

The Constitutionality of the National Health Insurance Bill: The Treatment of Asylum Seekers

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Abstract

As the supreme law of the land, the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) requires that any law or conduct be consistent with its provisions. The *Draft National Health Insurance Bill, 2019* (the Bill) is no exception. Clause 4 of the Bill states that South African citizens, permanent residents and refugees will have access to quality health care services whilst asylum seekers and undocumented migrants will have access to emergency medical services, as well as services for notifiable conditions of public health concern. The treatment of asylum seekers is concerning given the fact that asylum seekers are a vulnerable group which enjoys special status under international law. This article seeks to assess the constitutionality of clause 4 of the Bill in so far as it limits the access to health care services for asylum seekers. The objective is to ascertain the extent to which the differential treatment of asylum seekers is permissible. Clause 4 of the Bill will be benchmarked against sections 9 and 27 of the *Constitution* and international law.

Keywords

Asylum seeker; access to health care services; unfair discrimination; everyone; reasonable; constitutional; National Health Insurance Bill; retrogressive.

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1 Introduction

With the rise of international migration, one of the core issues the state has had to address is the extent to which non-nationals, particularly asylum seekers, should be accommodated in the provision of social services such as health care. Given South Africa's limited resources, it has been argued that the state has an obligation to its citizens first before catering for non-nationals.¹ However, a conservative regulatory approach towards the social protection of non-citizens in South Africa is problematic because social services are guaranteed to everyone in the *Constitution*. South Africa has also ratified many international instruments which protect asylum seekers' access to social services. It is for this reason that the Bill,² which provides for differential treatment for asylum seekers in clause 4, raises a constitutional issue.

The Bill aims to provide universal access to quality health care to all. Clause 4 of the Bill reads as follows:

- (1) The Fund, in consultation with the Minister, must purchase health care services, determined by the Benefits Advisory Committee, on behalf of—
 - (a) South African citizens;
 - (b) Permanent residents;
 - (c) Refugees;
 - (d) Inmates as provided for in section 12 of the Correctional Services Act, 1998 (Act No. 111 of 1998); and
 - (e) certain categories or individual foreigners determined by the Minister of Home Affairs, after consultation with the Minister and the Minister of Finance, by notice in the Gazette.
- (2) An asylum seeker or illegal foreigner is only entitled to—
 - (a) Emergency medical services; and

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¹ Mukumbang, Ambe and Adebiji 2020 *International Journal for Equity in Health* 2; Alfaro-Velcamp "Don't Send Your Sick Here" 3.

² *Draft National Health Insurance Bill*, 2019, Notice of Intention to Introduce and Explanatory Summary Published for Comment (the Bill), explanatory summary published in GN 1014 in GG 42598 of 26 July 2019.

(b) Services for notifiable conditions of public health concern

The clause treats asylum seekers differently from citizens, permanent residents and refugees and seemingly on a par with undocumented migrants. This article assesses the constitutionality of this provision in the light of the obligations placed on the state to realise the right of everyone to have access to health care services and the right not to be unfairly discriminated against. Two main issues will be addressed: first, whether the Bill is a retrogressive measure given that it reduces the extent to which the right to access health care services is currently guaranteed; and, secondly, whether clause 4 unfairly discriminates against asylum seekers.³

The article commences with a brief overview of the policy context surrounding access to health care services for asylum seekers and then goes on to explain the current protection afforded to asylum seekers under the *National Health Act* (the NHA).⁴ Thereafter, a summary is provided of the changes under the Bill. This is followed by a discussion of the nature and scope of the obligations placed on the state to realise the right to access health care services and the obligation not to discriminate unfairly against asylum seekers. The article then analyses the extent to which the Bill is constitutionally compliant with section 27 and section 9 of the *Constitution*.

2 Definition and status of an asylum seeker in context

An asylum seeker is a person who fled his or her country and is seeking refugee status in South Africa, but whose application is still under consideration.⁵ A refugee, on the other hand, is a person who has been granted asylum status and protection in terms of section 24 of the *Refugee Act*.⁶ Once a person has been granted refugee status, he or she enjoys full legal protection, which includes access to the rights in chapter 2 of the Bill of Rights.⁷

When asylum seekers enter the country, they are issued with an asylum seeker permit which allows them to be in the country whilst awaiting the outcome of their application. Ordinarily the permit is valid for six months and

³ It is acknowledged that clause 4 of the Bill also limits the health services available to undocumented migrants. However, asylum seekers and undocumented migrants are treated differently in international law; as such this article will be confined to the treatment of asylum seekers only, in the Bill.

⁴ *National Health Act* 61 of 2003 (the NHA).

⁵ Department of Home Affairs Date Unknown <http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>.

⁶ *Refugee Act* 130 of 1998.

⁷ S 27 of the *Refugee Act* 130 of 1998.

can be renewed for a further six months.⁸ However, in practice the application for refugee status is a lengthy process characterised by uncertainty.⁹ The reality is that there is a significant backlog in the processing of applications, with the result that asylum seekers have to renew their permits several times, with many having to wait six years for an outcome.¹⁰ To illustrate, in 2020 the Auditor-General reported to the Portfolio Committee on Home Affairs that the backlog period for the Standing Committee on Refugee Affairs was one year, and the backlog for those awaiting adjudication by the Refugee Appeals Board was 68 years.¹¹ This means that many *de facto* refugees are stuck in a bureaucratic backlog and retain their asylum seeker status in the interim period.¹² The Bill must be interpreted against this contextual reality.

