home Affairs is as follows: 218,000 asylum seekers and 91,000 recognized refugees

High rate of rejection of asylum applications.

Year	Overall Recognition rate	Musina RRO
2013	10.7%	2 out of 10,043 received refugee status
2014	12.1%	3 out of 14,586 received refugee status
2015	4.1%	0 out of 9,927 received refugee status

¹⁵ <http://www.702.co.za/articles/2843/operation-fiela-under-fire-for-allegedly-targeting-foreign-nationals>

¹⁶ <http://www.lhr.org.za/publications/final-order-access-detainees-operation-fiela-raids>

The same trend still persisted in 2016 and 2017

- The high rate of rejection is used to demonstrate that migrants are abusing the asylum process.
- This has been called into question by leading research institutions in South Africa, including research done by the African Centre for Migration and Society (ACMS) at the University of the Witwatersrand.¹⁷
- In a 2012 Report, ACMS found that the poor quality of refugee status determination (RSD) proceedings was a violation of the constitutional right to just administrative action. In another report from ACMS in the same year, hundreds of RSD decisions were analysed and specific problems relating to the determination procedure were found to violate both domestic constitutional law regarding just administrative action and good decision-making as well as international standards relating to RSD.¹⁸

Corruption

In 2015, LHR launched a comprehensive report on the issue of corruption within the asylum process, entitled *Queue here for Corruption: Measuring Irregularities in South Africa's Asylum System*.¹⁹ Following years of anecdotal evidence regarding corruption at the RROs, Lawyers for Human Rights (LHR) and the African Centre for Migration & Society (ACMS) conducted a quantitative assessment of the scope of corruption at these offices. The assessment revealed significant levels of corruption involving multiple actors, occurring at all stages of the asylum process, and continuing even after an individual had obtained refugee status. Results varied by office, but overall almost one-third of respondents experienced corruption at an RRO. The Marabastad RRO in Pretoria showed the highest levels of corruption. This continues to be an endemic problem which seriously impedes access to a fair process with respect to documentation of predominantly vulnerable foreign nationals from the African continent in general and of asylum seekers in particular.

Collapsed Asylum system

2016 was one of the toughest years as very few asylum seekers in SA were able to access any documentation. Nationalities most affected were asylum seekers from Burundi, DRC and Ethiopia.

¹⁷ Amit, Roni. "No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices." *African Centre for Migration & Society*. September 2012. p.9

¹⁸ Amit, Roni. "All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination." *African Centre for Migration & Society*. June 2012:

http://www.lhr.org.za/sites/lhr.org.za/files/all_roads_lead_to_rejection_research_report.pdf

¹⁹ <http://www.lhr.org.za/sites/lhr.org.za/files/272268061-queue-here-for-corruption.pdf>

The challenges that the LHR teams were facing were born directly out of the impact on our work of the policy shift that is already being implemented by the DHA. LHR was witness to how Marabastad has suffered the consequences of the closures of the different RROs over the last period.

Traditionally, migrants have resorted to the asylum system in increasingly large numbers thereby burdening and undermining the credibility of the asylum system. DHA, in response to this, has started to adopt various strategies mostly outside the legal framework in an attempt to limit access to the territory as well as access to asylum and effective protection. The implementation of the Zimbabwe Dispensation Project in 2010 was one such attempt to regularise the status of undocumented Zimbabweans in the country. In August 2017, the DHA set up an online link, hosted on VFS, to allow the Angolan applicants to make formal applications with successful applicants receiving status to be placed on their passports. LHR assisted a few clients with police clearance certificate updates in partnership with Scalabrini. These are two examples of interventions that were progressive in that they assisted in the process of documentation to provide opportunities for vulnerable populations to access legal documentation. These processes take the pressure away from the Asylum system process.

Respect for Human Dignity and Human Rights

Whilst the South African Government has ratified the OAU and UN conventions on Refugees and adopted its own refugee and immigration legislation in 2000 and 2002 respectively. The DHA is responsible for the administration of the Refugees Act 130 of 1998. A lack of resources, administrative limitations, an increase in asylum applications and a general lack of policies have resulted in the Department failing to adjudicate asylum claims within 180 days, as prescribed by the Regulations. This has created backlogs at almost all the regional Home Affairs offices, leaving asylum seekers without any real protection or adequate means of survival.

