

INTERNATIONAL MIGRATION IN SOUTHERN AFRICA



SACBC - Pastoral Care for Migrants & Refugees

International Migration in Southern Africa

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Southern African Catholic Bishops' Conference

The SACBC Office for Pastoral Care for Migrants and Refugees felt the need to organize a Manual on International Migration in Southern Africa, for Dioceses and Parishes of South Africa, Botswana and Eswatini. Our aim is to equip staff, and volunteers, with information concerning international migration in Southern Africa, and to enable them to apply it in their work as agents for Pastoral Care for Migrants and Refugees. A special thanks to Att. Sally Gandar for her hard work in gathering together the basic structures of applicable law and policy on Migration.

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Foreword

For a person to participate fully in social, economic and political life he/she must have a name and nationality. It is a crucial aspect in one's access to basic human rights. However, statelessness continues to affect millions of people around the world.

Despite pledges made by the South African government in 2011 and again in 2019 which include the accession of the United Nations Convention Relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness, South Africa is yet to ratify both the Conventions.

The right to be recognized as a person before the law is a critical step in ensuring lifelong protection and is a prerequisite for exercising all other rights. Such rights promote Human Dignity which according to our Catholic Social Doctrine, is one of the most fundamental principles.

If therefore, there is no legal proof of identity, children are left out and consequently, in many cases, end up being more vulnerable in many ways, including statelessness. It is for this reason in support of the Sustainable Development Goals (SDGs) that the Church calls on governments, states, and regional bodies to make sure that no child is born, or remains stateless.

The churches and faith-based organizations in South Africa are calling on the government of South Africa, in particular, the Department of Home Affairs to prioritise and implement practical solutions to preventing and reducing statelessness in South Africa. These should also include ratification of the UN Conventions on statelessness. We also call upon the Church and its network, to join together in implementing structures that better serve both migrants and refugees and South Africans.

May God Bless the work and efforts that have been done so far to achieve the common good of all.

+Buti Tlhagale, OMI
SACBC Liaison Bishop for Migrants and Refugees

Pretoria, 08th December 2021
Feast of the Immaculate Conception.

Introduction

This book explores the topic of international migration in South(ern) Africa, particularly from the perspective of the laws and policies that apply to this topic. This includes not only the laws within the country (namely South Africa) but also those laws and policies that apply to the region and internationally. This is important because migration to South Africa has been a regional phenomenon for centuries, and so to get a fuller view of the topic of international migration within South Africa, one has to consider Southern Africa even more broadly. Secondly, this chapter shows how some of these laws and policies work in practice because often there is an ‘implementation gap’ when looking at what the law says and what happens in practice.

This tool is intended to be practical and accessible for practitioners and pastoral care agents working directly with communities of people on the move. It is not a chapter that explores the topic from an academic point of view, a theoretical one, or even a technical legal one, but rather focuses on the practical – not only through exploring the actual laws and policies, but also the context in which they apply, the realities on the ground, and the historical context of international migration in South(ern) Africa.

We acknowledge, with many thanks, “8XMille” for funding this important project through the Italian Bishops’ Conference of Italy (CEI). Their support makes an enormous difference in the Ministry of Pastoral Care for Migrants and Refugees in all SACBC territories (South Africa, Botswana and Eswatini).

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Co-ordinator
SACBC – Pastoral Care for Migrants and Refugees

Aim

This chapter aims to equip you with knowledge about international migration in South(ern) Africa to enable you to appreciate the concept and apply it in your work as an agent of Pastoral Care for Migrants and Refugees in the Southern African region. This includes application on a one-on-one basis, as well as higher-level advocacy engagements at local, national, and regional levels.

The way this will be approached is by equipping readers with the basic structures of applicable law and policy, as well as the practical realities that may present themselves. It will also provide specific examples, particularly when it comes to more vulnerable groups, such as children (particularly unaccompanied or separated children, and those at risk of statelessness) as well as women, victims of gender-based violence, and smuggled persons or those who have been victims of trafficking.

Objectives

This chapter has the following objectives. By the end of the chapter:

- You will have an understanding of the basic definitions regarding refugees and migrants, how they differ, and some of the similarities and overlaps.
- You will have a more nuanced understanding of some of the facts and the numbers regarding international migration in South Africa.
- You will have an understanding of the international and regional legal frameworks that apply to refugees and migrants in South(ern) Africa.
- You will have an understanding of some of the domestic (country-specific) laws and policies that apply to refugees and migrants in South Africa.
- You will have a specific understanding of how children fit into this picture. There is a growing phenomenon of children migrating on their own, with their own assistance needs.
- Finally, you will be able to understand the documentation and immigration status needs of refugees and migrants, as well as their rights and responsibilities and the responsibilities and services that should be provided by the state.

International Migration: People and Children on the Move in South(ern) Africa – the realities, the legal frameworks, the barriers, and some approaches to assistance

This section approaches the topic of international migration in South(ern) Africa from several perspectives. First, it provides a list of common definitions, including focusing on some language or terms that could be used instead of ones that are more negative or have a worse connotation. Secondly, this section gives a brief overview of the numbers of international migrants in South Africa. This is a question that is often asked, but not easily answered. Third, it provides some of the historical contexts of migration in South Africa and the region. Thereafter, the remaining sections provide information on the international and regional laws and policies that apply in South Africa, and how they apply, as well as how the practical reality may differ. Lastly, this section looks at some of the important pieces of litigation and court judgments that impact refugees, asylum seekers, and the field of immigration in South Africa more generally. These court cases show some of the ways that the law has been interpreted, as well as ways that the courts have addressed barriers experienced on the ground, or instances when rights have not been accessible when they should.

Definitions

Adult – An adult is an individual who is over the age of 18 years.

Asylum seeker – According to the United Nations High Commissioner for Refugees (UNHCR), an asylum seeker is someone whose request, to a government or state that is not their home one, for protection (sanctuary) has not yet been processed to finality.¹ In South Africa, an asylum seeker is issued with a Temporary Asylum Seeker Visa also known as a “section 22 permit”, which is renewed periodically as they wait for the Department of Home Affairs to adjudicate their asylum claim.

Child – The legal definition of a child differs from one country’s laws to another. In South Africa, a child or a ‘minor’ is anyone under the age of 18 years old. This is in line with the universally accepted definition according to the United Nations Convention on the Rights of the Child (UN CRC). It should be noted that children also migrate – either on their own or with adults (whether relatives or not). The

¹ For more information about the term asylum seeker, see: <https://www.unhcr.org/asylum-seekers.html>

concept of child participation, defined below, should always be considered when offering assistance to a child migrant.²

Children on the Move – Children on the Move (CotM) are defined as ‘Children moving for a variety of reasons, voluntarily or involuntarily, within or between countries, with or without their parents or other primary caregivers, and whose movement, while it may open up opportunities, might also place them at risk (or increased risk) of economic or sexual exploitation, abuse, neglect, and violence. See below for the definition of unaccompanied and separated children. A distinction should be made between various children on the move, based on their motivations/reasons for moving. The four general categories are: Internally displaced persons (**IDPs**); asylum seekers or refugees; migrants (i.e. those moving for economic reasons, or due to the climate crisis, both internally or across an international border); and trafficked persons.

Child participation – The UN Convention on the Rights of the Child and other international legal instruments and laws within South Africa, provide for child participation. What this means is that where a child is involved; and is capable of forming an opinion or views on something that impacts them, then they have a right to express those views and their opinion must be given due weight in accordance with their age and maturity. This means that where a decision impacts a child, they should be consulted, not at the last minute once a decision has already been made, but all the way through a process. They should be provided with information and counselling so they feel safe to express their needs and opinions concerning decisions that will impact them and their future. This concept is particularly important for children on the move.³

Documentation and Immigration Status – These two concepts must be considered together as they are often conflated and confused. Many people use the term ‘undocumented’ to describe a situation where someone has no valid or lawful immigration visa to be in South Africa. However, that person may have a passport and simply does not have a visa in their passport. This means that the individual is not undocumented (i.e. because they have a passport), but they are without valid immigration status (i.e. their immigration status is irregular or has become irregular). To not have documentation or even access to documentation proving your identity, may put an individual at risk of statelessness. However, if a

² For more on the Convention on the Rights of the Child’s definition of a child, see <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

³ For more about the concept of child participation, see Article 12 of the UN CRC at the following link: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

person has documentation, but no immigration status, then the major risk that they face is the risk of deportation. The nuance regarding documentation and immigration status is particularly important when trying to assist unaccompanied or separated migrant children, as the lack of any document at all may make it more difficult to do family tracing and identify reunification options, and also means that the child is at risk of statelessness.

No person is illegal:

Please note that in the above description regarding documentation and immigration status, the words 'irregular' and 'regular' have been used. This is in recognition of the fact that no person is illegal, and that while official laws and documents sometimes describe people as such, to do so is to deny them their humanity.

Illegality is a form of status that has been deliberately used to refer to undocumented persons or persons without immigration status. It is a type of terminology that is used to try and justify why that group of people might be undeserving of rights. Words matter, and the language we use shapes our perceptions as well as the perceptions of others. By using 'regular' and 'irregular' we are trying to show that the duty bearer in this circumstance is the state, which should be assisting in ensuring that individuals can access documentation and immigration status and are not forced into 'illegality' or criminalized simply for living an undocumented life.

Internally Displaced Person (IDP) – An IDP is a person who has not yet crossed an international border to find safety/protection. So, unlike refugees or asylum seekers who have to be outside of their country of ordinary residence, an IDP is someone who is still in their own country, but who has been displaced for one reason or another. Reasons that people may be displaced could be because of war or natural disasters, and who have fled their area of residence to a place where they may more easily receive humanitarian assistance. The displacement in this context is forced, it is not by choice, and so while an IDP may still be in their home country, they may still require protection and assistance. Traditionally, South Africa is not a country that has IDPs, however, there are examples from neighbouring countries, such as in Mozambique with the current conflict taking place in Cabo Delgado.

Migrant – The International Organization for Migration (**IOM**) describes 'migrant' as an umbrella term not defined under international law, but which reflects an understanding of a person who moves away from their usual residence. This can

be within a country (internal migrant) or across an international border (cross-border migrant). It includes people who have forcibly moved, and who may have crossed the border at a recognized border post (**Port of Entry**) or not. Usually, the latter two are distinguished in terms of being either a 'regular migrant' or an 'irregular migrant' which means that terms such as legal and illegal can be avoided because of the negative connotations associated with them.⁴

Migrant/refugee children – A refugee child is a child who has a refugee claim after having fled their country of origin due to war, conflict, or persecution. This means that they have a refugee claim in their own right, and not through the claim as a dependent of an adult with a claim. A refugee child can, however, also be the child of a parent or caregiver who has a claim for refugee status. In this case, they would be 'joined' to their parent or caregiver's refugee file as a dependent. If a child leaves their country of origin for other reasons, such as school or to find work and not for protection-related reasons, then they would not be eligible for protection under the Refugees Act or UN Refugee Convention.

People smuggling – This is the act of transporting a person across an international border, but not through a recognized or formal border post or port of entry. In some cases, the person being smuggling will pay someone to assist them across the border. The United Nations Office on Drugs and Crime (**UNODC**) defines people or migrant smuggling as the facilitation, for financial or other material gains, of irregular entry into a country where the migrant is not a national or resident.⁵ Child smuggling is defined as 'the illegal transportation of children for profit' as set out in the Protocol Against the Smuggling by Land, Sea, and Air (Migrant Smuggling Protocol) supplementing the UN Convention Against Transnational Organised Crime.⁶

Person of concern (PoC) – This is a term often used by international agencies such as the UNHCR. It refers to persons who may require international protection as defined in the Refugees Convention. In South Africa, persons of concern would-be asylum seekers as well as refugees, but could also include someone who has not yet tried to claim asylum with the Department of Home Affairs, but

⁴ For more information about the term migrant, see: <https://www.iom.int/node/102743>

⁵ For more information regarding people smuggling, see: <https://www.unodc.org/unodc/en/human-trafficking/migrant-smuggling/migrant-smuggling.html>

⁶ For more information regarding child smuggling, see: https://www.unodc.org/documents/middleeastandnorthafrica/smuggling-migrants/SoM_Protocol_English.pdf

who wants to or who has grounds upon which to claim asylum and requires international protection.

