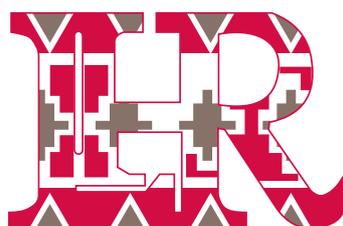


MONITORING IMMIGRATION DETENTION IN SOUTH AFRICA



LAWYERS FOR HUMAN RIGHTS

DECEMBER 2008

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Refugee children among the stranded R28 group (see page 7)

Hundreds of xenophobia victims left destitute at the side of the R28 highway after release from Lindela.



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1. Introduction	2
2. Legal framework	2
a. Illegal foreigners	2
b. Asylum Seekers and Refugees	3
3. Arrest procedures	3
4. Detention – Lindela Repatriation Centre	4
a. Verification of status	5
b. Length of detention	6
c. General detention conditions	6
d. Health care	6
e. Food	6
f. Children	6
g. Use of force	6
h. Displaced persons affected by xenophobic attacks	7
5. Musina detention facility (Zimbabwe border)	7
a. Detention procedures	8
i. Verification of status	8
ii. Length of detention	8
iii. Registration of detainees	8
b. Detention conditions	8
i. Living and sanitation conditions	10
ii. Health care	10
c. Children	10
i. Unaccompanied minors	10
d. Use of force	10
6. Detention in prisons	11
7. Deportations	11
8. Conclusion	11

1. INTRODUCTION

The constitutional order established in South Africa in 1994 included administrative and judicial protections governing detentions. These protections were meant to put an end to the apartheid era practice of indefinite detention without trial. Unfortunately, documented and undocumented foreigners, as well as South Africans mistaken for foreigners, have fallen outside of this protective structure. Detention remains the primary tool of immigration enforcement in a democratic South Africa. While the detention of “illegal foreigners” is governed by a legal framework, this framework has not been implemented by the Department of Home Affairs (DHA), which oversees immigration. Instead, DHA, a department plagued by inefficiency and corruption, has frequently flouted these procedures while continuing to use unlawful detention as a method of control.

Initially, the continuation of apartheid policies aimed at control and exclusion stemmed from the maintenance of the apartheid era Aliens Control Act (Act 96 of 1991), which remained in effect until 2002. The passage of the Immigration Act (Act no 13 of 2002, as amended in 2004) was envisaged as bringing about a more progressive, less exclusionary, immigration policy in contrast to the apartheid legislation. Unfortunately, the new Act failed to realize this vision and instead maintained the previous regime’s focus on controlling access to South Africa, rather than serving to provide protection for those fleeing from persecution.

In addition, the poor wording of the Act and major problems with enforcement have created an environment where human rights abuses, particularly in the field of immigration detention, are rampant. The causes of these abuses range from the lack of legal procedures governing long-term detention to overzealous policing by a number of law enforcement agencies. Although legal provisions give immigration officers the sole power to determine whether an individual is an illegal foreigner, these determinations are frequently made by others. Moreover, while police officers and, in certain circumstances, members of the military may assist with immigration enforcement, the Immigration Act makes it clear that only immigration officers may detain for the purposes of deportation and may deport such individuals.

As the South African Human Rights Commission and several human rights organizations have noted, arbitrary and unlawful detentions of illegal foreigners happen with regularity and in contravention of international and domestic human rights guarantees. These abuses are exacerbated by the difficulties involved with monitoring the various locations where foreigners are detained, including prisons, airports, police stations, an old dilapidated sports hall on a military base in Musina commonly known as “SMG”, and the infamous Lindela Holding Facility. Human rights monitoring groups face great difficulty accessing these establishments, particularly those managed by the Department of Home Affairs and the private corporation, Bosasa (Pty) Ltd. This means that the detention of foreigners occurs outside of regular supervision or monitoring.

The misplaced focus of the legal framework, in combination with a lack of capacity and training and a working environment rife with corruption, have made immigration enforcement in South Africa both a spectacular failure and a source of great human rights violations. This failure calls for a new legal approach. Until such an approach can be implemented, greater oversight over existing procedures is necessary to address the rampant abuses and to eliminate the practice of indefinite detentions that have no legal basis and that deprive detainees of their constitutionally guaranteed rights.

2. LEGAL FRAMEWORK

a. *Illegal Foreigners*

Practices with respect to illegal foreigners are governed by the Immigration Act (Act no 13 of 2002 as amended). Section 34 of the Act provides for the arrest, detention and deportation of “illegal foreigners”. It provides that an immigration officer may declare any person an illegal foreigner if that officer is not satisfied that he or she is a citizen, a permanent resident or a temporary resident under the Act.

An illegal foreigner is defined under section 1 as “a foreigner who is in the Republic in contravention of this Act.” This definition gives little direction to immigration officers regarding who actually qualifies under the Act, a problem that is revealed by the fact that many people who are picked up as “illegal foreigners” actually possess papers entitling them to be in the Republic legally. Section 32(2) of the Act requires that anyone who is declared an illegal foreigner be deported.

Section 41 of the Act allows an immigration or police officer to ask any person to identify him or herself as a citizen, permanent resident or temporary resident. The officer must have “reasonable grounds” on which to conclude that the person is not entitled to be in South Africa. Although the “reasonable grounds” standard is not clearly defined, it must be interpreted in accordance with the Constitution. Section 9 of the Bill of Rights prohibits discrimination on the basis of race, gender, ethnic origin, age, religion, culture and language. Section 41 must also be read with its corresponding regulation, Regulation 32 which provides for an investigation to take place and places a duty on immigration and police officers **to verify the identity and status** of persons arrested and detained as “illegal foreigners”. Finally, under the Immigration Regulations (2005), an illegal foreigner may be issued a Form 20 to prevent arrest and detention pending the outcome of a status application. This form, however, may only be issued if the person in question has not yet been arrested.

