FEATURE

Access to Justice for African Migrants in South Africa

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Africa has growing income inequalities, conflict, displacement, and economic crises, all of which tend to drive migration to South Africa despite the increasingly protectionist tendencies of the South African government. Migrants are perceived as a 'problem' and a 'threat' to jobs for South African nationals, perceptions that are exacerbated by careless comments made by persons in authority such as politicians and police officials. South Africa is committed in terms of the United Nations Sustainable Development Goals (UN SDGs 2015) to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels', yet its practice on the ground is a far cry from this commitment.

This article examines the way in which South African law and policy has increasingly securitised migration over the years and, in the process, reduced migrants' access to justice. The article takes particular interest in the interaction of migrants with the police, the Department of Home Affairs (DHA), and courts.

Securitisation

'Securitisation' entails the use of language and institutions that create the perception of refugees as a 'security' issue or 'crisis'. Sager notes that 'the language of crisis frequently plays into xenophobic discourses in which migrants and refugees are characterised as invaders, plagues, floods, waves or terrorists' (Sager forthcoming: 9). Framing migrants as a 'crisis' dehumanises them as 'flows' rather than people responding to an actual crisis (Sager forthcoming: 4).

Under apartheid

South Africa had a 'two-gate policy' in this era: 'The front gate welcomed people who corresponded to the criteria of attractiveness defined by the governing minority. The back gate served a double function, preventing unwanted migrants from entering and allowing cheap and relatively docile [labour] in for temporary periods' (Segatti 2008: 34).

South Africa's approach to immigration was grounded in its policies of racial separation. The 1910 Union of South Africa Act and 1950 Population Registration Act denationalised blacks, forced them to live in Bantustans (tribal homelands) and allowed them to enter the country only with ***dompas*** permits. These laws ran concurrently with the 1937 Aliens Control Act (1937 ACA) until the latter was replaced by the 1991 Aliens Control Act (ACA).

South Africa needed more whites to fill white-collar jobs and avoid being outnumbered by blacks, yet it also wanted to reduce the inflow of Jewish refugees and others to avoid a threat to European culture in the country (Segatti 2008: 35). The 1937 ACA thus limited Jewish refugees, Italian prisoners of war, Russians escaping pogroms, and French Huguenots to those 'likely to become readily assimilated' with whites in

the country. Consequently, between 1961 and 1991, the Republic welcomed many European refugees (and not African refugees), subsidising their travel expenses, accommodation and upkeep – it spent more than USD 4.8 million between 1972 and 1973, and about USD 2.9 million in 1991.

Although amendments to the ACA enabled non-European migrants to enter the Republic, they still had to assimilate; thus, black refugees from Mozambique, for example, had to assimilate with blacks living in the Bantustans. Furthermore, despite there being treaties to protect refugees, Mozambican refugees were deported ***en masse*** as 'illegal immigrants', and between the late 1990s and early 2000s very few managed to legalise their status (Segatti 2008: 38). In addition, section 55 of the ACA precluded judicial review of decisions on immigration.

Post-apartheid

Although the ACA was declared unconstitutional, more than a decade passed before it was replaced (Segatti 2008: 38). For example, section 47 of the ACA allowed restrictions on undocumented migrants, in violation of fundamental constitutional rights, and without recourse to judicial review. This resulted in human rights violations, mass deportations, and brutality from the police and military (Segatti 2008: 39).

By 1996, African and Asian immigrants had increased. Africans were mostly students at South African universities as well as workers who began filling white-collar jobs. The major policy documents of the post-apartheid government – the RDP, Gear 1996, and the Accelerated and Shared Growth Initiative (ASGISA) 2006 – were mostly silent on issues of migration.

South Africa soon acceded to the United Nations Convention Relating to the Status of Refugees (UNCRSR) (189, UNTS 150), Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa (OAU Convention 10001 UNTS 45), African Charter on Human and Peoples' Rights (ACHPR), and UN Declaration of Human Rights (UDHR).

It committed itself, inter alia, to protect the rights to life, human dignity, freedom of movement, and protection of private property of persons within its borders, as evidenced by its commitment to interpret and apply the Refugee Act with due regard to international and

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regional instruments, including the UNCRSR, OAU Convention and UDHR, as set out in section 6 of the Refugee Act 130 of 1998.

