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The Status 'Regularisation' Programme for Former Mozambican Refugees in South Africa

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Working Paper for the

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August 2002

The Status 'Regularisation' Programme for Former Mozambican Refugees in South Africa[1]

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1. Introduction

This paper intends to describe both the formulation and implementation of a programme to 'regularise' the legal residence status of a large group of former Mozambican refugees in South Africa and present a brief critique (from a mainly legal perspective) on the implementation of the regularisation programme itself.

2. Background to the Status Regularisation Programme

It has been estimated that out of the countless numbers of Mozambican nationals who fled to South Africa as a cause of the period of destabilisation and ensuring war in Mozambique (in which South Africa played a key role) 350,000 remained in the country by the early 1990s[3]. These persons settled mainly (though not exclusively) in the former "homeland"

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[1] This working paper is based partly on comments originally submitted by LHR to the *Task Team* in September 1998 (drafted by Schneider), and the outcome of various *Task Team* meetings. It furthermore draws on extensive feedback received from Nicola Johnston, included in a paper published by Johnston entitled "*The Point of No Return: Evaluating the Amnesty for Mozambican Refugees in South Africa*, Migration Policy Brief No. 6, Southern African Migration Project: Cape Town, 2001. Any unacknowledged statements reflect first-hand experiences of the contributors. *Note*: Not all original members of the "Task Team" became "outreach partners" and some NGOs later pulled out of the programme (including LHR). In this article, "local NGOs" refer to those who at some stage contributed (collectively or individually) to the Task Team and/or "outreach programme".

[2] Handmaker and Schneider were, formerly, co-ordinators of Lawyers for Human Rights' (LHR) Refugee Rights Project. Handmaker is an international lawyer and freelance consultant, based in The Netherlands. Schneider is currently a policy advisor with the government of Canada. Nicola Johnston was formerly head of Wits Refugee Research Programme (RRP). Both LHR and the RRP were involved in the programme's *Task Team*. However, while LHR later discontinued its participation in the FMR Amnesty programme, RRP remained directly involved throughout the duration of both the SADC and FMR Amnesties, participated in the FMR programme's outreach programme and also monitored the FMR Amnesty's implementation.

[3] Dolan, C., "Policy Choices for the New South Africa", in de Villiers and Reitzes, Southern African Migration, 53-58, quoted in Crush, J., "Covert Operations: Clandestine Migration, Temporary Work and Immigration Policy in South Africa", SAMP Migration Policy Series No 1, 1997, at note 50.

areas of South Africa, in the rural border areas[4]. Because of they were never granted formal status, they remain undocumented and so it has proven impossible to precisely determine the size of this group, which in 1998 was (nevertheless) still said to comprise the single largest group of "undocumented migrants" currently in South Africa[5].

Under the terms of a *tripartite* agreement between the government of South Africa, UNHCR and the government of Mozambique, these persons were retroactively recognised as refugees in 1993 (on a group basis) by the government of South Africa, for the purposes of a UNHCR co-ordinated repatriation programme[6]. As a result, between the period 1993 and 1994, some 65,000 Mozambicans returned to Mozambique.

On 4 December 1996, it was announced that the South African Cabinet granted an "amnesty" to the former Mozambican refugees who remained. Unlike previous amnesties for other categories of undocumented persons[7], the cabinet decision did not specify that proof of economic activity was necessary. It was purely intended to benefit persons from Mozambique who left as a consequence of hostilities in the country up until the Renamo / Frelimo Peace Accord in 1992.

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4 N. Johnston, "Accessing the SADC Amnesty: The rural experience" in The New South Africans? Immigration Amnesties and Their Aftermath, eds. J. Crush and V. Williams, SAMP, 1999, at 46

5 Prohibited Persons, Human Rights Watch, March 1998, at 19. Government put the official figure at 90,000

6 The programme's implementation generated some criticism. See Crush, J. 1997 (Ibid), C. Dolan, *Report to Norwegian refugee council*, RRP, 1995, G. Rodgers 1996 (Masters thesis Dept of Anthropology - University of the Witwatersrand), C. Dolan, Ibid, 'Aliens Aboard: Mozambicans in the New South Africa', C. Dolan, *Indicator SA*, Vol 12, No. 3 (Winter 1995), p. 29 and K.B. Wilson with J. Nunes, 'Repatriation to Mozambique', When Refugees Go Home: African Experiences, eds. T. Allen and H. Morsink, publ. United Nations Research Institute, 1994.

7 These included the "SADC Amnesty" and "Miner's Amnesty", see The New South Africans? Immigration Amnesties and Their Aftermath, eds. J. Crush and V. Williams, SAMP, 1999

2.1 Estimating numbers

Despite much uncertainty in estimating numbers, the government later declared that it believed 90,000 would be eligible under this amnesty for former Mozambican refugees ("FMR Amnesty")[8], rather than 220,000, as estimated by some local NGOs[9]. The government recorded that, out of the 146,675 Mozambicans who applied for formal legal status through the "SADC Exemption" [10], (one of the other amnesty programmes), 85,520 had been approved[11]. This confirmed that at least some of these persons included the target group of the FMR Amnesty, though it was impossible to determine exact numbers with any certainty. Thus, even on the most conservative estimates, the end result was that at least 135,000 former refugees remained in South Africa without formal legal residential status, rendering them subject to apprehension, detention and deportation as "prohibited persons" [12].

2.2 Cessation clause / delayed implementation

However, without any plans announced for the implementation of the FMR Amnesty, the *Tripartite Commission*, composed of representatives from UNHCR and the South African and Mozambique governments decided on 31 December 1996 to declare the social and political

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[8] Departmental Circular No. 34 of 1999, s.1.4(c), Department of Home Affairs

[9] 'Legalising the status of Mozambican former-refugees currently residing in South Africa, Recommendations for Implementation', prepared by local NGOs "at the request of AWEPA" by members of the *Task Team*. This document was "presented to the South African Department of Home Affairs by Dr Jan Nico Scholten, President of AWEPA", to the South African government on 5 March 1998. At page 3, "it has been estimated that perhaps as many as 220,000 Mozambicans (sic) former refugees still reside in South Africa". It must be noted, however, that a number of FMRs gained formal status through the earlier, SADC exemption / amnesty.

