



# 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. Caseworkers must refer to the relevant Asylum Policy 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](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 API on Article 8 ECHR. If, following consideration, a claim is to be refused, caseworkers 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. If, following consideration, a claim made on or after 23 July 2003 by someone who is entitled to reside in South Africa is refused, caseworkers should 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 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.<sup>1</sup>
- 2.2** The African National Congress (ANC) won South Africa's first non-racial general elections held 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 State 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).<sup>2</sup>
- 2.3** The Constitution was adopted by the Constitutional Assembly (comprising the National Assembly and the Senate) on 8 May 1996, and entered into force on 4 February 1997. The Constitution declares that South Africa is one sovereign democratic state founded on the following values: human dignity, the achievement of equality and advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the Constitution and the rule of law; universal adult suffrage; a national common voters' roll, regular elections, and a multi-party system of democratic government, to ensure accountability, responsiveness and openness. There is common South African citizenship, all citizens being equally entitled to the rights, privileges and benefits, and equally subject to the duties and responsibilities of citizenship.<sup>3</sup>
- 2.4** The Government generally respected the human rights of its citizens in 2005, but there were reports of serious problems in some areas. During 2005, there were examples of police use of excessive force against suspects and detainees, which resulted in deaths and injuries. Human Rights Watch noted a decrease in the number of reported deaths in police custody in 2005 compared to the previous year, but the number of deaths still remained high at 652 by April 2005. During 2005, there were also reports of abuse, including beatings and rape, of prisoners and severe overcrowding of prisons; and forcible dispersal of demonstrations. There were also reports of vigilante violence and mob justice; pervasive violence against women and children; violence resulting from racism, xenophobia, and ethnic tensions; child labour, including forced child labour related to child prostitution, and trafficking in persons.<sup>4</sup>
- 2.5** The law provides for an independent judiciary, but whilst the judiciary continues to be generally independent, in 2005, 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

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<sup>1</sup> U.S. Department of State Background Note: South Africa (October 2006)

<sup>2</sup> Foreign and Commonwealth Office (FCO) Country Profile 2006

<sup>3</sup> Home Office COI Service South Africa Country of Origin Information Report March 2006 (para 5.01)

<sup>4</sup> U.S. Department of State report on Human Rights Practices (USSD) - 2005: South Africa (Introduction), COIS South Africa Country Report (para 6.05) & Amnesty International (AI) Annual Report 2006: South Africa

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 and to provide appropriate counsel remained problems in 2005. The Government operated 46 justice centres in the country in 2005, 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 in trials and prolonged pre-trial detention remained serious problems and the Institute for Security Studies (ISS) has reported that in 2005 prisoners waited an average of three months, but some as long as two years for a trial.<sup>5</sup>

- 2.6** 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 2005, SAPS continued its major restructuring and transformation from a primary public order security force to a more accountable, community service oriented police force. However, in many sectors it remained ill-equipped, overworked, and poorly trained. Corruption, particularly of lower-ranked officers also continued to be a problem. Broad efforts to reform police practices continued in 2005 and the Independent Complaints Directorate (ICD) investigated reports of police misconduct and corruption whilst the Government introduced official anti-torture policy and training programmes for SAPS and SANDF officers that included human rights. Still, during 2005 the ICD received 1,731 allegations of criminal offences committed by the police and 3,407 complaints of misconduct.<sup>6</sup>

### **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 API 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 API's, 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 claimant 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 API on Assessing the Claim).
- 3.3** If the claimant does not qualify for asylum, consideration should be given as to whether a grant of Humanitarian Protection is appropriate. If the claimant 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. Caseworkers will need to consider credibility issues based on all the information available to them. (For guidance on credibility see para 11 of the API on Assessing the Claim)

<sup>5</sup> USSD 2005 (Introduction & Section 1)

<sup>6</sup> USSD 2005 (Introduction & Section 1)

