

Bureaucratic Barriers to Social Protection for Refugees and Asylum Seekers during the COVID-19 Disaster in South Africa

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The economic fallout of the coronavirus pandemic could be minimized by social protection instruments such as unemployment insurance and distress relief grants. This paper assesses the ability of refugees and asylum seekers to access these instruments in South Africa. In general, the bureaucratic system of asylum documentation acts as a barrier to access social protection, as exemplified by the administration of the Unemployment Insurance Fund and the Social Relief of Distress grants during the pandemic. While this problem has traditionally been articulated in terms of equality and socio-economic rights, this paper proposes that asylum administration should also be prioritized as a disaster preparedness and management infrastructure, as well as an essential service. This is to ensure refugees and asylum seekers' need for protection is not neglected in a disaster.

Keywords: disaster management, socio-economic rights, documentation, asylum administration

INTRODUCTION

The first diagnosed cases of COVID-19 in South Africa were reported on 05 March 2020 (National Institute for Communicable Diseases, 2020). Ten days later the Minister of Cooperative Governance and Traditional Affairs declared a ‘national state of disaster’ in terms of the Disaster Management Act (DMA) (CoGTA, 2020a). A further ten days later she promulgated regulations under the DMA which brought the country into a national lockdown that has persisted at fluctuating levels of stringency (CoGTA, 2020b). At the time of writing, we are approaching 500 days of continuous lockdown, more than 2.3 million total reported cases, and 70,000 deaths (DOH, 2021). In the quarter immediately following the imposition of the lockdown, the number of employed people fell by around 2.2 million; 640,000 of these losses were in the informal sector (Statistics South Africa, 2020a). In April 2020 alone, 47% of households reported running out of money to buy food, possibly double the already-high rate reported for the previous year. The full weight of the crisis represented by these numbers is startling and necessitated a relief response by the government.

The same regulations that initiated the lockdown also made provisions for government ministers to issue directives, among other objectives, to “alleviate, contain and minimise the effects of the national state of disaster” (CoGTA, 2020b: reg 10(8)(c)). The directives resulted in a set of relief and assistance programs to the public. The purpose of this paper is to outline the state of refugees and asylum seekers in South Africa during the coronavirus pandemic, and their status in relation to these social protection mechanisms during the disaster.

According to the United Nations High Commissioner for Refugees (UNHCR), South Africa is host to 266,694 refugees and asylum seekers (UNHCR, 2020).¹ For reasons explained later in this paper, this number may be under-reported. Most refugees and asylum seekers in South Africa are from Ethiopia, Somalia, Zimbabwe, and the Democratic Republic of the Congo (Parliamentary Monitoring Group, 2019). Their stay in South Africa is likely to be protracted due to either inefficiencies in the asylum-seeker process or to ongoing instability in their home countries, or both. South Africa’s Auditor-General (2020: 7) estimates that the backlog at the initial asylum application stage is seven months, and at the review and appeal stages, one year and sixty-eight years, respectively — all assuming no new asylum applications are received. Asylum seekers can wait anywhere between one to ten years to have their claim to asylum finalized, which usually results in final rejection considering the 96% rejection rate (Amnesty International, 2019) of asylum applications.

South Africa’s laws provide for an urban asylum policy as opposed to one of encampment. While an asylum seeker’s claim is being adjudicated, and while a refugee enjoys asylum, they are entitled to live independently. This is evidenced by

¹ Figures at January 2020.

their constitutional and statutory rights to freedom of movement² and to work,³ although for asylum seekers the latter right is no longer automatic and must be 'endorsed' on their visas (RSA, 1998 – Refugees Act, section 22). The effect of the urban policy is that save for appeals to organizations such as the UNHCR for aid, refugees and asylum seekers are self-reliant. This is a good thing, but only if self-reliance is possible, which is to say, only if the individual rights afforded to refugees and asylum seekers are realizable.

The Department of Home Affairs (DHA), which administers the asylum system in South Africa, suspended its asylum services at the start of the lockdown. Despite its resumption of civic and other immigration services as the lockdown has eased (such as birth registration and visa services for foreign travelers into the country), asylum services remained suspended to 30 September 2021 (DHA, 2021). Refugee Reception Offices (RROs) are closed: the government cannot field new asylum applications, process and adjudicate pending applications, or properly renew asylum seeker visas.⁴ Under direction of the Minister of Home Affairs, asylum seeker visas and refugee permits which were valid when the national state of disaster was first declared are deemed to remain valid until the DHA resumes its asylum services. This is a small comfort as holders of these documents are nonetheless forced to negotiate with incredulous people and institutions (landlords, banks, bosses, etc.) who are unwilling to accept the risk of relying on permits which are, on paper, expired.⁵ This says nothing of the asylum seekers who had yet to acquire an asylum seeker visa prior to the lockdown, or of the 946,000 asylum seekers (as of January 2017) who may or may not (the DHA does not know) still reside in the Republic since their permits have expired (Auditor-General of South Africa, 2020: 6). These latter groups remain undocumented and invisible in the eyes of the state and other institutions (Khan and Lee, 2018).

