Asylum-seekers in South Africa and Covid-19: a catalyst for social security law reform?[1]

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1. Introduction

The Covid-19 pandemic has affected lives and livelihoods across the world. In South Africa, the government's response has included a stimulus package reportedly worth R500 billion, a temporary employer / employee relief scheme funded by the Unemployment Insurance Fund, Compensation Fund benefits for contracting the coronavirus occupationally and an increase in the value of existing social assistance grants. A special Covid-19 Social Relief of Distress Grant (R350 per month) was also introduced only for unemployed citizens, permanent residents and refugees, thereby excluding various categories of non-citizens.

This kind of limitation of rights is consistent with the traditional, arguably conservative, social protection regulatory approach towards non-citizens in South Africa, as demonstrated by the Department of Home Affairs' White Paper on International Migration, 2017 and the Refugee Amendment Act, 11 of 2017 (RAA 2017). This has necessitated a variety of court applications in order to realise basic human rights, such as dignity, equality, access to health care and access to social security. Most of the existing jurisprudence has focused on the entitlements of permanent residents, refugees and asylum seekers, and the dominant trend has been the emergency of creative statutory interpretation and attempts to juxtapose immigration law and human-rights principles, with potentially far-reaching implications sanctioned by the judiciary. Also, relevant global human rights standards are embedded in international instruments (of which some have been ratified by South Africa). These standards need to be considered for purposes of interpreting the relevant fundamental rights enshrined in the Constitution of the Republic of South Africa, 1996 (Constitution), also taking into account comparative jurisprudence in this context.

This contribution seeks specifically to interrogate selected social security law issues applicable to asylum-seekers. It does so from the perspective of among others the impact of Covid-19-related labour market and social security Regulations and Directives (issued in terms of the

[1] This paper and presentation is based on a contribution submitted for publication to the South African Journal of Human Rights, and presently under review.

Disaster Management Act, 2002) and against the background of recent statutory and policy developments, and jurisprudential responses.

The overarching objective of the proposed contribution is to provide guidance to legislators, the executive and judiciary as to the complex balance between, on the one hand, immigration law principles and, on the other, the imperatives embedded in a human rights-infused approach, with particular reference to the right to (access to) social security, other related fundamental rights, and the principles underlying the limitation of these rights. A set of guiding principles, responsive to Covid-19 regulatory realities, are developed and proposed. These principles are drawn from a detailed analysis of the applicable constitutional principles and jurisprudence, international standards and comparative experiences in a manner that, ideally, may inform the future regulation of social security entitlements for asylum-seekers, as well as the judiciary's interpretation thereof.

2. Policy Context

The last decades, especially since 2000, have seen large numbers of asylum-seekers entering South Africa through porous borders, mainly from African countries. At some stage, during the early 2010s, South Africa hosted the largest asylum-seeker population in the world, partly aggravated by an inefficient management of applications and appeal. From 2008 until 2012, South Africa received the largest number of new asylum applications worldwide, registering 800,000 new asylum claims, mostly from Zimbabweans.[2] According to the 2020 United Nations High Commissioner for Refugees (UNHCR) report on global trends, still by the end of 2018, South Africa hosted 89,285 recognised refugees, while 188,296 asylum-seeker applications were pending.[3] The treatment of migrants generally and asylum-seekers specifically by South African authorities, also in the wake of wide-spread xenophobia in the country, has attracted wide-spread criticism by UN organs entrusted with supervising implementation by South Africa of key UN human rights instruments.[4] In October 2018, the Committee on Economic, Social, and Cultural Rights (CESCR) expressed concerns about 'the proposal of establishment of asylum processing centres in border areas' (see the discussion below) and urged South Africa to '[e]xpeditiously clear the backlog of asylum applications pending in the appeal process.'[5] It also took issue with the new legislative drive evidenced by the provisions of the RAA 2017, supported by an adjusted policy regime, discussed below, to curtail the right to work of asylum-seekers.[6]

[2] UNHCR Global Trends: Forced Displacement in 2019 (2020) 38.
[3] *Ibid*, 75.
[4] See M Olivier 'Social security: Framework' in LAWSA (The Law of South Africa) - Labour Law and Social Security Law (2012) para 137.
[5] CESCR 'Concluding Observations on the Initial Report of South Africa' (12 October 2018) E/C.12/ZAF/CO/1 paras 25, 26(a).
[6] *Ibid*, paras 25, 26(c).

Until recently, the South African policy framework paid scant attention to the situation of asylum-seekers, also in the social security domain. The *White Paper for Social Welfare* (1997) merely refers to the need to conduct an assessment of the needs of *refugees* (asylum-seekers not mentioned) and to develop appropriate programmes.[7] No proposals were made in the key document prepared by the Committee of Inquiry into a Comprehensive Social Security System for South Africa, suggesting the way forward for introducing a comprehensive social security system in South Africa – i.e. *Transforming the Present – Protecting the Future* (2002). The current discussion document informing comprehensive social security in South Africa envisages an integrated social security system for South Africa, which should cover all citizens and permanent residents, including migrant workers – no mention is made of refugees and asylum-seekers.[8] Even the *National Development Plan* makes no mention of an appropriate policy framework in relation to (refugees and) asylum-seekers.[9]

However, more recent policy instruments contain several pointers informing the treatment of asylum-seekers, also in social protection terms. In particular, the *National Health Insurance Policy* (2017) suggests that migrants, who (also) include refugees, asylum-seekers and irregular migrants, will receive 'basic health care services in line with the Refugees Act and international conventions that South Africa is a signatory to.'[10] Most importantly, and unlike the 1999 *White Paper*, the 2017 *White Paper on International Migration for South Africa* contains several important pronouncements. These pronouncements use a rights-based approach as a key policy building block, but deviate from this approach by indicating a range of restrictive measures evidently aimed at reversing some of the positions taken by the judiciary in relation to the legal and policy treatment of asylum-seekers, discussed below – apparently in an attempt to limit the perceived abuse of the asylum regime by economic and irregular migrants. Some of the main reflections appearing from the White Paper include:[11]

- International migration, in general, is beneficial if it is managed in a way that is efficient, secure and respectful of human rights.
- Effective provision of protection and basic services to asylum-seekers and refugees in a human and security manner.
- Continuation of the non-encampment policy in relation to refugees; however, as indicated immediately below, to some extent the new policy approach towards asylum-seekers deviates from this policy.

