



# NON-NATIONALS





# INTRODUCTION AND BACKGROUND

The Constitution of the Republic of South Africa, 1996 protects the rights of all people in South Africa, including non-nationals. Human rights are applicable to all people, therefore everyone in the country is entitled to human rights by virtue of being human. Section 9 of the Constitution prohibits discrimination against anyone on one or more grounds including amongst others, race, colour, ethnic or social origin and birth. In addition, South Africa is party to international laws and agreements that commit the country to respect and protect the rights of everyone within the country, regardless of where they originally come from<sup>1</sup>.



Globally, migration is on the increase, and South Africa is no exception to this phenomenon. Nationals from the region, the continent, and from around the globe migrate to South Africa for various reasons: economic, social, political, security, and other reasons. Statistics South Africa estimates that there were 2.2 million documented immigrants in South Africa during 2011, making up 4.2% of South Africa's population<sup>2</sup>.

Protecting and promoting the rights of all non-nationals are integral to the right to equality and human dignity as recognised in South African law. While all basic rights apply equally to non-nationals, some rights apply only to citizens.

<sup>1</sup> *Khosa and Others v Minister of Social Development and Others* [CCT 12/03]; *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114

<sup>2</sup> <http://www.statssa.gov.za/publications/P03514/P035142015.pdf> accessed 1 Oct 2018. Stats SA however points out that population figures are not static and likely to have changed significantly due to a number of variables.

These rights are available freely to citizens but may be limited in respect of persons who are not citizens and include the right to:<sup>3</sup>

- Vote, nor form, lead, campaign or recruit members for a political party;
- Enter, remain in and reside in the Republic as well as obtain a passport;
- A profession, occupation or trade;
- Gain access to land on an equal basis as citizens.

It is important to note that while the rights are limited in their application to non-nationals they are not completely inapplicable to them and a non-national may for instance take up a profession once certain legal conditions are met.

## THE CLASSIFICATION AND DIFFERENT CATEGORIES OF NON-NATIONALS

The categorisation of non-nationals is determined by the reasons for their migration to South Africa. This informs the type of authorisation and documentation conferred by the Department of Home Affairs to individuals entering the country.

International migrants are different from international visitors. Migrants to South Africa are people who are likely to change their usual country of residence to South Africa for a longer duration, either temporarily or permanently, than a visitor would. International visitors intend returning to their country of origin whereas migrants may not have such an intention. When a person moves, the country of origin views them as an emigrant and the country of destination views them as an immigrant.

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<sup>3</sup> Sections 19, 21 22 and 25

Some of the common categories for classification of non-nationals are as follows:

## Undocumented migrants

Undocumented migrants are non-nationals without the necessary authorisation from the Department of Home Affairs to be in the country. The exact number of undocumented non-nationals in South Africa is difficult to assess<sup>4</sup>. Regardless of their undocumented migrant status, such people must still be treated with dignity and respect and in a fair and humane manner in keeping with our Constitution. Non-nationals, including undocumented migrants, have a reciprocal responsibility to respect and abide by the laws of South Africa.

## Refugees and asylum seekers



A refugee is a person who has a well-founded fear of being persecuted or mistreated because of their race, tribe, religion, nationality, political opinion or membership of a particular social group in their country of origin. Such people are granted protection in terms of the Refugees Act, 130 of 1998. An asylum seeker is a person who has registered an application for refugee status with the Department of Home Affairs, and is awaiting finalisation of their application. While they await the outcome of their application, they are issued with an asylum seeker permit. Only once asylum has been granted does such a person then become a refugee. South Africa currently hosts asylum seekers who are mainly from other African and Asian countries<sup>5</sup>.

<sup>4</sup> [www.africacheck.org/reports](http://www.africacheck.org/reports) notes that although estimates of 5 million undocumented migrants are reported, no clear empirical data is available to support the estimate.