The situation is untenable in the best of times: in a disaster context it can become literally unlivable (Mukumbang et al., 2020). Refugee and asylum seeker populations are, on average, more vulnerable to disaster than citizens are. For four out of six COVID-19 vulnerability indices identified by Statistics South Africa, there are proportionally more vulnerable people in migrant populations than in non-migrant populations. These indices are being 60 years or older, being unemployed, having informal work, and living in informal dwellings (Statistics South Africa, 2020b). From their already precarious socio-economic positions, it is likely that many refugees and asylum seekers cannot absorb the shock of a health crisis and an economy buckling under a state of disaster.

The stakes of social protection are raised during and after a state of disaster.

² Sections 27(b) and 27A(c) of the Refugees Act 108 of 1998 afford refugees and asylum seekers, respectively, all the rights in the Bill of Rights which are available to non-citizens. See particularly s21 of the Constitution of the Republic of South Africa (RSA, 1996).

³ For refugees see s27(f) of the Refugees Act; for asylum seekers see s22 of that Act (RSA, 1998).

⁴ In May 2021 the Department of Home Affairs began extending permits by email request.

⁵ In 2020 the UCT Refugee Rights Clinic assisted approximately 250 refugees and asylum seekers with explanations of the blanket permit extension to employers, banks, and the Labour Department.

Inherent in South Africa's legal definition of disaster, is that the disaster event is:

... of a magnitude that exceeds the ability of those affected by the disaster to cope with its effects *using only their own resources* (RSA, 2002a – Disaster Management Act, section 1; emphasis added.)

Ideally, social protection mechanisms — such as social insurance, social transfers, and legislative protection — would narrow the gap between refugees' and asylum seekers' critical needs and their insufficient personal resources. Yet this has not been the case during the pandemic. Neither social insurance (for example, pay-outs from the Unemployment Insurance Fund) nor social transfers (for example, Social Relief of Distress (SRD) cash and food assistance, as well as ordinary social grants) have been entirely forthcoming to refugees and asylum seekers. This is for two reasons. The first is deliberate exclusion by the government of either or both groups from social protection, such as from the SRD grant. The second is the crisis of the bureaucratic identification system (including documents, computer systems, and human actors) which hinders access to social protection even when it is legally available. Legal access (the extension to refugees and asylum seekers of the right to social protection) and administrative access (the ability to materially exercise that right) are inseparable; the former is useless without the latter.

Legal access to social protection by refugees and asylum seekers is a tentatively settled issue, mostly so due to the piecemeal victories by civil society challenging regulations in court, both before and during the pandemic.⁶ For this reason, the larger focus of this paper is on administrative access to social protection. The argument is that the inefficiencies in the asylum documentation and identification system amount to breaches of international, constitutional, and statutory law obligations. Although similar arguments could have been made before the pandemic, this paper suggests that the threat and realization of disaster create their own, singular, and immediate obligations, or at least attenuate the existing ones. Hence, the conceptual framework is one of disaster preparedness and management over and above the usual framework of socio-economic rights and refugee treaty law. The effect is to raise the legal stakes of the social protection obligation in a manner commensurate with the heightened real-world stakes by reframing asylum bureaucracy as an essential service and critical disaster *preparedness* and *management* infrastructure. The intention is to revive attention to the asylum system not simply as mundane, routine government administration but as a crucial, life-saving mechanism. Social protection is just one demonstration of the power and necessity of a functioning asylum administration.

⁶ See Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others 2004 (6) SA 505 (CC), and Scalabrini Centre and Another v Minister of Social Development and Others 2021 (1) SA 553 (GP) discussed in this paper.

DOCUMENTATION, IDENTIFICATION AND THE CRISIS OF ASYLUM
BUREAUCRACY RECRUITMENT PROCESSES FOR DOMESTIC WORKERS

Asylum is a form of international protection afforded to persons whose home states are unwilling or unable to protect them (UNGA, 1951, art 1(A)). The protection relationship between host state and refugee is primarily determined by the refugee's need for protection on the one hand, and by the host state's ability to provide that protection, on the other. However, in practical terms, the controlling, decisive force which actually produces the protection/unprotection is the bureaucratic asylum system. No matter the greatness of the need for protection, nor the magnanimity of the state's offer to protect, in the contemporary state everything turns ultimately on a piece of paper, a computer system, and a civil servant. In South Africa, asylum bureaucracy is hindering the protection of refugees.

