Failed asylum seekers in South Africa: policy and practice

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Abstract

The return of failed asylum seekers has become an issue of concern for asylum states who must balance immigration control measures while upholding refugee protection obligations. The 1994 transition to democracy in South Africa saw the state establish a strong urban refugee protection framework based on individualised refugee status determination processes, freedom of movement, and local integration. The refugee protection framework, although strong on paper, has suffered from a lack of implementation and has coexisted uneasily next to immigration control imperatives. This tension is further exacerbated by the post-1994 immigration regime which promotes a restrictive immigration policy with few options for low-skilled migrants who have turned to the asylum system as a means by which to legalise their stay, thus stretching capacity and conflating immigration control and refugee protection. This article provides a general overview of these issues, as well as an analysis of South Africa's policies to address failed asylum seekers. In doing so it explores the tension between formal human rights protections found in legislation and underlying immigration enforcement imperatives. The article finds that the conditions for an effective failed asylum seeker policy are not present and concludes with a discussion of some of the issues that need to be addressed to implement a more effective and rights-based policy.

Keywords: deportation, detention, forced return, irregular migration, non-refoulement.

Introduction

South Africa's historical transition to democracy set forth a new dispensation based on equality and human rights. Prior to 1994, the country was not a party to any international human rights instruments, including the 1951 Convention relating to the status of refugees and its 1967 Protocol (hereinafter the '1951 Convention'), and, as such, refugees with international

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protection needs in the country were treated as illegal aliens subject to deportation without consideration of the potential consequences of return. After the democratic transition, the state signed and ratified the 1951 Convention, the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (hereinafter the 'OAU Convention'), as well as a host of international human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), many provisions of which were incorporated into the Constitution in the Bill of Rights. Importantly, most of the Bill of Rights' provisions apply to all people in South Africa regardless of nationality or legal status. A review of migration policy and legislation was undertaken shortly thereafter, resulting in the Refugees Act (No. 130) 1998 and its accompanying Regulations, which entered into force in 2000 (hereinafter the 'Refugees Act').

The Refugees Act, as administered by the Department of Home Affairs (DHA), establishes an individualised refugee status determination (RSD) system that features the right to freedom of movement, the right to work, and local integration as opposed to refugee camp settings commonly found throughout the African continent. Under this system, individuals lodge applications at designated Refugee Reception Offices (RRO) and receive documentation to legalise their sojourn while they await final adjudication of their claim. During this process, asylum seekers and refugees are guaranteed just administrative action under the the Promotion of Administrative Justice Act (PAJA) (No. 3, 2000) which gives effect to Section 33 of the Constitution. Discussing the system in 2007, the High Commissioner of the United Nations High Commissioner for Refugees (UNHCR), Antonio Guterres, described it as 'one of the most advanced and progressive systems of protection in the world today' (UNHCR, 2007). According to the act, asylum seekers and refugees are protected from deportation and generally detention should be employed only as a matter of last resort. Officials must exercise their discretion in regards to possible detention '*in favorem libertatis*', or in favour of liberty, and officials are not obligated to detain an illegal foreigner.

Despite the strong legal framework, refugee protection has existed uneasily next to the country's immigration regime and its focus on immigration control, particularly the control of undocumented migrants. The Immigration Act (No. 11) 2002 and its accompanying Regulations (hereinafter the 'Immigration Act') establishes a restrictive immigration regime that facilitates immigration for highly skilled immigrants but offers few options

for low-skilled workers. The lack of legal options under the Immigration Act has led many migrants to lodge asylum claims to temporarily and imperfectly legalise their sojourn. This strategy has resulted in large numbers of asylum applications, many without legitimate claims, and stretched the capacity of DHA to effectively administer the asylum system. It has also led to many state officials taking a sceptical view of asylum seekers and refugees as illegitimate and in practice many asylum seekers and refugees have difficulty realising their rights as guaranteed under the legal framework.

While refugee law and immigration law are separate regimes, they do overlap at certain points. One of the most critical junctures is where an asylum seeker receives a final rejection of their asylum claim and becomes termed a 'failed asylum seeker', transitioning from the refugee to immigration system.[1] UNHCR and the International Organization for Migration (IOM) define failed asylum seekers as 'people who, after due consideration of their claims to asylum in fair procedures, are found not to qualify for refugee status, nor be in need of international protection [and thus] are not authorized to stay in the country concerned' (UNHCR/IOM, 1997). In South Africa, the state has struggled to implement effective failed asylum seeker policies in the context of high numbers of asylum seekers, many without legitimate protection claims, and a lack of capacity within DHA to administer both the refugee and immigration systems.