[7] Department of Welfare *White Paper for Social Welfare* (1997) para 68.
[8] Inter-departmental Task Team on Social Security and Retirement Reform *Comprehensive social security in South Africa: Discussion document* (March 2012) 21.
[9] National Planning Commission Our future – make it work: National Development Plan 2030 (August 2012)
[10] Department of Health National Health Insurance for South Africa: National Health Insurance Policy (2017) 21 para 102.
[11] Department of Home Affairs *White Paper on International Migration for South Africa* (Gen Not 750 in GG 41009 of 28 July 2017).

- Asylum Seeker Processing Centres will be established, 'to profile and accommodate asylum seekers during their status determination process'.[12] It is envisaged that governmental departments and international organisations (including UNHCR) will operate there: Low risk asylum-seekers may have the right to enter or leave the facility under specified conditions. Most asylum-seekers who fall into low risk categories could be released into the care of national or international organisations and family or community members. Conditions could include the department receiving written assurances that the asylum-seekers will have their basic services provided for by the individual or the organisation.
- One of the key policy changes involves the removal of the automatic right to work and study for asylum-seekers – on the assumption that their basic needs will be catered for in the processing centres (of by an individual or an organisation that has made a written undertaking to provide for their basic needs while their status is being determined). Only in exceptional circumstances such as judicial review, will asylum-seekers be allowed to work and study.

Unfortunately, the White Paper failed to address the social security position of asylum-seekers, apart from a lone sentence suggesting that provision of social security and portability of social security benefits will be facilitated. As has been noted, the:

> '… list of legislation considered by the Department in formulating this White Paper excludes most social security-related legislation (only referencing the UIA). Similarly, the international instruments taken into consideration exclude those relating to social security and, unsurprisingly given these omissions, the analysis contained in the document in relation to refugees and asylum seekers falls short of properly describing and explaining the social security position of these categories of non-citizens, although there is some suggestion that basic needs of asylum seekers will be catered in asylum processing centres.' [13]

3. Legislative framework

With one important exception, the *current* social security legislative regime does not exclude asylum-seeking visa holders. This applies in particular to the contributory social security environment. Asylum-seekers are not prevented from contributing to and benefiting from retirement and medical schemes. In addition, they are not excluded from the operation of the *Compensation for Occupational Injuries and Diseases Act*, Act 130 of 1993[14] and the *Unemployment Insurance Act* (Act 63 of 2001), in particular since the exclusion of (temporary)

[12] Ibid 61.

[13] A Govindjee *et al* (ed) 'Access to social security for refugees and asylum seekers in South Africa: An analysis of recent developments' in M.P Olivier, E Kalula & L.G Mpedi (eds) *Liber Amicorum: Essays in honour of Professor Edwin Kaseke and Dr Mathias Nyenti* (2020).

[14] Even in the event of an asylum-seeker who may not have applied for asylum status yet, and assuming that the contract of service concluded by such a worker is 'invalid' (although this may be challenged on constitutional grounds – see *Discovery Health*, discussed below), the Act states that the Director-General has a discretion to deal with a claim as if the contract was valid at the time of the accident: s 27.

migrant workers from the sphere of coverage of the latter Act was recently removed. They are similarly not excluded from the purview of labour legislation that directly or indirectly contains provisions impacting on social security benefits, such as sick and maternity leave and benefits – they remain entitled to the protection of among other the Basic Conditions of Employment Act 75 of 1997, the *Labour Relations Act* (Act 66 of 1995) and the Employment Equity Act 55 of 1998. However, essentially, with some exception, the premise of most of these laws is that the asylum-seeker is attached to an employment relationship involving an employer. In other words, access to (formal) employment is a *sine qua non* for the asylum-seeker's entitlement to most categories of contributory social security benefits.

The exception relates to the South African social assistance regime. Unlike refugees, asylum-seekers have not been included in the provisions of the Social Assistance Act 13 of 2004 and its implementing regulations. Lately, however, as discussed below, and for purposes of the recently introduced Covid-19 Social Relief of Distress grant, as a consequence of the judgment in *Scalabrini Centre v Minister of Social Development*,[15] the Department of Social Development was ordered to remove the exclusion of asylum-seekers from eligibility for the grant.

The newly foreseen legislative regime may impact dramatically on the position outlined above. Firstly, the National Health Insurance Bill (B 11-2019) extends coverage to refugees, but treats asylum-seekers on par with 'illegal foreigners', by stipulating (in clause 4(2)) that an asylum-seeker or illegal foreigner is only entitled to (a) emergency medical services; and (b) services for notifiable conditions of public health concern. However, it also stipulates that all children, including children of asylum-seekers or illegal migrants, are entitled to basic health care services as provided for in section 28(1)(c) of the Constitution (clause 4(3)). This is evidently a retrogressive development and one likely to be met with a constitutional challenge given the constitutional rights to social security and health care services.

