BREAKING THE LAW, BREAKING THE BANK

The Cost of Home Affairs' Illegal Detention Practices

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Executive Summary

Introduction

This report shines a light on the Department of Home Affairs' (DHA) law-breaking activities in the area of immigration detention and assesses the financial costs of these illegal activities. These costs, totalling R4.7 million, are not only borne directly by the South African taxpayer but also divert resources away from important development services for South Africas, such as RDP housing, health care, education and water provision.

The report examines 90 legal challenges to immigration detentions brought over a 23-month period between 2009 and 2010. These cases reveal a government department that routinely violates its constitutional duties and its legislative obligations under both the Refugees and Immigration Acts. DHA's actions also display a general contempt for the legal process: the Department fails to implement court orders, continues to act in direct contravention of judicial rulings, and openly states that its actions are not bound by the law in cases in which particular legal provisions would prevent it from undertaking actions it deems necessary, such as arbitrary and indefinite detentions.

Detention of illegal foreigners in South Africa

Most illegal foreigners awaiting deportation are housed at the Lindela Detention Centre, located approximately 40 kilometres northwest of Johannesburg. The Immigration Act (No. 13 of 2002) empowers DHA to detain illegal foreigners for the purposes of deportation at Lindela, but it also sets out a series of procedural guarantees to ensure that these detentions and deportations are administratively fair and do not violate detainees' constitutional rights.

The Immigration Act only authorises the detention of illegal foreigners and only for the purposes of deportation. It does not authorise detentions in excess of 48 hours for purposes other than deportation, nor does it authorise the detention of asylum seekers. The Refugees Act (No. 130 of 1998) establishes a parallel system that specifically governs the detention of refugees and asylum seekers and protects them against *refoulement*—being returned to a country where they may face a threat to life or liberty. Because the non-refoulement principle prevents the detention of asylum seekers and refugees for the purposes of deportation, these categories of migrants cannot legally be detained at Lindela. DHA has sought to circumvent its non-refoulement obligations by denying individuals access to the asylum structure and placing all categories of suspected illegal migrants under the more punitive legal framework of the Immigration Act.

In 2009, the legal non-governmental organisation (NGO) Lawyers for Human Rights (LHR) began bringing regular weekly cases challenging both the detention of asylum seekers at Lindela and the Department's failure to put into practice the procedural guarantees around detention. Although DHA has lost or settled over 100 cases, the Department continues both to engage in the challenged practices and to defend these practices in court.

Examining the 90 cases brought between February 2009 and December 2010, this review details the various illegal grounds on which DHA has detained individuals at Lindela and analyses the arguments put forth to justify these detentions in defiance of the law and of judicial pronouncements. The report categorises the legal outcomes of every case, highlighting how DHA's actions contributed to unnecessary legal costs and extended the detention periods of those who were already being illegally denied their fundamental right to liberty. The analysis then breaks down the costs of DHA's actions in each of these cases.

Working with an economist, ACMS estimated the costs of each case in the following categories:

1. Legal costs incurred by LHR that were paid by DHA;
2. Legal costs incurred by DHA;
3. Cost of transporting detainees to Lindela;
4. Cost of detaining individuals at both the police stations and at Lindela; and
5. The potential opportunity costs of these wasted expenditures.[1]

The results that are detailed in this report will also be part of a broader ACMS initiative to cost South Africa's border control and deportation system.

Categories of illegal detentions

DHA engaged in a range of illegal practices to justify its detentions of individuals as illegal foreigners, including refusing them the protections of both the Refugees and Immigration Acts.

Violations of the Refugees Act

DHA's merging of the asylum and immigration frameworks has resulted in the immigration detention of individuals who should be protected by the Refugees Act. DHA has denied individuals the protections set out in this Act, and has instead turned to the more punitive

[1] Unlike the first four categories, this category is not based on a calculation of monetary values but instead considers some of the foregone spending possibilities (such as spending on housing, education and health care) based on the amounts calculated in the first four categories.

measures found in the Immigration Act. The case review uncovered the following categories of arrest that violated the Refugees Act and the rights of asylum seekers under this Act:

- Denial of the right to apply for asylum, including
    - Arrest of asylum seekers at the border,
    - Arrest of asylum seekers who enter with false documents,
    - Arrest despite stated intent to apply for asylum, and
    - Arrest stemming from access problems at the refugee reception offices;
- Denial of asylum protection with an expired asylum permit, including
    - No discretion regarding permit expiration,
    - Permit expired while ill/in the hospital, and
    - Permit expired while in detention/police custody;
- Sending of asylum seekers to Lindela directly from prison;
- Arrest of asylum seekers with valid asylum seeker permits;
- Detentions for purposes of deportation of asylum seekers who never received a negative asylum decision; and
- Arrests of refugees with valid refugee permits.

Bureaucratic failures, incompetence, and corruption

A number of individuals ended up in Lindela as a result of bureaucratic failures, incompetence, and corruption by DHA. These shortcomings included the failure to conduct proper verifications of immigration status, the loss of files and appeal requests, and improper procedures that affected both access and service delivery. Failures that led to improper detentions fell into the following categories:

- Failure to verify immigration status, including
    - Bureaucratic inability to verify;
- Procedural irregularities at the refugee reception offices, including
    - Procedural irregularities in the appeals process;
- Fraudulent stamps;
- Refusal of refugee reception officers to assist asylum seekers, including

    - Fraud stemming from lack of service;
- Corruption;
- Arrest stemming from failures to adequately explain the asylum process; and
- Arrests stemming from disruptions after the xenophobic attacks.

Violations of the law inside Lindela

Once inside Lindela, DHA continued to deny detainees their rights under the Refugees and Immigration Acts as well as their constitutional right to procedurally fair administrative action. Despite the detention of a large number of asylum seekers, DHA treated all detainees inside Lindela as illegal foreigners subject to the provisions of the Immigration Act. At the same time, it failed to implement most of the procedural guarantees found in this Act.

Asylum seekers in detention

DHA detained both existing and would-be asylum seekers at Lindela, in violation of the protections guaranteed them under the Refugees Act. The range of violations include:

- Denying individuals the opportunity to apply for asylum from inside Lindela;
- Arguing that asylum seekers may be detained as illegal foreigners on the following basis:
    - The right of an asylum seeker to sojourn may take place in detention;
    - An individual remains an illegal foreigner after applying for asylum; and
    - The legal requirement to halt proceedings against asylum seekers applies to deportation not detention.

Violations of administrative justice inside Lindela

In addition to the rights guaranteed to asylum seekers under the Refugees Act, all administrative detainees are entitled to administratively fair procedures. The right to just administrative action is guaranteed in the Bill of Rights and detailed in the Promotion of Administrative Justice Act (No. 3 of 2000). The Immigration Act also sets out a range of procedural guarantees in accordance with the constitutional right. DHA's violations of the right to just administrative action occurred in the following categories:

- Failure to issue the proper warrants and notifications;
- Detainees coerced into signing notices of deportation;
- Detainees forced to sign forms they did not understand; and
- Detentions exceeding the legally allowed maximum of 120 days.

DHA has openly sought to defend these practices in direct defiance of the law, making recourse to the courts the only option to vindicate the rights of those being illegally detained.

Legal processes

DHA's insistence that it was not bound by the law both forced unnecessary litigation and prolonged the detentions of those who were illegally being denied their fundamental right to liberty. In every case reviewed, DHA could have avoided litigation by acceding to the initial letter of demand that set out the reasons that a particular detainee was being held in violation of the law. Instead, DHA ignored these letters, which compelled detainees to institute court proceedings. Once legal proceedings were underway, DHA took one of the following actions, each incurring additional legal costs:

- *DHA acceded and asked for the case to be removed from the court roll*:
  After ignoring the letter of demand, DHA often acceded to the demands once legal proceeding were underway, resulting in the case being withdrawn. DHA paid LHR's legal costs in some of these cases.

- *DHA filed a notice to oppose but no opposing papers*:
  In some cases, DHA indicated an initial intention to oppose the court action but did not subsequently file court papers. Most of these cases ended in either an order by agreement or a court order against the Department, as well as a cost order. By waiting until the start of court proceedings to drop its opposition, DHA increased both its own and LHR's costs for which it paid cost recovery fees.

- *DHA filed opposing papers and then settled*:
  In some cases, DHA did file opposing papers but subsequently settled. The legal actions that preceded the settlement increased both DHA's own legal costs and the costs it had to pay to the other side.

- *DHA opposed the case in court*:
  In almost every case that DHA opted to argue in court, it lost. The Department was successful in two cases but subsequently lost on appeal, resulting in a stronger legal precedent against its actions. These cases increased DHA's cost liability.

The cases that were not removed from the roll resulted in either a court order by agreement or a court order against DHA. The Department also caused several unnecessary postponements, increasing both the costs of the litigation and the time that individuals were illegally detained. In many cases, the Department failed to adhere to the terms of the court orders, leaving individuals in detention for additional periods, and leaving them undocumented and subject to re-arrest following their release.

Costs of illegal detentions

The illegal practices described above, combined with DHA's actions during legal proceedings, have resulted in wasted costs totalling 4.7 million rand, over a 23-month period, although the true costs are likely to be higher. ACMS worked with an economist to estimate the legal costs, the costs of detention, and the opportunity costs of these detentions. Because ACMS limited its estimates to costs that could be confirmed for each case, the costs described below provide only a partial picture of the true costs, which are likely much higher.

- **Legal costs recovered by LHR: R1,253,686**
  This amount represents the total that LHR was allowed to recover for every case in which it was awarded costs under the rules setting out cost recovery in litigation.

- **Legal costs incurred by DHA: R783, 284–R1,253,686**
  This amount represents an estimate of the legal costs DHA paid attorneys and advocates for the following activities: perusal fees, drafting fees, and advocate fees. ACMS relied on the fees allowed by the taxing master, which are likely much lower than the true costs paid by DHA as it is not limited by these fees. The low estimate is based on the information that ACMS could obtain regarding the tasks performed. The higher number is based on the assumption that DHA incurred at least the same legal costs as LHR for each case. The lower amount was used to reach the R4.7 million total.

- **Cost of transporting individuals to Lindela: R82,350**
  This amount is an estimate of the total cost of transporting the detainees to Lindela from the place of arrest, assuming this transport occurred by car.

- **Detention costs: R2,630,805**
  To obtain this estimate, ACMS calculated detention costs for the number of days that individuals were held as illegal foreigners at police stations and at Lindela, as well as at the airport.

- **Opportunity costs: R4.7 million of foregone expenditure**
  ACMS estimated the opportunity costs of these expenditures in terms of the foregone options to which this money could have been allocated. For example, based on average detention costs, the government could have provided one South African with an RDP house for every two foreigners that it illegally detained. The entire R4.7 million in wasted costs could have built 87 RDP houses, provided an extra 168,144 households with the minimum water provision, or paid the salaries of 27 teachers or 44 nurses.

Conclusion

DHA's law-breaking activities have resulted in millions of rand of wasted government expenditure. This cost is borne not only by the taxpayer but also by the potential beneficiaries of the government's development programmes. While government contractors benefit from these illegalities, poorer South Africans pay the price when money that could be spent on housing, water provision, health care, and education is diverted to these illegal activities. The practice of arresting all suspected illegal foreigners and defending unlawful detentions in court fails to serve the country's immigration goals, detracts from the country's development goals, and wastes government resources, calling into question the rationality of DHA policy and practice. Moreover, the existence of a government department that routinely engages in law-breaking activities with impunity undermines the viability of the country's constitutional framework.

Introduction

> If the government becomes a law-breaker, it breeds contempt for the law. It invites every man to become a law unto himself. It invites anarchy.[2]

The words of US Supreme Court Justice Louis Brandeis warn against the dangers of a government whose actions are not bound by the rule of law. In South Africa, the Department of Home Affairs (DHA) has become such a 'law-breaker,' at least with respect to its treatment of asylum seekers and those it suspects of being illegal foreigners. DHA has consistently violated its constitutional and legislative obligations under both the Refugees and Immigration Acts. It has also shown contempt for the legal process by failing to implement court orders and continuing to act in direct contravention of judicial rulings. The Department has even suggested that it is not bound by the law when the law interferes with what it deems necessary and expedient.

This report shines a light on the actions of DHA as a lawbreaker by examining cases that challenge the detentions of illegal foreigners, brought over a 23-month period between 2009 and 2010. In every case that went to court, the judge found DHA's actions to be unlawful. Despite over 100 legal challenges, the Department has not altered its practices, suggesting that it does not take seriously judicial pronouncements on its legal obligations. While many South African citizens may not be particularly concerned with the treatment of suspected illegal foreigners, they should nonetheless be disturbed by a government department that not only routinely violates the law but also expressly claims that it is not bound by this law. There is little reason to believe that the Department's general contempt for the rule of law will be limited to its treatment of foreigners or that this attitude will not extend to other government departments, resulting in a government that is accountable neither to the public nor to the constitutional framework.

These illegal detentions also have cost implications for the South African taxpayer and for the country's reconstruction and development goals. For each illegal detention that is successfully challenged in court, the Department has to pay not only its own legal fees but also those of the winning side. DHA also pays detention costs for every individual in Lindela. When these individuals are detained illegally, this is money spent on nothing other than violating the law. For the 90 cases reviewed below, the overall costs total 4.7 million rand. This 4.7 million rand of wasted expenditures—stemming from DHA's law-breaking activities—is money that could have been directed towards the country's development goals, aimed at lifting South Africans out of poverty and providing them with access to the basic services needed to meet the minimum standards of human dignity.

[2] Justice Louis Brandeis (dissenting), *Olmstead v United States* 277 US 438 (1928).

Detention of illegal foreigners in South Africa

Most individuals arrested as illegal foreigners in South Africa are sent to the Lindela Detention Centre—the temporary holding facility for those awaiting deportation. Located in Krugersdrop, approximately 40 kilometres northwest of Johannesburg, this privately run centre was established as part of the Department of Home Affairs' (DHA) mandate to enforce the Immigration Act (No. 13 of 2002).

The Immigration Act empowers DHA to detain and deport illegal foreigners. But it also sets out certain procedural guarantees to ensure that all detentions and deportations are administratively fair and do not violate the fundamental rights of the detainees. The procedures set out in the Immigration Act are consistent with the Bill of Rights guarantees found in the Constitution. Moreover, as administrative detentions, detentions at Lindela are subject to the rights and limitations found in administrative law, including the requirements of just administrative action set out in the Promotion of Administrative Justice Act (PAJA) (No. 3 of 2000).

While the Immigration Act governs the detention of illegal foreigners, the Refugees Act (No. 130 of 1998) establishes a parallel system that specifically governs the detention of refugees and asylum seekers and protects them against *refoulement*—being returned to a country where they may face danger. The non-refoulement principle, a non-derogable norm under international law, prevents the detention of asylum seekers for the purpose of deportation. This principle stands in contrast to the provisions of the Immigration Act, which authorise DHA to detain individuals at Lindela only for the purpose of deportation. Accordingly, asylum seekers and refugees may not be detained there, as such detentions would violate the non-refoulement provision.

In 2009, the legal NGO Lawyers for Human Rights (LHR) began bringing regular weekly cases challenging both the detention of asylum seekers at Lindela, and the Department's failure to put into practice the procedural guarantees around detention. Between February 2009 and December 2010, LHR brought almost 100 cases. In almost every one of them, DHA either lost in court or settled the case before a judgment was issued. Yet, the Department not only continued to engage in the challenged practices, it also continued to defend these practices in court. DHA's behaviour prompted the following comment from the Supreme Court of Appeal (SCA) in a judgment stemming from one of these cases:

> [I]t is unfortunately necessary to comment upon the respondents' approach to this litigation. Section 7 of the Constitution imposes the duty on organs of State—and thus on officials of the Department—to "respect, promote and fulfil the rights in the Bill of Rights." The respondents' officials have failed to comply with these demands.... In the present instance the respondents' officials failed to understand the very object

> and purpose of the Act it was their duty to apply, causing unnecessary litigation and wasted costs.[3]

This censure had little effect on departmental practice. Despite having never successfully defended its detention practices in court, DHA continued to engage in practices that had already been declared illegal. It also continued to defend these practices in court, even after clear judicial statements that they were illegal. Moreover, in many instances, the Department failed to implement the court orders stemming from these cases, leading to further rights violations.

