



home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

**PRESS STATEMENT ON THE RELEASE OF THE WHITE PAPER ON
CITIZENSHIP, IMMIGRATION AND REFUGEE PROTECTION: TOWARDS A
COMPLETE OVERHAUL OF THE MIGRATION SYSTEM IN SOUTH AFRICA**

The Director-General of the Department of Home Affairs;
Commissioner: Border Management Authority;
Members of the Refugee Appeals Authority;
Members of the Standing Committee on Refugee Affairs;
Senior Management of the Department of Home Affairs;
Journalists of various media houses;
All guests present today.

0. Exactly four years ago, the Department of Home Affairs embarked on a painstaking exercise of drafting the White Paper on Citizenship, Immigration and Refugee Protection: Towards A Complete Overhaul of the Migration System in South Africa ("White Paper").

1. The process resulted in the Cabinet approving the White Paper on Wednesday, 1 November 2023 for public comments. The White Paper has been published in the Government *Gazette* No. 49661 on 10 November 2023. A copy of the *Gazette* is annexed hereto marked “A”.
2. Conflicts, armed violence, disasters, pandemics, seeking better business and work opportunities and other factors force people to leave their countries of origin to other countries.
3. There have been consistent loud voices calling for effective policy measures and legislative interventions dealing with migration in South Africa. These voices grew louder as violent clashes between foreign nationals and citizens rear their ugly heads. Many groups for and against migration are gaining momentum.
4. South Africa has different pieces of legislation dealing with citizenship, immigration and refugee protection, namely the Citizenship Act¹, Immigration Act² and Refugees Act ³ as amended. In fact, the South African Citizenship Act is a relic of the colonial era and a replica of the 1949 Citizenship Act⁴ under the Union of South Africa. In practice, these pieces of legislation are not in harmony with

¹ Act 88 of 1995.

² Act 13 of 2002.

³ Act 130 of 1998.

⁴ Act 44 of 1949.

each other. Piece-meal amendments were made without any policy framework whatsoever.

Refugee Protection

5. The United Nations adopted the 1951 United Nations Refugees Convention (“1951 Convention”) and the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”). Meanwhile the Organization of African Unity (“OAU”) [now AU] endorsed its own 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 (“1969 OAU Convention”) in order to deal with the peculiar circumstances of migration and refugees in Africa. This was done in the spirit of Pan – Africanism.
6. The 1969 OAU Convention prohibits refusal of entry, expulsion or extradition of asylum seekers and refugees and also provides for certain exclusions on certain grounds. In fact, the refugee laws in most of the AU countries based on the 1969 OAU Convention are much more stringent than the Refugees Act in South Africa. Furthermore, the principle of Pan-Africanism does not promote illegal entry in the countries that are signatory to the 1969 OAU Convention.

Asylum during the apartheid era

7. Asylum seekers and refugees were not recognized in South Africa until 1993. During the apartheid era, South Africa did not accede to any international and regional conventions relating to the status of refugees and asylum seekers.
8. South Africa administered its refugee policy on an *ad hoc* basis, granting refugee status mostly to white nationals from Zimbabwe, Portugal and Mozambique. The Aliens Control Act⁵ governed immigration during the apartheid era. The preference of whites over “non-whites” (blacks) became the focus of the immigration policy.
9. The Refugees Act⁶ was passed in 1998. In line with the 1951 Convention, the 1967 Protocol and the 1969 OAU Convention, the Refugees Act prohibits refusal of entry, expulsion or extradition of asylum seekers and refugees.

Accession to international agreements

10. In 1996, two years after the first democratic elections, South Africa acceded to various international agreements such as, the 1951 Convention, the 1967 Protocol⁷, the 1969 OAU Convention and other international instruments. This was done without the government having developed a clear policy on migration, including refugee protection.

⁵ Aliens Control Act 96 of 1991.

⁶ Refugees Act 130 of 1998.

⁷ Ratified on 12 January 1996.

11. The government did not make reservations and exceptions permitted in terms of international law.
12. Both the 1951 Convention and 1967 Protocol provide for reservations. In terms of article 42 of the 1951 Convention, any State may make reservations to articles of the Convention other than articles 1, 3, 4, 16(1), 33, 36-46 inclusive.
13. Article VII of the 1967 Protocol provides that any State may make reservations in respect of articles IV and 1 other than articles 1, 3, 4, 16(1) and 33.
14. Many countries made reservations in respect of both the 1951 Convention⁸ and 1967 Protocol⁹.
15. South Africa did not make any reservations in respect of the 1951 Convention and 1967 Protocol. This was a serious mistake on part of the government.
16. It is not surprising that South African courts developed jurisprudence regarding asylum and refugees (in the absence of reservations and exceptions) which is unfavourable to the interests of government.