A person may be detained on reasonable grounds for up to 48 hours while his or her status is investigated. After being declared an illegal foreigner by an immigration officer, he or she may be detained for up to 30 days without a warrant. For detentions lasting longer than 30 days, the immigration officer must obtain a warrant of extension from a magistrate’s court. This warrant may only extend the detention for a further 90 days. The Regulations also require that the detainee be given notice and an opportunity to make written representations to the magistrate.

After receiving a negative decision under the Immigration Act, a person has 3 days to seek a review of that decision by the Director-General of Home Affairs. No detainee in LHRs knowledge has ever been informed of this right. Further this does not provide sufficient time to review the immigration officer's decision or properly formulate an appeal. Moreover, the fact that detainees at SMG in Musina and at the Lindela Holding Facility are dependent on immigration officers and security guards for pens and pencils renders any review mechanism out of reach for them. In addition, High Court judgments suggest that a person who makes no attempt to have the decision reviewed may be deported during those three days.

Legal provisions only cover detentions lasting up to 120 days (30 days initial + 90 day extended detention). The Act makes no provision for situations in which the detainee cannot be deported within 120 days. Such detainees fall into a legal limbo and are detained indefinitely with no governing legal framework, or legal recourse.

b. Asylum Seekers and Refugees

The status of asylum seekers and refugees, as distinct from those deemed illegal foreigners, is governed separately by the Refugees Act (Act no 130 of 1998). An asylum seeker who enters the Republic must present him or herself to one of South Africa's six refugee reception offices to obtain refugee status. These Refugee Reception Offices are based in Pretoria, Johannesburg, Durban, Cape Town, Port Elizabeth and Musina.

Section 6 of this Act requires that it be interpreted and applied with due regard to instruments of international human rights protection, including the 1951 UN Convention Relating to the Status of Refugees, the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, and the 1948 Universal Declaration of Human Rights. This approach accords with the Constitution, which requires that the Bill of Rights be considered in light of South Africa's international law obligations.

Section 21(4) of the Refugees Act demarcates the boundary between the Immigration Act and the Refugees Act. It states that no proceedings may be instituted or continued against a person for being an "illegal foreigner" if that person has either made an application for asylum or has been recognized as a refugee. Where the Refugees Act applies, the provisions of the Immigration Act should not be employed. The Refugees Act contains its own measures for enforcement, including detention. Accordingly, the Immigration Act cannot be applied, at the whim of the immigration officer, to individuals whose status falls under the provisions of the Refugees Act.

Section 22(6) of the Refugees Act contemplates the removal of asylum seeker permits. If the permit holder violates a condition of asylum, such as failing to abide by the laws of the Republic, the permit may be removed. Once a permit has been removed, the holder may be detained at the discretion of the Minister of Home Affairs under section 23 and held in accordance with section 29. Section 29 provides for a 30 day detention period. After 30

days, the detainee must be brought before a High Court judge to determine if further detention would be reasonable and justifiable. The detention of a child must only be used as a measure of last resort, in accordance with the similar constitutional provision (section 28(1)(g)).

Immigration officers routinely ignore the provisions of the Refugees Act in favour of the Immigration Act's less burdensome procedures, requiring only written access to the courts. There is no legal basis for this practice, as a person whose status is governed by the Refugees Act must also be detained in accordance with that Act where such detentions are related to his or her status.

Reliance on the Immigration Act has greatly reduced the protections of review and appeal, while encouraging immigration officers to use detention as the primary tool of immigration enforcement. This has resulted in long-term detentions that fall outside of the law and take place in an environment of corruption and abuse. This practice also fails as an effective policy for enforcing the legitimate concerns of a state confronting a large degree of irregular movements across its borders. Of more concern it also amounts to a failure of the state to comply with its international and domestic laws in respect of refugee protection.

Detentions and deportations have proven ineffective as an enforcement strategy, while exposing immigrants and asylum seekers to an inefficient and corrupt system subject to abuse. We therefore recommended that a drastic change in immigration policy be undertaken by the Cabinet and the Department of Home Affairs, with a view to re-working the Immigration Act. This process should be accompanied by greater monitoring and oversight of existing procedures.

3. ARREST PROCEDURES

Additional legislation also provides a practical basis for the arrest and detention of so-called "illegal foreigners." The Criminal Procedure Act (Act no 51 of 1977) allows for the arrest and detention of "prohibited persons." In the area of border control, arrest and detention is governed by the Defence Act (Act no 42 of 2002). But while South African law enables other law enforcement agencies to be involved in immigration enforcement, only immigration officers are empowered, under the Immigration Act, to declare someone an illegal foreigner and to effect their deportation from the Republic.

In the normal course of events, a police officer, an immigration officer or a member of the SA National Defence Force patrolling the border may, upon reasonable grounds, request a person to identify themselves as a citizen, a permanent resident or a temporary resident. The person may be detained for up to 48 hours while their status is verified, provided there are reasonable grounds for such detention.

During that 48 hour period, the officer must consult the records of the Department of Home Affairs and review any documentation provided by the detainee. According to the Immigration Regulations,

the officer must also allow the detainee to contact any person who may help establish his or her status and to have reasonable access to their documents to prove their status. Relatively few police, military or immigration officers, however, actually allow such access.

