



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
- 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 Instructions 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 multi-party 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. Mandela handed over leadership of the ANC to Thabo Mbeki in December 1997, who succeeded him as president following the general elections of 1999. In April 2004, Mbeki was re-elected as president for a second five-year term, but he resigned in September 2008 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 April 2009 elections. The ANC won the April 2009 elections with 65.9% of the vote (down from 69.7% in 2004) gaining 264 seats in parliament. Jacob Zuma was elected president by members of parliament and was sworn in on 9 May 2009.²
- 2.3** The Government generally respects the human rights of its citizens. However, the Government, non-governmental organisations (NGOs), and local media have reported police use of excessive force against suspects and detainees, which have resulted in deaths and injuries; vigilante violence and mob justice; and forcible dispersal of demonstrations. Violence resulting from racial and ethnic tensions and conflicts with foreigners; violence against women and children; and trafficking in persons have also been reported.³
- 2.4** The constitution and law provide for an independent judiciary, but whilst the judiciary continues to be generally independent, it remains 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 remain problems. The Government operated 57 justice centres in the country in 2008 that provided legal assistance to the poor in order 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, but also has domestic security responsibilities. In 2008, the SAPS continued efforts to professionalise, however, it reportedly remained ill-equipped, overworked, underpaid, and

¹ U.S. Department of State Background Note: South Africa (March 2009)

² Foreign and Commonwealth Office (FCO) Country Profile 2009: South Africa, British Broadcasting Corporation (BBC) News Country Profile: South Africa, BBC News Timeline: South Africa, BBC News 'Zuma vows to unite South Africa' dated 25 April 2009, BBC News 'Zuma elected South African leader' dated 6 May 2009 & BBC News 'Zuma sworn in as S Africa leader' dated 9 May 2009

³ U.S. Department of State report on Human Rights Practices (USSD) 2008: South Africa (Introduction & Sections 1, 2 & 5), Human Rights Watch (HRW) World Report 2009: South Africa & Amnesty International (AI) Report 2009: South Africa

⁴ USSD 2008: South Africa (Section 1)

poorly trained. Although SAPS made efforts during the year to improve coverage in rural and township areas, the majority of law enforcement activities 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 psychological well-being. The Independent Complaints Directorate (ICD) investigates reports of police misconduct and crime. In 2008, the ICD received 2,101 allegations of criminal offences committed by police and 2,770 complaints of police misconduct, representing a 3% increase in allegations of criminal offences and a 3% decline in complaints of misconduct compared to the previous year. During the 2007-08 reporting period, nine officers were found guilty of murder and sentenced to imprisonment, while eight officers were found guilty of culpable homicide and sentenced to imprisonment, suspended sentences, and/or fines.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 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.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions>
- 3.6 False nationality**
- 3.6.1** Most applicants may 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

⁵ USSD 2008: South Africa (Section 1)

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 may 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.*** Independent organisations such as the United Nations High Commissioner for Refugees (UNHCR) asserted in 2008 that as many as 20,000 Zimbabweans entered South Africa each month. In June 2008, the UNHCR and the Department of Home Affairs reported an increase in Zimbabwean asylum applications to an estimated 40,000. Foreigners from neighbouring African countries, including Zimbabweans, continue to face violence at the hands of those who blame immigrants for job and housing losses, and increasing levels of crime. In 2008, for example, five Zimbabweans were killed when xenophobic attacks against foreign nationals and ethnic minorities by South African civilians in Johannesburg townships escalated into a national wave of violence.⁶
- 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.⁷ Dual citizenship, however, is not recognised in Zimbabwe for anyone over the age of eighteen.⁸
- 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 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

⁶ USSD 2008: South Africa (Section 2) & HRW World Report 2009: South Africa

⁷ South African Department of Home Affairs: South African Citizenship

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

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. In August 2008, the Acting Commissioner of Police reported to parliament that between July and December 2007 police recorded 50,497 incidents of domestic violence, though only a quarter led to criminal cases. Rape and other forms of gender-based violence continue to be under-reported. According to NGOs, about one in four women are in abusive relationships, but few report it.⁹

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 2007.¹⁰

3.7.4 According to national Department of Social Development officials, there were nearly one hundred domestic violence shelters operating in July 2008. The Government financed 39 shelters for abused women in 2008 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.¹¹

3.7.5 *Internal relocation.* The law provides for freedom of movement within the country and the Government generally respects this right in practice.¹² It is therefore practicable for applicants to relocate to other parts of South Africa to escape domestic violence and except 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.