[10] The 1996 "SADC Amnesty" aimed to regularise the status of Southern African Development Community (SADC) citizens who had been *employed and resident* in the Republic for the previous five years

[11] Departmental Circular No. 34 of 1999, Ibid., at s. 1.4(d)

[12] The uncertainty in numbers further emphasised the difficulties that would be faced in distinguishing former Mozambican refugees (FMRs) from other Mozambican migrants, the majority of whom were undocumented.

situation in Mozambique to amount to a "significant change of circumstances" warranting the imposition of a "cessation clause"[13], thus ending the period of formal 'refugee status' for this sector of the population resident in South Africa. The FMR Amnesty seemed to be forgotten, while other programmes of amnesty took precedence[14]. The reasons were said to be largely financial, with government declaring that it lacked the financial means to implement the amnesty[15]. But there also appeared to be both departmental and political resistance, in light of certain public statements[16], continued delays[17] and concerted efforts on the part of departments responsible for border control to apprehend and deport "illegal immigrants", including in the very areas which contained the largest numbers of potential applicants[18].

2.3 Project formulation / formation of AWEPA Task Team

Towards the end of 1997 and following a seminar held in Nelspruit in June 1997[19], AWEPA[20], a European NGO based in Holland, approached a number of "local" (South African) NGOs.

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[13] Article 1C of the 1951 Convention Relating to the Status of Refugees, provides that refugee status shall "cease to apply" to a person if:

'(6) …because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, (he is) able to return to the country of his former habitual residence…'

[14] For a comprehensive discussion / assessment of these amnesties, see The New South Africans? Immigration Amnesties and Their Aftermath, eds. J. Crush and V. Williams, SAMP, 1999

[15] Presentation to the Home Affairs Parliamentary Portfolio Committee by the Director-General: Home Affairs, 5 May 1998.

[16] In June 1999, the same Departmental official responsible for decisions on the FMR Amnesty programme made a number of shockingly xenophobic statements in public on "Africa Refugee Day" (devoted to tackling xenophobia and raising awareness of refugees in South Africa). Reported in 'Rights groups slam "xenophobic" official', *Mail and Guardian*, 5 to 11 November, 1999.

[17] A letter from AWEPA to *Task Team* members on 8 March 1999, confirmed that the Department of Home Affairs decided to (further) "postpone the exemption and outreach programme until July, after the elections". As transpired, the programme only got underway in August.

[18] "Illegal rampages by home affairs", Mail and Guardian, May 15-21 1998. Discussed in further detail later.

[19] "Prolonged Hospitality or Return Home?", seminar organised by AWEPA, Nelspruit, June 1997.

AWEPA sought local partners to collaborate in a wide-ranging project, which would come together in a *Task Team* to oversee the regularisation programme's implementation. AWEPA promised it would raise funds in order to realise this. Finally, a meeting was held in Pretoria in February 1997, to which AWEPA had invited a number of (mainly South African) organisations to discuss the project's draft proposal.

Based on the results of the February 1997 meeting, a Task Team was declared to have been formed (initially of NGOs only) for the purposes of providing FMRs with the (alternative) possibility of either assisted return to Mozambique or assistance in applying for amnesty. The Task Team later incorporated the Department of Home Affairs and developed into an "outreach programme" of provincial co-ordination teams, consisting of implementing local NGOs, identified as "outreach partners" and government-led "mobile units" (discussed in more detail later) for the purposes of implementing the regularisation / FMR Amnesty programme. Responsibility amongst local NGOs was shared, initially for the purposes of advising potential applicants, organising an information campaign and monitoring the project. AWEPA / Refugiado co-ordinated the programme[21] and declared it was responsible for political discussions with the government.

2.4 Objective of the AWEPA Programme

In short, the objective of this programme was to assist former refugees, giving them the option of being assisted to voluntarily return home, or to apply for regularisation / permanent residence status through the FMR Amnesty. Funding for the programme (raised

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[20] The Association of European Parliamentarians for Africa (AWEPA) incorporates "sister" NGOs AEI (Africa European Institute) and Refugiado, the latter which administratively said to be responsible for the project whereas the former claimed to be responsible for "political negotiations". There was some confusion regarding the purportedly separate identity of these organisations, which in fact shared the same management. But in the end, it was clear that all three were one and the same, hence general reference in this paper to "AWEPA".

[21] A major logistical problem was that the Refugiado/AWEPA co-ordinator was based in the Western Cape (several thousand kilometers away from where the regularisation programme was taking place in Mpumalanga, Northwest, Kwa Zulu Natal and Northern Provinces). This was felt by NGO *outreach partners* to be unnecessarily expensive and restricted the contact between the programme co-ordinator and the local partner organisations.

by AWEPA and RRP) provided 19 mobile units, staffed by a representative of the Department of Home Affairs. NGO outreach partners, namely three volunteers from local churches and one para-legal, accompanied these units. Funds raised by AWEPA covered at least some percentage of the extra costs incurred by the Department of Home Affairs to implement this programme, which later extended to cover extra burdens placed on the Mozambican consulate[22]. While at an earlier stage in the formulation of the Task Team there was to be a separate (independent) monitoring initiative, this never materialised and so the implementing partners in the project essentially "monitored themselves"[23].

2.5 Legal complications

Early in the project's development, it was very evident that the potential legal issues involved were going to be complex, not least being the FMRs' formal lack of legal status (rendering them constantly vulnerable to apprehension and deportation as "prohibited persons")[24]. The regional office of UNHCR expressed its concern about not being consulted by the organisers of this programme and using the term "Mozambican refugee" (in light of the 1996 "cessation clause", mentioned above)[25]. At the same time, AWEPA organisers were urged to elicit further responses from Task Team members[26], prior to the programme's implementation.

