



Scalabrini
Centre of Cape Town

Presentation for Oral Submissions on the National Health Insurance Bill

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ADVOCACY PROGRAMME SUBMISSIONS

OVERVIEW

1. Introduction
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Constitutional

- **The Bill takes away or removes ways of accessing healthcare services which including those provided to non-citizens in violation section 27 of the Constitution.**
- **Progressive Realisation is required understood and appreciated but what we see from the Bill is Retrogression in violation of the principle of Non-Retrogression**
- **Constitution, and a series of legislation are infringed and undermined**
- **Right to Equality**
- **Right to Dignity afforded to Asylum seekers compromised - Watchenuka**

Who are Asylum Seekers whose rights are being limited?

- A refugee is someone who fled on account of a well-founded fear of persecution and/or fled external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order. While one awaits refugee status determination in the country they are an asylum seeker.
- The process of determining who is a refugee in South Africa that's years and sometimes over a decade despite the law requiring finalisation in 180 days.

RIGHT TO APPLY AND EXTENT OF RIGHTS

- According to the Refugees Act, no person may be denied the opportunity to apply for asylum and asylum seekers and refugees are protected against detention, deportation and refoulement
- Refugees & Asylum Seekers have the majority of the rights that South Africans have with a few exceptions like the right to vote and to hold public office
- Refugees Act 130 of 1998 as amended in 2020:
- 27A. Protection and general rights of asylum seekers An asylum seeker is entitled to- (a) a formal written recognition as an asylum seeker in the prescribed form pending finalisation of his or her application for asylum; (b) the right to remain in the Republic pending the finalisation of his or her application for asylum; (c) the right not to be unlawfully arrested or detained; and **(d) the rights contained in the Constitution of the Republic of South Africa, 1996, in so far as those rights apply to an asylum seeker.**

RIGHTS OF REFUGEES & ASYLUM SEEKERS AND OTHER CATEGORIES OF MIGRANTS

Constitution of South Africa

- Supreme law of the land; provides legal protection to everyone in the Republic
- Section 9: “everyone is equal” and the “State may not unfairly discriminate against anyone”
- Section 10: “everyone has inherent dignity”
- Patel v Minister of Home Affairs (2000): as a result of the wording of the Bill of Rights (in which the word “everyone” is used) foreigners have the same rights under the Constitution that citizens have, unless the contrary emerges from the Constitution
- Refugees and Asylum Seekers are therefore protected by most of the Bill of Rights of the Constitution as they refer to “everyone”



Migrants and the Constitution

- It is important to state the Constitution, more specifically The Bill of Rights was meticulously drafted to redress apartheid injustices and to create a society based on the democratic values of human dignity, equality, and freedom. Some of our countries leaders themselves were refugees and asylum seekers in exile under apartheid.
- Yacoob J states in Grootboom within the context of the issue of housing, the state should ensure that its policies target the particularly vulnerable who cannot afford to provide for themselves. I submit that asylum seeker are a vulnerable group in South Africa.
- Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)
- The Constitutional Court has recognised asylum seekers and refugees as a specific vulnerable group in Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others (CCT 39/06) [2006] ZACC 23; 2007 (4) BCLR 339 (CC) ; (2007) 28 ILJ 537 (CC); 2007 (4) SA 395 (CC) (12 December 2006)

Special exemption permit holders

- Migrants of special exemption permits should also be included under 4(1). Most individuals on these permits are low skilled employees and are not high earners. Many have escaped their countries due to poverty and the failure of their governments to provide for their basic needs. They constitute a vulnerable group.
- Exemption Permit holders have by enlarge been in the country and made a substantial contribution to the fiscus and to the fabric of society in South Africa, many of whom are nurses, care workers, teachers and social workers
- It does not make sense to exclude such persons from the Bill beyond the fact that to do so would be unconstitutional and retrogressive.
- It is not enough in Law that there is a Ministerial Discretion and Special Permit Holders and Asylum Seekers should be expressly included categories

Progressive Realisation

- Progressive realisation.
- Through the Bill of Rights, everyone is granted the right to access rights, and duties are placed on the State to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.” Despite the right to have access to healthcare services being guaranteed in the Constitution, access is not always universal from the beginning due to resource constraints. Both the Constitution and the ICESCR recognise this reality and provide that those rights have to be realised over time and progress towards full realisation is dependent on the availability of resources. Progressive realisation entails the obligation to effectively use the available resources paying attention to equality. The review of whether adequate measures have been taken to realise access to rights takes into consideration these core aspects. Where scarcity is evident, it is the marginalised and vulnerable population groups that should be prioritised but this is not what is seen in the Bill in its current iteration.