The focus of this paper is the failed system of asylum documentation and identification. The type of bureaucracy at issue here is generally called 'identity management', a term used to describe the systems and protocols for the collection, storage, maintenance, and accessibility of identity registers. In South Africa identity management has a history of prejudice and exclusion: in fact, it was apartheid minister Hendrik Verwoerd's grand, modern vision of universal and all-encompassing identity registers and passes (the infamous *dompas*) which allowed the state to exercise control over the native Black population by limiting freedom of movement, undermining security of tenure, and exposing Black Africans to constant surveillance and threat of detention (Breckenridge, 2005). Today the vision of a universal population register remains, as in the proposed Draft Official Identity Management Policy (DHA, 2020a), but less as a means of control and more as a means of enabling effective governance. In the modern bureaucratic state, identity documents are essential to access education, banking, employment, housing, and to register births of children. As Boshoff (2016: 44) puts it, identity documents are "needed for every kind of public transaction imaginable" and legitimates claims to rights. The identity document mediates the personhood of the individual in its interaction with the state (Boshoff, 2016: 44). Without one, a person is unrecognizable, illegible in the eyes of the state and the consequences are dire. An additional proposition made in this paper is that in the production of civil identity, some documents are marginalizing asylum documents, even if duly possessed, and act as tools of exclusion.

The struggle to access asylum documents in South Africa can be demonstrated through a series of cases undertaken against the DHA, the government department responsible for the issuance of these documents. In *Kiliko and Others v The Minister of Home Affairs and Others* 2006 (4) SA 114 (C), and *Tafira and Others v Ngozwane and Others*, 12 December 2006, unreported, Case No. 12960/06, the High Court in the Western Cape and Gauteng, respectively, held that the DHA did not adequately capacitate the RROs, hence denying access for refugees to asylum, leaving them undocumented and vulnerable to arrest and deportation. In *Kiliko*, one of the first cases dealing with the right to documentation, the Court at paragraph 7 explained

the significance of the right to documentation appropriately thus stating:

Until an asylum seeker obtains an asylum-seeker permit in terms of s 22 of the Refugees Act, he or she remains an illegal foreigner and, as such, subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which, self-evidently, impact deleteriously upon or threaten to so impact upon, at least, his or her human dignity and the freedom and security of his or her person.

Another significant policy decision was the decision to close the RROs across South Africa, which resulted in deterrence from the asylum system. In almost every city where this happened, litigation was launched to challenge this decision. In *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape and Another* 2015 (3) SA 545 (SCA), and *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 (SCA) the Supreme Court of Appeal ordered that the decision by the DHA to close the Port Elizabeth RRO and the Cape Town RRO in order to reduce the presence of refugees in the major metropolitan areas and move them to the borders, was declared unlawful and ordered to reopen. Only in 2019 did the Port Elizabeth office reopen while the Cape Town office remains closed to new applications. Consequently, refugees can only make new asylum applications in Durban, Pretoria, Musina, and Port Elizabeth, thus restricting access to the asylum system. With the additional closure of the Johannesburg RRO, the Durban and Pretoria RROs had indicated that they had been unable to cope with the number of applicants since the closure of the three RROs (eNCA, 2013). After judgment in 2015, only in 2019 did the Port Elizabeth office reopen, with human rights lawyers reporting backlogs for applications of asylum of up to a year. In 2016 the DHA closed the Tshwane Interim RRO, one of only two in Pretoria (Amnesty International, 2019: 22). The Cape Town RRO remains closed to new applications, while the Western Cape High Court has in 2021 ordered the DHA's compliance with the 2018 *Scalabrini* order under the continual supervision of a judge (*Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others*, 18 May 2021, unreported, Case No. 7687/18).

After the closure of the three RROs, the DHA decided to not allow asylum seekers to renew their permits at RROs other than at the office of the first application. Litigation ensued in the Cape Town High Court in *A v Director-General of the Department of Home Affairs and Others* (7705/2013) [2015] ZAWCHC 131 (27 February 2015) and *Nbaya and Others v Director General of Home Affairs*, unreported, Case No. 6534 /15, which held that the Cape Town RRO must renew all asylum permits regardless of the office of the first application. The applicants had been unable to afford to travel to renew their permits, and remained on expired documents despite making their homes elsewhere in South Africa, some for up to 7 years. To date, many still have been unable to renew their permits and face the

risk of arrest and deportation (Washinyira, 2021). This practice compels the affected refugees to live only near the city where they first applied, thereby curbing their freedom of movement. It has also meant that refugees in these categories have only managed to remain documented because of legal intervention.

In 2013, the DHA introduced a requirement that asylum permits would be extended no more than twelve times. This practice was introduced even though asylum permit extensions are done at the behest of the DHA. This arbitrary practice left many asylum seekers with expired documents and formed the basis of *Bahamboula and Others v Minister of Home Affairs and Others* 2014 (9) BCLR 1021 (WCC). After the case was launched by the University of Cape Town (UCT) Refugee Rights Clinic, the 316 applicants were documented, and the practice withdrawn.