Secondly, the implications of the significantly altered regime applicable to asylum-seekers in terms of the provisions of the Refugees Amendment Act 11 of 2017 (RAA 2017) have to be noted. Currently, in principle, refugees enjoy full legal protection, which includes the fundamental rights set out in chapter 2 of the Constitution.[16] Concomitant to this is that refugees qualify for the constitutionally entrenched right to access to social security and social assistance, as well as the other socio-economic rights in terms of section 27 of the Constitution. The same protection is not accorded to asylum-seekers. However, on the basis

[15] [2020] ZAGPPHC 308.

[16] S27(b) of the Refugees Act 130 of 1998. According to s 27 of the Act, a refugee is entitled to a formal written recognition of refugee status in the prescribed form; and enjoys full legal protection, which includes the rights set out in chapter 2 of the Constitution (except those rights that only apply to citizens); is in principle entitled to permanent residence after a certain number of years' continuous residence in the Republic from the date on which he or she was granted asylum; is entitled to an identity document referred to in section 30; is entitled to a South African travel document on application; and is entitled to seek employment.

of constitutional jurisprudence, it was clear that asylum-seekers could not generally be barred from employment – whether wage- or self-employment – as discussed below. At least as far as wage-employment is concerned, this would bring them under the protective umbrella of most of South Africa's social insurance laws.

Now, however, the right to work is severely curtailed. Section 22(8) of the Refugees Act, as amended by RAA 2017, commences from the premise that the right to work in the Republic may not be endorsed on the asylum-seeker visa of any applicant, who –
(a) is able to sustain himself or herself and his or her dependants;
(b) is offered shelter and basic necessities by the UNHCR or any other charitable organisation or person; or
(c) seeks to extend the right to work, after having failed to produce a letter of employment as contemplated in subsection (9): Provided that such extension may be granted if a letter of employment is subsequently produced while the application in terms of section 21 is still pending.

The impact of these provisions is severe, also from the perspective of asylum-seekers' ability to contribute to and benefit from contributory social security. Ziegler notes:[17]

> 'Since asylum-seekers are now required to make an application for asylum within five days of entry into the Republic, and since their dependants have to be declared as part of the application, an asylum-seeker has five days to communicate with friends and family and obtain confirmation of their support before they lodge their application. They are denied the right to work whilst the initial assessment takes place. Implicitly, they will not receive an employment endorsement until and unless they can offer proof of a negative — that they cannot receive assistance from UNHCR or other organisations. There could thus be lengthy periods during which asylum-seekers would neither be able to self-sustain nor rely on others (let alone the state) for support, potentially leaving them destitute.'

Furthermore, these newly inserted provisions exclude all asylum-seekers from all forms of self-employment and work in the informal economy – irrespective of whether they can self-sustain or rely on others. It is questionable whether these exclusions would pass constitutional muster, in view of the approach adopted by constitutional jurisprudence, in particular in *Minister of Home Affairs v Watchenuka* (*Watchenuka)*[18] and *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* (*Limpopo)*,[19] discussed below. To this should be added the fact that as a result of the *non-refoulment* principle, and in the absence currently of state financial support to asylum-

[17] R Ziegler 'Access to effective refugee protection in South Africa: Legislative commitment, policy realities, judicial rectifications' (2020) 10 *Constitutional Court Review* 99.
[18] 2004 (4) SA 326 (SCA).
[19] 2015 (1) SA 151 (SCA).

seekers,[20] asylum-seekers may be left destitute, constituting a clear infringement of their human dignity, as indicated in the jurisprudence. Recently, in *AI v The Director of Asylum Seeker Management; Department of Home Affairs*,[21] the Western Cape High Court in a related matter held that:

The applicants have shown that they will suffer harm if the interim relief is not granted. They will not be able to work unless they are employed on an illegal basis and will, at the very least, face resistance should they try and enrol their children at school. They will find it difficult, if not impossible to obtain medical attention at a state hospital. It is so that the respondent's undertaking means that they will not be deported, and thus their right to *non-refoulement* will be respected, but this is only one of a conspectus of rights that allow people in their position to live a life of dignity.

4. Related constitutional considerations

Several overarching constitutional principles in relation to the treatment of different categories of non-citizens have been recognised in the South African constitutional jurisprudence. Firstly, the vulnerable status of non-citizens as a group, and of particular categories of non-citizens – such as children, refugees and asylum-seekers – has been recognised by the courts and been given constitutional significance.[22] Secondly, the Bill of Rights has been held to apply to citizens and non-citizens, except for those provisions which evidently apply to citizens only (such as provisions regarding political rights (section 19); or the right to choose one's trade, occupation or profession (section 22),[23] as discussed below).[24] This has caused the courts to accept that the term 'everyone', as it is used in relation to, for example, the constitutional right to access to social security, including the right to access social assistance,[25] includes non-citizens as well. This right is underpinned primarily but not exclusively by two other fundamental rights: the right to human dignity (contained in section 10) and the fundamental right to equality (enshrined in section 9).

[20] Watchenuka para 32 and Limpopo para 44.

[21] [2019] ZAWCHC 114 para 25.

[22] Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 6 BCLR 569 (CC) para 74; Larbi-Odam v Member of the Executive Council for Education (North-West Province) 1998 1 SA 745 (CC); Watchenuka (note 17 above); Limpopo (note 17 above).

[23] However, the specific ambit of s 22 needs to be understood. In Union of Refugee Women v Director: Private Security Industry Regulatory Authority 2007 (4) SA 395 (CC) (par 57; see also par 47) the Constitutional Court held that: "The Refugees Act guarantees the applicants the right to seek employment. It is the choice of vocation that is reserved only for citizens and permanent residents.", and in Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism 2015 (1) SA 151 (SCA) (par 38) the Supreme Court of Appeal stated: "Section 22 of the Constitution does not, as contended for by the respondents, prevent refugees from seeking employment. The emphasis in that section of the Constitution is on a citizen's right to choose his or her trade, occupation or profession freely."

