

Submission by the United Nations High Commissioner for Refugees

For the Office of the High Commissioner for Human Rights' Compilation Report

Universal Periodic Review: 4th Cycle, 41st Session

REPUBLIC OF SOUTH AFRICA

I. BACKGROUND INFORMATION

The Republic of South Africa ("South Africa") acceded to the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (hereinafter jointly referred to as the *1951 Convention*) in 1996, with no reservations. This ensures that refugees are availed the opportunity to locally integrate and achieve self-reliance where possible and that vulnerable ones meeting the necessary criteria are entitled to social assistance. South Africa has neither ratified the *1954 Convention relating to the Status of Stateless Persons* nor the *1961 Convention on the Reduction of Statelessness* (the *1954 Convention* and the *1961 Convention* respectively). South Africa, however, made a number of statelessness-related pledges in 2011, including with respect to the accession to the UN statelessness Conventions, which it is yet to implement. The country also made commitments during the Global Compact on Refugees (GCR) including the pledge to strengthen the management of asylum on a procedural and functional level and to ensure the issuance of the appropriate documents to refugees and asylum-seekers.

South Africa incorporated the *1951 Convention* into domestic legislation through the Refugees Act 130 of 1998. South Africa amended its Refugee Act through the Refugees Amendment Act 11 of 2017 and the Refugee Regulations of 2020 respectively, which came into force from 1 January 2020. UNHCR undertook a detailed and comprehensive analysis of the amendments to the Refugees Act and its implementing Regulations and found that several amendments were at variance with international refugee law. The Refugees Act also incorporated provisions of the *1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa*, to which South Africa is also a State party.

By the end of 2020, South Africa hosted 250,250 persons of concern to UNHCR, including 173,527 asylum-seekers and 76,723 refugees. In 2020, South Africa's Department of Home Affairs (DHA) registered 2,414 new arrivals. The new asylum applications were mainly from Democratic Republic of the Congo (DRC) 28 per cent, Ethiopia 16 per cent, Burundi 9 per cent, Zimbabwe 9 per cent and Somalia 8 per cent. Since the introduction of a National State of Disaster in March 2020, motivated by the COVID-19 pandemic, the five Refugee Reception Offices (RROs) around the country that both register and adjudicate asylum claims at first instance, have been closed to new applicants. After almost two years of the closure of the RROs, this not only compounds existing backlogs, but also leaves individuals seeking protection in South Africa during this period undocumented, and consequently unable to access essential and life-saving services and in a very vulnerable situation. Although DHA introduced an online documentation and permit renewal process, this is only accessible to those whose documentation expired after mid-March 2020, thus unavailable to newly arrived asylum-seekers. This means that asylum-seekers and refugees whose documentation expired before mid-March 2020, including those who could not access the RROs due to no fault of their own, have had no opportunity presently to renew their documentation.

II. ACHIEVEMENTS AND POSITIVE DEVELOPMENTS

Positive developments linked to 3rd cycle UPR recommendations

Linked to 3rd cycle UPR recommendation 139.209: “Set in place a comprehensive, national coordinated strategy to address gender-based violence in order to ensure the implementation of the legal framework and to tackle the high prevalence of sexual and gender-based violence, including against children (Finland);”

UNHCR commends South Africa for its efforts to put in place stronger mechanisms to protect women and girls against gender-based violence (GBV). The 2020 *National Strategic Plan on Gender Based Violence and Femicide* (NSP) represents a high-level and consultative process to address GBV and femicide in South Africa. The NSP succeeds to “provide a multi-sectoral, coherent strategic policy and programming framework to ensure a coordinated national response to the crisis of gender-based violence and femicide by the government of South Africa and the country as a whole.”¹ The NSP specifically mentions groups which could be considered more at-risk and among them, refugee women² and migrant women residing in South Africa. UNHCR also commends the February 2022 signing of the Criminal and Related Matters Amendment Bill; the Criminal Law (Sexual Offences and Related Matters) Amendment Bill and the Domestic Violence Amendment Bill, all aiming to cast a wider net to provide survivors of GBV with better protection and access to justice. UNHCR similarly commends South Africa for the integrated service, the Thuthuzela Care Centres (TCCs) which are available without discrimination to all survivors seeking services in South Africa regardless of their documentation status. UNHCR encourages South Africa to continue to strengthen TCCs – in line with the recommendations in the NSP – to train staff on inclusive GBV responses and to incorporate interpretation services into its GBV response programming to help non-national survivors access integrated services³.