The Bill is aimed at ensuring universal access to health care services by introducing the National Health Insurance Fund (NHI), which will purchase health care services from both the public and private sectors on behalf of the population.¹³ This means that both the public and the private sectors will be open to all persons who are registered users under the NHI Fund. However, not everyone will have access to the same services, as highlighted in clause 4 of the Bill. The Bill purports to limit the health services available to asylum seekers. This does not come as a surprise, given that migrants have been blamed for burdening the health system.¹⁴ These sentiments are also reflected in the Department of Home Affairs' White Paper on International Migration, 2017, which states that the asylum seeker regime is being abused by economic migrants, resulting in the state's failure to deliver on socio-economic rights.¹⁵ In order to assess the constitutionality of the treatment of asylum seekers in the Bill regard must be had to the current legislative framework for health care services for asylum seekers, which is now addressed.

⁸ Department of Home Affairs Date Unknown <http://www.dha.gov.za/index.php/immigration-services/refugee-status-asylum>.

⁹ Heeren *et al* 2014 *Comprehensive Psychiatry* 825.

¹⁰ Schockaert *et al* 2020 *Refugee Survey Quarterly* 35.

¹¹ PMG 2020 <https://pmg.org.za/committee-meeting/29634/>.

¹² Scalabrini Centre 2020 <https://scalabrini.org.za/wp-content/uploads/2020/04/scalabrini-centre-25-4-25-letter-to-ncc-regarding-equal-treatment-for-asylum-seekers-refugees-and-migrants.pdf> para 27.

¹³ Clause 2 of the Bill.

¹⁴ Willie 2018 <https://www.sahrc.org.za/index.php/sahrc-media/opinion-pieces/item/1422-ensuring-health-and-access-to-health-care-for-migrants-a-right-and-good-public-health-practice>.

¹⁵ Department of Home Affairs *White Paper on International Migration* 59.

3 Legislative framework for health care services for asylum seekers

The NHA is the main Act regulating the provision of health care services in South Africa. It recognises a two-tiered health system comprised of the private and the public health service sectors.¹⁶ The public sector caters to all, particularly those without medical schemes, whereas access to the private health services depends on an individual's ability to pay.¹⁷ Both sectors have two components: the provision of healthcare services by healthcare practitioners and the funding of such health services.¹⁸

Whilst the *Immigration Act*¹⁹ is silent on health rights for asylum seekers, the NHA does not exclude asylum seekers. In terms of section 4(3) of the NHA, all persons who are not members of medical schemes are entitled to free primary health care services at public health establishments.²⁰ Pregnant women, lactating mothers and children are entitled to free health care services at public hospitals and clinics.²¹ These services are available to all, regardless of nationality or immigration status. Moreover, according to the Directive issued by the National Department of Health in 2007, refugees and asylum seekers (documented or undocumented) are entitled to free HIV treatment.²²

Not all health services are provided free of charge - people pay for hospital services as defined in the patients' fee schedule. The National Uniform Patient Fee Schedule exempts the following persons from paying full fees for hospital services: non-citizens who are permanent residents, non-citizens with a temporary or work permit, and illegal foreigners from the SADC region.²³ Asylum seekers would fall under temporary permit

¹⁶ S 1 of the NHA defines the national health system as: "the system within the Republic, whether within the public or private sector, in which the individual components are concerned with the financing, provision or delivery of health services."

¹⁷ Mahlathi and Dhlamini 2015 https://www.who.int/workforcealliance/031616_south_africa_case_studiesweb.pdf?ua=1 3.

¹⁸ Competition Commission 2019 <http://www.compcom.co.za/wp-content/uploads/2014/09/Health-MarketInquiry-Report.pdf> 45.

¹⁹ *Immigration Act* 13 of 2002.

²⁰ S 4(3) of the NHA.

²¹ S 4(3) of the NHA.

²² Department of Health 2007 https://www.passop.co.za/wp-content/uploads/2012/07/revenue-directive_refugees-and-asylum-seekers-with-or-without-permit.pdf.

²³ These groups of non-citizens are exempt to the extent that South African citizens are exempt, subject to a means test based on their income to determine the subsidisation of fees.

holders.²⁴ This means that while health services are not entirely free, asylum seekers currently do not have to pay the full amount for health services. They are entitled to free primary health care services including free HIV treatment and are exempt from paying full fees for hospital services.

The Bill aims to amend the NHA by limiting the services that are currently available to asylum seekers. As discussed in 5.1 below, under the Bill asylum seekers will have access only to free emergency medical services and services for notifiable conditions of public health concerns.²⁵ The emergency medical services which will be available are narrowly defined as "health services provided by any private or public entity dedicated, staffed and equipped to offer pre-hospital acute medical treatment and transport of the ill or injured."²⁶ Emergency medical health services as envisaged by the Bill will not cover primary health care services and are likely to coincide with emergency medical treatment as defined in *Soobramoney v Minister of Health (Kwazulu-Natal)* (*Soobramoney*),²⁷ namely treatment for a sudden catastrophe that calls for immediate medical attention necessary and available to avert that harm.²⁸ Notifiable conditions of public health concern, on the other hand, are medical conditions, diseases or infections of public health importance such as tuberculosis and the recent COVID-19 pandemic.²⁹ The scope of services available to asylum seekers under the NHI scheme will thus be narrower than the access that is currently available to them, raising the question of whether the NHI scheme amounts to a retrogressive measure.

