




Chapter 13

Migration: A Perspective on Poor Basic Service Delivery for Refugees in South Africa

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Introduction

In terms of the 1951 Refugee Convention, a refugee is defined as a person who has fled his or her country forcefully because of fear of persecution, violence or war.¹ This Convention, among other International Conventions and national legislation, provides for the rights aimed for refugees and how those rights are to be implemented and protected. Whether the South African government adequately provides for such rights and services is a question of fact. Legislation exists, but is the South African government complying with it in administering service delivery for refugees? This essay, from a South African context, first discusses how the international legal framework and national legislation are shaped to cater to and protect the rights of refugees. Second, the essay discusses the extent to which the South African government provides shelter for refugees. It will continue to discuss the provision of education to refugees. From thereon, it discusses the extent to which it provides healthcare services. Lastly, it addresses South Africa's compliance with the Sustainable Development Goals and criticism thereof.

1 1951 Refugee Convention.

International Legal Framework for Advocating for Refugee Rights.

The United Nations has taken steps to provide an outline of what a refugee is, including the rights and protection of refugees. Member states are obligated to align national legislation with these conventions.² The international legal framework available for the protection of refugee rights is the 1951 Refugee Convention, 1967 Protocol, to mention a few. Our regional legislation includes the African Charter on Human and Peoples Rights, the 1969 Organisation of the Africa Union Convention, and the 1984 Cartagena Declaration. In their application and interpretation of law South Africa, courts must consider an interpretation in line with international law.³ This is an obligation set by the Constitution of the Republic of South Africa, and it is the supreme law in South Africa; its obligations must be fulfilled.⁴ The 1951 Convention and its protocol are domesticated through the enactment of the Refugees Act, and complementary to this is the Immigration Act.

As also highlighted in Section 234 of the Constitution, “to deepen the culture of democracy established by the Constitution”, Parliament may adopt Charters of Rights consistent with the provisions of the Constitution.⁵ These charters that may be adopted are those of international law; an example is that of protection of refugee rights. Our Constitution in the Republic places an emphasis on the implementation of international law when interpreting legislation.⁶

The United Nations has put in place Sustainable Developments Goals (SDGs) to assist states in managing certain global problems by 2030. The implementation of the SDGs in a nation’s legal policy will help eradicate some problems affecting refugees. SDGs are not internationally binding but are just guidelines provided by the United Nations. With respect

2 Art 2 UN Charter United Nations Charter (full text) | United Nations accessed 20/10/2024.

3 The Constitution of the Republic of South Africa, 1996.

4 Section 2 of the Constitution.

5 See n3.

6 Section 39 of the Constitution.

to SDG 3, “good health and well-being”, most refugees may be psychologically affected by the conditions from which they fled, even in certain situations where they find themselves in their host countries. Hence, this goal is a step by the UN that helps refugee well-being be considered a priority in providing healthcare. “At the Transforming Education Summit, held in New York during the UN General Assembly in 2022, refugee students and educators came together to call for all refugee children and youth to be given access to quality education, through their inclusion in national education systems and relevant education financing mechanisms.”⁷ This shows and serves as an example of initiatives South Africa may take in trying to increase the quality and access to education for refugees in the realisation of goal 4, ‘Quality Education’. As an initiative taken by the United Nations in America, it makes a global statement that encourages other nations, especially Africans, to integrate them into national legislation for refugees. SDG 10 ‘Reduced inequalities’ aims at providing equal opportunities. “Even after fleeing violence and persecution at home, they often continue to be discriminated against or targeted for violence.”⁸ This can be seen by xenophobic attacks, and in South Africa, refugees are denied access to prenatal care, as will be shown further in this article. A deeper context of this will be highlighted below in the essay, showing how refugees are discriminated against and not seen as equals to citizens. SDG 16 ‘Peace, Justice and strong institutions’ promotes inclusivity in societies shunning away discrimination based on nationality and advocating for one society, including refugees. The South African legal framework in Section 6 of the Refugee Act advocates for the use of international legislation such as the universal Declaration of Human Rights, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and other Conventions by the UN to protect the interests of refugees.⁹ International laws create a legal obligation for South Africa to protect refugee rights.

7 17 ways refugees are leading on sustainable development | UNHCR accessed 09/09/2024.