[24] Khosa paras 46–47; Lawyers for Human Rights v Minister of Home Affairs 2004 7 BCLR 775 (CC).

[25] Section 27(1)(c) of the Constitution.

The courts have also struck down the purported drawing of a distinction between citizens and non-citizens in other (more general) areas of fundamental rights protection, for instance regarding the applicability of the right to access to the courts and the right to human dignity.[26] Some of these exclusions are contrary to the treaty obligations to which South Africa is bound. For example, in *Minister for Welfare and Population Development v Fitzpatrick*[27] the Constitutional Court held the provision in the then Child Care Act 74 of 1983[28] which prohibited foreigners who qualified for naturalisation but had not yet applied for citizenship from adopting a child born of a South African citizen to be invalid: the Court held that, not only does the Act offend against certain of the fundamental rights in the Constitution of South Africa but also infringes upon inter-country adoptions, as provided for in article 21 of the UN Convention on the Rights of the Child (1989).

In relation to the constitutionally entrenched *right to access to social security* (section 27(1)(c)), in the key Constitutional Court decision of *Khosa* (concerning the then legislative exclusion of permanent residents from accessing social assistance), the Court held that the constitutional entitlement to access to social security accruing to 'everyone' includes 'all people in our country'.[29] To exclude permanent residents from entitlement to social assistance would fundamentally affect their (human dignity) (which is both a constitutional right – see section 10 – and a constitutional value) and equality (which is likewise both a constitutional right – see section 9 – and a constitutional value).[30] The Court reiterated that non-citizens constitute a vulnerable group in society and that it needed to be determined whether excluding permanent residents from the social assistance system would amount to *unfair* discrimination. If the exclusion were to be upheld, that would imply that permanent residents would become a burden on other members of the community – something which would impair their dignity and further marginalise them.[31] Taking into account the competing considerations and intersecting rights that were involved, the Court held that the statutory exclusion of permanent residents from the scheme for social security (i.e. social assistance) affected their dignity and equality in material respects. Sufficient reason for such invasive treatment of the rights of permanent residents had not been established. The exclusion could, therefore, not be justified under the Constitution.[32] However, the Court reasoned that it might be reasonable to exclude citizens from other countries, visitors and illegal residents, who have only a tenuous link with the country (e.g., non-citizens in South Africa who are supported by sponsors who arranged their immigration).[33]

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[26] Baramoto v Minister of Home Affairs 1998 5 BCLR 562 (W); Johnson v Minister of Home Affairs 1997 2 SA 432 (C).
[27] 2000 3 SA 422 (CC).
[28] S18 (4)(f) of the Child Care Act.
[29] Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 6 BCLR 569 (CC) paras 46-47.
[30] *Khosa* paras 58-59.
[31] Ibid paras 76-77, 80-81.
[32] *Khosa* para 573I-J (case headnote summary), paras 80, 83-84.
[33] *Khosa* paras 58-59.

The limitation of the right to access to social security is subject to the provisions of the limitation clause, i.e. section 36 of the Constitution. Also, in terms of section 27(2), the State is enjoined to take *reasonable* legislative and other measures, within its available resources, to achieve the progressive realisation of this right. It needs to be borne in mind that reasonableness goes beyond a rationality review, i.e. a review based on whether there is a rational connection between, for example, a differentiating law and a legitimate governmental purpose (such as the immigration policy of the country). In *Khosa* the Constitutional Court remarked that the standard of reasonableness was a higher standard than rationality. The fact that the differentiation between citizens and non-citizens might have a rational basis did not mean that it was not an unfairly discriminatory criterion to use in the allocation of benefits. The Court held that differentiation on the grounds of citizenship, while not a ground listed in section 9(3) of the Constitution, was clearly a ground analogous to those listed grounds. It therefore amounted to discrimination. It then became necessary to determine whether that discrimination was unfair.[34]

While one does not take issue with the sense of applying a reasonableness criterion in the light of the constitutional requirement to this effect, one is tempted to ask, as a measure to assist in the interpretation of a socio-economic right such as the right to access to social security, whether is it not possible to identify a core content of the right to (access to) social security (as would be required in terms of international law), given the extensive comparative experience in this regard – despite the rejection of the core content requirement in constitutional jurisprudence?[35] It could be argued that identifying such a core content is not necessarily dependant on the availability of statistical data. To the contrary, from a *normative* perspective and on a normative level, it can be argued that there is indeed a core content, in particular when it comes to the right to access social security. The interrelated nature of fundamental rights would lead to such a conclusion that a constitutional basis is laid for an entitlement to an adequate level of minimum social security support. In particular as far as social security is concerned, the Constitutional Court itself remarked, when considering the purpose of providing access to social security to those in need, that:[36]

> 'A society had to attempt to ensure that the basic necessities of life were accessible to all if it was to be a society in which human dignity, freedom and equality were foundational. The right of access to social security, including social assistance, for those unable to support themselves and their dependants was entrenched because society in the RSA valued human beings and wanted to ensure that people were afforded their basic needs.'

[34] 2004 6 BCLR 569 (CC) 573D-E (case headnote summary).
[35] See, e.g., *Government of RSA v Grootboom* 2000 (11) *BCLR* 1169 (CC).
[36] Ibid 573A (case headnote summary).