In *Mwamba and Others v The Department of Home Affairs and Others*, unreported, Case No 14820/15, the practice of the DHA to leave refugees undocumented whilst the DHA conducted investigations into irregularities picked up on its computer system (regarding fingerprinting, identity photographs, duplication of files or other administrative errors) was challenged. Once again, large numbers of refugees were left undocumented and only legal intervention led to the abandonment of the practice. The practice however returned in early 2019.⁷

These cases demonstrate that despite having the legal right to documentation, refugees are failing to access these documents due in large part to various *ad hoc* administrative practices at the DHA. These restrictive and exclusionary policies and practices have contributed towards the creation of a mass population of hidden and undocumented refugees and asylum seekers, which forces many to remain in the country undocumented and unprotected (Khan and Lee, 2018).

How are we to begin thinking about this state of affairs? It is not enough to identify rights on the one hand and the breach thereof on another: we must understand what lies between the two. Strictly legal analyses are insufficient, so we turn to sociology and anthropology to diagnose the problem and offer a new (or revised) solution.

One way of analyzing the (in)adequacy of services intended for refugees is with street-level bureaucracy theory. According to this theory, the analytic lens is directed at the organizations tasked with implementing social policies, and specifically at the workers who come into direct contact with clients who are the recipients of service. By examining the day-to-day work of public and private human service agencies, or street-level organizations, street-level theory seeks to explain how social policies take shape at this intersection of worker and client. Drawing on the work of Lipsky (1980), Brodtkin and Marston (2013), and others, the street-level framework draws attention to both the formal dimension of social policy, which provides the parameters for street-level work, and the informal dimension, in which street-level workers give meaning to the formal policy through their everyday work.

Street-level theory assumes that workers will respond to the constraints and

⁷ Experience from the UCT Refugee Rights Unit.

opportunities created by the organizational context in which they are embedded by using their discretion to make practice-choices in their work with clients. These discretionary choices are adaptive responses to a particular organizational context, which is made up of the unique set of resources, incentives, and demands within the street-level organization (Darrow, 2015). Ultimately, informal policy is (re) created at the street-level when workers use their discretion in both authorized and unauthorized ways in order to adapt to their organizational context, and when these adaptive practices become routine (Darrow, 2015).

The issue of the documentation of refugees in South Africa has been described by Amit and Kriger in terms of the ‘street-level organizational approach,’ which emphasizes how administrative practices, including those relating to documentation, shape politics and create policy (Amit and Kriger, 2014). The essence of the street-level organizational approach is the recognition that administrative practices may determine who gets access to organizational benefits and who is excluded (Amit and Kriger, 2014). These practices are often hidden from public view, and thus tend to be less transparent than legislative processes that are conducted in the open (Brodkin and Marston, 2013) Indeed, as Hoag (2010) suggests, due to poor funding and poor communication practices, there are perceptions of ‘magic’ (inscrutability and unpredictability) between the public and the DHA workers, and the DHA workers with their superiors.

The work of asylum administration is mired in confusion, miscommunication, and suspicion between all parties (Hoag, 2010). While our position is critical of asylum administrators, it is not fair to suggest that they work in perfect conditions and should therefore produce perfect outcomes. Importantly, the street-level approach does not assume that administrative exclusion, the denial of benefits to those who are eligible, is necessarily the product of intentions (Amit and Kriger, 2014). Instead, it highlights how administrative exclusion often occurs due to the work practices, intentional or not, employed by those who interpret and apply eligibility criteria as they adjudicate claims for benefits. Administrators are caught in a volatile “double relationship” (Kalir and Van Schendel, 2017) between their superiors and their clients, in a severely constrained working environment, and through non-uniform decisions become part of the system that results in non-recorded, illegible asylum seekers or refugees.

Around the time of writing this article, the DHA began renewing asylum seeker and refugee permits online via email while its asylum offices remained closed to the public during the lockdown. In theory this could solve the pre-pandemic problems of long queues at RROs and costs of having to return to the office of first application. What remains to be seen is whether access to renewal in this manner will be equitable, as the poorest refugees and asylum seekers may not have access to internet data, computers/cell-phones or their own email address, or the technical knowledge of how to use these resources.

THE 'ORDINARY' TIME AND LAW OF ACCESS TO SOCIAL PROTECTION

In this section we introduce the ordinary socio-economic rights and equality paradigm used to argue for access by refugees and asylum seekers to social protection. While no standard definition exists for social protection, its elements are easily identified. It usually comprises contributory schemes (social *insurance* such as unemployment insurance), non-contributory schemes (social *transfers* or *assistance* such as distress relief grants, child maintenance grants, etc.), labor market schemes (such as basic conditions of employment legislation or public works programs) and social care services (such as children's homes and safe houses) (Carter et al., 2019). Differing views exist on the exact purpose of social protection, particularly in developing countries, but the main explanations are that it addresses social risks, responds to basic needs, or implements basic human rights (Barrientos and Hulme, 2009). While these different purposes might explain different structures of social protection schemes across the world, for the purpose of arguing for the expansion of social protection, risks, basic needs, and human rights are confluent considerations. Although our analysis proceeds from legal rights, notions of social risk and need are also indispensable, particularly in the disaster context.