<sup>5</sup> According to UNHCR, as of 31 December 2016, South Africa hosts 308,156 persons under UNHCR's mandate, of which 92,296 are refugees and 215,860 are asylum-seekers. According to statistics provided by the Department of Home Affairs, 14,333 new arrivals were registered in South Africa in January-June 2017. The overall recognition rate at the first instance was 7.2 per cent at 30 June 2017.

A person does not qualify for refugee status if there is a reason to believe that he/she:

- a) Has committed a crime against peace, a war crime or a crime against humanity;
- b) Has committed a crime which is not of a political nature outside the country of refuge prior to his admission and which if committed in the Republic would be punishable by imprisonment;
- c) Has been guilty of acts contrary to the objects and principles of the United Nations and the (then) Organisation of African Unity Conventions<sup>6</sup>;
- d) Enjoys the protection of any other country in which he/she has taken residence.

A refugee enjoys full legal protection in the country where asylum is granted, which includes the rights set out in the Bill of Rights and the right to remain in South Africa. Refugees are therefore entitled to:

- a) Seek employment;
- b) The same basic health services and basic primary education which all inhabitants of the country receive from time to time;
- c) Apply for an immigration permit in terms of the Immigration Act 13 of 2002 after five (5) years' continuous residence in the South Africa from the date on which he/she was granted asylum, if certified that he/she will remain a refugee indefinitely;
- d) An identity document and a travel document.



Refugees, like all who live in South Africa, are required to abide by all laws and may be removed from the country on grounds of national security or public order.

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<sup>6</sup> 1951 UN Convention Relating to the Status of Refugees and 1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa

## Temporary residence visas

The Department of Home Affairs issues various types of permits to non-nationals who want to enter South Africa on a temporary basis. The following temporary residence visas can be applied for, provided the necessary requirements in terms of the Immigration Act are met:



## Business visas

Business visas are issued to those who seek to establish a business or invest in an existing business in the country. Such persons must ensure that at least 60% of the total staff complement to be employed in the operations of the business are South African citizens or permanent residents who are permanently employed.

In addition, the business must be registered with the South African Revenue Service, Unemployment Insurance Fund and Compensation Fund for Occupational Injuries and Diseases.



## General Work visas

General work visas are issued to non-nationals where it has been proven beyond reasonable doubt that South African citizens and permanent residents with the relevant qualifications or skills and experience are not available for appointment for a particular job. Prior to applying for a general work visa, the applicant's prospective employer is required to apply to the Department of Labour for a certificate confirming that:



- a) Despite a diligent search, the prospective employer has been unable to find a suitable candidate with qualifications or skills and experience equivalent to those of the applicant;
- b) A contract of employment stipulating the conditions of employment and signed by both the employer and the applicant is in line with the labour standards in the Republic and is made conditional upon the general work visa being processed.

### Critical Skills Work visas

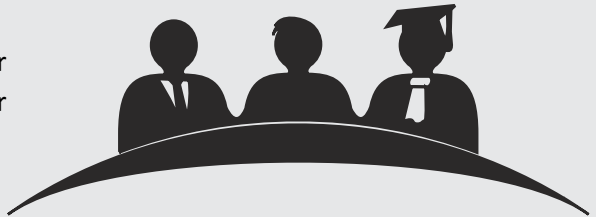
The Minister of Home Affairs from time to time publishes in the Government Gazette a list of critical skills that the country requires. Non-nationals who possess any of the listed critical skills may apply for a Critical Skills Work visa for them to be able to work in South Africa.

### Intra-Company Transfer Work visas

A foreign employee in a key position who has been transferred from a foreign branch of a multi-national company to a branch, subsidiary or an affiliate of that company in South Africa must apply for intra-company transfer work visa. This type of visa does not require steps to be taken to obtain the services of a South African citizen or permanent resident. Intra-company transfer visas are issued for a maximum period of 4 years and are not renewable or extendable.

### Study visas

Study visas are issued only for studies at a school, college or institution of higher education<sup>7</sup>.



