This chapter will provide an overview of the law, policy and relevant case-law relating to refugee and migrant learners. The chapter should assist refugee and migrant learners in accessing schools.
People migrate for many different reasons. These reasons may be classified as:

- economic migration: moving to find work and better economic opportunities
- social migration: moving to be closer to family or friends
- political migration: moving to escape conflict, violence and war
- environmental migration: moving to escape natural disasters such as drought and flooding

WHY PEOPLE MIGRATE

Push and Pull Factors for Migration

People have moved from their home countries for centuries, for all sorts of reasons. Some are drawn to new places by ‘pull’ factors, others find it difficult to remain where they are, and migrate because of ‘push’ factors. Migration usually happens as a result of a combination of these push and pull factors.

Push factors are the reasons why people leave an area. They include:
- Lack of basic services
- Lack of safety/high crime
- Crop failure
- To escape from natural disasters such as drought and flooding
- To escape poverty
- To escape conflict, violence and war.

Pull factors are the reasons people move to a particular area. They include:
- For jobs, business and educational opportunities
- Better services, such as healthcare and education
- Good climate
- Safety; less crime
- More fertile land
- Lower risk from natural hazards
- To reunite with family members.

PUSH AND PULL FACTORS

Global forced displacement increased to record-high numbers in 2015. By the end of the year, 65.3 million individuals had been forcibly displaced worldwide as a result of persecution, conflict, generalised violence, or human rights violations.

This is 5.8 million more than in 2014 (59.5 million). By the end of 2015, about 3.2 million people were waiting for a decision on their application for asylum. As in the previous two years, in 2015 Syrians lodged the largest number of asylum claims worldwide (373 700 new claims). In general, recognition rates for Syrian asylum seekers were above 90 per cent in most countries.

At the end of 2015 the number of new asylum applications was relatively low, at 62 200. In 2015 South Africa hosted just over 1 million asylum seekers and 121 645 refugees. The large number of asylum seekers is due to the serious backlogs in South Africa’s refugee status determination procedure, which leaves persons in asylum limbo for prolonged periods. (UNHCR Global Trends 2016)

Very few people sought asylum and protection in South Africa before 1994. The first large-scale movement into South Africa was the movement of Mozambicans in 2000 following catastrophic flooding in Mozambique, when more than 220 000 people were displaced. After the birth of democracy, South Africa drafted its Refugees Act in 1996, and it became operational in 2000.

Some people choose to migrate voluntarily, for example, someone who moves to another country for better care opportunities. Some people are forced to migrate because the circumstances in which they live have become unbearable; for instance, someone who moves due to war or famine. A refugee is someone who has been forced to leave their home and does not have a new home to go to. Often refugees do not carry many possessions with them, and do not have a clear idea of where they can find protection.

WHY DO PEOPLE MIGRATE?

CONFLICTS THAT BROUGHT REFUGEES TO SOUTH AFRICA

- The Somali civil war was spanning more than 20 years since the early 1990s, grew out of resistance to the Sad Barre regime and evolved into clan-based conflicts, invasions, and more recently, resistance to Al-Shabaab. Peace and stability remain tenuous.
- The Rwandan genocide (April-July 1994) was a mass murder of Tutsis by Hutus.
- The First Congo War (1996-1997) was a foreign invasion of then Zaire, led by Rwanda, which replaced dictator Mobuto Sese Seko with the rebel leader Laurent Kabila.
- The Second Congo War (1998-2003) in the Democratic Republic of the Congo was driven by the trade in ‘conflict’ minerals (any mineral or its derivative determined to be financing conflict in the Democratic Republic of the Congo, or any adjoining country). Although a peace agreement was signed in 2002, violence and instability continued in many regions of the country, especially in the eastern region.
- Burundi (April 2015): Displacements followed protests against the president’s decision to run for a contested third consecutive term. The security situation has deteriorated, with more than 400 people killed and 200 000 fleeing to neighbouring countries since April 2015.
Every day, all over the world, people make the most difficult decision of their lives: to leave their homes in search of a better life. Others are forced to flee due to conflict, wars and persecution. South African refugee policy is regulated by the Refugees Act, which allows refugees to ‘seek’ and ‘enjoy’ asylum.