Against this background, and so as to determine the constitutionality of clause 4 of the Bill, the scope of the right to access health care services in section 27 of the *Constitution* is introduced, followed by an analysis of the right not to be discriminated against unfairly in section 9 of the *Constitution*. The analysis of both rights is preceded by a description of the scope of the right in international law.

²⁴ Southern Africa Litigation Centre 2019 <https://www.southernafricalitigationcentre.org/2019/11/28/salc-submissions-on-the-south-african-national-health-insurance-bill-nhi/> para 14.

²⁵ Clause 4 of the Bill.

²⁶ Clause 1 of the Bill.

²⁷ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 1 SA 765 (CC) (*Soobramoney*).

²⁸ *Soobramoney* para 20.

²⁹ Regulations Relating to the Surveillance and the Control of Notifiable Medical Conditions, published in GN 604 in GG 40945 of 30 June 2017.

4 Related constitutional considerations

4.1 *The right to access health care services*

The right to access health care services is protected in international law under a broader right to health that is afforded to everyone. Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) entrenches everyone's right to the "highest attainable standard of physical and mental health".³⁰ There is a duty on state parties not to discriminate when adopting measures aimed at fulfilling the right to health. Article 2(2) of the ICESCR obliges state parties to ensure that the rights of the Covenant are exercised without discrimination of any kind. The following grounds are listed as prohibited grounds: "race, colour, sex, language, religion, national or social origin, land, birth or other status."³¹

International law jurisprudence has reiterated the need to protect the right to health for non-nationals, including asylum seekers. The Committee on Economic, Social and Cultural Rights (UNCESCR) in its *General Comment 19* on the right to social security stated that:³²

Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.

Furthermore, the United Nations High Commissioner for Human Rights (UNHCR) has recognised the obligation of states to safeguard the welfare of asylum-seekers, by stating that:³³

Asylum seekers should have access to the appropriate governmental and non-governmental entities when they require assistance so that their basic support needs including food, clothing, accommodation, and medical care, as well as respect for their privacy, are met.

³⁰ *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR). South Africa ratified this treaty in 2015.

³¹ Article 2(2) of the ICESCR.

³² *UNCESCR General Comment 19: The Right to Social Security* UN Doc E/C.12/GC/19 (2008) para 37.

³³ UNHCR 2002 <https://www.unhcr.org/excom/exconc/3dafdd344/executive-committee-conclusion-93-2002-conclusion-reception-asylum-seekers.html> para (b)(ii). The Supreme Court of Appeal has already upheld the right of asylum seekers (who are awaiting the process of their applications) to work or study on a limited basis: *Minister of Home Affairs v Watchenuka* 2004 1 All SA 21 (SCA); Also see *Arse v Minister of Home Affairs* 2010 7 BCLR 640 (SCA).

Finally, the UNCESCR in its *Concluding Observations* to South Africa recommended that South Africa must ensure that asylum seekers are guaranteed effective basic health care and other social services.³⁴ It can be seen in the provisions of international law that asylum seekers should be afforded special protection when accessing health care services.

In South Africa the right to access health care services is entrenched in section 27 of the *Constitution*, which reads as follows:

- (1) Everyone has the right to have access to—
 - (a) health care services ...
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

The right to access health care services has been interpreted in case law, with the following core principles enunciated:

- South Africa's constitutional jurisprudence stresses that the Bill of Rights applies to citizens and non-citizens, except for those provisions which apply to citizens only.³⁵ For example, the Constitutional Court in *Khosa v Minister of Social Development (Khosa)* accepted that the term "everyone", when used in relation to the rights contained in section 27, includes non-citizens.³⁶ Similarly, in *Centre for Child Law v Minister of Basic Education*, in interpreting the right to basic education for children, the Eastern Cape High Court held that the word "everyone" is not conditional upon the presentation of a valid identification document.³⁷
- The right does not create an entitlement to claim a core service immediately from the state; instead, the right is subject to progressive realisation, which means that it is to be realised over time.³⁸

³⁴ *UNCESCR Concluding Observations on the Initial Report of South Africa* UN Doc E/C.12/ZAF/CO/1 (2018) para 25.

³⁵ *Khosa v Minister of Social Development* 2004 6 SA 505 (CC) (*Khosa*) para 47; *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 38; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 46; *Lawyers for Human Rights v Minister of Home Affairs* 2004 4 SA 125 (CC) para 26-27.

³⁶ *Khosa* para 47.

³⁷ *Centre for Child Law v Minister of Basic Education* 2020 3 SA 141 (ECG) para 90.

³⁸ *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) para 39; *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC) para 56 (*Mazibuko*).

- The realisation of the right is dependent upon the availability of resources.³⁹
- Whether the state has discharged its duty to realise the right progressively will be evaluated by the courts in terms of the "reasonableness" of the state's plan to implement the right.⁴⁰

4.2 Progressive realisation

The Bill is a measure aimed at achieving the progressive realisation of the right to access health care services. Progressive realisation is a concept that acknowledges that socio-economic rights, like the right to access health care services, cannot be realised over a short period because the reality is that most states do not have the resources to implement the right straight away.⁴¹ Progressive realisation requires the state to ensure that accessibility is facilitated progressively by adopting measures that are aimed at removing financial, administrative and legal hurdles which impede access over time.⁴² While the right cannot be realised immediately, the state must show that it is moving expeditiously and effectively in trying to ensure that everyone has access to the right to health care services.⁴³ Progressive realisation also includes a negative duty to avoid retrogressive measures. Retrogressive measures are steps taken by the state which have the effect of taking away an existing entitlement to a right.⁴⁴ The concept of a retrogressive measure is not subject to the reasonableness test because the duty not to impose retrogressive measures is a negative one.⁴⁵ However, before exploring the concept further (see 3.4 below), a brief explanation of how the courts will assess whether the state has fulfilled its positive obligation to realise the right to access health care services progressively is necessary, as this impacts on the question of whether the separate treatment of asylum seekers in the Bill is justifiable.

