

Pretoria Office

Block C, Brooklyn Court
Veale Street, New Muckleneuck, Pretoria
Postal: PO Box 1787, Brooklyn Square 0075
Pretoria, South Africa
Tel: +27 12 346-9500/02
Fax: +27 12 460-0998
E-mail: iss@iss.org.za

www.iss.org.za

VAT No: 473 0129 782
Non-Profit Reg No: 006-981 NPO



Cape Town Office

67 Roeland Square
Drury Lane, Gardens
Cape Town 8001
South Africa
Tel: +27 21 461-7211
Fax: +27 21 461-7213
E-mail: issct@issct.org.za

www.iss.org.za

Executive Director: Dr Jakkie Cilliers
A non-profit trust, Reg No: T1992/91

The response of the Institute for Security Studies to the call by the Department of Home Affairs for interested parties to comment on the new Immigration Regulations

by
The Crime and Justice Programme
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Introduction

1. The Institute for Security Studies (ISS) welcomes the amendment of the Immigration Act (Act No 13, 2002) through the Gazetting by the President of the Immigration Amendment Act (Act No 19, 2004) on 18 October 2004. The repeal of the Immigration Regulations of February 2003 and the publishing of the new ones on 31 January 2005 are important steps in the reengineering of South Africa's migrancy regime.
2. Although the new regulations make important changes to a variety of aspects of migration policy that affect human security, in this submission, the focus is on two issues. The first is highlighting some important results of a survey completed by the ISS on behalf of the DHA and which are relevant to the development of enforcement strategies for the regulations. The second relates to the problem of corruption that any enforcement strategy must confront.

Summary of research findings

3. The following sets out some of the findings of a survey conducted among deportees at the Lindela Repatriation Centre in July 2004. A full report has already been made available to the DHA, and this section serves only to highlight a few issues relevant to the development of an enforcement strategy that might seek to tighten up immigration control.
4. Before discussing the findings of the research, two preliminary points must be made. The first is that by its nature, a survey of people at Lindela cannot purport to be representative of the population of migrants since there are very likely to be

important systematic differences between those migrants who find themselves in Lindela and those who do not. Geographic differences in enforcement practices, for instance, may explain why so many of the people in Lindela were caught in Johannesburg and that, in turn, may have important implications for some of the data drawn from the sample. Migrant populations in other centres may have quite different profiles. In addition, given the extraordinarily high proportion of interviewees who reported having been asked for a bribe, it is quite possible that the sample of migrants in Lindela is, on average, poorer than those who have managed to avoid the centre.

5. The second point is not methodological, but goes to the question of whether migrants constitute a security threat in this country. In this respect, and despite the stated conviction of numerous officials in the criminal justice system and elsewhere in government, there is at this time NO credible, systematic evidence that foreigners resident in South Africa—legally or otherwise—are systematically more prone to committing crimes than are South Africans themselves. Indeed, if this is the case, one would expect there to be far more than 3,800 foreigners (2% of the prisoner population) in South Africa’s jails that there were in April 2004. While foreigners may have some techniques for evading arrest not available to locals—they may leave the country, for instance—one would expect that if they were genuinely more likely to commit serious crimes, more would go to jail than appear to do, especially given the attention devoted to migrants by the police. This is NOT to say that migrants do not engage in crime. It is, however, important to recognise that there is, at this stage, very little empirical evidence to support a general claim that foreigners constitute a serious crime threat. Migration policy must not, therefore, been seen primarily through the prism of crime control.
6. Having said this, the key findings of the Lindela survey were:
 - a. The bulk of the deportees come from four countries: Mozambique (about half), Zimbabwe (a third or more), Lesotho (4% to 7%), and Malawi (3% to 5%). The majority (63%) came from nine urban areas, with Maputo alone supplying about a quarter of the deportees.
 - b. The vast majority of respondents (92%) reported coming to SA through an official border post, with 81% saying they crossed into South Africa at just five checkpoints (Lebombo/Resano Garcia, Beitbridge, Spencerhoek, Kosi Bay/Ponta do Ouro, and Ficksburg/Mapulsoe). Despite reporting coming through a formal border post, fully 75% did so without their passports being endorsed (if they had one at all: 64% said they crossed the border with no passport). This suggests that either they are not coming through these posts and are, instead, coming through near the border post itself, or that officials at these posts are facilitating passage either through incompetence or through corruption.
 - c. While in SA, most were employed, with over a third doing construction work. While most got their jobs through ethnic networks, nearly a third got them through a formal process of hiring.
7. A number of recommendations flow from these findings. These include:

