Home Office
Border & Immigration Agency

OPERATIONAL GUIDANCE NOTE

SOUTH AFRICA

CONTENTS

1. Introduction

1.1 This document evaluates the general, political and human rights situation in South Africa and provides guidance on the nature and handling of the most common types of claims received from nationals/residents of that country, including whether claims are or are not likely to justify the granting of asylum, Humanitarian Protection or Discretionary Leave. Case owners must refer to the relevant Asylum Instructions for further details of the policy on these areas.

1.2 This guidance must also be read in conjunction with any COI Service South Africa Country of Origin Information at: http://www.homeoffice.gov.uk/rds/country_reports.html

1.3 Claims should be considered on an individual basis, but taking full account of the guidance contained in this document. In considering claims where the main applicant has dependent family members who are a part of his/her claim, account must be taken of the situation of all the dependent family members included in the claim in accordance with the Asylum Instruction on Article 8 ECHR. If, following consideration, a claim is to be refused, case owners should consider whether it can be certified as clearly unfounded under the case by case certification power in section 94(2) of the Nationality Immigration and Asylum Act 2002. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail.

1.4 With effect from 23 July 2003 South Africa is a country listed in section 94 of the Nationality, Immigration and Asylum Act 2002. Asylum and human rights claims must be considered on their individual merits. If, following consideration, a claim made on or after 23 July 2003 by someone who is entitled to reside in South Africa is refused, case owners must certify it as clearly unfounded unless satisfied that it is not. A claim will be clearly unfounded if it is so clearly without substance that it is bound to fail. Guidance on whether certain types of claim are likely to be clearly unfounded is set out below.

Source documents

1.5 A full list of source documents cited in footnotes is at the end of this note.

2. Country assessment

2.1 South Africa is a multiparty parliamentary democracy in which constitutional power is shared between the president and the parliament. The parliament consists of two houses, the National Assembly and the National Council of Provinces, which are responsible for drafting the laws of the republic. The National Assembly also has specific control over bills relating to monetary matters. The current 400-member National Assembly was retained under the 1997 constitution, although the constitution allows for a range of between 350 and 400 members. The National Assembly is elected by a system of 'list proportional representation.' Each of the parties appearing on the ballot submits a rank-ordered list of candidates. The voters then cast their ballots for a party. Seats in the Assembly are allocated based on the percentage of votes each party receives.[1]

2.2 The African National Congress (ANC) won South Africa's first non-racial general elections in April 1994. Nelson Mandela became president and a Government of National Unity was formed; Commonwealth membership was restored and international sanctions against South Africa lifted. South Africa also took up her seat in the United Nations after a 20-year absence. Nelson Mandela handed over leadership of the ANC to Thabo Mbeki in December 1997, who succeeded him as president following the general elections of 1999. On 14 April 2004, South Africa held her third general election since the end of apartheid. President Mbeki was re-elected as president for a second five-year term. The ANC won 70% of the vote on a 77% turnout. Its nearest rival was the Democratic Alliance (DA) with 12%, followed by the Inkatha Freedom Party (IFP) with 7%. As the result of a series of "floor-crossings" in parliament in late 2005, the ANC gained 14 seats, bringing its majority to 293 (out of 400). The ANC now controls outright eight out of nine provinces in South Africa (KwaZulu Natal is the exception).[2]

2.3 The Government generally respected the human rights of its citizens in 2006, but there were reports of problems in some areas. During 2006, there were examples of police use of excessive force against suspects and detainees, which resulted in deaths and injuries. There were also reports during the year of forcible dispersal of demonstrations, vigilante violence and mob justice; pervasive violence against women and children; and violence resulting from racism, xenophobia, and ethnic tensions.[3]

2.4 The law provides for an independent judiciary, but whilst the judiciary continues to be generally independent, in 2006, it reportedly remained understaffed, underfunded and overburdened. The Constitution provides for due process, including the right to a fair public trial within a reasonable time after being charged, the right to appeal to a higher court, and the right for detainees to obtain state-funded legal counsel when 'substantial injustice' would otherwise result. However, a general lack of information for accused persons regarding their rights to legal representation and the Government's inability to pay for these services remained problems in 2006. The Government operated 46 justice centres in the country in 2006, composed of the Departments of Justice, Correctional Services, Welfare and Health and the South African Police Service (SAPS), to speed the administration of justice, reduce the court rolls and alleviate overcrowding in prisons. However, lengthy delays continued to be a problem.[4]