This article will assess South Africa's experience in attempting to implement policy to address failed asylum seekers and explore the tension between the state's emphasis on immigration control against the human rights protections found the in the formal legal framework. As effective policies are predicated on fair, efficient and timely refugee status determination processes, this article will begin by analysing the state of the asylum system and deportation regime. It then considers the state's two failed asylum seeker return policies, one involving voluntary return with minimal state oversight and the other regarding the state's more recent attempt to implement a more stringent detention and deportation policy upon receipt of a final rejection of their asylum claim. The article finds that the state's primary focus is on the removal of failed asylum seekers regardless of

[1] The terms 'rejected' and 'unsuccessful' asylum seeker are also commonly used. This paper will use the term 'failed asylum seeker' as this is the common term used in South Africa.

alternative legal options and human rights obligations. Somewhat paradoxically, it also finds that the implementation of both of these policies are driven by a lack of capacity within the immigration enforcement regime.

Methodology

In assessing South Africa's failed asylum seeker policy, this article first provides a brief overview of international legal principles and norms for the return of failed asylum seekers. It then analyses the development and implementation of South Africa's urban refugee framework and parallel immigration framework, before turning to the state's two primary failed asylum seeker return policies. The article relies heavily on primary information supplied by DHA in the Western Cape High Court case *Tshianda and Others v Minister of Home Affairs and Others* (2011) (hereinafter the 'Tshianda matter'), which details DHA's attempt to implement a stringent removal policy for failed asylum seekers through detention and deportation upon receipt of a final rejection at RROs. This information includes founding, responding and supplementary affidavits, a Standard Operating Procedure (SOP) developed by DHA for processing failed asylum seekers, and transcripts from immigration hearings at the Cape Town Magistrates Court in which DHA immigration officials testified under oath regarding the implementation of the SOP. At the time of writing, the Tshianda matter has not been finalised and the legality of the SOP has not been determined. However, despite the legal uncertainty, the case provides an insight into DHA policy considerations and implementation in regards to failed asylum seekers.

The analysis is supplemented by the author's experience with the Advocacy Programme at the Scalabrini Centre of Cape Town, a non-governmental organisation (NGO) that provides assistance to migrants with accessing documentation and government services and functions on a walk-in basis. A significant portion of this work includes assisting with access to the asylum system. This has provided the author with the opportunity for interactions with failed asylum seekers as well with DHA officials within the asylum and immigration systems.

International Legal Principles, Norms and Considerations for Effective Return Practices

The right of a state to remove individuals from its territory is fundamental to liberal democracies and remains a central feature of the state (Arendt, 1958, p. 279; Torpey, 1997). However, the right to deport is not absolute and is

limited by international human rights law and regulated by domestic judicial systems that require that state actions adhere to recognised norms and standards. UNHCR (2001) has stated generally that 'return procedures should be undertaken in a humane manner, in full respect for human rights and dignity and, that force, should it be necessary, be proportional and undertaken in a manner consistent with human rights law.'

The first consideration is the principle of *non-refoulement*, the cornerstone of international refugee law which safeguards individuals against being returned to a country where they have reason to fear persecution or harm as stated in Article 31 of the 1951 Convention. This principle represents the international community's commitment to 'ensure all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger' (UNHCR, 1997). An efficient return policy that maintains the principle of *non-refoulement* is 'predicated on the existence of a fair, efficient, and timely process of refugee determination' as well as the notion that 'a determination system that lacks some or all of the qualities of fairness, efficiency, timeliness and transparency exacerbates the difficulties often associated with removals.' The longer an individual asylum seeker stays in the country of asylum, the more difficult the removal will be if the claim is rejected (Gibson, 2007, pp. 1-3).

Asylum states have preferred to implement voluntary return measures for failed asylum seekers due, in part, to the social, political and monetary costs of detention and deportation practices. However, even if voluntary return is preferred, the credible threat of forced return remains a useful tool to reinforce and promote voluntary return processes (Noll, 1999b, p. 269). Return is not the only option available to the state and, in some cases, failed asylum seekers may be eligible for an alternative legal status based on family unity or, in some jurisdictions, temporary protection measures.

The use of force in detention and deportation procedures is regulated by the ICCPR, the main international instrument that regulates the deprivation of liberty in any form. Articles 7, 9(1), and 10(1) set out the basic framework for the use of detention and deportation for returns. In general, the legality of forced return measures depends on the 'nature, purpose and severity of the treatment applied' and there is no blanket list of prohibited actions or procedures (UN Human Rights Committee, 1994, para. 4). The use of force in

return processes must conform to these standards and be proportionate to the goal of returning the individual to their country of origin. Although there is evidence to support the presumption that rejected asylum seekers are more likely to abscond and avoid forced return, the mere fact that an individual receives a final rejection cannot be automatically equated with a high rate of absconding and does not automatically justify detention (Noll, 1999a, p. 28).