³⁹ *Soobramoney* para 11.

⁴⁰ *Khosa* para 43 (in determining reasonableness, context is all-important. There is no closed list of factors involved in the reasonableness enquiry and the relevance of various factors will be determined on a case-by-case basis depending on the particular facts and circumstances in question).

⁴¹ *UNCESCR General Comment 3: The Nature of States Parties' Obligations* UN Doc E/1991/23 (1990) (*General Comment 3*) para 9. This concept has been interpreted by the UNCESCR in *General Comment 3* and the Constitutional Court has endorsed such an interpretation.

⁴² *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (*Grootboom*) para 45.

⁴³ *General Comment 3* para 9.

⁴⁴ OHCHR 2015 <https://www.ohchr.org/Documents/Issues/ESCR/E-2015-59.pdf>.

⁴⁵ See 3.4 below.

4.3 Reasonableness approach

The courts use the reasonableness review to assess whether the state has fulfilled its positive obligation to realise the right to access to health care services progressively within its available resources. The reasonableness approach, as developed in *Government of the Republic of South Africa v Grootboom* (*Grootboom*), allows the state a margin of discretion in choosing policies.⁴⁶ The test is not whether better measures could have been adopted or whether public money could have been better spent. The question is whether the measures that have been adopted are reasonable.⁴⁷ This analysis goes beyond a rationality analysis.⁴⁸ In *Khosa*, when dealing with the exclusion of permanent residents from a social security scheme, the Constitutional Court remarked that the standard of reasonableness was a higher standard than that of rationality.⁴⁹ In other words, it goes beyond asking whether there is a rational connection between a differentiating law and a legitimate governmental purpose. The court will examine whether the measure adopted by the state can facilitate the realisation of the right in question. Reasonableness is context-sensitive,⁵⁰ because it requires the weighing up of various factors such as the extent to which the measure considers those in desperate need.⁵¹

4.4 Retrogressive measures

Retrogressive measures are measures that reduce the extent to which a right is already guaranteed.⁵² In international law there is a presumption

⁴⁶ The reasonableness test has been subsequently applied in *Mazibuko v City of Johannesburg* 2010 3 BCLR 239 (CC); *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC).

⁴⁷ *Grootboom* para 41.

⁴⁸ Rationality enquires into whether there is a rational connection between a differentiating law and a legitimate governmental purpose.

⁴⁹ *Khosa* para 67.

⁵⁰ Quinot and Liebenberg 2011 *Stell LR* 652.

⁵¹ *Grootboom* para 44. The CC held that a reasonable measure in brief: "i) is well-coordinated and allocates responsibilities to different spheres of government; ii) does not unfairly discriminate against groups of people; iii) is coherent and comprehensive; iv) does not exclude people who need assistance; v) is reasonable in conception and implementation; vi) is transparent; vii) is continuously reviewed; viii) does ensure that there are sufficient human and financial resources to implement the measure; ix) does consider the short-term, medium-term and long-term needs of the people."

⁵² *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997) (*Maastricht Guidelines*) para 14.

that, unless justified, retrogressive measures are prohibited.⁵³ The UNCESCR in *General Comment 3* states that:⁵⁴

Any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

The implementation of retrogressive measures requires the most rigorous justification. The UNCESCR will consider the following factors when assessing whether a state was justified in adopting retrogressive measures: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation from affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realisation of the right in question; and (f) there was an independent review of the measures at the national level.⁵⁵

In *Grootboom* the Constitutional Court endorsed the concept of a retrogressive measure as outlined by the UNCESCR in *General Comment 3*. However, the court did not give content to the term in the South African context. In *Mazibuko v City of Johannesburg (Mazibuko)*,⁵⁶ the Applicants argued that the shift from the deemed consumption system of water supply to the new water provision policy constituted an unreasonable measure because it was retrogressive. The court laid down the test for determining whether a measure constituted a retrogressive step. It held that when determining whether a measure is retrogressive it is necessary to compare what was provided under the old system to what is furnished under the new system.⁵⁷ Again, the court did not deal with the content of a retrogressive measure and did not ultimately find that a retrogressive step had been taken by the state. The concept has still not been clearly adapted for the South African context and this has led scholars such as Woolman to describe retrogressive measures as "a concept in search of a definition".⁵⁸ There is also no clarity on how the courts will approach the matter where a measure is clearly retrogressive. While progressive realisation is a positive duty that

⁵³ Liebenberg 2020 *South African Judicial Education Journal* 19; De Vos 1997 *SAJHR* 97.

⁵⁴ *General Comment 3* para 9.

⁵⁵ *UNCESCR General Comment 19: The Right to Social Security* UN Doc E/C.12/GC/19 (2008) para 42

⁵⁶ See *Mazibuko* above.

⁵⁷ *Mazibuko* para 138. It should be noted that the court did not ultimately find that a retrogressive step had been taken by the state.