3.5 All APIs can be accessed via the IND website at:

<http://www.ind.homeoffice.gov.uk/documents/asylumpolicyinstructions/>

### 3.6 False nationality

- 3.6.1 Most claimants 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 claimants 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 claimants 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.<sup>7</sup> Dual citizenship, however, is not recognised in Zimbabwe for anyone over the age of eighteen.<sup>8</sup>
- 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 claimants 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 claimant 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 claimant 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 claimant 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 claimant asserts that they are not entitled to them.<sup>9</sup>

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<sup>7</sup> COIS South Africa Country Report (para 5.02)

<sup>8</sup> United States Office of Personnel Management Investigations Service 'Citizenship Laws of the World' in March 2001

<sup>9</sup> Immigration and Nationality Directorate (IND) Asylum Policy Instructions: Guidance for South African disputed nationality cases (Asylum Policy Notice 5/2005)

- 3.6.7** Claimants 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 claimant is entitled to reside in South Africa. The claimant's asylum/human rights claim should then be considered in accordance with the current Zimbabwe Operational Guidance Note (OGN).<sup>10</sup>
- 3.6.8** Where there is strong evidence, either material or material and oral, that a claimant is South African, and the claimant 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 claimant is South African unless this is proved otherwise, for example by an enhanced nationality check undertaken by the South African authorities. Where an enhanced nationality check confirms that the claimant is a citizen of South Africa, the South African authorities have agreed that they will stand by the confirmation that the claimant is entitled to reside in South Africa when he/she is removed there and 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 caseworkers should first refer to the IND Asylum Policy Instruction regarding South African disputed nationality cases.
- 3.7 Prison conditions**
- 3.7.1** Claimants 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 generally poor during 2005 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. In 2005, South Africa had 240 prisons with a capacity of 114 thousand prisoners, but there were 189,748 prisoners in custody, according to the Governmental Judicial Inspectorate of Prisons. Many prisons were reportedly overcrowded and understaffed, which in some cases led to as many as 75 inmates occupying a cell designed to hold 40 inmates.<sup>11</sup> The UN Working Group on Arbitrary Detention even reported in 2005 that the rate of overcrowding in detention facilities in some cases was over 300 per cent of capacity.<sup>12</sup>
- 3.7.4** According to the Judicial Inspectorate Report, there were 1,758 prison deaths in 2004, 1,689 of which resulted from natural causes, including HIV/AIDS. In 2005, the Correctional Services Minister stated that eight thousand prisoners were HIV positive, but that only 195 were receiving treatment with anti-retroviral therapy. There were also reports that prison employees and other prisoners abused and assaulted prisoners physically and sexually, whilst detainees awaiting trial reportedly contracted HIV/AIDS through rape. In September 2006, however, the Department of Correctional Services stated that 1,960 inmates had been enrolled in the department's anti-AIDS programmes with at least eight hundred using

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<sup>10</sup> IND Asylum Policy Instructions: Guidance for South African disputed nationality cases (Asylum Policy Notice 5/2005)

<sup>11</sup> USSD 2005 (Introduction & Section 1) & COIS South Africa Country Report (paras 5.22 & 5.23)

<sup>12</sup> AI Annual Report 2006: South Africa

antiretroviral drugs (ARVs) at the four accredited prison-based ARV sites. In 2005, 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 and in March 2005 the Correctional Service Minister announced that 105 officials had been convicted of corruption in prison, of which 2 were dismissed and 95 given final warnings. In 2005, the Jail Commission also completed its investigation into allegations of corruption and sexual abuse in prisons.<sup>13</sup>

**3.7.5** In 2005, 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 2005, 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 2005, including visits by human rights groups and extensive access for groups like Lawyers for Human Rights, the South Africa Human Rights Commission and faith based groups like Khulisa.<sup>14</sup>

**3.7.6 *Conclusion.*** Whilst prison conditions in South Africa are poor, conditions are unlikely to reach the Article 3 threshold. Therefore, even where claimants 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 API 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 API 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 API on Discretionary Leave and the API 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.