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[22] *Progress Report*, Gerrit ten Velde, 'Support to the Mozambican Former Refugees of the Period of Destabilisation', Field Co-ordinator for Refugiado (AWEPA), March 2000

[23] Funding was, however, separately secured by RRP from the European Union Foundation for Human Rights in South Africa, for the provision of some monitors.

[24] See, for example, submission by Lawyers for Human Rights, presented to a meeting organised by AWEPA of the "*Task Team*", Pretoria, 27th February 1998

[25] Letter from the Director of Operations for Southern Africa, addressed to the Deputy Minister of Home Affairs of South Africa, and copied to "*Task Team*" members, 24 February 1998. According to UNHCR, AWEPA did not make any subsequent efforts to involve the organisation.

[26] See 'Legalising the status of Mozambican former-refugees (Ibid), 5 March 1998. The government responded to AWEPA on this document, four months later, in June 1998, in a letter (addressed to Dr Scholten of AWEPA) and disseminated to *Task Team* members.

Despite a much publicised "launch" of the programme by the Dutch organisers in April 1998[27], there were delays for a further year and a half, amidst much negotiation with the South African government. The programme only began implementation on 10 August 1999[28].

It was reported that in the first month of the programme, over 30,000 applications were received (including family members). By contrast, even though a survey showed that "between 20% and 40% of the (former) refugee population (were) still interested in returning to Mozambique if they (could) get assistance with transport and...support" [29], only around 40 registered in this same period for assistance to return home[30].

At the close of the regularisation programme, 150,592 applications had been received, whereas only 88 former refugees took up the option of returning to Mozambique voluntarily[31]. Thus, while the programme was designed to "kept both options open", clearly most FMRs initially preferred to take their chances with the regularisation procedure and settle in South Africa rather than return to Mozambique. The large numbers of Mozambicans who applied further confirmed that estimates of 220,000 potential applicants by local NGOs were not so unrealistic, although the organisers of the programme claimed that many who had applied were "illegal immigrants" who "seized this opportunity to obtain false papers"[32].

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[27] "Refugees the focus of new aid group", *Pretoria News*, 22 April 1998, p. 12, *The Star*, 22 April 1998. Unbeknownst to their "South African partners", in April 1998 AWEPA initiated an (exclusive) "UK launch" of the programme in London, England, reported in the UK Press, and later in South Africa.

[28] In March 1999, the "*Task Team*" was informed that the regularisation programme was to be suspended, "Return or Remain? A programme for Mozambican former refugees", *Botshabelo*, LHR, p. 8

[29] N. Johnston, "Homeward-bound", *Mail and Guardian*, October 1 to 7 1999, 42

[30] N. Johnston, "Mozambican refugees get a chance to settle", *Reconstruct*, Sunday Independent, 3 Oct. 1999

[31] *Progress Report*, G. ter Velde, Ibid., p. 2

[32] *Progress Report*, G. ter Velde, Ibid., p. 3

3. Policy framework

While the cabinet decision of 4 December 1996 to grant FMRs regularised status provided a legal basis for the regularisation programme, it did not (publicly) specify the terms[33].

In developing a policy framework for the FMR Amnesty, LHR recommended that the Task Team (and especially the department) draw reference from the previous practice of the Department. Specific attention was drawn to "Passport Control Instruction (PCI) No.20 of 1994" (as amended by PCI No. 23 of 1994), which were issued as "Guidelines for Refugee Status Determination of Mozambicans in South Africa". They were produced in conjunction with the UNHCR's regional voluntary repatriation programme undertaken in 1994, and contained a humane and workable set of guidelines believed to be applicable to a mass programme of the current nature as well. PCI No. 20 made provision for various scenarios including:

1) an individual reporting to the Department claiming to be a [former] refugee;

2) an individual apprehended as a suspected illegal alien but who provided information suggesting he is a [former] refugee;

3) an individual apprehended as an illegal alien when crossing the border or in the immediate vicinity of the border" [34].

There are additional factors to be noted about the procedures provided for in this Instruction. First, once a person was identified as having a claim of being a (former)

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[33] This paradoxically meant that, while the cabinet decision provided no objective guarantee that one would qualify, its "unconditional" nature (Department Circular No. 34, Ibid, s.1.1), it did allow room for flexibility in the event of later appeals, as is indeed currently the case regarding a number of (pending) appeals of rejected decisions.

[34] This latter provision would have been particularly valuable. There were various (unconfirmed) instances of applicants in the FMR Amnesty visiting their family in Mozambique for Christmas (which fell right in the middle of the programme), and had their permits withdrawn at the border.

refugee they were to be tracked into the relevant procedures. The same procedures were followed regardless of whether they presented themselves, or were apprehended as a suspected illegal alien.

Secondly, once a person was identified as a (former) refugee, they were issued with a temporary permit *valid for six months* and an information leaflet outlining their responsibilities and duties (which, in the case of PCI 20, included renewal of the permit after six months) [35].

Thirdly, and most crucially, under these Instructions, "if any doubt as to the status of the applicant existed the applicant should be given the benefit of the doubt.[36]"

Without any evidence to the contrary, it was assumed that these passport control instructions had never been revoked. This meant, in theory, that anyone presenting themselves as a former Mozambican refugee, or discovered during a section 7 inquiry[37] to have such a claim would be potentially entitled to a six month temporary residence permit (subject to conditions outlined in such a permit). It was suggested that these earlier instructions serve as "guidelines" for the regularisation programme.

3.1 Departmental Circular No. 34

Details of the conditions under which FMRs[38] would be granted status were ultimately incorporated in Draft Departmental Circular No. 34 of 1999[39]. While the Circular referred to

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[35] As was also the case with the information leaflet distributed during the FMR programme, such pamphlets were largely irrelevant since most FMRs were illiterate.

[36] PCI 20 of 1994, s. 5

[37] In terms of section 7 of the Aliens Control Act 96 of 1991, an immigration officer may question a person on the basis that they are suspected to be a prohibited person (i.e. without legal residence to remain in South Africa).

[38] AWEPA confusingly referred to FMRs as Refugees during the Period of Destabilisation, or "RPDs"

"*Draft* Guidelines" (emphasis added), its provisions (later modified following consultation with the NGO outreach partners), were regarded by the Department of Home Affairs as final. In addition, the Task Team collectively produced an information pamphlet.