The sections that follow review the cases brought over a 23-month period and detail the various illegal grounds on which individuals were detained at Lindela. The discussion also examines DHA's justifications for these detentions, highlighting the ways in which these justifications diverge from the law. The review then categorises the legal outcomes of each case and highlights how DHA's actions incurred unnecessary legal costs and led to prolonged periods of illegal detention. Finally, the analysis breaks down the costs of DHA's actions in each of these cases and considers the opportunity costs of these wasted expenditures.

[3] *MAA3*, paras. 33, 36.

Methodology

This report reviews 90 detention cases from February 2009 to December 2010 in order to investigate both DHA's disregard for the law and the waste of government resources associated with its actions. The review focuses on the following areas:

- Patterns of illegal practices, including the detention of asylum seekers and the failure to abide by the procedural guarantees laid out in the law;
- The use of government resources to defend these practices, ruled illegal by a court, in the absence of any concrete legal argument justifying the decision to oppose the case;
- DHA's failures to implement court orders demanding specific actions, placing it in contempt of court; and
- The cost implications of these legal battles, highlighting the instances in which DHA expended resources to pursue frivolous legal defences where the law was clear.

Most of the detainees were male, but there were four females, including two sisters arrested together. One case involved an entire family. While the parents were detained at Lindela, the children were taken to a place of safety for minors. The two eldest children, who travelled separately from the rest of the family, were detained at the airport for several days. Two of the cases were appealed to the Supreme Court of Appeal.[4]

The nationalities of the detainees, which included one South African, are summarised in the table below.[5]

Afghanistan	8
Bangladesh	2
Burundi	21
Cameroon	2
Democratic Republic of Congo	41
Republic of Congo	1

[4] *MAA2*, *MAA3*.
[5] The numbers total more than 90 because some cases involved multiple applicants.

Ethiopia	2
Iran	2
Kenya	1
Nigeria	1
Pakistan	4
Rwanda	1
Sierra Leone	2
Somalia	2
South Africa	1
Sri Lanka	2
Sudan	2
Uganda	3
South Africa	1
Zimbabwe	2

All of the information detailed below is taken directly from court documents, including affidavits, heads of arguments, and judgments, as well as correspondence between LHR attorneys and the Department of Home Affairs. ACMS categorised the cases based on patterns of practice and grounds for detention. Each of the categories is discussed below, with the relevant cases. Many of the cases are linked to multiple practices and will appear in more than one category. The case names are listed by initials in order to protect the confidentiality of the individual applicants. The full case name is used in case citations that do not involve one of the 90 analysed cases.

The findings also categorise each case by the legal outcome: 1) removal from the roll; 2) settlement; 3) court order by agreement; and 4) court order. The review also indicates when these outcomes resulted in cost orders against DHA. The legal categorisation further specifies the instances in which DHA indicated an intention to oppose the case and whether it followed through with its opposition or ultimately settled. Finally, the review identifies

instances when DHA was responsible for unnecessary postponements and when it acted in contempt of court.

The report then analyses the costs associated with each of these cases. Working with an economist, ACMS estimated the costs of each case in the following categories:

1. Legal costs incurred by LHR that were paid by DHA;
2. Legal costs incurred by DHA;
3. Cost of transporting detainees to Lindela;
4. Cost of detaining individuals at police stations and at Lindela; and
5. The opportunity costs of these wasted expenditures.

Unlike the first four categories, the final category does not calculate a monetary value. Instead, it considers the foregone spending opportunities (e.g. housing, health care, water provision, education) of the money spent in the first four categories. More details of how costs were estimated in each of these categories will be provided in the costing section below. The results of this study will also form part of a broader ACMS initiative to cost South Africa's border patrol and deportation system.

The Legal Framework Governing Immigration Detention

Immigration detention is governed by two separate and parallel pieces of legislation: the Refugees Act, covering the detention of asylum seekers, and the Immigration Act, covering the detention of illegal foreigners. The Immigration Act empowers DHA to detain individuals for the purposes of deportation. Although the power to detain is discretionary,[6] DHA has employed detention as the primary tool of immigration enforcement, opting to apply a general policy of detention and deportation to all suspected illegal foreigners rather than exercise discretion over individual cases. This general policy has also been applied to asylum seekers, despite the fact that the Immigration Act's power to detain does not extend to asylum seekers. The non-refoulement principle prevents the detention of asylum seekers for the purposes of deportation. Instead, the Refugees Act sets out a separate legal regime that governs their detention.

As administrative detentions, detentions for immigration purposes are not subject to the normal judicial safeguards found in the criminal trial process. But they are regulated by the Constitution, which requires all administrative action, including detentions, to be lawful, reasonable, and procedurally fair.[7] The Promotion of Administrative Justice Act lays out further requirements for just administrative action. In addition, the Immigration Act itself contains a series of procedural guarantees that govern the process of detention and deportation and ensure that these processes accord with the requirements of just administrative action. In *Jeebhai*, the Supreme Court of Appeal ruled that immigration officials must strictly comply with the administrative justice procedures laid out in the Immigration Act.[8]

The Immigration Act

The Immigration Act, together with the Regulations, set out a host of procedures and prescribed forms in order to ensure a fair process of detention and deportation. The key provisions are summarised below.

[6] In *Ulde*, the Supreme Court of Appeal ruled that the general power to detain is discretionary and that a blanket policy of arresting and detaining illegal foreigners is unlawful. *Ulde v Minister of Home Affairs and Another* (320/08), 2009 (4) SA 522 (SCA).
[7] Constitution, Section 33.
[8] *Jeebhai and Others v Minister of Home Affairs and Another* (139/08), 2009 (5) SA 54 (SCA).

Arrest and detention for verification purposes: first 48 hours

Police and immigration officers

- *May* detain an individual for up to 48 hours in order to confirm his or her immigration status (Section 41).
- *Must* take reasonable steps to assist an individual to verify his or her status (Section 41). These steps include:
    - Allowing access to nearby and readily accessible documents;
    - Contacting relatives or other people who can confirm an individual's status; and
    - Accessing relevant departmental records (Regulation 32).
- May not detain an individual for longer than 48 hours for purposes other than deportation and may not detain an individual for purposes of deportation until he or she has been declared an illegal foreigner (Section 34).
- May declare an individual to be an illegal foreigner for the purposes of deportation. The Act only authorises immigration officers, not police, to make this determination (Section 34).

Detention for the purposes of deportation

Individuals who are declared illegal foreigners

- Must receive written notice of 1) the decision to declare them an illegal foreigner and 2) their right to request a review of this classification (Section 34).
- Must receive written notice of 1) the decision to deport them and 2) their right to appeal the decision (Section 34).
- May at any time request that their detention for the purpose of deportation be confirmed by a warrant of the court (Section 34).
- Must be immediately released if such a warrant is not issued within 48 hours (Section 34).
- Must be informed of the above rights upon arrest and in a language that he or she understands when possible, practicable, and reasonable (Section 34).
- May not be detained for longer than 30 days without a warrant of the court. The warrant may, on good and reasonable grounds, extend the detention for an adequate period that may not exceed 90 days (Section 34).

- Must be notified of the intention to extend their detention and must be given an opportunity to make representations as to why the detention should not be extended (Regulation 28).

The Refugees Act

The Refugees Act sets up a parallel legal framework with its own procedures for the detention of asylum seekers and refugees. The framework excludes the detention of asylum seekers and refugees as illegal foreigners under the legal regime established by the Immigration Act. As mentioned previously, the non-refoulement principle found in international law and upheld by the Refugees Act bars the detention of asylum seeker for the purposes of deportation.

The relevant provisions of the Refugees Act related to detention are summarised below:

- No proceedings may be instituted or continued against a person who has applied for asylum in respect of his or her unlawful entry or presence in the country (Section 21).
- The asylum permit lapses if an individual leaves the country without the Minister's permission (Section 22).
- The Minister may withdraw an asylum permit if the holder contravenes any of the conditions on the permit, the application is rejected, or the application is deemed to be manifestly unfounded, abusive, or fraudulent (Section 22).
- After withdrawing an asylum permit, the Minister may cause an individual to be arrested and detained in the manner and place determined by him or her, pending final adjudication of the asylum claim (Section 23).
- No one should be detained for a longer period than is reasonable and justifiable. A High Court judge must review the detention every 30 days (Section 29).

The provisions set out a series of requirements for the treatment of asylum seekers that differ from those found in the Immigration Act. Several points are important. First, an asylum seeker may only be detained by order of the Minister and only following withdrawal of the permit. Second, the detained individual remains an asylum seeker during this period. The only loss of asylum status the Act contemplates is that of a lapsed permit, occurring if the individual leaves the country without permission. Finally, all detentions must be reviewed by a court every 30 days.

The Constitution

In addition to the Immigration and Refugees Acts, certain provisions in the Constitution's Bill of Rights further govern administrative detentions. In the absence of judicial proceedings, these protections are important to ensure that administrative detentions occur within a legal framework and do not take on the character of extra-legal or indefinite detentions.

The most relevant Constitutional provisions are summarised below.

Under Section 33 of the Constitution, everyone is entitled

- To lawful, reasonable, and procedurally fair administrative action. The specific requirements of just administrative action are laid out in PAJA.
- To be given written reasons if their rights are adversely affected by administrative action.

Under Section 35(2) of the Constitution, detained individuals, including those in administrative detention, are entitled

- To be promptly informed of the reasons for the detention.
- To be promptly informed of the right to consult with a legal practitioner of choice.
- To challenge the lawfulness of the detention in person.
- To conditions of detention consistent with human dignity, including the provision of adequate accommodation, nutrition, reading material, and medical treatment.
- To communicate with and have visits from a spouse, partner, next of kin, religious counsellor, or medical practitioner.

As the following sections will show, DHA has consistently failed to adhere to the legal provisions detailed above. Instead, it has routinely violated the provisions of the Refugees Act, the Immigration Act, and the Constitution, as well as PAJA.

Violations of the Refugees Act

DHA's practice of merging the refugee and immigration frameworks has resulted in the immigration detention of individuals who should be protected by the Refugees Act. In other words, DHA has denied asylum seekers access to the rights guaranteed under the Refugees Act and has instead subjected them to the more punitive provisions of the Immigration Act.

The right to apply for asylum

Among the most fundamental of the rights protected in the Refugees Act is the right to apply for asylum. The International Refugee Convention creates an obligation on states to allow individuals to apply for asylum and to not restrict this right. Article 31(1) states:

> The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

In practice, this means that any individual who expresses an intention to apply for asylum following illegal entry into the country must be afforded an opportunity to apply and cannot be held in detention for the purpose of deportation as an illegal foreigner.

Section 21(4) of the Refugees Act adopts the Convention obligation. The Supreme Court of Appeals has described the obligation under the Refugees Act as follows:

> The words of the Act mirror those of the UN Convention and the OAU Convention of 1969. They patently prohibit the prevention of access to the Republic of any person who has been forced to flee the country of her or his birth because of any of the circumstances identified in s 2 of the Act. Refugees entitled to be recognized as such may more often than not arrive at a port of entry without the necessary documentation and be placed in an inadmissible facility. Such persons have a right to apply for refugee status, and it is unlawful to refuse them entry if they are bona fide in seeking refuge.[9]

The International Convention, South Africa's Refugees Act, and judicial pronouncements clearly specify that asylum seekers may not be denied entry into the country, nor may they be denied the opportunity to apply for asylum.

[9] *MAA3*, para. 22.

Arrest of asylum seekers at the border

Despite South Africa's legal obligations, many detainees at Lindela were arrested as illegal foreigners as they were entering the country, without being afforded an opportunity to apply for asylum. Below is a description of cases involving individuals who were detained as they entered country.

- A Ugandan man who arrived via Botswana was immediately arrested and detained at the police station for approximately two weeks before being transferred to Lindela. When immigration officers came to interview him after a week at the police station, he told them he wanted to apply for asylum. The officers said they would return the following week. When they returned, they instructed him to sign a deportation notice, telling him he would be indefinitely detained if he did not sign (*JK*).

- A Sudanese man told immigration officers at the Botswana border that he wanted to apply for asylum. He was held at a police station for 11 days before being taken to Lindela (*ROJ*).

- A Sudanese man with refugee status returned to Sudan after his gravely ill wife begged him to take her home. While there, he was again arrested, detained, and tortured by the Sudanese authorities, during which time his wife died. He again fled to South Africa and told the border officials that he had refugee status. He was arrested and detained at a police station for 11 days before being taken to Lindela (*LWN*).

- A Pakistani man was arrested at the Beitbridge border because he did not have the 500 USD demanded by the border official. Despite stating an intention to apply for asylum, he was detained in Musina, where he witnessed others being taken to apply for asylum. After an immigration officer told him, 'we do not like Pakistani people,' he was taken to a police station for one night before being transferred to Lindela (*AF*).

- Several individuals were arrested at the airport as they sought to enter or leave the country (*MKK, TS, PC, HH&HH, AS, MAA3*).

The above detentions violated the rights of these individuals to apply for asylum. Moreover, because these asylum seekers were detained for the purposes of deportation, the detentions also contravened the prohibition against refoulement, found in both international and domestic law. The non-refoulement principle, which bars the return of an individual to a country where he or she may face persecution, is the primary principle ensuring the safety of individuals who flee from a threat to their lives or freedom.

As the above examples demonstrate, DHA has sought to circumvent its non-refoulement obligation—with grave rights implications—by denying individuals access to the asylum system. The experience of two Somali nationals—one a registered asylum seeker and one a

recognized refugee in South Africa—highlights this point. The two men travelled to Namibia from South Africa in the hopes of eventual resettlement in a country with fewer attacks on foreigners. Namibian authorities arrested them and sought to deport them to Somalia via South Africa. Immigration officials at OR Tambo International Airport in Johannesburg arrested them as they transited the country.

DHA denied any knowledge of their former status in South Africa and evaded its non-refoulement obligation by claiming that it could not interfere with the sovereign decision of another country, even once the detainees were in South African custody. DHA added that the men were outside of the court's jurisdiction and outside of constitutional protection because they had not formally entered the county. The SCA rejected this argument, finding it 'incompatible' with the Constitution, the Refugee Convention and the Refugees Act.[10] It cited a previous Constitutional Court ruling:

> The government contended that our Bill of Rights does not accord protection to foreign nationals at ports of entry who have not yet been allowed formally to enter the country.... The denial of these rights [human dignity, equality, and freedom] to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution.[11]

In upholding the detainees' constitutional rights, the Court also noted that DHA had been a party to the previous Constitutional Court case in which this legal principle had been established and, accordingly, had no basis on which to deny the principle's application in the current case.[12]

Arrests for false documents

As cited above, Section 21(4) of the Refugees Act bars the punishment of asylum seekers for their illegal entry into the country, which may involve the use of false documents. Asylum seekers are often forced to travel on false documents in order to escape from their countries of origin, particularly if they are known by the government. Despite the legal protections stemming from this reality, several asylum seekers were arrested for traveling on false documents.

- A Sri Lankan man was arrested at OR Tambo Airport in Johannesburg while en route to Germany to join his uncle, who had refugee status. He was arrested for using a fake Malaysian passport (*TS*).

[10] *MAA3*, para. 22.
[11] *MAA3*, para. 20, citing *Lawyers for Human Rights & another v Minister of Home Affairs & Another* 2004 (4) SA 125 (CC).
[12] *MAA3*, para. 21.

- A Congolese man was arrested at OR Tambo while en route to the Netherlands for using his brother's Dutch passport, despite explaining that he was seeking asylum (*MKK*).
- Two Iranian brothers were arrested at OR Tambo for traveling on fake passports while en route to join their father, a recognized refugee, in the UK (*HH & HH*).
- Two Afghani minors were arrested at OR Tambo en route to Paris for flying with false Swiss passports. The Department attempted to deport them back to Afghanistan via Turkey, but Turkish authorities refused to allow them to continue and returned them to South Africa (*AS*).

Ignoring the relevant provision of the Refugees Act, Section 21(4), DHA has relied solely on Section 29(1)(f) of the Immigration Act, which holds that any 'foreigner found in possession of a fraudulent passport is a ***prohibited person*** and does not qualify for admission into the Republic.'[13] The blanket application of this provision without regard for the Refugees Act prevents asylum seekers from accessing the protections found in Section 21(4) of the Refugees Act. DHA has dealt with all categories of migrants, including asylum seekers, as illegal foreigners under the Immigration Act.