Article 12 of the ACHPR requires states to grant the right to people to move freely in the country, while article 26 of the UNCRSR grants the same rights specifically to refugees. Article 16 of the UNCRSR requires states to treat refugees with the same access to courts as nationals. The ACHPR guarantees the right to life and integrity (article 4); liberty and security of the person (article 6); equal access to public service, such as police protection (article 13); and the right to protection of private property (article 14).

These rights are echoed in articles 3, 13, 21, 17 of the UNDHR, respectively. Furthermore, the Constitution restates these same rights in sections 10, 11, 12, 9 and 25, which guarantee the right to life, freedom and security, equality and the right to property.

In 1998, South Africa enacted the Refugee Act to comply with its obligations under international law. The Act is a combination of the provisions of the UNCRSR and the OAU Convention on Refugees, and as such contains important provisions protecting the rights of refugees and asylum-seekers.

However, as early as 1998 and only four years into democracy, Human Rights Watch (HWR) reported rising levels of xenophobia in South Africa and increasing perceptions of foreigners as criminals, drug dealers, and causes of unemployment (HRW 1998). A decade later, xenophobia erupted in attacks on foreign nationals in what was described as 'an orgy of violence' that was 'jumping like veld fire from place to place' (Everatt 2011: 8).

Section 13(b) of the 2002 Immigration Act was

amended to require a repatriation guarantee for departure. Similarly, section 10A of the Immigration Amendment Act 19 of 2004 requires foreign nationals to present a valid permit upon demand, thereby further restricting the mobility of foreign nationals in violation of article 26 of the UNCRSR. To make matters worse, informal pamphlets circulated in poor communities offered rewards to encourage people to 'help' the police identify foreign nationals, especially Mozambicans (HRW 1998).

Politicians have been known to use populist and securitising language in rallies as a means to secure votes in national and provincial elections. In 2008, more than 62 foreign nationals were killed and 150,000 displaced (Segatti 2011). In 2015, three weeks after Zulu King Zwelithini made inflammatory comments calling for foreigners to go back to their countries, there was a crisis in which, as at 17 April, six people had been killed and 5,000 displaced (UNHCR 2015).

These attacks were labelled as xenophobia, but in a truer sense they reflected Afrophobia, the fear of 'the black other from north of the Limpopo River' (Tshaka Unisa). The main causes of Afrophobic attacks on black foreigners are socio-economic pressures, as migrants are perceived as threats to access to housing and employment (Segatti 2008, 33), as well as threats to sexual relationships.

Thereafter, amendments were made to the Immigration Act. Section 5(3) of the Immigration Amendment Act 13 of 2011 prohibits entry into the Republic without a passport; such passport should have a visa, and the passport should be valid for 30 days after the intended date of departure. This provision introduced further stringent requirements for asylum-seekers, who may not be able to produce the required documentation because often they leave their homes in a rush.

Worse still is section 23(1) of the 2011 Act, which requires asylum-seekers to report to the nearest refugee reception office within five days, which is not always practical. For example, the Limpopo office attends to Zimbabwean and Congolese nationals only on Mondays and Tuesdays. This means an asylum-seeker from Zimbabwe who arrives on Tuesday afternoon can become unlawful by virtue of this time limit if for any reason he or she has difficulty in locating the refugee reception centre on the day of arrival.

The White Paper on International Migration for South Africa (DHA 2017) is contradictory to the extent that the same policy document introduces 'Asylum Seeker Processing Centres' where asylum-seekers are required to reside until their applications are processed. It is more stringent because it seeks to remove the automatic right of asylum-seekers to work and study. Despite the non-encampment policy, this heightened securitisation of asylum-seekers does not integrate them but forces them to be housed in centres whose conditions are yet to be determined. It also increases the state's financial burden.

At these centres, only 'low-risk asylum seekers may have the right to enter or leave the facilities under certain conditions'. It would be unfortunate if the determination of risk were based on determining certain countries as dangerous and accordingly treating migrants from them as high risks. This would normalise and legitimate differential treatment of asylum-seekers based on administrative discretion. It is also not yet clear whether applicants would have a right in effect to seek judicial review of their classification. Whatever the case, these developments clearly increase the burden on certain categories of asylum-seekers relative to what that burden is for others.