The DHA has struggled to implement these legal provisions as a result of lack of management capacity, skills, lack of inter-departmental coordination, corruption and staff turnover. In light of its limited ability to be a lead department in the area of refugees and migrants, DHA has also been slow to work jointly with other key government departments involved in the provision of public services to asylum seekers, refugees and migrants. In turn, this has led to a situation where asylum seekers, refugees and other migrants have had to fend for themselves or rely on the limited assistance provided by NGOs to ensure their survival. In this context, LHR has played a vital role in safeguarding basic civil and political rights of asylum seekers and refugees - including challenging unlawful arrest and detention, providing legal representation in appeals cases, facilitating access to documentation and thus enabling access to basic socio-economic rights viz. education, health, social assistance.

The DHA disrespects court rulings. In 2015, LHR successfully challenged the closure of the Port Elizabeth Refugee Reception Office (PE RRO) in the Supreme Court of Appeal. Despite LHR's judgment in the Supreme Court of Appeal (confirmed by the Constitutional Court) regarding the unlawful closure of the PE RRO, DHA remains in contempt of Court and has failed to re-open the PE RRO throughout 2015, 2016 and 2017. LHR is currently preparing papers to request that the court intervene in this matter as the PE RRO remains closed to date.

To close, we quote the Honorable Chief Justice Mogoeng Mogoeng in a 2013 address²⁰ on the rule of law:

"..the oath or affirmation to be faithful to the Republic of South Africa, to uphold and protect the constitution and the human rights entrenched in it and to administer justice to all persons alike without fear, favour or prejudice, in accordance with the constitution and the law. Central to the affirmation or oath of office is the obligation to uphold the foundational values of our constitutional democracy, which include the rule of law, human dignity, equality, freedom, transparency and accountability.

This is the legal philosophy and the vision necessary for the promotion of the rule of law and the economic developmental agenda not only for South Africa and the SADC (Southern African Development Community) region but of the African continent as well..."

²⁰ <https://constitutionallyspeaking.co.za/transcript-chief-justice-mogoeng-on-the-rule-of-law-in-south-africa/>



NATIONAL ASSEMBLY

QUESTION FOR WRITTEN REPLY

QUESTION NO. 2649

DATE OF PUBLICATION: Friday, 25 November 2016

INTERNAL QUESTION PAPER 40 OF 2016

2649. Mr M H Hoosen (DA) to ask the Minister of Home Affairs:

(a) How many (i) appeals were received by the Refugee Appeals Board (aa) in each of the past five financial years and (bb) since 1 April 2016 and (ii) of the specified appeals were finalised, (b) what are the causes of the delays in adjudicating the appeals and (c) by what date will the backlog in the appeals be cleared?

NW3133E

REPLY:

(a) Appeals received and finalised by the Refugee Appeal Board (RAB) in the past five financial years and from 01 April 2016 to date is tabulated hereunder:

(aa - bb) FINANCIAL YEAR	(i) RECEIVED	(ii) FINALISED
April 2011 - March 2012	5452	4248
April 2012 - March 2013	5655	922
April 2013 - March 2014	11098	4978
April 2014 - March 2015	16830	1705
April 2015 - March 2016	9321	1331
April 2016 – Nov 2016	3251	555

(b) The causes for the delay in the adjudication of appeal cases is as follows:

- Most asylum applications received by the Refugee Reception Offices in South Africa are rejected as unfounded and they end up at the Refugee Appeal Board (RAB). Presently the RAB has one member based in Cape Town and an Acting Chairperson based in Pretoria as

three RAB Members resigned early this year. The process to identify and appoint the Chairperson and the three members is continuing.