The legal argument for equal access to social protection mechanisms is typically founded in the constitutional rights to equality (s9), human dignity (s10) and access to social security (s27(1)(c)) (RSA, 1996). These rights apply to 'everyone' (RSA 1998 – Refugees Act section s27A(c)), not only to citizens, and so apply to asylum seekers. Dignity, equality, and social security are the recurring legal motifs of social protection cases discussed in this paper. They tend to flow into one another. An argument that a certain group has a right to social security will naturally produce an equality argument if that group is excluded. The unfair discrimination argument itself relies on there being some affront to human dignity before 'discrimination' can be proven over mere differentiation (*Khosa and Others v Minister of Social Development and Others; Mahlaule and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC)). And finally, the relationship between dignity and protection from abject poverty (and hence access to socio-economic rights) is both obvious and legally recognised in *Minister of Home Affairs and Others v Watchenuka and Others* 2004 (4) SA 326 (SCA). Together the trifecta forms what we could call the *ordinary legal argument* for ensuring that refugees and asylum seekers, and non-citizens more broadly, have access to social protection.

The constitutional provisions governing equal access to social security can be read as domestic expressions of South Africa's international law obligations both under the International Covenant on Economic, Social and Cultural Rights (ICESCR) (UNGA, 1966) and the United Nations Convention Relating to the Status of Refugees (hereafter the UN refugee convention) (UNGA, 1951). South Africa is a state party to both. Article 9 of the ICESCR states that:

The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.

This was also expressed in the Universal Declaration of Human Rights (UNGA, 1948), arts 22 and 25(1), which latter article provides that:

Everyone has ... the right to security in the event of unemployment, sickness, disability, widowhood, old age or other *lack of livelihood in circumstances beyond his control* (emphasis added).

As the United Nations Economic and Social Council's General Comment (ECOSOC, 2008: para 4) on the right to social security confirms, the phrase 'social security' should be interpreted widely to include not only social security in the strictest sense of contributory security, but also non-contributory social assistance.

In addition, the UN refugee convention, in articles 23 and 24(1)(b), obliges state parties to "... accord to refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals" and "in respect of social security" which includes legal provisions in respect of unemployment.

These international instruments which oblige South Africa to provide access to social security/assistance mechanisms, equally between nationals and refugees, thus find domestic expression in the constitutional rights to equality and social security. Together with the right to dignity, these rights ground the ordinary legal argument for equal access to social security and assistance.

As case examples we outline two illustrative social protection mechanisms, one contributory (unemployment insurance), and one non-contributory (distress relief grants). These are to demonstrate how the ordinary legal argument operates in the 'ordinary' time, so that the argument can be tested against the extreme circumstances of the time of disaster. The proposition is that while ordinary discourses of equality and socio-economic rights are laudable and generative, a disaster-oriented approach to the issue of asylum documentation should be used to complement and 'speed-up' the achievement of a sound and just asylum administration. The social protection mechanisms in South Africa relevant to this paper have two main sources, namely the Unemployment Insurance Act 63 of 2001 (RSA, 2001) and the Social Assistance Act 13 of 2004 (RSA, 2004) and their respective regulations.

The Unemployment Insurance Act

The Unemployment Insurance Act (UIA) establishes the Unemployment Insurance Fund (UIF), as outlined in section 4. Its stated purpose is "to alleviate the harmful economic and social effects of unemployment" (section 2) by allowing employees who are contributors to the fund to receive compensation in the event of their unemployment or their inability to work due to illness, maternity leave, parental

responsibility, or child adoption responsibility. Contributions to the Fund are mandatory for both employers and employees, as stipulated in the Unemployment Insurance Contributions Act, sections 5 and 7 (RSA, 2002b) and all contributors have a right to receive compensation from the Fund (RSA, 2001: section 12). Compulsory contribution coupled with compulsory entitlements render the UIF a strong form of social protection for those in the ambit of its cover.

However, when it comes to refugees and asylum seekers, that ambit is not very broad. The UIA applies to relations between an 'employer' and an 'employee' who make registered contributions to the fund. Yet due to existing barriers to access the formal employment sector such as untrusted documentation, complete lack of documentation, and xenophobic sentiment, many refugees and asylum seekers find themselves pushed to the margins of employment in precarious and informal work (Smit and Rugunanan, 2014). These workers do not ordinarily contribute to the Fund (such is the nature of informality) and so are not entitled to its benefits. In addition to informal employment, refugees and asylum seekers may turn to independent trading, which in addition to being extremely difficult and even dangerous (Crush et al., 2017), also does not afford them unemployment insurance. In sum, the UIF may not be able to protect the poorer and more precarious among the refugee and asylum seeker populations; nevertheless, it is a strong form of social protection for those under its cover.

