

Human rights law

Refugee rights protection in South Africa

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South Africa became party to the 1951 Convention relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in 1995. These instruments are the core international human rights laws that promote and protect the rights of refugees. To make these instruments enforceable at the national level, in 1998 South Africa adopted the Refugees Act 130 of 1998, which was later amended by the Refugees Amendment Act (33 of 2008).

These instruments guarantee the rights that every refugee, irrespective of their status, must enjoy to live decent life. These rights includes *inter alia* the right to housing, right to work, right to education, right to access the courts, right to freedom of movement within the territory and the right to be issued identity and travel documents to enable refugees to live dignified lives.

Since its transition to democracy in 1994, refugees from across the African continent seeking refuge in South Africa have received a mixed reception. Their presence has not only impacted the country's population dynamics but is also having a visible effect on public attitudes and political rhetoric. Despite the progressive nature of the 1998 Refugees Act, in compliance with international standards, refugees continue to be subject to discrimination, police harassment and xenophobic attitudes (LB Landau & K Jacobsen "Refugees in the new Johannesburg" (2006) 19 Forced Migration Review 44).

Another critical factor affecting the protection of refugees has been the increasing xenophobia within public institutions. Over the past decade xenophobia has increasingly become a factor constraining the South African government in its development and implementation of refugee policies. Rising numbers of asylum seekers and refugees coupled with the already tremendous economic and social difficulties faced by the country has brought into question the capacity of government to deal effectively with the number of forced migrants entering or living within South Africa's borders.

A study undertaken by Landau and Jacobsen in 2006, *Refugees in the new Johannesburg*, confirmed the criticisms of refugee advocates in South Africa on the poor treatment of refugees by the police and the Department of Home Affairs (DHA). More than 67% of respondents indicated that the asylum application process at DHA took at least 18 months, rather than the six months period provided by legislation. Others opined that cases often take three or more years to push their applications through.

Many respondents also reported having to pay bribes to DHA officials

just to enter the refugee reception centre. Sadly, the study discovered that refugees are far more likely to be victims of crime than South Africans, with 72% of the respondents or someone they live with having been a victim. The study concludes that rather than helping to protect foreigners, police appear to be contributing to the problem. Indirectly, the action from government, state agencies and local communities forces refugees back to their countries of origin. This puts refugees in a dire and vulnerable position.

The circumstance of refugees is succinctly captured by Kondile J in *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others* 2007 (4) BCLR 339 (CC) as follows:

"Refugees are unquestionably a vulnerable group in our society and their plight calls for compassion. Refugees have been forced to flee their homes as a result of persecution, human rights violations and conflict beyond their control. Very often they, or those close to them, have been victims of violence on the basis of very personal attributes such as ethnicity or religion. Added to these experiences is the further trauma associated with displacement to a foreign country."

Conversely, Professor Guy S Goodwin-Gill contends that "*whilst asylum is a humane way of assisting victims of persecution and social disorder, appeals based solely upon compassion, solidarity and rights are only occasionally successful because there is awareness that governments will be moved only on their own terms, primarily in the discourse of national interest*" (Guy S Goodwin-Gill "The Dynamic of International Refugee Law" (2014) 25 International Journal of Refugee Law 651).

Moreover, the African Commission on Human and Peoples' Rights held in the *Institute for Human Rights and Development in Africa vs. Angola* case that:

"African States are faced with many challenges especially economic. Therefore, these States often resort to radical measures to protect their nationals and their economies from



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non-nationals but no matter the circumstances, however, such measures should not be taken at the detriment of the enjoyment of fundamental human rights.”

In light of this, the South African government has two options. The first is to find a solution in the form of a strategy that will translate into tangible and concrete projects to put an end to the challenges faced by refugees. The second is to attempt to achieve the impossible by sealing off South Africa's borders, something no country in the world has been able to achieve. It may be worth a mention that the South African Constitution has been hailed as one of the best the world has ever seen and is anchored on the Universal Declaration of Human Rights, a “Bill of Rights” for the world. As such it has no boundaries and borders and applies to all persons, young and old, weak and strong, rich and poor, the citizen, the non-citizen, the asylum seeker, the refugee and the migrant.

Human dignity is one of the fundamental principles of the South African Constitution and this principle must be applied to all persons

residing in its borders, not because they are citizens, but because they are human beings. The recognition of the dignity of others forms the foundation for the protection of their rights. Indeed all other rights are inspired through the recognition of human dignity and from human dignity all other human rights are given meaning. In the words of Nugent JA in the case of *Watchenuka and Another v Minister of Home Affairs* (2003, para 25):

“Human dignity has no nationality. It is inherent in all people – citizens and noncitizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s10 of the Bill of Rights.”

Finally, human rights lawyers must demonstrate to the South African government that protecting the rights of refugees is not a matter of virtue, but a means of promoting its domestic and regional strategic interests. ♦

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