The Guidelines and information pamphlet were later accompanied by a Department of Home Affairs (Mpumalanga Province regional office) Media Release on the 18th of August (issued one week after the programme began)[40], which provided additional guidance on the procedure.

The programme was intended to operate within strict time limitations, namely 9 August 1999 and 9 February 2000[41]; applications could only be submitted within this period. According to the Circular, applications were to be received by "mobile units made available by AWEPA", accompanied by "at least one Home Affairs official qualified to take fingerprints[42].

3.2 Inclusion Criteria

The general criteria was indicated by the government in Departmental Circular No. 34:

> "Mozambican refugees are citizens of Mozambique who entered South Africa between 1980 and 1992 and live mainly in the Gazankulu, KaNgwane and Winterveldt areas (i.e. the Northern Province, Mpumalanga and North West. Some have also settled in the northern parts of Kwazulu Natal." [43]

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[39] Departmental Circular No. 34 of 1999, *Draft Guidelines for the Exemption for the Mozambican Refugees in Terms of Section 28(2) of the Aliens Control Act, 1991 from the Provisions of Section 23(a) of that Act*, Department of Home Affairs, 15 July 1999

[40] "Support to Mozambican Former Refugees of the Period of Destabilization", Media Release, Department of Home Affairs, 18 August 1999.

[41] Departmental Circular No. 34 of 1999, Ibid., at s. 1.5

[42] Departmental Circular No. 34 of 1999, Ibid., at s. 5

[43] Departmental Circular No. 34 of 1999, Ibid., at s. 1.2

Mozambican refugees were defined as: "citizen(s) of Mozambique who entered South Africa between 1980 and before 1 January 1993 and lived in the areas mentioned in paragraph 1.2" (above).[44] It was explicitly treated as an *exclusive* definition; in other words it was not to include other areas (e.g. the industrial areas in Gauteng, where many FMRs worked) [45].

While the wording in the Circular itself was rather vague, it appeared to require that a Mozambican spouse and children (under 18 years) would be included on the same application form (presumably of a principal applicant)[46]. While this in and of itself was not particularly unusual (probably to promote administrative efficiency), it could have created problems (not least being international legal principles on maintaining the family unit) if, for example, an applicant was rejected. The Circular was not clear as to whether such a situation would exclude the spouse and children from applying separately. On the other hand, the "information pamphlet" (referred to earlier) suggested that independent applications would be permitted.

However, during the implementation, there were allegations that families of rejected applicants had been "blacklisted". An example of such a situation was where the "criminal record" of the principal applicant effectively "implicated" the rest of the family. The standard for "rejectable" criminal offences was apparently set rather low, covering even the selling of liquor without a licence[47].

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[44] Departmental Circular No. 34 of 1999, Ibid., at s. 4

[45] This geographical distinction is one of the more controversial and enduring problems of the FMR Amnesty programme. Many FMRs have been refused status under the programme due to their residence in other parts of the country, purportedly now being considered under administrative appeal.

[46] Departmental Circular No. 34 of 1999, Ibid., at s. 1.5

[47] This example can itself can be seen as a "survival strategy" on the part of certain FMR applicants, consequent on their inability to obtain formal status in the first place.

3.3 Need for Clear Eligibility Criteria

South African NGOs who were partners in the Task Team felt it was necessary to have clear criteria for those who would be eligible for the regularisation of their status in South Africa, in terms of the 4 December 1996 decision formally granting amnesty.

As a broad principle, it was submitted that those qualifying for the regularisation programme should have included "any Mozambican who arrived in South Africa before (the Renamo / Frelimo (Rome) Peace Agreement) in October 1992, as a result of the war in Mozambique", and any spouse or child of this person.

The qualifying date, clearly a crucial aspect of admission, was ultimately indicated as between 1980 and the end of 1992[48]. The information pamphlet usefully explained who could apply, indicating that it excluded those who "did not come because of the war" or who had "committed a crime".

With respect to the (alternative) choice of obtaining assistance in returning home, it was felt by local NGOs that special consideration should have been given to ensure the regularisation programme did not produce unintended results, such as the forced break up of families. In addition, the programme needed to ensure that women were not forced into decisions pertaining to their legal status and future which they would not voluntarily, or otherwise make (i.e. there should have been particular sensitivity as to gender and "household power" implications). The argument put forward by the RRP was that women should be able to apply as principal applicants, a right that they had been frequently denied under the SADC Amnesty.

As it turned out, the information pamphlet, while encouraging "family applications", did indicate that applicants (over the age of 18 years) would be permitted to apply independently, though it did not explicitly acknowledge these power implications.

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[48] Department Circular No. 34, Ibid, s.1.2

4. Required documentation

Recognising that providing documentation to establish eligibility would be a major problem, as indeed it is in most refugee contexts, it was felt to be necessary and practicable that the government agree to a list of documents, which would be admissible as proof of date of entry to the Republic during the stipulated period. Concerned local NGOs recommended that criteria for "primary" documentation[49] be broad, supplemented by a procedure for obtaining credible affidavits[50] ("secondary" documentation).

4.1 Affidavits

During the SADC amnesty, applicants were required to obtain affidavits from a very limited class of persons (e.g. Tribal Authorities), but this wasn't universally the case. According to RRP, affidavits were also permitted from "friends and neighbours", but these were only as "supporting evidence". This not only made it difficult for some to obtain affidavits, but in both cases raised a serious secondary problem of extortion and bribery which in turn cut down on access to the amnesty procedure for those who could not afford to pay for them.

In other words, if the class of persons whose affidavits would be accepted by the Department of Home Affairs was too narrow (e.g. only Tribal Authorities), this could have presented a significant barrier to the success of the regularisation programme. The specific inclusion of 'Headmen' and SACC 'Catholic Mission representatives' was made on the advice of local NGOs who had worked closely with (former) refugee settlements in rural areas, and had experienced the SADC amnesty. These two classes of individuals reportedly had extensive knowledge of the target populations and were identified as reliable and trustworthy.[51]

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49 "Primary" documents could have included: hospital records, school records, church papers, chief's or village headman papers, food ration or employer work cards, and any document issued from an office of the Department of Home Affairs (or another governmental department). UNHCR "VRAF card" issued during the 1995/96 repatriation programme, and other documents (e.g. "passport from Mozambique") could also have been used.