Refugee – A refugee is a person who has fled either war or persecution in their home country, and who has crossed an international border to seek the protection of another government and find safety in another country.⁷ In South Africa, a refugee who has been recognized as such by the Department of Home Affairs is issued with a Formal Refugee Recognition document, also known as a “section 24 document” which has to be renewed usually every four years. Refugees in South Africa are entitled to apply for a refugee travel document as well as a refugee Identity Document. Both of these are only valid for as long as their formal recognition document is valid. Importantly, a travel document should not be used to travel back to the refugee’s home country, as this could place their recognized refugee status in jeopardy. Refugees in South Africa are also entitled to apply for social assistance, through social grants from the South African Social Security Agency (**SASSA**).

Separated child(ren) – A separated child is a person under the age of eighteen years who is living or moving with their relatives but not with parents or their previous legal or customary primary caregivers.⁸ Separated children may be in the care of an informal guardian once they arrive in South Africa, but the care relationship is not formalized. When assisting separated children, the particular needs that should be understood relate to assessing the care situation that they are presently in, as well as assisting with family tracing, and family reunification or re-establishment of family links.

Sexual and Gender-Based Violence (SGBV) – The UNHCR defines SGBV refers to harmful acts directed at an individual based on their gender. This could include sexual, physical, mental, and economic harm inflicted in public or in private on an individual. It also includes threats of violence, coercion, and manipulation. It can take many forms, including intimate partner violence (IPV), child marriage, female genital mutilation (FGM), and so-called ‘honour’ killings. Survivors of SGBV may often flee their country of origin as a result of what has happened to them. They often need additional support, including access to mental health and

⁷ For more information about the term refugee, see: <https://www.unhcr.org/what-is-a-refugee.html>

⁸ For more information about this, see: General Comment Number 6 (2005) Treatment of unaccompanied and separated children outside their country of origin. Para 8: <https://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf>

psychosocial support, and debriefing, to assist them once they have arrived in the country in which they seek to claim asylum. Importantly, SGBV can and does also take place once a person has reached a country of asylum, and is an issue that pastoral care providers should be mindful of when trying to assist people on the move, including children.

Stateless or at risk of statelessness – A stateless individual is someone who is not considered to be a citizen or national of any state. The 1954 Convention relating to the Status of Stateless Persons defines a stateless person as someone whom no state considers to be a national under the operation of its law. This is elaborated upon through the UN Guidelines (2012) which indicated that determining whether a person is stateless is a mixed question of both fact and law. Statelessness, as well as lack of recognition of nationality, impact an individual's ability to access services and rights, without proof of identity a person is often unable to be formally employed, access health care, education, or even a bank account.

Trafficking – The UNODC defined human trafficking as the recruitment, transportation, transfer, harbouring, or receipt of people through force, fraud, or deception, with the aim of exploiting them for profit. All persons are at risk of being victims of trafficking – men, women, girls, and boys. Many potential traffickers will use the lure of a job or education in order to trick their victims to come with them to another destination (either within their own country – such as from a rural area to an urban one; or across an international border). The Palermo Protocol defines trafficking of children as the 'recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation, even if this does not involve any fraudulent means such as violence, deception or coercion'. A child for these purposes is defined as any person below the age of 18 years. Trafficking should not be confused with people smuggling, which has been described above.⁹

Unaccompanied child(ren) – An unaccompanied child is a person under the age of eighteen years old who is without the care of those responsible to do so by law or custom. In South Africa, an unaccompanied migrant child could be a child crossing into South Africa from elsewhere either to seek asylum or sometimes for other reasons, such as to seek employment. Thus, unaccompanied children can either be ones who need assistance in accessing the asylum system, or who need

⁹ For more information regarding trafficking, see: <https://www.unodc.org/unodc/en/human-trafficking/human-trafficking.html>

assistance in understanding the immigration system and what laws apply to them. Unaccompanied children may need specific assistance as they are seen to be children in need of care and protection. This means that a social worker would need to be consulted to best assist such children in South Africa

Xenophobia – Xenophobia is the fear or hatred of persons perceived to be ‘foreign’ and from another country. It can include direct physical attacks, but also more institutionalized forms of xenophobia and discrimination, such as refusal to offer services to a person because they are not South African, or because they are perceived to not be South African. It could also include discriminatory treatment of persons based on a perception that they are not South African, such as where those perceived to be not South African are made to pay medical bills up front before receiving services at a state hospital when the same standard is not applied to South African citizens. Xenophobia is a significant issue in South Africa, and people from communities on the move experience it in varying degrees. There is a significant need for more integration, social cohesion work, and understanding between local ‘host’ communities, and non-citizens in South Africa.

History

South Africa has a long history of migration, particularly within the region. Prior to colonization, there was a significant movement of people across the Southern African region. Post-colonisation, this continued and included the movement of people to South Africa from various areas in the world. In addition to these movements from more than just the region or African continent, the more recent historical context also saw the creation of borders in Southern Africa by colonial authorities. Many of these borders cut across areas where families or larger relational networks lived. Some also, as we still see today, separated people in one area from the closest larger trading post or town, making it more difficult for them to access goods and services because a border meant that a previously close trading area was now rendered inaccessible to them. These historical impacts of migration continue to shape some of the international migration trends that we see in South(ern) Africa today.

In addition to the above, when gold and diamonds were discovered in South Africa, as well as other minable minerals, active policy decisions were made by the governments of the time and the mining companies to secure cheap labour. This was done through the active encouragement and recruitment of migration to South Africa to work on the mines. This included mining companies recruiting

mine workers from neighbouring countries such as Mozambique, Zimbabwe, Malawi, and elsewhere. South Africa's own internal historical context, and the divisions drawn up by the Apartheid government, have also played a significant role in shaping internal migration in the country. As with the recruitment of mine workers from neighbouring countries, the mining companies did the same from what was then known as the "homelands" or "bantustans" (a term used to describe the so-called separate states that the Apartheid government set up for South Africa's black majority, but which were not recognized by any other government). These "homelands" were only recognized by the then-South African government and were not only discriminatory but also unlawful in terms of international law. Many of the former "homelands" continue to be rural areas within South Africa, that remain underdeveloped and often under-resourced, meaning that the internal migratory pattern for migrant labour within South Africa from rural to urban areas persists.

The Numbers

It is not easy to provide the exact number of cross-border migrants in South Africa. Over time, the numbers do appear to be reducing. In the National Census in South Africa in 2011, it was shown that there were 4,2 million "foreign-born" people in the country. This amounted to approximately 4.2% of the total population then. The next national census is scheduled to take place in 2021, and so the information that we have from the national census is almost a decade old. In between these censuses, Statistics South Africa does Community Surveys, where they collect the same information, but across several communities rather than on the large scale done in the national census. These community surveys show the trends and are usually a good predictor of what the information will say in the next national census.

In the 2016 Community Survey,¹⁰ it was found that the number of foreign-born people in South Africa had reduced to 1,6 million – 2.8% of the population. However, in 2021, Statistics South Africa stated that the mid-year population estimates indicate that there may be approximately 3,95 million foreign-born persons in South Africa.¹¹ Below are three tables from the 2016 Community Survey showing the information about the people behind these numbers –

¹⁰ To see the full document, see: http://cs2016.statssa.gov.za/?portfolio_page=census-2011-fact-sheet

¹¹ For more on this, see: <http://www.statssa.gov.za/?p=14569>

whether they're male or female, and what age they are, as well as how long they have spent in South Africa, and what their country of birth is.

Table providing information about foreign-born persons living in South Africa, as indicated in the 2016 Statistics South Africa Community Survey

Age and sex information for those persons living in South Africa, but foreign-born (2016)

Table 3.1: Distribution of persons born outside South Africa by age and sex

Age group	Census 2011			CS 2016		
	Male	Female	Total	Male	Female	Total
0-4	39 724	38 707	78 432	19 154	18 708	37 863
5-9	29 054	28 852	57 906	18 968	19 512	38 479
10-14	24 888	23 911	48 799	18 687	21 213	39 900
15-19	51 090	42 041	93 130	29 972	29 495	59 467
20-24	182 258	126 915	309 172	82 205	75 919	158 123
25-29	260 124	160 588	420 712	144 442	107 459	251 900
30-34	212 943	114 879	327 822	147 201	99 531	246 732
35-39	150 729	78 436	229 165	141 582	77 844	219 426
40-44	98 860	55 523	154 383	97 071	49 741	146 812
45-49	68 062	44 592	112 655	65 110	34 240	99 350
50-54	52 088	37 775	89 863	44 155	26 722	70 877
55-59	38 785	29 850	68 634	32 314	24 222	56 535
60-64	32 242	27 304	59 546	23 269	18 035	41 305
65-69	25 769	22 342	48 111	21 163	17 977	39 140
70-74	19 586	17 311	36 898	15 597	16 566	32 163
75+	25 078	28 566	53 643	17 151	23 318	40 469
Total	1 311 280	877 592	*2 188 872	918 040	660 501	*1 578 541

*Total numbers of persons who reported that they were born outside South Africa includes those who did not respond on year moved into South Africa.

Year of arrival in South Africa for those living here who are foreign-born (2016)

Table 3.2: A comparison of number of persons who reported that they were born outside South Africa

Year moved to SA	Census 2011	Community Survey 2016
1996	30 336	22 232
1997	27 375	14 612
1998	35 731	24 170
1999	41 381	33 271
2000	66 485	56 599
2001	45 459	25 183
2002	43 396	28 119
2003	54 109	30 391
2004	65 283	37 303
2005	85 482	51 383
2006	107 881	63 908
2007	139 195	66 591
2008	173 091	91 524
2009	183 435	87 579
2010	189 125	112 438
2011	236 316	61 029
2012	n/a	66 509
2013	n/a	83 058
2014	n/a	77 891
2015	n/a	121 161
2016	n/a	56 875
Total	1 524 080	*1 211 824

*Total number of persons who reported that they were born outside South Africa excludes those who did not respond to year moved into South Africa

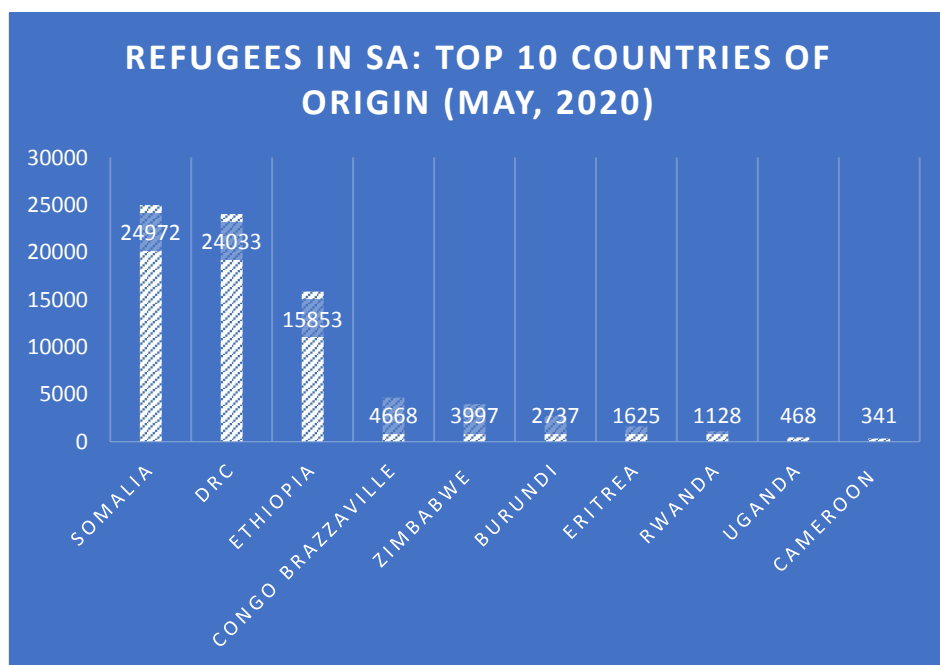
Country of origin for those foreign-born individuals living in South Africa (2016)