Finally, the fundamental *right to fair labour practices*, provided for in section 23 of the Constitution, has also played a key role of ensuring employment protection, even (under certain circumstances) of irregular migrant workers – and may hold important consequences for access to social security benefits provided for in South African labour laws or otherwise. In *Discovery Health Ltd v CCMA*,[37] the Labour Court extended labour rights to a foreign national *whose work permit had expired*. The court noted that, although the Immigration Act 13 of 2002 prohibited the employment of foreign workers without work permits, the only consequence of doing so was that the employer was guilty of a criminal offence: it did not render an employment contract with the foreigner invalid. In the new constitutional era, so the Labour Court held, courts are obliged to interpret all legislation in a way that would 'promote the spirit, purport and objects of the Bill of Rights.'[38] In interpreting the provisions of the Immigration Act, the court must ensure that it does not unduly limit the constitutional right of 'every person' to 'fair labour practices.' The Court consequently held that a foreigner whose work permit had expired still had a valid employment contract and was entitled to the unfair dismissal protection provided for in South African labour laws. To rule otherwise would have inequitable consequences and cause abuse by unscrupulous employers.[39] In addition, the definition of 'employee' in the Labour Relations Act 66 of 1995 did not depend on a valid underlying employment contract. Therefore, the foreigner concerned was thus covered by the provisions of the Act and consequently entitled to the unfair dismissal protection available under the Act.[40] The *Discovery Health* judgment has to some extent been supported by some, later judgments of the Labour Appeal Court.[41]

5. International law principles

The South African Constitution accords particular prominence to the role and importance of international law. To the extent that South Africa has ratified these instruments, it is bound by their standards and provisions.[42] Furthermore, when interpreting fundamental rights contained in the Bill of Rights, including the rights covered in the constitutional part of this contribution, courts, tribunals and forums have to consider international law[43] – which, according to the Constitutional Court, includes both binding and non-binding international

[37] *Discovery Health Ltd v CCMA* [2008] 7 BLLR 633 (LC).
[38] S39(2) of the Constitution.
[39] *Discovery Health Ltd v CCMA* paras 29-31.
[40] *Discovery Health Ltd v CCMA* paras 35-48.
[41] In *Joseph v University of Limpopo* [2011] 12 BLLR 1166 (LAC), e.g. a fixed term contract had not been renewed on the basis that a university employee's work permit had expired. The court considered that there was a reasonable expectation of renewal of the employment contract in coming to the conclusion that the employee reasonably anticipated that the work permit would be obtainable in due course. By frustrating his reasonable expectation, the university was deemed to have unfairly dismissed the employee. In *Dunwell Property Services CC v Sibande* [2012] 2 BLLR 131 (LAC) an employee had been dismissed on suspicion of being an illegal immigrant, but there was no evidence that the employee had been declared to be a prohibited person. The immigration officer was held not to have complied with this legislation in declaring the employee to be a prohibited person and the employee's dismissal for this reason was held to have been unfair.
[42] S 231 of the Constitution.
[43] *Ibid*, s39(1)(b).

law.[44] Also, according to section 233 of the Constitution, there is a constitutional preference for statutory interpretation which is aligned to international law. The section stipulates: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' Therefore, in matters concerning the legal status of asylum-seekers, the international law-sensitive ethos underlying the Constitution and its interpretation has to be respected. International law norms need to be heeded, as also confirmed by the Constitutional Court in *Minister of Home Affairs v Rahim*,[45] discussed below: these norms need to be considered in the context of fundamental rights interpretation and have to be applied if contained in a ratified instrument. Even if the international law has not yet been transformed or incorporated in South African law (that is, 'domesticated'), it has a major influence as an interpretive tool on the state's obligation to protect and fulfil the rights in the bill of rights.[11] This approach has found the support of both the minority and majority judgments in the Constitutional Court matter of *Glenister v President of the Republic of South Africa*.[46]

It has increasingly been recognised that asylum-seekers should be entitled to at least core forms of assistance, as supported by international, regional and constitutional law (as indicated by various provisions of the Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 19).[47] The UNHCR has recognised the obligation on states to safeguard the welfare of asylum-seekers, by concluding that 'asylum seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs including food, clothing, accommodation, and

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[44] *Glenister v President of the RSA* 2011 3 SA 347 (CC) para 96; *S v Makwanyane* 1995 (3) SA 391 (CC); *Government of RSA v Grootboom* 2000 (11) *BCLR* 1169 (CC). See also *Discovery Health Ltd v CCMA* [2008] 7 BLLR 633 (LC), where the Labour Court emphasised that it is required, in terms of s 39(1)(b) of the Constitution, to consider the provisions of a non-binding (non-ratified) UN Convention and non-binding International Labour organisation (ILO) Convention in relation to the protection available, in terms of international standards, to undocumented or irregular workers (para 42–47).

[45] (2016) (3) SA 218 (CC).

[46] *Glenister v President of the RSA* 2011 3 SA 347 (CC) paras 107, 182, 189-196. The majority in particular held:

> '[192]. . . Section 39(1)(b) states that when interpreting the Bill of Rights a court 'must consider international law'. The impact of this provision in the present case is clear, and direct. What reasonable measures does our Constitution require the state to take in order to protect and fulfil the rights in the Bill of Rights? That question must be answered in part by considering international law. And international law, through the inter-locking grid of conventions, agreements and protocols we set out earlier, unequivocally obliges South Africa to establish an anti-corruption entity with the necessary independence.
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> [193] …
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> [194] …
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> [195] This is not to incorporate international agreements into our Constitution. It is to be faithful to the Constitution itself, and to give meaning to the ambit of the duties it creates in accordance with its own clear interpretive injunctions. The conclusion that the Constitution requires the state to create an anti-corruption entity with adequate independence is therefore intrinsic to the Constitution itself.'