South Africa is the only African country with an urban refugee policy that refugees are not confined to refugee camps. There is no automatic detention of asylum seekers or refugees. Many other countries have encampment policies or detention regimes. This urban refugee policy makes South Africa an appealing place to seek asylum. However, there are proposed changes to the Refugee Act, which if passed in their current form could have a serious impact on asylum seekers’ rights. The current socio-economic environment – high unemployment, poor service delivery, and economic inequality – has strained relations between refugees, asylum-seekers and host populations. The practice of granting asylum to people fleeing persecution in foreign lands is one of the earliest signs of civilisation. ‘Civilisation’ is defined as the process by which a society reaches an advanced stage of social development and organisation.

In Southern Africa, an increase in mixed migratory movements has also led to growing hostility towards refugees, putting pressure on asylum seekers, host countries and protection space.

Refugees are a special category of migrant who seek international protection. South Africa has a progressive refugee policy that includes the basic principles of refugee protection, including freedom of movement, the right to work, and access to basic social services.

However, there may be practical barriers to fully accessing these rights. The current socio-economic environment – high unemployment, poor service delivery, and economic inequality – has strained relations between refugees, asylum-seekers and host populations. The practice of granting asylum to people fleeing persecution in foreign lands is one of the earliest signs of civilisation. ‘Civilisation’ is defined as the process by which a society reaches an advanced stage of social development and organisation.

South Africa’s laws allow for refugees to be able to access basic services such as health and education. These laws also allow for local integration. In practice, however, local integration does not always work very well. Failed or rejected asylum seekers may be returned to their country of origin. These are persons for whom a final decision has been made to refuse.
**Refugee Convention** Article 2 states that every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations, as well as to measures taken for the maintenance of public order.

**WHO IS A DEPENDENT?**

The Refugees Act limits the definition of “dependent” to include only unremarried minor biological children who are younger than 18 years old, as well as children legally adopted in the asylum seeker/refugee’s country of origin.

This excludes children who have not been adopted, but who are under the care of a refugee or asylum seeker; as contemplated by the decision in Mubaka, which held that separated asylum seeker children should be considered dependents of their primary caregiver in terms of the definition of “dependent” in the Refugees Act. This will provide legal protection for separated children, and ensure that they are issued with asylum or refugee permits.

**PROPOSED CHANGES TO THE REFUGEES ACT**

The current amendments to the Refugees Act make some far-reaching changes, which are intended to discourage non-genuine asylum applicants. Of particular concern are the changes to the urban refugee policy, which has been the cornerstone of South African refugee protection since its inception in 1993.

**LIMITED PRESCRIBED APPLICATION PERIOD**

The Bill’s amendment in Section 13 (amending Section 21 (a) of the principal act) provides that an application for asylum must be made in person, in accordance with the prescribed procedures, within five days of entry into the country. Individuals who fail to lodge their claims within the prescribed period will be excluded from refugee status.

**LIMITATION ON THE RIGHT TO WORK**

The Section 15 amendment seeks to introduce provisions that would divide asylum applicants into two groups: those who can sustain themselves and their dependents financially for a period of four months, and those who cannot. These plans include an assessment of an applicant’s ability to sustain themselves and their dependents, though no information has been provided as to how this ability will be assessed.

The effect of this amendment is to limit the right of asylum seekers to work. Those who are in a position to sustain themselves financially will be denied the right to work for a four-month period. Asylum seekers who cannot sustain themselves may be offered shelter and basic support by the United Nations High Commissioner for Refugees (UNHCR). If they are able to obtain assistance, these persons will also be denied the right to work.