It has even treated non-asylum seekers with valid documents as illegal foreigners if they happen to be from asylum-producing countries. In one case, a Zimbabwean man entered South Africa with a valid passport and received a three-month visa. He was arrested at OR Tambo as an illegal foreigner when trying to board a flight from Johannesburg to Australia, despite having a valid visa for both countries (*PC*).

Arrests despite stated intent to apply for asylum

Asylum seekers who make it across the border are often subsequently arrested as illegal foreigners once inside the country, either because they are unaware of the asylum process or are unable to access a refugee reception office. A survey of asylum seekers in South Africa conducted by ACMS in 2011-12 found that 67 percent were unaware of the asylum process when they first arrived.[14] Ignorance of the asylum system means that some individuals delay applying until they hear about the process from other migrants. Lack of familiarity with the asylum system, however, does not mean that these individuals are any less in need of protection as refugees.

The courts have ruled that a detained individual who indicates an intention to apply for asylum must not be barred from applying[15] and ceases to be an illegal foreigner once he or she has applied.[16] Yet, several individuals in the cases under review were arrested shortly

[13] *HH & HH*, Leave to Appeal, para. 2.7 (italics and bold in original).
[14] R. Amit, 'No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices,' ACMS Research Report, September 2012, p. 30.
[15] See, e.g., *AS* and *HH & HH*, granting orders to this effect.
[16] *MAA2*, para. 19.

after entering the country—before they were able to reach a refugee reception office to apply—despite indicating a desire to apply for asylum to both police and immigration officials. Police officials routinely disregarded the stated intention of these individuals who wished to apply for asylum and, together with immigration officials, sent them to Lindela. In one case, police even arrested an individual who had approached a police station to ask how to apply for asylum (*TN*).

The Department has argued that there is no legal obligation on the part of an immigration officer at either a port of entry or at a refugee reception office to assist an illegal foreigner to apply for asylum.[17] Given that a prospective asylum seeker is undocumented prior to applying, this logic enables the Department to characterize all potential applicants as illegal foreigners, essentially making the asylum application process discretionary on the part of DHA. Accordingly, several would-be asylum seekers in the cases reviewed were denied access to the asylum process and were sent to Lindela after stating an intention to apply.

- A Congolese man was arrested a day after entering the country (*EN*).
- A Rwandan man was arrested a day after entering the country. He told the police and an immigration officer that he wished to apply for asylum (*GG*).
- Two Congolese sisters were arrested on the day they arrived. Despite language difficulties, they tried to explain their desire to apply for asylum (*NO & MG*).
- A Congolese man was arrested while en route to Cape Town, where he intended to apply for asylum (*TMB*).
- A Congolese man told police and immigration officers that he wished to apply for asylum and was ignored (*MB2*).
- Two Congolese men told police that they were asylum seekers but were nonetheless arrested (*FW, MY).*
- A Congolese man was arrested while waiting for assistance to apply (*AM*).

The SCA has deemed the above practices illegal, declaring that DHA 'officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file an application with the relevant Refugee Reception Office.'[18] But DHA continued to deny individuals this right even after this ruling, as detailed below:

- A Congolese man was trying to learn how to apply for asylum. When he told the police he wanted to apply, they responded that he could apply from Lindela (*FFMK*).
- A Ugandan man who was undocumented because he did not know how to apply for asylum told the police that he wished to apply, but he was sent to Lindela (*AAK*).

[17] *LS2*, Answering Affidavit, para. 26.
[18] *MAA3*, para. 22.

- A Zimbabwean man was falsely told he could not apply for asylum because he had come to Lindela from prison (*LS2*).

Although the police were responsible for the initial detentions in the above cases, the police are not directly responsible for implementing the Refugees Act and may not be familiar with its provisions. Instead, it is DHA that expressly violated its obligations under this Act by taking the detainees to Lindela rather than assisting them in applying for asylum.

Arrests stemming from access problems at the refugee reception offices

Some individuals managed to avoid arrest long enough to reach a refugee reception office, but they were unable to get into the office. Nineteen cases involved asylum seekers and refugees who were arrested after they could not access the refugee reception offices. This included individuals with asylum papers and those applying for the first time. Many of these individuals tried to access these offices several times.

First time applicants:

- A Zimbabwean man slept outside of the Marabastad reception office in an attempt to get access (*LS2*).
- A Nigerian man went to Marabastad and told the immigration officer that he wanted to apply for asylum. The officer laughed and told him that Nigerians who come to seek asylum are lying and asylum applications are only accepted from countries where there is war. He encountered the same officer when he tried to apply a few weeks later. The officer asked him why he was persisting and again turned him away (*CU*).
- A Congolese man was twice turned away from the Durban reception office before being arrested for not having documentation (*MY*).

Renewals:

- A Congolese man tried eight times to renew his permit (*MB1*).
- A Congolese man tried weekly for four months to renew his permit (*IIW*).
- A Burundian man tried to renew his permit at least seven times at Marabastad (*JD*).
- A Congolese man waited every day for two and a half weeks to renew his permit (*CKM*).
- A Congolese man could not get into the Durban office (*KM2*).
- A Congolese man could not get into the Marabastad office and was arrested en route to the office to try again (*YK1*).

- A Congolese man travelled from Bloemfontein to Johannesburg to renew his refugee permit and was twice turned away from the Crown Mines reception office. He returned to Bloemfontein. When he again travelled to Johannesburg, he was arrested before he could reach Crown Mines (*MB3*).
- Four Congolese men were unable to gain access to the Crown Mines reception office (*IKM*, *NM*, *KMI*, *TT*).
- A Burundian man tried for two weeks to renew his permit, but he could not get into Marabastad. He was arrested at the office after finally getting inside (*AN1*).
- A Pakistani man was unable to access the Marabastad reception office (*AT*).

Two applicants were not allowed to enter the office for their appeal hearings and were subsequently arrested (*ZS*, *TMM*). Another applicant who was not allowed to enter Crown Mines on the day of his appeal hearing was told to return when his permit expired. He was arrested when he returned (*MAA*).

Expired asylum permits

According to the SCA, an individual who has been granted an asylum seeker permit is protected under Section 21(4) of the Refugees Act, which prevents the launching of any proceedings against the asylum seeker until he or she has received a decision and has exhausted all rights of review or appeal.[19] The court further explained that an individual ceases to be an illegal foreigner once an asylum permit has been issued, and DHA must thus extend an expired permit.[20]

DHA, for its part, has on many occasions refused to renew expired permits, regardless of the reasons for the expiration. It has denied individuals with expired permits the protections of the Refugees Act and treated them as illegal foreigners, despite their efforts to obtain or renew their asylum permits. In the Department's view, a 'lapsed' permit renders an individual 'to be an illegal foreigner.'[21]

This interpretation is not supported by the Refugees Act, which does not address the issue of expired permits and defines a lapsed permit as occurring when an asylum seeker has left the country without permission. The Act does include a provision specifying the conditions under which the Minister may withdraw an asylum seeker permit, but an expired permit is not one of the specified conditions.[22] The inclusion of a provision specifically delineating the grounds for permit withdrawal suggests that additional grounds not included in this provision do not provide a basis for permit withdrawal.

[19] *MAA2*, para. 19.
[20] *MAA2*, para. 22.
[21] *NT*, Respondents' Answering Affidavit, para. 13.3.
[22] Section 22(6). One of the conditions includes contravening a condition endorsed on the permit; however, while permit renewal is required, it is not a specifically endorsed condition on the permit.

The inclusion of the withdrawal provision further suggests that an individual maintains his or her asylum seeker status unless his or her asylum seeker permit has been withdrawn, a view that has been supported by the courts. And even in the case of withdrawal, the Refugees Act provides for finalisation of the asylum claim, indicating that the individual retains the protections afforded to asylum seekers.[23] Moreover, the Immigration Act specifically states that an individual becomes an illegal foreigner following the expiration of a transit permit, but it does not contain a similar provision for the expiration of an asylum permit. Nonetheless, DHA has maintained its view that asylum seekers with expired permits are illegal foreigners. And it has exacerbated this problem by refusing to renew expired permits.

Individuals are generally required to renew their permits on the day they expire. But circumstances may leave an individual unable to approach the office on the designated day. DHA has not exercised any discretion on these occasions, instead employing a general policy of arrest and detention for purposes of deportation. In light of the fact that an individual remains an asylum seeker and cannot be deported until final adjudication of his or her claim, such arrests contravene the law.

The principle that an individual retains his or her asylum status pending final adjudication stems from the fact that an asylum claim is based on the fear of persecution giving rise to a need for protection outside the country of origin. Neither this fear nor the need for protection is negated by the failure to abide by certain procedural deadlines. Deporting an individual as a result of such procedural irregularities violates the international prohibition against refoulement. The factual prerequisites that make an individual an asylum seeker remain present even when his or her asylum permit expires. In a rebuke of DHA practice, the Supreme Court of Appeal confirmed this view of the law.[24]

No discretion regarding permit expiration

In some instances, the DHA's own actions prevented asylum permit holders from renewing their permits before the expiration date. In one such case, a claimant arrived at Marabastad to renew his permit. He was told that his file had been transferred from Pretoria to Johannesburg. He went to Johannesburg the next day to renew, but the office refused to assist him because his permit had expired a day earlier (*TKN*). In another case, a Congolese man's asylum permit expired on Saturday. He planned to renew it on Monday, but he was arrested on Sunday before he could renew (*KJM*). A Burundian man's permit expired while he was in prison. Officials at Marabastad refused to renew his permit and did not give him an opportunity to explain the reason for the expiration (*IM1*).

[23] Section 23.

[24] See *MAA2*, paras. 21–22, discussing the need to renew an expired permit and the requirement that an asylum seeker may not be detained unless the Minister has withdrawn his or her asylum seeker permit.

Permit expired while ill/in the hospital

Several individuals were unable to renew their permits on the day they expired because of illness. These individuals tried to renew as soon as they recovered, but they were denied service and subsequently arrested.

- A Congolese man's permit expired while he was in the hospital for appendicitis. When he got out, he spent one month trying to renew his permit before being arrested (*KMJ*).
- A Congolese man's permit expired while he had malaria. He arrived six weeks late to renew and was not given an opportunity to explain his late renewal. His permit was seized, and he was taken to Lindela (*TM*).
- A Congolese man's permit expired while he was suffering from a stomach virus. He arrived at the Tshwane Interim Refugee Reception Office (TIRRO) two days late to renew his permit and was arrested. Officials at Lindela subsequently took him back to TIRRO, but TIRRO officials would not assist him (*IM2*).
- A Burundian man who had been sick went to renew his permit in Cape Town one month after it had expired, but officials there told him it was too late. He went back to the refugee reception office eight times, but they refused to renew his permit. He was then arrested by the police in front of his house (*MAR*).
- A Burundian man went to renew his permit five days late because he had a stomach virus. He was arrested at the office and taken to Lindela (*PN*).

Permit expired while in detention/police custody

Several asylum seekers were unable to renew their permits because they were in police custody—either on suspicion of being an illegal foreigner or for other reasons. DHA and prison services made no provision for these asylum seekers, and they were sent directly to Lindela, even in cases in which they were acquitted or the charges were dropped. Moreover, no provision in the Refugees Act or elsewhere states that an arrest or conviction negates one's asylum seeker status.

- A Congolese man was arrested for fraud. His permit expired while he was awaiting trial. He paid the fine and was then sent to Lindela (*OW).*
- A Sri Lankan man was arrested as an illegal foreigner while in possession of a valid asylum permit. His permit expired while he was in police custody (*ST*).
- A Burundian man's permit expired while he was in prison on charges of marijuana possession (*IM1*).

- A Sierra Leonean man's permit expired while he was detained on suspicion of dealing drugs. He was ultimately acquitted, but the investigating officer retained his permit and sent him to Lindela (*WFK*).
- A Burundian man's permit expired while he was awaiting trial for possession of a stolen cell phone (*BH*).
- A Burundian man who lost his permit while being evicted from the Blue Waters temporary protection site was arrested as an illegal foreigner. His permit expired while he was in detention (*OK*).

Sent from prison directly to Lindela

As mentioned above, the Refugees Act makes no provision for withdrawing refugee or asylum status following an arrest or conviction for a crime. Yet, fourteen asylum seekers[25] and one recognised refugee, all detained for non-immigration offences, were sent directly to Lindela after being acquitted or after being convicted and either serving prison sentences or paying a fine.

- A Congolese man was sent to prison after paying a fine for fraud (*OW*).
- A man from Sierra Leone was detained at the Durban police station for two weeks following his acquittal and then transferred to Lindela (*WFK*).
- A Burundian man was transferred to Lindela after serving his prison sentence (*KF*).
- A Congolese man's permit was retained when he was arrested for drunk driving. He was transferred to Lindela after paying a fine (*BNM*).
- A Burundian man was transferred to Lindela after serving a thirty-day sentence for assault (*NH*).
- A Burundian man was arrested for breaking a car mirror while chasing thieves. He was transferred to Lindela after serving his sentence (*JD*).
- A Congolese man was sent to Lindela after serving four and a half months of an eight-month sentence for fraud (*KMFD*).
- A Bangladeshi man was arrested at Crown Mines and convicted of fraud after losing his asylum permit and using part of his name to re-apply because he did not understand he could ask for his permit to be re-issued. He served six months of a one-year sentence and was transferred to Lindela (*JIMM*).

[25] One man was not an asylum seeker at the time of his arrest but had a valid visa that expired while he was in prison. Following his transfer to Lindela, he explained that he feared for his life if returned to his home country and wished to apply for asylum (*AN2*).

- A Congolese man who was arrested for fraud at Crown Mines was sent to Lindela after paying a fine (*MMB*).
- A Burundian man was sentenced to three years for possession of a stolen cell phone. He was paroled after two years and taken directly to Lindela (*BH*).
- A Pakistani man's passport and visa expired while he was serving an 18-month prison term. He was taken directly to Lindela on his release (*AN2*).
- A recognised refugee from the DRC served an eight-month sentence for attempted theft and assault. After his sentence, he was transferred to Lindela (*MB3*).
- A Nigerian man was transferred to Lindela after serving a two-year sentence for fraud (*CU*).
- A Zimbabwean man was transferred to Lindela after serving a one-year sentence for fraud (*LS2*).
- A Burundian man paid a fine for receiving stolen goods. An immigration officer took a copy of his asylum permit, and he was transferred to Lindela (*IM3*).

In all of these cases, the asylum seekers and refugees were slated for deportation without any regard for the non-refoulement principle.

Arrested with valid asylum seeker permit

In what can only be characterized as a wilful disregard of the law, DHA detained several individuals who were in possession of valid asylum permits that they showed to police. The police responded with indifference or outright hostility while immigration officers authorised the detention as illegal foreigners of these documented individuals. Signalling a breakdown of the verification requirements established under the Immigration Act or, alternatively, revealing a decision to directly flout the law, immigration officials failed to act to ensure that only those individuals properly classified as illegal foreigners were sent to Lindela.

- A Sri Lankan man was arrested along with his friend who had a fraudulent Singaporean passport. The former showed the police his valid asylum permit, which then expired while he was in police detention. He was detained for 51 days before being transferred to Lindela (*ST*).
- A Cameroonian woman was arrested at her home with a valid permit and transferred to Lindela (*NC*).
- A Burundian man was transferred from prison to Lindela with a valid asylum seeker permit (*NH*).

- A Congolese asylum seeker had his permit confiscated by the police, who said they would show it to the immigration officials for verification. The verification never happened, and he was told that he was being held as an undocumented foreigner. The man missed his appeal hearing while in detention at Lindela (*GGBM*).
- A Burundian man had his permit confiscated by the police during an arrest for possession of a stolen cell phone. He was taken to the Maitland Home Affairs Office and then transferred to two police stations and to Pollsmoor Prison before being transferred to Lindela (*AH*).
- Police came to a Congolese man's house and arrested him, even though he showed them his valid permit. He was then taken to a DHA office, where he showed his permit to an immigration officer. The officer took it away, handcuffed him, and took him to prison, from where he was transferred to Lindela (*LB*).
- A Congolese man showed the police a certified copy of his asylum permit, but the police refused to accept it and tore it up (*KJM*).
- A Congolese man told police that he had a valid asylum seeker permit at home, but he was not given the opportunity to retrieve it (*TKN*).