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<sup>13</sup> USSD 2005 (Introduction & Section 1) & IRIN.NEWS.ORG: South Africa 'Correctional services shed light on HIV in jails' dated 15 September 2006

<sup>14</sup> USSD 2005 (Introduction & Section 1) & COIS South Africa Country Report (para 5.27)

**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 of three years or until their 18<sup>th</sup> birthday, whichever is the shorter period.

#### **4.4 Medical treatment**

**4.4.1** Claimants 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 attracts most of South Africa's health professionals.<sup>15</sup> A district-based health system is being developed, however, to ensure that health care is affordable and accessible to everyone. Since 1994, more than 700 clinics have been built or upgraded and given new equipment, and 125 new mobile clinics introduced. There are reportedly more than 3,500 clinics in the public sector and free health care for children under 6 years of age and for pregnant or breastfeeding mothers is also available at these clinics.<sup>16</sup> The South African Government has also introduced legislation to increase the availability of drugs by making them more affordable and promoting the use of generic alternatives, but high levels of poverty and unemployment still make it difficult for most people to afford medical treatment or medication.<sup>17</sup>

**4.4.3** In 2005, South Africa reportedly recorded 320,000 HIV/AIDS related deaths and over five million HIV positive people.<sup>18</sup> The AIDS Foundation of South Africa also estimated that 21.5% were infected. Given the numbers of people infected and dying, South Africa is regarded by some commentators as having the most severe HIV epidemic in the world. 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. Women face a greater risk of HIV infection in South Africa and the infection rates between women and men are most pronounced in the age group of 15–24 year olds where the infection ratio is reportedly 20 women for every 10 men.<sup>19</sup>

**4.4.4** 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 has increased the budget allocation for the ARV programme and there is at least one public health facility in every health district rolling out the treatment programme. The 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, whilst an estimated further 45,000 patients were accessing private treatment. By June 2006, however, it was reported that more than 175,000 people were receiving free medication in all 53 districts of the country.<sup>20</sup> Non-governmental Organisations (NGOs) have also worked together with business, government, donors and health professionals to promote a more coherent response to HIV/AIDS.<sup>21</sup>

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<sup>15</sup> COIS South Africa Country Report (para 5.32)

<sup>16</sup> COIS South Africa Country Report (para 5.33)

<sup>17</sup> COIS South Africa Country Report (paras 5.34 & 5.35)

<sup>18</sup> IRIN.NEWS.ORG: South Africa 'The World's biggest ARV programme?' dated 14 September 2006

<sup>19</sup> COIS South Africa Country Report (paras 5.38 - 5.40)

<sup>20</sup> COIS South Africa Country Report (paras 5.41, 5.42 & 5.44 - 5.46) & IRIN.NEWS.ORG: South Africa 'The World's biggest ARV programme?' dated 14 September 2006

<sup>21</sup> COIS South Africa Country Report (para 5.43)

**4.4.5** The Article 3 threshold will not be reached in the majority of medical cases and a grant of Discretionary Leave will not usually be appropriate. Where a caseworker considers that the circumstances of the individual claimant 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.

## **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 run by the International Organisation 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 2001, 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 020 7233 0001 or [www.iomlondon.org](http://www.iomlondon.org).

## **6. List of source documents**

- Home Office COI Service South Africa Country of Origin Information Report March 2006. [http://uk.sitestat.com/homeoffice/homeoffice/s?rds.south\\_africa\\_070306\\_doc&ns\\_type=clickout&ns\\_url=\[http://www.homeoffice.gov.uk/rds/pdfs06/south\\_africa\\_070306.doc\]](http://uk.sitestat.com/homeoffice/homeoffice/s?rds.south_africa_070306_doc&ns_type=clickout&ns_url=[http://www.homeoffice.gov.uk/rds/pdfs06/south_africa_070306.doc])
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- U.S. Department of State Background Note: South Africa (October 2006). <http://www.state.gov/r/pa/ei/bgn/2898.htm>
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- Amnesty International Annual Report 2006: South Africa.  
<http://web.amnesty.org/report2006/zaf-summary-eng>

**Asylum and Appeals Policy Directorate  
12 February 2007**