(on Progressive realisation see: Chenwi, Lillian. (2013). Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance. *De Jure Law Journal*, 46(3), 742-769)

RIGHTS OF REFUGEES & ASYLUM SEEKERS

Right to Health Care

- Refugees & Asylum Seekers have the right to the same basic health care and emergency health care services as South Africans:
- S27 (1). **Everyone** has the right to have access to
- **a. health care services, including reproductive health care;...**
- 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.
 - Includes ante and post-natal care for pregnant and lactating women



RIGHTS OF REFUGEES & ASYLUM SEEKERS

Right to Health Care

- The well-being of asylum seekers and refugees is intrinsically challenged by ill-health. The journey of Refugees is often through difficult terrain, and they face challenges such as violence, hunger, exhaustion and increasing vulnerability to ill health.
- Before leaving their countries some of them might have been victims of armed conflict and suffered conflict from displacement, violence or torture. As a result of these issues refugees are often in a poor state of health and greatly in need of healthcare services.



Right to Health Care

- *2007 Department of Health Circular* (below) confirming that asylum seekers and refugees at public hospitals to be charged same fees as South Africans in the same circumstances; also undocumented asylum seekers to be treated similarly
- Refugees and Asylum Seekers should have access to HIV Voluntary Counseling and Testing; some refugees & asylum seekers with AIDS may qualify for ARV treatment at same charge as South African nationals
- The exclusion of asylum seekers from section 4(1) of the Bill is both retrogressive and Unconstitutional.



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Verw/Reference : BI 4/29 REFUG/ASYL 8 2007

**REVENUE DIRECTIVE- REFUGEES/ ASYLUM SEEKERS WITH OR WITHOUT
A PERMIT**

**To: PROVINCIAL HEALTH REVENUE MANAGERS
HIV/AIDS DIRECTORATES**

19TH SEPTEMBER 2007

Dear All

**HOSPITAL FEES: ASSESSMENT OF REFUGEE / ASYLUM-SEEKERS
(with or without a permit)**

Preamble

REFUGEE ACT, Act No. 130 of 1998 (Chapter 5; Section27, (g))

RIGHTS AND OBLIGATIONS OF REFUGEES (Protection and general rights of refugees)

27. A refugee-

(g) Is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.

**To avoid contravening patients rights, as precepts to the Constitution (section 27 (3))
and the Refugee Act: Act No. 130 of 1998 (Chapter 5; Section27, (g))**

1. Where refugee status have been determined or asylum seekers with or without a permit:

1.1. Basic Health Care:

1.1.1 Refugees / asylum seekers **with or without a** permit that do access public health care shall be assessed according to the current MEANS test. (as specified in the Annexure H).



1.2. Anti-retroviral treatment (ART)

- 1.2.1 Refugees / asylum seekers **with or without a** permit that do access public health care, shall be exempted from paying for ART services irrespective of the site or level of institution where these services are rendered. *(Please refer to the ART directive: BI/429/ART dated the 20th April 2007).*

2. Full paying patients:

- 2.1 The following full-paying patients **are excluded** from free services (basic Health Care and ART) irrespective of the level of care where the service is being rendered:
- 2.1.1. Refugees / asylum seekers whose income **exceeds** the prevailing means test shall be levied at the full paying UPFS.
 - 2.1.2. Externally funded patients, including members of medical schemes registered in terms of the Medical Schemes Act, 1998 (ACT No. 131 of 1998).
 - 2.1.3. Externally funded patients whose medical schemes **are not recognised** within the RSA scheme pool shall be charged as full paying patients (Self Funded), unless prior arrangements have been made.
 - 2.1.4. Patients treated on account of other state departments, e.g. Compensation Commissioner (COID), SA Police Services, Department of Correctional Services.
 - 2.1.5. Patients treated in state facilities by their **private medical practitioner.**

NB: The execution of this directive is with immediate effect.