Where it cannot be immediately verified, an immigration officer should be called in person to determine the status of the individual. In terms of section 34 of the Immigration Act, only an immigration officer may declare a person an illegal foreigner and detain, or cause his or her detention, on that basis. Similarly, only an immigration officer may deport or cause that person to be deported. The Immigration Act and its regulations also contain various administrative guarantees that provide for notices to be issued to the detained person at several stages of the process.

Despite these legal provisions, other law enforcement agencies frequently employ the powers reserved for immigration officers, both at the border and in urban areas. In urban centres in particular, the perception of inadequate immigration enforcement by the Immigration Inspectorate has motivated other law enforcement agencies to exceed the powers granted to them in law.

In 2006, immigration officers in the Free State province sought to enforce the provisions of the Refugees Act on the basis of their authority under the Immigration Act. They arrested a number of asylum seekers and charged them with non-compliance with the terms of their permits because they had not notified DHA that their addresses had changed. These arrests occurred despite the fact that, at the time, there was no procedure in place for changing an address on a permit. Moreover, considering the well-documented access problems at the refugee reception offices, it is unrealistic to expect that an asylum seeker would be able to access the offices simply to change their address.

The matter was eventually struck from the roll in the local magistrate's court due to the non-attendance of an interpreter.

More recently, on the night of 30 January and the morning of 31 January 2008, police officers from the Johannesburg Central Police Station conducted a raid on the Central Methodist Mission, which runs a shelter for many undocumented and documented migrants in central Johannesburg. The raid was authorised under section 13(7) of the SA Police Act (Act no 83 of 1986), allowing for the cordoning off of a particular area to ensure the safety of the public or to restore public order. The authorisation specified that it was being conducted in order to search for firearms, ammunition and other criminal items. None were found. The effects of the raid included damage to the Central Methodist Church, abuse and assaults of its residents and the arrest of approximately 1300 people.

Within hours of the raid, 800 of those arrested were released and forced to walk through the Johannesburg Central Business District in the pre-dawn hours in order to return to the mission. Over the next couple of days, over 500 were kept in custody and brought to court on charges of being illegally in the country. Many were released when it became clear that they would not be brought before the court within 48 hours of their arrest. The remaining detainees

were represented by a variety of private law firms and public interest NGOs. They were released after the magistrate was reprimanded by the High Court for having abused her powers during the bail applications. Despite the stated purpose of the raid, no person was charged with a non-immigration related offence.

Although immigration officers were present during the raid, they did not participate. Most of those arrested were taken to the police station without being seen by these officers to verify their status.

This episode is illustrative of the ways in which police overstep their powers in order to conduct immigration raids under the guise of law enforcement activities.

This abuse of detention is ongoing. During November 2008 we have received more than one report of asylum seekers being detained at the Atteridgeville Police Station after receiving negative decisions on their asylum claims, despite being legally entitled to launch an appeal within 30 days. One of the asylum seekers was told that he would be able to make his appeal from Lindela, but was detained at the police station for one week with no information. In the last reported incident, the asylum seeker was deported from Lindela to Zimbabwe within 3 days, despite being in possession of a notice from the Refugee Appeal Board confirming her appeal hearing in March 2009.

Similar detentions at police stations have been reported in Mokhadlo, Polokwane and Musina, in some cases where foreign nationals who wish to press charges against abusive or corrupt police officials are kept in detention in the hopes that they will eventually withdraw the charges. These individuals are told that they must remain in detention because they are potential witnesses. No legal provision exists for the detention of individuals on such grounds. In other cases asylum seekers have been arrested from outside humanitarian NGOs where they have sought social assistance, and subsequently been detained and then deported.

4. LINDELA REPATRIATION CENTRE



An asylum seeker leaving the Lindela Detention Centre after his release.

Following their arrest, the majority of illegal foreigners are sent to the Lindela Detention Centre, outside of Johannesburg, pending deportation. LHR is unable to fully report on conditions at Lindela because DHA continues to deny monitoring visits. Consultations with clients, however, reveal that little has been done to alleviate problems documented in

the past. These include routine violence, corruption and bribery, insufficient food, overcrowding, lack of reading and writing materials, denial of access to medical care, and indefinite detentions without judicial review.

Efforts to establish accountability for these abuses have been thwarted by the fact that DHA has contracted out the management of Lindela to Bosasa, a private company. By pointing to Bosasa as the entity responsible for the treatment of detainees, DHA seeks to avoid accountability under the provisions of the Constitution and the Bill of Rights, South African administrative law, and international human rights instruments. At the same time, enforcement of these provisions against Bosasa is hindered by the status of Bosasa as a private entity that is not eager to cooperate in human rights monitoring and oversight efforts.

DHAs subcontracting to Bosasa displaces accountability and results in both actors evading responsibility. Moreover, the Immigration Act makes no provision for the manner in which detention centres should be administered, enabling Bosasa to operate free of any monitoring or oversight, while ordinary penal prisons fall under the monitoring mandate of the judicial inspectorate

a. Verification of status and access to asylum procedures

Apart from the special provisions of Section 22(6) of the Refugees Act contemplating the removal of asylum seeker permits and the Minister's discretion to then detain the asylum seeker, there is no provision in law for the detention of asylum seekers and refugees.

Yet, because of the difficulties that many people face both in being assisted by immigration officers at border posts and ports of entry and in accessing the Refugee Reception Offices, a great number of bona fide asylum seekers are arrested and detained at Lindela as "illegal foreigners".

