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The Challenge of Immigration Policy in the New South Africa

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South Africa's immigration policy is in a state of flux. South Africa's borders, once heavily guarded by government troops fighting African National Congress guerillas, have proven to be an ineffective barrier to the recent surge in illegal immigrants and refugees entering the country.¹ Following the national election which brought Nelson Mandela's coalition government to power, illegal immigrants have flocked to South Africa in the hope that the Mandela government will be more sympathetic to their interests than were previous administrations.² South Africa is particularly attractive to immigrants and refugees due to its higher wages, better living standards, and more secure future.³ The South African Department of Home Affairs estimates that as many as 2,000,000 illegal immigrants now reside in South Africa.⁴ The emergence of South Africa as a magnet for the region's immigrants and refugees presents a difficult challenge to a country which is in the process of redefining itself and its relationship with other African nations following the demise of apartheid.

Lured by potential economic opportunities, immigrants to South Africa have found "little more than grinding poverty and xenophobia" upon reaching

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1. Ray Kennedy, *South Africa Plans Clampdown on Illegal Immigrants*, THE TIMES (London), Dec. 5, 1994, at 13.

2. Liz Sly, *South Africa Is the New Lure for Continent's Refugees*, CHI. TRIB., Oct. 9, 1994, §1 at 1, 20. Traditionally, immigrants to South Africa have come mainly from neighboring countries such as Mozambique, but in recent years the sources for South Africa's immigrant population have broadened to include such countries as Zaire, Nigeria and Somalia. Karl Maier, *Bring Back Pass Laws, Say Black South Africans*, THE INDEPENDENT, Dec. 26, 1994, at 6, available in LEXIS, World Library, CURNWS File.

3. Hussein Solomon, *Migration in Southern Africa: A Comparative Perspective*, 24 AFR. INSIGHT 60, 62 (1994). Although forced to flee for political reasons, refugees are also choosing South Africa for economic reasons. Sly, *supra* note 2, at 1. Economic immigrants have largely gravitated towards Johannesburg, South Africa's commercial center. Judith Matloff, *Flood of Illegals Stymies a New South Africa*, CHRISTIAN SCI. MONITOR, Jan. 5, 1995, at 7. Paradoxically, while illegal immigration is on the upswing in South Africa, legal immigration to South Africa is on the decline, dropping over 23% between 1993 and 1994. *Immigration to South Africa Drops in Past Year*, REUTERS WORLD SERVICE, Sept. 16, 1994, available in LEXIS, World Library, CURNWS File.

4. Bill Keller, *Dazzled by Rich South Africa, Migrants Pour In*, 22 MIGRATION WORLD, No. 5, 1994, at 8, 9.

their destination.⁵ Tolerated in the past as a source of cheap labor for businesses owned by whites, recent immigrants to South Africa are facing an increasingly hostile response in South Africa. The current rise in anti-immigrant sentiment has been fueled by labor unions who fear that immigrants will compete with black South Africans for jobs, housing, and resources.⁶ One of the most outspoken advocates of anti-immigration policies is Chief Mangosuthu Buthelezi, leader of the Inkatha Freedom Party; Chief Buthelezi is also the Minister of Home Affairs, the position responsible for implementing the Mandela government's immigration policy.⁷ An October 1994 conference of South African political scientists demonstrated that views on immigration in South Africa are often divided along racial lines.⁸ Nearly all of the white academics at the conference supported a liberal immigration policy, while most black academics argued for restrictions on immigration so long as economic opportunities for native South Africans remain unrealized.⁹

Anti-immigrant sentiment in South Africa has presented the African National Congress with a political dilemma. It must protect the jobs of its impoverished constituency, but any measure which achieves this result by cracking down on immigration risks alienating neighboring countries that provided safe harbor for South African exiles who fought the white apartheid regime.¹⁰ Despite this thorny political dilemma, the new South African government continues to take a hard-line position on immigration. South Africa classifies refugees from Mozambique as illegal immigrants and has enforced a policy of forced repatriation. This policy expels refugees and illegal immigrants to Mozambique at a rate of 3,000 people per week.¹¹ In a period of only two months in 1994, South Africa deported over 50,000 illegal emigrants from Mozambique.¹²

The centerpiece of South Africa's restrictive immigration policy is the Aliens Control Act of 1991.¹³ Regarded by some critics as "possibly the

5. David Beresford, *The Streets of the City of Gold Are Paved with Misery: Waves of Illegal Immigrants Find Only Poverty in South Africa*, THE GUARDIAN, Oct. 6, 1994, at 18.

