

Asylum-seekers in South Africa and COVID-19: A catalyst for social security law reform

Prof MP Olivier, Honorary Professor: Faculty of Law, Nelson Mandela University;
Adjunct Professor: Faculty of Law, University of Western Australia; Director:
International Institute for Social Law and Policy

Prof A Govindjee, Executive Dean, Faculty of Law, Nelson Mandela University;
Consulting attorney: Cliffe Dekker Hofmeyr

Presentation: ILERA Africa 9th Regional Congress, 26-29 September 2021

Overview

- Introduction
- Policy context
- Legislative framework
- Related constitutional considerations
- International law principles
- Conclusions and recommendations

Introduction

- The COVID-19 pandemic and South Africa's response in general
- Limitation of rights and the response of the courts
- Overarching objective: provide guidance to legislators, the executive and judiciary as to the complex balance between immigration law principles and human-rights imperatives
- Guiding principles are required
 - To be drawn from:
 - Constitutional principles and jurisprudence
 - International standards and comparative experiences

Policy context

- Large number of asylum-seekers entering SA
- Xenophobia, and UN criticism of the country's direction
- More recent policy instruments contain several pointers informing the treatment of asylum-seekers
 - NHI (2017)
 - White Paper on International Migration for SA (2017)

Legislative framework

- Current social security legislative regime does not exclude asylum-seeking visa holders (especially in relation to contributory social security environment)
- One exception: social assistance regime
 - Unlike refugees, asylum-seekers not included
- COVID-19 Social Relief of Distress grant?
 - Initially excluded
 - *Scalabrini Centre v Minister of Social Development* [2020] ZAGPPHC 308
- NHI proposals treat asylum-seekers on par with ‘illegal foreigners’
- Different treatment to refugees to Refugees Amendment Act, 2017
 - Contrary to jurisprudence on right to work?
 - *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA)
 - *AI v The Director of Asylum Seeker Management: Department of Home Affairs* [2019] ZAWCHC 114 para 25

Related constitutional considerations

- Vulnerable status of non-citizens as a group, and of particular categories of non-citizens
- Application of the Bill of Rights to non-citizens
 - Application to 'Everyone'...
 - Human dignity
 - Right to equality (and meaning of 'unfair discrimination' in relation to asylum-seekers)
 - Access to social security, including access to social assistance
 - Access to courts
 - Fair labour practices
- Limitation of rights

International law principles

- Section 231 of the Constitution
- Courts must consider international law
- Constitutional preference for statutory interpretation aligned to international law
- Asylum-seekers should at least be entitled to core forms of assistance and basic support needs
- Equal treatment with regular migrant workers in respect of social security rights arising out of past employment
- May the right of refugees to wage employment, self-employment and social security, enshrined in the UN Refugee Convention, be limited in the case of asylum-seekers?

Conclusions and recommendations

- ‘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 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.’

- Disproportionate effect of the pandemic on categories of migrants and their children
- Backlash in public opinion against immigrants
- Unprecedented mobility constraints
 - Has affected access to employment, state support and self-help opportunities
- May result in return of asylum-seekers to the home country contrary to the non-refoulement principle
- SA containment measures have arguably deepened the unequal treatment of asylum-seekers and refugees in the country
 - 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

- Agreement to eliminate delays and existing backlog in decision for asylum-seekers
 - Potentially crucial
 - Expectation: respect, protect, promote and fulfil constitutional and international law rights
- Scarcity of resources
 - Reservation for citizens
- Disconnect between state immigration policy and court adjudication of disputes relating to the basic rights of asylum-seekers
 - Further court adjudication in the post-Covid-19 era is likely
 - Policy certainty is also required

RRA 2017

- Commencement appears to be a part-response to some of the judgments of the courts
- Constitutionality of exclusion of asylum-seekers from forms of self-employment and casual work?
- The current underlying policy framework appears to be problematic from a constitutional perspective
- Special protection required for children of asylum-seekers, irrespective of their status
- Opportunities for asylum-seekers to contribute to existing social insurance funds?
 - Cases contradicting the White Paper?
- Access to social relief of distress is important
 - Supported by international law
- Limitation of rights of irregular migrants more easily justifiable, but only to the extent that is reasonable
- The significance of the *Scalabrini* decision

- It may be argued that it is the precarity of the position asylum-seekers find themselves in at the time of the global pandemic that might well prompt a shift in policy direction to accord with international law, constitutional law and South Africa case law
- As such, Covid-19 may still stand as a catalyst for sustainable social security reform for asylum-seekers in South Africa