2.5 The South African Police Service (SAPS) under the Department of Safety and Security, has primary responsibility for internal security. The South African National Defence Force (SANDF), under the Department of Defence, is responsible for external security,

[1] U.S. Department of State Background Note: South Africa (October 2007)
[2] Home Office Country of Origin Information (COI) Key Documents: South Africa & Foreign and Commonwealth Office (FCO) Country Profile 2007: South Africa
[3] COI Key Documents: South Africa & U.S. Department of State report on Human Rights Practices (USSD) 2006: South Africa (Introduction) & Amnesty International (AI) Report 2007: South Africa
[4] USSD 2006: South Africa (Introduction & Section 1)

but also has domestic security responsibilities. In 2006, SAPS continued its major restructuring and transformation from a primary public order security force to a more accountable, community service oriented police force. However, it remained ill-equipped, overworked, and poorly trained. As of November 2006, there were 125,521 police officers and 32,948 civilians working in SAPS. The majority of police resources and law enforcement attention remained focused on wealthy residential and business areas. Corruption, particularly of lower-ranked officers also continued to be a problem in 2006. Broad efforts to reform police practises continued in 2006 and the Independent Complaints Directorate (ICD) investigated reports of police misconduct and corruption whilst the Government also made efforts to address abuses with an official anti-torture policy and training programmes for police and SANDF officers that included a focus on human rights. During 2006, the ICD received 1,643 allegations of criminal offences committed by the police and 2,855 complaints of misconduct, representing a 5 percent decline in allegations of criminal offences and a 16 percent decline in complaints of misconduct compared to the previous year.[5]

3. Main categories of claims

3.1 This Section sets out the main types of asylum claim, human rights claim and Humanitarian Protection claim (whether explicit or implied) made by those entitled to reside in South Africa. It also contains any common claims that may raise issues covered by the Asylum Instructions on Discretionary Leave. Where appropriate it provides guidance on whether or not an individual making a claim is likely to face a real risk of persecution, unlawful killing or torture or inhuman or degrading treatment/ punishment. It also provides guidance on whether or not sufficiency of protection is available in cases where the threat comes from a non-state actor; and whether or not internal relocation is an option. The law and policies on persecution, Humanitarian Protection, sufficiency of protection and internal relocation are set out in the relevant Asylum Instructions, but how these affect particular categories of claim are set out in the instructions below.

3.2 Each claim should be assessed to determine whether there are reasonable grounds for believing that the applicant would, if returned, face persecution for a Convention reason - i.e. due to their race, religion, nationality, membership of a particular social group or political opinion. The approach set out in *Karanakaran* should be followed when deciding how much weight to be given to the material provided in support of the claim (see the Asylum Instructions on Assessing Credibility in Asylum and Human Rights Claims).

3.3 If the applicant does not qualify for asylum, consideration should be given as to whether a grant of Humanitarian Protection is appropriate. If the applicant qualifies for neither asylum nor Humanitarian Protection, consideration should be given as to whether he/she qualifies for Discretionary Leave, either on the basis of the particular categories detailed in Section 4 or on their individual circumstances.

3.4 This guidance is **not** designed to cover issues of credibility. Case owners will need to consider credibility issues based on all the information available to them. (For guidance on credibility see the Asylum Instructions on Assessing Credibility in Asylum and Human Rights Claims).

3.5 All Asylum Instructions can be accessed via the Horizon intranet site. The instructions are also published externally on the Home Office internet site at:

http://www.ind.homeoffice.gov.uk/ind/en/home/laws___policy/policy_instructions/apis.html

3.6 False nationality

[5] USSD 2006: South Africa (Introduction & Section 1)

3.6.1 Most applicants will claim to be sole Zimbabwean nationals who fled Zimbabwe and then South Africa because of the ill-treatment amounting to persecution they faced at the hands of the ZANU-PF/Zimbabwean Government on account of their membership of or affiliation with the opposition Movement for Democratic Change (MDC). Many of these applicants will claim that the South African passports and/or identity documents they used to travel to the United Kingdom were obtained illegally from South African Government officials or other sources in South Africa upon payment and passport photographs. Many of these applicants will also cite a fear of being deported from South Africa back to Zimbabwe or claim that they have previously been the subject of such a deportation.