Table 3.3: Distribution of top 20 sending countries, 2011 and 2016

2011			2016		
Sending country	N	%	Sending country	N	%
Zimbabwe	672 308	38,1	Zimbabwe	574 047	39,6
Mozambique	393 231	22,3	Mozambique	293 405	20,2
Lesotho	160 806	9,1	Lesotho	160 749	11,1
Malawi	86 606	4,9	Malawi	78 796	5,4
United Kingdom/Great Britain	81 720	4,6	United Kingdom	56 412	3,9
Namibia	40 575	2,3	Swaziland	38 038	2,6
Swaziland	36 377	2,1	Congo Democratic Republic of	31 504	2,2
India	31 165	1,8	Namibia	30 701	2,1
Zambia	30 054	1,7	Nigeria	30 314	2,1
Ethiopia	28 230	1,6	India	25 063	1,7
Nigeria	26 341	1,5	Ethiopia	22 148	1,5
Somalia	26 116	1,5	Zambia	19 119	1,3
Congo	26 061	1,5	Germany	13 894	1,0
Democratic Republic Of The Congo (Zaire)	25 630	1,5	Bangladesh	12 764	0,9
Germany	20 494	1,2	Pakistan	11 157	0,8
Bangladesh	19 696	1,1	Somalia	10 954	0,8
Pakistan	17 241	1,0	Botswana	10 759	0,7
Portugal	15 626	0,9	Congo	10 686	0,7
China	15 071	0,9	Portugal	9 931	0,7
Botswana	12 316	0,7	Ghana	8 943	0,6

When looking at the above numbers, it is important to understand that these represent cross-border migrants in South Africa who may have regular immigration status, or might not. In the next few paragraphs, we will look at some of the information that we have regarding the numbers of people who do have regularised immigration status: asylum seekers, refugees, and other groups of migrants who form part of the numbers provided above.

The number of asylum seekers and refugees in South Africa has changed over the years. The most recent statistics indicate the total number of active refugee and asylum files at the Department of Home Affairs is approximately 270 000. This includes 188 296 asylum seekers¹² and 80 758 refugees¹³. The graph below provides the top ten countries of origin for recognized refugees in South Africa at the moment. Other countries that South Africa receives refugees from include, Afghanistan, Cambodia, Central African Republic, Chad, East Timor, Egypt, Iran, Iraq, Jordan, Kenya, Malawi, Niger and Nigeria, Palestine, Russia, Serbia, Sudan, Swaziland, Syria, Yemen, and Zambia as well as several others.¹⁴

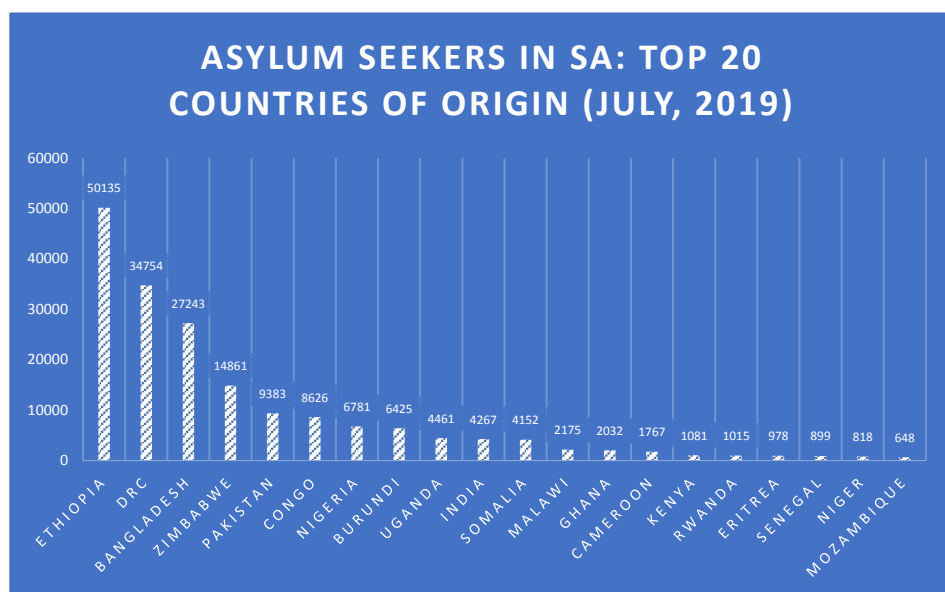


¹² This was the number on 1 January 2020, see: <https://pmg.org.za/committee-question/13290>

¹³ This was the number as at 31 March 2020, see: <https://pmg.org.za/committee-question/13510>

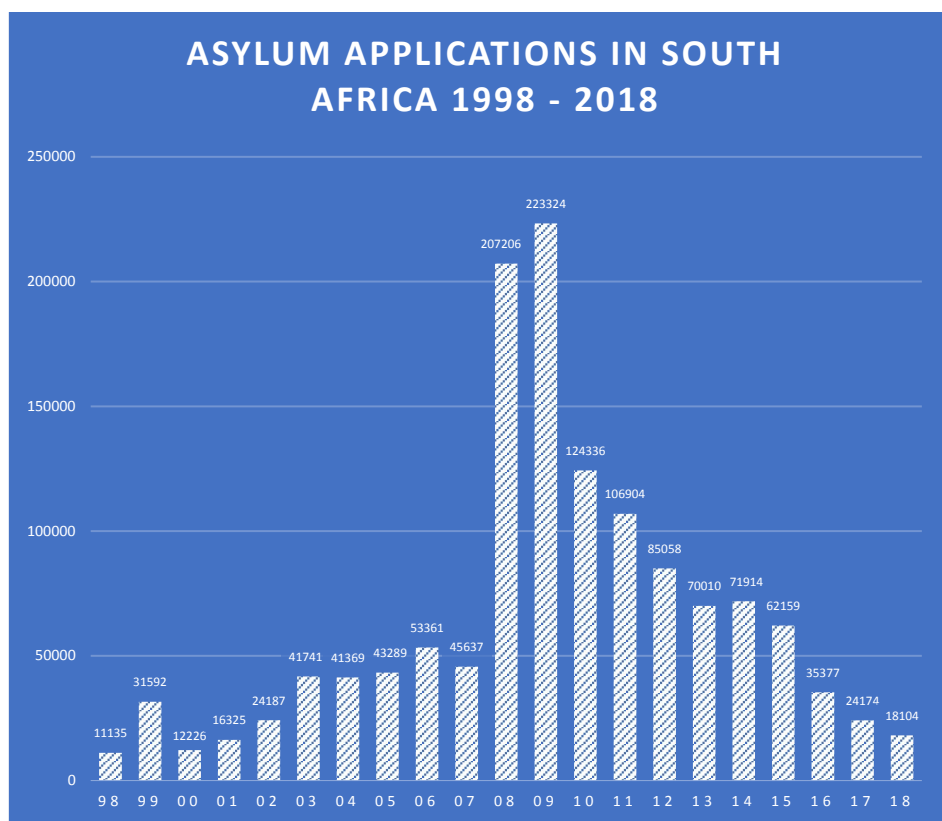
¹⁴ This information is taken from a report from the Minister of Home Affairs to Parliament, see: <https://pmg.org.za/committee-question/13510>

Similarly, the top twenty countries of origin for persons on asylum seeker status in SA, as of July 2019, are provided in the graph below. Additional countries not listed on the graph include ones such as Egypt, Algeria, Ivory Coast, China, Mali, Nepal, Sudan, Syria, Swaziland, Afghanistan, Yemen, Palestine, East Timor, Iraq, Central African Republic, Turkey, Bahrain, Jordan, Mauritania, Madagascar, Iran, Azerbaijan, Kyrgyzstan, Burma, Russia, and Lebanon.¹⁵



Historically, the total number of refugees and asylum seekers has fluctuated quite dramatically. The graph below provides information about the total number of asylum applications lodged per year from 2008 to the most recent year that we have the information for being 2018. What this graph shows is that while there was a peak in or around 2008/2009 – the time of the global financial crisis as well as the time of the political crisis in Zimbabwe. The number of asylum applications has been steadily decreasing. It is difficult to understand the exact reason for this. The decrease in applications for asylum in South Africa could be a combination of factors, including simply that people are less able to access South Africa’s asylum system, or that they are finding different types of documentation to enter the country on, or different countries are their country of flight.

¹⁵ This information is taken from a report from the Minister of Home Affairs to Parliament, see: <https://pmg.org.za/committee-question/11798>



More information about refugees and asylum seekers in South Africa is included in the section below.

In terms of the numbers of visas issued in terms of the Immigration Act, we do not have the exact numbers. However, what has been reported is that between 2015 and 2018, the number of critical skills visas applied for increased from 3852 in 2015/16 to 6697 in 2017/18. Of those numbers only about half, or just over half, are approved.

One further key group of foreign-born persons in South Africa that can easily be counted is the number of people who are on Special Dispensation Permits. This includes persons on the Zimbabwean Exemption Permit, the Lesotho Exemption Permit, and the Angolan Special Permit. More information about the origins of these special dispensations is provided in the relevant section below. However, in terms of numbers, the approximate number of persons on the Angolan Special Permit is between 2000 and 3000. The total number that we have for the

Zimbabwean Exemption Permits was provided in 2017 as 197 941.¹⁶ No figures have been published in respect of the Lesotho Exemption Permit. All of these permits are due to expire on 31 December 2021. While a further application and renewal process has been made available for those on the Angolan Special Permit, as of October 2021, no further information had been provided regarding prospects for renewal of the Zimbabwean and Lesotho Exemption Permits.

Risk of Statelessness

While South Africa's Constitution, as well as its obligations in terms of international law, provide that every child born in South Africa has a right to a name and a nationality, and thus should be issued with a birth certificate, in practice, there are many gaps (including legal difficulties and administrative ones) which place children and adults at risk of statelessness. As indicated in the definitions section of this guide, a stateless individual is someone who is not considered to be a citizen or national of any state – and is not recognized as such either by law or in fact. A significant factor in ensuring that there is less of a risk of statelessness for individuals in a particular country is to ensure access to universal birth registration. In South Africa, while there is no reliable information or statistics indicating the exact number of people who may be at risk of statelessness, there is information about birth registration and barriers to birth registration. Statelessness and the risk of statelessness affects South African citizens as well as non-citizens. The paragraphs below provide information specifically relating to non-citizens, but it should always be understood that the risk of statelessness is a risk faced by many in South Africa, citizens, and non-citizens alike.

In a 2018 Statistics South Africa Report,¹⁷ the historical pattern of birth occurrence and registration between 1995 and 2018 and current trends in birth registration shows that while there has been an increase in prompt birth registration in recent years, there is still a deficit and that more than 10% of births in South Africa are not registered within the first 30 days. The Birth and Deaths Registration Act is the legislation that provides the process for how births must be registered in South Africa, and who can register a birth. In general, the barriers to birth registration affect those who are most marginalized – that is, those in

¹⁶ For more information, see: <http://www.dha.gov.za/index.php/statements-speeches/1034-statement-by-minister-mkhize-on-the-closure-of-the-zimbabwean-special-permit-zsp-and-the-opening-of-the-new-zimbabwean-exemption-permit-zep>

¹⁷ For more information, see: www.statssa.gov.za/publications/P0305/P03052018.pdf

rural areas with difficulties accessing Department of Home Affairs services, or migrants, refugees, and asylum seekers. Key barriers to birth registration for migrants, asylum seekers, and refugees in South Africa are the requirements that the parents of the child must have valid documentation and immigration status; the 30-day registration of birth time restriction; restrictions on guardians being able to register the birth of a child; a separate procedure that unmarried parents have to undertake to register the birth of a child; and difficulties in registration of birth of a foundling (a child abandoned at birth or shortly thereafter). Ensuring that a birth is registered is the first step in reducing the risk of statelessness for a child. Pastoral care agents can assist with this either through encouraging the registration of a birth within the first 30 days since birth, as well as through accompaniment to the closest Department of Home Affairs office. A recent Constitutional Court judgment has also made it possible for fathers to register the birth of a child, this is particularly useful if the father has valid documentation and immigration status and the mother does not, as this will ensure the birth of the child is registered. Once a birth is registered in South Africa, it should also be registered at the relevant embassy or consulate (in the case of cross-border migrants) or the Refugee Reception Office (in the case of asylum seekers and refugees).