⁸ Countries that made reservations, include but not limited to Angola, Australia, Botswana, Ethiopia, France, Malawi, Namibia, Mozambique, Netherlands, Somalia, Sweden, Uganda, Zambia, Zimbabwe, United Kingdom and Ireland,

⁹ Countries that made reservations in respect of the 1967 Protocol, include but not limited to Angola, Botswana, Congo, eSwatini, China, Malawi, Netherlands, Portugal, United States of America and United Kingdom and Ireland.

Policy framework recommendations

17. The White Paper proposes that the Government of the Republic of South Africa must review and/or withdraw from the 1951 Convention and the 1967 Protocol with a view to accede to them with reservations like other countries.
18. The Refugee Protection and Immigration legislation must provide for reservations and exceptions as contained in the 1951 Convention and the 1969 OAU Convention. Particularly in that South Africa does not have the resources to grant the socio-economic rights envisaged in the 1951 Convention.

Citizenship

Genesis of the 1949 Citizenship Act, Citizenship Act, 1995 and other laws

19. The current citizenship legislation has its roots in the 1949 Citizenship Act¹⁰ (“1949 Act”) and other relevant successive laws governing citizenship. The 1949 Act and other relevant laws were not only discriminatory on the basis of race and sex but the “*natives*” (black people) were totally excluded from the South African citizenship regime.

¹⁰ Act 44 of 1949.

20. The South African Citizenship Act provides for three main forms of citizenship, namely, citizenship by birth, citizenship by descent and citizenship by naturalization.

Policy framework: Proposals (Citizenship)

21. The White Paper makes radical proposals regarding citizenship:
- 21.1 Section 4 (3) of the Citizenship Act requires to be reviewed, together with other sections, including those relating to citizenship by naturalization during the legislative process.
- 21.2 The United States of America, Canada, Switzerland and Britain are developed countries with resources that far exceed those of South Africa, have developed strict immigration, citizenship and refugee laws in order to protect the rights of their citizens.
- 21.3 The Citizenship Act and Births and Deaths Registration Act must be repealed in their entirety and be included in the single legislation dealing with citizenship, immigration and refugee protection. This will remove contradictions and loopholes in the paths towards citizenship as is now the case with the three pieces of legislation.

21.4 The criteria for granting any form of citizenship must be strictly in accordance with the law.

21.5 A proper register should be kept for all persons granted citizenship by naturalization by the Minister. The register must be tabled every year in Parliament by the Minister.

Immigration

22. Before the Immigration Act 13 of 2002 was enacted, the applicable legislation was the Aliens Control Act¹¹ and the Aliens Control Amendment Act¹².

Illegal foreigners

23 South Africa is today a great place to live in and many people in the world aspire to live, work or to be citizens of South Africa. In the result, many foreign nationals come to South Africa and stay in the country illegally.

24 No one can account for all undocumented migrants.

¹¹ Act 95 of 1991.

¹² Act 76 of 1995.

25. The DHA has no idea as to how many illegal immigrants are in South Africa. However, Immigration Services deports between 15 000 - 20 000 illegal foreigners every year at a huge cost. This number is on the increase.
26. The establishment of the Border Management Authority (“BMA”) should significantly reduce the risk of foreigners entering the country illegally¹³.
27. The Immigration Act introduced fundamental changes (albeit controversial) and a host of visas such as, temporary visa, study visa, business visa, critical skills visa, corporate visa, spousal visa¹⁴, retired persons visa, relative visa, intra company visa and permanent residence.

Policy framework: Proposals (Immigration)

28. The White paper proposes:
- 28.1 Border control must be coupled with immigration. The United Kingdom Parliament introduced in November 2021, the Nationality and Borders Bill.
- 28.2 The Border Management Authority Act must be reviewed to align it with Immigration and Citizenship new policy framework.

¹³ The BMA was established in terms of the Border Management Authority Act 2 Of 2020.

¹⁴ This is the most abused visa of them all. Bogus marriages are entered into and the new trend is that Life Partnership Agreements are concluded.

- 28.3 The policy framework must provide for the establishment of the Advisory Board which comprise representatives of the Departments of Trade, Industry and Competition, Labour and Employment, Tourism, South African Police Service, South African Revenue Service, Education, International Relations & Cooperation, Defence & Military Veterans and Director- General of the DHA¹⁵.
- 28.3 The Board must also comprise representatives of organized labour, including four individuals on the grounds of expertise in administration, regulatory matters or immigration law, control, adjudication and enforcement, appointed by the Minister.
- 28.4 I have published the new Critical Skills List in August 2022. The Critical Skills List is necessary to attract foreign skills required for the development of South Africa.
- 28.5 The list was compiled in consultation with all the relevant stakeholders, including NEDLAC.
- 28.6 Policy and legislative interventions are required to tighten the procedures and strengthening the monitoring capacity by introducing integrated IT systems capable of flagging fraudulent activities in the issuing of visas, identity

¹⁵ Paragraph 9.1.10 of the Resolution of the 55th ANC National Conference, held on 16-20 December 2022 and 5 January 2023.

documents, marriage certificates and passports. This include giving wide statutory powers to the existing Anti- Corruption Unit within the DHA.