- In the past members of the Refugee Appeal Board (RAB) used to sit as single members for each appeal hearing. However, in the Western Cape Court judgement of November 2011(Harerimana v Chairperson of the RAB and others) the RAB was ordered to sit as a quorum of 50 percent plus one of the members for each appeal hearing or at least two members.
 - The high number of appeals lodged on daily basis makes it difficult for the few RAB members to hear and determine cases without delay. Some cases are simple and straight forward and can be determined without delay, however, a lot of cases are complex and take some time to determine. The decision making process requires extensive research on latest possible country of origin information, International Refugee Law and Case Law because of the complexity of most cases that have to be adjudicated and it is not always easy to get access to these sources of information
 - The RAB normally hears between five and ten appeal cases per day, depending on the profile and complexity of each case, from Monday to Thursday. On Fridays determinations on appeals heard are normally written. The RAB visits the regional Refugee Reception Offices for hearings, sometimes for up to three weeks. As much as the Board makes efforts to adjudicate appeals already heard, there is also a high number of appeals scheduled to be heard by the Board. The RAB tries to balance the number of cases it hears with those that are adjudicated.
 - The RAB decisions need to be carefully constructed because sensitive human rights issues are being dealt with; some of which in their nature are matters of life and death. The RAB has to apply its mind to the facts of each case in compliance with Public Administrative Justice Act, The Constitution, The Refugee Act, International Refugee Law and other Human Rights Instruments before coming to a particular decision.
- (c) At this stage the RAB is not in a position to provide the date on which the appeals backlog will be cleared. It is presently estimated that the RAB has around 145 414 appeal cases nationally defined as a backlog and around 80 315 of these cases appear to be active in the National Immigration Information system.

During the Republic of South Africa – UNHCR High Level Bilateral Meeting in Geneva, July 2015 the two parties agreed to the development of a backlog project to address the outstanding RAB appeal cases, However

the project has not taken off in earnest due to financial constraints. The project was planned to continue for three years, until 2019. Provided enough human capacity and financial resources are made available, the backlog could be cleared within three years.



NATIONAL ASSEMBLY

QUESTION FOR WRITTEN REPLY

QUESTION NO. 267

DATE OF PUBLICATION: Friday, 24 February 2017

INTERNAL QUESTION PAPER 4 OF 2017

267. Mr M H Hoosen (DA) to ask the Minister of Home Affairs:

- (1) With reference to his reply to question 2649 on 5 December 2016, what specific steps are being taken to address the existing backlog of appeals received by the Refugee Appeals Board;
- (2) will the Refugee Appeal Authority, as proposed in the Refugees Amendment Bill [B12-2016], be better equipped to address the specified backlog;
- (3) (a) for how long has the specified Board been improperly constituted and (b) what impact has this had on the existing backlog of appeals?

NW285E

REPLY:

- (1) The Department of Home Affairs (DHA) has undertaken two backlog projects in 2001 and 2006 with a view of reducing the backlog. While these projects were able to resolve most outstanding claims, they were not able to prevent the re-occurrence of the backlog. The problem is complex and as a result of many interlinked causes.

To address the existing backlog of appeal hearings it is necessary to contextualize the backlog: -

- In terms of section 13 of the Refugee Act (No 130 of 1998), the Refugee Appeal Board (RAB) must consist of a Chairperson and at least two other members. In the past members of the RAB would hear matters individually for each appeal.
- As explained under question 2649 (b) in the *Harerimana v Chairperson of the RAB and others* the honourable Judge Dennis Davis ordered RAB to sit as a quorum of 50 percent of members plus one of the members for each appeal hearing or at least two members.

- Apart from the capacity constraints the subsequent dilemma is if only two members sit to hear an appeal and they disagree they cannot come to a decision. As a consequence, RAB was advised to sit as a quorum consisting of the three members (at this point the Chairperson and two members) which will then be properly constituted. The main rationale appears to be that sitting as a quorum of three facilitates the process of decision-making.
- As at the end of January 2017, RAB consisted of one member based in Cape Town and an acting Chairperson based in Pretoria. This chronic incapacity was as a result, of the end of contract of the previous RAB Chairperson as well as the resignation of three RAB members around the same time in middle 2016.
- The DHA has about 90 Refugee Status Determination Offices (RSDO's) based at the five Refugee Reception Offices on average these RSDO's may hear and determine between four and seven applications per day. If the applicant is rejected as unfounded by the RSDO, he or she has a right to appeal to the RAB within 30 days. Most applicants for asylum are rejected as "unfounded" and almost all such rejections are appealed against. This further strains the backlog.