50 In South Africa, an affidavit is a specific, written form of testimonial evidence, sworn before a recognised "commissioner of oaths".

51 According to RRP, during the implementation of the FMR Amnesty, no headmen provided affidavits.

It was anticipated that the affidavit procedure would play a critical role in the success of the regularisation programme. In agreeing on criteria, it was ultimately necessary to strike a balance between ensuring maximum access to the regularisation programme for those who did not have other documentary evidence and devising minimum standards capable of ensuring the reliability of the affidavits as documentary evidence. Clear criteria were further necessary to prevent fraudulent applications[52]. Furthermore, a *sworn* affidavit should have been seen as having more "weight" (i.e. credibility) than an unsworn affidavit. Likewise the weight of a *sworn* affidavit might have depended on the individual who is submitting it.

4.2 Supporting (secondary) documentation permitted

As it turned out, section 2a of Departmental Circular No. 34 (providing Guidelines to the FMR Amnesty programme), specified the following documents as "proof that (the applicant) entered the country before 1 Jan 1993, and reside (sic) in one of the above-mentioned areas:

1. The yellow card issued by the refugee camps (in Gazankulu, KaNgwane and Winterveldt areas)

2. A section 41 permit (as a *prohibited person*, in terms of the Aliens Control Act 96 of 1991)

3. VRAF (Voluntary Repatriation Application Form, issued by the UNHCR

4. Ration card for food received by some refugees when they first entered South Africa

52 LHR, in its September 1998 submission, urged that the affidavit should:

(a) be *sworn* and legally notarized by a "commissioner of oaths" (in South Africa, this includes police officers, who are required to notarise documents, including affidavits, *free of charge*, upon request);
(b) *not* be made out by the applicant
(c) instead be made out by
(i) any *citizen of the Republic* who
A. is honest and trustworthy, and
B. has first hand knowledge of the residency of the applicant in the Republic during the period which makes him or her eligible for the regularisation programme, or
(ii) the *Headman* of a recognised "refugee settlement" (recognised by the tribal authority, or
(iii) a *representative of the South African Council of Churches* (represented by both catholic and protestant missions), which has been active in the relevant refugee settlement and who, as a representative, has knowledge of the applicant on behalf of whom he or she is testifying.

5. Identity card issued by tribal authorities

6. Marriage document

7. Referral letter from tribal authorities where applicant resides"

Section 2a also permitted affidavits from employers (no nationality specification) and friends, relatives and neighbours (in possession of a South African ID). "Proof of Mozambican citizenship", it stated, would be proved "by means of an identification card / document issued by the Mozambican government". The government of Mozambique was later obliged to expand its consulate capacity (supported by AWEPA) to try and accommodate this substantial, unanticipated demand. Ultimately the "passbooks" issued by the former Gazankulu and Kangwane "homeland" authorities were the most commonly used and accepted.

4.3 Burden of Proof

It was ultimately the responsibility of the applicants to show that they qualified for an exemption[53]. This was to be established by the submission of "primary" documents and "referral" letters. Affidavits made by employers, friends, relatives or neighbours in possession of a South African identity document were not only accepted, as it was mentioned. The Department in some instances also interviewed some persons who provided affidavits, in order to strengthen certain applications.

4.4 Difficulties faced in relation to documentation

This broad list of documents notwithstanding, difficulties faced by applicants (in many instances taken up with the Department) *primarily* concerned documentation, with Mozambicans unable to prove their Mozambican identity[54]. This included applicants who had previously changed their names (and obtained fraudulent ID documents) in order to

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[53] *Department of Home Affairs Media Release*, 18 August 1999, section 2.2.1

[54] N. Johnston, Ibid, states that "officials have been sending away about 70 percent of the applicants" because they "lack documents to prove their Mozambican identity".

register for schools and 'matric' examinations and now wished to regularise their status. Many of these people allegedly wished to come forward, but were reluctant, after the government took the position that applicants in possession of false identity documents would be "removed from the country".

Applications were, according to the Circular, to be "rejected on the spot", if they came from persons who were not Mozambican citizens or who entered after the 31 December 1992 cut-off date, and "no appeal" was to be allowed[55]. Nevertheless, some appeals were considered on the grounds that some applicants had been moving back and forth across the border, but were based in South Africa.

5. Access to the regularisation programme and issues relating to apprehension and deportation

Early on in discussions by the Task Team on the terms of implementation of the programme, the Department issued a number of contradictory and confusing statements on the subject of apprehension and deportation of persons who might potentially qualify for residence in terms of the programme. This was a critical area to have clarity on if there was to be a prospect of large-scale participation in the programme. South African NGOs who were partners in the Task Team maintained that if the persisting practice of arbitrary apprehension, detention and deportation continued this would have had a significant negative impact on the regularisation programme, as it ultimately did.

NGOs participating in the Task Team requested a guarantee for both those voluntarily coming forward to apply for the programme and those apprehended as suspected illegal aliens but who seem to fulfil the criteria making them eligible for the programme. A "moratorium" on deportations was proposed to the Task Team[56], in the face of growing

[55] Departmental Circular No. 34 of 1999, Ibid., at s.2. RRP observed that, in practice, applications from Mozambican nationals who ostensibly did not qualify were not arrested, respecting an agreement with the Task Team that no arrests would take place until the application phase was over. This did allow the DHA to register such persons on the computerised "Movement Control Register" database.

[56] "Legalising the status of Mozambican former-refugees", Ibid Note 8, item 4.3

allegations that the authorities "routinely" violated constitutional principles in apprehending suspected undocumented migrants[57]. Unfortunately, this recommendation was seen as impracticable by the Department at National level and deportations continued during the period leading up to the programme's implementation[58].