3.6.2 ***Treatment.*** There are three main forms of South African citizenship, namely citizenship by birth, descent or naturalisation. In accordance with the South African Citizenship Act 1995, citizenship can be acquired by a person born outside of South Africa if the subject has at least one parent who is a South African citizen and the birth is registered in South Africa. Foreign nationals wishing to acquire South African citizenship may also apply for South African citizenship by naturalisation, provided the requirements of section 5 of the Act are met. It is also possible for an individual to hold dual citizenship and foreign nationals wishing to acquire South African citizenship are not required to relinquish their foreign citizenship.[6] Dual citizenship, however, is not recognised in Zimbabwe for anyone over the age of eighteen.[7]

3.6.3 There is no evidence that individuals who are South African citizens or who are entitled to reside in South Africa face a real risk of mistreatment by either state or non-state agents in South Africa on account of their activities in support of the MDC in Zimbabwe. Such applicants would therefore not face persecution or treatment amounting to a breach of the ECHR in South Africa. Nor is there evidence that South African citizens or people who are entitled to reside in South Africa would be deported to Zimbabwe because of alleged involvement in politics in Zimbabwe.

3.6.4 ***Sufficiency of protection.*** There is no evidence that this category of applicant has a well founded fear of persecution or treatment likely to engage the UK's obligations under Article 3 of ECHR and the question of state protection in South Africa is not therefore relevant.

3.6.5 ***Internal relocation.*** There is no evidence that this category of applicant has a well founded fear of persecution or treatment likely to engage the UK's obligations under Article 3 of ECHR in South Africa and the question of internal relocation in South Africa is not therefore relevant.

3.6.6 ***Conclusion.*** The key issue is whether the applicant is entitled to reside in South Africa. It may not be appropriate to rely upon documentation issued by the South African authorities where conflicting evidence of nationality is produced. Caution should therefore be applied in placing significant weight on South African passports or other identity documents, even those that have been genuinely issued, where the applicant asserts that they are not entitled to them.[8]

3.6.7 Applicants who possess a South African passport, but assert that they are not entitled to it and provide a credible explanation of how they obtained it, possess Zimbabwean identity documents that are not clearly unreliable, and have a detailed knowledge of Zimbabwe, should generally be treated as Zimbabwean unless there are compelling reasons, other than possession of a South African passport, to believe that the applicant

[6] South African Department of Home Affairs: South African Citizenship
[7] United States Office of Personnel Management Investigations Service 'Citizenship Laws of the World' in March 2001
[8] Home Office Border and Immigration Agency: Asylum Policy Instructions; APU notices; Guidance for South African disputed nationality cases

is entitled to reside in South Africa. The applicant's asylum/human rights claim should then be considered in accordance with the current Zimbabwe Operational Guidance Note (OGN).[9]

3.6.8 Where there is strong evidence, either material or material and oral, that an applicant is South African, and the applicant displays poor knowledge of Zimbabwe and/or no Zimbabwean identity documents (or Zimbabwean documents that are clearly unreliable), it will normally be appropriate to proceed on the basis that the applicant is South African unless this is proved otherwise. In such cases it will not be appropriate to grant asylum, Humanitarian Protection or Discretionary Leave on the basis of a fear of mistreatment in Zimbabwe. Asylum claims can be certified as clearly unfounded on the basis of an entitlement to reside in South Africa, and for further guidance on this subject case owners should first refer to the Border and Immigration Agency Asylum Policy Instruction regarding South African disputed nationality cases.

3.7 Prison conditions

3.7.1 Applicants may claim that they cannot return to South Africa due to the fact that there is a serious risk that they will be imprisoned on return and that prison conditions in South Africa are so poor as to amount to torture or inhuman treatment or punishment.

3.7.2 The guidance in this section is concerned solely with whether prison conditions are such that they breach Article 3 of ECHR and warrant a grant of Humanitarian Protection. If imprisonment would be for a Refugee Convention reason, or in cases where for a Convention reason a prison sentence is extended above the norm, the claim should be considered as a whole but it is not necessary for prison conditions to breach Article 3 in order to justify a grant of asylum.

3.7.3 ***Consideration.*** Conditions in prisons were reportedly poor during 2006 with reports of abuse, including beatings and rape, of prisoners and severe overcrowding of prisons. Most prisons reportedly did not meet international standards, and prison conditions did not always meet the country's minimum legal requirements. According to the Governmental Judicial Inspectorate of Prisons (JIP) South Africa had 240 prisons with a capacity of 114,500 prisoners in 2006, but there were 158,501 prisoners in custody. Still, the 2005-06 JIP annual report noted that, with 27,992 fewer prisoners during the reporting period and 697 additional places, conditions in the majority of prisons improved. Some prisons reportedly remained overcrowded and understaffed, which in some cases led to poor health, with as many as 74 inmates occupying a cell designed to hold 16 people.[10]