A further issue that increases the risk of statelessness, but which is unrelated to the registration of births, is access to documentation for unaccompanied or separated foreign children. For many, if they do not remember details of their country of origin and family, they may not be able to access documentation from their relevant embassy or consulate; and without a parent or guardian present in South Africa they also may not be able to access immigration or refugee documentation in South Africa. This lack of pathways to documentation increases the risk of statelessness for such children.

Asylum Seekers & Refugees: The Refugees Act

South Africa's asylum system is an urban integration model, also known as an 'urban protection policy' which encouraged refugees to integrate into local communities. This means that in South Africa there are no refugee camps. Instead, refugees and asylum seekers have the right to freedom of movement and can live anywhere in the country. What it also means is that they are not provided with education or healthcare through special camp-based systems, but must access these services in the same way that any other South African or person in South Africa would, through either the public sector or the private sector.

Prior to the COVID-19 related lockdown and associated border closures, there were approximately 188 000 asylum seekers in South Africa (registered with the Department of Home Affairs) and 80 000 refugees. No new applications have been lodged since March 2020, because the Refugee Reception Offices have been closed to in-person services since then.

South Africa's Refugees Act was passed in 1998 and came into effect in 2000. It was one of the most progressive in the world. However, it has since been amended, with the amendments coming into effect in January 2020. The amendments undermine the protections that had been included in the original version of the Act, and there are now several parts that may violate international refugee law and could be unconstitutional. Over at least the past decade there has been a shift away from the protection focus of the asylum system, to one of securitization. Refugees and asylum seekers are seen more as a problem to be managed, rather than a group of vulnerable people who require protection and to whom the South African state has committed to protect based on international law.

There have been many flaws in the South African asylum system, but one of the biggest is the backlogs and delays that it takes to process a refugee claim – delays that leave claimants in limbo for many years. While the initial version of the Refugees Act and Regulations stated that the Department of Home Affairs had to adjudicate a refugee claim within 180 days, this has now been removed from the current version of the Act. In practice, many asylum seekers remain on asylum seeker documentation for many years, living in limbo and having to renew their document periodically at one of the Refugee Reception Offices. This system created many hardships. The context since COVID-19 has changed slightly in that in April 2021, the Department of Home Affairs (**DHA**) implemented a system where asylum seekers and refugees could renew their documentation by email. There are still difficulties and flaws in this email renewal system, but it has also helped many people because they now have not had to travel to far away Refugee Reception Offices to renew their documents. It has also meant that asylum documents are renewed for six or 12 months at a time, which is a welcome change from the DHA.

The Application Process to Become a Refugee in South Africa

The Refugees Act in South Africa says that if an individual comes into South Africa and intends to apply for asylum, they must declare this when they enter the country – at the Port of Entry. They should then be issued an “Asylum Transit Visa” in terms of section 23 of the Immigration Act, which gives them five days in which to report to a Refugee Reception Office (**RRO**) to lodge their asylum application. The Refugee Reception Offices in South Africa are located in Musina, Pretoria, Durban, Gqeberha (previously Port Elizabeth), and Cape Town (but at the time of writing, and since about 2012, the Cape Town RRO did not accept new asylum applications).

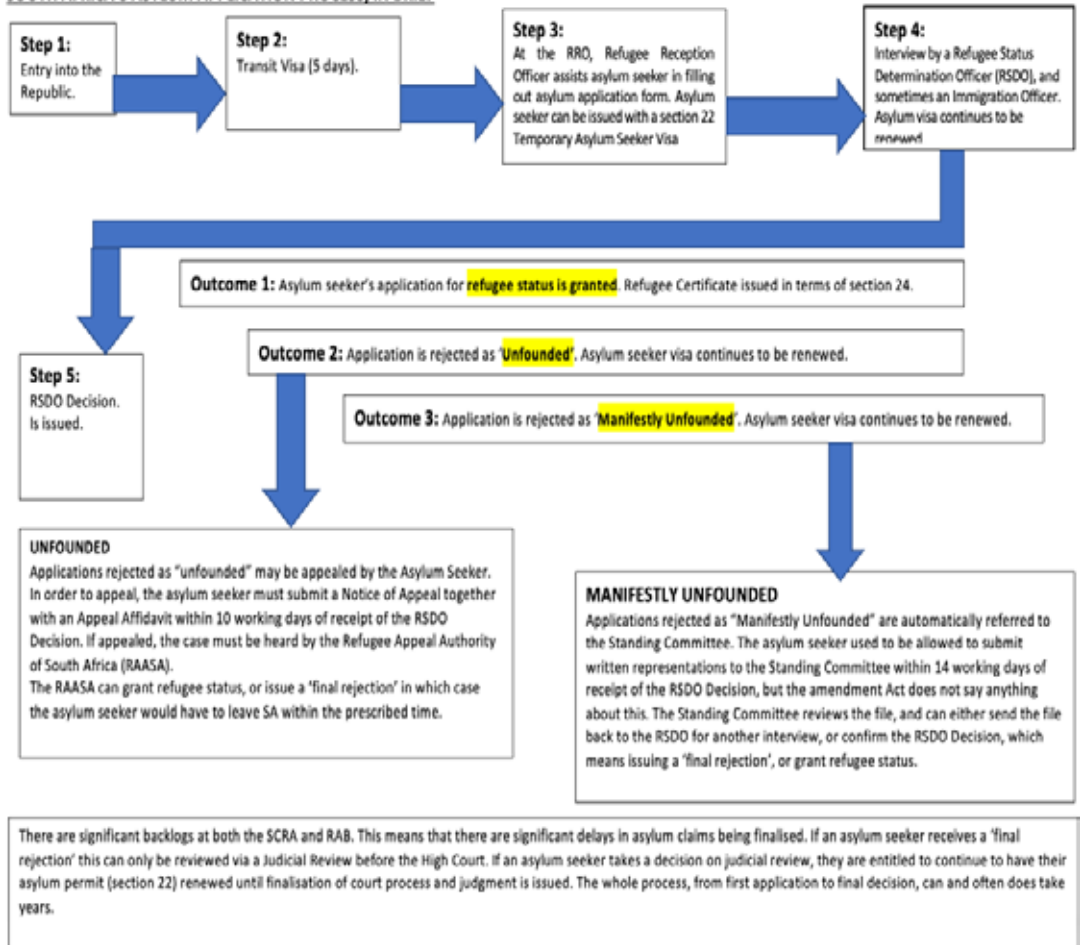
When lodging an application for asylum, the asylum seeker’s biometrics will be taken, and they will be asked to fill in the relevant application forms. These can be lengthy and difficult to understand, especially if you are not fluent in English. Assistance is supposed to be provided at the RRO by a refugee reception officer, but it is often helpful for an asylum applicant to understand or have some knowledge of the process before they go to the RRO to fill in the forms. Everything written on the application form must be true and correct, and at the end of completing the form, the asylum applicant will not have an opportunity to change anything that they have said. The language the asylum applicant wants to use in the process must also be indicated on the form. If the asylum applicant came into the country irregularly or does not have an asylum transit visa, they will also be interviewed by an immigration officer about this. If the asylum applicant has a spouse and children, they should be included in the form filled in, and their biometrics must also be taken by the RRO officials.

Once the asylum application form is completed and submitted, the asylum applicant will be scheduled for a Refugee Status Determination (**RSD**) interview, with a Refugee Status Determination Officer (**RSDO**). At this interview, the asylum seeker should be told the procedure by the RSDO and will be asked why they have fled their country and why it may be unsafe to return. After applying for asylum, the asylum applicant together with any dependents should be issued with an asylum seeker visa in terms of section 22 of the Refugees Act. Later, the RSDO should provide a written decision (**RSDO Decision**) regarding the asylum application. The RSDO Decision can either grant asylum, in which case the applicant would be given refugee status, or it can reject the asylum application. The rejection can either be “unfounded” or “manifestly unfounded”.

If the asylum seeker is rejected as unfounded, then they can appeal the reasons for the rejection. It is advisable to get assistance with this appeal, which is written usually in the form of an affidavit. This must be done for the appeal to be lodged. This appeal goes to the Refugee Appeals Authority of South Africa (**RAASA**) where the asylum seeker might be scheduled with another in-person hearing to find out further reasons about their asylum claim. Thereafter, another decision will be issued by the RAASA, which could either grant the person refugee status or reject them again. If they receive a second rejection, known as a 'final rejection' then it means that the RAASA does not think that their refugee claim fits into the reasons someone can claim refugee status. If that happens, the only further recourse that the asylum applicant can take is to find a lawyer (either paid or pro bono) and seek a judicial review of the decision before a High Court.

Similarly, if the asylum seeker's RSDO Decision says the claim is rejected as manifestly unfounded, then the next step for the asylum applicant is that the claim is automatically reviewed by the Standing Committee for Refugee Affairs. The asylum applicant does not have to submit anything further, but usually, there is an opportunity to submit further written submissions about their claim. This can be done with the help of lawyers or those assisting refugees and asylum seekers. The Standing Committee can now grant refugee status, or again reject the claim, or send it back to the RSDO for further interviews. If the Standing Committee rejects the claim, then the asylum seeker is given a Final Rejection. As with the final rejection that can be given by the RAASA, the only way to challenge this is to seek a judicial review, for which the asylum seeker will need the assistance of a lawyer or pro bono law clinic. Below is a diagram or flow chart showing the basic asylum application process. This is a very basic flow chart and it must be understood that many of the processes take a long time and so from first application to final decision can, and often does, take years.

SOUTH AFRICA'S ASYLUM APPLICATION PROCESS, IN BRIEF



Grounds for Refugee Status

The grounds for refugee status in South African law can be found in section 3 of the Refugees Act. Section 3(a) outlines the grounds related to personal persecution. Section 3(b) provides the grounds related to war in one's country of origin. Section 3(c) provides that the dependant of a refugee can also be granted refugee status. Sections 3(a) and (b) have been quoted in full below, with a brief explanation of each.

Section 3

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person–

(a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion, or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality, and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination, or events disturbing public order in either a part of the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence to seek refuge in another place outside his or her country of origin or nationality;

Thus, the grounds for refugee status in South Africa relate to either personal persecution based on one of the grounds listed in section 3(a) of the Refugees Act, where the person is unable to get assistance from their government to address the persecution. This could be because their government is the agent of the persecution, or is simply not in a position to assist the individual. Similarly, someone can seek asylum and should be granted refuge, if they have fled a war-like situation in their home country, and are forced to seek refuge outside of their home country. Section 3(b) was specifically included in the 1998 Refugees Act because it is included in the Organization of African Unity (OAU) Refugee Convention, which sought to address the specific situation of refugees in Africa. It is not a ground that was included in the original 1951 UN Refugee Convention.

