

South Africa's migration policy mess

Where did it come from, and can it be fixed?

– By Alan Hirsch

Alan Hirsch is Professor Emeritus at the Nelson Mandela School of Public Governance, University of Cape Town; the Leader of the Migration Governance Research Programme at New South Institute; and a Professorial Research Associate at School of Oriental and African Studies (SOAS), London.

ALAN HIRSCH comments on the draft White Paper on Citizenship, Immigration and Refugee Protection issued by the South African government in November 2023. The government wants to make laws still tighter when it is unable to implement existing laws. He finds that what is proposed simply won't help and suggests what could be done to fix the urgent need for better migration policy.

The minister

In 30 May 2019, Aaron Motsoaledi, a medical doctor, was appointed by President Cyril Ramaphosa as Minister of Home Affairs. Before joining national government as Minister of Health in 2009, Motsoaledi had a chequered career in provincial government. It may have seemed that because he was the nephew of struggle hero Elias Motsoaledi he had several chances to succeed. But when he was appointed by former President Jacob Zuma as Minister of Health he found an opportunity to shine.

I was present (as a senior official in the presidency) at the cabinet meeting where Motsoaledi presented his plan to fight HIV/ AIDS. It was an exciting and inspiring moment, and Zuma rose to the occasion giving his new health minister his full support.

Motsoaledi's campaigns against AIDS and other infectious and non-infectious diseases were widely lauded. Even the chairperson of the Treatment Action Campaign, which had fought bitterly for a change of course in the Mbeki era, lauded Motsoaledi saying "he's one of the best deployments the ANC ever made".

The mess

In 2021 Motsoaledi, frustrated by the poor performance of his Department of Home Affairs (DHA), appointed a ministerial committee to investigate the mishandling of the system of permitting and visas, which also decided on permanent residence and naturalisation. This was sparked by a public outcry when fraudster pastor Shepherd Bushiri and his wife Mary were granted permanent residence and South African citizenship even though they had no right to either. The terms of reference were to investigate the implementation of the permit/visa system between 2004 and 2020.

The investigation began shortly after 14 members of the permit section of the

department signed a petition demanding that the Counter-Corruption Unit should cease investigating “their errors”. Chief investigator was the former Secretary of Cabinet and Director General of the Presidency, Dr Cassius Lubisi. Lubisi had served throughout the presidency of Jacob Zuma but his reputation was solid. He was joined by a small group of experts, including some with experience and skills in forensic investigation.

The headline finding in his report was that 36,647 applications for visas, permits or status over the 16-year period under investigation had used fraudulent documentation. Of these, 880 were immediately approved and 288 were pending. A total of 4,160 of the fraudulent applications were first rejected, and then accepted after reconsideration. It found that “all [permit] applications were manually processed, finalized and approved with minimal to no electronic capability”¹.

Lubisi discovered that systems which had been replaced were still being used illegally from time to time for suspicious purposes. He found cases where applications were processed in zero days, and visa expiry dates issued beyond the legal limit.

The Lubisi committee found a huge disjuncture between the naturalisation database of the DHA and the population registration database, which falls under the same department. They found that the ‘V-list’ which designates undesirable immigrants was “fatally flawed due to incomplete and missing crucial data”.² They found cases where files had been inserted illegally into the information system – a process that would require “a highly skilled IT user with administrator rights to execute”.³

Even the introduction of VFS Global (a private international immigration service company) in the application process did not inhibit various forms of bribery and corruption. Decision-making on visas and permits had been centralised in the DHA in Pretoria in 2009. The complete catalogue of serious issues uncovered by the ministerial committee is far too long to include in this article.

A parallel investigation headed by Mavuso Msimang, Umkhonto we Sizwe veteran and distinguished former civil servant, recommended a range of reforms in the administration of the visa process for key business people and expert professionals (Msimang, 2023). His investigation was commissioned by the Presidency’s Operation Vulindela. In response to the Msimang report there was a recent simplification of the regulations for business visas⁴ but the business community remains sceptical about implementation of policy.