### Exchange visas

Exchange visas are applicable to non-nationals who are taking part in a programme administered or organised by a learning institution in South Africa in conjunction with a learning institution of a foreign state.

### Retired persons' visas

A person who wishes to retire in South Africa may apply for a retired person visa, provided that he or she receives at least R 37 000 per month from a pension fund or an irrevocable retirement annuity or has a net worth or a combination of assets realising a minimum monthly of R 37 000<sup>8</sup>.



<sup>7</sup> As contemplated in the South African Schools Act, 1996; Further Education and Training Colleges Act, 2006 and The Higher Education Act, 1997 respectively

<sup>8</sup> This is the current figure but it is revised from time to time in terms of the Regulations to the Immigration Act



## Relative's visas

A relative's visa may be issued for a set period of time by the Director-General to a non-national who is a member of the immediate family of a citizen or a permanent resident, provided such citizen or permanent resident is able to prove that they can provide financial assistance to the relative as prescribed.

## Medical treatment visas

A medical treatment visa may be issued to a non-national who needs to undergo medical treatment in the Republic.



## Permanent residents

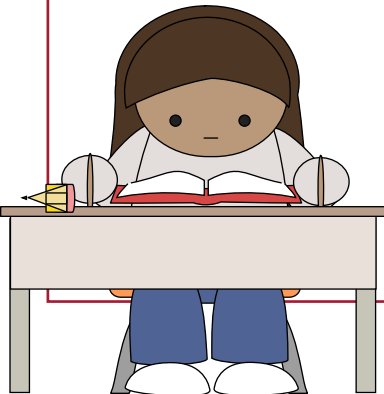
Permanent residents are non-nationals who are entitled to reside in South Africa indefinitely, having satisfied the requirements for direct residency or residency on other grounds, but remain citizens of their country of origin and not of South Africa.



# CHALLENGES FACED BY NON-NATIONALS

Non-nationals face a number of challenges in accessing their rights. Some common challenges include procedural difficulties with the application and determination process for the relevant documentation related to their immigration status; accessing basic services such as health, education and shelter as well as problems related to social integration. A general common lack of awareness that the rights of non-nationals are protected in the Constitution contributes to the challenges non-nationals experience in South Africa.

Children, mostly of asylum seeker and undocumented migrant parents, often find it difficult to access the public education system. Section 28- 29 of the Constitution provides for the right to education for all children and the best interest of the child is of paramount importance when dealing with children.





The South African Schools Act prohibits discrimination of any form in the admission of children into school, therefore no child may be discriminated against based on his/her own status or that of his/her parents or because their parents experience delays in furnishing required documentation. The National

Education Policy requires schools to assist the child to obtain documentation and where there is none, the burden to comply with documentation requirements is shared between parents and the school.

Access to public health care facilities is another challenge that non-nationals encounter, mainly due to a lack of awareness on the part of some front line health care staff. Section 27 of the Constitution entitles everyone to access basic health care services and no one may be denied emergency medical treatment. This means even undocumented migrants may not be refused emergency medical treatment on the basis of their lack of documentation; but they may be held liable to pay fees for any other health services<sup>9</sup>. The National Health Act, 61 of 2003 provides that children below the age of six and pregnant or lactating women can access free health care services, irrespective of their documentation status or nationality. The right to health care can however be limited, for everyone, depending on the availability of resources.

Minimal assistance in critical cases is provided for short periods by faith-based organisations on a humanitarian basis; or by the United Nations High Commissioner for Refugees (UNHCR) for asylum seekers or refugees through its partner non-governmental organisations. The majority of non-nationals therefore tend to support themselves.

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<sup>9</sup> Annexure H of The National Uniform Fee Patient Schedule



Xenophobia remains one of the single biggest ongoing obstructions that non-nationals face in their attempts to integrate into another community. The definition of xenophobia is the irrational dislike, fear or hatred of non-nationals/ foreigners based on unfounded myths and stereotypes about such persons. However, this definition has now been

expanded to include widespread entrenched prejudices and discrimination, whose motivations include material or political gain targeting non-nationals due to the systemic disadvantages and vulnerabilities associated with being foreign<sup>10</sup>. Xenophobia manifests itself in different ways such as derogatory name calling; blaming non-nationals for social ills, crime and unemployment; theft of goods and property; and physical attacks, which results in displacement or death and institutionalised denial of basic services for non-nationals.