⁵⁸ Woolman, Sprague and Black 2009 *SAJHR* 110.

is assessed in terms of the reasonableness criterion, the duty to avoid retrogressive measures is a negative duty, and in South Africa negative infringements are regarded as limitations on the applicable right, which are subject to justification in terms of section 36, the general limitation clause.⁵⁹ It follows that since the duty to avoid retrogressive measures is a negative one,⁶⁰ such a step would have to be justified in terms of section 36.

However, the recent decision of the Gauteng High Court is worth noting, where the court had to consider whether the state was in breach of its duty to ensure that the National School Nutrition Programme (NSNP) provides a daily meal to all qualifying learners whether they are attending school or studying away from school.⁶¹ It was argued that by not providing at least a meal a day during the school term, the Minister and the MEC took away an existing entitlement for learners.⁶² Drawing from the UNCRC *General Comment 19*, the court held that in times of economic crisis, regressive measures may be considered only after assessing all other options and ensuring that children are the last to be affected, especially children in vulnerable situations.⁶³ Although the court did not engage with the nature of the obligation imposed by a retrogressive measure, nor the section 36 analysis, it is apparent from this judgment, that when assessing whether retrogressive measures are justified the courts will consider: a) whether the state has exhausted all other options; b) whether the state has considered the vulnerability of the group affected; c) the availability of resources; and d) the totality of the rights in issue.

5 The right to equality

The right to equality is entrenched in several international instruments. A succinct expression of the right is found in article 26 of the *International Covenant on Civil and Political Rights* (ICCPR).⁶⁴ Discrimination is defined

⁵⁹ *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) paras 3-34.

⁶⁰ Pieterse *Can Rights Cure?* 21; Du Toit *Evaluation of the National Health Insurance Scheme* 37.

⁶¹ *Equal Education v Minister of Basic Education* 2021 1 SA 198 (GP) (*Equal Education*).

⁶² *Equal Education* para 46.

⁶³ *Equal Education* para 57; UNCRC *General Comment 19 on Public Budgeting for the Realisation of Children's Rights* UN Doc CRC/C/GC/19 (2016).

⁶⁴ *International Covenant on Civil and Political Rights* (1966). These grounds are similar to those listed in art 2(2) of the ICESCR.

as any distinction, exclusion, or differential treatment based on a ground that is prohibited by law.⁶⁵

Discrimination based on nationality has been recognised as discrimination falling under the prohibited ground of "other status" in international law.⁶⁶ Differentiating between citizens and non-citizens in international law is not impermissible *per se*. Differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the relevant Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.⁶⁷ Furthermore, the UNHRC has stated that although there may be grounds in some situations for differential treatment between migrants and non-migrants in specific areas, these will be permissible only "as long as minimum core obligations are not concerned: differentiations cannot lead to the exclusion of migrants, regular or irregular, from the core content of economic, social and cultural rights ...".⁶⁸ Moreover, the case of asylum seekers is distinguishable from irregular migrants as they enjoy a special and separate status in international law.⁶⁹ What is afforded to them has to go beyond the bare minimum.⁷⁰

The *Constitution* entrenches the right to equality in section 9.⁷¹ Equality has been described as "an accessory and overarching principle of all other rights".⁷² This is because it is both a stand-alone right and a constitutional

⁶⁵ UNHRC CCPR General Comment 18: Non-discrimination UN Doc HRI/GEN.1.Rev.9 (1989) para 8.

⁶⁶ UNCRC General Comment 20 on the Implementation of the Rights of the Child During Adolescence UN Doc CRC/C/GC/20 (2016) para 20; *Gueye v France* Communication No 196/1985, UN Doc CCPR/C/35/D/196/1985 (1989) para 9.4. In this case, discrimination based on nationality was said to fall under the ground "other status".

⁶⁷ UNCERD General Recommendation XXX on Discrimination Against Non-citizens (2002) para 36.

⁶⁸ ECOSOC Report of the United Nations High Commissioner for Human Rights UN Doc E/2010/89 (2010) para 14.

⁶⁹ Olivier and Govindjee 2021 <https://www.lerasa.co.za/index.php/docman/ilera-africa-2021/papers-2/track-3-1/140-olivier-govindjee-asylum-seekers-in-south-africa-covid19>; UNHCR 2016, updated 2018 <https://www.unhcr.org/news/latest/2016/3/56e95c676/refugees-migrants-frequently-asked-questions-faqs.html>.

⁷⁰ See 3.1 above.

⁷¹ The legislation giving effect to s 9 is the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000. The principle of subsidiarity requires that this Act must be relied upon where there is a case of unfair discrimination rather than s 9. However, the *Constitution* must be relied upon directly where a statute (or the common law) fails to protect a basic right; See *Institute for Democracy in South Africa v African National Congress* 2005 3 All SA 45 (C) para 32.

⁷² International Commission of Jurists *Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights* 190.

value.⁷³ As a right, it intersects with other rights. Equality will always be implicated where the realisation of socio-economic rights excludes a group of people from the provision of a service.⁷⁴ This is because these rights are guaranteed to everyone.

In *Harksen v Lane* the Constitutional Court developed a test to determine whether there is an infringement of section 9.⁷⁵ Where a measure differentiates between groups of people, the courts will firstly assess whether a measure bears a rational connection with a legitimate government purpose. If no rational connection is established, the measure falls foul of section 9(1) of the *Constitution*. Even if there is a rational connection, the measure may still amount to unfair discrimination as envisaged in section 9(3). The second analysis therefore involves a consideration of whether the measure constitutes unfair discrimination.