[47] Also see M Olivier *et al* 'Constitutional framework' in M Olivier *et al Introduction to social security* (2004) 153. This is also in line with the position adopted by the government in the White Paper on International Migration (GN 529 in GG 19920 of 1 April 1999) which recognises that there is no constitutional basis to exclude, *in toto*, the application of the Bill or Rights owing to the status of a person while in South Africa.

medical care, as well as respect for their privacy, are met.'[48] In principle, if regard is had to *at least* the entitlements accruing to undocumented migrants, this core assistance should, among others, cover basic social assistance / welfare support (which could be in the form of social relief of distress) and (an 'expanded' notion of) emergency medical treatment.[49] Kapuy also remarks that international law explicitly provides for equal treatment with nationals in social security, provided that irregular migrant workers fulfil the relevant national and international legal requirements.[50] International law further provides for equal treatment with regular migrant workers, but only in respect of social security rights arising out of past employment.[51] In fact, the UN High Commissioner for Human Rights has concluded that, although 'there may be grounds, in some situations, for differential treatment between migrants and non-migrants in specific areas', these will be permissible only – *'as long as minimum core obligations are not concerned: differentiations cannot lead to the exclusion of migrants, regular or irregular, from the core content of economic, social and cultural rights…*'[52] Of course, asylum-seekers are to be distinguished from irregular migrants, as they enjoy a special and separate status in international law; yet, it is of comparative value to consider the minimum level, and nature of protection that is assumed in the case of irregular migrants.

Several principles applicable to the social security status of asylum-seekers can be derived from international law. Firstly, international law recognises the vulnerable status of asylum-seekers, as indicated. Secondly, as far as the UN Refugee Convention[53] and other refugee instruments are concerned, a critical question is whether and when asylum-seekers are entitled to the substantive protection accruing to refugees. It has been suggested that the recognition of refugee status is a *declaratory* act. According to the UNHCR, a person is a refugee within the meaning of the Refugee Convention as soon as he fulfils the criteria contained in the definition (of 'refugee'). This would necessarily occur prior to the time at which his refugee status is formally determined: 'He does not become a refugee because of

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[48] UNHCR ExCom Conclusion No. 93 (LIII) 'Conclusion on reception of asylum-seekers in the context of individual asylum systems' (2002) para (b)(ii). The Supreme Court of Appeal has already upheld the right of asylum seekers (who are awaiting process of their applications) to work or study on a limited basis: *Watchenuka* (note 17 above). Also see *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA).

[49] This is supported by the constitutional provisions contained in section 27. An 'expanded' form of 'emergency medical treatment', which is not subject to the internal limitation contained in section 27(2) of the Constitution, should ideally include urgent, emergency and necessary forms of medical-related interventions, such as: medical programmes which are preventive or which safeguard individual and collective health; maternity coverage; health coverage of minors; vaccinations foreseen by public health law; diagnosis, treatment and prevention of infective diseases; and activities of international prevention: P Schoukens & D Pieters *Exploratory report on the access to social protection for illegal labour migrants* (Council of Europe, 2004) 11.

[50] K Kapuy *The social security position of irregular migrant workers* (Intersentia, 2011). See also Article 27(1) of the International Convention on the Protection of All Migrant Workers and Members of Their Families (1990).

[51] See Article 9(1) of the ILO Migrant Workers (Supplementary Provisions) Convention (adopted 24 June 1975, entered into force 9 December 1978) (Convention 143).

[52] UN Economic and Social Council (ECOSOC) 'Report of the United Nations High Commissioner for Human Rights' E/2010/89 (2010) para 14.

[53] UNGA Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

recognition but is recognised because he is a refugee.'[54] Nevertheless, so the Commission of International Jurists opine, the protection of asylum-seekers' rights will be limited until the State determines whether the refugee's situation fulfils the Convention's definition.[55]

This raises the question whether the right of refugees to wage employment, self-employment and social security, enshrined in the Convention, may be legally limited in the case of asylum-seekers. Regarding the Convention's provisions on wage employment (Art 17) and self-employment (Art 18), it is worth noting that the court in *Limpopo* apparently assumed the applicability of these rights also to asylum-seekers.[56] Regarding social security, Article 24 of the Convention stipulates that countries that have ratified the Convention shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of social security, subject to certain limitations. According to one of these limitations, 'national laws or regulations of the country of residence may prescribe special arrangements concerning benefits or portions of benefits which are payable wholly out of public funds, and concerning allowances paid to persons who do not fulfil the contribution conditions prescribed for the award of a normal pension.'[57] This implies that even for refugees, special and separate arrangements could be made as regards their entitlement to social assistance. Nevertheless, under the *International Covenant on Economic, Social and Cultural Rights*,[58] and its embedded Article 9, which guarantees the right to social security, the CESR, in its *General Comment on the Right to Social Security* (2008), states that 'Refugees, stateless persons and asylum-seekers, and other disadvantaged and marginalized individuals and groups, should enjoy *equal treatment* in access to non-contributory social security schemes, including reasonable access to health care and family support, consistent with international standards.'[59]

6. Quo vadis?: conclusions and recommendations

The following quotation, while referring directly to the refugee crisis, remains telling and equally applicable in respect of asylum-seekers:

> 'The Covid-19 pandemic is not a refugee crisis per se but it has created multiple crises for refugees. Refugees are among the most likely populations to suffer both the direct and secondary impacts of the pandemic. In most countries in the world they face pre-existing barriers to protection and assistance, and now are often – though

[54] UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection (revised 2019) para 28. See also Ziegler (note 16 above) 73-74.
[55] International Commission of Jurists Migration and International Human Rights Law: A Practitioner's Guide (2014) 56.
[56] *Limpopo* para 37.
[57] Art 24(1)(b)(ii) of the Refugee Convention.
[58] International Covenant on Economic, Social and Cultural Rights (ICESCR) (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.
[59] CESCR 'General Comment No. 19: The right to social security (Art. 9 of the Covenant)' E/C.12GC/19 (2008) paras 36-38.