These arrests suggest that the police are diverting resources that could be directed at crime prevention to unfounded immigration enforcement activities—activities that are reinforced by DHA's similarly unfounded decisions to detain these individuals as illegal foreigners.

Never received a negative decision

Seventeen cases involved detained asylum seekers who had never received a negative decision on their asylum claims. As such, they remained entitled to the Refugees Act's protection against detention and deportation.[26]

Detention of refugees

In an even more blatant and egregious violation of the law, DHA also detained several recognised refugees with the intention of deporting them. While asylum seekers are still awaiting a determination on their asylum claim, refugees have been deemed by DHA to be in need of protection. The act of recognition is an acknowledgement that these individuals cannot safely be returned to their countries of origin. Yet, detaining them at Lindela flouts this acknowledgement and ensures that they will be deported back to the persecution or danger from which they fled.

[26] *MB1, ST, IIW, MAR, JD, JF, EW, JIMM, SPH, OK, ZJM, BH, LB, BB, YK2, AH, CM.*

- Police arrested a Burundian man for being an illegal foreigner despite the fact that he showed his refugee permit to the arresting officer. Police took his permit, and he was detained at a police station for two weeks and in Pollsmoor for three weeks before being sent to Lindela (*SN*).
- A Sudanese man was arrested at the border, despite having valid refugee status. He informed immigration officials that he was a refugee, but he was taken to Lindela (*LWN*).
- A Congolese man told immigration officers at a DHA office that he was an asylum seeker. They told him he needed to go to Lindela to have his status checked. In fact, he had been granted refugee status in 2007, but he was never told; DHA did not verify his status before detaining him. His refugee status was only discovered as a result of LHR's intervention (*TKN*).
- A Congolese man with refugee status was taken to Lindela directly from prison. Lindela officials took him to Crown Mines to get his refugee permit reissued, but the officials retained his permit and kept him in detention (*MB3*).

Bureaucratic Failures, Incompetence and Corruption

A number of individuals ended up in Lindela as a result of bureaucratic failures, incompetence and corruption by DHA. These systemic failures include an unwillingness or inability to conduct proper immigration status verifications, as well as lost files, lost appeal requests, and improper procedures resulting in problems with both access and service delivery at the refugee reception offices.

Failure to verify immigration status

The Immigration Act requires an immigration officer to verify an individual's immigration status before detaining him or her as an illegal foreigner.[27] In cases in which the individual is unable to provide a copy of his or her asylum permit, an immigration officer must verify the individual's status through DHA records before transporting him or her to Lindela. The Act also requires the police to take reasonable steps to 'assist the person in verifying his or her identity or status' (Section 41(1)). These steps, defined in Section 32 of the regulations, include: 1) allowing the individual to obtain easily available documents; 2) contacting individuals who could aid in verification; and 3) verifying the individual's status through DHA records.

In many cases, these steps were not followed, and individuals were sent to Lindela without verification of their immigration status. As a result, many asylum seekers who should have been identified through DHA records were illegally sent to Lindela. No subsequent attempt was made to verify their status once they were detained in Lindela.

- A Burundian man was arrested after losing his asylum permit. DHA detained him at Lindela without verifying his asylum status (*BB*).
- A Burundian man who had lost his permit informed the police that he was an asylum seeker and tried to give his file number to Lindela officials (*OK*).
- Immigration officials took a detainee, a Congolese man, from Lindela to Marabastad to verify his immigration status. The reception officer refused to verify his status or reissue his permit (*ZJM).*
- A Congolese man appeared before the magistrate's court after his arrest. He told the magistrate that he was an asylum seeker and had a file in Durban. The case was postponed on numerous occasions to allow for verification, but DHA did not

[27] Section 34, read with Section 41.

conduct the verification. LHR requested the detainee's file number from an immigration officer at Lindela, but the officer said that the information was 'his' and that he could not share this information with the client's attorney without a directive from legal services (*KM2*).

- A detainee, a Kenyan male, was arrested with a copy of his asylum permit that he was on his way to renew. He was taken to a DHA office in Port Elizabeth. Immigration officers there informed him that he was on the system, but they could not assist him. He was sent to Lindela, and officials there took him to reapply for asylum. During the court case, DHA claimed it did not have a record of his asylum application (*CM*).

Bureaucratic inability to verify

In some instances, problems with DHA's computer system and record-keeping procedures prevented the verification of individuals with valid status. For example, an individual with a valid permit was sent to Lindela because DHA could not find him in the system (*KF*). In another case, DHA officials said that they could not find a detainee on the system despite the fact that he had given his permit to immigration officers when admitted to Lindela (*EW*). In yet another instance, the Department detained a recognized refugee whose file it could not locate (*LWN*). DHA determined that his file must have been moved to the 'new system,' and he was instructed to file a new claim.

Procedural irregularities at the refugee reception offices

Several individuals were arrested at the refugee reception offices as a result of procedural irregularities that contravened the requirements of just administrative action.

- A Burundian man's permit was retained when he came to Marabastad to renew it. He was twice asked to return to the office and was arrested without explanation the second time he returned (*EW*).

- A Congolese man went to Marabastad to renew his permit. He was told to write his name and return the next day. When he returned, he was arrested and taken to Lindela. DHA said that his claim had been rejected as manifestly unfounded and had been reviewed by the Standing Committee for Refugee Affairs (SCRA). The claimant had never received a copy of his initial decision (*JF*).

- A Burundian man's permit expired while he was at the Blue Waters protection camp. Following his arrest, the police took him to the reception office, where he was told that his permit had been cancelled. He did not receive any notice of or

reasons for the permit cancellation, and he was not afforded an opportunity to make representations (*YK2*).

- A Burundian man went to Marabastad to renew his permit on the expiration date and was told that his file had been moved to Crown Mines. He went to Crown Mines the next day, and the officials there told him that his permit could not be extended because it had expired a day earlier. He returned several times over the next three months without being assisted. DHA had in fact granted him refugee status in 2007 but had never informed him (*TKN*).

- A South African citizen in detention was born in Namibia. Both his South African ID and his passport incorrectly listed his birthplace as South Africa, but immigration officials assured him it was not a problem when he alerted them to the error. He was arrested after an immigration official at the airport instructed him to report to the Home Affairs office in Cape Town. He was taken to the Namibian embassy three times. Each time, the Namibian embassy informed DHA that he could not be deported back to Namibia and that they should investigate his case further (*LS1*).

- A Kenyan man went to renew his permit at the Cape Town reception office after leaving the Blue Waters temporary protection site. Despite DHA's stated policy that an asylum seeker may renew a permit at any office, the Cape Town refugee reception office told him that he must go to the Port Elizabeth reception office where he had initially applied. The Port Elizabeth office then refused to renew his permit because it had expired (*CM*).

Procedural irregularities in the appeal process

A number of the procedural irregularities involved problems with the appeals process.

- A reception officer refused to accept a Congolese man's appeal request because it had not yet been 30 days since he had received his rejection decision.[28] The man then emailed the request to the centre manager, but it was not processed; the man was subsequently arrested (*AIM*).

- A Congolese man handed in his appeal request and received a six-month extension on his permit. When he returned to renew his permit, the reception office said it did not have his appeal request; he was immediately arrested. He remained in detention even after his brother arrived with a copy of the original appeal request letter (*TPDM*).

[28] Section 14 of the Regulations to the Refugees Act states that the appeal request must be made within 30 days of receiving the initial decision, not after 30 days have elapsed.

- A Pakistani man arrived at the reception office for his appeal hearing. A reception officer took his documents, and another officer gave him a new three-month permit. When he returned after three months, he received a three-day extension and was told to return. When he returned a second time, he was informed that his appeal was rejected even though he had never had a hearing. He was immediately arrested *(PK)*.
- A Congolese woman arrived at Crown Mines for her appeal hearing. The reception officer extended her permit for six months, but she did not have a hearing. When she arrived to extend her permit again, she received a rejection from the appeal board and was immediately arrested (*OM*).
- A Congolese man arrived at Crown Mines for his appeal hearing. He showed a security guard his notice of appeal, but the security guard refused to let him in and told him to return when his permit expired. He returned on the day of his permit expiration and was told to return three days later. When he returned, he was arrested as an illegal foreigner (*ZS*).
- A Burundian man was not allowed into Crown Mines on the day of his appeal hearing and was told to return when his permit expired. He was arrested when he returned (*MAA*).
- A Burundian man lodged an appeal request and continued to renew his permit. On one of these occasions, he went to Crown Mines to renew a few days after the expiration date and was arrested. At the time of his arrest, he received a letter stating that he had failed to appeal, despite the fact that his asylum permit indicated that he was 'to be scheduled for appeal hearing' (*PN*).

Four detainees were arrested while waiting for their appeal hearings (*TT*, *JAA*, *KM1*, *GGBM*). Another four were arrested while waiting for the decision on their appeal (*IKM*, *KJM*, *TKN*, *IM3*). One of them had been granted refugee status but had never been informed of the decision (*TKN*).

Bureaucratic irregularities and fraudulent stamps

Irregularities and bureaucratic problems at the reception offices also led to accusations of fraud. Some of these issues stemmed from DHA's decision to begin processing all renewals electronically so that permits would be printed with the new expiration date. After this change, some offices continued to manually stamp the existing permits with new dates, as had been the previous practice. This led to accusations of fraud—levelled not against the reception office staff but against the asylum seeker. In two cases, asylum seekers whose permits had been manually renewed were accused of having fraudulent stamps, despite having renewed their permits at a reception office (*JAA*, *NT*).

Refusal of refugee reception officers to assist asylum seekers

Although refugee reception officers have a legal obligation to receive all asylum applications,[29] some individuals remained undocumented because reception office staff refused to assist them. One instance involved a Burundian man who was a recognized refugee in Zambia and was encouraged by UNHCR to seek the protection of another country after the Zambian government proved unable to protect him from Rwandan and Burundian militias that had infiltrated the refugee camp. He was twice denied assistance at Marabastad when he went to apply. The centre manager refused to receive his asylum application even when he was accompanied by an UNHCR representative, as well as when he was taken to the office by the police following his arrest (*EB*). While the Refugees Act allows for the exclusion of individuals who enjoy the protection of another country, this individual no longer had such protection. Moreover, the fact that he had previously been granted refugee status pointed to his need for protection. As a result, his detention for purposes of deportation constituted refoulement. Finally, as UNHCR has explained, the exclusion provision should only be applied at the status determination phase and cannot bar an individual from applying for asylum.[30]

Other individuals faced similar problems getting assisted at a refugee reception office.

- After losing his permit, a Burundian man went to Marabastad several times with a police affidavit, but the centre staff there refused to assist him. He then went to the Cape Town office, where he had first applied. On his third visit, a reception officer tore up his affidavit (*SPH*).
- A Congolese man's permit was stolen before he was able to request an appeal hearing. The guards at Crown Mines refused to let him enter the reception office without a photocopy of his asylum permit (*MMB*).
- A Congolese man was robbed the day before his appeal hearing and lost his notice of appeal. The Durban office denied him access to attend his appeal hearing and would not extend his permit, stating that he had no documentation allowing him to access the office. (*TMM*).
- A Congolese man's permit was stolen. Although the man had a police affidavit, Crown Mines refused to assist him without a photocopy of his permit (*KMFD*).

[29] Section 22(1) of the Refugees Act states that a refugee reception officer 'must' issue an asylum permit pending the outcome of an asylum application.

[30] UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, para. 31.

Fraud stemming from lack of service

These denials of service left individuals undocumented and vulnerable to arrest, detention, and deportation. Having been barred from obtaining documents legitimately, some asylum seekers turned to desperate measures to obtain documentation and avoid deportation.

Fearful of arrest as undocumented migrants, a few individuals decided to re-apply or to pay money in order to obtain documentation and were subsequently detained for fraud. While these individuals did contravene the law, it is important to note that they did so only after their attempts to adhere to the law were thwarted by DHA, which illegally denied them service.

- Guards at Crown Mines would not let a Congolese man into the reception office without a photocopy of his asylum permit, which had been stolen. After several attempts to access Crown Mines, he made a new application in Pretoria under a new name (*MMB*).
- After the Durban reception office refused to let a Congolese man enter to extend his permit, he applied under the same name, birth date, and claim at the Marabastad office (*TMM*).
- The Crown Mines reception office refused to assist a Congolese man without a photocopy of his permit, which had been stolen. He returned several times. A reception officer offered to assist him if he changed his name and date of birth and gave the officer R2000. He agreed. When he subsequently went to renew his permit, he was told several times to return and was then arrested for fraud (*KMFD*).
- An official at the Marabastad refugee reception office twice refused entry to a Nigerian man on the grounds that he was Nigerian and not eligible for asylum. The man then obtained a temporary resident permit, and was subsequently arrested for fraud. After serving his full two-year sentence, he was transferred to Lindela, where he continued to be denied the right to apply for asylum. The individual ultimately opted for deportation rather than face further prison time, despite facing a risk of persecution (*CU*).

Corruption

Many individuals were denied assistance because they did not have money to pay corrupt officials, and they ended up in detention as a result. At the same time, those who did pay these officials in order to obtain service also ended up in detention for fraud. In none of these cases was the DHA official punished for demanding illegal payments in exchange for service.

- After several attempts to replace his stolen permit, a Congolese man was forced to pay a reception officer to get assistance and was subsequently arrested for fraud (*KMFD*).
- A Pakistani man was detained because he did not have money to pay the border official, despite explaining that he was an asylum seeker (*AF*).
- A Congolese man did not know that payment was not required at the reception office, and he paid an immigration official R1500 for what he believed was a valid refugee document. When later asked by another immigration official to show his documentation, he was arrested (*CKM*).

Arrests stemming from failure to adequately explain the asylum process

Many of those seeking asylum do not fully understand the asylum process. In a survey of asylum seekers, 68 percent reported that the asylum process had not been properly explained to them.[31] The survey also pointed to a lack of adequate interpretation services. Under PAJA, an administrative procedure must be fully explained to the individual in order to be fair, and the individual must be given an opportunity to make representations.[32]

Many individuals failed to properly adhere to the requirements of the asylum system because they did not understand these requirements, which had not been adequately explained to them. As a result, they found themselves in Lindela without having had a status determination officer consider their asylum claim or whether or not they faced a risk of refoulement.

- A Pakistani man received a rejection on the day that he applied for asylum. He did not understand that his application had been rejected, and he was arrested when he returned to renew his permit (*AT*).
- A Congolese man did not speak English. He was never properly informed that his claim had been rejected as manifestly unfounded and that he had fourteen days to make written submissions to the SCRA. He was arrested when he went to renew his permit (*FCM*).
- A Burundian man who was illiterate did not know he had an appeal hearing scheduled. He was arrested when he went to renew his permit after being rejected by the Appeal Board (*KHA*).

[31] R. Amit with T. Monson, 'National Survey of the refugee reception and status determination system in South Africa,' FMSP Research Report, February 2009, p. 35.
[32] Section 3, PAJA.

- A Congolese man tried for three weeks before finally getting into a reception office to renew his permit. Not knowing that payment was not required, he paid a DHA official R1500 and was later arrested for fraud (*CKM*).
- A Burundian man who did not speak English relied on another asylum seeker, whom he did not understand very well, to interpret. The status determination officer handed him papers that the interpreter did not explain to him. His permit was extended for three months, and he understood only that he had to return to renew it not that he had to lodge an appeal (*MJ*).
- A Bangladeshi man who spoke very little English did not understand that he could get a new asylum permit after he lost his. He went to Crown Mines to re-apply and, three times, was told to return. On his last visit, he was arrested (*JIMM*).
- A male Pakistani was detained at the border, then taken to the DHA office in Musina. He was instructed to sign documents there that he did not understand and was then sent to Lindela. From there, he was eventually taken to Crown Mines, but he did not understand the application process or that he had been rejected. He did not receive a copy of his decision. A fellow detainee helped him submit an appeal. He then requested legal assistance with his appeal hearing inside Lindela, but DHA did not allow him to access this assistance. He was forced to rely on a fellow detainee to interpret. His appeal was denied (*AF*).
- A Kenyan man was taken from Lindela to Crown Mines, where an RSDO interviewed him. He was instructed to sign some papers that were not explained to him. He did not know that he had received a rejection and that he had to lodge an appeal (*CM*).