6. Sly, *supra* note 2, at 20.

7. Beresford, *supra* note 5, at 18.

8. John Battersby, *Era of Borderless World Challenges South Africa*, CHRISTIAN SCI. MONITOR, Oct. 19, 1994, at 7, 14 [hereinafter *Borderless World*].

9. *Id.*

10. Matloff, *supra* note 3, at 7.

11. Solomon, *supra* note 3, at 67.

12. Maier, *supra* note 2, at 6.

13. Aliens Control Act 96 of 1991, 5 JUTA'S STAT. S. AFR. 2-26 (1994) (amended 1993).

ugliest leftover from apartheid [still] on the statute books,"¹⁴ the Act gives any police officer or immigration official the right to declare anyone suspected of being an illegal immigrant a "prohibited person."¹⁵ Such a person must be deported, and the detainee then has the burden of proving his or her innocence.¹⁶ The mandates of the Act also include harsh provisions that insulate deportation decisions from any possible legal or administrative review. Section 55 of the Act provides in part, "No court of law shall have any jurisdiction to review, quash, reverse, interdict or otherwise interfere with any act, order or warrant of the Minister [or] an immigration officer . . . issued under this Act . . ."¹⁷ Such a provision may violate the guarantee of administrative justice found in the new South African constitution, but the Aliens Control Act has yet to face such a constitutional challenge.¹⁸

Another centerpiece of South Africa's immigration policy is an enormous eighty-mile barbed wire fence erected along its border. Intended to act as a deterrent to illegal immigration, one stretch of the fence was electrified with 3,200 volts of electricity.¹⁹ This electrified fence is responsible for more deaths than the Berlin Wall.²⁰ Despite the large toll it exacts in human suffering, the fence has been ineffective in impeding the flow of refugees and illegal immigrants into South Africa.²¹ Although the fence is still in place, the

14. Eddie Koch, *South Africa: Immigrants Learn to Live Under Draconian Laws*, Inter Press Service, July 15, 1994, available in LEXIS, World Library, CURNWS File. Ironically, many black South Africans support enforcement of the country's dormant pass laws, formerly a cornerstone of the apartheid regime responsible for enforcing racial oppression, as a means to control immigration. Maier, *supra* note 2, at 16.

15. Koch, *supra* note 14; See Aliens Control Act, § 39, 5 JUTA'S STAT. S. AFR. at 2-38 (outlining different categories of "prohibited persons").

16. Aliens Control Act, § 59(1) "Evidence": If in any proceedings the question arises whether, or it is alleged that, any person entered or remained in the Republic in contravention of the provisions of this Act, such person shall be presumed to have so entered or remained in the Republic until the contrary is proved. 5 JUTA'S STAT. S. AFR. at 2-43.

17. Aliens Control Act, § 55, 5 JUTA'S STAT. S. AFR. at 2-42.

18. Koch, *supra* note 14. The South African Constitution's guarantee of administrative justice reads:

Every person shall have the right to—

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.

S. AFR. CONST. (Act 200 of 1993), § 24, 5 JUTA'S STAT. S. AFR. 1-266, at 1-269 (1994) (amended 1994).

19. Solomon, *supra* note 3, at 67.

20. *Id.* at 67-68.

21. Beresford, *supra* note 5, at 18; Solomon, *supra* note 3, at 67.

electric current has been turned off.²² There are no plans to switch the current back on, but some high-level officials in South Africa's government have advocated extending the fence to prevent illegal immigration from Mozambique.²³

South Africa's failure to create an effective physical barrier to immigration along its borders has prompted a reconsideration of its approach to immigration policy. South Africa's current approach may be shifting away from the current scheme of forced repatriation to a focus on enforcing laws which seek to eliminate the incentives for immigration to South Africa.²⁴ The Aliens Control Act established a system of penalties for employers who hire illegal immigrants.²⁵ Under the provisions of the Act, an employer of an illegal immigrant may be fined up to 40,000 rand (U.S. \$11,400) and can be sent to prison for two years.²⁶ Greater enforcement of the toughest penalties under the Act may be used as an alternative to attempts to control illegal immigration at the border.²⁷