⁹ USSD 2008: South Africa (Section 5), AI Report 2009: South Africa & AI Report 2008: South Africa

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

¹¹ USSD 2008: South Africa (Section 5), AI Report 2009: South Africa & AI Report 2009: South Africa

¹² USSD 2008: South Africa (Section 2)

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 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 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, the majority of South Africa's 237 operational prisons did not meet international standards in 2008, and prison conditions did not always meet the country's minimum legal requirements. Overcrowding remains a problem. According to the Judicial Inspectorate of Prisons (JIP) report for the period from April 2007 to 31 March 2008, there were 165,987 prisoners in facilities designed to hold 114,559 inmates.¹³
- 3.8.4** The JIP reported that there were 1,136 prison deaths in 2007-08, 1,056 of them from natural causes, including HIV/AIDS. The remaining eighty deaths were the result of suicides, assaults, or accidents. The Department of Correctional Services had 16 centres dispensing Anti-retroviral (ARV) therapy to approximately 3,500 sentenced prisoners during the year.¹⁴
- 3.8.5** According to the JIP, there were 1,498 complaints of assault by inmates on inmates and 1,004 complaints of assault by staff on inmates during the reporting period from April 2007 to 31 March 2008. There were also several reports of physical and sexual abuse by both prison officials and prisoners. Some detainees awaiting trial reportedly contracted HIV/AIDS through rape. Corruption remains a problem within prisons, although in most cases correctional services officials are either suspended or fired following an investigation. According to the JIP 2007-08 report, there were 392 complaints of corruption during the annual reporting period.¹⁵
- 3.8.6** In 2008, the Government permitted independent monitoring of prison conditions, including visits by human rights organisations to 83% of facilities. In total, the JIP received and recorded 158,362 complaints from prisoners.¹⁶
- 3.8.7** **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 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

¹³ USSD 2008: South Africa (Section 1)

¹⁴ USSD 2008: South Africa (Section 1)

¹⁵ USSD 2008: South Africa (Section 1)

¹⁶ USSD 2008: South Africa (Section 1)

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 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 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 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.¹⁷

4.4.3 There are an estimated 5.7 million HIV infected individuals in South Africa. 18.1% 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, 11.8% of the population is infected. About 1,000 new infections occur each day, and approximately 350,000 AIDS-related deaths occur annually. A 2007-11 national strategic plan provides the structure for a comprehensive response to HIV and AIDS, including a national rollout of ARV therapy. Overall, 30% of those who need it are currently on ARV therapy.¹⁸

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

¹⁷ South Africa & SouthAfrica.info: Health care

¹⁸ U.S. Department of State Background Note: South Africa (March 2009)

psychiatric nurses per 100,000 population. Therapeutic drugs are generally available.¹⁹

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 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
- U.S. Department of State report on Human Rights Practices (USSD) 2008: South Africa (released on 25 February 2009). <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119025.htm>
- Foreign and Commonwealth Office Country Profile 2009: South Africa (last reviewed 10 June 2009).
<http://www.fco.gov.uk/en/about-the-fco/country-profiles/sub-saharan-africa/south-africa>
- U.S. Department of State Background Note: South Africa (March 2009).
<http://www.state.gov/r/pa/ei/bgn/2898.htm>
- British Broadcasting Corporation (BBC) News Country Profile: South Africa (last updated 11 May). http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1071886.stm
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http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1069402.stm
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¹⁹ World Health Organization Mental Health Atlas 2005: South Africa

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- Human Rights Watch World Report 2009: South Africa. <http://www.hrw.org/en/node/79205>
- South African Department of Home Affairs: South African Citizenship.
http://www.home-affairs.gov.za/sa_citizenship.asp

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