The administration of the UIF produced an important pre-pandemic case study on access to social protection in the matters of *Saddiq v Department of Labour*, unreported, Case No. EQ04/2017 in the Equality Court at Vereeniging, and *Musanga and Others v Minister of Labour*, unreported, Case No. 29994/18 in the High Court at Pretoria – two unreported but consequential cases. Both cases dealt with the fact that asylum-seeker employees who *had* contributed to the Fund were unable to claim compensation due to the nature of their documentation. The computer system could not recognize applicants' asylum seeker permits as valid forms of documentation. Neither case produced a court judgment (the Department of Labour in each case conceded to all material arguments and the applicants' relief was granted), but the effect of the court orders in each case was to compel the Department of Labour to recognize asylum-seeker documents for the purpose of compensating UIF contributors. Although we do not have the benefit of court dicta, the applicants' and respondents' arguments as detailed in a recent case note (Singo, 2020) on *Musanga* are illustrative of how cases of exclusion from social protection are being formulated and structured in legal argument.

In *Musanga* the applicants sought a declaration of constitutional invalidity of UIA regulations and Department of Labour practices which (inadvertently or otherwise) prevented asylum-seeker contributors to the Fund from claiming their compensation. They proposed the ordinary legal argument based on the constitutional rights to human dignity, equality and to access to social security (Singo, 2020: 410–413). The respondents responded evasively. Firstly, they argued

that instead of approaching the court, the applicants should have first exhausted internal departmental appeal processes — to which the applicants countered that this was a challenge to regulations and not simply an appeal of a decision (Singo, 2020: 413). Secondly, respondents argued that the Department of Labour had already begun corrective amendments and measures to the law and practice — to which applicants countered that such promises had been made for a decade prior with no progress (Singo, 2020: 415). Finally, respondents argued that the appropriate remedy was for the Minister to utilize a “deeming provision” in the UIA to deem asylum seekers as “contributors” within the definition of the Act — to which applicants countered that asylum seekers already *are* contributors to the Fund, and to “deem” them as such would be logically impossible (Singo, 2020: 415–417). Merely deeming asylum seekers as contributors would also not itself remedy the technical barrier in the system which did not allow for identity numbers other than the 13-digit South African ones.

Observe here how, in the face of judicial scrutiny and an argument made on socio-economic rights, the state actors in the matter chose not to engage at all with the ordinary legal argument on its terms. No arguments were made, for example, as to the justifiable limitation of the rights to equality or social security, or as to the reasonableness of the limited access to the Fund. Instead, the state sought to reframe the issue as one entirely within the state’s domain through the notions of internal appeals, internal policies, and Ministerial deeming provisions.

Ultimately the respondents conceded to the application and an order of constitutional invalidity was granted. In February 2020 the UIA regulations were amended to conform to the order and allow all refugees and asylum-seeker claimants to submit claims (DOL, 2020). That was before the pandemic.

During the pandemic, the situation did not improve. Neither the UIF nor the government’s coronavirus Temporary Employment Relief Scheme (TERS), paid from the Fund to employees whose wages had been diminished by the lockdown, were wholly accessible to refugees and asylum seekers. Though the measures themselves did not specifically exclude asylum seekers or refugees, their administrative systems were indirectly exclusionary. Despite *Musanga*, refugees and asylum seekers were unable to make applications for TERS or UIF due to the failures in the online application system. The Department of Labour’s system excluded refugees (without identity numbers) and all asylum seekers as the online application system only recognised the 13-digit ID numbers of South African citizens, permanent residents and those recognised refugees possessing a 13-digit ID document. Refugees and asylum seekers who could not access or receive the pay-outs were not provided with any information as to how the issue should or would be resolved. Bureaucrats and administrators were not equipped with information to explain why the system would reject applications from applicants who did not have a 13-digit ID number.⁸ Nor were they able to provide alternative methods for rectifying this.

⁸ Experience from practice in the UCT Refugee Rights Unit.

After the initial hiccup, the DOL requested persons who could not make applications online, i.e., those without a 13-digit ID, to approach a DOL office in person. The UCT Refugee Rights Clinic reported long delays and few responses from the Department, which created further delays in receiving relief. In addition to this, the Clinic reported that refugees and asylum seekers who were able to approach DOL offices were turned away for expired permits. This is despite the directives by the Department of Home Affairs to extend the permits by operation of the law (DHA, 2020b). Officials at the Department of Labour lacked information and thus excluded asylum seekers and refugees or wanted legal authority to confirm the current state of expired permits. ‘Verification’ of asylum documents is a recurring barrier. Even when asylum documents are accepted, the DOL insists on verifying the veracity and validity of the documents with the DHA. Yet the DHA’s asylum services have been closed for the entirety of the pandemic. The DHA’s identity management systems are not integrated, nor are they currently always accessible by other government departments, either directly or through correspondence with the DHA. Extraordinary waiting periods for verification of documents were observed even before the pandemic (Rosenkranz, 2013). During the pandemic, the systems infrastructure was simply not capable of functioning to ensure that refugees and asylum seekers were protected. This is over and above the general system incapacity at the UIF, even for South African citizens — by November 2020 it was backlogged by 440,000 emails while its call centre’s staff of 40 managed around 77,000 calls per day (Business Insider SA, 2020).