Linked to 3rd cycle UPR recommendation no. 139.57: “Take all necessary steps to address xenophobia through legislation, appropriate public awareness programmes and promotion of tolerance and cultural diversity, and adopt a national action plan to combat racism, racial discrimination, xenophobia and related intolerance (Sweden);”

UNHCR commends South Africa for its development and adoption of the National Action Plan (NAP) to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance. The NAP is implemented through a Programme of Action (PoA) (2019-2024) which is closely aligned to the Government of South Africa’s Medium-Term Strategic Framework (MTSF), in particular Priority 6: Social Cohesion and Safer Communities, which gives expression to Chapter 15 of the National Development Plan: Vision 2030 (NDP). Since the adoption of NAP, the Department of Justice and Constitutional Development (DoJ&CD) held the National Consultative Workshop to refine and validate the measures and commitments in the first five-year plan and develop a Programme of Action to guide the implementation of critical deliverables for inclusion in the strategic performance plans of the Government of South Africa. DoJ&CD also hosted its first webinar on anti-xenophobia in March 2020, to enhance the understanding that xenophobic violence in South Africa has continued to affect migrants, refugees and asylum-seekers and resulted in the loss of many lives and damage to property. It also held a multi-stakeholder webinar on 30 March 2021, in collaboration with the Human Sciences Research Council (HSRC) to discuss anti-immigrant sentiments in the current South African context. Additionally, DoJ&CD conducted 21 anti-xenophobia campaigns between 2019-2021, focusing on protection of the rights of migrants, refugees, asylum-seekers and stateless persons in different communities and on virtual platforms; conducted

¹ *National Strategic Plan on Gender Based Violence and Femicide*, 2020, pg 16. Available at <https://www.justice.gov.za/vg/gbv/NSP-GBVF-FINAL-DOC-04-05.pdf>

² Ibid, pg 46

³ UNHCR 2021 Participatory Assessments with refugee and asylum-seeking women in Western Cape, Northern Cape, Eastern Cape, KZN, Gauteng and North-West revealed that language barrier is one of the main reasons why female refugee survivors of GBV hesitate to report incidents and seek access to justice. Similarly, the ongoing closure of the Refugee Reception Offices in South Africa translate to more and more women holding expired or no documentation. Fear of arrest or turn-backs at TCCs, hospitals and the police because of documentation status similarly hinders GBV reporting

various activities, with stakeholders such as the Anti-Racism Network of South Africa (ARNSA) and other partners during Anti-Racism week (which takes place annually around March). It also established the NAP governance structure, carried out a baseline study to determine current levels of racism, racial discrimination, xenophobia, and related intolerance, and set up a virtual Repository providing open and free access to NAP documents, files and promotional materials.

III. KEY PROTECTION ISSUES, CHALLENGES AND RECOMMENDATIONS

Challenges linked to outstanding 3rd cycle UPR recommendations

Issue 1: Implementing the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance

Linked to 3rd cycle UPR recommendation no. 124.44: “Reinforce measures to combat and prevent xenophobia and related violence (Republic of Korea).”

While there has been commendable progress in relation to the implementation of the NAP, UNHCR is concerned that the NAP implementation is concentrated more on Gauteng and KwaZulu-Natal provinces, leaving out other key provinces such as Eastern, Western and Northern Cape. UNHCR notes that even though the other key provinces are yet to see full implementation of the NAP, provinces such as the Western Cape (WC) have made huge strides in reinforcing measures to combat and prevent acts of xenophobia, recognising the actions required to prevent or reduce the effects of xenophobia before it becomes a complex issue that can result in violence and the possible mass displacement of individuals.

Recommendations:

UNHCR recommends that the Government of South Africa

- a) Speed up the implementation of the National Action Plan to combat Racism, Racial Discrimination, Xenophobia and Related Intolerance in all provinces, prioritising key provinces of Eastern, Western and Northern Cape.