The failure of South Africa's hard-line immigration policy to control the influx of refugees and immigrants into South Africa has reinforced the belief held by many experts that the only long-term solution to South Africa's immigration problem is to foster the economic development of South Africa's neighbors, and thus lessen the incentive to come to South Africa. President Mandela has demonstrated support for such proposals. Specifically, he has called for greater regional integration which would ultimately eliminate most tariff, trade, and immigration barriers in southern Africa.²⁸

Assuming such an approach could effectively address immigration problems, an initial stumbling block to regional integration is the condition of South Africa's economy. South Africa's apartheid regime left a legacy of an internally unbalanced socio-economic development.²⁹ A country struggling to improve the living standards of its own impoverished population is hardly an ideal engine for regional economic development. The political climate in

22. Matloff, *supra* note 3, at 7.

23. *Id.* (citing the views of South African Defense Minister Joe Modise).

24. *Jail Threat to South Africa Illegal Aliens' Employers*, REUTERS WORLD SERVICE, Dec. 2, 1994, available in LEXIS, World Library, CURNWS File [hereinafter *Jail Threat*].

25. Aliens Control Act, § 32(1): "No person shall—(a) employ or continue to employ any alien who is in the Republic in contravention of the provisions of this Act." 5 JUTA'S STAT. S. AFR. at 2-36.

26. *Jail Threat*, *supra* note 24.

27. *Id.*

28. John Battersby, *Striving for Links After Decades of Hostility*, CHRISTIAN SCI. MONITOR, Sept. 21, 1994, at 8 [hereinafter *Striving for Links*].

29. *Id.*

South Africa also hinders development of any regional integration plan that includes relaxed national immigration controls. In the final analysis, the current anti-immigrant sentiment in South Africa presents a catch-22 situation for any regional integration plan. Eugene Nyati, director of the Center for African Studies in Washington D.C., notes, "Any attempt to open up [South Africa's] borders could lead to further resentment, which could jeopardize future regional integration policies."³⁰ On the other hand, South Africa's decision to continue a hard-line approach on immigration alienates its neighbors and risks derailing plans for regional integration.

South Africa's attempts to serve as a catalyst for increased regional integration may be extremely important in resolving immigration issues, yet South Africa also faces difficult internal migration problems which are seemingly immune to such a solution. South Africa has approximately 4.1 million internally displaced people within its borders.³¹ Internally displaced persons are persons who have fled their homes for the same reasons as refugees, but do not cross international borders.³² The influences responsible for such a high level of internally displaced persons include South Africa's migrant labor system, forced removals resulting from apartheid policies, ecological and economic deterioration, and endemic violence in parts of the country.³³

In a positive move toward addressing refugee concerns, South Africa reversed its long-standing policy of blocking United Nations protection and assistance for refugees within South African territory in 1993.³⁴ This policy change, however, did little to address the plight of internally displaced persons since the international protection and assistance mechanisms, implemented by the United Nations High Commission on Refugees, are directed solely at refugees who have crossed international borders.³⁵

South Africa faces a critical juncture in its national development following the collapse of its apartheid regime. Developments in immigration policy will have a profound effect on the direction in which South Africa's national

30. Battersby, *Borderless World*, *supra* note 8, at 14.

31. Solomon, *supra* note 3, at 60. There are approximately twenty million internally displaced persons worldwide. *Id.* By some estimates, Sub-Saharan Africa alone accounts for nearly 60% of the worldwide total of internally displaced persons. *Crisis-Torn Africa Becomes Continent of Refugees*, 22 *MIGRATION WORLD*, No. 4, 1994, at 5 [hereinafter *Continent of Refugees*].

32. *Continent of Refugees*, *supra* note 31, at 5.

33. Bill Frellick, *The Year in Review*, in *WORLD REFUGEE SURV.* 2, 3 (1994).

34. Jeff Drumtra, *Africa*, in *WORLD REFUGEE SURV.* 46, 68 (1994) (U.S. COMMITTEE FOR REFUGEES).

35. Frellick, *supra* note 33, at 3.

development will proceed. South Africa may open up and encourage regional integration or it may continue a hard-line policy on immigration. South Africa's choice will depend largely on the manner in which the Mandela government chooses to respond to rising anti-immigrant sentiment among South Africans.