Effectiveness of access to justice

The United Nations Development Programme (UNDP) defines access to justice as 'the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards' (UNDP 2003). In the absence of access to justice, migrants are excluded from benefitting from specific legal provisions, particularly section 9 of the Constitution, which entrenches the right to equality and the prohibition on discrimination on the grounds of 'nationality', among other factors (Bloch 2010: 233). Women face intersecting vulnerabilities in the course of migration, such as physical and sexual abuse from traffickers, smugglers, border officials and the police force (Sager forthcoming: 9).

Police official

In many cases, foreign nationals know their perpetrators

because they live with them in the same communities; consequently, they are fearful about reporting them to the police. Victims of xenophobic violence have also said that police respond to requests for assistance by insisting on cash payment (SAHRC 2008: 72). As a result, foreign nationals have come to expect little from the police who are supposed to protect them.

Secondly, the police have taken 'an observer role' (SAHRC 2008: 72), ignoring their duties and discriminating against foreign nationals. For example, a Zimbabwean truck-driver's stomach was slit open in front of the police while they were present 'monitoring the situation', but no arrests were made (Mavhinga 2019). There is no recovery of property damaged, looted or burned. With such impunity and a complicit police force, local communities can get away with xenophobic violence.

Thirdly, the HRW (1998) noted that both the police and DHA had been antagonistic towards lawful and undocumented migrants. For example, in 2013 a Mozambican national, Mido Macia, was accused of stealing a police gun and tied to a moving police van, as a result of which he sustained serious injuries (The Guardian 2013). If the police can behave in such an appalling manner, it becomes easy for civilians to emulate this lack of respect for the lives, health and integrity of foreign nationals, since they are secure in the knowledge of their impunity.

Department of Home Affairs

The 2017 White Paper on International Migration acknowledges that the existing system might not be identifying vulnerable applicants who need special protection and immediate assistance, such as women victims of war crimes (DHA 2017). Secondly, the DHA refugee centres often lack benches, clearly visible information desks, and forms translated into the languages of the region, leaving applicants vulnerable to crooks posing as 'agents' of the DHA. However, having to stand in a queue is not unlawful despite the health and psychological strain it might have on persons. Thirdly, children tend to miss school and tests because they have to be present at the DHA for all renewals and follow-ups, despite the fact that this disrupts children's integration into normal life.

Courts

Courts are one of the most important mechanisms for access to justice for migrants. They are supposed to give victims of violations such as xenophobic attacks the right to be heard. However, the court system is inherently expensive and adversarial, which makes it undesirable for many. Unlike refugees, who qualify for social protection and access to free legal aid from government institutions, asylum-seekers, undocumented and economic migrants are particularly vulnerable because they are excluded from these resources which advance access to justice.

Bail is also problematic, as some courts have ruled harshly and insisted on detention in lieu of a security deposit, which negatively affects poorer migrants. Undocumented migrants risk being deported if they approach the formal court system, which is an additional barrier to their access to justice.

However, the Constitutional Court is proving to be an invaluable tool for legal and policy reform. For example, in ***Lawyers for Human Rights v Minister of Home Affairs and Others***, the Court held that section 34(1)(b) and (d) of the Immigration Act 13 of 2002 were unconstitutional for failing to ensure that detained refugees were presented to the magistrate within 48 hours of detention. In another case, ***Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others***, the DHA had closed the refugee reception office in Cape Town on the basis that it encountered mostly economic migrants allegedly feigning asylum and that most asylum-seekers entered the country through its northern borders. The Court upheld Scalabrini's appeal and ordered the DHA to reopen the refugee reception office by 31 March 2018.

In ***Osman v Minister of Safety and Security and Others,*** the Western Cape Equality Court was faced with a complaint that certain police officers had been present during the looting of a foreign national's shop but watched without helping him despite their having the means to do so and being armed. The Court reasoned that although it was a terrible experience for the shop owner, there was no substantial evidence to prove his claim and held that the police had no positive obligation to protect the shops of the foreign nationals during a xenophobic

attack. The challenge is that the evidentiary burden is often so high, and the circumstances of the offence so difficult for obtaining evidence, that victims cannot ultimately get the recourse that is sought.

Conclusion

In conclusion, politicians and the institutions of the police and DHA should be held accountable for their statements in order to reduce securitisation of migration and the targeting of foreigners by local communities in response to political sentiments. The DHA must reform its refugee reception offices and procedures. The South African Human Rights Commission should strengthen its oversight role in this regard. More importantly, the government should allocate sufficient resources to enable migrants to access the justice system.

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