Detention and deportation may be inapplicable to particular vulnerable groups of failed asylum seekers who invoke more specific responsibilities under the international human rights framework. Individuals with mental or physical illness may not be eligible for forced return measures if these measures might negatively affect the individual's health or, at the extreme, their right to life. For individuals with these circumstances, forced return must be assessed against norms that prohibit cruel, inhuman or degrading treatment (Noll, 1999a, p. 30).

The optimal practice for implementing an effective return policy involves the provision of information to asylum seekers about the possibility of return during the asylum process, well before a final rejection is issued. This ensures that individuals are aware of the possibility of return and, more importantly, understand the asylum process. The provision of information for asylum seekers involves minimal expenditure and will offer ancillary benefits such as increased knowledge about the asylum process that may steer migrants not in need of protection to other immigration streams and lessen the administrative burden. Counselling services may also be provided during the asylum process which may constitute another means by which to offer information on the asylum process and conditions in the country of origin (Noll, 1999b, p. 271-272). UNHCR (2001) notes that NGOs have an important contribution to make in this regard, helping failed asylum seekers retain or regain their self-esteem and self-respect, as well as provide assistance with skills-development to take home.

While voluntary mechanisms are preferred, the exact definition of 'voluntary' is debatable and states often employ measures that might involve elements of coercion, such as the threat of force or the provision of inducements and incentives in voluntary return schemes (Black and Gent, 2006; Weber, 2011). In practice, any return mechanism will involve a mix of incentives and threats to ensure compliance. To make certain that an efficient return can be enacted if necessary, returning states should engage in activities directed at

ensuring cooperation with countries of origin (such as bilateral return agreements or documentation arrangements), and, if necessary, activities securing the cooperation of third states (Noll, 1999b, p. 269).

Operating outside of the governmental removal process are Assisted Voluntary Return (AVR) programmes as operated by IOM, defined as 'the administrative, logistical, financial and reintegration support to rejected asylum seekers, victims of trafficking in human beings, stranded migrants, qualified nationals and other migrants unable or unwilling to remain in the host country who volunteer to return to their countries of origin' (IOM 2011, p. 15). AVR programmes can thus assist those willing to return (only individuals who voluntarily opt for the programme can be considered) but unable to do so without financial and logistical support. For highly vulnerable migrants, AVR programmes provide assistance at all points of the return process.

The South African Urban Refugee Framework and Immigration Control

The development of the post-1994 migration regime began in 1996 with a comprehensive consultative process resulting in a Draft Green Paper on international migration drafted by civil society members, government representatives and international refugee legal scholars (Draft Green Paper, 1997). The Draft Green Paper proposed a rights-based migration framework (containing a refugee-specific chapter), a collectivised approach to burden-sharing in the region, as well as an inclusive approach to regional migration that would address irregular immigration through increased means for legal participation in the economy. In terms of failed asylum seekers, the importance of effective policy was recognised and it was noted that a 'firm commitment to expeditiously deport rejected asylum seekers who have exhausted their appeal rights is moreover essential to the credibility of the refugee protection system' (Draft Green Paper, 1997, para 4.4.2).

The resulting draft legislation that culminated in the Refugees Act largely avoided many of the Draft Green Paper's recommendations. Barutciski (1998, p.703, 722) noted that the draft bill originated 'essentially from internal drafting attempts that emphasize a bureaucratic approach to refugee protection [that] does not fully comply with international law' and 'proposes to establish a self-sufficient bureaucratic model of refugee protection which pays no heed to international cooperation.' Throughout the policy

development process, refugee protection was often seen as 'within the ambit of migration control' and early versions of the Immigration Act stated that in the event of conflict between the Refugees Act, the Immigration Act should take precedence (Handmaker, 2001, p. 105). The policy development process was characterised by Belvedere (2007, p. 59) as civil society representatives 'lobbying for the inclusion of refugee rights against recalcitrant representatives from the Department of Home Affairs who held that foreigners did not enjoy any rights in South Africa' contrary to the Bill of Rights.

Despite these difficulties, the resulting Refugees Act establishes a refugee protection system based upon freedom of movement and local integration and is recognised as one of the strongest regimes in southern Africa. A strong articulation of the principle of *non-refoulement* that embodies the intent and spirit of the *non-refoulement* principle by recognising the possibility of indirect *refoulement* and extends protection to those whose 'life will be at risk' in line with the expanded OAU Convention refugee definition.[2] Additionally, the Refugees Act provides for dependents of recognised refugees to be able to access the status afforded to the principal applicant through section 3(c). This provision recognises the importance of family unity and allows for immediate family members who might not have refugee claims to access protection. Dependants are defined as 'the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee.' At all points in the asylum application process, the constitutional guarantee of administrative justice must be observed, requiring DHA officials to ensure that applicants are aware of their rights and obligations and understand the process (Section 24).