Arrests stemming from disruptions after the xenophobic attacks

In May 2008, many of the country's foreigners were displaced by xenophobic attacks that took place throughout the country. During the chaos that followed, a number of these individuals lost their documents—including asylum and refugee permits. Many would up in places of safety established by the government and were afraid to leave these impromptu camps. As a result, their documentation expired.

The government made little effort to address the unique situation asylum seekers faced after the attacks and the effect that their continued vulnerability might have on their efforts to reach the refugee reception offices. Several arrests can be linked to these events.

- A Ugandan man received a rejection after arriving at Marabastad from the Acasia place of safety. UNHCR then placed him in a shelter, and several months later he

was taken with other residents to TIRRO to lodge an appeal request. The TIRRO official refused to accept his request, and he was arrested (*AU*).

- Following the xenophobic attacks, a Congolese man went to Acasia, where UNHCR assisted him in extending his permit. He was then moved to the Riet Family Shelter. He could not afford the trip from Johannesburg to Pretoria to renew his permit, and he was afraid to leave the shelter. He was arrested when he went out to buy food (*ZJM)*.
- A Burundian man lost his permit during his eviction from the Blue Waters temporary protection site. He sought shelter at the Strandfontein police station for two days immediately following the eviction. During this time, he told the police that he had lost his permit, but they did not help him with an affidavit. He was later arrested and charged as an illegal foreigner despite his efforts to explain that he was an asylum seeker (*OK*).
- A recognized refugee from Burundi was arrested in Springbok after being evicted from the Blue Waters temporary protection site (*SN*).
- A Burundian man's permit expired while he was at the Blue Waters temporary protection site. He was afraid to leave to renew it and was arrested in Springbok (*YK2*).
- Despite having a valid permit, a Burundian man was arrested in Springbok together with others from the Blue Waters protection site (*AH*).
- A Kenyan man's permit expired while he was in Blue Waters. He went to the Cape Town refugee reception office after he left Blue Waters to renew his permit, and was told he had to go to Port Elizabeth, where he had initially applied. While traveling to Port Elizabeth, he was arrested with an affidavit and a copy of his permit. The police took him to the reception office, but officials there said that they could not assist him because his permit had expired (*CM*).

Violations of the law inside Lindela

Once individuals were detained at Lindela, DHA continued to deny them their rights under the Refugees and Immigration Acts as well as their constitutional right to procedurally fair administrative action. DHA characterised all detainees at Lindela as illegal foreigners governed by the Immigration Act regardless of their asylum status. At the same time, DHA ignored most of the procedural guarantees found in the Act.

Asylum seekers in detention

DHA detained both existing and would-be asylum seekers at Lindela. Categorising these individuals as illegal foreigners, it denied them the protections under the Refugees Act to which they were legally entitled.

Denied opportunity to apply for asylum from Lindela

Under the law, no one may be denied the opportunity to apply for asylum.[33] In a March 2010 decision, a High Court ruled that although individuals who were detained prior to applying for asylum were not protected by the Refugees Act, they could not be denied an opportunity to apply for asylum.[34] In a subsequent case, the SCA stated that the 'Department's officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file an application.'[35] Nonetheless, DHA continued to argue even after the initial ruling that it was under no legal obligation to take individuals from Lindela to a refugee reception office to apply for asylum.[36] As a result, several individuals detained at Lindela were not allowed to apply until legal interventions were made on their behalf.

- A Sri Lankan man was not allowed to apply until LHR obtained a court order demanding his release (*TS*).
- A Ugandan and two Congolese detainees who told officials at Lindela that they wished to apply for asylum were only taken to apply after LHR sent letters of demand (*MKK*, *MY*, *AAK*).
- Despite repeated requests, a man from Sierra Leone was not taken to apply for asylum until LHR intervened (*BM*).

[33] The Refugees Act places an obligation on a refugee reception officer to accept and submit all applications (Section 21(2)).
[34] *AS*, para. 10.
[35] *MAA3*, para. 22.
[36] *LS2*, First and Second Respondents' Answering Affidavit, para. 20.5.

- A Pakistani man came to Lindela from prison. He and his brother explained to an official that his life would be in danger if he returned to Pakistan. When the official asked if he had applied for asylum, he responded that he was unaware of the prospect and he would like to apply. The official misinformed him that the application had to be prepared by a lawyer. The man repeatedly asked over the next few months to be allowed to apply, but Lindela officials responded that he must wait. Despite his asylum requests, he was taken to the airport for deportation and was only returned to Lindela following an urgent intervention from LHR, at which point he was also taken to apply for asylum (*AN2*).

In some cases, the asylum seekers were not taken to apply at all.

- Officials at Lindela told a Nigerian man that he could not apply for asylum because he had come to Lindela from prison. His deportation was halted following an intervention from LHR (*CU*).
- A Burundian man repeatedly told guards at Lindela that he wished to apply for asylum, but he was not assisted. In correspondence with LHR, DHA's Asylum Seeker Management division stated that he would be taken to Crown Mines to apply, but this did not happen (*AM*).
- LHR sent multiple letters requesting that a Congolese man be taken to a refugee reception office to apply for asylum, but he was never taken to apply (*TN*).
- DHA informed LHR that two applicants, Iranian brothers, would be taken from Lindela to Crown Mines to apply for asylum, but this did not happen (*HH & HH*).

Lindela officials told some individuals that they were not eligible to apply for asylum. Not only did these officials lack the authority to make this determination, but there also are no eligibility requirements for asylum applications. Any exclusions as defined by the Refugees Act can only be determined after the status determination process takes place.[37]

- Immigration officials at Lindela told a Zimbabwean and a Nigerian man who wished to apply for asylum that they could not apply because they had come from prison (*LS2*, *CU*).
- After being told by police that he could apply for asylum from Lindela, a Congolese man told an immigration officer there that he sought protection as a refugee and could not be deported. The officer refused to assist him. He told another officer a week later. The officer responded that he could not apply from Lindela and should simply wait for his deportation (*FFMK*).

[37] UNHCR Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees, para. 31.

Asylum seekers as illegal foreigners: legal arguments and practice

In an effort to limit the protections of the Refugees Act while expanding the reach of the Immigration Act, DHA has characterized various categories of asylum seekers as illegal foreigners, denying them the protection against refoulement afforded to asylum seekers and refugees and justifying their continued detentions. These categorisations include the following:

- An individual is an illegal foreigner pending the outcome of his appeal to the Appeal Board (*TT*).
- An individual with an expired permit is an illegal foreigner (*TT*).
- An individual is an illegal foreigner, pending the outcome of his condonation application to the Refugee Appeal Board (*KHA, MMB*). After losing this argument in court (*KHA*), DHA persisted with it in the subsequent case (*MMB*). Both cases came after the SCA's proclamation that an individual remains an asylum seeker until he or she has exhausted all rights of appeal and review (*MAA2*).
- An applicant who is arrested as an illegal foreigner remains an illegal foreigner until a decision is made granting asylum (*KR*).
- Until a decision rejecting an individual's asylum status is reversed, an individual may be detained as an illegal foreigner and is liable to deportation (*KR, MAA1*).

By treating these categories of individuals as illegal foreigners, the Department denied that they fell within the purview of the Refugees Act and its separate legal regime for detention and deportation. Instead, DHA relied solely on the Immigration Act.

Calling the Department's reliance on the Immigration Act 'misconstrued,' the SCA rejected the above categorisations of asylum seekers as illegal foreigners. The Court made clear that an individual who has received an asylum permit is entitled to the protections of the Refugees Act and may not be detained as an illegal foreigner.[38] It added that an individual retains this asylum seeker status until all final reviews and appeals have been completed and cannot be treated as an illegal foreigner.[39] And once an individual has been issued with an asylum permit, the provision barring the institution or continuation of proceedings applies, and the detention becomes unlawful.[40]

Despite both clear legal provisions and judicial pronouncements such as those described above, DHA has employed a variety of legal arguments to defend its continued detention of asylum seekers.

[38] *MAA2*, para. 12.
[39] *MAA2*, para. 19. See also *KHA*, *MMB*.
[40] *MAA2*, para. 19.

Sojourning in detention

In several instances, the Department indicated in correspondence with LHR that certain individuals would remain in detention until their asylum claims were finalized.[41] In legal arguments, as well as in practice, DHA maintained that a Section 22 permit did not entitle an individual to be released from detention, and that the permit's entitlement to 'sojourn' in the Republic did not mean that such sojourning could not be done in detention.[42]

The Supreme Court of Appeal firmly rebuffed this view, stating that the detention of an asylum seeker contravened section 2 of the Refugees Act and rejecting the notion that an individual could 'sojourn' in detention.[43] But the Department persisted in this view and continued to detain asylum seekers following the SCA's clear statement that an individual must be released from detention once he or she has applied for asylum (*AN2*).

An individual remains an illegal foreigner after applying for asylum

DHA also defended its position by maintaining that if an individual was arrested and detained as an illegal foreigner, he remained an illegal foreigner until a decision was made upholding the asylum claim.[44] As a result, DHA continued to detain individuals who applied for asylum from Lindela,[45] arguing that it was under no obligation to release an applicant who applied for asylum from detention (*GG*).

The SCA also rejected this view, stating that Section 23(2) of the Immigration Act, which declares an individual to be an illegal foreigner, 'ceased to be of application when an asylum seeker permit is granted to an "illegal foreigner."'[46] In defiance of the SCA's judicial pronouncement, DHA continued to detain individuals who applied for asylum from Lindela following the judgment.[47]

Halting of proceedings applies to deportation not detention

Section 21(4) of the Refugees Act states that 'no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the country' once he or she has applied for asylum. The wording of this clause—that proceedings may not be instituted or *continued*—implies that once an individual applies for asylum, any actions stemming from his or her unlawful immigration status are void. As affirmed by the SCA, an individual is no longer unlawfully in the country once he or she has

[41] *JAA*, *IKM*, *NM*, *KF* (taken to re-apply after DHA could not find him in the system), *IIW*, *YK1*, *KA*, *HH & HH* (never taken to apply), *MAA1*.
[42] *KA*, *HH & HH*, *KR*, *MAA1*, *MAA2*, *AS*.
[43] *MAA1*, para. 22.
[44] *KR*.
[45] *GG*, *BM*, *EN*, *MKK*, *NO & MG*, *TMB*, *KF* (taken to re-apply after DHA could not find him in the system), *MA*.
[46] *MAA2*, para. 19.
[47] *MB2* (appeal hearing inside Lindela), *MY*, *FW*, *JK*, *ROJ*, *LWN* (recognized refugee taken to re-apply when DHA could not find him in the system), *AN2*, *AF*, *CM* (taken to re-apply after DHA office refused to renew his expired permit on arrest), *KR* (application rejected as manifestly unfounded when taken from Lindela to apply—not advised of right to make representations to the standing committee), *AAK*.

applied for asylum; accordingly, an illegal foreigner who receives an asylum permit can no longer be regarded as an illegal foreigner.[48]

Since detentions in Lindela stem from an individual's 'unlawful presence within the country,' it follows that such detentions may not be continued once the detained individual has applied for asylum. DHA, however, has rejected this clear reading of the law, arguing that 'the words "no proceedings may be instituted or continued" should not be interpreted widely to include a right to be released from lawful detention by merely invoking provisions of section 21(1).'[49] In the Department's view, this clause applies solely to the halting of deportation proceedings and not to detentions.[50]

In response to the SCA's clear statement that once an individual receives an asylum permit, no proceedings could be instituted or continued against such a person as a result of unlawful entry or presence in the country, DHA insisted that the halting of deportation proceedings was sufficient to meet this standard. Accordingly, it sought to justify the continued detention of asylum seekers, arguing in one case that the detained asylum seeker was not at imminent risk for deportation and would be deported only if his appeal was dismissed.[51]

If true, this submission reveals a practice of detaining individuals at Lindela for purposes other than deportation. Such detentions are extra-legal in nature, as the Immigration Act authorises detentions only for the purposes of deportation at Lindela. While Section 34(1) authorizes detentions for the purposes of deportation, the suspending of deportation proceedings places such detentions under the purview of Section 34(2), which provides for the detention of illegal foreigners for purposes other than deportation. Such detentions, however, are only authorized for 48 hours, rendering unlawful the detentions in question. The Immigration Act does not provide DHA with legal authority to detain an individual for more than 48 hours for purposes other than deportation, a view that has been confirmed by the courts.[52] Moreover, the reliability of the Department's claim that this category of detained individuals will not be deported is questionable given that it has mistakenly deported individuals in the past, a practice that suggests that it does not categorise particular Lindela detainees as exempt from deportation.[53]

Furthermore, the Department has denied that the Section 21(4) protection applies to certain categories of individuals: 1) those who were detained when trying to leave the country, even if they subsequently applied for asylum;[54] 2) those who applied for asylum after a certain

[48] *MAA2*, para. 19.
[49] *KR*, DHA Heads of Argument, para. 42.
[50] *KR*, Answering Affidavit, para. 36; *MAA1*, Respondent Heads of Argument, paras. 34-35.
[51] *GG*, Respondents' Answering Affidavit, para. 38.2.
[52] *KHA* (Oral judgment). See also *MAA2*, para. 8.
[53] In 2009, the Department deported a Congolese asylum seeker two days before a scheduled court hearing to challenge his detention. The Department's attorneys had been engaged in settlement negotiations with LHR as the deportation took place and were unaware of the deportation proceedings. According to witnesses, the detainee attempted to tell Lindela officials that he was represented by attorneys and was scheduled to be in court, but they did not investigate or halt the deportation (*JPAB*).
[54] *HH & HH*, Answering Affidavit, para. 47; *AS*, Answering Affidavit, para. 20; *AS*, Respondent Heads of Argument, para. 38.

but unspecified period of time;[55] and 3) those who applied for asylum from detention.[56] In DHA's view, the protection granted in Section 21(4) only applies to individuals who were able to apply for asylum before their arrest.[57] If this interpretation is correct, it is difficult to imagine under what circumstances the Section 21(4) protections would be necessary, as DHA's version limits its scope to only those individuals who managed to apply before the instituting of proceedings, thereby negating the protection need altogether.

DHA arguments to the contrary notwithstanding, judicial pronouncements have made clear that the continued detention of asylum seekers is not authorised under the Immigration Act.[58] Nor is it authorised under the Refugees Act, which states that the detention of an asylum seeker requires the withdrawal of the asylum seeker permit,[59] a 'jurisdictional fact' that was absent in all of the cases involving the detention of asylum seekers.

Violations of administrative justice

In addition to its misplaced reliance on the Immigration Act to detain asylum seekers, DHA has also failed to observe the proper procedures governing immigration detentions as laid out in this Act. The latter includes routine failures to issue the proper forms and notifications as well as a general non-adherence to the warrant requirements and detention limits laid out in the Immigration Act.

The Immigration Act requires individuals to be notified of their rights of review and appeal, and the Regulations set out prescribed forms to carry out this notification. Section 34 of the Act demands that any detention of an illegal foreigner beyond 30 days be authorized by a warrant of the court and sets an overall limit of 120 days on immigration detentions. DHA did not adhere to any of these requirements involving notifications, authorisations, and detention periods.

No warrants or notifications

As described above, all detentions beyond 30 days must be authorized by a warrant of the court. DHA did not, as a matter of practice, obtain these warrants. In a few of the cases reviewed, DHA produced warrants during the legal proceedings, but these warrants had not been properly obtained. Both the High Court and the SCA held that a warrant obtained improperly—without adhering to the procedural requirements of the Immigration Act—

[55] *MAA1*, Answering Affidavit, para. 14.14-14.16.
[56] *MAA1*, Respondents' Heads of Argument, para. 8; *KR*, Answering Affidavit, para. 39.
[57] *KR*, Answering Affidavit, para. 39.
[58] *MAA2*, para. 8.
[59] *MAA2*, para. 21.

could not be used to authorise a detention.[60] DHA nonetheless continued to rely on such warrants in court.[61]

Not only did DHA fail to obtain the necessary warrants, it also neglected to issue the proper notifications to ensure that the detentions adhered to the standards of administrative justice. Under PAJA, administrative action that adversely affects the rights of individuals must include the following in order to be procedurally fair: 1) a clear statement of the nature and purpose of the administrative action, 2) an opportunity for the individual to make representations, and 3) notification of the individual's rights of review or appeal.[62]

The Immigration Act has incorporated measures to give effect to these rights. Under the Act, an individual declared to be an illegal foreigner must receive a notification explaining his or her right to request a review of the decision by the Minister. The Act also provides for the issuance of a Notice of Deportation, which informs the detainee of his or her rights and allows him or her to choose whether to be deported, to appeal the deportation decision, or to have the detention confirmed by a warrant of the court.