Rights, Duties, and Responsibilities of Refugees and Asylum Seekers in South Africa

Being an asylum seeker or refugee in South Africa comes with certain rights and responsibilities, as well as entitlements owed to the asylum seeker/refugee by the South African state. Asylum seekers are entitled to an asylum seeker document, and to the renewal of that document from time to time. Refugees are entitled to a refugee recognition document, a refugee identity document, as well as to apply for and receive a refugee travel document. All refugees and asylum seekers are entitled to the rights in South Africa's Bill of Rights, except for those specifically promised to citizens only, such as the right to vote. Asylum seekers and refugees also have responsibilities under South African law, such as obeying

and abiding by all South African laws, renewing their documents when prescribed, and providing certain details to the Refugee Reception Officer (such as your residential address).

Refugees are entitled to apply for social assistance grants in South Africa and provided they meet the ordinary criteria, they are entitled to receive those grants. Asylum seekers have been included as eligible to apply for the COVID-19 Social Relief of Distress grant, but this is not the same as the grants available in times outside of a National State of Disaster. Asylum seekers and refugees are entitled to employment-related benefits and insurance, such as UIF and compensation for occupational injuries. They are also entitled to apply for learners and drivers licenses, as well as for bank accounts. Asylum seekers are not permitted to leave South Africa, as this will cease their asylum claim. Refugees would have to first obtain a refugee travel document to leave South Africa.

All persons, including asylum seekers and refugees, have the right to basic education. However, according to the amendments to the Refugees Act, any asylum seeker who wishes to undertake study beyond basic education must fill out a specific form to do so. This must be signed by the appropriate person at the educational institution and submitted to the RRO. The endorsement on an asylum seeker visa, allowing the holder to study, may be provided once the appropriate documents have been submitted to the RRO.

Similarly, if an asylum seeker wishes to work in South Africa, they will now (under the amendments) have to seek an endorsement with permission to work on their asylum seeker document. This was not the case before the amendments came into effect. To get the permission to work, the asylum seeker would have to fill out the appropriate form at the RRO and submit it together with other relevant documents, such as an assessment showing whether they have the means to sustain themselves. Once the endorsement of the right to work is provided, the asylum seeker has to find a job within six months, failing which the endorsement is removed. Once a job has been found, the asylum seeker's employer will have to sign a letter proving that they have offered employment to the individual, this will allow the asylum seeker visa to continue to be endorsed with the right to work.

NOTE: This system regarding the right to work and endorsements, as well as the one above regarding education, have not yet been implemented at Refugee

Reception Offices. At the time of writing, all asylum documents still were automatically endorsed with the right to work or study.

Refugees are also entitled to not be returned to their country of origin if they are likely to face harm in that country. This is known as the principle of *non-refoulement*. The principle of *non-refoulement* is an internationally recognized principle and essentially means that the South African government cannot deport someone if there exists a reasonable risk of harm' should that person be returned to their country of origin. For more information on immigration detention and deportation in South Africa, the Lawyers for Human Rights Practitioners Guide to Immigration Detention in South Africa.¹⁸

Other Types of Immigration Status: The Immigration Act

There are many other types of immigration status available to non-citizens wishing to come to South Africa. However, many are difficult to obtain and there are specific requirements. There are three types of Special Dispensation Visa programmes that the South African government has made in the past, and these have been described in more detail below. They particularly apply to former refugees from Angola, as well as to Zimbabweans and persons from Lesotho. The provision in the Immigration Act that allows for the creation of a special dispensation is section 31(2)(b).

The Immigration Act (13 of 2002) describes the types of 'temporary' and 'permanent' stays that a person can have to be in South Africa with a recognized immigration visa or permit. The Immigration Act also states that non-citizens can only enter South Africa legally if they have been issued with the appropriate temporary residence visa and that they fulfil the conditions of the various listed categories provided for temporary visas. An example of a type of temporary visa is a study visa or a tourism visa. In the table below, the other types of visas available in terms of the Immigration Act are very briefly described. In general, they can be understood as being divided into two very broad categories, one category which allows the visa holder to work while in South Africa, and the other category which does not. There is also one further type of temporary visa that is issued in terms of the Immigration Act but which relates to asylum seekers, that is the Asylum Transit Visa. This is supposed to be issued to someone at the port

¹⁸ Available at: <https://www.lhr.org.za/lhr-resources/a-practitioners-guide-to-immigration-detention-in-south-africa>

of entry or border post when they indicate that the reason that they are entering South Africa is that they want to seek asylum.

Section 10 of the Immigration Act states:

- (1) Upon *admission*, a *foreigner* may enter and sojourn in the *Republic* only if in possession of a *temporary residence*.
- (2) Subject to *this Act*, upon *application* and upon *prescribed* examination at the *port of entry*, one of the *temporary residences* set out in *sections 11 to 23* may be issued to a *foreigner*.
- (3) If issued outside of the *Republic*, a *temporary residence* is deemed to be of force only after an *admission*.
- (4) A *temporary residence* is to be issued on condition that the holder is not or does not become a *prohibited* or an *undesirable person*.
- (5) For good cause, as *prescribed*, the *Department* may attach reasonable individual terms and conditions to a *temporary residence*.
- (6) Subject to *this Act*, a *foreigner* may change his or her *status* while in the *Republic* (italics in the original).

In simple terms, what the above means is that when someone who is not a South African citizen comes to South Africa, they must have a visa already or they can sometimes apply when they arrive. The visa only becomes active or 'in force' when the person is in South Africa, and there may be conditions attached – such as that you may or may not work while in the country. Some visa types can be changed while the person is in the country, rather than them having to leave and apply from their home country. Most of the visa application and processing services for immigration visas are outsourced to a company called Visa Facilitation Services. This is where individuals have to go to attend to visa matters whether inside or outside South Africa. It is best to consult their website for more information on specific requirements for each visa, the costs, and how to book the relevant appointments.¹⁹

¹⁹ To visit the VFS South Africa website, see: <https://www.vfsglobal.com/dha/southafrica>

Table describing the temporary visa types available in terms of the Immigration Act		
Section of Immigration Act	Type of Visa	What is the visa holder entitled to?
Section 11	Visitor's permit	<p>There are different types of visitor visas. Usually, this type of visa allows someone to come into South Africa for not more than three months but can be renewed on application.</p> <p>The visa holder is <u>not permitted to work</u>.</p> <p>However, you can apply for a visitor's visa that is longer than three months, for other reasons such as for the purposes of academic sabbaticals, volunteering, or research.</p> <p>This type of visa can be a single entry visa or a multiple entry visa.</p> <p>DHA can sometimes require an applicant for a visitor's visa to show that they have the financial means to sustain themselves without work during the time they will be in SA.</p> <p>If one applies for a visitor's visa that is longer than three months, such as an 11(6) visa which is meant for spouses of a citizen or permanent resident, then it is possible under certain circumstances to get the visa endorsed with permission to work while in South Africa.</p>
Section 12	Diplomatic permit	<p>This type of visa is issued to diplomats from a foreign state. It can be issued by either the Department of Home Affairs or the Department of International Relations and Cooperation (DIRCO).</p> <p>It can also be issued to immediate family members of diplomats.</p> <p>Diplomatic permit holders cannot work in South Africa, other than the work that they do as a diplomat. However, for the spouses, there is a way that they can apply for permission to work, in</p>

Table describing the temporary visa types available in terms of the Immigration Act		
		which case they would be issued with an additional work permit.
Section 13	Study permit	<p>This allows the holder to study in South Africa. However, to obtain this visa, the applicant must be able to fulfil certain requirements, including such things as an offer of placement, medical insurance, and that tuition fees will be paid, and that they have sufficient funds to support themselves while in South Africa.</p> <p>Holders of study permits are not permitted to undertake full-time work, but if they are attending an institution of higher learning (university) they are permitted to undertake part-time work.</p>
Section 14	Treaty permit	<p>This is a type of visa issued to someone who is undertaking activities in terms of an international agreement. This could be a person who is working for a UN-related agency. The requirements, including work-related ones, are prescribed in Regulations.</p>
Section 15	Business permit	<p>This type of visa is issued to someone who wants to start a business in South Africa. This could be a business that they will be employed in and members of their immediate family. However, to get this type of permit, the applicant must be able to show that they have a certain amount of investment capital that they will contribute to the start-up of the business. The amount changes from time to time and is prescribed by the Minister in regulations. The applicant also has to show additional things, such as compliance certificates, the intended book value of the business, registration with SARS, etc.</p>
Section 16	Crew permit	<p>This type of permit is issued to the crew or owner of a ship or aircraft. It may restrict the individuals</p>

Table describing the temporary visa types available in terms of the Immigration Act		
		to a certain area (for example the harbour area), and it does not permit the holder to work in South Africa generally.
Section 17	Medical treatment permit	This visa is issued to someone who is intending to receive medical treatment in South Africa for a period longer than three months. The holder or applicant would need to show that they can afford treatment costs, and may have to show details of the institution where the treatment will take place (including that it is in good standing with the Department).
Section 18	Relative's permit	This is issued to the immediate family member of a citizen, or a resident in South Africa, as long as that immediate family member or resident provides proof that they can provide for the person financially. The holder of a relative's permit is not allowed to work in South Africa.
Section 19	Work permit	There are different sub-categories of work permits that are issued. <ul style="list-style-type: none"> - <u>A quota permit</u> relates to a specific category of workers prescribed (in the Government Gazette) by the Department of Trade and Industry. - <u>A general work permit</u> can be issued, but the prospective employer has to fulfil certain requirements including showing that no South African could be hired for the position advertised. Certificates showing the same must be obtained from the Department of Labour. In practice, a general work permit is very seldom issued. - <u>Critical skills visas</u> are also issued in terms of section 19. These used to be called

Table describing the temporary visa types available in terms of the Immigration Act		
		<p>exceptional skills visas. This can be issued to people who have skills for certain scarce skilled areas, which are published by the Department in the Government Gazette from time to time. Family members can also obtain visas, once a critical skills visa has been issued, and if applied correctly this can include permission to work.</p> <ul style="list-style-type: none"> - <u>An intra-company transfer visa</u> can be issued for employees of international companies who are employed abroad, but where the company wants to send the employee to their South Africa offices for a period of less than two years. There are further requirements that have to be fulfilled by the company to obtain this visa, including financial guarantees.
Section 20	Retired person permit	<p>A retired person visa is issued to an individual wishing to retire in South Africa, provided they can show proof that they have the funds to support themselves. There are various ways in which this proof can be shown, including a minimum prescribed net worth, or proof of a right to a pension, etc. Persons with this visa can reside in South Africa on a full-time basis, or seasonally. The visa is issued for four years at a time. They are permitted to conduct some work, but it is subject to specific circumstances.</p>
Section 21	Corporate permit	<p>This type of visa is issued to a company/corporate applicant to employ non-citizens. The Department of Employment and Labour must be consulted, as well as Trade and Industry. They can prescribe the maximum amount of employees, as well as other restrictions.</p>

Table describing the temporary visa types available in terms of the Immigration Act		
Section 22	Exchange permit	Exchange visas are issued to persons participating in exchange programmes organized by any organ of the State. The person holding this type of visa must be under 25 years of age and have an offer of work from an employer certifying that they are responsible for the person concerned. The individual is not permitted to conduct any other type of work.
Section 23	Asylum Transit Visa	This is issued to persons who indicate when they arrive at South Africa's borders that they wish to apply for asylum in South Africa. It is issued for a five-day period, and in that time the asylum seeker must present themselves at a Refugee Reception Office to apply for asylum.
Section 24	Cross-border and transit pass	This is provided to citizens of certain countries that share borders with South Africa. Usually, it is issued to someone who does not hold a passport but is making use of one of South Africa's borders periodically. An example could be for teachers or children whose closest school is actually on the South African side of the border and so would need to cross the border daily to attend school. Another type of transit pass is one issued when someone is travelling through South Africa to get to another country.

In addition to the temporary residence types listed in the table above, there is also permanent residence. This is when a person applies to stay in South Africa permanently. A Permanent Residency Permit is only granted if the applicant meets certain requirements, such as length of stay and what other type of visa they had been in South Africa on previously. For example, a person could apply for permanent residence if they have been residing in South Africa for a minimum of five years, and have been on a spousal visa or a critical skills visa. Various

documentation and proof would need to be submitted, including police clearance certificates and all other documents relating to the basis for which one is applying for Permanent Residency. If granted, the holder is then able to enter and leave South Africa without the need for any other type of visa.

