

Security rhetoric and detention in South Africa

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The South Africa example is instructive in demonstrating both the limits and the dangers of the increasing reliance on detention as a migration management tool.

Around the globe, government policymakers have characterised detention as an effective way to keep track of migrants seen as potential security risks as well as to make migration less appealing. There is little evidence, however, that this strategy – although generally popular with the public – is achieving its stated security and deterrence goals.

discretion. Instead, ‘illegal foreigners’ are held at the Lindela Repatriation Centre¹ as a matter of course. Immigration officials do not give due consideration to the factors that may weigh against detention prior to the decision to detain (although bribery remains a viable option for avoiding detention); the result is an over-zealous reliance on detention that sweeps up in its net asylum seekers, refugees, documented migrants and others legally in the country. Many of these individuals are then illegally deported, some back to the dangers from which they fled.



Lawyers for Human Rights/Julie Ebenstein

Release of a group of illegally detained asylum seekers, Lindela Repatriation Centre.

At the same time, South Africa’s detention practices illustrate how rhetoric around the securitisation of migration as essential for upholding the integrity of the state can legitimise a range of illegal practices and give rise to many drawbacks; these include unlawful detentions and deportations, rights violations, financial costs, increased opportunities for corruption, and threats to the rule of law.

Presumption of illegality

Immigration detention is discretionary under South African law. The dominant rhetoric framing migration as a security issue, however, has encouraged a wide-ranging practice of detention. Rarely, if ever, do immigration officials apply any

Inside Lindela, the flawed presumption that all detainees are illegal and by virtue of this illegality are also a security risk has legitimised the routine violation of detainee rights and legal protections. In one example, in justifying its defiance of the law’s clear and absolute 120-day limit on immigration detention, the Department of Home Affairs (DHA)² argued that it had complied as far as was “reasonably possible” with the law but believed that “the best interests of justice” warranted continuing to detain the individual indefinitely, and that releasing him in accordance with the law would in fact be “perpetuating illegality” by sending the “wrong message” to “illegal foreigners” in the country. The fact that the detainee in question was an asylum seeker who had wrongly been sent to Lindela after being acquitted of non-related criminal charges was irrelevant to the government’s detention decision, which it automatically framed as a security issue. The Department further admitted that it had not applied to a magistrate’s court, as required by law, for a warrant extending the detention beyond 30 days because as “creatures of statute” magistrates would be bound to adhere to the statutory requirements that the DHA believed it was entitled to ignore. In other words, the

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state interest – defined in security terms – justified disregarding legal provisions in order to maintain a broader notion of legality understood through control over migrants, and the exercise of such control via detention.

In a 23-month period between 2009 and 2010, the legal NGO Lawyers for Human Rights brought more than 100 cases on behalf of individuals being detained illegally (and has continued to bring almost weekly cases since then). Because of limited capacity, these cases are likely to represent only a fraction of those illegally detained at Lindela.

The DHA maintains that an individual may remain an illegal foreigner even after applying for asylum and that asylum seekers may themselves be detained as illegal foreigners. Immigration officials also detain individuals at the border before they can apply for asylum, as well as individuals inside the country who state an intention to apply for asylum. These practices directly contravene the legal regime set up by South Africa's Refugees Act, which requires that all individuals be allowed to apply for asylum, bars the detention of asylum seekers as illegal foreigners, only allows for the detention of asylum seekers under a very narrowly defined set of circumstances, and sets out a stringent set of procedural guarantees.

The framing of migration as a security threat has created a perception that the legal demands of detainees lack legitimacy, encouraging immigration officials to deny detained individuals access to their legal rights to appeal and review.³ Access to legal rights is highly circumscribed in detention and individuals may be illegally deported without any review or appeal procedures and at great risk to their safety. The cases reveal a practice of detaining documented asylum seekers and refugees and actively denying individuals access to the legal protections of the asylum framework.⁴

Further costs and drawbacks

At the same time, there is little to suggest that these detentions have been effective in

achieving their goals; in fact, they may be undermining these goals. Many deportees subsequently return to South Africa but because they can no longer legally enter the country and obtain documentation, they either enter illegally or apply for documentation under a false name, calling into question the claim of increased security linked to the deportations. In recent comments calling for detention and deportation practices to be reassessed, the Home Affairs Minister noted that this failed policy was costing the country 70-90 million rand (US\$7-9 million) a year.

Widespread detentions have also given rise to a culture of corruption, as many individuals, even those illegally detained, have no recourse other than to pay a bribe in order to be released and avoid deportation. The ability to extract such payments has provided further incentives to officials to deny detainees access to legal, cost-free means of obtaining their freedom.

Perhaps the most far-reaching and fundamental effect of the over-zealous reliance on detention is its effect on the rule of law. The DHA has regularly defended legal violations on the basis of necessity, in outright defiance of judicial pronouncements. Because security is seen to trump other interests, it sets the stage for an ever-expanding reliance on detention, resulting in rights violations, corruption and, ultimately, disregard for the law by the government, a situation that threatens to undermine the underpinnings of constitutional democracy.

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1. Also known as the Lindela Holding Facility, located approximately 40 kilometres from Johannesburg.

2. The body responsible for immigration.

3. The experiences of detainees in Lindela are discussed in R Amit, 'Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa', FMSP Research Report, June 2010 <http://tinyurl.com/Amit-June2010-Vortex>

4. For more details on the range of illegalities, see R Amit and R Zelada-Aprili, 'Breaking the Law, Breaking the Bank: The Cost of Home Affairs' Illegal Detention Practices', ACMS Research Report, September 2012 <http://tinyurl.com/Amit-Aprili-Sept2012-Breaking>