The removal of failed asylum seekers was not elaborated on in full in the Refugees Act and the power to detain asylum seekers is narrow; Section 21(4), giving effect to Article 31(1) of the 1951 Convention, protects asylum

[2] The OAU definition is found in Section 3(b) of the Refugees Act which states that an individual qualifies for refugee status if that person 'owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere.'

seekers from treatment as illegal foreigners and from criminal proceedings flowing from unlawful entry. Asylum seekers are only liable for detention and deportation after the withdrawal of the asylum permit, which may be done if the holder contravenes the conditions on the permit or receives a final rejection of their claim (Section 22(6)). Individuals whose claims are finally rejected, are then subject to the Immigration Act's provisions. An asylum seeker can only be detained if the asylum seeker permit has been withdrawn in terms of Section 22(6), and they may be 'arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity' (Section 23). This provision is not common practice for failed asylum seekers as DHA officials, instead, opt to use the Immigration Act's framework (Cote, 2014, p. 256).

The overhaul of the country's immigration regime proceeded at a much slower pace than the refugee protection legislation. The Immigration Act entered into force in 2005 and immigration matters were previously governed by the Alien Controls Act (No. 96) of 1991, one of the final acts of Apartheid-era governance. During this period, immigration policy 'remained impervious to the new political dispensation and its stated commitment to inclusivity, diversity, and human rights' (Peberdy, 2001, p. 16) with a continuing emphasis on immigration control (Algotsson and Klaaren, 2003). In terms of the new dispensation, the ruling African National Congress (ANC) party viewed immigration's role in transformation as 'antithetical or at best irrelevant,' making it a low priority (Crush and McDonald, 2001, p. 8). The Immigration Act promotes 'a highly restrictionist immigration policy' (Khan, 2007, p. 4), in which detention is used as the primary means of immigration enforcement (Lawyers for Human Rights [LHR], 2008, p. 2)

In terms of provisions, Section 1 of the Immigration Act defines an illegal foreigner broadly as a 'foreigner who is in the Republic in contravention of this Act'. Section 32(2) requires that any person declared an illegal foreigner must be deported; however section 34(1) confers discretion on the part of the officer as to whether the individual must be detained. Section 34(1) also includes a range of safeguards including the need for the authorities to provide reasons in writing for the negative decision, the right to appeal the decision to deport them, the right to have a court confirm the detention, and temporal limitations on detention.

The courts have developed a strong body of jurisprudence regarding detention and deportation processes, discretion and liberty. In *Silva v Minister of Safety and Security*, the Court underscored the importance of liberty, stating that: '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' (1997, p. 661). In *Ulde v Minister of Home Affairs* the SCA confirmed that foreigners cannot be detained 'arbitrarily or without just cause', and that Section 34 does not require officials to detain every illegal foreigner they encounter, but instead obligates officials to exercise their discretion, which must be construed '*in favorem libertatis*', or in favour of liberty (2009, para 7). In *Jeebhai v Minister of Home Affairs* the SCA held that 'every deprivation of liberty is presumptively unlawful,' which obligates government officials to sufficiently justify their actions, as the consequences of a decision to deport someone

> […] concerns that person's livelihood, security, freedom and, sometimes, his or her very survival. This is why immigration laws, are often harsh and severe in their operation, contain safeguards to ensure that people who are alleged to fall within their reach are dealt with properly and in a manner that protects their human rights (2009, para 21).

Thus, the refugee protection framework is one that affords a range of rights, but is complemented by a restrictive immigration regime focused on exclusion. In practice, the tension between the formal protections of the Refugees Act and the exclusionary immigration regime has resulted in refugee protection being subsumed by immigration concerns.

The refugee protection framework in practice

Since the Refugees Act entered into force in 2000, South Africa has struggled to efficiently implement the Refugees Act's provisions. For asylum seekers, a number of obstacles block them from realising their rights in the asylum process, including access to information on the asylum process, provision of interpreters and quality RSD processes. Additionally, the detention and deportation process has a history of unlawful practices and is synonymous with human rights violations.

A lack of information available to asylum seekers about their rights and the asylum process, has been a historic feature of the South African asylum system. Five years after the Refugees Act had entered into force, Human Rights Watch (2005) found that the '[l]ack of clear, easily available rules

regarding the asylum process […] and the lack of official interpreters complicate the process' (p. 10). In 2009, the a national survey of RROs conducted by Amit found that 17% of respondents had errors on their asylum permits (p. 32), less than one-third of respondents received official assistance in filling out application forms, and 68% did not have the application process explained to them (p. 35). A further study in 2012 found that roughly half of respondents did not know anything about the interview process and one-fifth did not receive assistance from an interpreter (Amit, 2012b, p. 12).