In virtually every case reviewed, the detainees did not receive these notices. The only exceptions—individuals who were either forced to sign documents or did not understand what they were signing—failed to accord with the standards of administrative justice laid out in PAJA.

The Immigration Act provides that an individual may at any time ask for a warrant of the court confirming his or her detention and must be released immediately if the warrant is not produced within 48 hours. One detainee who requested a warrant was told that the request must be in writing; however, pens are forbidden in Lindela, which the immigration officer would have known (*AIM*). Another detainee was chased away when he asked an immigration officer about the warrant (*IM2*), while a third was simply ignored (*KMFD*).

Detainees forced to sign notices of deportation

As mentioned, individuals were sometimes forced to sign documents and were often coerced into acceding to their deportations. According to court papers, seven Burundian detainees were threatened and/or beaten in August 2010 and forced to sign notices of deportation.[63] In one of these cases, a senior immigration officer informed LHR attorneys that their client, a recognized refugee, could not be released because he had signed a notice of deportation (*SN*).

[60] *MAA2*, para. 9; *AS*, para. 15, 18.
[61] *MMB*, *CU*.
[62] PAJA, para. 3(2)(b).
[63] *SPH*, *OK*, *SN*, *BB*, *AH*, *BH*, *IM3*.

Other examples include the following:

- A Burundian man was threatened and forced to sign a notice of deportation while in police custody (*EB*).
- An official from the Nigerian consulate visited a Nigerian detainee at Lindela and gave him a deportation notice. When the detainee refused to sign it, the official signed it for him (*CU*).

Detainees forced to sign forms they did not understand

Other detainees also reported being forced to sign deportation notices or to sign documents that they did not understand, in violation of the requirements of procedurally fair administrative action.

- A Rwandan man told police and an immigration officer that he wished to apply for asylum, but he was forced to sign a notice of deportation form that he did not understand (*GG*).
- A Burundian man who was illiterate was made to sign three forms without knowing what they were. In addition to the notice of deportation, the forms included a notice of the right to request a review of illegal foreigner status and a notice of rights under the Constitution (*KHA*).
- A Congolese man held at the police station was forced to sign three documents including a notice of deportation. He asked for the documents to be explained to him, but the police only responded that he must sign the documents (*CKM*).
- An immigration officer told a Ugandan man detained at the police station that he would be detained indefinitely if he did not sign a deportation notice (*JK*).
- An official from the Zimbabwean consulate instructed a Zimbabwean man to sign a notice of deportation. He signed the document because he had been told that he could not apply for asylum and believed he had no choice (*LS2*).
- Two men—from Burundi and the DRC—were forced to sign papers they did not understand at the police station (*JD, JF*).
- A Burundian man was forced to sign papers he did not understand at the Crown Mines reception office on the day that he was arrested. A few months after arriving at Lindela, an immigration officer instructed him to sign another document that he did not understand. She falsely told him that this document was needed to help prepare his case for Lawyers for Human Rights (*PN*).

Detentions beyond 120 days

The Immigration Act places a 120-day limit on detentions for the purposes of deportation.[64] But the Department has explicitly refused to be bound by this limit, arguing that 'it is unavoidable that often such persons would be held at Lindela pending deportation for longer periods than required by law.'[65] This view effectively rejects the idea that the law is binding.

The legal submissions excerpted below—justifying both a detention in excess of 120 days and the failure to obtain the necessary warrant after the initial 30 days – illustrates the non-binding character that DHA has ascribed to the law.

> I have been informed by Masanabo [Director of Lindela] that magistrates are unwilling to extend warrant of arrest beyond a period of ninety (90) days as prescribed in subsection 34 (1) (d) of the Immigration Act. Masanabo further informs me that the magistrates normally provide that their discretion to extend the Warrant of Detention in subsection 34 (1) (d) is limited to ninety (90) days.
>
> I am advised that magistrates are creatures of statute. That, unless provided otherwise, magistrates may not exercise any discretion beyond the powers of an enabling statute.
>
> It is submitted the fact that a period of one hundred and twenty (120) days has expired does not necessarily entitle the Applicant to an immediate or automatic release or grant the Respondents any authority to release him.[66]

Revealing extra-legal motivations, the Department went on to explain:

> I submit that Respondents has [sic] complied as far as it is reasonable and possible with the statutory requirements and in the best interest of administration of justice and protection of Immigration laws Applicant should not be released.[67]
>
> I submit further that the problem is now beyond the Respondents control and the Respondents have no legal basis to release Applicant. The Respondents primary view is that releasing Applicant at this stage will send a wrong message to the society in general and illegal foreign nationals in particular and further releasing him might be interpreted to be perpetuating illegality in the Republic.[68]

[64] Section 34(1)(d).
[65] *KA*, Supplementary Answering Affidavit, para. 26; *HH & HH*, Supplementary Answering Affidavit, para. 21.
[66] *KA*, Supplementary Answering Affidavit, paras. 27-29.
[67] Ibid., para. 43.
[68] Ibid., para. 47. See also *HH & HH*.

Failing to recognise the irony of its statement, the Department maintained that it was obliged to violate the law in order to avoid 'perpetuating illegality' in the Republic. Its submissions reveal that the Department does not believe itself to be bound by statutes when such statutory requirements prove inconvenient.

The Department has, in some instances, blamed the detainees themselves for prolonging their detentions by refusing to cooperate with the relevant consulates[69]—ignoring the fact that forcing an asylum seeker who fears persecution to disclose information to his or her consulate may place him or her in greater jeopardy. Discounting the legal provision establishing a 120-day limit, the Department argued that 'to an extent that the delay in deportation proceedings was caused by the Respondents [initially, the applicants], their continued detention beyond the prescribed period in Section 34 (1) (d) is justifiable.'[70]

A court rejected all of these arguments, affirming that the Immigration Act established an absolute rule that no one may be detained for over 120 days and that an individual detained in excess of 120 days must be immediately released.[71] A few days later, another judge reached the same conclusion.[72] In the former case, the judge determined that 'a strict construction should be placed upon statutory provisions which interfere with an individual's rights.'[73] The subsequent judgment reiterated this view: 'A court has a duty to apply the plain, literal or grammatical sense of the words of a statute and not to fill in gaps which the legislature seems to have omitted.'[74] The judge added that given the clear, unambiguous language, there was no reason to turn to the canons of construction that guide legal interpretations.[75]

DHA nonetheless persisted in its view, arguing that the judge in the earlier case had erred in applying a strict interpretation of Section 34(1)(d) and that he should have applied a more purposive interpretation.[76] Even after three judgments upholding the 120-day limit,[77] DHA continued to assert that this limit was not legally binding. In its leave to appeal the last of the three decisions, the Department maintained: 'His Lordship erred in law in not according section 34(1) (d) a purposive interpretation which would result in the realization of the intention of the statute.'[78]

In two cases, DHA compounded the initial injustice brought about by the unlawful deprivation of liberty by claiming that it needed to extend the detention in order to ensure that the detainee was released in possession of an asylum seeker permit:

[69] *KA*, Supplementary Answering Affidavit, para. 40; HH & HH, Supplementary Answering Affidavit, paras. 19-21.
[70] *HH & HH*, Notice of Application for Leave to Appeal, para. 3.7.
[71] *KA*, paras. 12-18.
[72] *HH & HH*.
[73] *KA*, para. 15, citing *Consortium for Refugee and Migrants in South Africa and Others v Minister of Home Affairs and Others* [*CoRMSA*] (WLD, 7 July 2008, Case No. 6709/08).
[74] *HH & HH*, para. 17.
[75] *HH & HH*, para. 20.
[76] *KA*, notice of application for leave to appeal, paras. 2.2-2.3.
[77] *CoRMSA*, *KA*, *HH & HH*.
[78] *HH & HH*, notice of application for leave to appeal, para. 4.3.

> Kindly note that we are instructed further that the issuing of a Section 22 permit is a lengthy and involved process. The Applicant will have to be escorted to Refugee Reception Office, officers have to be available to assist Applicant and upon arrival at the office Applicant has to get in line as the Department cannot prioritize any Applicant for asylum to the detriment of other thousands Applicants who are applying for same.
>
> We are therefore instructed to propose that Applicant be issued with a Section 23 permit and released. Alternatively that you must allow our client (the Department) an opportunity of fourteen (14) working days to attend to the logistics of issuing a Section 22 permit.[79]

At the time of the Department's offer, the individuals had been detained for more than 172 days (*TMB, KF*).

Of the 90 cases reviewed, 47 individuals were detained for more than 120 days. When time spent in police detention is added (discounting the 48 hour period allowed for by law), the number rises to 55. In three cases, Lindela issued the detainees with new Lindela cards without releasing them.[80] The new cards re-started the timeline to inaccurately reflect a lower number of days spent in detention. In fact, one of these detainees had been in detention for 722 days.[81] The other two also exceeded the legally prescribed limit, having been detained for 277[82] and 165[83] days.

Conclusion: the regularisation of law-breaking

These examples point to widespread violations of the law that have become a matter of course. Adherence to the procedural guarantees protecting against arbitrary and unlawful detentions have become the exception, while the failure to implement these legal requirements is the norm. Rather than seek to obfuscate these activities, DHA has openly sought to defend its role as law-breaker, making litigation the only recourse to vindicate the rights guaranteed by law.

[79] Letter from State Attorney to LHR, 22 December 2009 (on file with author).
[80] *BM*, *IM2*, *AN2*.
[81] *BM*.
[82] *IM2*.
[83] *AN2*.

Legal Processes

This section outlines the legal steps and the outcomes of the detention cases summarised above, including efforts to avoid litigation. It highlights how DHA's actions both resulted in unnecessary litigation and extended the detentions of individual who were illegally being denied their fundamental right to liberty.

Multiple letters of demand

The Department has sought to portray the large number of detention cases as signalling litigiousness on the part of LHR and others. Yet, in every case, the Department had the opportunity to avoid litigation by responding to the initial letter of demand. These letters—sent to members of the Department, including representatives from Lindela and asylum seeker management—informed DHA of an individual's status as an asylum seeker or of other irregularities in the detention process. DHA did not release any detainees as a result of these letters.[84]

In some cases, LHR sent multiple letters before resorting to litigation.

- LHR sent a letter to the police, two letters to DHA, and subsequently intervened to halt the pending deportation (*NC*).
- LHR sent three letters of demand and twice intervened to halt the scheduled deportation (*KMJ*).
- In several cases, LHR sent two (*AN1, TMB, MMB*) or three (*BM, KF, AF*) letters of demand.

Two additional individuals were almost deported, an outcome that was only avoided through urgent interventions by LHR (*AN2, CU*). In one of these cases, LHR sent a letter of demand indicating the detainee's intention to apply for asylum, which he had attempted to do prior to his arrest. Two days later, the detainee told LHR by phone that his deportation was scheduled for the following morning. LHR phoned at least six people asking that the deportation be halted on the basis that he was an asylum seeker. Without regard for the legal obligation against refoulement, DHA responded that deportation arrangements had already been made and halting the deportation would have serious financial implications.[85]

The letters of demand afforded DHA an opportunity to resolve every case before the institution of court proceedings. Rather than adopt this course, DHA accused LHR of

[84] One detainee was erroneously released before the launching of court papers. His asylum application had been rejected and he had been informed that he was to be deported within a week (*AF*).
[85] *CU*, e-mail from Head of Lindela to LHR attorney in response to letter of demand (on file with author).

launching an 'onslaught' of litigation and threatened to adopt an even harsher attitude towards foreign migrants:

> [T]he continued onslaught by way of this incessant litigation may compel the Department to adopt a hardened attitude, something that the Department has pondered for sometime and resolved to stay clear in the interest of the indigent and vulnerable people who may feel aggrieved by administrative decisions.[86]

DHA's response reveals that its actions are directed by spite more than by legal obligations. Moreover, the fact that DHA was ultimately unsuccessful in all of these cases confirms both the legitimacy of the cases and the fact that litigation costs could have been avoided with the same outcomes achieved. In short, DHA gained nothing from opting to ignore the letters of demand and provoking litigation.

Cases removed from the roll

In several cases, DHA ignored LHR's letters of demand until the start of court proceedings, and then acceded to the demands. These cases were then removed from the roll—some of them after DHA had initially indicated an intention to oppose the proceedings—which contributed to the legal costs of both sides prior to removal. Below is a list of cases that were removed after initial DHA intransigence. Although DHA's settlement proposals often included an offer to tender costs, no costs were tendered in the following cases:

- DHA opposed the matter, sought a delay, and then settled (*TT*).
- The Refugee Affairs Division indicated that the detainee would be released. When he was not released, LHR launched a court application. The detainee was released six days later, and the matter was removed (*KMJ).*
- LHR removed the matter from the roll following the detainee's release ten days after the launching of court papers (*YK1*).
- After three letters of demand and the launching of court papers, the application was removed when DHA agreed to the detainee's release (*BM*).
- DHA filed a notice of intention to oppose, but the State Attorney's office sent a letter on the same date stating that DHA was no longer opposing the matter. The matter was removed from the roll after the detainee was released (*AU*).
- The matter was removed from the roll after the State Attorney's office told LHR that DHA would not oppose and that the client had been released. DHA did not

[86] E-mail from the DHA's Director of Litigation to Lawyers for Human Rights, 25 September 2010 (on file with author).

return the client's passport when it released him, and he was given a notice to report back to Lindela, which forced LHR to issue a new letter of demand (*LS1*).

- The matter was removed after DHA indicated that it would not oppose and would settle the matter (*PN*).
- The matter was removed, but the detainee was released without any documentation and with a notice to report to Lindela (*GGBM*).
- The case was dismissed because the client was released by mistake before the hearing date (*KM2*).
- Several matters were removed after the detainees were released from detention (*JD, JF, ZS. PK, AIM, JPK*).

DHA did tender costs in the cases below:

- Several cases were removed after the detainees were released (*FW, OM, IM2, MB2, TPDM, ZJM*).
- The case was removed just before the start of court arguments (*JAA*).
- DHA released the detainee after the start of court proceedings, and the matter was removed (*NH*).
- The matter was settled the day before the hearing (*MAA, AT, FCM, MY*).
- DHA indicated it would not oppose the matter, and it was removed (*MAR*).
- The matter was removed after DHA indicated that it would not oppose and would settle the matter with costs. The detainee was released with a notice to report to Lindela weekly (*KMFD*).
- The matter was removed, and the detainee was released with a 14-day transit permit (*JIMM*).
- DHA offered to release the detainee with a transit permit if the matter was removed. LHR replied that it would remove the matter only if the detainee, a recognized refugee, was released with his refugee permit. The court ordered DHA to submit an affidavit that the applicant was released in possession of his refugee permit. The matter was removed, with costs, after submission of the affidavit (*MB3*).

The refusal to accede to legal demands until the start of court proceedings incurred unnecessary costs against the government. Three of these cases (*MB2, MY, FW*) involved practices that the SCA had previously declared unlawful.

DHA opposition

In the remaining cases—those not removed following the launching of court papers—DHA either opposed the case in court, indicated an intention to oppose without filing opposing papers, or initially opposed but ultimately settled the case. In many of these cases, DHA opted to oppose despite a previous negative court ruling on the same issue. In the two instances in which DHA obtained a favourable judgment in the High Court, the Supreme Court of Appeal subsequently overturned the judgments, creating an even stronger precedent establishing the illegality of DHA's actions.[87]

DHA files a notice to oppose and no opposing papers

This section highlights the cases where DHA filed an intention to oppose the court action but did not subsequently file opposing papers. Most of these cases ended in a court order against the Department or in an order by agreement.

- Order (*MB1*, *IKM*).
- Notice to oppose and order by agreement (*KJM, OW, ST, IIW, TS, EN*).
- DHA opposed the application despite the facts that the individual was lawfully in the country and that there was no legal basis on which to oppose his detention, resulting in an order against DHA (*PC*).
- DHA filed a notice to oppose, but the State Attorney sent a letter on the same date, which stated that DHA was no longer opposing the matter. It was removed from the roll (*AU*).
- The matter was postponed so that DHA could decide whether to oppose and resulted in an order by agreement (*SPH, OK*).