At one stage in negotiations within the Task Team, the Department of Home Affairs maintained that the fact that FMRs were occasionally deported to Mozambique was not within its regulatory scope, as there were a number of authorities responsible for border control. However, given that Home Affairs was the only government department capable of issuing instructions on the handling of suspected illegal aliens, it was legally incorrect for them to state this. In fact, any official apprehending a suspected illegal alien under the authority of the *Aliens Control Act* was required to conduct a "section 7 inquiry" to test whether their initial "reasonable suspicion" (that the person is an illegal alien) had any basis. In the past, instructions had been issued pertaining to the conduct of section 7 inquiries. However, there seemed to be few clear instructions relating to conduct at the initial apprehension stage[59].

In the end, while a number of apprehensions and deportations of potential applicants took place in the period *leading up to* the FMR Amnesty's implementation, throughout the implementation of the FMR Amnesty programme itself there were relatively few reported arrests of persons who came forward and applied. However, all persons were registered on

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[57] See "Prohibited Persons" Abuse of Undocumented Migrants, Asylum Seekers and Refugees, Human Rights Watch, March 1998 and "Illegal? Report on the arrest and detention of persons in terms of the Aliens Control Act", SA Human Rights Commission, Feb. 1999, the latter available at: http://www.lhr.org.za/refugee/hrcreport.htm

[58] "Illegal rampages by home affairs", *Mail and Guardian*, 15-21 May 1998.

[59] In a workshop held in late July 1998 at Kutlwanong Democracy Centre, Pretoria, the South African Police Service (including the Border Police) along with representatives of the National Inter-Departmental Structure on Border Control (NIDS) and other relevant national government departments, expressed frustration with the Department of Home Affairs over their inability or unwillingness to issue clear instructions for the handling of suspected illegal aliens. Participants expressed a willingness to adopt guidelines relating to the apprehension and detention of suspected illegal aliens. Unfortunately, nothing concrete came out of it, perhaps due to the lack of participation from the Department of Home Affairs, which chose not to attend.

the Department of Home Affairs computerised *movement control system* [60]. Local NGOs (including RRP) were therefore partly successful in convincing provincial Department of Home Affairs authorities to curtail the number of arrests[61], as it was justifiably felt this would scare off genuine applicants.

But they were not completely successful. Indeed, RRP observed a number of instances of potential applicants being stopped at roadblocks (searching for undocumented migrants) and asked for their papers. There were even allegations of documents being destroyed, particularly by members of the Defence Force (SANDF)[62]. More recently, there have been a number of arrests reported to RRP of persons who qualified for amnesty, or were awaiting a final decision on their application, following the government's "raids" on suspected undocumented migrants in Johannesburg[63].

6. Procedures for dealing with irregularities and abuses / Monitoring and corrective mechanisms

There was felt to be a great need for an efficient and effective mechanism to prevent abuses, including resources for rapid *investigation* and *redress* in cases where irregularities were reported and confirmed[64]. Ideally, there should have been a centralised mechanism, empowered to investigate and redress instances of confirmed irregularities (including a

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60 Departmental Circular No. 34 of 1999, section 8

61 RRP noted that, during the implementation period, the provincial authorities did not make many arrests even though many applicants were, in their view, "clearly bogus" (e.g. the applicants only spoke Portuguese and arrived at application points in vehicles with Mozambican number plates).

62 In South Africa, there are essentially three departments responsible for controlling the movement of people within the Republic's borders. These are Safety and Security (border police), Defence (military officers) and Home Affairs (immigration officers). Concerns have frequently been raised regarding overlapping jurisdiction for border control. See Prohibited Persons report, Human Rights Watch, Ibid., at p. 43-49.

63 "SA under fire over handling of aliens", *The Star*, 17 March 2000

64 There were subsequently allegations of bribery and corruption. *African Eye New Service*, Nelspruit, 11 January 2000.

disciplinary procedure for the offending officer, and access to the correct procedures for the complainant), rather than one relying on redress from local officials, who could be potential perpetrators themselves. A suggestion by one of the Task Team members of establishing a central point where reports of abuses could be dealt was at one stage endorsed, but not ultimately accepted by the department.

Following regional meetings held with outreach partners[65], DHA officials provided opportunities for "taking up issues" and following up complaints. This alternative was agreed to between outreach partners and the government, as an alternative to setting up an appeals body. In addition, there was one para-legal situated in each of the "mobile units" responsible for monitoring the implementation of the procedure, providing legal advice and raising complaints. An RRP monitoring and evaluation team visited each of the "Mobile Units" on a weekly basis, providing an overview of what was going on for all outreach partners and, where necessary, referring issues to the regional meetings.

It was also recommended in the "setting up phase" that special attention be paid to the Lindela facility[66]. Lindela is the final transit point for suspected illegal aliens before they are deported to their country of origin. Thus, it is an important filter point to catch potential candidates for the regularisation programme who may have been wrongfully tracked into deportation proceedings. Apart from cases of "mistaken identity" or possibly detaining those who might qualify for regularised status, it was evident that, since its inception, there had been consistent and credible reports of extensive corruption amongst the junior Home Affairs officials working at Lindela[67].

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[65] AWEPA and the European Union Foundation for Human Rights in South Africa (EUFHRSA) secured funding for local, South African NGOs to act as "outreach partners". These included South African Council of Churches (SACC), National Association of Paralegals and Refugee Research Programme.

[66] Lindela Repatriation Centre, in Krugersdorp (outside of Johannesburg) is a privately-run facility, fully sub-contracted from the Department of Home Affairs. It exists to detain undocumented migrants while they await deportation. For more on this facility, see Prohibited Persons report, Human Rights Watch, Ibid., esp. pp. 69-85.