3.7.4 According to the JIP annual report, there were 1,554 prison deaths in 2005, 1,507 of which resulted from natural causes, including HIV/AIDS. In 2006, the Department of Correctional Services (DCS) estimated that nearly 6 percent of sentenced prisoners were HIV positive. This HIV infection rate was much lower than the rate in the general population and was therefore suspect. According to DCS reports, only 800 HIV-positive prisoners (of a total 6,400 such prisoners) were receiving treatment with anti-retroviral (ARV) therapy. In 2006, official corruption in prisons also remained a problem and there were credible reports that prison employees stole food and money from prisoners, and provided them with illegal drugs. Still, in many cases offending police or prison officers were suspended or expelled from their services for corruption. In October 2006, Correctional Services Minister Ngconde Balfour announced that a total of 109 officials, including seven senior managers, had been investigated for corruption. Of these, 31 had

[9] Home Office Border and Immigration Agency: Asylum Policy Instructions; APU notices; Guidance for South African disputed nationality cases
[10] USSD 2006: South Africa (Section 1)

been found guilty and fired, and in 26 cases the charges were dismissed; 52 investigations were still in progress.[11]

3.7.5 In 2006, human rights groups continued to raise concerns regarding C-MAX prisons, which were designed to hold South Africa's most dangerous criminals and there were also allegations of corruption, overcrowding and abuse of detainees at the Lindela Repatriation Center, the country's largest detention facility for undocumented immigrants. Although the Government operated 13 youth detention facilities in 2006, juveniles were sometimes held with adults and there were credible reports that these youths were vulnerable to sexual exploitation and gang related activities. The South African Government generally allowed independent monitoring of prison conditions in 2006, including visits by human rights groups. According to the JIP's annual report, independent prison visitors, including visits by prisoners' counsel as well as third-party visitors, recorded 10,524 visits to prisons in 2005 and conducted 611,900 interviews with prisoners. The Judicial Inspectorate also visited all prisons regularly.[12]

3.7.6 ***Conclusion.*** Whilst prison conditions in South Africa are poor, conditions are unlikely to reach the Article 3 threshold. Therefore, even where applicants can demonstrate a real risk of imprisonment on return to South Africa a grant of Humanitarian Protection will not generally be appropriate. However, the individual factors of each case should be considered to determine whether detention will cause a particular individual in his or her particular circumstances to suffer treatment contrary to Article 3, relevant factors being the likely length of detention, the likely type of detention facility, and the individual's age and state of health. Where in an individual case treatment does reach the Article 3 threshold a grant of Humanitarian Protection will be appropriate.

4. Discretionary Leave

4.1 Where an application for asylum and Humanitarian Protection falls to be refused there may be compelling reasons for granting Discretionary Leave (DL) to the individual concerned. (See AI on Discretionary Leave) Where the claim includes dependent family members consideration must also be given to the particular situation of those dependants in accordance with the Asylum Instructions on Article 8 ECHR.

4.2 With particular reference to South Africa the types of claim which may raise the issue of whether or not it will be appropriate to grant DL are likely to fall within the following categories. Each case must be considered on its individual merits and membership of one of these groups should *not* imply an automatic grant of DL. There may be other specific circumstances related to the applicant, or dependent family members who are part of the claim, not covered by the categories below which warrant a grant of DL - see the Asylum Instructions on Discretionary Leave and on Article 8 ECHR.

4.3 Minors claiming in their own right

4.3.1 Minors claiming in their own right who have not been granted asylum or HP can only be returned where they have family to return to or there are adequate reception, care and support arrangements. At the moment we do not have sufficient information to be satisfied that there are adequate reception, care and support arrangements in place for minors with no family in South Africa.

4.3.2 Minors claiming in their own right without a family to return to, or where there are no adequate reception, care and support arrangements, should if they do not qualify for leave on any more favourable grounds be granted Discretionary Leave for a period as set out in the relevant Asylum Instructions.

[11] USSD 2006: South Africa (Section 1)
[12] USSD 2006: South Africa (Section 1)

4.4 Medical treatment

4.4.1 Applicants may claim they cannot return to South Africa due to a lack of specific medical treatment. See the IDI on Medical Treatment which sets out in detail the requirements for Article 3 and/or 8 to be engaged.