Apologies

Just a few months ago Minister Motsoaledi was quoted as saying, in legal papers:

I would like to take this opportunity to extend my sincere apology to the Chief Justice, all judges of the high court and Constitutional Court, the President of South Africa, Minister of Finance, LHR [Lawyers for Human Rights] and its legal representatives and the people of South Africa for the mess created by officials of the Department of Home Affairs. (Hawker, 2023)

Legal grievances against the South African DHA, including myriad contempt of court cases, are common. Far too frequently the minister is required to apologise to the court or to ask for more time on behalf of the DHA.

This particular “mess” was where the minister had failed to amend an unconstitutional law which allowed for the detention of irregular migrants for 120 days. Motsoaledi described how he was “shaking with anger” when he saw a legal instruction his department had made on his behalf, without his knowledge.

Frequently, the minister has had to apologise for delays in the issuing of various permits which concern the right to live and work in South Africa. He regularly is forced to announce that people who should have a response to their permit applications but have not heard anything may continue their lives under temporary exemption. Temporary exemptions are as common as the court cases and the apologies. The visa and permit section of the DHA and of many of the department’s information systems are virtually dysfunctional. These huge inefficiencies till the soil for corruption.

The draft White Paper

Yet the new draft White Paper on Citizenship, Immigration and Refugee Protection, subtitled Towards a Complete Overhaul of the Migration System in South Africa, fails to make any reference to the findings or recommendations of the Lubisi and Msimang reports.⁵ It says very little about the deficiencies of systems and personnel. Instead, it proposes to tighten laws and regulations that will be impossible to implement.

It proposes the amalgamation of the laws on citizenship, immigration and refugee protection. These three laws will become a single law. However, there is no draft legislation accompanying the White Paper. As many of the proposals are quite vague, it is not possible to know exactly what is being proposed. It is hard to say if this is accidental or deliberate.

The central purpose of the White Paper is to tighten the management of refugees and to withdraw socio-economic rights from prospective refugees. The intention is not to allow those without a genuine claim to get ‘pending asylum’ status. Decisions will only be made at official ports of entry and appeals will be swiftly dealt with by a special tribunal.

The new laws will override current jurisprudence which allows asylum seekers awaiting decisions to access socio-economic rights such as the right to education and health care. These rights are embodied in South Africa’s commitment to United Nations and African Union conventions on refugees and asylum seekers. South Africa will withdraw from the conventions and re-join them with reservations regarding these rights. The White Paper cites examples of other countries that belong to the conventions with similar reservations.

The rationale for this shift is that many asylum seekers, especially those who apply for asylum only when they are detected as irregular migrants, are actually economic migrants who have not gone through the proper channels to obtain visas and work permits.

The draft White Paper argues that more than 90% of asylum seekers are not eligible for asylum. South Africa intends to apply the ‘first safe country’ principle for refugees – if asylum applicants have entered South Africa after passing through other ‘safe countries’, they will be returned to the first ‘safe country’ they entered.

The White Paper also notes the need to upgrade institutions administering refugee law. Refugee status should be determined very rapidly and any appeals must be

dealt with without delay. According to the United Nations High Commission for Refugees website, there are currently about 129,000 asylum seekers awaiting decisions and about 91,000 stateless people in South Africa.⁶

The White Paper has little detail on citizenship policy, but its purpose is to make access to naturalisation and citizenship much more difficult to obtain. It proposes that asylum-seekers should be blocked from obtaining a path to naturalisation or South African citizenship in any way. Even their children born in South Africa would be ineligible. There is also a proposal that the national population register should distinguish between citizens and non-citizens.

How this is all to be done is far from clear because of the absence of draft legislative text for any aspect of the White Paper.

The remaining recommendations of the draft White Paper are about tightening border control through the new Border Management Agency and preventing the immigration of foreigners who will “adversely impact on existing labour standards and expectation of SA workers”.

There are several additional unexplained institutional proposals such as the establishment of an Immigration Advisory Board and a new Immigration Division in the Department of Home Affairs.

Much of the draft White Paper remains open to a wide range of interpretations. The most cynical among us might speculate that the proposals are deliberately vague, doing little more than enabling the ruling party to campaign on an anti-immigration platform.