Many asylum seekers who do manage to gain entry to a Refugee Reception Office are not issued with a Section 22 permit immediately as provided for in the Refugees Act, but are instead advised to return up to three months later to collect their permits. In the interim these asylum seekers are subject to arrest, detention and deportation as undocumented "illegal foreigners" through no fault of their own, but as a result of DHA's failure to issue permits in terms of Section 22(1) of the Act.

A similar situation arises when documented asylum seekers report to a Refugee Reception Office to renew their permits, but are denied access by the security guards, or are unable to renew their permits because of long queues. Once the permits have expired, these asylum seekers also become vulnerable to arrest, detention and deportation.

Section 21(a)(a) of the Refugees Act states that once a person has stated their intention to apply for asylum, he or she must be issued a temporary asylum seeker permit, and may remain legally in South Africa pending the completion of the asylum determination and appeals process. Accordingly, once a detained asylum seeker has made his intention to apply for asylum known to an immigration officer, the law requires that he be able to lodge his claim and receive a temporary asylum seeker permit.

Moreover, Section 21(4) of the Refugees Act states that no proceedings may be instituted or continued against a person for being an "illegal

foreigner" in terms of the Immigration Act if that person has either made an application for asylum or has been recognised as a refugee. Detainees who wish to apply for asylum should thus be released.

Section 41 of the Immigration Act read with Regulation 32 of the Immigration Regulations places a duty on police officers and immigration officials to verify and identify the status of persons arrested and detained as "illegal foreigners" when they are informed that the arrested person has lodged an asylum application. To this end the duty extends beyond verifying an individual's status to verifying attempts to lodge asylum applications with the Department as well.

Numerous detainees in Lindela have told LHR that when they approach immigration officers to verify their asylum applications, or to inform them that they wish to lodge asylum claims, they are often met with indifference or scorn, and their requests are ignored. As such, detainees in Lindela find it virtually impossible to access the asylum process without the assistance of an NGO or a private attorney.

LHR was previously able to intervene on behalf of asylum seekers to secure their release from Lindela. Since September 2007, however, DHA has instituted a practice of continuing to detain asylum seekers who apply for asylum from within Lindela, or those whose claims are verified after they have been transferred to Lindela, until a final decision has been made on their claims and all appeals have been exhausted. An asylum seeker who receives a negative decision may lodge an appeal within 30 days, but he or she will remain in detention until the appeal is finalised—a process that can exceed one year. A detainee will only be released once he or she is granted refugee status.

Asylum seekers remain vulnerable to *refoulement** while they await finalisation of their claims under this process. In July of this year, LHR intervened on behalf of an asylum seeker from Sri Lanka who was being detained at Lindela. Although assisted by immigration officers at Lindela to lodge his asylum application after LHR's intervention, DHA nonetheless instituted deportation proceedings against him prior to him receiving a decision on his claim. LHR was able to halt his deportation approximately twenty minutes before his departure. He was subsequently granted refugee status and released from Lindela two days thereafter. The fact that he was ultimately recognized as a refugee, and that his deportation was halted only through the last minute intervention of LHR because he was fortunate enough to access a phone hours before his intended deportation, suggests that other bona fide refugees are being returned to areas where they fled human rights abuses, in contravention of the legal prohibition against refoulement in both domestic and international law.

LHR is currently representing the Zimbabwe Exiles Forum (ZEF) in a matter brought against the Department of Home Affairs. The case was brought on behalf of 33 Zimbabweans who were arrested outside of the Chinese Embassy in Pretoria in March 2008, while protesting against the delivery of a Chinese arms shipment to Zimbabwe.

* *Refoulement* means the expulsion of persons who have the right to be recognised as refugees. The principle of non-refoulement has first been laid out in 1954 in the UN-Convention relating to the Status of Refugees, and is now a universally accepted in principle of international law and is also reflected in South Africa's Refugees Act.

Those arrested were all MDC members actively protesting against their government. Some of them had already lodged asylum applications at Refugee Reception Offices and had been given dates to return, while others lodged their asylum claims for the first time while in Lindela.

The application for their release was brought before the High Court in Pretoria on an urgent basis. DHA agreed to their release on the date of judgement. The second part of the application will be argued in 2009 in which ZEF has requested the court to clarify the legality of the Department's policy and practice on a number of issues affecting asylum seekers in Lindela. These include the continued detention of asylum seekers once they have been issued with temporary permits, the maximum length of detention permissible in law, and the worrying practice that has developed recently, in which immigration officials release and immediately re-arrest asylum seekers at Lindela in order to circumvent the relevant provisions restricting lengths of detention. This practice is not only unconstitutional, but arguably also amounts to cruel and unusual treatment under the UN Convention Against Torture (CAT).

b. Length of detention

As the result of a 1999 case brought by the Law Clinic of the University of the Witwatersrand and the South African Human Rights Commission (SAHRC), the SAHRC now has bi-monthly access to Lindela's registers in order to monitor compliance with the rules governing detentions that exceed twenty days¹. These registers list every detainee who has been held in excess of twenty days, along with his or her country of origin and the date he or she was brought to Lindela. They reveal that some detainees have been detained for over two years.