8 Kavuro “Housing and Integrating Refugees: South Africa’s Exclusionary Approach” 2019 *Sabinet African Journals*.

9 Refugee Act 130 of 1998.

1. Do Refugees have a right to service delivery? If so, is the South African Government successfully implementing international law and protecting refugee rights in service delivery?

Housing and Settlement

Refugees are awarded all rights in the Bill of rights unless a limitation is provided.¹⁰ This includes the right to “access adequate housing,”¹¹ a limitation to this right according to Section 26(2) of the Constitution cannot be justified constitutionally, as “the exclusionary approach would be irrational and unreasonable since it is contrary to the constitutional objective of protecting human dignity and in violation of the Refugees Act.”¹² Article 21 of the 1951 Refugee Convention promotes access to housing for refugees and the same treatment as to citizens where possible in terms of housing.¹³ As a point of departure, member states are obligated to implement the rights mentioned in the convention while also considering our constitutional stance on the application of international law. South Africa uses an exclusionary approach in regard to housing for refugees. The Housing Act, which provides programmes and housing opportunities, is limited to only citizens and permanent residents.¹⁴ Refugees are considered as non-permanent residents, meaning that they are not eligible for or entitled to any privileges provided in the Housing Act. The lack of proper refugee camps and integration strategies by the South African government despite policies set in place such as the Refugee Act leaves refugees in vulnerable situations where they end up taking matters into their own hands in looking for places to stay.¹⁵ This is evident by the refugees creating informal settlements and squatter townships of their own, causing an influx in xenophobic attacks, as they all vie for

10 Refugee Act 130 of 1998.

11 Section 26 of the Constitution.

12 Kavuro “Housing and Integrating Refugees: South Africa’s Exclusionary Approach” 2019 *Sabinet African Journals* 77.

13 1951 Refugee Convention.

14 Housing Act 107 of 1997.

15 Mpehle “Theoretical perspectives on refugee movements and service delivery in South Africa” 2014 *Sabinet African Journals* 247.

the same basic services.¹⁶ For example, in 2019, Congolese shop owners' property was burnt down by citizens, who claimed that because of his alien status, he was undeserving of having a house or shop, and they were taking away opportunities from citizens.¹⁷

For the integration and wellness of refugees in a host country, housing plays a vital role. The quality of the environments in which refugees settle and the availability of housing directly affect the ability of refugees to thrive and settle in their new environments. Research has indicated that social-legal status acts as an aggravating factor to the barriers for refugee access to adequate housing.¹⁸: "Many African states do not take a human rights approach towards refugee management within their borders and often maintain an encampment system for refugees."¹⁹ This shows how a lack of resources has affected service delivery for refugees, as many refugee settlements in African countries are mainly made for temporary use but have now turned to a permanent settlement situation for them. Without proper documentation and education, they fail to buy or obtain proper housing, which is a duty that is left for the government, but they are failing them.²⁰

Education

Education is also a major area where refugee status affects service delivery. The constitutional right to education provided in Section 29 of the Constitution²¹ does not provide a limitation only to nationals; rather, by virtue of their approved refugee status, they claim this right. One cannot over-emphasise the importance of education for refugees, which not only promotes their integration into society but also helps curb their involvement in

16 See n8.

17 Human Rights Watch "They Have Robbed Me of My Life": Xenophobic Violence Against Non-Nationals in South Africa | HRW accessed 24/09/2024.

18 Brown, Gill, Halsall"; The impact of housing on refugees: an evidence synthesis" 2022 *Routledge Taylor and Francis Group* 228.

19 Helping Africa help refugees - SAIIA accessed 06/09/2024.

20 See n19.

21 See n3.

criminal activities because of idleness or a lack of opportunities. As highlighted in the *Governing body of Juma Masjid Primary School and others v Essay N.O. and others*, indeed basic education is an important socio-economic right directed, among other things at promoting and developing a child's personality, talents to his or her fullest potential... access to school is an important component of a right to basic education guaranteed to everyone in Section 29(1)(a) of the Constitution.²² Section 27 of the Refugee Act provides that, refugees are entitled to the same legal protection, basic healthcare services and primary education as that of citizens.²³ Refugees are awarded all rights in the Bill of rights unless a limitation is provided. This argument was further highlighted by the *Centre of Child Law and others v Minister of Basic Education and others 2020 1 ALL SA 711*. case in which the court held that undocumented learners should not be denied access to education,²⁴ it went on to highlight the same argument in the *Governing body of Juma Masjid Primary School and others v Essay N.O. and others* case that the right to education is a basic right for everyone.²⁵ For this reason, it is not acceptable to deny child access to basic education because their parents are refugees and that they lack proper documentation. Considering that, in matters dealing with a child, their rights are of paramount importance.²⁶