Issue 2: Access to fair and efficient asylum procedures

South Africa is working with UNHCR on the Refugee Status Determination Backlog Elimination Project (Backlog Project) to clear an appeals backlog of 153,391 cases by 2024. The Backlog Project commenced in March 2021. 31 new members of the Refugee Appeals Authority of South Africa (RAASA) have so far been appointed; Standard Operating Procedures have been drafted and the digitalization of files has commenced. UNHCR is pleased to note that South Africa has also expressed willingness to expand the Backlog Project to the first instance stage. This will capacitate first instance decision-makers and create an asylum system that is fair and efficient, prevent the formation of new backlogs, and maintain the gains made at the appeal level by the Backlog Project.

While acknowledging the reasons given by South Africa, UNHCR remains concerned by the continued closure of the Refugee Reception Offices (RROs). This not only risks creating a new backlog of new arrivals/asylum-seekers but also has critical knock-on effects on access to asylum procedures, regularization of stay, lack of documentation and access to crucial services such as education, medical treatment and social welfare (SASSA) grants. South Africa's efforts to mitigate the adverse consequences of the RROs closure through the online renewal of permits is commendable but does not offer a solution for the new arrivals and the asylum-seekers and refugees whose permits expired prior to the lockdown. UNHCR reiterates that in order to have a fair and efficient asylum system with integrity, all processes, including the ones related to documentation need to be fully operational.

UNHCR remains concerned about the recent amendments to the Refugees Act. UNHCR submitted detailed comments to South Africa, raising concerns and the need to harmonize the amendment with its international refugee law obligations. UNHCR appreciates the productive ongoing engagement it has had with South Africa on this.

Recommendations:

UNHCR recommends that the Government of South Africa:

- a) Expands, with UNHCR's assistance, the online permit extension platform to include asylum-seekers and refugees whose permits expired prior to the lockdown as well as new asylum applicants;
- b) Take steps to reopen Refugee Reception Offices and, alternatively, explore with UNHCR's support, online document and permit renewals and applications;
- c) Ensures that any legislative amendments to the national asylum framework comply with South Africa's international and regional refugee law obligations.

Issue 3: Child Protection in the Asylum and Immigration System

Linked to 3rd cycle UPR recommendation no. 139.235: "Ensure registration of all children at birth as well as delayed registration of children who have not been registered at birth (Czechia)."

UNHCR is concerned that the continued closure of RROs creates an additional barrier to the timely processing of family unity applications, also known as "family joining" applications. These delays result in many children remaining undocumented and unable to administratively "join" their parent/caregiver's asylum application or refugee file. UNHCR also notes that dependent refugee children are "split" off their parent/caregiver's case upon reaching the age of majority and required to apply for asylum in their own right.⁴ Children and youths in this situation often do not know the reasons for their initial flight; know very little about their countries of origin; and/or, were protected by their parents and caregivers from the often-traumatizing realities which precipitated their flight to South Africa. They may also have been on their parent's asylum or refugee status for a significant amount of time and splitting their cases will likely create an additional burden on the asylum system.

UNHCR also remains concerned by the lack of access to effective birth registration, and therefore Birth Certificates, for children born to one or more undocumented parents or in a case where one or more parent lacks valid immigration status. A practice which in the absence of uniform Notice of Birth in compliance with National legislation which is captured on a National Registry may be at variance with Articles 7(1) and 22(1) of the *Convention on the Rights of the Child*. The prolonged closure of the RROs has exacerbated this issue as many undocumented asylum-seekers are unable to register the births of their children. Because of the fear of persecution that brought about their flight, these asylum-seekers are unable to avail themselves of civil registration services at the embassies of their country of origin.

UNHCR notes the requirements under section 32 of the Refugees Act, under which unaccompanied children must be brought before Children's Court first before they can be registered into the South African asylum system. While appreciating the immediate referral of unaccompanied children to protective State services in line with their best interests, UNHCR is concerned that many unaccompanied asylum-seeking children never get registered and remain in alternative care at Child and Youth Care Centres (CYCCs) or community-based foster care with no documentation for prolonged periods.