In spite of the ruling, access to the registers remains problematic because they appear to be under the control of Bosasa rather than DHA. As a result, when LHR has requested information on a particular detainee, or has sought to consult with a detainee whose name was not faxed to Lindela in advance, DHA officials have been unable to comply. Instead, they have advised LHR that requests regarding specific detainees need to be forwarded to Bosasa. This demonstrates that DHA is not exercising the requisite control over detention practices at Lindela.

c. General detention conditions

Detention facilities at Lindela are divided into a men's section and a women's section. Each detainee has his or her own bed in a cell that contains 30 beds. Each cell has its own television, but there are no reading materials or other recreational facilities. Different groups of detainees are held in separate sections of Lindela. Detainees scheduled for deportation within 48 hours are moved to C section prior to deportation. Though there is ample space at Lindela, many of the detainees may be crowded together in particular sections.

d. Health care

Numerous detainees have complained to LHR that they have experienced difficulties being assisted by the doctor and the resident nurses at Lindela, and that when they are seen they are merely given painkillers,

irrespective of their particular ailment or condition. LHR has also received reports that nurses have refused to give any medical assistance to detainees who were 'fighting with the guards'. In one instance, a detainee attempted to break up a fight between a group of Nigerian and Congolese detainees in the kitchen. When the guards entered, he was caught in the middle of a scuffle and kicked by the guards repeatedly until he was rendered unconscious. The nurses refused to give him medical assistance.

There are also reports that detainees suffering from tuberculosis do not sleep in separate cells but are kept together with other detainees, thereby spreading the infection. There is no access to anti-retroviral treatment inside Lindela.

e. Food

Although difficult to verify, LHR believes that there are problems with both the quantity and quality of food. LHR also is troubled by reports that detainees sell food to each other in order to obtain income for phone calls and cigarettes. The practice is apparently condoned by the guards, some of whom confiscate the money. Despite lodging complaints with the head of security, detainees have not had this money returned to them.

These conditions run foul of the Constitutional provisions relating to detained people demanding at section 35(2)(3) that 'conditions of detention are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.'

f. Children

LHR is disturbed by reports that minors are being held in detention at Lindela together with adults. In *Centre for Child Law and Another v Minister of Home Affairs and Others* (2005 (6) SA 50 (T)), the High Court held that unaccompanied foreign children found in South Africa must be dealt with under the Child Care Act 74 of 1983 in the same manner as South African children, before being dealt with in accordance with the Immigration Act. The Child Care Act requires that children be brought before a children's court to determine if they are in need of care. As such, they should not be detained at Lindela as "illegal foreigners" together with adults.

g. Use of force

All incidents of force and outbreaks of fighting at Lindela, as well as any occasion for the use of force by security guards, are supposed to be recorded in Bosasa's incidents log book. LHR has received a number of complaints of abuse by Bosasa security guards, and in certain instances also against immigration officials. It is problematic that these incidents are regulated by the same guards and officials who are perpetrating the assault, in the absence of any external oversight. Several detainees have indicated a desire to file a formal complaint with the Human Rights Commission, but have stated that they are unwilling to do so while still in detention for fear of repercussions.

Although cell phones are officially not permitted inside Lindela, a number of detainees possess them. The guards generally tolerate

1. *SAHRC and Forty Others v. Minister of Home Affairs and Dyambu (Pty) Ltd.*, Case no. 28367/99, Witwatersrand High Court, November 1999.

their presence, or use them as a means of extorting payment. Occasionally, cell phone raids do take place, either at the discretion of the guards or under the direction of DHA. LHR has received reports that excessive force and violence is used against detainees suspected of being in possession of cell phones.

LHR also has received numerous reports of detainees being beaten both by security guards and by immigration officials, in order to force them to comply with their instructions. These instructions include the signing of 'voluntary repatriation' forms and the forced entry into vehicles taking them for embassy visits to obtain travel documents for deportation purposes. These reports increased significantly during August to October 2008, when a group of 208 male asylum seekers and refugees displaced by the outbreak of xenophobic attacks in May 2008 were detained at Lindela.

Officials also continue to use teargas on detainees to deal with protests and so-called "strikes."

h. Displaced foreigners affected by xenophobic attacks

Thousands of foreigners were displaced by the outbreak of xenophobic attacks in May 2008. In Johannesburg, many of them sought temporary protection at the Jeppe and Cleveland police stations before being moved to the Rifle Range temporary protection site in Glenanda. During July 2008, the government began a process of registering the foreign nationals seeking protection at various sites. This process was met with particular resistance at the Rifle Range site. The majority of those resisting were in possession of refugee and temporary asylum seeker permits. After refusing to register, approximately 750 people were removed to Lindela under threat of deportation. With the exception of 14 individuals who had not lodged asylum applications, all of them were released once their documents has been verified or re-issued. Having nowhere to go and no means of transport, this group remained on the side of the R28 highway near Lindela. Initially offers of transport back to Rifle Range site and alternative accommodation were made to the group by the local municipality, though the majority of the group did not want to move until everyone had been released. A few days later, and after the accommodation offers were no longer available, the police arrested a group of 208 men only on criminal charges of obstructing traffic. The women and children were then sent to a nearby shelter.

LHR assisted the Legal Aid Board at the Krugersdorp Justice Centre in representing the 208 men who were detained in police custody for one week before the criminal charges against them were withdrawn. Once the charges were withdrawn they were not released but were immediately sent back to Lindela, on 6 August 2008.

The vast majority of this group has now been voluntarily repatriated directly from Lindela through UNHCR and IOM, though a number have also been illegally deported. The detainees who remained in the country informed LHR that those who "voluntarily" opted for repatriation were in fact forced to apply by the immigration officers at Lindela, under threat of deportation, indefinite detention, and beatings.