In order to address the immediate challenges of the incapacity, the Minister of Home Affairs appointed a new Chairperson for RAB on 07 February 2017. As a matter of urgency, RAB re-started appeal hearings on 20 February 2017 on the basis that it is now properly constituted. All three current members are conducting these appeal hearings sitting as a quorum.

There is also an imminent appointment of two additional members by the Minister of Home Affairs. These two members are going through the internal interview and vetting processes. The Minister will in this regard also make the appointment after the conclusion of these internal processes. (It must be noted that there is challenges in attracting qualified legal refugee experts to a mandate with such a high backlog and low salary band). As soon as the interview and vetting process is completed, it is planned that the members be based at the Durban and Musina Refugee Reception Centres, respectively. It is also planned, that the Chairperson and another member, as may be required, will travel to these centres to hold appeal hearings as an interim measure in anticipation of the adoption of the new amendments in particular related to the quorum requirements.

According to RAB statistics there are 1287 judicial review cases that were served on RAB to date. This is another capacity constraint.

Year -	No of cases
2013 to 2014	132
2014 to 2015	230
2015 to 2016	663
2016 to 2017	262 (to date)

The reasons for the high number of reviews are the following, firstly, the decisions taken by RAB as an individual member after the *Harerimana* case was decided in November 2011. At the time, the previous Chairperson of RAB failed to apply the judgement and continued with hearings as individual members in some instances. Secondly, reviews are submitted in order for RAB to provide a hearing date. These reviews are mainly to compel the extension of the asylum seekers permit and to order RAB to provide a hearing date.

In this regard, RAB has undertaken an open dialogue with legal representatives of the appellants to prioritise certain cases. These cases include legal challenges to demand a hearing date and cases where a single member in contravention of the quorum requirements took decisions. This process is ongoing and intended to reduce the number of legal proceedings against RAB. RAB also intends to approach organisations such as Lawyers for Human Rights, Wits Law Clinic, UCT Law Clinic and other interested representatives to open this dialogue. (It should be noted, that at this stage there are very few of these reviews based on the merits of the case.)

During July 2015, the United Nations High Commissioner for Refugees (UNHCR) and representatives of South Africa had a high-level bilateral meeting in Geneva. The parties had agreed to develop a backlog project to address the outstanding RAB appeal cases. The project has not taken off due to the incapacity constraints listed above and financial constraints on both sides. The project was to run for three years ending in 2019.

RAB is continuing the dialogue with the UNHCR under the above agreement. RAB has approached the UNHCR and reopened discussion about the backlog project and its implementation. In this regard, the UNHCR was also approached to assist RAB with the development and financing of a comprehensive case management system. This system will be central to the management of any backlog project and will streamline the management of individual cases. The system will also provide a means to undertake a proactive approach to avoid a re-occurring backlog. The discussion is ongoing but promising.

At this stage, RAB is conducting hearings on an average of five to ten cases per day dependent on the complexity of cases. It has an estimated backlog of 258 232 cases with 92 535 active and 165 697 inactive cases. The institutional incapacity in this regard is evident and multifaceted. The institutional incapacity cannot be a problem that the DHA can alleviate on its own. Therefore, we are in discussion with all interested parties. This is in its infant stage.

- (2) Yes, as discussed above the legislative amendments will play a key role in alleviating the current incapacity and thus assist in management of the backlog. Although the legislative changes is important there is more to be done in order to address the specified backlog and to manage the caseload proactively. For example, another key requirement in proactive management of the backlog is a case management system (discussed above). This will strengthen resource management and can pinpoint how to address institutional incapacity.
- (3)(a) Since May 2016, no decision was taken by RAB members due to the resignation of three members and the end of contract of the previous Chairperson. It is unclear in how many appeal hearings RAB was improperly constituted.
- (3)(b) The impact is not measurable at this point, however, as a result of the improperly constituted RAB hearings this has opened the RAB decisions to judicial review and these reviews are likely to be successful if submitted to a High Court. As mentioned above the total number of reviews on hand is 1287 cases. A percentage of this number is reviews based on the lack of a quorum. This percentage will have a marginal effect on the backlog, compared with the total backlog, if these matters are referred back to RAB.