



Briefing Paper 333

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Refugees and Their Rights

A change of attitude towards migrants and refugees is needed on the part of everyone, moving away from attitudes of defensiveness and fear, indifference and marginalization – all typical of a throwaway culture – towards attitudes based on a culture of encounter, the only culture capable of building a better, more just and fraternal world¹.

Pope Francis

1. Introduction

In 1996 South Africa committed itself to the protection of refugees when it ratified the 1951 United Nations Refugee Convention, as well as the Organisation of African Unity's Refugee Convention. The South African Constitution further confers almost all the rights applicable to its citizens, except for the right to vote and certain other political and citizenship rights, on foreign nationals considered to be refugees.

The Refugee Act of 1998 takes cognisance of both the UN and OAU Conventions when it defines a refugee as a person who has a well-founded fear of being mistreated because of their race, tribe, religion, nationality, political opinion or membership of a particular social group. A foreign national who has been granted refugee status in terms of section 24 of the Refugee Act may access the same socio-economic rights as a citizen, such as the right to seek housing, and the rights to work, health-care, and education². While these rights are guaranteed (in so far as the government is able, within practical constraints, to give effect to them) refugees often have difficulty in accessing them.

This briefing paper is a synopsis of the discussion at a recent CPLO roundtable on Refugees' Socio-Economic Rights.

2. Socio-Economic Rights – the Legal Framework

In South Africa asylum seekers and refugees are entitled to the same 'meaningful existence rights' – the right to education, the right to seek employment, the right of access to housing, and the right to basic health care – that South African citizens are entitled to. These rights are contained in Chapter 2 of the Constitution, as well as in the Refugees Act 130 of 1998. It is interesting to note that, despite the fact that both the UN and OAU Conventions are relatively silent on socio-economic rights, South Africa is one of a handful of countries that confers these socio-economic rights on refugees. Most African countries have a refugee encampment policy³ and thus do not confer socio-economic rights on refugees.

2.1. Housing

While South Africa's non-encampment policy is praiseworthy, the unintended consequence for asylum-seekers and refugees in general is that finding accommodation becomes the first priority, and a major source of frustration and exploitation. Unlike many developed countries, such as the USA, South Africa does not have a social assistance policy for refugees, which often leads to financially vulnerable asylum-seekers struggling to find accommodation, and often

being unable to remain in the country. There are, however, implementing partners such as the UNHRC, which do assist with small assistance allowances for the first three months.

However, the major challenge that most asylum seekers and refugees are faced with is not so much accessing housing, but rather being exploited by unscrupulous landlords. As was reported at the roundtable, landlords often charge a higher rental to foreign nationals and often illegally evict such tenants. The refugee's tenuous position in the host country, and the fact that they usually lack financial resources, make it difficult for them to fight such landlords in the courts.

2.2. Employment

Section 27(f) of the Refugees Act states that a refugee is entitled to seek employment. Employed refugees are also entitled to the same rights contained in the Basic Condition of Employment Act and the Labour Relations Act as are South African citizens.

Finding gainful employment in the formal sector is a major challenge for South Africans, let alone for asylum-seekers and refugees. The problem is not so much acquiring the right to seek employment, but rather convincing a prospective employer that as a refugee you can be employed legally. The situation is exacerbated by the fact that the refugee status permit, issued in term of section 24 of the Refugees Act, which allows a refugee to remain in South Africa for two years, does not clearly indicate that the holder of the permit is entitled to work and study in South Africa. On the other hand, an asylum-seeker's temporary permit, issued in terms of section 22 of the Refugees Act, which allows a foreign national to stay for a period of three months while his/her application is processed, prominently displays the fact that the carrier has the right to study and work in South Africa. The asylum-seeker's right to seek employment is in fact not an automatic right contained in any local or international legislation, but rather a right conferred to ease an administrative bottleneck. A blanket right to seek employment was granted to all asylum-seekers because the committee empowered to individually process all asylum applications and to assess whether an individual could be employed, did not have the personnel to do so. The discrepancy between the two documents has led to employers being cautious not to break the law when employing foreign

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nationals and thus incurring a fine of R120 000 for employing an 'illegal alien'.