Concerning the test for unfair discrimination,⁷⁶ where the differentiation occurs on the grounds listed in section 9(3) of the *Constitution* it is presumed to be unfair.⁷⁷ If not, the applicant has to establish that the differentiation amounts to discrimination on an analogous ground and that the discrimination is unfair.⁷⁸ Differentiation will be regarded as being on an analogous ground if it is based on attributes that have the potential to impair the dignity of a person or to affect that person adversely in a comparably serious manner.⁷⁹

The unfairness test focusses primarily on the impact of the discrimination on the complainant and others in his or her situation. In assessing unfairness, the court will look at the impact of the exclusion on the complainant.⁸⁰ If after weighing up all those factors the court concludes that a provision unfairly discriminates against a group of people, such discrimination will have to be justified in terms of section 36 of the

⁷³ International Commission of Jurists *Guide for the Legal Enforcement and Adjudication of Economic, Social and Cultural Rights* 190.

⁷⁴ Wayburne 2016 SAJHR 31.

⁷⁵ *Harksen v Lane* 1998 1 SA 300 (CC) (*Harksen v Lane*). The *Harksen v Lane* steps have been subsequently applied in several judgments and have been modified to fit a particular scenario. For example, the test was applied by the Eastern Cape High Court in *Centre for Child Law v Minister of Basic Education* 2020 3 SA 141 (ECG) when dealing with the right to basic education of undocumented children.

⁷⁶ The test was formulated in *Harksen v Lane*.

⁷⁷ *Harksen v Lane* para 47.

⁷⁸ *Harksen v Lane* para 47.

⁷⁹ *Harksen v Lane* para 47.

⁸⁰ *Khosa* para 72.

Constitution. These steps will be considered below under 5.2 when assessing whether the Bill falls foul of section 9 of the *Constitution*.

6 Analysis

6.1 Compliance with section 27

Section 27 includes the duty to avoid retrogressive measures. As outlined in *Mazibuko*, the test for retrogression entails comparing the access that was available under the previous system against that under the new system.⁸¹ As explained earlier, currently asylum seekers have access to free primary health care services, which are inclusive of treatment for HIV and Tuberculosis. Clause 4 of the Bill limits this access to mere emergency health services and services for notifiable conditions. The impact is that asylum seekers will have to pay for primary health care services. For instance, a pregnant woman who is an asylum seeker will have to pay for antenatal care, and an asylum seeker who is HIV-positive will not have access to ante-retroviral treatment. The Bill thus takes away the existing entitlement of asylum seekers to access primary health care services. This is a breach of the state's duty to refrain from impairing existing access to rights for groups of people and the duty to avoid retrogressive measures.⁸² To this extent the Bill constitutes a retrogressive measure and requires justification.

The state is required to provide a compelling justification for the retrogression.⁸³ While the courts have not provided much guidance as to how such a justification would occur in the South African context, at the very least the courts would have to assess whether the state had exhausted all other alternatives before limiting the right in question.⁸⁴ Furthermore, because the duty to avoid retrogressive measures is a negative one, the implementation of clause 4 of the Bill requires justification in terms of section 36 of the *Constitution*. This means that the state would have to show, *inter alia*, that there are no less restrictive measures available. For example, the state has not provided justification as to why it is impossible to provide asylum seekers with basic primary health care services or a package that is inclusive of treatment of chronic illnesses such as HIV. It is in this respect that the state is likely to experience difficulties, as will be shown below. Before this is shown, however, it is also necessary to assess whether clause

⁸¹ See para 3.4 above.

⁸² S 7 of the *Constitution*.

⁸³ Liebenberg *Socio-economic Rights* 190.

⁸⁴ *Equal Education* para 57.

4 violates the right to equality: specifically whether the measure discriminates unfairly against asylum seekers. This analysis is also relevant to the determination of whether clause 4 of the Bill is a retrogressive measure, as the relevant factors overlap to a large degree.

6.2 Compliance with section 9(3)

The equality enquiry is two-legged in that the first consideration is whether or not there is a rational connection between the differentiating law and a legitimate government purpose. Where a measure is found to be rational it may still be found to be discriminatory. The second consideration involves an analysis of whether or not a measure unfairly discriminates against a group.

A measure falls foul of section 9(3) if it discriminates unfairly on a listed or an unlisted ground. Nationality is not a listed ground in terms of section 9(3) of the *Constitution*, but the Constitutional Court has recognised it as an unlisted ground.⁸⁵ This means that unfairness will have to be established by looking at the impact of the measure on the complainant's dignity. The courts will consider the following factors: the position of the complainants in society, the nature of the provision and the purpose sought to be achieved by it, and whether the provision is aimed at achieving a worthy societal goal.⁸⁶ It is to these factors that the discussion now turns.

6.2.1 Position of the complainant

Asylum seekers are considered a vulnerable group in South Africa.⁸⁷ In *Union of Refugee Women v Director: Private Industry Regulatory Authority*, the Constitutional Court emphasised the need to protect refugees and asylum seekers as they are vulnerable groups in South African society.⁸⁸ Similarly, in *Minister of Home Affairs v Watchenuka*, when dealing with the right to employment of asylum seekers the Supreme Court of Appeal held

⁸⁵ *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC); *Khosa* para 71.

⁸⁶ *Harksen v Lane* para 60.