LHR launched an urgent application against DHA on 2 September 2008 calling, amongst other relief, for the halt of any deportations of this group of foreigners; for their release from detention; and for the return of their asylum seeker and refugee permits, on the basis that any status determination and appeal interviews that were conducted while they were in police custody at the Krugersdorp Police Station, or after they were subsequently re-detained at Lindela, were conducted irregularly, in part because of their unlawful detention at the time. Lindela was apparently designated as Refugee Reception Office during this period for the purposes of accelerated status determination interviews.

After launching this application, LHR was informed that the Department was continuing to deport individuals from this group, despite the pending legal challenges. LHR sought an undertaking from DHA that no one would be deported until the court had made a finding on the facts. After the Department refused to give this undertaking, LHR launched an urgent application seeking an interdict preventing the Department from continuing any deportations until the court had made a final determination on the main application. Despite DHA opposition, the court granted the interdict.

Although the interdict prohibited further deportations until the case was resolved, DHA's own affidavit placed before the court revealed that the deportations, in contempt of the court order, had continued. Individuals were deported to countries where they faced grave risks of abuse and persecution, including the DRC, Burundi, Sudan and Ethiopia.

By the time oral arguments were scheduled, after a number of postponements caused by DHA, only 37 detainees remained in Lindela. The court ordered that all 37 of the detainees be released by 11h00 on 24 October 2008. The last of this group were finally released at 19h00 on 24 October, 2008.

5. MUSINA DETENTION CENTRE (ZIMBABWE BORDER)



Women's section at SMG



Men's section at SMG

The town of Musina sits just 16 kilometres south of the Beitbridge border, the main point of entry into South Africa for Zimbabwean asylum seekers. It is home to the SMG detention centre. In contravention of South African law and the applicable international refugee conventions, South Africa departs around 3,900 Zimbabwean migrants every week from Musina, some of whom have valid asylum seeker permits or claims. In and around Musina, Zimbabweans are often simply picked up, detained at the local detention centre, and then deported back to Zimbabwe. This is done without

regard for their legal status in South Africa, or for the danger they will face in Zimbabwe.

The SMG detention centre consists of an enclosed basketball court housing detainees awaiting deportation, a block of toilets separated from the housing facility, and a small outdoor perimeter where detainees are brought once a day to receive food, which usually consists only of bread and water. Occasionally detainees are also given pap (thick porridge) with a boiled chicken foot and very watery gravy. No provision is made for baby food or nutritional requirements of pregnant or breastfeeding women. The detention area is split down the middle, with tin roofing and barbed wire, constructed into a wall that separates the men from the women and infants. On the women's side, there are two sinks and a stack of filthy mats. On the men's side, there is no bedding and only one sink. The enclosed facility has a line of windows covered in barbed wire, but no proper ventilation. The lack of toilet facilities, the lack of refuse areas or receptacles, and the large number of people kept in such a small space, creates an unbearable stench and a potential health hazard. As a result of these factors, the entire facility is unfit for occupancy.

The conditions and procedures in place at the SMG detention centre, in Musina, directly contravene South Africa's legal obligations to protect the rights of refugees and asylum seekers, particularly children, and to maintain minimum standards of detention for all detainees.

Section 34(1) of the Immigration Act authorizes an officer to detain "illegal foreigners" pending deportation only in a manner and at a place determined by the Director-General. Although hundreds of Zimbabweans are detained daily at SMG pending their deportation, SMG has not, to our knowledge, been formally designated in terms of the Immigration Act. The unofficial status of the facility blurs the lines of responsibility and obscures the Department of Home Affairs' accountability for the numerous violations occurring there daily.

The facility is located within a military compound and overseen by officials from the South African Police Service. During months of daily monitoring by LHR, we observed, at times, the presence of only one immigration officer.

Although only immigration officers may detain, or cause "illegal foreigners" to be detained, LHR has observed a number of different actors taking people into SMG custody. Both police officers and immigration officers regularly take new detainees to Lindela, with no formal registration processing of these new arrivals. LHR also observed men without uniform or identification delivering a number of people to SMG. In client interviews, we discovered that it is commonplace for farmer employers to cause for their seasonal employees to be brought to SMG for deportation, to avoid paying them wages at the end of the month.

a. Detention procedures

i. No verification of status

In terms of Section 21(1)(a) of the Refugee Act, once a person has stated their intention to apply for asylum, he or she must be issued a temporary asylum seeker permit, and may remain legally

in South Africa pending the completion of the asylum determination and appeals process.

LHR has observed a number of detainees (approximately one in ten detainees canvassed) in possession of valid documentation who were being held at SMG pending deportation. Since August 2008, an LHR attorney has been on site daily to separate documented asylum seekers from the group awaiting deportation.

ii. Length of detention of non-Zimbabweans

Although SMG holds predominantly Zimbabweans awaiting deportations, a number of non-Zimbabweans are also detained at SMG awaiting transfer to Lindela for further deportation processing. This detention pending transfer to Lindela can continue in excess of a number of weeks. The conditions at SMG are inadequate for overnight detention, much less for use as a long term holding facility.

In September 2008, a group of Malawians were held for over three weeks in the abhorrent conditions of SMG awaiting transfer. At the time of LHR's visit, they were begging SMG officials for permission to fund their own return to Malawi in order to accelerate their release.