The issue of the right to work and study has previously been pronounced on by the Supreme Court of SA in Minister of Affairs v Wakatenga and Others. The case concerns the prohibition on the rights of asylum seekers to work and study while they are waiting to be recognised as refugees. The court found that the Minister of Home Affairs could not prohibit asylum seekers from holding the right to work and study. This power to determine conditions of work and study vests in the Standing Committee for Refugee Affairs. The Standing Committee’s general prohibition of employment and study for the first 180 days after a permit has been issued is in conflict with the Bill of Rights. A general prohibition of work and study was found to be unlawful and was set aside. The court held that the freedom to engage in productive work is an important component of human dignity.

The court stated that while an asylum seeker is in the country, he or she must be respected, and is also protected by Section 10 of the Bill of Rights. It went on to say that the freedom to study is also inherent to human dignity, because without it, a person is deprived of the potential for human fulfilment. It is expressly protected by Section 29(1) of the Bill of Rights, which guarantees everyone the right to basic education, including adult basic education, and to further education. This power to determine conditions of work and study vests in the Standing Committee for Refugee Affairs. Asylum seekers are entitled to access to basic education, which is very clear: refugees receive the same basic education as nationals. Article 22 of the Refugee Convention states: a refugee has the right to work and education, and to further education. The education system is further regulated by the South Africa Schools Act and regulations.

Section 3(1) states that it is compulsory for every parent to ensure that every learner attends school from the age of seven years to the age of fifteen years or the ninth grade, whichever comes first. Section 5(1) of the SA Schools Act regulates admission to public schools, and holds that a public school must admit learners and serve their educational requirements without unfairly discriminating in any way. Section 5(2) states that the governing body may not administer any test related to the admission of a learner to a public school.

Refoulement refers to the forcible return of refugees or asylum seekers to a country where they may be persecuted.
Section 21 states that when persons classified as illegal aliens apply for residence issued by the Department of Home Affairs, they are entitled to the same stay in the country in terms of the relevant legislation (Immigration Act or Refugees Act, as applicable).

The Department of Education’s A Public School Policy Guide states that ‘every child has the right to be admitted to school and to participate in all school activities’. This policy stipulates that a school governing body (SGB) may determine the admission policy of a school. However, the admission policy must be based on the guidelines determined by the head of the provincial education department. If a learner is refused admission, the head of the provincial department (through the principal of the school) must inform the parent of the refusal, and the reasons for the refusal. If a child is refused admission to a school, the school principal must give a written explanation of why the child was not admitted.

Asylum-seeker and refugee children should be regarded as dependents of caregivers (who are not necessarily parents) and do not need to hold a study permit in addition to their refugee or asylum-seeker permit. In the case of Mphalele and others v Home Affairs, the applicants – who were orphaned asylum seekers from the DRC – sought an order declaring that children who had been separated from their parents were dependents of their primary caregivers, in terms of the definition of ‘dependents’ in Section 1 of the Refugees Act. They contended that such children should automatically be recognized as dependents of the existing asylum seekers or refugee adults who accompany them into South Africa.

Initially, the applicants also sought orders against the Department of Basic Education, to provisionally allow the registration in public schools of the child applicants and other children who are dependents of asylum seekers and refugees, as well as an order for the Minister of Basic Education to review the admission policy for ordinary public schools by expressly making provision for child asylum seekers and refugees. That relief was granted by the High Court in 2013.

This case is important, as it resolved the difficulty that asylum-seeker children in particular were facing where they were unable to obtain asylum-seeker permits. They faced further challenges when schools insisted they obtain a study permit, in addition to the asylum-seeker permit. The case clarifies the position for separated or orphaned asylum-seeker children who are now guaranteed access to asylum, and admission to schools on their asylum status.

It is clear that both international and domestic law guarantee the right to basic education to all learners. The State is obliged to provide basic education to all children, irrespective of nationality, documentation status, or ability to pay for school fees. Unfortunately, this right is not being uniformly respected and promoted in South Africa. There are still many refugee and migrant learners who face significant barriers to learning.
WHAT THE LAW SAYS ABOUT SCHOOL FEES

Section 5(3)(a) of the South African Schools Act of 1996 states that: ‘no learner may be refused admission to a public school on the grounds that his or her parent is unable to pay or has not paid the school fees determined by the governing body.’