The first-instance RSD interview process has been characterised by delays and poor decisions. Amit's 2009 survey found irregularities in the interview process, brief interviews with a large portion lasting 10 minutes or less, and applicants waiting, on average, for over one and a half years for their interview (p. 40-42). In subsequent research conducted in 2013-2014, it was found that on average, survey respondents were in the system for 2.8 years with one applicant being in the system for over 18 years (Amit, 2015, p. 31). The decisions resulting from these interviews have been consistently poor with numerous errors of law, including the failure to provide adequate reasons for rejection, errors of law such as the misapplication of the concept of persecution and well-founded fear, improper use of the internal relocation standard, as well as improper and inaccurate assessment of the conditions in the country of origin (Amit, 2010; Amit, 2012a). In conclusion, Amit (2012a, p. 10) notes that 'migration control has displaced protection as the primary goal of the asylum system.'

The state has explained the low acceptance rates and delays as evidence of economic migrants abusing the asylum system, justifying restrictions in the asylum system as due, in part, to the abuse (African National Congress, 2012). The poor decision making in the RSD process has required numerous individuals to undertake judicial review of the RSD process under PAJA. A recent case which resulted in refugee status being conferred by the High Court, prompted the Judge to describe DHA's handling of the case as 'deplorable' and comment generally that '[o]ne shudders to think of the many thousands of refugees in similar situations … subjected to the same treatment [as the applicant] by those to whom the law has entrusted their fate' (Rickard, 2015). Consequently, the judicial review process has proven a critical safeguard for many refugees, resulting in a growing body of refugee law

jurisprudence[3]and providing further evidence of systemic problems in the RSD process.

Asylum seekers have also struggled to access the 3(c) family joining process for dependants. Difficulties arise in the declaration of dependants during the application process which can be hampered by the lack of interpreters and the lack of assistance provided by officials at RROs in explaining the process or understanding applicants' rights. In addition to these practical obstacles, Khan (2013, p. 85) notes that because of the lack of a specific family joining system or procedure, DHA 'often refuse a family member's application on the basis of a more restrictive reading of the Refugees Act,' often regarding regulation 16 which stipulates that 3(c) applies only to 'dependants who accompanied the asylum applicant to the Republic.'

In addition to the challenges in the asylum system, the state has also struggled to administer its detention and deportation system and, as such, unlawful practices have been commonplace at the facility since the late 1990s (De Wet, 2014). While a large proportion of deportees are not failed asylum seekers and are instead irregular migrants, failed asylum seekers are returned through the same process and facility, and face the same conditions.

The South African Human Rights Commission first investigated the Lindela Repatraition Facility in 1999 and found significant obstacles in accessing detainees and poor conditions (Algotsson, 2000). In 2005, the UN Working Group on Arbitrary Detentions (2005, p. 14, 21) found similar circumstances with arbitrary detention, unlawful detention of asylum seekers and refugees, inadequate legal procedures to challenge detention, and conditions that do not meet international standards. In 2009, research conducted with detainees found that many detainees were prevented from exercising their rights and accessing legal counsel (Amit, 2010a). Over an 18 month period in 2009-2010, Lawyers for Human Rights brought over 60 cases to the High Court concerning unlawfully detained asylum seekers and describe a 'general pattern of contempt' exhibited by DHA and officials at Lindela in the legal process (LHR, 2010, pp. 9-12). More recently, the SAHRC (2014) released a report detailing severe human rights abuses such as procedural irregularities, inhumane conditions and the use of violence against detainees.

[3] For an overview of the judicial review process and associated case law, see De La Hunt, 2014.

The review above highlights some of the more critical gaps in South Africa's refugee protection framework and establishes that the conditions for efficient failed asylum seeker policies are not present. These issues have led some scholars to argue that asylum seekers and refugees are 'internally excluded' from human rights protections due to DHA practices and the construction of asylum seekers as 'bogus' illegal immigrants who manipulate the system (Belvedere, 2007). Others have advanced the notion that the state, in an attempt to regulate foreign nationals within the country, has declared a 'state of exception' in which elements of the normal legal order are suspended to address crises (the presence of foreign nationals) that threatens the state. The state of exception allows state authorities to act outside of their legal mandate but still retain the power and authority of the law to address threat of foreign nationals by establishing a parallel system to regulate threats not bound by normal regulation (Landau, 2005a; Musuva, 2014). This declaration of a state of exception results in categories of individuals who are unable to realise their rights under the law.

This response is rooted in notions of the foreign migrant as a negative and criminal presence, similar to the rationale for restrictive immigration legislation. The post-1994 state has increasingly relied on descriptions of foreign migrants (particularly African migrants) as endangering the country's physical and moral health, its ability to provide services and employment to citizens, and its ability to control crime (Peberdy, 2001, p. 24). At other times, government officials have overtly labelled migrants as criminal, as evidenced by a former Director General of DHA who labelled '90 per cent of foreign persons' in South Africa as possessing fraudulent documents (quoted in Algotsson and Klaaren, 2003, p. 1) or, more recently, through a coded description of asylum seekers as 'illegal immigrants' who are 'illegitimately' undertaking employment (SAPA, 2014). The effects of such a discourse lead the citizenry to equate 'foreignness' with a crime, as this association is not discouraged in government rhetoric or national media (Misago et al, 2009).