⁸⁷ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) paras 28-30. A vulnerable person is a person whose survival, care, protection or development may be compromised, due to a particular condition, situation or circumstance and which prevents the fulfilment of his or her rights. Examples of other vulnerable groups include persons with disabilities, older persons, vulnerable women and orphans.

⁸⁸ *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC) para 101; Also see *Somali Association of South Africa v Limpopo Department of Economic Development, Environment and Tourism* 2015 1 SA 151 (SCA) para 32.

that limiting the right of an asylum seeker to undertake employment where "employment is the only reasonable means for the person's support" is a restriction placed upon his or her ability to live without positive humiliation and degradation.⁸⁹ These decisions highlight the courts' willingness to protect the dignity of asylum seekers.

More recently, in *Scalabrini Centre of Cape Town v Minister of Social Development* the Gauteng High Court extended access to the Covid-19 Social Relief of Distress grant to special permit holders and asylum seekers with visas valid on 15 March 2020.⁹⁰ The court emphasised the need to protect the dignity of asylum seekers, holding that the exclusion of asylum seekers and special permit holders violated the Bill of Rights.⁹¹

Asylum seekers also struggle when it comes to accessing health care services. In *A E v Chief Executive Officer Helen Joseph Hospital*⁹² an asylum seeker was needed renal dialysis but was denied access on the ground that she did not qualify for such services because section 61 of the NHA confines organ transplants to South African citizens and permanent residents. In any event, even if the applicant had qualified for a transplant, she would have to be placed on a waiting list due to resource scarcity.⁹³ In finding that the exclusion of the asylum seeker from renal dialysis was reasonable, the court held:⁹⁴

It is not in the function of the court to decide who shall and who shall not receive the required medical treatment. It is for the medical practitioners and the Health profession and authorities who make those decisions. This court will only interfere if it finds that the decision was exercised unreasonably. I could not find any such suggestion.

This decision highlights the fact that asylum seekers depend heavily on public health care in South Africa and reemphasises the vulnerability of this group.⁹⁵ Furthermore, asylum seekers already face challenges when they

⁸⁹ *Minister of Home Affairs v Watchenuka* 2004 1 All SA 21 (SCA) para 32.

⁹⁰ *Scalabrini Centre of Cape Town v Minister of Social Development* 2021 1 SA 553 (GP).

⁹¹ *Scalabrini Centre of Cape Town v Minister of Social Development* 2021 1 SA 553 (GP) para 34; See also *AI v Director of Asylum Seeker Management* [2019] ZAWCHC 114 (2 September 2019) para 25.

⁹² *A E v Chief Executive Officer Helen Joseph Hospital* (19/15448) [2019] ZAGPJHC 379 (7 October 2019).

⁹³ *A E v Chief Executive Officer Helen Joseph Hospital* (19/15448) [2019] ZAGPJHC 379 (7 October 2019) para 32.

⁹⁴ *A E v Chief Executive Officer Helen Joseph Hospital* (19/15448) [2019] ZAGPJHC 379 (7 October 2019) para 32.

⁹⁵ The court based its decision on *Soobramoney*, which also dealt with the exclusion from renal dialysis, and used the rationality test to find that the exclusion from renal dialysis was fair. The court placed too much emphasis on the fact that the case was

want to access health care services due to prevalent rampant xenophobia against foreign nationals.⁹⁶

It is submitted that treating asylum seekers differently in the Bill will result in the further marginalisation of a group that already face challenges, when they should be protected by the law.

6.2.2 *The purpose sought to be achieved by the provision*

The South African public health care system struggles to provide sufficient medical care to any person, regardless of the person's nationality or status. To justify clause 4 of the Bill the state could try to argue that to function effectively and to meet the objectives of the Bill the NHI Fund cannot accommodate asylum seekers. When one assesses the cost estimation of the Bill it is apparent that the NHI will require funds over and above the current funds allocated towards health care.⁹⁷ Furthermore, the state has also suffered an extra drain because of COVID-19 and the procurement of vaccines. Granting everyone the same package of health services under the NHI could have a serious cost implication for the state, justifying the exclusion of persons such as asylum seekers. This argument would be in line with what the court held in *Soobramoney*, namely that the realisation of the right to access to health care services is dependent upon the availability of resources.⁹⁸ Also, the court in *Khosa* held that it may be reasonable to limit social services to undocumented migrants and temporary residents.⁹⁹

It is submitted, however, that this argument fails to acknowledge that asylum seekers are distinguishable from undocumented migrants as they enjoy a special and separate status in international law. Furthermore, the Constitutional Court has reiterated the need to protect the dignity of asylum seekers as outlined above.¹⁰⁰ It follows that despite their particular legal

one of resource scarcity rather than discrimination based on nationality. Also, given that the court had to assess whether the state had complied with its positive obligation to realise the right to access health care, it would have done better to base its decision on considerations relevant to the reasonableness criteria, considering factors such as the context and the degree of denial. Furthermore, the court could have also addressed the impact on the dignity of the asylum seeker as this was one of the arguments raised by the applicant.

⁹⁶ SAHRC 2017 <https://www.gov.za/speeches/sahrc-it-our-constitutional-imperative-protect-healthcare-rights-refugees-and-asylum>.

⁹⁷ Department of Home Affairs *White Paper on International Migration* para 203 estimates that the NHI will cost around R256 billion.

⁹⁸ Nxumalo 2020 <http://www.derebus.org.za/nhi-and-the-inequalities-of-coverage-for-asylum-seekers-and-illegal-foreigners/>. The test in *Soobramoney* was rationality.

⁹⁹ *Khosa* para 64.