Immigration politics

South Africa is not alone in using the threat of immigration as a political weapon. Immigration anxiety was a determining factor in Britain’s departure from the European Union. This proved futile – the Conservative Party which called the referendum is still tearing itself apart over immigration policy (Lawless, 2024). In the Netherlands, a far-right leader got the most votes and seats in the latest election on an anti-immigrant ticket (Adler, 2023). The president of Italy is a right-winger with strong anti-immigration credentials. In the United States, the Republican Party wants to turn this year’s election into a referendum on President Joe Biden’s immigration policy (Del Valle, 2024).

Many politicians all over the world maintain some eminently refutable fictions about immigration, despite evidence to the contrary. One fiction is that tighter rules reduce migrancy – they only increase illegality. Another fiction is that centrist or leftist parties can neutralise right-wing parties by adopting their stance on immigration. Invariably the policies will fail, and the failures will simply feed the electoral machine of the far right. Several countries in western Europe have experienced this in recent years.

It seems that politicians appear to hold onto their fictional beliefs mainly because they think it will be to their advantage, and electorates swallow those fictions either because they don’t know any better or because they want to believe them. Sometimes anti-immigrationism is a mask for racism or religious intolerance.

Colonial and liberal

In the late 19th century, the first bilateral labour migration agreement was signed between the South African Republic and Portugal over Mozambican migrant workers. Colonial in design, it excluded virtually all rights the workers may have wished to have.

Similar treaties were concluded with other countries. Current Bilateral Labour Agreements are barely changed from their colonial forebears except that they are now between South Africa and five independent countries.

South Africa's first immigration law was the Aliens Act of 1911 (which later became the Aliens Control Act). It essentially excluded any foreign black Africans from legal long-term residence in South Africa. It was also designed to block immigration from India. In the 1930s, the rules were extended to sharply limit the immigration of Jews and Catholics. The Aliens Act continued to be the basis of immigration law until the new Immigration Act of 2002.

During the 1990s, the humanitarian attitude of the Mandela government softened South Africa's stance towards immigrants, especially those from neighbouring African countries. Mozambicans living illegally in South Africa were allowed a once-off amnesty to regularise their status. South Africa became a full signatory to international treaties on refugees, and the Refugee Act of 1998 was a landmark in liberal, humanitarian immigration law. The Mandela period was the highwater mark in South African immigration law.

The Immigration Act of 2002 retained part of what Professor Jonathan Crush called the "two-gate" system (Crush, McDonald, 2001) – one law for Africans from the countries which had come to depend on South Africa to employ their migrant contract workers and another regime for others.

When hundreds of thousands of Zimbabweans fled their country's economic fiasco in 2008, South Africa granted temporary permits that allowed them to remain in South Africa with socio-economic rights, but with no right for them or their children to naturalisation. This permit was renewed in several forms and remains in place due to a court case and the inability of the DHA to swiftly process applications for a different status for the people who want to remain.

There is a similar provision for some citizens of Lesotho. The total number of Zimbabweans and Lesotho citizens living in South Africa under special exemption permits is thought to number less than 250,000 in total. In the 1990s, South Africa gave an amnesty to a larger number of Mozambicans living in South Africa, many of whom had fled the civil war. They were allowed to apply to regularise their status.

Numbers

Let's consider the dimensions of immigration into South Africa. In the United Nations Department of Economic and Social Affairs data it is estimated that between 2000 and 2020 the number of people living in South Africa who were not born here increased from 1 million to 2.9 million. So, accepting that migration data is not very accurate at the best of times and that 2020 as the first year of Covid-19 is not a good basis for comparison the increase from about 1 million to about 3 million people amounted to an almost 200% increase in migrant stock over a roughly 20-year period (Mutava, 2023).

The proportion of foreign born to locally born in 2020 was about 4.8%, up from about 2.1% of the population in 2000, more than double.

How does that compare to the rest of the world? The proportion of foreign-born residents to locals is about 3.5% for the world as a whole. It has remained around that level at least since the 19th century, which incidentally belies the myth that we are amid a global migration crisis. Countries of mass immigration like the US, Australia and New Zealand have a larger proportion of foreign born. The US, for example, has a foreign-born population of about 16%. Côte d'Ivoire has one of the largest foreign-born populations in Africa at around 10%. So, South Africa at about 4.8% is far from extraordinary.