While these exceptional responses towards migrants are not formal nor monolithic declarations and are subject to various forms of resistance from the state and civil society, Landau (2005a, p. 338) notes the state of exception is instead implemented through 'official endorsement or tacit acceptance of systems in which government officials (albeit at different levels of the official hierarchy) legitimise or help create parallel – extra-legal – systems for

policing foreigners.' While this response is prevalent across government departments in their treatment of foreign migrants, it is particularly acute within DHA and at RROs. Segatti et al. (2012, pp. 138-139) note that DHA officials at the Johannesburg Crown Mines RRO criminalise asylum seekers by fostering a legal culture that questions the legitimacy of foreigners' presence in South Africa. Vigneswaran (2008, p. 6) notes that access issues at RROs often arise out of the individual efforts of DHA officials

> who act outside their legislative mandate to prevent asylum seekers gaining access to the reception system [and] are embedded in an institution which sanctions its officials engaging in extra-legal practices that prevent foreigners from entering and residing legally in South Africa.

While these extra-legal practices are not absolute or all-encompassing, the frequency and scope of rights violations committed by the state against asylum seekers and refugees suggests that more than bureaucratic maladministration or incompetence is behind these practices.

South Africa's failed asylum seeker policies

In administering the Refugees Act, DHA has predominantly relied on a voluntary return process with minimal government oversight for failed asylum seekers. In recent years, DHA has attempted to implement a more stringent detention and deportation process by which, upon the asylum seeker receiving a final rejection at the RRO, they are detained for the purposes of deportation. The two processes are at opposite ends of the use of force spectrum and the changes in policy, tracks with the DHA's inclusion in the Justice and Security government cluster in 2010 along with a host of restrictive practices implemented from 2011 onwards. This policy shift amounts to a 'significant reduction of asylum seeker and refugee protection, culminating in increased danger of *refoulement*' (Polzer Ngwato, 2013, p. 3).

The voluntary return process involves the failed asylum seeker being given 30 days to finalise any outstanding affairs and make their own arrangements to leave South Africa. This can be arranged through a final asylum seeker permit or through alternative immigration measures such as Form 21 to depart or Form 23 requiring the individual to report at a certain date to provide proof of their intention to depart (Cote, 2014, p. 261). The failed asylum seeker will receive notification of the final rejection upon reporting to an RRO and will subsequently receive the documentation informing them that they must depart the country. While these notices give DHA the ability to

follow-up with individuals if they do not report or to confirm the departure of individuals, the author is not aware of immigration officials systematically investigating individuals who do not report as required as standard practice in recent years. Due to the poor collection of information at the RRO during the application process, these details are often incomplete or recorded incorrectly.

The voluntary return process affords failed asylum seekers ample opportunity to return to their country of origin without being detained or deported, and does not result in the serious expenditure of state resources. More critically, in terms of *non-refoulement*, the 30 day notices also provide recourse for individuals who believe their asylum claim has not been handled as required by law, to undertake a review. The review may be completed either under section 8 of the Immigration Act, which provides for an internal review within DHA, or more commonly through Section 33 of the Constitution, which allows for a judicial review at the High Court in terms of PAJA. It also provides family members with separate asylum claims the opportunity to enact Section 3(c)'s family joining proceedings in respect of the principle of family unity.

The initial rationale for adopting this policy, whether for the above protection-related reasons or out of capacity constraints, is unknown. In terms of effectiveness, it remains unclear how many rejected applicants fail to depart the country within the allotted time period. Internationally, data on the efficacy of voluntary return schemes is limited, although officials in Europe have made unverified statements that up to 70% of non-detained rejected asylum seekers abscond (Field and Edwards, 2006, p. 41). In regards to South Africa's voluntary return practice, DHA officials have stated at various times that the policy is ineffectual. In the Tshianda matter, DHA noted that

> the 30-day period afforded to failed asylum seekers, was abused in that the vast majority of failed asylum seekers who were issued with the said notice, failed to leave the country and instead, disappeared into the mainstream of South African society, thereby defeating the objects of the Immigration Act, which requires that all illegal foreigners depart or be deported … In most cases, these people relocate from the places where they originally stayed in order to evade deportation and accordingly make it immensely difficult for officials within the Immigration Inspectorate to find them (Tshianda Matter, Respondents' Answering Affidavit, pp. 16-18).

Additionally, an immigration officer at the Cape Town RRO stated more specifically that 2,000 individuals had absconded in this way (Tshianda Matter, Applicants' Founding Affidavit, p. 121). However, the figure was not compared to how many in total were rejected or how many voluntarily departed, nor do DHA's deportation statistics differentiate between failed asylum seekers and irregular migrants.