> notably not always – excluded from host countries' national Covid-19 responses and relief programs. Lockdowns have affected the organisations they may usually receive assistance from, which in many cases have struggled to provide the same amount and type of support as they previously had, while travel restrictions have limited the access of both aid and personnel to many regions in need. In camps as well as in dense urban areas where many refugees reside, a lack of basic health infrastructure, overcrowding, and poor sanitation all contribute to the risk of transmission and infection.'[60]

The Covid-19 pandemic appears to have had a predictably disproportionate negative impact on categories of migrants and their children.[61] Immigrants are generally at a much higher risk of contracting Covid-19 infection due to a range of vulnerabilities such as higher incidence of poverty, overcrowded housing conditions and high concentration in jobs where physical distancing is not possible. Covid-related mortality rates for immigrants also appear to exceed those of the native-born population.[62] Immigrants are potentially in a more vulnerable position in the labour market due to their generally less stable employment conditions and lower seniority on the job and studies suggest that discrimination increases strongly during times when the labour market is slack. Perhaps most significantly, from a policy perspective, growing unemployment and the role of international travel in the initial spread of the pandemic typically cause a backlash in public opinion against immigrants.[63] The pandemic has also occasioned unprecedented internal and external mobility constraints. This has affected access to employment (and, consequently, the ability to contribute to social insurance schemes), state support and even self-help opportunities. This set of circumstances, coupled with the general lack of employment opportunities, would, in many cases, necessitate a return of asylum-seekers to the home country contrary to the non-refoulement principle.

Although South Africa has been praised for including refugees and asylum-seekers as part of its vaccine programme,[64] the emerging evidence suggests that the Covid-19 containment measures adopted by the South African government have deepened the unequal treatment

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[60] E Easton-Calabria 'Exploring the impact of Covid-19 on the Global Compact on Refugees' (October 2020) 5 accessed at https://data2.unhcr.org/en/documents/download/79498+&cd=3&hl=en&ct=clnk&gl=za (accessed on 28 March 2021).

[61] OECD 'What is the impact of the Covid-19 pandemic on immigrants and their children? *Tackling Coronavirus (Covid-19): Contributing to a global effort* (19 October 2020) accessed at https://read.oecd-ilibrary.org/view/?ref=137_137245-8saheqv0k3&title=What-is-the-impact-of-the-COVID-19-pandemic-on-immigrants-and-their-children%3F (accessed on 27 March 2021).

[62] *Ibid*. The OECD report suggests that the negative impact on immigrants' labour market outcomes is increased further by the fact that they are strongly overrepresented in those sectors most affected by the pandemic, such as the hospitality industry.

[63] *Ibid*.

[64] C du Plessis 'Covid-19: SA praised for including refugees, asylum seekers in vaccine programme' accessed at https://www.news24.com/news24/southafrica/news/covid-19-sa-praised-for-including-refugees-asylum-seekers-in-vaccine-programme-20210308 (accessed on 27 March 2021).

of asylum-seekers and refugees in the country.[65] Excluding categories of non-citizens from national response safety nets and failing to include them in economic, poverty and hunger alleviation schemes exacerbate the problem.[66]

Recent developments suggest that the Department of Home Affairs has signed an agreement with the UN High Commissioner for Refugees (UNHCR) to eliminate delays and the existing backlog in decisions for asylum-seekers.[67] If properly implemented, this would be a crucial step towards addressing the precarity experienced by asylum-seekers post-Covid-19. Asylum-seekers are entitled to expect that the state will respect, protect, promote and fulfil the various constitutional and international law rights to which they are entitled, at least while they are in the country. Proper processing of applications for asylum would at least obviate the sense that asylum-seekers have increasingly been treated on a par with irregular / 'illegal' migrants, also during the pandemic, which is not an approach supported by South African constitutional law and case law.

A more fundamental issue remains. State resources, which have been devoted to various forms of relief for citizens to assist in ameliorating the adverse effects of the pandemic, are particularly scarce at this point in time. This scarcity is likely to manifest in the entrenchment of policies that exclude categories of non-citizens from entitlement to social security. As the survey of recent jurisprudence and policy developments suggests, there is a disconcerting, growing disconnect between state immigration policy and court adjudication of disputes relating to the basic rights of asylum-seekers. The extent of this disparity is extended when considering established international law principles. It is likely that any attempts to unreasonably limit the rights of asylum-seekers, through policy and legislation, will ultimately require further court adjudication in the post-Covid-19 era. Clear policy direction post-Covid is necessary, so that there is legal certainty that the array of constitutional rights available to vulnerable non-citizens, as reflected in the jurisprudence of South African courts, will not be forsaken at a time when they are most needed.

The commencement of the RRA 2017 and accompanying regulations (on 1 January 2020) appears to be a part-response to some of the judgments mentioned above, affecting the

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[65] See A Akinola 'Covid-19 reinforcing the trend of 'extreme nationalism' from Canberra to Pretoria' *Daily Maverick* (18 March 2021) accessed at https://www.dailymaverick.co.za/article/2021-03-18-covid-19-reinforcing-the-trend-of-extreme-nationalism-from-canberra-to-pretoria/ (accessed on 28 March 2021).

[66] F Mukumbang *et al* 'Unspoken inequality: how Covid-19 has exacerbated existing vulnerabilities of asylum-seekers, refugees, and undocumented migrants in South Africa' *International Journal for Equity in Health* 19, 141 (2020) accessed at https://equityhealthj.biomedcentral.com/articles/10.1186/s12939-020-01259-4 (accessed on 28 March 2021).