28.7 The new policy must provide that members of the Anti- Corruption Unit should be seconded from the South African Police Service (“SAPS”). The rationale being that members of the SAPS enjoy wide statutory powers, including search and arrest without a warrant.

28.8 New legislation must be introduced to strengthen the powers of immigration officers and Inspectorate and make continuing training compulsory. The majority of members of the Inspectorate must have legal qualifications and policing experience.

28.9 The recent publication of the National Labour Migration Policy introducing quotas for employment of foreign nationals will go a long way in defusing simmering tensions between South African citizens and foreign nationals.

28.10 When the Immigration Act was enacted, provision was made for the establishment of Immigration Courts. However, the Immigration Act was amended in 2004 to remove the establishment of such courts.

Immigration Division and Immigration Appeal Division

28.11 New policy framework and legislative intervention is required to establish the Immigration Division whose members are duly qualified to deal with granting of various visas. The current system is unworkable as staff members are overworked. Appeals/ review are dealt with by the DG and Minister. Given the responsibilities that the two have, it is impossible for them to deal with the appeals/reviews.

28.12 Given the current challenges, there is merit in establishing an independent body to deal with appeals/reviews, such as, Immigration and Refugee Board: Immigration Division, Refugee Protection Division and Immigration Appeal Division.

Canada

28.13 The Immigration and Refugee Protection Act, 2001 (Canada) makes provision for the Immigration and Refugee Board, consisting of the Refugee Protection Division, Refugee Appeal Division, Immigration Division and Immigration Appeal Division or Special Immigration Appeals Commission¹⁶ (as in the United Kingdom).

28.14 The Canadian equivalent of the Refugee Status Determination Officers (“RSDOs”) is the Refugee Protection Division (“RPD”). This is a statutory body charged with the responsibility of taking decisions on asylum applications. In

¹⁶ Nationality and Borders Bill, 2021 (United Kingdom).

order to avoid backlogs, its members are appointed on full-time basis in terms of the Canadian Public Service Act. In other words, the RPD performs functions that are assigned to the RSDOs in terms of the Refugees Act. The RPD conducts proper hearings with asylum seekers being afforded the right to legal representation. This will obviate the long-winded and tedious appeal process under the current legislative framework.

28.15 A party that is aggrieved by the decision of the RPD must appeal to the Refugee Appeal Division with majority members being appointed on full-time basis and 10% of whom must be members of the bar or attorneys for at least a period of five years.

28.16 Furthermore, the Canadian legislation clearly makes a distinction between economic immigrants and refugees. The same approach is adopted in the White Paper.

United Kingdom

28.17 In the United Kingdom¹⁷ ("UK"), adjudicators (equivalent of RSDOs) must be members of the Bar or attorneys for a period of seven years. The strict qualifications requirements in Canada and UK are because asylum matters are by their nature complex and involve international refugee law.

¹⁷ Nationality, Immigration and Asylum Act, 2002 (United Kingdom).

Further Policy framework: Proposals (Refugee Protection)

28.18 The new policy framework and legislative measures must include the establishment of structures such as in Canada. The decision-making powers will be quick and virtual hearing can be introduced at the ports of entry as in Netherlands.

28.19 Consideration will be given and provided for in the new integrated legislation to appoint either serving judges or retired judges or Senior Counsel as chairpersons of the appeal bodies.

Different treatment of refugees

28.20 In instances of unlawful entry into the Republic, an additional requirement must be introduced that they must show good cause for their unlawful entry or presence.

28.21 The Minister should be empowered to declare an asylum claim made by an asylum seeker who has a connection to a first safe country invalid. In other words, the first safe country principle must be strictly applied. This will include a person who may apply to be recognized as a refugee in that State.

28.22 This policy framework would discourage asylum seekers who deliberately fail to apply for asylum at the first safe country which is a signatory to the 1951 Convention, the 1967 Protocol and the 1969 OAU Convention. Furthermore, it would deter economic migrants who come to South Africa disguising as asylum seekers.

Conclusion

29. I take this opportunity to thank all the concerned citizens and staff of the DHA who worked tirelessly in developing the policy frameworks contained in the White Paper. An explanatory memorandum will accompany the distribution of the White Paper to the public at large.

30. I call upon all citizens and stakeholders to make comments to enrich the White Paper. Public participation is a principle that underpins the Constitution.

ISSUED BY THE MINISTER OF HOME AFFAIRS

DR AARON MOTSOLEDI, MP

All media enquiries must be directed to:

Thabo Mokgola, 060 962 4982 (Spokesperson for the Minister of Home Affairs)