Where South Africa does stand out is in the relatively rapid increase in foreign born residents in the past two decades. The growth rate was unusually fast. Reasons for this include political and economic shocks in the region, such as the Zimbabwe crisis, and the historical dependence of the poorer countries of our very unequal region on South Africa for labour remittances.

The preoccupations informing the White Paper include the concern that economic migrants are drawn to South Africa because of the size and complexity of its job market and because of the social services which are available to all residents. A key assumption of the White Paper is that restricting access to jobs and social services will reduce the attraction of South Africa and reduce immigration, especially of poor people from nearby countries.

Impact on society

While it sometimes is claimed that the immigration of low-skilled workers contributes to the high level of unemployment, two recent studies have argued that immigration has contributed to net job creation rather than to net unemployment (OECD/ILO, 2018; World Bank, 2018). The World Bank found that "a one percent increase in the number of immigrants relative to the previous period raises local employment by 0.2 percent". The International Labour Organization found that immigrants likely had a positive effect on South African economic growth, but in some areas "the presence of immigrant workers has both negative effects (lower employment rates) and positive effects (higher incomes) for the native-born population." So, for certain people in certain areas there are negative employment effects.

The perception is widespread that migrants, especially irregular, low-skilled migrants, compete with poor locals for housing and social services. This is partly an outcome of the fact that when formulating refugee regulations, South Africa decided that, unless they were destitute, asylum seekers and refugees could live wherever they preferred.

The decision not to house refugees and asylum seekers in camps is widely considered progressive and humanitarian. However, there has been no systematic attempt at any level of government to manage and promote the inclusion of poor migrants. The progressive step of allowing the integration of migrants into local communities was radically undermined by the absence of policies and strategies for inclusion.

Evidence in a recent in-depth research paper suggests that xenophobia is not an apt term to describe the attitude of poor urban citizens to migrants. What the

researcher, Ringisai Chikohomero, himself a former refugee (and a former student of mine), found was that residents of Atteridgeville and Diepsloot did want foreign migrants to leave, especially the irregular or undocumented migrants. They told Chikohomero in focus groups and individual interviews that this was not because they didn't like them but because they competed for jobs and economic resources (Chikohomero, 2023).

There is no doubt that the primary reason for the lack of jobs for poor South Africans is the low growth rate of the economy, which is in turn largely a result of poor government policies and weak government management. There is clear evidence that South Africa is performing poorly by any standards. Growth is slow by global standards and by developing country standards and we are way down among the poorest performing African countries. Average household incomes have declined in almost every year in the past decade. This is why poor people don't have jobs, and why many of the jobs they do have are poorly rewarded and precarious.

Nevertheless, it is convenient for politicians on both sides to blame foreigners. Populists who want to oust the government claim that the ANC is not protecting 'our people'. The government sometimes excuses its own poor provision of services on the 'flood' of migrants from African countries.

This is a toxic and dangerous mess that can have huge ramifications. Already we have seen, in the past 16 years or so, many horrifically violent attacks on poor migrants from other parts of Africa.

How to fix it

The priorities signalled in the draft White Paper are intended to show to the people, and voters in particular, that the government is making an effort to defend the interests of citizens and residents. But what is proposed simply won't help. The government wants to make laws still tighter when it is unable to implement existing laws. So, what else could be done?

This is the main thing – first fix the operations of the relevant parts of the department. This will require the government to make a serious commitment. Rooting out and prosecuting the corrupt staffers, reorganising existing IT systems, investing in effective integrative systems, and appointing high quality staff in operations and in the IT department will cost a considerable amount of effort and money.

It would be easier and cheaper to pass new laws, but what is the point of doing so when systems are so corrupted?

The government should make an urgent, firm and fully budgeted commitment to major upgrades of information systems and to the appointment of trained, competent officials managing and implementing the visa and permit systems.