In an attempt to address the perceived ineffectiveness of the voluntary return practice, DHA implemented the Tshianda SOP for the return of failed asylum seekers in 2011. In addition to the challenges in the voluntary return process mentioned above, DHA noted, in the Tshianda matter, that the combination of porous borders, large numbers of asylum seekers, and the lack of an encampment policy has led to difficulties in administering its RSD system, thereby allowing for asylum seekers to reside in society at large for 'many years' while awaiting the determination of their claim. Further, 'in many cases asylum seekers are not economic migrants but rather persons belonging to crime syndicates,' placing extra burdens on the state's resources committed to combatting crime (Tshianda Matter, Respondents' Answering Affidavit, 2012, p. 16-17).

As a response to these issues, the Tshianda SOP was developed to deal with the process for the deportation of failed asylum seekers and establish guidelines as to how failed asylum seekers could be dealt with. The SOP consists of guidelines, including handover procedures upon receipt of a final rejection where the failed asylum seeker transitions from the Refugees Act to the Immigration Act. In addition, the SOP provides guidelines for the determination of forced return through detention and deportation via Lindela, based on the possibility of absconding and flight risk, or through voluntary measures similar to the 30 day notice discussed above (Tshianda Matter, SOP, pp. 1-6).

The Tshianda SOP requires the immigration official to interview the failed asylum seeker to determine the appropriate course of action and to detain the individual while verifying the details of the failed asylum seeker, namely addresses, workplace details, bank details and other relevant information. The investigating official can then, 'with discretion, decide on the appropriate action to be taken' and, if the decision to 'detain and/or deport' is made, 'the failed asylum seeker may then be detained in order for the Immigration Officer to do verification of details and see what affairs the suspect needs to close up' (p. 2). If the investigating official determines the asylum seeker has

family or property 'and other ties to RSA such as children in school', the official will 'draw up lists of assets and provide a motivation on whether a person is a flight risk if released to close up their affairs' and, if so, continue to detain for deportation.If not, release can be recommended for the purposes of closing affairs and an order to leave must also be issued (p. 3).

While the law requires an immigration officer to exercise their discretion, the Tshianda SOP requires the individual to be detained before investigating the situation. Attorneys acting on behalf of the applicants argued that the Tshianda SOP is unlawful as the failed asylum seeker would be detained in terms of Section 34 of the Immigration Act, for the purposes of deportation, before being investigated as to determine what steps the person would need to undertake to finalise their affairs; if the person is detained it would be practically impossible for a person to finalise their affairs if necessary (p. 18). The SOP appears to contradict the principle of *in favorem libertatis* and instead favours the immediate detention and deportation of failed asylum seekers.

Included in the evidence presented to the Court were transcripts from hearings at the Cape Town Magistrates Court taken during confirmation of warrant hearings as provided under Section 34 of the Immigration Act. The transcripts cover three cases in which individuals were detained for deportation as provided for in the SOP by three different immigration officials in the employ of DHA. The transcripts reveal that in all three cases the immigration officials understood their duty in regards to failed asylum seekers, and undocumented migrants generally, to verify the individual's legal status and then summarily detain and deport the failed asylum seeker. One official, when questioned about his interpretation of the SOP, stated that it means that failed asylum seekers 'must be arrested with immediate effect … and deported' (Tshianda Matter, Applicants' Founding Affidavit, p. 127). Another official described his duties towards failed asylum seekers to 'arrest it [the failed asylum seeker] for investigation purposes first and then after we discover that the person doesn't have a status and then we declare him for deportation' [sic] (Tshianda Matter, Applicants' Founding Affidavit, p. 128).

The above policies represent opposing ends of the spectrum in terms of failed asylum seeker policy, with either minimal oversight or conversely immediate detention and deportation upon receipt of a final rejection. The seemingly schizophrenic approach reinforces Segatti's (2011, p. 54) description of post-1994 immigration policy and enforcement as a 'mix of

laissez faire and mismanagement, related to both chronically weak administrative capacity and coercive and abusive practice.' The adoption of both return practices described above, despite their difference in the use of force, relates to capacity within the Immigration Inspectorate as each practice can be implemented by DHA with minimal effort in terms of capacity. In practice, both return practices rely on the asylum seeker to report to the RRO which removes the need for an investigation which might involve address checks from across the metro region, province or country. While both options provide for further investigation and follow-up, there is little evidence to suggest officials undertake such investigations routinely. Any practice such as enhanced reporting mechanisms and regular address checks require more action on the part of officials, complicated by the poor record keeping at RROs due to capacity constraints.