## PROTECTING THE RIGHTS OF NON-NATIONALS

Whilst the State has the primary responsibility for safety, security, and social cohesion, it is important that all who reside in the Republic (nationals and non-nationals alike) collaborate in working towards a just and equal society that is inclusive of non-nationals, in the promotion and protection and realisation of the rights of everyone, in line with the government's Draft National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance.

### South African Human Rights Commission

The South African Human Rights Commission (SAHRC) is the national human rights institution in South Africa as designated by the Constitution. Its mandate is to promote, protect and monitor the observance of human rights in the Republic. The SAHRC has a Commissioner with a dedicated focus on the area of migration and non-nationals.

<sup>10</sup> Southern Africa Migration Policy Series 14: SA Attitudes to Migration and Immigration 1999

The SAHRC engages directly with members of the public, State Departments, the Office of the High Commissioner for Refugees (UNHCR), non-nationals, and civil society organisations to raise awareness and protect the rights of non-nationals. Outreach interventions, publication of educational material and disseminating information to enable the affected group to assert and enforce their rights are some of the methods the SAHRC uses to improve awareness levels and access to justice. The SAHRC has developed this information sheet for the general public to provide basic information on non-nationals.



The SAHRC has powers to investigate and report on the observance of human rights as well as to take steps to secure appropriate redress where human rights have been violated<sup>11</sup>. This means that any person who feels that their rights have been violated can approach the SAHRC for assistance, at no cost. A complaint may be lodged at any of the provincial offices of the SAHRC where the alleged violation of a fundamental right took place. A complaint can be lodged in person, by telephone, in writing or by completing the online

complaint form. Where the SAHRC is unable to deal with a complaint, it will explain why and recommend alternative forms of recourse. If after preliminary investigation, the SAHRC is of the opinion that there is substance in any complaint, it will in so far as it is able to do so, assist the complainant and other persons adversely affected to secure redress.

The SAHRC can also refer matters to other competent bodies like the Public Protector, Commission for Gender Equality and Commission for Conciliation Mediation and Arbitration for investigation; or to the Equality Court on matters involving unfair discrimination.

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<sup>11</sup> SAHRC Report on the Investigation into Issues of Rule of Law, Justice and Impunity arising out of the 2008 Public Violence against Non-Nationals, 2010.



The SAHRC calls upon the people of South Africa to embrace the spirit of *ubuntu* in building an inclusive society that is united in diversity.



Arising from a court order where the SAHRC argued that the Department of Home Affairs was detaining undocumented migrants for periods longer than the 30 days prescribed in the Immigration Act, the Department of Home Affairs now provides the SAHRC with reports regarding period of detention of detainees. In addition, to advocating for independent monitoring mechanism for places of detention, the SAHRC monitors the Lindela Repatriation Centre and certain police stations to ensure that detentions and deportations of non-nationals are in line with minimum international standards<sup>12</sup>.

The SAHRC also works with a number of international bodies such as the UNHCR, International Organisation for Migration (IOM) and local non-governmental, faith or community-based organisations to advance the rights of non-nationals. Examples of such organisations include, but are not limited to, the member organisations of the Consortium for Refugees and Migrants in South Africa, Lawyers for Human Rights, African Centre for Migration and Society, Jesuit Refugee Service, Legal Resources Centre and law clinics at universities. Any non-national who feels that any of their rights have been violated may also visit such organisations for assistance.

The SAHRC calls upon the people of South Africa to embrace the spirit of *ubuntu* in building an inclusive society that is united in diversity.

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<sup>12</sup> SAHRC Lindela Monitoring Project Report; 2016

## NOTES

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