4.4.2 South Africa's health system consists of a large public sector and a smaller, but fast growing private sector. According to the World Health Organisation (WHO), public and private health expenditure in 2004 was 8.6 percent of gross domestic product. Hospital treatment in large cities is good but can be expensive in the private sector, whilst medical facilities in rural areas can be basic. In 2004, there were 34,829 physicians in South Africa and 4.08 nurses per 1,000 population.[13]

4.4.3 A mental health policy was formulated in 1997 based on advocacy, promotion, prevention, treatment, and rehabilitation. Mental health is part of the primary health care system and actual treatment of severe mental disorders is available at the primary level either from a psychiatric nurse or a primary health care worker. There are 4.5 psychiatric beds, and 7.5 psychiatric nurses per 10,000 population. Therapeutic drugs are generally available at the primary health care level of the country.[14]

4.4.4 There are 5.5 million people estimated to be HIV positive in South Africa and the HIV prevalence rate for adults aged between 15 and 49 is 18.8 percent. In 2005, South Africa reportedly recorded 320,000 HIV/AIDS related deaths. Efforts to stem the tide of new infections have only had limited success, as behaviour change and social change are long-term processes, and the factors that predispose people to infection, such as poverty, illiteracy, and gender inequalities, cannot be addressed in the short term.[15]

4.4.5 The South African Government's response to the HIV/AIDS epidemic is based on prevention; treatment, care and support; research, monitoring and evaluation; and human and legal rights. In November 2003, after pressure from advocacy groups, the Government adopted the Operational Plan for Comprehensive HIV and AIDS Treatment and Care, which included the provision of antiretroviral (ARV) therapy in the public health sector. The Treasury increased the budget allocation for the ARV programme, but roll-out of the plan has been a slow process and by early 2005 it was reported that only approximately 30,000 patients were receiving ARV therapy through the state programme. By June 2006, however, it was reported that more than 175,000 people were receiving free medication in all 53 districts of the country. The Government also coordinated closely with the Treatment Action Campaign (TAC) to introduce a new five-year plan in December 2006 to halve infection rates and extend ARV treatment to 80 percent of the infected population.[16]

4.4.6 Where a case owner considers that the circumstances of the individual applicant and the situation in the country reach the threshold detailed in the IDI on Medical Treatment making removal contrary to Article 3 or 8 a grant of discretionary leave to remain will be appropriate. Such cases should always be referred to a Senior Caseworker for consideration prior to a grant of Discretionary Leave. The Article 3 threshold will not be reached in the great majority of medical cases and a grant of Discretionary Leave will usually not be appropriate.

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[13] FCO Travel Advice By Country: South Africa & World Health Organization (WHO): South Africa
[14] WHO Mental Health Atlas 2005: South Africa
[15] AIDS Foundation South Africa, UNAIDS: South Africa & IRIN: South Africa 'The World's biggest ARV programme?' dated 14 September 2006
[16] AIDS Foundation South Africa, IRIN: South Africa 'The World's biggest ARV programme?' dated 14 September 2006, IRIN PlusNews – Country Profile: South Africa & Freedom House - Freedom in the World 2007: South Africa

5. Returns

5.1 Factors that affect the practicality of return such as the difficulty or otherwise of obtaining a travel document should not be taken into account when considering the merits of an asylum or human rights claim. Where the claim includes dependent family members their situation on return should, however, be considered in line with the Immigration Rules, in particular paragraph 395C requires the consideration of all relevant factors known to the Secretary of State, and with regard to family members refers also to the factors listed in paragraphs 365-368 of the Immigration Rules.

5.2 South African nationals may return voluntarily to any region of South Africa at any time by way of the Voluntary Assisted Return and Reintegration Programme (VARRP) implemented on behalf of the Border and Immigration Agency by the International Organization for Migration (IOM) and co-funded by the European Refugee Fund. IOM will provide advice and help with obtaining travel documents and booking flights, as well as organising reintegration assistance in South Africa. The programme was established in 1999, and is open to those awaiting an asylum decision or the outcome of an appeal, as well as failed asylum seekers. South African nationals wishing to avail themselves of this opportunity for assisted return to South Africa should be put in contact with the IOM offices in London on 0800 783 2332 or www.iomlondon.org.

6. List of source documents

- Home Office Country of Origin Information (COI) Key Documents: South Africa dated 5 April 2007. http://www.homeoffice.gov.uk/rds/country_reports.html
- IRIN PlusNews – Country Profile: South Africa (27 November 2007). http://www.plusnews.org/profiletreatment.aspx?Country=ZA&Region=SAF
- Foreign and Commonwealth Office (FCO) Country Profile: South Africa (Last reviewed on 21 May 2007). http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029394365&a=KCountryProfile&aid=1019745081555
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  http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions

- Amnesty International Report 2007: South Africa.
  http://thereport.amnesty.org/eng/Regions/Africa/South-Africa

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