DHA's initial refusal to cooperate despite clear legal obligations increased the unnecessary costs it ultimately had to pay in these cases.

DHA files opposing papers and then settles

DHA did file opposing papers in some cases, but then it subsequently settled the case or sought to have it removed from the roll.

- DHA initially indicated that it would not oppose, but then it decided it would oppose to avoid conceding costs. The matter was postponed and then removed after the detainee was released (*TT*).

[87] *MAA2*, *MAA3*.

- DHA opposed the matter for two weeks and caused multiple delays, then released the applicant just before the date of the hearing (*MMB*).
- DHA filed opposing papers, and then it settled the case via a court order by agreement (*GG, NT*).
- The matter was postponed so that DHA could file answering affidavits and then settled via an order by agreement (*EB*).

Order by agreement

A total of 26 cases resulted in a court order by agreement against DHA, including cost orders.

- *IM1, TMB, BNM, AM, SN, ROJ, LWN, CM, FFMK, AAK, IM3, EN, TS, MKK, NO & MG.*
- Notice to oppose + settlement (*KJM, OW, ST, IIW*).
- Opposing papers + postponement + settlement (*GG, NT*).
- Postponement + settlement (*SPH, OK, YK2, AH*).
- Postponement + settlement—no cost order (*EB*)

Four of these cases (*ROJ, LWN, CM, AAK*) involved practices that the SCA had previously declared unlawful.

Order

Another 30 cases resulted in an order against DHA.

- *AS, MB1, IKM, NM, TN, NC, AN1, TM, WFK, KF, PC* (costs reserved), *KHA, CKM, EW, JK, BB, MMB, BH, LB, TKN, TMM, AN2, LS2, KA, HH & HH, MAA2, MAA3, KR, MJ.*
- DHA made a settlement offer but did not respond when LHR requested confirmation of the terms of the settlement, which included copies of the Section 22 permit and the warrant of release (*KM1*).

In five of these cases (*KHA, MMB, AN2, JK, KR*), the Department opposed the matter despite a previous judicial pronouncement from the SCA declaring the challenged practice illegal (*MAA2*).

In a habeas case involving the disappearance of a client following his purported release from Lindela, LHR provided an affidavit detailing the release procedure in previous cases. LHR's affidavit noted that it had been involved in over 90 urgent applications regarding the

detention of asylum seekers, most of which resulted in court orders for release.[88] DHA denied that these applications resulted in court orders demanding release, adding: 'It is interesting to note that the applicant fails to mention that most court orders that are referred to are achieved on technical grounds without the merits of the case visited.'[89] It is not clear to which technicalities the affidavit is referring, given that most orders stemmed from the fact that the detention was declared illegal under either the Immigration or the Refugees Act.

Postponements

DHA caused several unnecessary postponements, increasing both the costs to the taxpayer, and the deprivation of liberty occasioned by the increased time in detention. Recognising what is at stake when the fundamental right to liberty is abrogated, the SCA stated in a 1997 ruling: 'A detained person has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention.'[90] Many of these postponements were the result of DHA's failure to make timely legal submissions, and many ultimately proved unnecessary as the Department settled following the postponement.

- DHA caused the case to be stood down for further argument then agreed to remove it from the roll (*TT*).
- DHA filed opposing papers on the day of the hearing, postponing the matter by two days. After LHR filed an answering affidavit, the Department settled (*GG*).
- DHA argued on the day of the hearing that the detainee was not entitled to the relief he was seeking—release from detention—because he had not sought to have the magistrate's warrant extending his detention reviewed and set aside. The case was postponed for 19 days to allow for supplementary papers to be filed, and DHA settled on the day of the hearing (*NT*).
- DHA caused a postponement on the day of the hearing so it could decide whether or not to oppose. DHA then offered to settle under specified terms and indicated that, if LHR did not accept these terms, it would seek an additional postponement in order to oppose the matter (*SPH, OK)*.
- Three matters were postponed for three days to allow DHA to serve answering affidavits. DHA then agreed to settle the cases (*EB* (no costs), *YK2*, *AH*).
- DHA sought several postponements, each time failing to file papers by the court-specified deadline. It justified these delays on the grounds that it needed time to

[88] *CM*, LHR Founding Affidavit, para. 21.
[89] *CM*, First and Second Respondents' Answering Affidavit, para. 9.3.
[90] *Silva v Minister of Safety and Security* 1997 (4) SA 657 (W), at p. 661-H (cited in *KA*, para. 18 and *MAA2*, para. 10).

establish why it was detaining the applicant, notwithstanding the fact that the reasons for detaining an individual must be established prior to the detention, or, at the very least, within 48 hours if for the purposes of verifying immigration status. DHA opposed the case for two weeks and then released the detainee just before the hearing, which went forward and resulted in a court order (*MMB*).

Contempt

In many cases, DHA failed to adhere to the terms of court orders, whether obtained by agreement or by court decree. These actions left individuals in detention for additional periods as well as undocumented and subject to re-arrest following their release.

- DHA agreed to release the detainee and provide him with an asylum seeker permit. He was subsequently turned away from the Crown Mines refugee reception office on numerous occasions, and LHR was forced to send an additional letter of demand. It took 27 days before he received his permit (*JAA*).
- The court order specified that the detainee be released and included a deadline for the issuing of an asylum permit and the return of the money that had been confiscated from him. The money was returned two weeks after the deadline (*KJM*).
- The order called for the detainee to be released 'forthwith' with an asylum seeker permit. He was not released for six days following the court order, and he did not receive the permit for an additional week after his release—13 days after the court order (*ST*).
- The order required the detainee to be released in possession of a Section 22 permit by the close of business on 21 April—the day of the order. The detainee was released without a permit and remained undocumented for a week (*NC*).
- The order required that the detainee be released on 12 August 2009 with an asylum seeker permit. On 13 August, Lindela officials informed LHR that there was no transport to take the detainee to Marabastad and he would be taken on the following day. When LHR arrived to consult on 14 August, they discovered that their client was still in detention. The centre manager at Marabastad had refused to issue the permit despite the court order. After LHR threatened contempt proceedings, the client was released after 6:00 p.m. on 14 August. He did not receive an asylum seeker permit until 11 September (*AN1*).
- In several cases involving court orders requiring immediate release with a Section 22 permit, DHA instead released the detainees with 14-day Section 23 permits, requiring them to go on their own to obtain a Section 22 permit at a refugee reception office and leaving them vulnerable to re-arrest (*EN, IM1, TS, MKK, CKM, MJ*). In four of these cases (*EN, TS, IM1, MKK*), counsel for the applicants specifically

drew the judge's attention to the provision in the orders that the applicants be released in possession of valid Section 22 permits. The judge noted this requirement and received confirmation from the respondent's counsel that this would occur as ordered.

- The court order dated 1 June required immediate release with a Section 22 permit. LHR arrived at Lindela on 2 June and found the client still in detention. Lindela's director claimed no knowledge of the court order. The detainee was released a day late with a Section 23 permit (*KHA*).
- LHR removed the matter from the roll in response to a letter from the State Attorney's office indicating that the detainee would be released on 25 June with a Section 23 permit. The client was released on 28 June with a Section 23 permit that included a condition that he report to Lindela every Tuesday. This condition was not part of the settlement agreement (*KMFD*).
- Two detainees spent an additional two days in detention and were released only after LHR discovered that they were still in detention. One was released with an expired asylum permit (*ROJ*). The other was released with a Section 23 permit, despite being a recognized refugee (*LWN*).
- DHA did not comply with any of the filing deadlines established by the court and sought condonations and postponements without providing notice to opposing counsel. DHA filed affidavits out of time, made changes after LHR had commissioned its answering affidavit, and failed to include the necessary annexures as required under court practice rules (*MMB*).
- The order stated that the individual could go to any refugee reception office to obtain a permit. When he arrived at Crown Mines, he was told that he needed to go to Pretoria. He tried six times to get documentation at three different reception offices. LHR discovered that he had been granted refugee status in 2007, but he had never been informed (*TKN*).
- The court order said that the detainee should be released with a Section 22 permit. Although Lindela was in possession of his valid asylum seeker permit, he was released with an expired permit and a copy of the valid permit (*FFMK*).
- The court order stated that the detainee should be released in possession of a valid asylum seeker permit. He was released in December 2009 with a transit permit. Following intervention by LHR, he obtained an asylum permit. However, this permit was retained when he went to renew it in April 2010, which left him undocumented (*EN*).
- A Muslim woman who was detained with her husband experienced abdominal pains and feared she might be pregnant and in need of medical care. The court postponed the detention hearing, but it ordered DHA to ensure that she received

proper medical care by the close of business the following day, including access to a female gynaecologist. The Department did not facilitate this access, and LHR was forced to arrange for her to see a private doctor. The Department then refused to release her for a follow-up visit, which was requested by the doctor (*AS*).

- The Department failed to file a notice to oppose and did not file a record of proceedings by the deadline established by the court (*AS*).

One case of contempt involved a wilful deception of the court (*CM*). On 22 November 2010, the State Attorney's office sent a letter that was made an order of court on 23 November. The letter stated that the detainee would be released with a Section 22 permit, and Lindela informed LHR that it had released the detainee. After LHR could not locate him, the organisation contacted his brother, who told LHR that the detainee had phoned him and told him that he had been transferred to another detention facility. LHR asked the State Attorney's office for a copy of the release warrant, but the office advised them that one was not available at that time. The organisation then discovered that DHA had 'released' the detainee directly into South African Police Service (SAPS) custody so that he could be charged under the Refugees Act. LHR learned only by chance where their client was being held after another client informed the organisation that he had been detained with him.

A week after LHR requested a copy of the release warrant from the State Attorney's office, the office produced one without the appropriate signatures. DHA was ordered to produce the detainee in court on 6 December and to either show the lawfulness of the detention or release him that same day. Following subsequent court action, the charges against the detainee were dropped on 8 December. The detainee was not released, however, until 15 December despite there being no basis on which to hold him. In court papers, DHA acknowledged that the decision to refer the case to SAPS preceded the settlement offer and justified its actions on the grounds that the individual had made false representations regarding his nationality. DHA stated that once these false statements were clarified, he could apply for asylum. The Department did not raise any of these facts before agreeing to the court order to release him with a Section 22 permit, and it made this agreement while fully aware that it intended to deny him this permit and hand him over to SAPS. The court order did not make the issuance of the Section 22 permit contingent on acquittal by a criminal court of making false statements.

The table below shows the additional number of days that individuals were held in detention in contempt of court orders.

KHA	1
AN1	2
ROJ	2
LWN	2
ST	6
CM	22

Conclusion: wasted litigation

DHA's actions have unnecessarily prolonged both the course of the legal proceedings and the deprivation of liberty suffered by those in illegal detention. In none of these cases did DHA's decision to oppose or to postpone legal proceedings result in a positive outcome for the Department. Moreover, many of the Department's decisions to proceed with litigation were made in defiance of clear legal precedent. The next section evaluates just how costly these actions were for the South African taxpayer.

Costs of Illegal Detention

The illegal practices described above have resulted in wasted costs totalling at least 4.7 million rand[91]—an amount borne by the taxpayer. Because ACMS had limited access to information and restricted its costing to only those costs it could confirm for each case, the true costs are likely to be even greater and will continue to accumulate as long as illegal detentions continue. The costs were broken down into five categories:

1. Legal costs incurred by LHR that were paid by DHA;
2. Legal costs incurred by DHA;
3. Cost of transporting detainees to Lindela;
4. Cost of detaining individuals at both the police stations and at Lindela; and
5. The opportunity costs of these wasted expenditures.[92]

Rule 69 of the Supreme Court Act (No. 59 of 1959) sets out the rules governing cost recovery in litigation. It provides for an individual (known as a taxing master) to determine the amount that a party who has been awarded costs may recover for particular tasks (known as attendances). Cost recovery sheets (known as bills of cost) that detail every task and the recoverable amount allowed by the taxing master, are prepared for every case involving a cost order. These sheets provided the basis for calculating LHR's legal costs.

The fees allowed by the taxing master are often significantly lower than the actual rates charged by attorneys and advocates. Although DHA is not bound by the taxing master rates in determining what it pays its attorneys and advocates, ACMS nonetheless relied on these rates in cases in which it lacked any other information on the rates paid by DHA. These rates do not reflect the true costs to DHA, which are likely to be significantly higher.

The costing analysis was performed by Raul Zelada-Aprili, an economist based at the University of Massachusetts (Amherst). ACMS worked with a trained economist so that it could verify and provide a justification for every step of the analysis and ensure that the results represent methodologically rigorous cost analysis procedures. The methods used to reach the total amounts in each category will be detailed in the sections below.

[91] The exact amount totalled ZAR 4,750,124.73.

[92] Unlike the first four categories, this category is not based on a calculation of monetary values but instead considers some of the foregone spending possibilities (such as spending on housing, education and health care) based on the amounts calculated in the first four categories.

Legal costs recovered by LHR: R1,253,686

ACMS calculated the legal recovery costs that DHA paid LHR in every case in which there was a cost order or cost agreement. For most cases, the the bill of costs prepared in accordance with the fees allowed by the taxing master provided the amount. For the cases in which the bill of costs had not yet been drawn, ACMS prepared its own bill of costs, adopting the task and fee breakdown displayed in bills of cost for comparable cases.

The cost recovery amount that DHA paid to LHR totalled R1,012,855. This is an average of R17,658 per case in the 71 cases in which LHR recovered costs. These amounts do not reflect the full cost of the cases but only the proportion that LHR was allowed to recover under Rule 69.

Of the remaining 19 cases in which there was no cost recovery, 16 were removed from the roll following the client's release. Costs were reserved in another case, and one involved a client who was erroneously released before the filing of court papers. There was only one case in which there was no cost recovery following a court order.

Legal costs incurred by DHA: R783,284 – R1,253,686

DHA incurs a range of legal costs when legal proceedings are initiated. These costs vary by case, depending on the steps taken by DHA. These steps include the following:

- Deciding what action to take: filing a notice to oppose or indicating an intention to settle.
- Drafting opposing papers: answering affidavits, supplementary affidavits, and heads of argument.
- Perusing papers filed by the applicants: founding affidavits, annexures, replying affidavits, and supplementary affidavits.
- Appearing in court: for each case argued in court, a representative from the State Attorney's office, together with an advocate hired by the State Attorney, must appear in court (unless the State Attorney representative argues the case).

Costs have been broken down into the following categories:

- *Perusal Costs*
  For every case in which DHA filed a notice to oppose, filed an answering affidavit, or appeared in court, ACMS assumed that DHA legal representatives had to peruse the papers of the opposing side. The taxing master sets the perusal rate at R43 per page.

- *Drafting Fees*
  In cases in which DHA filed answering, supplementary, or any other affidavits, ACMS used the taxing master drafting rate of R200 per page. Heads of Argument were not included in this rate, as they were included in the advocate fees. Any leave to appeal filed by DHA was also included in this amount.

- *Advocate Fees*
  ACMS calculated advocate fees for cases in which it could confirm that DHA hired an advocate. These calculations were based on the billing method of advocate day fees rather than hourly rates. They allowed for one day of preparation (including perusal and drafting) and one day for the court appearance. The calculations included an additional day fee for preparation and for a court appearance in the two cases that were appealed to the SCA. Travel fees to Bloemfontein and the cost of one night's lodging were also estimated for these cases.

  Day fees were based on estimates provided by a cost consultant who is familiar with the rates charged by advocates engaged by the government. In most cases, ACMS applied a conservative estimate of R10,000 per day. In three cases involving more senior advocates, ACMS employed a higher day rate. This rate was similarly estimated by the cost consultant based on her familiarity with the rates generally paid to advocates of this level of seniority.

The total costs to DHA were calculated at R743,284. Because these calculations are limited to the information ACMS could verify and are based on the much lower rates allowed by the taxing master, they under-estimate the true cost to DHA, which may be significantly higher. The amount of R743,284 represents approximately 62 percent of LHR's cost recovery amount. This lower amount was used to reach the overall total of R4.7 million. However, one can assume that DHA's costs in each case are at least equal to LHR's—as represented by the higher amount above—and are in fact much higher because the attorneys and advocates engaged by DHA will receive a higher fee for equivalent tasks than those received by public interest attorneys and advocates, and DHA's advocate fees will also be higher than those allowed by the taxing master. Without obtaining this information from DHA, there is no basis on which to estimate how much greater these costs are. In addition, this amount involves legal costs alone, and excludes all staff costs within DHA itself.

