

OPERATIONAL GUIDANCE NOTE

SOUTH AFRICA

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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
- 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 Instructions on Article 8 of the European Convention on Human Rights (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 In September 2008, Thabo Mbeki resigned as president over allegations he interfered in a corruption case against his former deputy, ANC party leader Jacob Zuma. ANC deputy leader Kgalema Motlanthe was chosen by parliament to lead the country until the elections due in April 2009.³
- 2.3 The Government generally respected the human rights of its citizens in 2007. However, the Government, non-governmental organisations (NGOs), and local media reported police use of excessive force against suspects and detainees, which resulted in deaths and injuries; vigilante violence and mob justice; forcible dispersal of demonstrations; pervasive violence against women and children; trafficking in persons; and violence resulting from racial and ethnic tensions and conflicts with foreigners.⁴
- 2.4 The law provides for an independent judiciary, but whilst the judiciary continues to be generally independent, in 2007, it reportedly remained understaffed and underfunded. The bill of rights 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 2007. The Government operated 46 justice centres in the country in 2007, 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

¹ U.S. Department of State Background Note: South Africa (September 2008)

² Foreign and Commonwealth Office (FCO) Country Profile 2008

³ British Broadcasting Corporation (BBC) News Country Profile: South Africa & BBC News Timeline: South Africa

⁴ Home Office Country of Origin Information (COI) Service Country of Origin Information Key Documents May 2008: South Africa, U.S. Department of State report on Human Rights Practices (USSD) 2007: South Africa (Introduction) & Amnesty International (AI) Report 2008: South Africa

problem.5

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, but also has domestic security responsibilities. In 2007, the 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. Although the SAPS has made efforts to improve its coverage in poorer areas, in 2007 the majority of police resources and law enforcement attention reportedly remained focused on wealthy residential and business areas. To address problems of crime and misconduct, the SAPS has provided its officers with comprehensive training in corruption prevention, human rights, and ethics, and with access to social workers, psychologists, and chaplains to enhance social, spiritual, and psychological well-being. The Independent Complaints Directorate (ICD) investigates reports of police misconduct and crime. In 2007, the ICD received 1,787 allegations of criminal offences committed by police and 2,760 complaints of misconduct, representing an 8% increase in allegations of criminal offences and a 3% decline in complaints of misconduct compared to the previous year. During the 2006-07 reporting period at least 12 officers were found guilty of murder and sentenced to imprisonment.6

3. <u>Main categories of claims</u>

- 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 guidance 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 Instruction on Considering the Asylum Claim).
- 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 the 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 'Considering the Asylum Claim' and '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.ukba.homeoffice.gov.uk/documents/asylumpolicyinstructions/

⁵ USSD 2007: South Africa (Section 1)

⁶ USSD 2007: South Africa (Section 1)

3.6 False nationality

- 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.* Zimbabweans are reported to be the largest African immigrant group in South Africa. In 2007, the United Nations High Commissioner for Refugees and the Department of Home Affairs reported an increase in Zimbabwean asylum applications and press reports during the year asserted that as many as 49,000 illegal immigrants entered the country from Zimbabwe every month. There continued to be reports of violent attacks on foreigners during 2007, especially immigrants from neighbouring countries. Foreigners were reportedly attacked by anti-immigrant groups who blamed immigrants for job losses and increasing levels of crime. Zimbabweans complained that they were targeted by criminals and harassed by police in major cities.⁷
- 3.6.3 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. Bual citizenship, however, is not recognised in Zimbabwe for anyone over the age of eighteen.
- 3.6.4 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.
- **3.6.5 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 the ECHR and the question of state protection in South Africa is not therefore relevant.
- **3.6.6** *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 the ECHR in South Africa and the question of internal relocation in South Africa is not therefore relevant.
- **3.6.7** *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

⁷ USSD 2007: South Africa (Sections 1, 2 & 5)

⁸ South African Department of Home Affairs: South African Citizenship

⁹ United States Office of Personnel Management Investigations Service 'Citizenship Laws of the World' in March 2001

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.

- 3.6.8 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 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.
- 3.6.9 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. Applicants in this category should not be certified as clearly unfounded.