Parents who are unable to pay school fees can apply for a fee exemption. Parents will need to submit proof of their monthly income and expenses in order to qualify for an exemption. This can be done at any public school. This process is the same for asylum seekers, refugees and citizens. If your application for an exemption is denied, you can appeal the decision with the Head of Department in the province, who must explain to you the reason for the decision.

A learner cannot be excluded from participation in any official school programmes due to non-payment of school fees by the parent. A school may not retain a learner’s report because the parent cannot afford to pay school fees. A learner may also not be excluded from school if they do not have the ability to pay for a school uniform or books.

LANGUAGE BARRIERS

As discussed earlier in the chapter, asylum seekers and refugees may come from a variety of different places, and do not always speak the language of the place at which they end up. This can be especially difficult for children, if they are being taught in a language they do not understand. Schools might be hesitant to accept a learner who does not speak the language of instruction.

FAILURE TO RELEASE MATRIC EXAM RESULTS

Sometimes schools still learners that they will not release matric exam results to learners who do not have passports or study permits. This is unlawful. If you can prove that you have made or are making attempts to legalise your stay in the country, you are entitled to be included in all school-related activities including writing examinations and receiving the results of those examinations.

UNDOCUMENTED MIGRANTS, AND THE ARREST AND DETENTION OF MINOR LEARNERS

Children may not be detained in the country illegally.

In a high court case, Centre for Child Law v Minister of Home Affairs, the court said that the detention of children (for immigration reasons) was unlawful. The court said that as a vulnerable group, children are entitled to protection under the Children’s Act, regardless of whether they are documented or undocumented. This includes access to places of safety.

The South African Constitution states in Section 28(1)(g) that:

• every child has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be:
  i. kept separately from detained persons over the age of 16 years; and
  ii. treated in a manner, and kept in conditions, that take into account the child’s age

OTHER BARRIERS

REQUIREMENT FOR SCHOOL REPORTS

Some schools may turn away children who do not have previous school reports. This requirement is only for the purpose of placing the child into the correct grade. If no reports are available, the school can carry out an assessment in order to place the child into the correct grade. They may also accept an affidavit from the parent or caregiver.

GETTING HELP

Where can foreign learners and parents of learners complain about unfair treatment and xenophobia related to access to education?

• Department of Education (Provincial and National levels)
  • Department of Basic Education toll-free hotline 0800 202 933
  • Consortium for Refugees and Migrants in SA
  • Equal Education Law Centre
  • SECTION27
  • Lawyers for Human Rights
  • SA Human Rights Commission
  • Centre for Child Law

POLICY AND GUIDELINES


Department of Basic Education ‘Admission Policy for Ordinary Public Schools,’ 1998.

INTERNATIONAL AND REGIONAL INSTRUMENTS

Convention Relating to the Status of Refugees, 1951

The Universal Declaration of Human Rights (UDHR), 1948.

The International Covenant on Civil and Political Rights (ICCPR), 1966.


CASES

Minister of Home Affairs v Watschanku

2004 1 All SA 21 (SCA); 2003 ZASCA 142.

Centre for Child Law v Minister of Home Affairs 2005 (6); SA 50 (T).

Mubake and Others v the Minister of Home Affairs and Others North Gauteng High Court case no 73342 (2012).

Kajjal Ramjathan-Keogh is the Executive Director of the Southern Africa Litigation Centre. She has expertise in asylum, refugee protection, citizenship and statelessness.

CONSTITUTION AND LEGISLATION


South African Schools Act No 84 of 1996.

SOURCE MATERIAL AND FURTHER READING


F Khan & T Schreiner (eds) ‘Refugee Law in South Africa (2014).’

J Hathaway ‘The Rights of Refugees under International Law (2005).’