[67] Numerous investigations culminated in an extensive report, *Illegal? Report on the arrest and detention of persons in terms of the Aliens Control Act*, produced by the South African Human Rights Commission in collaboration with others and released in February 1999. See: www.lhr.org.za/refugee/hrcreport.htm

In the end, Lindela was not monitored during the period of applications, as the regularisation programme and "mobile units" were restricted to receiving applications in the *rural provinces* of Mpumalanga, Northern Province, Northwest Province and Northern Kwa-Zulu Natal, but not the *urban province* of Gauteng, where Lindela is based [68]. However, during the "appeals phase" (10 February – 10 May 2000), there were some cases followed-up by local NGOs at Lindela. These persons had been awaiting decisions on their applications for FMR Amnesty, and were later arrested in a recent series of "raids" by police officers in Gauteng Province.

7. The issue of fraudulent documentation

The Department stated that "during the SADC amnesty the main reasons for rejection were crime or fraud",[69] which explained their uncompromising approach in dealing with these issues in the FMR Amnesty. The Department declared that, "No application from applicants with false identity documents (would) be approved". It further stated that there would be "no condonation" of this offence and "applicants (would) be removed from the country"[70].

While the local NGOs participating in the Task Team felt such allegations of fraud were over-stated, it was nevertheless acknowledged that fraud was possible, but required some explanation, and especially specific guidance at the outset as to how such cases would be dealt with. One NGO proposed to the Task Team that, in the event an applicant had committed fraud, a "bargain" could have been made between the applicant and the authorities. This could have been based on the models of other programmes requiring "full disclosure", such as the South African Truth and Reconciliation Commission (gaining applicants immunity from prosecution) and the United States Immigration and Naturalisation

[68] In addition to special care in the training of Lindela officials, LHR raised the necessity of publicly posting information at the Lindela facility relating to the regularisation program and phone numbers which can be called to report irregularities. But this was never done.

[69] Also, E. Mahlutshana, "The view from home affairs" in The New South Africans?, Op Cit., p. 28

[70] Section 4 of the *Department of Home Affairs Press Release*, dated 18 August 1999.

Service model, permitting the government to waive what would otherwise be exclusion from the procedure[71].

7.1 "Survival Fraud"

It was widely believed that many of those who fulfilled the criteria for the SADC amnesty and regularisation programme obtained fraudulent identification documents either to secure their entry into South Africa or increase the security of their residency once they had arrived in the Republic. These individuals included those who obtained ID documents using names which were not, in fact, their own names, and individuals with two or more different identification documents. Nonetheless, these persons potentially met the criteria for the regularisation programme; they could legitimately be categorised as individuals who committed a form of "survival fraud." In order to encourage persons (who might otherwise have feared apprehension and deportation as undocumented migrant) to apply to the regularisation programme, outreach partners proposed to the Task Team that these individuals should be able to apply and have their applications considered "without prejudice". This was never agreed, though it did have the support of senior provincial officials, including the former Premier of Mpumalanga Province, who had similar experiences himself years earlier, as a (South African) refugee in Mozambique.

7.2 Errors

It was further felt that a clear indication was required in terms of the effect of errors in the application procedure itself. In any large-scale programme of this nature, there are inevitably cases of both intentional fraud, as well as errors in the application procedure, one common mistake being the date of birth. While it was anticipated that the number of simple errors would be quite small given the nature of the outreach programme, it was still expected that they would occur. In other words, errors of fraud and some errors of mistake were anticipated. It was proposed to the Task Team (by LHR)[72] that there be a degree of

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[71] Klaaren, J., book review of J Crush and V Williams (eds) The New South Africans? Immigration Amnesties and Their Aftermath, (1999) 15 South African Journal on Human Rights 574-576.

[72] LHR submission to the *Task Team* in September 1998

leniency towards those who had clearly committed a "mistake" (rather than intentional fraud), and otherwise had not intended to mislead the authorities, but this proposal was also never agreed.

8. Applicants' rights in the procedure, information pamphlet and information campaign

With regard to the initial procedure, those coming forward to apply for regularisation needed to be issued with certain documentation, namely a temporary permit and an information pamphlet informing them of their rights, complemented by an extensive information campaign.

8.1 Temporary permits

Local NGO members of the Task Team proposed that an applicant's permit be valid for the period in which their application was under examination (e.g. for the six-month duration of the regularisation programme, allowing possible extension if the decision was not made within this period). The period ultimately agreed (through "trial and error"), was for three month renewable permits, which greatly increased the Department's administrative burden.

Rejected applicants ought to have been given either a reasonable period of time to leave the Republic on their own initiative (including time to tend to their personal affairs) or consider appealing a rejected decision. It was further recommended that full details of the appeal procedure be included with the notice of rejection.

The Department at one stage indicated that the period from the date the applicant received a written rejection, and was expected either to appeal or leave the country, would be one 21 days[73]. This period was ultimately extended to one-month, in consideration of the fact that many of these persons had been settled in the Republic for some time. Temporary permits were granted to appealing applicants in terms of s.41 of the Aliens Control Act 96 of

[73] This was an agreement determined at an inter-provincial planning meeting between government and NGO outreach partners.

1991[74]. Details of the procedure were not specified in the Guidelines, but were detailed in the information pamphlet. The Guidelines specified that applications were to be decided by officials "at the level of Senior Administrative Officer / Control Immigration Officer"[75]. There were no details provided regarding the appeals procedure, only that they would be considered by officials of the ranking of "ASD level" [76], though persons appealing rejected decisions were ultimately given extended permits in terms of section 41.

8.2 Information pamphlet

The information pamphlet was important, as it was unlikely that applicants would have had the benefit of legal representation. The applicants "rights" should have included the effects of a successful / unsuccessful application (including procedures and time periods for appeal) and the period and circumstances under which they would be required to leave the country if their application was finally rejected.

The information pamphlet should also have made clear the applicant's rights in the event they were apprehended as suspected illegal aliens. Similarly, the procedure for voluntary departure from the Republic should have been described in the pamphlet. In particular, their legal position should have been clear regarding "interim protection" during the period leading up to the implementation of assisted return programmes.

In the final information pamphlet neither of these rights were specified. The pamphlet only explained those who were entitled to apply, what the procedure was (including the documents needed), where and when to apply and that it was not necessary to prove that

[74] This section in the Aliens Control Act is customarily used in respect of persons awaiting final judgement in a court case. More recently, it has been used to "except" persons who have lodged applications for political asylum.