- a. The fact that a very high proportion of migrants appear to come from a limited number of places, suggests that the existence of established networks and kinship ties explains how many of the migrants hear about and find their ways to SA. It seems likely that many follow in the footsteps of those who have gone before, and this may create opportunities for enforcement agencies to magnify the impact of their efforts by concentrating their attention on the organisational and other weaknesses which are exploited along the routes used by migrants in these networks. This is reinforced when account is taken of the fact that a very high proportion of migrants at Lindela report coming through the border at or near only a small number of border posts and on buses and taxis. It is very likely, of course, that tightening up weaknesses will lead to innovations in migrants' techniques, but it seems that progress here is reasonably possible.
- b. The fact that migrants appear to find it relatively easy to find work suggests that they have a comparative advantage relative to local prospective employees. Given the low-skills profile of these migrants, it seems likely that their main advantages lie in their costliness: with no formal protection, no UIF and SDL payments, etc., irregular migrants are cheaper than are locals. There are only two ways in which this disparity can be off-set: either their employment must be regularised or those who employ irregular immigrants must pay fines for doing so. Either of these approaches, by snuffing out the comparative advantage of migrants, might help stem the flow of people from neighbouring countries. Because the regularisation of employed immigrants seems unlikely, we would recommend a vigorous enforcement campaign directed at the employers of irregular migrants.

Corruption and migration policy

8. Before turning to the question of the challenge of corruption in the implementation of migration policy, it is worth spelling out the relevant results of the Lindela survey. These were that nearly half (45%) had been asked by a police member for a bribe, with 34% experiencing multiple requests. A majority (56%) had complaints about treatment at the hands of police, with about one in four reporting brutality. This is reinforced by a survey conducted in the Johannesburg's inner city in which 43% of foreign respondents said they had been asked to pay a bribe at some point.
9. It is clear, in other words, that one of the central features of the migration enforcement system is the degree to which it is undermined by corruption. It is important to understand why this is so and what can be done about it.
10. The key reason why the enforcement of immigration laws is likely to generate corruption is that much of it takes place in the form of street-level enforcement actions in which officers—be they police or from the DHA—approach people to look at their documents. What happens after that cannot be observed by supervisors, a fact that the officials and the people approached for documents know and understand. It is impossible, in other words, to know whether an officer

demands a bribe when he finds a suspect foreigner or, indeed, when the foreigner produces documents whether the officer threatens to withhold or destroy them unless a bribe is paid. This is a problem with much street-level law enforcement, but the difficulties are accentuated when the target population—in this case irregular migrants—is unable and unwilling to report corruption for fear of victimisation.

11. A crucial point to recognise is that all of this is inevitable: there is NO real prospect of monitoring street-level enforcement activities for the simple reason that they take place on the street. For this reason, an anti-corruption strategy, which must be part of any realistic implementation plan, must contain, and must devote resources to, two elements: the creation of the capacity to run undercover investigations and sting operations; and the maximisation of the (admittedly limited) space for complaints-based investigations.
12. Sting operations should be both intelligence-driven—with intelligence coming from informers, from intelligence agencies in source countries, and from the conducting of periodic lifestyle audits of enforcement officials—and random. The latter is needed to test the integrity of officers and because it can act as a powerful deterrent to corrupt activities.
13. Complaints-based investigations suffer from the problem that few bribers are likely to lodge complaints since they will fear victimisation (including deportation). In order to offset some of this, it may be worth considering the possibilities that might arise from the development of more or less formal relationships with organisations representing migrant communities. Even if these are composed largely of legal migrants, they may be able to access information about corruption and act as anonymous channels for information that might drive undercover operations. It may even be worth employing members of these communities to act as these channels.

Conclusion

14. The ISS welcomes the opportunity to comment on the regulations developed by the department. We hope that the comments we have made will be useful to the Department and look forward to working with the Department in the future.