For refugees specifically, the road to obtaining Permanent Residency is very difficult and can take many years. One first has to be a recognised refugee for more than 10 years (previously it was 5 years under the old Act), then you have to obtain a letter from the Standing Committee certifying that you will remain a refugee indefinitely in terms of section 27(c) of the Refugees Act. Only then can you apply for Permanent Residence.

Special Dispensation Permits

There are three types of special dispensation permits that have been issued by the South African government. They are issued to groups, in terms of the Immigration Act. There is potential for the government to use the provisions in the Immigration Act to issue more such permits, which is also something that is mentioned in the DHA's White Paper on International Migration and in the National Development Plan. This would be particularly useful to regularise the stay of many low-skilled migrants in South Africa from the Southern African region. The three types of special dispensation permits currently in existence are the Angolan Special Permit which will be the Angolan Exemption Permit, the Lesotho Exemption Permit, and the Zimbabwe Exemption Permit. All of these are due to expire on 31 December 2021. However, by 4 October 2021, the government had only announced a new permit for Angolans, not for the other two groups. The three types are described more below.

Angolan Cessation Permit/ Angolan Special Permit/Angolan Exemption Permit

The Angolan Special Permit was issued to former refugees originally from Angola. It is a closed group of about 2 000 people. They had been recognised refugees in SA for many years, and then when the cessation of Angolan refugee status took place they were simply told to return to Angola. This small number did not want to as understandably as they had built a life in South Africa over decades. After some litigation the Angolan Cessation Permit was created, which has then become the Angolan Special Permit. The permit itself states clearly that the holder is entitled to all the same rights as a permanent resident. However, unlike a permanent resident, there is an expiry date for the permit. In August 2021, the DHA announced that former refugees from Angola could apply for an Angolan

Exemption Permit, which is likely to be like permanent residence.²⁰ Those who can apply include those who did not initially receive either of the previous two permits but who have been in South Africa and can show their previous refugee or asylum documents from before the cessation.

Lesotho Exemption Permit

The Lesotho Exemption Permit was created in recognition of the regular movement of people from Lesotho to SA and the need to regularise people's time in SA through a visa option. It is different from the Angolan one, as the group does not relate to persons who had fled their country to seek protection. It is more similar to the Zimbabwean permit, described below. The permit stipulates that it is short-term, and the holder does not acquire the right to make an application for permanent residence after the permit expires.

Zimbabwean Exemption Permit

The Zimbabwe Exemption Permit (**ZEP**) has been through many iterations, such as the ZSP – Zimbabwean Special Permit – in 2014. In April 2009, the South African Cabinet approved the “Dispensation of Zimbabweans Project (**DZP**)”. This was after a significant number of Zimbabweans came to South Africa from 2008/9 onwards as a result of the crisis in Zimbabwe and also the impacts of the global financial crisis. Many made use of asylum applications to regularise their stay in and get documents allowing them to work in South Africa. However, it is likely that many of those applications may not have fallen under the grounds for refugee status in section 3 of the Refugees Act. The long processing times in the asylum system meant that this was one way to regularise your immigration status in South Africa. This should not detract from the fact that many may also have had legitimate asylum claims. According to the DHA, approximately 295 000 Zimbabweans applied for the initial DZP, and 245 000 were successfully issued with the permit. It was a special permit that gave all the rights of permanent residence except for the right to apply for permanent residence as a result of that visa. Usually, if someone is on the same type of immigration visa for a set period, they can apply for PR, but certain visas are excluded – study visas, and special dispensation permits. When those initial permits began to expire, around 2014, a new special dispensation permit was created, the Zimbabwean Special Permit

²⁰ For more information, see: <http://www.dha.gov.za/index.php/statements-speeches/1467-the-department-of-home-affairs-invites-qualifying-holders-of-angolan-special-dispensation-permits-to-apply-for-the-angolan-exemption-permit>

(**ZSP**), valid for three years. In 2017, the [Minister stated](#) that the total number of ZSPs issued was 197 941.

In September 2017, when the ZSP was due to expire by 31 Dec 2017, the Minister announced the Zimbabwean Exemption Permit (**ZEP**) – this was the new special dispensation permit and if an individual had held a ZSP then they were entitled to apply for the ZEP. Some people did not and so the number provided in September 2017 is likely to have reduced in respect of ZEP holders. The ZEP expires on 31 December 2021, and it also states that the holder is expressly not permitted to apply for permanent residence in South Africa. These permits all allowed the holders to work, study, and conduct business in South Africa. At the time of writing, a court case had been launched to try asking the court to declare that ZEP holders should be entitled to permanent residence. No further information had been announced by the South African government concerning the renewal of the ZEPs, which expire on 31 December 2021.

International Laws, Instruments, Policies & Mechanisms

The table below provides more information about the international laws that relate to human rights and migration, which South Africa is a signatory to, and so which apply in South Africa. The first column gives the name of the law, instrument, policy, or special mechanism; and the second column provides a brief introductory explanation of it together with how it may relate to immigration in South Africa. This is a list that is designed to be a living document, which can be added to over time as more become available and applicable. South Africa's Constitution states that international law is applicable in South Africa when interpreting other legislation. However, as a general rule, international instruments must be domesticated through an Act of parliament for them to be comprehensively applicable and not just used in courts when there is an issue with interpreting legislation. For example, the UN Refugee Convention as well as the OAU Refugee Convention, are domesticated in South Africa through the Refugees Act.

Table of useful international laws and mechanisms in the context of human rights and international migration	
Universal Declaration of	The UDHR was proclaimed by the UN in 1948 and is the document that sets out the common standards of human rights for all peoples and all nations. It was the first document to set out fundamental human rights to

Table of useful international laws and mechanisms in the context of human rights and international migration	
Human Rights (UDHR) ²¹	be universally protected and is seen as the inspiration for many other human rights treaties. Importantly, it enshrines the right to freedom, equality, and dignity; as well as life, liberty, and security of person.
1951 UN Refugee Convention and 1967 Protocol ²²	The UN Refugee Convention and 1967 Protocol are the key international legal documents forming the basis of refugee law worldwide. These documents define the term ‘refugee’ and also outline what rights a refugee has as well as the legal obligations that a state has to protect refugees. The most important principle of these documents is the principle of non-refoulement, which means that a refugee may not be returned to a country where they could face harm. This is domesticated in South Africa’s Refugees Act in section 2.
International Covenant on Economic, Social and Cultural Rights (ICESCR) ²³	This is a multilateral treaty adopted by the UN in 1966 and signed by South Africa in 1994, but only ratified in 2015 after a targeted campaign by many civil society organizations in the country. The ratification of the document gives it a greater force in South Africa. The key rights in the ICESCR are economic, cultural, and social rights. Examples of these include the right to work; the right to an adequate standard of living including food, clothing, housing; and the right to physical and mental health; social security; a healthy environment, and education. ²⁴ The ICESCR sets out standards for all of these rights that countries that have ratified it are expected to meet. When ratifying the ICESCR South Africa put in a reservation in respect of the rights and

²¹ For more information see: <https://www.un.org/en/about-us/universal-declaration-of-human-right>

²² For more information see: <https://www.unhcr.org/1951-refugee-convention.html>

²³ For more information see: <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

²⁴ For more information see: <https://www.cesr.org/what-are-economic-social-and-cultural-rights>

Table of useful international laws and mechanisms in the context of human rights and international migration	
	<p>standards relating to education, which means that the standards set out cannot be directly applied. However, there is significant jurisprudence in respect of education in South Africa, which is likely to ensure that despite the reservation, the South African government must still meet certain norms and standards.</p> <p>Importantly, in respect of refugees, asylum seekers, and migrants, the ICESCR applies to all persons in a country regardless of documentation and immigration status. Furthermore, the right to work in the ICESCR will be important if the South African government tries to restrict the right to work for refugees and asylum seekers, as it will likely be in contravention of its obligations in terms of this international covenant.</p>
International Covenant on Civil and Political Rights (ICCPR)	<p>This international covenant came into force in 1976 and is a key international human rights treaty providing protections for civil and political rights. Examples of these rights include the right to life; human dignity; religious freedom and privacy; freedom from torture, ill-treatment, and arbitrary detention; gender equality; the right to a fair trial; and the right to family life and family unity. South Africa ratified this treaty in 1994. Many of the rights in the ICCPR are included in South Africa's Bill of Rights. Many are important for refugees and migrants such as the right to family unity as well as those relating to non-detention. These must be followed in South Africa in the applicable way as ensured by South Africa's laws.</p>
Convention Against Torture (CAT), and the Optional Protocol to the	<p>The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment is the international human rights treaty aimed at preventing torture around the world. South Africa signed it in 1993, and ratified it in 1998; the OPCAT was signed in 2006, but implementation only began in 2019 with the</p>

Table of useful international laws and mechanisms in the context of human rights and international migration	
Convention Against Torture (OPCAT) ²⁵	government and various other organizations and Chapter 9 institutions such as the South African Human Rights Commission (SAHRC) beginning to put in place a National Preventative Mechanism in respect of torture. One of the ways that the CAT applies to asylum seekers and refugees is that it also reiterates the principle of non-refoulement – that individuals cannot be returned to a country where they may be in danger of facing torture.
Convention on the Rights of the Child (CRC) ²⁶	The UN CRC is an international human rights treaty that specifically focuses on children and sets out their civil, political, economic, social, health, and cultural rights. This treaty defines a child as anyone below the age of 18. One of the key principles in the CRC is child participation – that is, that a child has the right and should be consulted in any matter that relates to them. This is particularly important in the area of asylum, refugee, and migration, as many children do cross borders either accompanied by their parents or family members or alone. For those that are unaccompanied or separated, there are procedures in place to assist them to return to their home country or to trace family and assist with reunification. However, where this is done, the child should be consulted to understand their needs and aspirations.
The UN Handbook (Handbook on Procedures and Criteria for	This handbook is the key text and guidelines used when determining whether an asylum seekers refugee claim falls within the criteria provided in the UN Refugee Convention. It also provides information on the rights

²⁵ For more information see:

<https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>

²⁶ For more information see:

<https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

Table of useful international laws and mechanisms in the context of human rights and international migration	
Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees) ²⁷	and responsibilities of refugees and asylum seekers. The Handbook was first published in 1979, re-issued in 1992, and again in 2019. It is often quoted by Refugee Status Determination Officers in their decisions in respect of asylum claims in South Africa.
Decisions from various International Human Rights Mechanisms and Reporting Bodies and Communications from Special Rapporteurs ²⁸	To encourage the enforcement of international law, various international human rights bodies, mechanisms, and reporting procedures have been developed. This allows civil society in a specific country to communicate directly with a part of the United Nations and to provide information about a specific issue. For example, the UN Committee on the Rights of the Child can receive communications and reports regarding the implementation, or violation, of the UN CRC. Similarly, there are periodic country reports that are submitted for many of the international treaties, and civil society organizations often use these reports to highlight areas where there are issues or barriers. For some of the treaties, some Special Rapporteurs are appointed, and who can go to a country to investigate or monitor the issue that they have a mandate for, they would then be expected to provide a report to the relevant part of the UN on that country visit.

²⁷ For more information see:

<https://www.unhcr.org/publications/legal/5ddfc47/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

²⁸ For more on the UN Human Rights Bodies, see:

<https://www.ohchr.org/En/HRBodies/Pages/HumanRightsBodies.aspx>

Regional and Sub-Regional Laws, Instruments, Policies & Forums

The table below, as with the table in the section above, provides an introductory list of regional and sub-regional laws, instruments, and policies that apply to South Africa and link or may link to immigration in South Africa. The first column provides the name of the regional law or instrument, and the right-hand column provides an introductory explanation. This is a list that is designed to be a living document, which can be added to over time as more become available and applicable.