Your co-operation would be appreciated.

**MR. FG MULLER
CHIEF FINANCIAL OFFICER (CFO) (NDOH)**



RIGHTS OF MIGRANTS, ASYLUM SEEKERS & REFUGEES

- **Non-Refoulement**

- The NHI Bill places South Africa at risk of violating the non-refoulement principle. If asylum seekers are forced to leave because of failure to access healthcare, this will be constructive or indirect-refoulement. The non-refoulement principle is the cornerstone of international refugee protection and it is a non-derogable principle of international refugee protection. South Africa has shown commitment to the principle and in addition through ratification of international law and it is bound by it. The principle is further codified under south African law in terms of section 2 of the Refugees Act 130 of 1998.
- Whilst economic migrants can freely return to their countries of origin where they can access protection as nationals when circumstances become unbearable, refugees do not have the same privilege. They do not have the option of returning to their country of origin because they have lost its protection.

RIGHTS OF MIGRANTS & REFUGEES

Right to Freedom and Security of Person

- Section 12(1) of Bill of Rights: **Everyone** has the right to freedom and security of the person, which includes the right —
... (e) **not to be treated or punished in a cruel, inhuman or degrading way.**
- (2) **Everyone** has the right to **bodily and psychological integrity**, which includes the right— (a) to make decisions concerning reproduction; (b) to security in and control over their body...

RIGHTS OF REFUGEES & ASYLUM SEEKERS

Children's Rights in terms of Constitution:

- **Section 28(1)(b):** “every child has the right to family care/parental care, or to appropriate alternative care when removed from family environment”
- **Section 28(1)(c):** “every child has the right to basic nutrition, shelter, basic health care services and social services”
- **Section 28(1)(d):** “every child has the right to be protected from maltreatment, neglect, abuse or degradation”
- **Section 28(2):** “a child's best interests are of paramount importance in every matter concerning the child”

RIGHTS OF MIGRANTS & REFUGEES

Right to Education (Progressive Realisation – analogous to right the Health)

- Every child has a right to an education and cannot be denied access thereto
- <http://www.saflii.org/za/cases/ZAECGHC/2019/126.html> Centre for Child Law and Pakamisa High School Case - Centre for Child Law and Others v Minister of Basic Education and Others (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019)
- Department of Education Circular



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**TO: HEADS OF PROVINCIAL EDUCATION DEPARTMENTS
HEADS OF PROVINCIAL GOVERNANCE SECTIONS
DISTRICT DIRECTORS
SCHOOL GOVERNING BODIES
SCHOOL PRINCIPALS
ALL SOUTH AFRICAN SCHOOLS
GOVERNING BODY ASSOCIATIONS**

CIRCULAR No. 1 of 2020

ADMISSION OF LEARNERS TO PUBLIC SCHOOLS

1. INTRODUCTION

- 1.1 The judgment in the matter of the undocumented learners was handed down on 12 December 2019 in the High Court of South Africa, Grahamstown: Eastern Cape Division (High Court).
- 1.2 The High Court amongst others made the following order:
- a. Clauses 15 and 21; of the Admission Policy for Ordinary Public Schools; were declared to be inconsistent with the Constitution and therefore invalid.
 - b. Eastern Cape Education Department Circular 6 of 2016, dated 17 March 2016, was declared to be invalid and was set aside. (Circular 6 of 2016 deals with the payment of norms and standards funding, school nutrition and post

Conclusion

- The Bill is not in line with the Constitution nor with other legislation, international law or the jurisprudence of our courts
- The Bill should be amended to make express and clear provision for asylum seekers and special permit holders in the revision of Section 4.
- The Bill takes away access to healthcare services from asylum-seekers, immigration detainees, certain categories of children and dependents, citizens of the SADC and other undocumented migrants. It is unlawful, unconstitutional, inhumane, not in the interests of public health, and in conflict with the Bill's own objectives.
- Thank you for the opportunity to make submissions.

Thank you



Questions?

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