LHR also interviewed a number of Zimbabweans who were held for days before being deported due to overcrowding at the facility. Detainees are selected at random for deportation, without regard to the length of their detention. Many have asked LHR to advocate for their speedy deportation to avoid additional nights at SMG.

iii. Registration of detainees – admission, release and deportation

The United Nations Standard Minimum Rules for the Treatment of Prisoners¹ (hereinafter "U.N. Minimum Rules") requires that in every place where people are imprisoned, a bound register must be kept with each detainee's identity, the reason for his detention, and the date and time of his admission and release (Art. 7(1)). SMG has no formal process for registering new arrivals. The immigration officer on site does register those who are removed from SMG, but many of those interviewed reported that numerous people pay bribes to the driver of the deportation truck between SMG and the border.

b. Detention conditions

Section 34(1)(e) of the Immigration Act states that "illegal foreigners" who are detained pending deportation "shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights." The Regulations to the Act as regulation 28(5) refer to Annexure B, the Minimum Standards of Detention. The conditions at SMG violate both Annexure B to the Regulations, the U.N. Minimum Rules, section 35 of the Constitution and fail to protect the inherent right to human dignity explicitly guaranteed in Section 10 of the Constitution.

i. Living and sanitation conditions

Annexure B to the Regulations provides that detainees should be provided accommodation with 'adequate space, lighting, ventilation, sanitary installations and general health conditions and access to

1. U.N. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

WEST RAND REMOVALS



Children were among the stranded R28 group.

basic facilities. (Art. 1), that every detainee SHALL be provided with a bed, mattress and at least one blanket (Art. 2). The regulations only provide for deviation of these minimum conditions if approved by the Director General at a particular detention centre, and only for purposes of support services or medical treatment. No deviation is permitted in terms of sleeping accommodation.

The Regulations further specify that each detainee be provided with an adequate diet providing for nutritional requirements of children, pregnant women and other categories of detainees, served at intervals of not less than four and a half hours, nor less than fourteen hours between evening meal and breakfast, and clean drinking water should be available to every detainee at all times (Art. 2).

The U.N. Minimum Rules require that detention facilities should have natural light and fresh air (Art. 11(a)), that adequate bathing installations should be provided (Art. 13), that detainees should have separate and sufficient bedding (Art. 19), that every prisoner should receive adequate food (Art 20(1)), that drinkable water should be available whenever needed (Art 20(2)), and that medical services must be available (Art 22).

The conditions at SMG violate each of these basic requirements.

At SMG, the toilet facilities are inaccessible from the area where detainees are held. Guards are often unavailable, or simply refuse, to let detainees out to use the toilets. Detainees are forced to urinate and defecate on the floor of communal areas in which they must then sleep, or in small plastic buckets which are quickly filled. There is no regular cleaning of the facility, which often holds over three-hundred people at once. LHR has observed the police captain in charge of SMG, together with some junior officers selecting detainees at random and striking them with a yard of garden hose in order to force them to clean the facility. For the unfortunate individuals forced to clean the facility there is no protected clothing of any nature provided for them.

Along with the lack of sanitation, the men's side of SMG lacks running water for drinking or bathing. There is no bedding on the men's side and wholly inadequate bedding on the women's side. Male detainees receive one large slice of bread and water in the morning; women receive bread with jam and tea. There is no medical care available on site.

Women with young children must be provided with special accommodation, including adequate food to be able to breast feed, and formula for their children. SMG is extremely unsafe for babies, yet women with young children receive no additional protection.

ii. Health care

Although tuberculosis and other infections can easily be spread in a small, enclosed space housing hundreds of people, there is no medical care available at SMG. Of particular concern is the exposure of very young children (as young as a few weeks old) to illness. One child (a fourteen year old boy) reported to LHR that he had malaria, and that he just wanted to be deported quickly so that he could seek treatment in Zimbabwe. No medical care was provided for him,

which aspect was in contravention of Article 35 of the Constitution of South Africa

c. Children

i. Unaccompanied minors

Section 28(2) of the Constitution provides that "A child's best interests are of paramount importance in every matter concerning the child." In terms of Section 29(2) of the Refugees Act, "The detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time." The Immigration Regulations provide that detained minors SHALL be kept separately from adults and in accommodation appropriate to their age, and further that unaccompanied minors SHALL not be detained (Art. 1(d) of Annexure B to regulation 28(5)). The U.N. Convention on the Rights of the Child provides in article 37(b) that "arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

On each of LHR's visits to SMG, numerous children as young as twelve years old were detained. In contravention of the Convention on the Rights of the Child (signed by South Africa on 29 January 1993) and the African Charter on the Rights and Welfare of the Child (signed by South Africa 10 October 1997), as well as South African law, these children were detained together with adults.

In *Centre for Child Law and Another v Minister of Home Affairs and Others* (2005 (6) SA 50 (T)), the High Court held that unaccompanied foreign children found in South Africa must be dealt with in accordance with the Child Care Act 74 of 1983. The Child Care Act requires that children be brought before a Children's Court to determine if they are in need of care. At SMG, there are no social workers or other personnel qualified to consult with children, as the law requires. The deportation of children is carried out despite the clear knowledge that the Social Welfare system in Zimbabwe has totally collapsed.

d. Use of force

Officers of a detention facility may not use force against detainees, except in self-defence, in cases of attempted escape, or in active or passive physical resistance to a legal order (U.N. Minimum Rules, Art. 54(1)). Any force used must be no more than is strictly necessary, and the incident must be immediately reported to the director of the institution.

The police overseeing SMG apparently maintain order in the facility through the random use of physical force. The officers hits people, and threatens to hit people (including children) with a switch, created from a garden hose, when giving them orders – to clean, to stay in line, or to leave an area – or simply as a method of crowd control. Should groups get "out of control," they herd them backwards by swinging his switch and hitting whoever does not get out of the way quickly enough.