In addition to that, there are some areas where laws and regulations can be improved to make them more implementable and to achieve the objective of more orderly, more regulated migration.

a) *Critical skills*

The Critical Skills List (CSL) – a list of occupations where obtaining work permission and residence is facilitated – could be replaced with a points system like the UK,

Australia and Canada for example. This addresses two issues – it is less subject to interpretation and manipulation than a CSL, as I understand, and it makes the system of attracting high-skilled labour more market efficient. Highly skilled people will only emigrate to South Africa if they have jobs lined-up, so there isn't a risk of opening the floodgates. A combination of a CSL and points system could work too.

b) Zimbabwe & Lesotho Exemption Permits

It might be politically complex to allow for the regularisation of law-abiding Zimbabweans and Lesotho citizens who came to South Africa under special permits, but the number isn't that large. There are about 178,000 Zimbabweans and 55,000 citizens of Lesotho living in South Africa under special permits. Most are long settled and have jobs and families, and some have children born in South Africa. Some are highly skilled.

In 1997 Mozambicans who had entered South Africa legally or illegally were offered amnesty to regularise their status. A similar approach should be offered to the Zimbabweans and Lesotho citizens who were allowed to enter under exemption arrangements (and their children born in South Africa) if they are properly employed or self-employed and don't have criminal records. This would be no greater gesture than was made to the Mozambicans and not costly to South African citizens, though it is true that the political atmosphere is more hostile to migrants than in 1997.

c) Bilateral Labour Agreements

The Bilateral Labour Agreements could be modernised along the lines of the Canadian system which allows for long-term temporary migration with a wide array of rights, but completely prohibits permanent residence for contract migrants or their dependants.

This would encourage more people from neighbouring countries who need to work in South Africa to use the regular Bilateral Labour Agreement channel, rather than to immigrate illegally.

d) Quotas?

Two years ago, the Minister of Employment and Labour issued a draft National Labour Migration Policy for South Africa (another, earlier draft White Paper) with draft legislation in which he proposed the establishment of quotas on an industry sector basis which would reserve a certain percentage of jobs for South Africans, not counting CSL employees. On the face of it this is unpalatable protectionism. However, it is true that many countries worldwide have similar rules, including many Organisation for Economic Co-operation and Development countries and some neighbours of South Africa. Quotas could help to appease people who feel disadvantaged by immigrant labour.

If a quota system is introduced, the levels must be set at industrial sector level by representatives of government, business and labour who are mandated by their peers. Quotas should not apply to small businesses and should be required to be reviewed regularly.

e) Asylum seekers

The 2023 draft White Paper notes that better systems for asylum seekers would

include the strengthening of the quality of personnel in DHA, efficient border posts, better prepared Refugee Status Determination Refugee Appeals Authority officers and an effective Standing Committee for Refugee Affairs. Professionalising and ensuring coordination between departments and agencies is the mandate of the new Border Management Agency.

Also, the 'first safe country' policy recommended by the 2023 White Paper could be explored, but implementation would have to be subject to bilateral or multilateral agreements. It would have to accord with the principles of international law which South Africa is so supportive of.

f) *Camps vs. inclusion*

Some political parties have called for refugee camps for asylum seekers pending decisions instead of housing only those who cannot afford accommodation. This proposal is thankfully not included in the 2023 draft White Paper. However, the issue of finding ways to reduce tensions between refugees, other foreigners and locals is also not covered.

Currently, the three spheres of South African government have virtually no formal programmes to integrate migrants with local communities nor programmes to assist migrants, especially refugees, to get started. Such activities are undertaken by a range of civil society organisations, but on a relatively small scale. All three spheres of government must get more involved in inclusion programmes and support the settling-in process for refugees, possibly in cooperation with existing programmes driven by civil society and international organisations.

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ENDNOTES

1 South Africa, Department of Home Affairs, 'Report of the Review by the Ministerial Committee on the Issuance of Permits and Visas' Ministry of Home Affairs, 10 June, 2022, p.31

2 *Ibid.*, p.42

3 *Ibid.*, p.53

4 Government Gazette, 11666, Vol. 704, 8 February 2024, No. 50098

5 Government Gazette Vol. 701, 10 November 2023, No. 49690

6 See

<https://reporting.unhcr.org/operational/operations/south-africa-multi-country-office#toc-populations> accessed 02 February 2024