Observe also how an effective social insurance mechanism may be exclusionary at both ends due to documentation: firstly, it hampers access even to the opportunity to qualify for benefits (by channeling insufficiently documented people into informal work); and secondly, it hampers access for those who do have a sure claim on social security.

The Social Assistance Act

Terminologically, social assistance refers to support from the state, which is not contingent upon a person making any contributions or having employment. South Africa provides several grants which are governed by the Social Assistance Act (RSA, 2004), including child support, disability, and older person’s grants. The Act’s 1992 predecessor was subject to a constitutional challenge in a landmark case on socio-economic rights — the matter of *Khosa and Others v Minister of Social Development and Others* 2004 (6) SA 505 (CC). In that case the Constitutional Court held that a provision in the Social Assistance Act of 1992 that only South African citizens are eligible for certain social grants, was unconstitutional. Since section 27(1)(c) of the Constitution (RSA, 1996) affords ‘everyone’ the right to social assistance, the Act could not in that case exclude permanent residents from eligibility. Mokgoro J’s judgment reasoned through the ordinary argument, based explicitly on the rights to social security and equality, and with regular reference to dignity. In the wake of the

judgment, the Social Assistance regulations regularly stated that a person is eligible for a grant who “is a South African citizen, permanent resident or a refugee” (DSD, 2008 as amended in 2012).

At the advent of the pandemic, the government announced the provision of a Social Relief of Distress (SRD) grant to those in desperate need because of the pandemic and lockdown (DSD, 2020a). The SRD would take the form initially of food parcels, and then a R350 cash payment. The DSD, through its subsidiary Social Assistance Security Agency (SASSA) were responsible for its provision. Both forms of the SRD were problematic.

The criteria for the food parcels did not limit provision to citizens only but did not specifically include refugees and asylum seekers either. The DSD workers, however, without authority, required persons to produce a 13-digit ID book to register for a food parcel. The UCT Refugee Clinic received many reports from undocumented and documented asylum seekers being unable to access food parcels without a 13-digit ID document. The exclusionary practice drew the censure of the Human Rights Watch (2020). Persons being forced to rely on food parcels are probably some of the most vulnerable persons affected by the lockdown regulations, and yet front-line officials prevented access to such a service merely based on documentation.

The SRD cash payment, announced toward the end of April 2020, was a temporary provision of assistance intended for persons in such dire material need that they are unable to meet their families' most basic needs. The directions for the payment of this grant limited payment to “South African citizens, permanent residents or refugees registered on the Home Affairs database” (DSD, 2020). On an urgent basis, the directions were challenged in the High Court case of *Scalabrini Centre Cape Town and Another v Minister of Social Development and Others* 2021 (1) SA 553 (GP). In this case the ordinary argument was presented to the court: the directions infringed the rights to social assistance, equality, and dignity. The court accepted the argument on all accounts. Its short and principled judgment makes explicit the interrelatedness of those rights, which “cannot be overemphasised” (paragraph 40) and which the state needs to bear in mind. The order was for the DSD to extend SRD eligibility to special permit holders and asylum seekers whose permits were valid at 15 March 2020, the date of the declaration of the state of national disaster. Considering the tens of thousands of asylum seekers resident in South Africa, this judgment is a significant victory.

Yet by its nature a court victory is only a partial one. The court must respond to the circumstances before it and not make grand, sweeping orders. As such the court narrowed its reasoning to the pandemic, as the irrationality of the exclusion of asylum seekers to financial assistance only arose in this specific context. In other, non-emergency times, such exclusion may have been a reasonable limitation of the social assistance right. The court also limited eligibility to asylum seekers who had valid documents at the start of the pandemic — but as has been discussed, the

asylum administration system has failed to adequately document the true extent of the asylum-seeker population.