3.7 Women victims of domestic violence

- **3.7.1** Some female applicants may apply for asylum or make a human rights claim based on the grounds that they are the victims of domestic violence and are unable to seek protection from the authorities.
- 3.7.2 Treatment. Domestic violence is reportedly widespread in South Africa and includes physical, sexual, emotional, and verbal abuse, as well as harassment and stalking by former partners. Police officials reported to parliament that between July 2006 and June 2007, police recorded 88,784 incidents of 'domestic violence' in terms of the 1988 Domestic Violence Act. However, Rape and other forms of gender-based violence continue to be under-reported. According to NGOs, an estimated 25% of women are in abusive relationships, but few report it.¹⁰
- 3.7.3 Sufficiency of protection. The 1988 Domestic Violence Act defines victims of domestic violence (including persons who are not in legal or common-law marriages), facilitates the serving of protection orders on abusers, requires the police to take victims to a place of safety, and allows police to seize firearms at the scene and to arrest abusers without a warrant. Violating a protection order is punishable by a prison sentence of up to five years, or twenty years if additional criminal charges are brought. The Department of Justice reported that over 63,000 protection orders were issued by the courts between April 2006 and March 2007.¹¹
- 3.7.4 In 2007, the Government financed 39 shelters for abused women and continued to conduct domestic violence awareness campaigns. However, women experiencing violence have reported inadequate responses from some police officials. While some police facilitate women's access to protection orders, others reportedly refer complaints back to families, fail to seize dangerous weapons, or refuse to take any steps unless the complainant lays criminal charges first.¹²
- **3.7.5** *Internal relocation.* The law provides for freedom of movement within the country and the Government generally respects this right in practice.¹³ It is therefore practicable for applicants to relocate to other parts of South Africa to escape domestic violence and except

¹⁰ USSD 2007: South Africa (Section 5) & Amnesty International (AI) Report 2008: South Africa

¹¹ USSD 2007: South Africa (Section 5) & Al Report 2008: South Africa

¹² USSD 2007: South Africa (Section 5) & Al Report 2008: South Africa

¹³ USSD 2007: South Africa (Section 2)

where the circumstances of an individual applicant indicate otherwise, it would not be unduly harsh to expect them to do so.

3.7.6 Conclusion. Domestic violence is widespread in South Africa but there is in general sufficient protection and internal relocation is also an option where in the particular circumstances of the applicant's case it is not considered unduly harsh for them to relocate. The grant of asylum or Humanitarian Protection is unlikely therefore to be appropriate and unless there are specific reasons why sufficient protection would not be available to the individual applicant and why it would be unduly harsh to expect them to relocate internally, such claims may be certified as clearly unfounded.

3.8 Prison Conditions

- **3.8.1** 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.
- 3.8.2 The guidance in this section is concerned solely with whether prison conditions are such that they breach Article 3 of the 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.
- **3.8.3** *Consideration.* According to the U.S. Department of State, most prisons did not meet international standards in 2007, and prison conditions did not always meet the country's minimum legal requirements. Overcrowding remained a problem during 2007. According to the governmental Judicial Inspectorate of Prisons (JIP) there were 161,674 prisoners in custody in facilities designed to hold 115,327 inmates.¹⁴
- 3.8.4 The JIP reported that there were 1,315 prison deaths in 2006, 1,249 of them from natural causes, including HIV/AIDS. The remaining deaths were the result of suicides, assaults, or accidents. Anti-retroviral (ARV) therapy was reportedly provided in prisons during 2007, but the percentage of HIV-positive prisoners receiving this treatment was unknown.¹⁵
- 3.8.5 Prison employees and other prisoners allegedly abused and assaulted prisoners physically and sexually during 2007. Official corruption was reportedly also a problem. In many cases police or correctional officers were suspended or expelled from their services for, among other offences, stealing food and money from prisoners, colluding with prisoners in escape attempts, and providing drugs to inmates. In October 2007, the Department of Correctional Services (DCS) reported that a total of 93 officials, including senior managers, had been investigated for corruption during the 12-month period ending in March 2007. Of these, 43 had been found guilty and fired, 22 received warnings, and 13 cases were dismissed; investigations of the remaining officials were still in progress. ¹⁶
- 3.8.6 In 2007, the Government reportedly permitted independent monitoring of prison conditions, including visits by human rights organizations. According to the JIP's annual report, independent prison visitors collectively spent a total of 99,633 hours visiting all 237 prisons, and interviewed tens of thousands of prisoners. Their observations, including prisoner complaints, were reported monthly to the JIP. The judicial inspectorate also visited all prisons regularly.¹⁷
- **3.8.7** *Conclusion.* Whilst prison conditions in South Africa are poor, they are unlikely to reach the minimum level of severity required to reach the Article 3 threshold. Therefore, even