[67] The backlog apparently stands at 163 000 and R147m will be provided by the UNHCR to the Refugee Appeal Authority of South Africa: M Charles 'Home Affairs signs deal with UN refugee agency to deal with asylum seekers backlog' (22 March 2021) accessed at https://www.news24.com/news24/southafrica/news/home-affairs-signs-deal-with-un-refugee-agency-to-deal-with-asylum-seekers-backlog-20210322 (accessed on 28 March 2021).

rights of asylum-seekers and also threatening the status and rights of recognized refugees in South Africa.[68] As appears from the discussion above, among others the right to work of asylum-seekers has been significantly curtailed. For Ziegler, the RAA 2017 indefinitely (and arguably in contravention of international refugee law) excludes all asylum-seekers from all forms of self-employment and casual work, irrespective of whether they can self-sustain or rely on others, and also excludes asylum-seekers who can either self-sustain or otherwise be supported from wage-earning employment.[69]

Importantly, the current underlying policy framework appears to be particularly problematic from a constitutional perspective. Some of the principles expressed in the White Paper appear to conflict with the jurisprudence that has emerged from the Supreme Court of Appeal and Constitutional Court in relation to enhanced protection of refugees and asylum seekers. The White Paper, for example, states that asylum seekers will only be allowed to work and study in exceptional circumstances when they have cases under judicial review. This is a matter that should be addressed, along with possible amendments to social security legislation to provide clarity in respect of the position of asylum seekers, refugees and (particularly given the developments in the recent *Scalabrini Centre of Cape Town* matter) their family members (including possible access to social assistance for asylum-seekers who are children, older persons or disabled in addition to the basic support presently on offer). It should be borne in mind that children of asylum-seekers, irrespective of their status (thus also where the application for refugee status has been refused), are entitled to special protection in terms of the Constitution, which would require additional supportive (social welfare) measures, not subject to qualifications applicable to the right to access to social security/access generally, i.e., the adoption of reasonable measures, within the available resources, to achieve the progressive realisation of that right.[70]

It should be remembered that the core judgments in support of the right to work in *Watchenuka*, *Union of Refugee Women* and *Somali Association of South Africa*, read together, lend support for the right to earn a living through wage employment or self-employment (also pending applications for asylum). This opens up further prospects for asylum-seekers and refugees to make contributions to existing social insurance funds (as occurred in the *Saddiq* case). Again, these developments appear to contradict the White Paper.

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[68] The legislative developments have been criticised for being incompatible with the 1951 Geneva Convention relating to the Status of Refugees for instituting new grounds for cessation of status and for rendering permanent residence and naturalization less attainable. In particular, the Minister of Home Affairs is authorised to 'cease the recognition of the refugee status of any individual refugee or category of refugees, or to revoke such status. Cessation of status is also authorised if a refugee 'returns to visit' the country of origin, or if there is contact with that country's consular authorities without prior authorisation of the Minister. Perhaps most significantly, the Amendment Act doubles the residence requirement for refugee status certification, which is related to securing the status of permanent residency, to ten years. Ziegler (note 16 above) 88, 89.

[69] Ziegler (note 16 above) 100.

[70] According to s 28(1)(c) of the Constitution, every child has the right to to basic nutrition, shelter, basic health care services and social services.

For asylum-seekers who exhaust the limited benefits obtainable in terms of other forms of social insurance (e.g., the UIF) (or who have not had the benefit of even basic forms of employment, and accordingly have not contributed to any forms of social insurance) and who require relief, social assistance, for example in the form of Social Relief of Distress (SRD), ought to be payable. Emergency medical care and treatment should also be available in this instance (as defined above) and payments in respect of road accidents should be made where applicable. There appears to be clear international law authority to the effect that asylum-seekers should be entitled to at least core social assistance support. Similarly, should a person's asylum-seeking status be withdrawn, the social security position changes. The person is now considered to be an undocumented / irregular / illegal migrant and restrictions to such a person's social security entitlements would more easily be considered to be proportionate and reasonable. A person whose application for asylum has been rejected should, at the very least, nevertheless be entitled to the return of his / her contributions / joint contributions to a social insurance scheme such as the Unemployment Insurance Fund prior to being deported from the country, and to basic forms of social assistance, while awaiting deportation.

Finally, the Social Assistance Act, 13 of 2004 (and its Regulations) could be amended to specifically provide for such forms of (social) assistance to asylum-seekers – bearing in mind the precarity of their position, especially in view of the impact of the provisions of the RAA. In doing so, special attention should be focused on the position of unaccompanied children and mentally disabled refugees / asylum-seekers, due to their particularly vulnerable position. With respect to asylum-seekers who are mentally disabled, for example, care should be taken to ensure that such persons are not deported in a manner which is detrimental to their health, well-being and rehabilitation and there is a need, in particular, to remove unlawful conditions from the asylum-seeking process.[71]

The recent decision in *Scalabrini* represents the present high-water mark of case authority relevant to the rights of asylum-seekers in the Covid-19 and post-Covid-19 eras. The judgment in that matter follows a set of judgments that has established the enforceability of constitutional rights of asylum-seekers, discussed above. The precarity of their position has been noted and any suggestions of a total ban on wage- and self-employment may be rejected on the strength of their authority. *Scalabrini* boosts the case for (new) forms of non-contributory social assistance to be made available to asylum-seekers, despite the restrictive perspectives offered by the RAA 2017 and social assistance legislation. Given the challenges in obtaining employment and the state of the economy, which would restrict the ability of asylum-seekers to contribute to social insurance schemes, this is particularly apposite. As such, it may be argued that it is the precarity of the position asylum-seekers find themselves

[71] Federation International des Droits de l'Homme (FIDH) Surplus People? Undocumented and other vulnerable migrants in South Africa (2008).

in at the time of the global pandemic that might well prompt a shift in policy direction to accord with constitutional law, international law and South African case law. Covid-19 may then serve at least one useful purpose amidst the devastation it has caused: to stand as a catalyst for sustainable social security reform for asylum-seekers in South Africa.