2.3. Health-care

Health care rights are set out in section 27 of the Constitution:

- 1) *Everyone has the right to have access to*
 - a) *health care services, including reproductive health care;*
 - b) *sufficient food and water; and*
 - c) *social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*
- 2) *The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.*
- 3) *No one may be refused emergency medical treatment.*

Refugees and asylum-seekers are included in 'everyone' and are entitled to receive health-care services at any day-hospital, general public hospital and private hospital. However, as with locals, problems arise in accessing these services when the necessary identification documentation is not presented. There has also been anecdotal evidence of pregnant refugees and asylum-seekers not being attended to. As in the case of accessing other socio-economic rights, the challenge lies not with the law itself, but rather with the attitude of those providing the service as espoused in legislation.

2.4. Education

The right to education is guaranteed in chapter 2, s29 of the Constitution: "(1) *Everyone has the right to a basic education, including adult basic education*". Furthermore, the South African Schools Act 84 of 1996 makes access to schooling a basic right and prohibits any kind of unfair discrimination or exclusion, whether on the basis of nationality, documentation status, or ability to pay. Primary schooling is also compulsory in South Africa.

All asylum-seeker and refugee children have a right to primary education, and are entitled to the same access to schooling as any South African

child. Just like South African citizens, asylum-seekers and refugee children can be either enrolled in a public school (and more than 60% are no-fee schools) or a private school. Despite the fact that children of asylum-seekers and refugees have a legal right to be in school, many have had difficulty in accessing schooling. Among the most common reasons for not allowing refugee children into schools is that they do not possess the requisite documentation. Most schools require a birth certificate, and/or the last school report card before a child can be admitted. Although a section 22 or 24 permit should be sufficient to apply for a birth certificate from the Department of Home Affairs, a 2011 study by the University of Johannesburg's Centre for Education Rights and Transformation⁴, found that such permits were often not accepted by the Department of Home Affairs; as a result, birth certificates could not be obtained and schools refused admission. The requirement that a prospective learner should have a last report is also problematic for most asylum-seekers and refugees because these documents are often lost or left behind in their home countries.

This situation is a stark illustration of how a clear constitutional right can be undermined and violated by an intransigent attitude on the part of administrators and bureaucrats. In any event, the lack of documentation should not be decisive, as schools are obliged to admit children

conditionally until the relevant documentation is obtained.

3. Conclusion

It was clear from the roundtable discussion that South African law is far more generous in extending socio-economic rights to refugees than most African and European countries. However, this does not mean that refugees and asylum seekers have it easy in making these rights a reality. Refugees, like South African citizens, are often subject to service delivery inadequacies, whether regarding access to housing or health care services, or in the field of education. They also suffer from discriminatory treatment at the hands of government officials. And, as is demonstrated by occasional outbreaks of xenophobic violence, they still face, in the words of Pope Francis, "*...attitudes of defensiveness and fear, indifference and marginalization...*"

Clearly, what is needed is not just more, or different, laws, but rather the necessary attitudinal changes to make us more accepting of diversity, and of the 'strangers' in our midst.

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¹ Pope Francis (2013): *Migrants and Refugees: Build a better world.*

² Section 26 & 27 of the Constitution of the Republic of South Africa

³ Encampment refers to a policy in terms of which refugees are confined to a camp, and are generally not permitted to move freely around their host country. Clearly, this has a direct impact on their ability to seek work, to access housing, to find schools and medical-care, etc.

⁴Kathleen Chaykowski (2011): *Lifting the veil on migrants and myths.* Available online at <http://mg.co.za/article/2011-10-28-lifting-the-veil-on-migrants-and-myths/>