¹⁴ USSD 2007: South Africa (Section 1)

¹⁵ USSD 2007: South Africa (Section 1)

¹⁶ USSD 2007: South Africa (Section 1)

¹⁷ USSD 2007: South Africa (Section 1)

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. <u>Discretionary Leave</u>

- 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 Asylum Instructions 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 of the 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 the Asylum Instructions on Article 8 of the 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 favorable grounds be granted Discretionary Leave for a period as set out in the relevant Asylum Instructions.

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. Health care varies from the most basic primary health care, offered free by the state, to highly specialised hi-tech health services available in the private sector for those who can afford it. The public sector is under-resourced and over-used, while the private sector, run largely on commercial lines, caters to middle- and high-income earners who tend to be members of medical schemes. The private sector also attracts most of the country's health professionals.¹⁸
- **4.4.3** There are an estimated 5.3 million HIV infected individuals in South Africa. 19% of the 15-49 year old population is infected, and in parts of the country more than 35% of women of childbearing age are infected. Overall, 11-12% of the population is infected. About 1,700 new infections occur each day, and approximately 40% of deaths are believed to be AIDS-related. A 2003 national operational plan provides the structure for a comprehensive

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¹⁸ South Africa & SouthAfrica.info: Health care

response to HIV and AIDS, including a national rollout of ARV therapy. 19

- **4.4.4** 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 per 10,000 population and 7.5 psychiatric nurses per 100,000 population. Therapeutic drugs are generally available at the primary health care level of the country.²⁰
- **4.4.5** Where a case owner considers that the circumstances of the individual applicant and the situation in South Africa 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.

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 UK Border 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. Those wishing to avail themselves of this opportunity for assisted return 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) Service Country of Origin Information Key Documents: South Africa (dated 6 May 2008).
 http://www.homeoffice.gov.uk/rds/country_reports.html
- Foreign and Commonwealth Country Profile 2008: South Africa (last reviewed on 6 May 2008). http://www.fco.gov.uk/en/about-the-fco/country-profiles/sub-saharan-africa/south-africa?profile=all
- Amnesty International Report 2008: South Africa. http://thereport.amnesty.org/eng/regions/africa/south-africa
- British Broadcasting Corporation (BBC) News Country Profile: South Africa (last updated 18 October 2008). http://news.bbc.co.uk/1/hi/world/africa/country-profiles/1071886.stm
- BBC News Timeline: South Africa (last updated 2 October 2008). http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1069402.stm
- U.S. Department of State report on Human Rights Practices 2007: South Africa (released on 11 March 2008). http://www.state.gov/g/drl/rls/hrrpt/2007/100505.htm

World Health Organization Mental Health Atlas 2005: South Africa

¹⁹ COI Key Documents May 2008: South Africa & U.S. Department of State Background Note: South Africa (September 2008)

- U.S. Department of State Background Note: South Africa (November 2008). http://www.state.gov/r/pa/ei/bgn/2898.htm
- SouthAfrica.info: Health care. http://www.southafrica.info/about/health/health.htm
- World Health Organization Mental Health Atlas 2005: South Africa.
 http://www.who.int/mental_health/evidence/mhatlas05/en/index.html
- United States Office of Personnel Management Investigations Service 'Citizenship Laws of the World' in March 2001. http://www.opm.gov/extra/investigate/is-01.pdf
- South African Department of Home Affairs: South African Citizenship. http://www.home-affairs.gov.za/sa_citizenship.asp

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