Table of useful African regional laws, conventions, and mechanisms in the context of human rights and international migration	
African Charter on Human and Peoples' Rights (ACHPR) ²⁹	The ACHPR is an international human rights instrument intended to protect and promote human rights in Africa. It was adopted by the Organization for African Unity (OAU) which later became the African Union (AU). It is the key document in respect of the African Human Rights System, and provides not only for basic human rights applicable to all African states, but also a mechanism tasked with oversight of adherence to the Charter. That is the African Commission on Human and Peoples' Rights. Later on, the African Court on Human and Peoples' Rights was also developed and set up.
1969 OAU Convention Governing the Specific Aspects of the Refugee Problems in Africa ³⁰	The OAU Refugees Convention was drafted after the UN Convention. The UN Convention was drafted shortly after World War 2, and in many respects, the definition and approach to refugees was a result of the context just after WWII. As a result, it did not speak to issues that were arising on the African continent, particularly in the context of independence struggles and the end of colonialism in many countries across the continent. The OAU Refugees Convention provides for that context, and also extended the definition of a refugee from that of someone fleeing personal persecution, to also include someone fleeing war or grave disturbances to the public order in either whole or part of their country of origin. This is known as the

²⁹ For more information, see: <https://www.achpr.org/legalinstruments/detail?id=49>

³⁰ For more information, see: <https://au.int/en/treaties/oau-convention-governing-specific-aspects-refugee-problems-africa>

Table of useful African regional laws, conventions, and mechanisms in the context of human rights and international migration	
	extended definition and is domesticated in South Africa through section 3(b) of our Refugees Act.
African Charter on the Rights and Welfare of the Child (ACRWC) ³¹	The ACRWC was adopted by the OAU in 1990 and entered into force in 1999. Similar to the UN CRC, the ACRWC sets out the rights and defines universal principles and norms for the status of children. It provides for greater contextualization of children's rights in Africa. In addition, the ACRWC provides for the creation of the African Committee of Experts on the Rights and Welfare of the Child, which is tasked with promoting and protecting the rights established by the Charter. This Committee can also hear complaints and receive communications about specific issues within a specific state.
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ³²	This Protocol is also known as the Maputo Protocol and guarantees comprehensive rights to women, including the right to participate in political processes, and rights to social and political equality. One important aspect of this Protocol is the right to bodily autonomy, and specifically to reproductive health decisions and an end to female genital mutilation (FGM). For some refugee women, FGM is a reason for them fleeing their country of origin, and in this regard, adherence to the Maputo Protocol is important when assessing the refugee claim.
Communications and Decisions from both the African Commission on Human and Peoples' Rights as well as the African Court on Human and Peoples' Rights, and from the	Like the international human rights mechanisms, the African Human Rights System also has various similar mechanisms to encourage the enforcement of various African human rights treaties and decisions by the African Commission on Human and Peoples Rights as well as the African Court on Human and Peoples Rights. Civil society organizations can make reports to these mechanisms. The key one in respect of migrants, asylum seekers, and refugees is the African Union Special Rapporteur on

³¹ For more information, see: <https://au.int/en/treaties/african-charter-rights-and-welfare-child>

³² For more information, see: <https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-rights-women-africa>

Table of useful African regional laws, conventions, and mechanisms in the context of human rights and international migration	
Regional Human Rights Mechanisms and Special Rapporteurs.	Refugees, Asylum Seekers, Migrants, and Internally Displaced Persons. ³³ Another important human rights body in the African context is the African Committee of Experts on the Rights and Welfare of the Child, which has been described above in the section on the African Charter on the Rights and Welfare of the Child.
Pan African Parliament ³⁴	The Pan African Parliament is a legislative body set up by the African Union. It sits in South Africa and exercises oversight as well as having advisory and consultative powers. It is tasked with implementing the policies and objectives of the AU. Importantly, there is a yearly Pan African Parliament CSO Forum, which is a space where civil society organizations can come together to speak about issues and topics that they wish the Pan African Parliament to take notice of, in 2019 the key focus was on refugees and migrants.
African Peer Review Mechanism (APRM) ³⁵	The APRM is a space where member states of the AU engage in self-monitoring on amongst others, human rights issues. Four thematic areas are looked at: democracy and political governance; economic governance and management; corporate governance; and broad-based sustainable socio-economic development. Civil society organizations can monitor the self-assessments made by states at the APRM, by looking at the National Programmes of Action that come out of the APRM process.

³³ For more information, see: <https://www.achpr.org/specialmechanisms/detail?id=5>

³⁴ For more information, see: <https://au.int/en/pap>

³⁵ For more information, see: <https://www.aprm-au.org>

Table of useful African regional laws, conventions, and mechanisms in the context of human rights and international migration	
Migration Dialogue for Southern Africa (MiDSA) ³⁶	MiDSA was established in 2000 with the assistance of the International Organization for Migration and creates a framework for regular migration dialogue amongst SADC states. This is aimed at improving inter-state coordination, and migration governance, particularly on issues such as border governance and irregular migration, as well as migrant rights, migrant health, and migration and development. MiDSA is a high-level space, that can be used in respect of high-level advocacy on specific issues.

Domestic Laws & Policies

There are many laws and policies that apply to people on the move in South Africa. Together, they form a framework of laws some of which would apply altogether, and others that only apply in specific instances. The three most important ones that apply are the South African Constitution (and Bill of Rights), the Immigration Act, and the Refugees Act. These three are described briefly in the paragraphs below. Then, in the table that follows, other legislation is provided that might apply in specific circumstances or because of a specific focus.

The Constitution

South Africa's Constitution is its supreme law and includes the Bill of Rights, which outlines all the rights that people in South Africa – whether a citizen or not – are promised. There is a small set of rights that are only for citizens, such as the right to vote, but most of the rights in the Bill of Rights, are for any person in South Africa. Legislation has to give effect to those rights, and so when wanting to access a right, it is essential to also look at the piece of legislation that may apply which gives effect to that right, such as the SA Schools Act, which provides for how the right to education is realised. Or the SA Social Assistance Act, which provides for the realisation of social assistance in section 27. More information about domestic legislation in South Africa that may apply in the context of

³⁶ For more information, see: <https://www.iom.int/node/103051>

international migration is provided in the paragraphs below as well as in the table below. In addition to this, the courts have often played a key role in interpreting legislation, and so some key rights-enabling judgments have also been summarized below.

The Immigration Act

The Immigration Act has been described in detail in the section on immigration above. This is the key piece of legislation used to govern the movement of people into and out of South Africa, as well as the key legislation governing the conditions under which someone who is not a South African citizen may be present in South Africa. The one aspect of the Immigration Act that was not dealt with in the section above was how the Act deals with detention and deportation for immigration-related purposes. For more information on immigration detention and deportation in South Africa, the Lawyers for Human Rights Practitioners Guide to Immigration Detention in South Africa.³⁷

The Refugees Act

The Refugees Act, as well as the situation for refugees and asylum seekers in South Africa, has been described in detail in the section on refugees and asylum seekers above. The Refugees Act is the key piece of domestic legislation governing how someone can claim asylum in South Africa, the grounds upon which they may be granted asylum, as well as the rights, duties, and entitlements of asylum seekers and refugees in South Africa.

Additional Domestic Legislation in South Africa

Additional domestic legislation that may be applicable in the context of international migration in South Africa, and which may sometimes apply to non-citizens in the country, is provided and summarised in the table below.

³⁷ Available at: <https://www.lhr.org.za/lhr-resources/a-practitioners-guide-to-immigration-detention-in-south-africa>

Table of South African domestic legislation that is applicable in certain circumstances in the context of international migration		
Name of legislation	Brief description	When it might apply
The Citizenship Act	This Act provides for who is considered a citizen of South Africa, as well as the gaining of citizenship and the loss of citizenship.	The key contexts in which this Act may apply for migrants and asylum seekers/refugees are in respect of stateless persons, as well as in respect of the children of refugees, migrants, or asylum seekers who were born in South Africa and have lived here until they reach 18. In those circumstances the Act allows them to apply for citizenship. Seeking legal advice in either of these circumstances is recommended.
The Birth and Deaths Registration Act	This Act provides for the registering of a birth or a death in South Africa.	<p>Migrants, asylum seekers, and refugees who either give birth to a child in South Africa or those who may die while here, would have to register the birth or the death with the Department of Home Affairs. For registration of a death, proof of identity of the deceased is needed, often in the form of a passport or asylum/refugee document.</p> <p>In respect of births being registered, at present, Home Affairs will only register a birth if the parents can show valid immigration documentation for South Africa – such as a visa, asylum seeker, or refugee document. A hand-written birth certificate is provided, without an ID number. In the case of migrants who have an immigration visa, it is important that they also register the birth with their consulate or embassy, and then obtain the relevant family member visa for the child to lawfully be in South</p>

Table of South African domestic legislation that is applicable in certain circumstances in the context of international migration		
Name of legislation	Brief description	When it might apply
		Africa. For refugees and asylum seekers, they must register the birth at the Refugee Office as well, and undergo the family joining process so that their child is issued with refugee or asylum documentation.
The Children's Act	This Act applies to all children in South Africa, regardless of country of origin.	For migrants, refugees and asylum seekers, the key context where the Children's Act applies is usually in respect of unaccompanied or separated children who may need to be placed in the care and protection system in the country through a Children's Court.
The Border Management Authority Act	This Act was recently passed, it applies to the border areas of South Africa, and establishes a single border authority.	The key context for this Act is that of South Africa's borders, where the Act envisages one agency to manage the borders. Prior to the enforcement of this Act, multiple agencies were managing different aspects at South Africa's borders, such as the Defence Force which was tasked with managing security, Trade and Industry tasked with managing customs, and Immigration tasked with managing the movement of people. This Act envisages one authority that will take on all duties and tasks at South Africa's borders. It also represents a step towards further securitization of migration in South Africa.

Table of South African domestic legislation that is applicable in certain circumstances in the context of international migration		
Name of legislation	Brief description	When it might apply
The Labour Relations Act The Unemployment Insurance Act The Basic Conditions of Employment Act	All of these Acts provide for labour rights in South Africa.	Labour rights and the right to fair labour practices apply to all persons working in the country, including migrants and asylum seekers/refugees. An employer must register employees who work over a certain number of hours a month, for unemployment benefits (UIF). These can be claimed if someone becomes unemployed or goes on maternity leave. There are often difficulties for asylum seekers and refugees in claiming these benefits, and so may need further assistance or a referral to an organization that can assist.
Promotion of Administrative Justice Act	This Act provides for the right to fair administrative procedures and decisions.	The key context in which this Act applies to migrants, refugees, and asylum seekers in South Africa is in respect of administrative decisions that impact them. Examples of these are administrative decisions regarding someone's refugee or immigration status. If an asylum seeker fails in their asylum claim, for example, they have the right to seek a judicial review if they believe that the process was not administratively fair. The judicial review is in terms of the Promotion of Administrative Justice Act.

Court cases

There is a fair amount of litigation that has taken place in South Africa to further the rights of refugees and migrants in the context of refugee protection and international migration. This section briefly looks at some of the significant ones, and what their impact has been. These can be grouped into the following categories: detention and deportation; access to the asylum system; citizenship; the right to work and study for asylum seekers; the right to go to school for undocumented learners; the right to social grants, and unemployment benefits; and birth registration.