1. U.N. Standard Minimum Rules for the Treatment of Prisoners, article 27 states "discipline and order should be maintained with no more restriction than is necessary for safe custody."

This method exceeds the requirement to use the least restrictive method available to maintain order¹. It also violates Section 12 of the Constitution, as well as South Africa's obligations under applicable international and regional conventions, to protect against cruel, inhuman, or degrading treatment or punishment.

On 16 October 2008, three Zimbabweans detained at SMG were subjected to cruel and inhumane assaults at the hands of a number of police officers. The police officers tightly handcuffed one of the detainees with his hands behind his back. Later, the police officials forced one of the non-handcuffed detainees to handcuff the other, forcing him to continue tightening the handcuffs while his friend cried out and yelled in pain. Once handcuffed, the detainees were forced to get down on the ground and roll in the puddles of urine which line the holding cell where the detainees sleep. While being forced to roll in urine they were assaulted with hosepipes and kicked with booted feet. At least one hundred detainees witnessed the assault.

Through the insistence of an LHR lawyer, two of the three detainees were eventually able to lay charges against the police officers involved. However, after being removed from the detention facility under the pretext of being assisted with lodging their complaints, they were shackled in leg irons and charged with malicious damage to property. After being detained in police holding cells, they were then taken to Makhoda Prison pending the conclusion of the matter in court. The continued ill-treatment by the police suggests that these detainees are being retaliated against for pressing charges against members of the force. Of concern as well is that no investigation has, as at the date of publication of this report, been carried out against the officers who tortured the detainees.

Since LHR intervened in this matter, our representative in Musina has been denied access to SMG by the SAPS Superintendent ostensibly in charge of the facility, despite the UNHCR formally being allowed access, and LHR's status as a UNHCR local implementing partner.

6. IMMIGRATION DETENTION IN PRISONS

While some of the illegal foreigners in prisons are awaiting trials or serving prison sentences for criminal offences, others are there on immigration charges while awaiting transfer to Lindela. For instance, the police in Durban detain illegal foreigners at the local police station pending the arrival of an immigration officer. If the detention period exceeds 24 hours, the detainees are sent to Westville prison until an immigration officer arrives. The majority of individuals who are asylum seekers are released following these interviews.

In Cape Town, illegal foreigners are held at the local police station. There, they are picked up by the Immigration Inspectorate and taken to the immigration offices, where their status is verified. If an individual is deemed to be an illegal foreigner, he or she is given a notice of consent to sign and then transferred to Pollsmoor prison. Illegal foreigners at Pollsmoor are housed separately from the general population while they await transfer to Lindela. Transport

to Lindela happens every Thursday. As a result, illegal foreigners generally are not held at the prison for longer than a week.

Although this procedure accords with the law, it is not applied consistently to all individuals who are deemed to be illegal foreigners. In some instances, officials charge the detainee with a Section 49 offence under the Immigration Act and seek a prison sentence prior to deportation. These individuals are detained alongside ordinary criminals before being deported.

The concern relating to detaining foreigners under immigration detention alongside awaiting trial prisoners as well as convicted prisoners is that the "illegal foreigners" have not perpetrated any crime beyond their irregular status in the country. While there is at least judicial oversight of prisons by the judicial inspectorate, the conditions in awaiting trial sections of prisons and police stations are often the most crowded and least compliant with basic minimum standards of detention.

While this report focussed mainly on the detention concerns at the Lindela and SMG detention facilities, future reports will focus on non-nationals held on immigration charges in prisons.

7. DEPORTATIONS

The following table shows that deportations began increasing significantly in 2005. This increase is in part a result of the heightened police role in immigration enforcement.



Note: Statistics for 2008 are only through September of that year.

8. CONCLUSION

Problems with South Africa's immigration approach, as well as failures in oversight and monitoring, have given rise to a detention system that is characterized by abuse and indefinite detentions. The detention of illegal foreigners occurs in a legal vacuum, removed from the legal protections found in both South African and international law.

We therefore recommend the following actions be taken:

- Reformulate immigration policy toward a modern view of enforcement that will encourage the use of border posts while discouraging irregular movement across the border;
- Ratify the Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

or Punishment, which calls for a system of independent visits by national and international bodies to places of detention;

- Establish an independent monitoring body to oversee compliance with arrest and detention procedures and to verify the status of those detained as illegal foreigners;
- Adopt minimum standards and guidelines for the administration of detention centres housing “illegal foreigners”;
- Address cases of abuse and improve conditions at the Lindela and Musina detention centres;
- Put mechanisms in place to ensure that detainees are not held in indefinite detention without legal process or subject to any form of detention that may amount to cruel and unusual treatment.

While LHR is aware that the Human Rights Commission is currently aiming to increase the implementation of its monitoring mandate in certain prisons, including Lindela, within the scope of the provisions of the Optional Protocol to the Convention

Against Torture, formal monitoring in itself will not be sufficient to eradicate the abuse of process and legal vacuum prevalent at these administrative detention facilities.

It is also necessary to distinguish between the roles of official detention monitoring bodies, and those organisations and or private attorneys providing legal assistance to persons in detention, as the purpose for collecting and using information will have different intended outcomes and may also be sensitive in some cases. One of the main aims of detention monitoring is to improve the conditions of detention, while the provision of legal services usually aims to secure the release of individuals or groups of detainees from administrative detention. For this reason it is imperative that a number of bodies are committed both to the monitoring of places of detention as well as providing legal and social services to persons in detention, as both areas are severely under-resourced.