While the implementation of the Tshianda SOP might not require a considerable increase in the use of resources from immigration officers at RROs, it would likely result in increased costs through the detention and deportation regime and put more individuals at risk of *refoulement*. These increased costs might deter DHA to increase its reliance on detention and deportation, but there is little evidence that the immigration enforcement regime's direct cost factors heavily in policy implementation. A 2012 study found that DHA incurred unnecessary legal costs of around 4.7 million Rands in regards to unlawful detentions at Lindela (Amit and Zelada-Aprili, 2012) and as of 2013, unlawful practices within immigration enforcement amount to R503.3 million or 37.5% of DHA's pending legal claims (Mthembu-Salter et al, 2014, p. 11). These figures and the lack of concern associated with them suggest these costs are acceptable for pursuing immigration enforcement goals.

Summary and Implications

The analysis above has provided an overview of South Africa's refugee protection and immigration enforcement regime and the state's attempts to address failed asylum seekers. Put simply, the conditions for effective failed asylum seeker policies – efficient and fair refugee status determinations – are not present. The state has either employed a laissez-faire approach that relies on the removal of the asylum permit and legal status as a coercive measure, or a more stringent detention and deportation upon receipt of a final rejection policy that increases the likelihood of *refoulement* and endangers the principle of family unity. The state's evolving policy for failed

asylum seekers can be explained by the state's increasing focus on security issues in migration policy and associated restrictions in the asylum system (Amit, 2013; Polzer Ngwato, 2013), as well as the state's attempt to implement policy with limited resources (SAPA, 2014). For a more effective failed asylum seeker policy, a number of issues might be considered: a more regional approach to immigration issues, more effective administration at RROs, increased involvement of civil society and international organisations, and increases in state capacity to allow for DHA to carry out its duties and fulfil its obligations considering South Africa's role on the continent as a destination for migrants, both economic and forced.

For the implementation of an effective failed asylum seeker policy, consideration first needs to be given to how to increase the effectiveness and efficiency of the RSD system. Towards that end, alternative immigration options with relaxed conditions for low-skilled migrants may reduce the burden on the asylum system, resulting in a more manageable caseload. The isolationist approach to migration taken during the policy development process in the late 1990s has not been conducive to effective immigration policy In recent years, DHA has discussed the development of 'work seeker' visas for SADC nationals (DHA, 2013) and increased cooperation in regards to refugee protection (DHA, 2015). These adjustments might result in a reduction in the number of unnecessary asylum applications lodged and may also assist in increased coordination of migration matters. However, as evidenced elsewhere, are not without their own potential pitfalls (Arbel and Brenner, 2013; Mouzourakis, 2014) and follows a history of difficulties in regards to increased integration of the movements of people in southern Africa (Oucho and Crush, 2001).

The state should also consider how to increase the efficiency at RROs to ensure that asylum seekers better understand their rights and responsibilities and that DHA can obtain updated and accurate information. The studies cited above have all found high numbers of asylum seekers not being informed of the process or of their rights; the establishment of information desks and counselling services at RROs may address that chronic deficiency. Some of these services may also be established with assistance from NGOs, lessening the cost of implementation for the state. Such measures, while modest and not directly involved in the return process, might result in more awareness amongst asylum seekers of the possibility of return and begin to prepare them for that reality in line with UNHCR's recommendations.

Other options might involve providing support – both financial and institutional – for IOM's AVR programme which assisted with 250 returns from South Africa in 2014. Support might allow for the programme to expand and may reduce the unnecessary expenditure in deportation costs and litigation. A further, more long-term benefit of these adjustments might be increased consideration of the vulnerability of asylum seekers amongst officials, resulting in a better understanding and adherence to humanitarian obligations.

A lack of capacity and resources (both human and financial) are significant factors in the failed asylum seeker practices described above and has perhaps been the most structural obstacle to effective failed asylum seeker policywith capacity issues affecting all stages of the asylum process. This issue has been acknowledged as a significant impediment by DHA and it is now being addressed as a departmental priority (DHA, 2014). The danger inherent in this reprioritisation is that it becomes focused on exclusionary practices such as deportation without consideration of the protection needs and *non-refoulement* concerns.

However, even with efforts to address the above issues, extra-legal practices and underlying anti-asylum seeker sentiment amongst many officials may mitigate the positive effects of any policy changes. As Vigneswaran (2011, pp. 116-117) notes, '[d]ecades of neglect have produced a range of deeply embedded control-oriented practices that lower-level officials adhere to regardless of the signals from above or the goals of their departments.' This factor makes formal policy changes unlikely to succeed unless accompanied by engagement with officials and new incentive structures. As such, the above considerations should be accompanied by the political will to ensure that the refugee protection framework is effectively implemented and its associated human rights protections are given equal footing with immigration control measures.

In conclusion, consideration of the above issues may lead to the establishment of a more fair and efficient asylum system. With improved conditions in the asylum system, DHA may be able to implement a more effective failed asylum seeker policy that is in accordance with international norms and the principle of *in favorem libertatis* while meeting DHA's immigration control imperatives.

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