It must be noted that issues arose in accessing grants that refugees already had access to. Refugees whose permits expired during the lockdown struggled to have the social grants paid out to them by the DSD due to their expired permits. This was despite the directive extending the permits of refugees. The UCT Refugee Rights Unit reported that recipients who queried why they were not receiving their grants were not given a clear answer but rather told to contact the Department of Home Affairs, who is responsible for the issuance of refugee documentation. With the DHA closed, refugees were unable to resolve the issue themselves. The Refugee Rights Unit, after consulting with clients who were unable to receive their grants, contacted the DSD and discovered that various state departments were unaware or had no communication with the DHA regarding the fact that they were closed and that they had extended the permits by operation of law.⁹

DOCUMENTS AND DISASTER TIME

At this rate, the provision of social protection to refugees and asylum seekers will remain woefully deficient indefinitely. The availability of generous international law protections and justiciable constitutional rights, while crucial, is not likely ever to be enough to repair the system on all fronts, immediately, and at every level. Socio-economic rights need only be progressively realized (RSA, 1996: section 27(2)) and in any case the courts have neither the authority nor the capacity to affect change to the system as a whole. The practical exercise of the ordinary legal argument for equal access to social protection is generally reactive rather than proactive, and piecemeal rather than complete. By the time disaster strikes, time has already run out: something else is needed. In this final section we begin to recast the asylum administration system as a critical disaster preparedness and management infrastructure, and an essential service. The effect is that, firstly, the national government has an immediate and urgent obligation to remedy the deficiencies in the system, and in a state of national disaster may not cease asylum administration operations.

For this proposition we follow Bowker et al.'s (2010: 98) definition of infrastructure as “pervasive enabling resources in network form”. This definition expands the understanding of infrastructure from the traditional brick-and-mortar forms to include systems, protocols, and human actors. In this sense the entire asylum administration — including the computer systems, civil servants, RROs, and, crucially, the documents — are seen as system infrastructure which enable the protection of refugees and asylum seekers. The reason for recasting asylum administration as an infrastructure is to ensure that the integrity of the system is prioritized, properly funded, maintained and protected both before and during a national disaster, in the same way, for instance, that healthcare infrastructure would be. In the parlance of disaster management, this is ‘emergency preparedness’, which

⁹ Experience from practice in the UCT Refugee Rights Unit.

is defined in the Disaster Management Act (RSA, 2002a: section 1) as:

... a state of readiness which enables organs of state and other institutions involved in disaster management, the private sector, communities and individuals to mobilise, organise and provide relief measures to deal with an impending or current disaster or the effects of a disaster.

The national government is responsible for the management of national disasters, whether or not a disaster has been declared (RSA, 2002a: section 26(1)). Each organ of state must have a disaster preparedness plan and co-ordinate with other organs of state in its implementation (RSA, 2002a: section 25). The Disaster Management Centre is obligated to do

... all that is necessary (section 14) ... [to] promote an integrated and coordinated system of disaster management, with special emphasis on prevention and mitigation, by national, provincial and municipal organs of state, statutory functionaries, other role players involved in disaster management and communities (RSA, 2002a: section 9).

What we have here is a co-operative system of disaster management actors — beyond simply the DHA — which has a better chance of properly equipping the asylum administration for a disaster situation. It is suggested that by reframing asylum management in disaster management terms, a more sophisticated, accountable, and urgent government response to its failures could emerge. A failure of asylum administration is not merely a failure, but a disaster-in-waiting.

Similarly, we propose that when disaster strikes, the asylum administration should not cease operations. During the lockdown certain ‘essential services’ were still allowed to function (CoGTA, 2020c: Chapter 2). The Labour Relations Act (RSA, 1995) defines an essential service in its section 213 as,

... a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population.

When the DHA suspended its asylum services, thereby rendering asylum seekers unable to lodge applications, or for permits to be properly extended, or for permits to be verified by other state departments, it placed in danger the entire refugee and asylum-seeker population which is reliant on proper documentation to access social protection and other services. For some, this literally meant the difference between having food to eat or not any at all. Surely this amounts to an interruption which endangers life? It is inconceivable that an already-failing system could simply suspend operations when that system was most needed to ensure people’s survival.

Expressing the problem in disaster management terms is not a panacea, nor on

the other hand should this paper be read to argue that international and constitutional law rights are wholly inadequate. What is proposed is that the state view asylum management not only in strictly legal, human rights terms (which have not yet been enough to ensure proper administration), but also as a pressing obligation to reduce disaster risks *now*. This is due to the unique centrality of identity management to relief efforts. Even if the argument for inclusion of asylum management in disaster management discourse is not accepted, nevertheless the argument is provocative and should, in any case, act as a shock to revive South Africa's political will to protect refugees.

CONCLUSION

This paper addressed the state of refugees and asylum seekers during the COVID-19 pandemic and their status with respect to social protection during the COVID-19 pandemic. The picture is dismaying. Decades of asylum maladministration have excluded asylum seekers and refugees from protection when it is most needed. This is exemplified by the case studies of the UIF and Social Relief of Distress grant before and/or during the pandemic. South Africa is a long way away from fulfilling its international and constitutional law obligations to provide equal access to social protection. As the pandemic has shown, the consequence of maladministration, particularly in identity management, is devastating: the “unspoken inequality” (Mukumbang et al., 2020) in bureaucratic treatment of refugees and asylum seekers can deprive them of the basic necessities of life. It is hoped that reframing asylum administration as a critical disaster readiness infrastructure and essential service could galvanize the profound changes required to protect these vulnerable groups and ensure their protection is elevated in priority.

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