Costs of transporting individuals to Lindela: R82,350

The individuals in this study were arrested in locations all over the country and were then transported to Lindela. To estimate transport costs, ACMS used a standard distance from each location to Krugersdorp without accounting for variance within a particular city. These

distances were obtained through an online distance calculator between cities.[93] ACMS assumed that all transport took place by motorised vehicle (i.e., not train or airplane) and assigned a value of R3 per kilometre. These costs did not take into account additional transport costs for individuals who were taken to several police stations before being sent to Lindela. Transport costs varied greatly, ranging from R100-R200 for individuals arrested near Johannesburg or Pretoria to R4,300 for those arrested in the Western Cape.

Given that all of these individuals were subsequently released, DHA could have avoided these expenses had it conducted proper verifications of immigration status and followed the legal requirements of the Immigration and Refugees Acts. Not only did DHA incur these unnecessary costs, it also created transport costs for these individuals who had been wrongly detained. After their release, these individuals—many of whom had been in detention for several months without any income—were responsible for making their way from Krugersdorp back to the point of arrest.

Detention costs: R2,630,805

ACMS calculated detention costs for the number of days that individuals were held as illegal foreigners at both police stations and at Lindela. Although the law states that an individual may only be held for 48 hours in order to verify his or her immigration status, many detainees were held for much longer at police stations. In cases in which an individual was transferred to Lindela from prison or was held for a crime other than being an illegal foreigner, this time in detention was not included in the calculation.

There is no public information on the amount that DHA pays Bosasa to detain individuals at Lindela. Despite repeated requests, DHA has refused to make a copy of its contract with Bosasa publicly available. ACMS did obtain a copy of the contract through Bosasa, but the costs of detention were blacked out.

As a result, ACMS was forced to estimate detention costs per detainee. In court filings, DHA reported that it was spending an average of seven million rand per month on Lindela detentions.[94] ACMS previously obtained daily lists of detainees at Lindela over a 10-month period from March 2009-January 2010 as part of another research project. Given that there is no evidence indicating that detention practices have changed since this period, these lists were used to calculate the average population at Lindela. On average, the facility holds 1,200 detainees.[95] Based on the figures provided by DHA, the cost per day per detainee is R188.[96] ACMS used the Lindela figure as a proxy for detention costs at police stations. This figure was also used as a proxy for calculating the costs of airport detentions.

[93] http://distancecalculator.globefeed.com/Country_Distance_Calculator.asp.

[94] *KA*, Supplementary Answering Affidavit, para. 44.

[95] This number was confirmed off the record by a DHA official.

[96] This estimate is based on a 31-day month. When estimated on the basis of a 30-day month, the amount increases to R194 per day.

For the 90 cases described above, DHA spent R2,630,805 on detentions ultimately ruled illegal and thus unnecessary—an average of R27,404 for each of the 96 detainees. But these figures provide only part of the story. The cases described above do not account for all of the illegal detention in Lindela but represent only those individuals that LHR had the capacity to assist. Many more are likely detained and ultimately deported before they can obtain legal assistance. This suggests that the costs of illegal detentions are much higher, and, for those individuals who are ultimately deported, the costs of these possibly illegal deportations must also be calculated.

Opportunity costs of these expenditures

The costs detailed above represent R4,750,125 of expenditures based on violations of the law. This section considers the opportunity cost of these expenditures. The opportunity cost measures the cost of an activity based on foregone options. In other words, it considers the alternative ways in which the money could have been spent.

Many South Africans lack access to the basic resources—housing, water, health care, and education—deemed necessary to meet the minimum standards of human dignity. Using published figures on the provision of these resources, ACMS has calculated the additional resources that could have been provided based on the expenditures detailed above.

The R 4.7 million in wasted costs could have built 87 RDP houses (at R54,000 each).[97] Focusing exclusively on detention costs, DHA spends an average of R27,404 on each individual. Thus, for every two individuals illegally detained, the government could have provided an additional RDP house. If even a quarter of the1,200 detainees who are held at Lindela on average every month are being detained there illegally, the cost equals an additional 150 RDP houses per month.

Many households in South Africa remain without adequate water provision. The government has established six kilolitres of water per household as the absolute minimum amount of water necessary for survival. Based on an average rate of R4.7 per kilolitre,[98] this amounts to a total of R28.2 for six kilolitres of water. The expenditures described above amount to free minimum water provision for 168,144 households.

Many South Africans also lack access to health care and adequate education. This money could have been devoted to a variety of health care-related costs: expanding rural health care, providing ARVs, increasing basic health care provision, or hiring an additional 44 nurses (at R106,000 per annum[99]). In the area of education, this money could have been

[97] Amount reported on DA's 'Every Rand Counts' page, http://www.da.org.za/campaigns.htm?action=view-page&ctegory=7034&sub-page=9152.

[98] Municipalities generally charge between R3.8 to R4.7 per kilolitre of water; S. Masondo, 'Water Prices Set to Soar,' *Times Live*, 21 March 2011, http://www.timeslive.co.za/local/article979785.ece/Water-prices-set-to-soar.

[99] F. Lund, 'Hierarchies of care work in South Africa: Nurses, social workers, and home-based care workers,' *International Labour Review*, Vol. 149, No. 4 (2010), p. 501.

used to expand rural education, improve resources at schools, or hire an additional 27 teachers (at R170,000 per annum).[100]

While these numbers may not be significant on a national scale, they nonetheless contribute to efforts to improve the lives of the many South Africans living in dire poverty, an effort in which even the most incremental of improvements can play a large role in the life of an individual or a community. Instead, DHA has expended government resources to continue funding its illegal activities.

[100] Amount reported on DA's 'Every Rand Counts' page, sup. note 97.

Conclusion

DHA's flagrant disregard for the law has resulted in millions of rands of wasted government expenditure. Not only is this amount borne by the taxpayer, it is also taking resources away from other government programmes that directly improve the lives of South African citizens, such as the provision of housing, water, electricity, and education. Given that many South Africans lack these basic resources, the continued directing of money towards detaining asylum seekers as illegal foreigners lacks not only a legal basis but also a rational one.

As mentioned, the expenditures described above represent only a part of the picture. It is likely that DHA is in fact spending much more in illegally detaining those individuals it characterises as illegal foreigners. While not all of those cases will incur the same legal costs described above, those individuals who do not wind up in court will be deported—an additional cost that has not been included in the current study. Moreover, while the cases detailed above resulted in the release of the individuals in question, many more will continue to be detained, resulting in additional detention costs.

DHA has not been held accountable for its consistent and flagrant violations of the law. Despite repeated judicial pronouncements on the illegality of its actions, each with financial implications, no government department has sought to call DHA into account. Whether this is from ignorance or indifference is unclear. But allowing a government department to engage in consistent law-breaking activity without any accountability, regardless of who the victims of this law-breaking activity may be, comes at a cost. Not only do these actions have financial implications for all South Africans, they also jeopardise the continued existence of a constitutional democracy based on the rule of law. If DHA's actions continue to go unchecked, the effects of the law-breaking activity will not be limited to foreigners alone but will ultimately reverberate within the country as a whole.

LIST OF CASES ANALYSED

High Court Cases[101]

AAK v Minister of Home Affairs (SGHC) unreported case no. 48201/10 (30 November 2010).

AF v Minister of Home Affairs (SGHC) (no court application launched).

AH v Minister of Home Affairs (SGHC) unreported case no. 36015/10 (17 September 2010).

AIM v Minister of Home Affairs (SGHC) unreported case no. 08711/10 (16 March 2010).

AM v Minister of Home Affairs (SGHC) unreported case no.34372/10 (7 September 2010).

AN1 v Minister of Home Affairs (SGHC) unreported case no. 31418/2009 (11 August 2009).

AN2 v Minister of Home Affairs (SGHC) unreported case no. 41512/10 (19 October 2010).

AS v Minister of Home Affairs (SGHC) case no. 101/2010 (12 January 2010).

AT v Minister of Home Affairs (SGHC) unreported case no. 15490/10 (4 May 2010).

AU v Minister of Home Affairs (SGHC) unreported case no. 20695/10 (8 June 2010).

BB v Minister of Home Affairs (SGHC) unreported case no. 36016/10 (14 September 2010).

BH v Minister of Home Affairs (SGHC) unreported case no. 37121/10 (21 September 2010).

BM v Minister of Home Affairs (SGHC) unreported case no. 343340/2009 (25 August 2009).

BNM v Minister of Home Affairs (SGHC) unreported case no. 53070/09 (15 December 2009).

CKM v Minister of Home Affairs (SGHC) unreported case no. 21825/10 (15 June 2010).

CM v Minister of Home Affairs (SGHC) unreported case no. 47111/10 (23 November 2010).

CU v Minister of Home Affairs (SGHC) unreported case no. 46055/10 (19 November 2010).

EB v Minister of Home Affairs (SGHC) unreported case no. 36017/10 (17 September 2010).

EN v Minister of Home Affairs (SGHC) unreported case no. 51131/09 (15 December 2009).

EW v Minister of Home Affairs (SGHC) unreported case no. 32558/10 (24 August 2010).

FCM v Minister of Home Affairs (SGHC) unreported case no. 15493/10 (4 May 2010).

FFMK v Minister of Home Affairs (SGHC) unreported case no. 48200/10 (30 November 2010).

[101] Initials have been used to protect the confidentiality of the individuals.

FW v Minister of Home Affairs (SGHC) unreported case no. 16245/10 (11 May 2010).

GG v Minister of Home Affairs (SGHC) unreported case no. 14060/09 (16 April 2009).

GGBB v Minister of Home Affairs (SGHC) unreported case no. 32559/10 (24 August 2010).

HH & HH v Minister of Home Affairs (SGHC) unreported case no. 00187/2019 (19 January 2010).

IIW v Minister of Home Affairs (SGHC) unreported case no. 17270/2009 (12 May 2009).

IKM v Minister of Home Affairs (SGHC) unreported case no. 10697/09 (10 March 2009).

IM1 v Minister of Home Affairs (SGHC) unreported case no. 51132/09 (15 December 2009).

IM2 v Minister of Home Affairs (SGHC) unreported case no. 08709/10 (16 March 2010).

IM3 v Minister of Home Affairs (SGHC) unreported case no. 34376/10 (7 September 2010).

JAA v Minister of Home Affairs (SGHC) unreported case no. 9167/09 (3 March 2009).

JD v Minister of Home Affairs (SGHC) unreported case no. 16240/10 (11 May 2010).

JF v Minister of Home Affairs (SGHC) unreported case no. 16241/10 (11 May 2010).

JIMM v Minister of Home Affairs (SGHC) unreported case no. 27405/10 (20 July 2010).

JK v Minister of Home Affairs (SGHC) unreported case no. 34374/10 (7 September 2010).

JPAB v Minister of Home Affairs (SGHC) unreported case no. 17271/2009 (12 May 2009).

JPK v Minister of Home Affairs (SGHC) unreported case no. 32560/10 (24 August 2010).

KA v Minister of Home Affairs (SGHC) unreported case no. 00189/2010 (19 January 2010).

KF v Minister of Home Affairs (SGHC) unreported case no. 52291/09 (22 December 2009).

KHA v Minister of Home Affairs (SGHC) unreported case no. 19262/10 (1 June 2010).

KJM *v Minister of Home Affairs* (SGHC) unreported case no. 10003/09 (10 March 2009).

KM1 v Minister of Home Affairs (SGHC) unreported case no. 15312/09 (21 April 2009).

KM2 v Minister of Home Affairs (SGHC) unreported case no. 40509/10 (15 October 2010).

KMFD v Minister of Home Affairs (SGHC) unreported case no. 23538/10 (29 June 2010).

KMJ v Minister of Home Affairs (SGHC) unreported case no. 22902/09 (17 June 2009).

KR v Minister of Home Affairs (SGHC) unreported case no. 06784/2010 (2 March 2010).

LB v Minister of Home Affairs (SGHC) unreported case no. 37122/10 (21 September 2010).

LS1 v Minister of Home Affairs (SGHC) unreported case no. 23537/10 (29 June 2010).

LS2 v Minister of Home Affairs (SGHC) unreported case no. 49231/10 (10 December 2010).

LWN v Minister of Home Affairs (SGHC) unreported case no. 36019/10 (14 September 2010).

MAA v Minister of Home Affairs (SGHC) unreported case no. 15489/10 (4 May 2010).

MAA1 v Minister of Home Affairs (SGHC) case no. 52898/09 (7 January 2010).

MAR v Minister of Home Affairs (SGHC) unreported case no. 15492/10 (4 May 2010).

MB1 v Minister of Home Affairs (SGHC) unreported case no. 6213/09 (24 February 2008).

MB2 v Minister of Home Affairs (SGHC) unreported case no. 12460/10 (13 April 2010).

MB3 v Minister of Home Affairs (SGHC) unreported case no. 44956/10 (10 November 2010).

MJ v Minister of Home Affairs (SGHC) unreported case no. 21824/10 (15 June 2010).

MKK v Minister of Home Affairs (SGHC) unreported case no. 51134/09 (15 December 2009).

MMB v Minister of Home Affairs (SGHC) unreported case no. 36021/10 (29 September 2010).

MY v Minister of Home Affairs (SGHC) unreported case no. 15491/10 (4 May 2010).

NC v Minister of Home Affairs (SGHC) unreported case no. 15311/09 (21 April 2009).

NH v Minister of Home Affairs (SGHC) unreported case no. 01188/2010 (19 January 2010).

NM v Minister of Home Affairs (SGHC) unreported case no. 10008/08 (17 March 2009).

NO & MG v Minister of Home Affairs (SGHC) unreported case no. 51135/2009 (15 December 2009).

NT v Minister of Home Affairs (SGHC) unreported case no. 14337/2009 (5 May 2009).

OK v Minister of Home Affairs (SGHC) unreported case no. 33476/10 (1 September 2010).

OM v Minister of Home Affairs (SGHC) unreported case no. 16243/10 (11 May 2010).

OW v Minister of Home Affairs (SGHC) unreported case no. 13772/09 (24 March 2009).

PN v Minister of Home Affairs (SGHC) unreported case no. 23539/10 (29 June 2010).

PK v Minister of Home Affairs (SGHC) unreported case no. 16242/10 (11 May 2010).

PT v Minister of Home Affairs (SGHC) unreported case no. 19551/10 (28 May 2010).

ROJ v Minister of Home Affairs (SGHC) unreported case no. 36020/10 (14 September 2010).

SN v Minister of Home Affairs (SGHC) unreported case no. 34375/10 (7 September 2010).

SPH v Minister of Home Affairs (SGHC) unreported case no. 33475/10 (31 August 2010).

ST v Minister of Home Affairs (SGHC) unreported case no. 13818/090 (24 March 2009).

TKN v Minister of Home Affairs (SGHC) unreported case no. 37123/10 (21 September 2010).

TM v Minister of Home Affairs (SGHC) unreported case no. 52288/09 (22 December 2009).

TMB v Minister of Home Affairs (SGHC) unreported case no. 52290/09 (22 December 2009).

TMM v Minister of Home Affairs (SGHC) unreported case no. 40510/10 (12 October 2010).

TN v Minister of Home Affairs (SGHC) unreported case no. 12154/09 (31 March 2009).

TPDM v Minister of Home Affairs (SGHC) unreported case no. 16244/10 (11 May 2010).

TS v Minister of Home Affairs (SGHC) unreported case no. 51133/09 (15 December 2009).

TT v Minister of Home Affairs (SGHC) unreported case no. 14059/09 (14 April 2009).

WFK v Minister of Home Affairs (SGHC) unreported case no. 52289/09 (22 December 2009).

YK1 v Minister of Home Affairs (SGHC) unreported case no. 22901/2009 (17 June 2009).

YK2 v Minister of Home Affairs (SGHC) unreported case no. 36014/10 (17 September 2010).

ZJM v Minister of Home Affairs (SGHC) unreported case no. 32562/10 (24 August 2010).

ZS v Minister of Home Affairs (SGHC) unreported case no. 08710/10 (16 March 2010).

SCA cases

MAA2 v Minister of Home Affairs 2010 (7) BCLR 640 (SCA) (12 March 2010).

MAA3 v Minister of Home Affairs 2011 (3) SA 37 (SCA) (15 February 2011).

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