⁴ Refugees Act, s 33(2) Where a dependant of a recognised refugee is within the Republic in accordance with an asylum-seeker permit or has been granted asylum in terms of this Act, and ceases to be a dependant by reason of his or her marriage, his or her attaining the age of majority or the cessation of his or her dependence upon the recognised refugee, as the case may be, he or she may be permitted to continue to remain within the Republic in accordance with the provisions of this Act.

Lastly, UNHCR urges South Africa to comply with the Court Order in the *Miriam Ali*⁵ case as well as the Court Order in the *DGLR* matter. In the latter, the Department of Home Affairs was ordered to provide the relevant forms in order to give effect to section 2(2) of the Citizenship Act which provides for children born in South Africa to be registered as South African citizens if they would otherwise be stateless. The *Miriam Ali* matter, as confirmed by the *Jose* case, confirms that in terms of section 4(3) of the Citizenship Act, if a child, upon reaching the age of majority, meets the criteria set out in s 4(3) of the Act, that they must be granted South African citizenship by naturalization, the granting of which is non-discretionary. This provision could benefit many refugee children who were born and documented in South Africa and resided here until their reached age of majority, and whose applications are yet to be adjudicated if it was consistently applied.

Recommendations

UNHCR recommends that the Government of South Africa:

- a) Critically reviews aspects of the asylum system which negatively impact children and families and are not in harmony with international human rights, particularly related to interpretation of dependency, difficulties in obtaining birth certificate for asylum-seekers' children; and the splitting off of children off their parents asylum file.
- b) Prioritize family joining applications for adjudication and adopt a holistic interpretation of a "dependent" to ensure children do not remain both undocumented and administratively separated from a parent or caregiver's case;
- c) Resume asylum-seeker registration, ensuring swift and prioritized registration and referral procedures for unaccompanied children seeking international protection, so that they have immediate access to state protection, identity documents and the asylum system while their overall immediate and long-term needs are assessed;
- d) Commit to universal birth registration, including the registration of births of all children born in South Africa, and to the issuing of all children born in South Africa with a Birth Certificate to ensure they have access to a legal document and identity with which they can access key social services;
- e) Reconsiders the practice of splitting dependent children off their parent or caregiver's asylum or refugee case file at the age of majority, in full respect of the best interest of the child principle and the interest of avoiding future asylum backlogs;
- f) Enact the necessary regulations to give full effect to the Citizenship Act and ensure children have effective access to naturalization procedures

Issue 4: Statelessness

UNHCR reiterates its call to South Africa to accede to the *1954 Convention* and the *1961 Convention* in line with its December 2011 pledge at the UN ministerial-level conference in Geneva. UNHCR is pleased to note that South Africa has enacted progressive nationality legislation ensuring nationality for children born and registered on its territory who would otherwise be stateless; in line with safeguards against childhood statelessness enshrined in the *1961 Convention*. However, UNHCR notes that South Africa's birth registration rate is currently at about 85% and has remained stagnant for over a decade. UNHCR welcomes South Africa's initiative for a holistic policy review and development of regulations to address risks of statelessness among refugees, asylum seekers and migrants by facilitating access to civil registration, including birth registration.

Recommendations:

UNHCR recommends the Government of South Africa:

- a) To develop and implement a roadmap towards realisation of the pledge made in 2011 to accede to the *1954* and *1961 Statelessness Conventions*;
- b) To develop and implement a roadmap towards the implementation of the pledge made at the 2019 High-Level Segment on Statelessness (HLS) on the promotion and

⁵ Minister of Home Affairs v Ali and Others (1289/17) [2018] ZASCA 169; 2019 (2) SA 396 (SCA) (30 November 2018) available at <http://www.saflii.org/za/cases/ZASCA/2018/169.html>

strengthening of civil registration, including birth registration, and facilitate access to documentation in South Africa and in the Southern African Development Community region;

- c) To draft and implement regulations and procedures to operationalise Section 2(2) of the Citizenship Act on citizenship by birth for persons born in South Africa who do not hold the citizenship or nationality of any other country; and
- d) Within the ongoing review process of the Citizenship Act, ensure that it includes a provision to accord citizenship to children of unknown parentage found on its territory (also known as foundlings).

UNHCR
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