Healthcare Access

The courts are mandated by national legislation, which is the Refugee Act, and on an international level, the conventions put forward by the United Nations, namely, the United Nations Human Rights Convention (UNHCR). A judgement was passed in the case of the *Scalabrini Centre of Cape Town and Another v The*

22 *Governing body of Juma Masjid Primar School and others v Essay N.O. and others 2011 8 BCLR 761.*

23 Refugee Act 130 of 1998.

24 *Centre of Child Law and others v Minister of Basic Education and others 2020 1 ALL SA 711.*

25 See n22.

26 Section 28 of Children's Act.

Minister of Home Affairs and Others,²⁷ where sections 22(12) and 22(13) of the Refugee Act were declared unconstitutional. Apart from the declaration of invalidity, the court highlighted important aspects of this situation, considering that refugees are a very vulnerable group who have fled into the host country because of situations that force them. It is up to the law to protect their interests and put them in a position where they must return to a place they ran away from because incompetent stringent laws are not ideal. The courts are taking measures to protect refugee rights and provide them equal access to healthcare, as shown in the case of *Section 27 v MEC of the Gauteng Department of Health and Others*, where the court overturned provincial health policies, providing that all pregnant women, lactating women and children under six are entitled to free healthcare irrespective of their nationality and documentation.²⁸ Laws are there, and courts are enforcing them, but this is not seen in practice by those who are supposed to enforce and follow them as well. In a report by the International Women's Media Foundations of interviews they had of women, despite this constitutional judgement, pregnant refugee women still find themselves in situations where they are being turned away from clinics to give birth of pre-natal care just because they are refugees or because their asylum papers expired.²⁹

Some women had to turn to home births, putting both the child and the mother at risk; others were asked to pay a bribe fee of R20000 or R30000 by the nurses at some clinics in Johannesburg just so that they could receive healthcare they are entitled to but deprived of because of their refugee status. By denying refugees access to healthcare because of their status as refugees is an inhumane act that affects their right to dignity, and as highlighted by the *Minister of Home Affairs v Watchenuka* case, the right to dignity is not applied based on nationality but

27 *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* 2024 3 SA 330 (CC).

28 *Section 27 v MEC of Gauteng Department of Health and Others* (22/19304).

29 Howard G Buffett Fund for Women Journalists Pregnant immigrants say they have been turned away from Joburg clinics | GroundUp accessed 25/09/2024.

applies to all by virtue of being a human being.³⁰ There has been an argument by Mukumbang that “Given South Africa’s limited resources, it has been argued that the state has an obligation to its citizens first before catering for non-nationals.”³¹ However, this approach is problematic, as the Constitution in Section 27 provides that everyone has the right to social security,³² and this right is extended to everyone being national or not. Under the umbrella, the term “social security” involves the proper delivery of services without unfair discrimination. Refugees also deserve quality healthcare, and with a scarcity of resources, improvisations should be made for all. A comment was made by an MEC of Limpopo stating that “You are killing my health system” because a Zimbabwean national was injured and was seeking medical assistance in South Africa.³³ She was criticised for this statement.

Conclusion and Recommendations

Before the government accepts more refugees, as much as they are willing to help, it is best to consider the available resources and if the country can accommodate more refugees on top of providing for its own citizens to avoid a fight for resources between refugees and citizens, such situations leave refugees in vulnerable positions where they are seen as burdens and not humans in need of assistance, and the animosity surrounding them increases, which is evident by an influx of xenophobic attacks aimed at them by citizens. This will help the government be able to provide equally for both parties and provide better services, thus also curbing hostility and xenophobic attacks. Government officials should first accept foreigners as people. Legislation is present, but the government should improve efforts to use it more effectively.

30 *Minister of Home Affairs and Others v Watchenuka and Others 2004 1 All SA 21 (SCA) par 25.*

31 Mukumbang, Ambe and Adebisi 2020 *International Journal for Equity in Health* 2; Alfaro-Velcamp “Don’t Send Your Sick Here” 3.

32 S 27 of the Constitution.

33 BBC News Phophi Ramathuba: South African official’s hospital rant at Zimbabwean goes viral ([bbc.com](https://www.bbc.com)) accessed 24/09/2024.