Children

In terms of **access to education**, the *Phakamisa* judgment (2019) ensured that undocumented learners – whether South African citizens or not – must be allowed to register at a school and must have access to education. For migrants and asylum seekers, what this means in practice is that if a child does not have documentation showing their identity, the parents can depose to an affidavit confirming the child's identity and age and the school must accept the affidavit to register the child. The issue of **citizenship** has been litigated on for many years. In the *Miriam Ali* case, it was confirmed that if a child is born in South Africa to parents who are not SA citizens or permanent residents, and if that child grows up in the country until they reach 18 years, they can apply for citizenship and provided their birth was registered they should be granted it. The DHA is supposed to provide the appropriate application forms so that such a citizenship application can be made. At the time of writing (last few months of 2021) this had not yet taken place, despite the court deadline having passed years ago. Practically speaking, what this means is that if an individual thinks they may qualify to apply for citizenship, they should approach an organization such as Lawyers for Human Rights, UCT refugee rights unit, or Scalabrini Centre, for assistance. On the **right to birth registration**, litigation recently decided by the Constitutional Court in the *Naki* judgment (2021) provides for fathers to register the birth of a child if a mother is unable to do so. The way that this impacts migrants and asylum seekers is that the DHA refuses to register the birth of a child if the mother is undocumented (or has expired documentation). Thus, this judgment would be able to ensure that a father with documentation that is not expired, or who is a South African citizen, would be able to register the birth of the child where the mother is unable to do so because of her documentation. This is a very recent judgment and so it is unclear how the DHA is implementing it yet.

Social protection and social insurance

There are three notable pieces of litigation in respect of social protection and social insurance. In respect of social protection, this is social grants. Only South African citizens were entitled to apply for and **access social grants**. However, this changed because of the *Khosa* case, where the court ruled that permanent residents should have access to social grants. In adhering to this litigation and changing the laws to reflect the judgment it was made possible that recognised refugees would also have access to social grants. This means that if a permanent resident or recognised refugee meets the criteria prescribed by the Department of Social Development (**DSD**) and implemented by SASSA, then they are entitled to access one or more of the social grants provided by the SA government. These range from old age pension grants to child-care support grants and others.

During the COVID-19 pandemic, the DSD introduced a special emergency grant, called the COVID-19 Social Relief of Distress (**SRD**) grant. This was announced as a measure to support those who were most severely impacted by the lockdown and not being able to work. However, the government only made the grant available to people who could normally apply for grants in normal times. That is citizens, permanent residents, and recognised refugees. The Scalabrini Centre of Cape Town urgently litigated the matter and ensured that that particular grant, and in emergency circumstances, was available to asylum seekers and special permit holders as well. The court agreed with the Scalabrini Centre's arguments that limiting the eligibility for the grant was unconstitutional.

In respect of **social insurance**, this applies to **unemployment benefits**. These should be available to any person who has been employed in South Africa if they become unemployed (not through resignation). However, in practice, although asylum seekers were expected to pay UIF contributions they were unable to claim unemployment benefits. The barrier was that the Department of Labour refused to accept asylum seeker documents as valid proof of identification. In the *Musanga* matter, the court found this practice by the Department of Labour to be unconstitutional. The Department of Labour has since published regulations to ensure that asylum seeker documents are recognised proof of identity documents. In addition to this, there has been further litigation indicating that even where an employer has not registered someone for UIF benefits and so they have not paid UIF contributions, the employee should still be able to claim the benefits as it was not their fault their employer didn't register them (registration is required by law). This may have a positive outcome for persons without immigration documentation who are often denied labour protections. However,

in practice, it is less likely that such a person would come forward to claim as they risk being detected as being in the country without regularized immigration status.

Asylum seekers access to the asylum system, right to work and study, and deportation protections

While accessing a centre such as VFS in order to try and obtain a visa is managed in quite an orderly manner; the same is often not the case for refugee reception offices (**RRO**). As has been indicated, there is only a handful of RROs across the country. To access and enjoy the right to asylum, an asylum seeker must be able to access an RRO to apply for asylum. There are many examples, in various provinces, where this right has been restricted through unlawful practices by the Department of Home Affairs, such as limiting the number of people who could enter an RRO per day, or security officials turning people away, or simply issuing people with appointment slips rather than an asylum seeker document. All of these practices have been litigated and found to be unlawful. Thus, the courts have ensured that there are fewer barriers present in **accessing the asylum system** in South Africa. This also includes someone trying to access it by claiming asylum while in transit through South Africa at the airport.

Once one has been provided with asylum documentation, because South Africa has an urban integration model for asylum, the individual asylum seeker is expected to be self-sufficient. However, in practice, this means that the asylum seeker had to be granted the **right to work or study** while awaiting the adjudication of their claim. Previously, whereas refugees were granted these rights, asylum seekers were not. However, this was taken to court and in the *Wachenuka* case, the court stated that the right to work and be a productive member of society is intrinsically linked to one's dignity. Thus, in that case, the right to work and study while awaiting the adjudication of an asylum claim was ensured by the courts. Unfortunately, the Refugees Amendment Act, 2017, which came into effect on 1 January 2020, undermines this win by prescribing a complex process that an asylum seeker will have to follow to be granted permission to work while awaiting adjudication of their claim. Although to date this is not yet implemented, it will be a significant backtrack on the rights of asylum seekers in South Africa and undermines international refugee law.

Various litigation has taken place to ensure that South Africa's detention and deportation procedures are compliant with human rights standards, and also to ensure that the South African government does not undermine or contravene

the principle of non-refoulement by deporting an individual back to a country where they may face harm. Detention for the purposes of deportation should only happen if a person cannot provide valid identification documentation. If someone is detained they must be brought before a court within 48 hours and no detention can take place for longer than 30 days without being reviewed by a court which can then extend for a further 30 days, and then may be extended for thirty days at a time up to a maximum of 120 days. Children should not be detained unless as a matter of last resort. If an individual is detained because they do not have immigration status in South Africa, they may indicate that they wish to claim asylum. If they do so, then by law they must be released and allowed to pursue an asylum application.³⁸

Conclusion

The section above has given a very brief introduction to some of the international, regional, and national laws that apply in the context of international migration in South Africa. It has also summarized some of the key rights-enabling court judgments that are important for people on the move in South Africa. This is to help pastoral agents to be better equipped to assist people on the move in South Africa and to be able to speak to them about what their rights are, while also having a deeper understanding of the broader context. In the section below, some resource materials are listed, as well as resource organizations. These are helpful as places where people can be referred to if they are having difficulty in accessing either documentation or their rights, or if they are experiencing discrimination.

Resource Materials

In the sections in this chapter, footnotes have been provided that can be used to access a specific document such as a piece of legislation or a policy or handbook. However, there are additional handbooks and resources, as well as websites, and entities, that can be useful when assisting people on the move in South Africa. The table below provides a list of these, however, this list is not a complete list as many can be added, or can sometimes be specific depending upon the province or town that you are in. A useful list of public interest organizations across South Africa can be found at the Public Interest Legal Services (**PILS**) website:

³⁸ For more information on immigration detention, please see: <https://www.lhr.org.za/lhr-resources/a-practitioners-guide-to-immigration-detention-in-south-africa>

<https://www.pils.org.za>, other organizations (some of which are already on the PILS website) are also provided in the table below.

Name	Website	Focus area or issue
United Nations High Commissioner for Refugees	https://www.unhcr.org/south-africa.html	Refugees and asylum seekers.
South African Catholic Bishops Conference	https://sacbc.org.za	Pastoral care generally, and with a specific migrant and refugee office.
Catholic Parliamentary Liaison Office	https://www.cplo.org.za	High-level advocacy, with a focus on many issues including migration, refugees, and asylum seekers.
Lawyers for Human Rights	https://www.lhr.org.za	Pro bono legal services generally, with a refugee and migrants programme. UNHCR legal implementing partner.
Legal Resources Centre	https://lrc.org.za	Pro bono legal services and advice.
University of Cape Town Refugee Rights Unit	http://www.refugeerights.uct.ac.za	UNHCR legal implementing partner, providing pro bono legal services and advice to refugees and asylum seekers (Western Cape).
Nelson Mandela University Refugee Rights Centre	https://cla.mandela.ac.za/Refugee-Rights-Centre	UNHCR legal implementing partner, providing pro bono legal services and advice to refugees and asylum seekers (Eastern Cape).

Name	Website	Focus area or issue
Adonis Musati Project	https://www.adonismusatiproject.org	UNHCR social services implementing partner (Western Cape) providing counselling and social services to refugees and asylum seekers.
Refugee Social Services	https://refugeesocialservices.co.za	UNHCR social services implementing partner (KZN) provides counselling and social services to refugees and asylum seekers.
Jesuit Refugee Services	https://jrs.net/en/country/south-africa	Medical care, income generation support, and advocacy support for refugees and asylum seekers (JHB and Pretoria).
Scalabrini Centre of Cape Town	https://www.scalabrini.org.za	NGO based in Cape Town that provides welfare services, advocacy and paralegal support, English language training, and job/employment support to asylum seekers, refugees, and migrants.
Save the Children	https://www.savethechildren.org.za	International NGO focused on assisting migrant and asylum seeker/refugee children in South Africa.
Future Families	https://futurefamilies.co.za	UNHCR implementing partner offering social welfare services and support in Pretoria and Musina.
Messina Legal Advice Centre	https://www.facebook.com/MusinaLegal	Pro bono legal advice services in Musina.

Name	Website	Focus area or issue
Department of Home Affairs	http://www.dha.gov.za	The government department tasked with facilitating immigration as well as assisting refugees and asylum seekers in South Africa.
Department of Social Development	http://www.dsd.gov.za	The government department assisting with social welfare in South Africa, including social grants through SASSA.
UNICEF	https://www.unicef.org/southafrica	International UN Agency that assists with children's rights in South Africa.
Doctors without Borders/MSF	https://www.msf.org.za	With sites in Cape Town, Pretoria, and Musina, MSF assists migrants, asylum seekers, and refugees (and South Africans) with health access, and also does monitoring at Lindela.

The Way Forward

South Africa is moving towards a more securitized approach to international migration. What this means is that instead of migration being viewed as an opportunity, it is more likely to be viewed as a threat. This has an impact on those seeking to come to South Africa to be employed, as well as those needing to come to South Africa to seek refuge and protection. Crucial in our approach to international migration is the need to re-emphasise and re-centre the opportunities that migration can bring, not only to South Africa but to a whole region. This includes opportunities to stabilise a region through the assistance of international remittances that help people in their home countries. A further vital approach that needs to be emphasized is that South Africa commits in terms of international law, to offer protection to those who need it – people seeking refuge.

As the world changes and we see more impacts of the climate crisis as well as fewer resources, there will likely continue to be people needing to seek protection. The conversation must begin to shift back to protection and away from a securitized approach that sees immigration – and indeed immigrants – as a threat to the security and jobs of a nation and state. Ways that this can begin to be achieved are through knowledge sharing, education and awareness-raising, and practical assistance and service provision.

Providing knowledge of the systems in place. Giving people a type of ‘map’ of what laws and policies might impact them based on their individual position, but also providing them with information about what they can expect within a government (bureaucratic) system, such as the asylum and refugee system. Often, simply providing this map and information, goes a long way in reassuring an individual and helping them to access the system armed with knowledge and faith that they have allies.

Practical assistance can include referring individuals to organizations that do offer the service if it is an issue that you are not familiar with or less comfortable offering assistance in. Advocacy is also needed, both at ground level with individual service providers and through accompaniment where needed, but also at a higher level, through engagement with ward councillors, politicians, and other decision-makers within government departments, including regional bodies where appropriate. There is much that can be done to assist people on the move in South Africa, including children on the move, it starts with a conversation with the individual involved to understand their needs and what

information they may find useful. That conversation is the start of a journey, hopefully, a journey that is less precarious, and more friendly than the one that they undertook to reach South Africa, and certainly a journey with more allies and persons able to provide pastoral care and assistance.



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Sally Gandar is an attorney and the Head of Strategic Litigation and Advocacy at the University of Cape Town's Refugee Rights Unit. She was previously the Head of Advocacy & Legal Advisor at the Scalabrini Centre of Cape Town. The Scalabrini Centre is an NGO in Cape Town that assists the refugee and migrant community. In addition to this role, Sally is also the Chairperson of the Hate Crimes Working Group and sits on the South African Human Rights Commission's section 11 committee of experts on migration. Sally is passionate about advocacy, particularly in respect of migration, asylum seekers and refugees.



Southern African Catholic Bishops' Conference