[75] Departmental Circular No. 34 of 1999, section 3(a)

[76] Departmental Circular No. 34 of 1999, section 3(b). To no great surprise, there was subsequently much confusion over the appeals process, and a number of appeals are currently outstanding at a senior departmental level. There is a possibility of court challenges to decisions made under this procedure, by way of judicial review.

one had a job (a crucial distinction from the SADC Amnesty) [77]. As an alternative, para-legals (not officials) verbally explained an applicant's rights in explaining the purpose of the s.41 permit. While the RRP observed that this was the only effective method in dealing with applicants who were, for the most part, illiterate, there remains much uncertainty as to what in fact applicants' rights were in the procedure.

8.3 Information Campaign

The information campaign, notifying potential applicants about the programme, was originally intended as a major component of the local NGOs' involvement, in reference to detailed recommendations by local experts knowledgeable of the mistakes made in the earlier, SADC amnesty[78]. Unfortunately, the campaign was ultimately quite restricted, attributed largely to delays in the start date by the Department of Home Affairs.

There were one or two news articles detailing the programme, but very little publication in the mainstream press. However, local radio stations were used for 2 weeks prior to the start-date. There were also community meetings held in all of the major FMR settlement locations[79].

A media statement by the Department of Home Affairs was only released 9 days *after* the programme had begun[80]. A condensed information pamphlet produced by the Task Team was translated into all the relevant local languages and distributed. However, its circulation was confined to Mpumalanga, Northwest Kwa Zulu Natal and Northern Provinces, in areas where there had previously been refugee camps/settlements.

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[77] It also, helpfully, indicated that no fee was required, presumably part of an effort to limit corruption.

[78] "Legalising the status of Mozambican former-refugees", Ibid, item 3 and V. Williams, 'Lessons for the Third Amnesty', The New South Africans? Ibid, pp. 86-87.

[79] RRP observed that locally-spread information was much more effective than newspaper articles, which were read more by local South Africans rather than the FMRs. At the end of the day, RRP felt that the information campaign in the FMR amnesty was more effective than that of SADC.

[80] Department of Home Affairs, Media Release, dated 18 August 1999.

The end result was that few persons or NGOs outside these rural areas (other than those directly involved) were aware that the procedure was to be implemented from the 10th of August.

9. Conclusion

It is our conclusion that, on one hand, many of the problems encountered by the Task Team were anticipated, and could thus have been avoided had the programme's organisers given greater credence to the concerns raised by local NGOs (as indicated above). Indeed, the Department of Home Affairs confirmed some time before the regularisation programme began that it was "unlikely that anything (would) be done differently" from the previous amnesties[81]. In other words, the "confusion and uncertainty" in connection with the previous amnesties seemed destined to be repeated in the FMR amnesty.

There were some notable successes in the programme's implementation observed by RRP, which cannot be over-looked. These included: the constructive working relationships which developed between local NGOs and government officials (particularly at regional levels), better dissemination of information during the course of the programme's implementation and the support which para-legals provided to applicants.

In short, while implementation of the regularisation procedure was faced with numerous problems, often of a complex nature[82], there were also some positive results. Perhaps the greatest benefit (observed by RRP) was the "autonomy" given to the regional offices that allowed for a certain amount of "flexibility and adaptability"[83].

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[81] V. Williams, Ibid, p. 85

[82] E-mail communication by N. Johnston, 12 February 1999, to SAIMMIG list-server, a discussion list of 150 members focussing on migration issues in the country: "We feel it is important to get wider inputs from other actors in the field of migration on some of the issues we are encountering – many of which are pretty complex!" (sic)

[83] Confirmed in Department Instruction No. 34 of 1999, s. 3, which permitted decisions to be taken by regional officials.

While the FMR Amnesty programme will continue to be evaluated by the outreach partners themselves, we hope that a more comprehensive, *independent* evaluation of the FMR Regularisation Programme will take place. This would be crucial in order to assess fully (and objectively) the successes and failures, as this paper can only touch upon a few issues from primarily a legal / human rights perspective. Issues relating to the vagueness of the procedure, non-transparent "political negotiations", non-transparent funding situation and restricted information campaign all need to be carefully analysed, also in the context of what was "forewarned" by various commentators and local NGO members of the Task Team[84]. Equally, we feel that an assessment of the consequent value and/or detriment of political discussions that took place between the organisation AWEPA and the two governments concerned, the co-ordinating role played by AWEPA and the subsidiary role in this process played by local NGOs, would be important.

At the end of the day, the great deal of time that passed between the making of the cabinet decision and actual implementation of the programme was widely felt to be the main cause of concern. During this period, there were numerous allegations of maltreatment of foreigners by authorities, resulting in a number of potentially eligible applicants being arrested and deported[85]. Again, additional research is needed in order to make a final assessment of this programme, determine what lessons can be learnt, both for the benefit of government and NGOs in similar, large-scale operations in future.

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[84] A key issue of concern that arose in our own organisations' involvement in the project, and subsequent investigations, concerns the role of a foreign NGO in going beyond fund-raising and taking the responsibility for organising such a complex exercise, in particular taking responsibility for "political guidance", and co-ordination. There was a strong feeling that a great deal of the recommendations contained in various documents referred to in this article, many of which were the product of extensive research, were largely ignored by the organisers. In particular, a comprehensive collection of research, which brought together a number of experts commenting on earlier amnesties and contained detailed, additional recommendations for the implementation of this, the "third" amnesty, did not appear to be taken very seriously. See V. Williams, 'Lessons for the Third Amnesty', (Ibid), pp. 84 – 88*, Legal Issues Raised by the 'Status Regularisation Programme' for Mozambican Former Refugees*, presented to the Task Team, LHR, September 1998 and various minutes of *Task Team* meetings. This major oversight may have played a role in the difficulties subsequently faced in the programme's implementation.

[85] V. Williams, Ibid, p. 84 and Johnstone, Selabi and Simbine, "The Usual Victims", in Beyond Control, ed. J. Crush, SAMP, 1998