¹⁰⁰ *S v Makwanyane* 1995 3 SA 391 (CC) para 392.

status asylum seekers deserve to be treated with dignity, which includes receiving proper access to health care services. Moreover, the state would have to prove that the equal treatment of asylum seekers would have a significant impact on the financial viability of the NHI scheme, thereby justifying the differentiation as having a valid and rational purpose.

6.2.3 *The impact of the exclusion*

The importance of being able to access health care services cannot be understated, especially at a time when the world is having to deal with the Coronavirus. Most asylum seekers cannot afford to pay for health care services and are thus likely to resort to self-diagnosis and treatment or over-the-counter medication. This approach may lead to a high burden of disease amongst asylum seekers as well as an increased infant and maternal mortality rate.¹⁰¹ When one considers these factors cumulatively, it can be seen that the differential treatment of asylum seekers would have a detrimental impact on their well-being and dignity. The effect is aggravated by the reality that asylum seekers flee to countries such as South Africa to seek refuge. The way in which clause 4 of the Bill limits asylum seekers' access to health care services ignores the vulnerability of this group and the need to protect their dignity. It is argued, therefore, that clause 4 of the Bill constitutes unfair discrimination against this group.

7 Section 36 considerations

Section 36 considerations are relevant primarily because clause 4 of the Bill unfairly discriminates against asylum seekers and also constitutes a retrogressive measure. Section 36 of the *Constitution* provides that a right in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open, democratic society. A law of general application incorporates all forms of legislation.¹⁰² It follows that the Bill, if passed, will be a law of general application. In assessing whether a measure that limits a right is justifiable, the following factors are considered: the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, and whether less restrictive measures are available.

¹⁰¹ Mbatha and Mphahlele 2019 <https://www.dailymaverick.co.za/article/2019-10-31-nhi-bill-deviates-from-goal-of-universal-health-coverage/>.

¹⁰² Liebenberg *Socio-economic Rights* 94.

Many of the section 36 factors were addressed when the violation of equality was considered. To supplement this analysis, when one assesses the objective of the Bill as stated in clause 2, which is to provide "universal access" to quality health care services by all, the differential treatment of asylum seekers in clause 4 cannot be said to advance this objective. Universal access as defined by the World Health Organisation implies that all people and communities have access without any kind of discrimination to comprehensive, appropriate and timely, quality health services.¹⁰³ Therefore, the differential treatment of asylum seekers cannot be said to be advancing the aims of the Bill. Furthermore, in relation to the less restrictive means factor, the Constitutional Court has held that the courts must consider alternative means by which the legislature could have achieved its stated purpose.¹⁰⁴ It is argued that there are less restrictive means to achieve the Bill's objectives and the purpose of clause 4 thereof. Giving asylum seekers access to primary health care services (at the very least) would achieve a compromise between ensuring that the health system is not overburdened and protecting the dignity of persons falling within the ambit of clause 4. Such provision of primary health care services would ensure that those persons already in the country have access to clinics and the treatment of communicable diseases. This proposal is in line with the UNCESCR recommendation in its *Concluding Observations* that South Africa should take the steps necessary to providing basic social services to asylum seekers.¹⁰⁵ Furthermore, as seen in recent reports, the Department of Home Affairs has adopted various new measures aimed at restricting access to the country,¹⁰⁶ which should help to alleviate the asylum seeker crisis, reducing the supposed need to restrict the rights of asylum seekers.¹⁰⁷ Unfairly discriminating against asylum seekers cannot be said to be justified in terms of section 36 of the *Constitution*. Similarly, for the reasons advanced above the state cannot be said to have exhausted all options before limiting the access available to asylum seekers.

¹⁰³ PAHO and WHO Date Unknown <https://www.paho.org/en/topics/universal-health>.

¹⁰⁴ *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 2 SA 168 (CC) para 100.

¹⁰⁵ *UNCESCR Concluding Observations on the Initial Report of South Africa* UN Doc E/C.12/ZAF/CO/1 (2018) para 25.

¹⁰⁶ This contribution does not engage with the legitimacy of these measures.

¹⁰⁷ Department of Home Affairs 2021 <http://www.dha.gov.za/index.php/statements-speeches/1422-address-by-the-minister-of-home-affairs-dr-aaron-motsoaledi-at-the-signing-ceremony-of-a-partnership-with-the-united-nation-high-commissioner-for-refugees-to-eliminate-a-backlog-in-the-asylum-seeker-system>. The Department of Home Affairs has signed an agreement with the UN High Commissioner for Refugees (UNHCR) to eliminate delays and the existing backlog in decisions for asylum-seekers.

As mentioned above, there is a huge overlap between the consideration of whether a retrogressive measure is permissible and whether a measure that unfairly discriminates against a group is justifiable. Though the courts have not dealt with the justification of a retrogressive measure directly, it is apparent from the consideration of international law and how negative duties are assessed in South Africa that the analysis will include section 36 factors such as whether less restrictive measures were available. It is argued, therefore, as per the reasons stated above, that it is highly unlikely that the state would be able to justify the regression in the healthcare access available to asylum seekers.

8 Conclusion and recommendations

This article has assessed the constitutionality of the Bill in so far as it limits access to health care services for asylum seekers and concludes that the Bill does not comply with either section 9 or section 27 of the *Constitution*.

The *Constitution* affords everyone the right to access health care services. This right is not conditional on immigration status. While the state may limit the rights of non-nationals in certain instances, the limitation of the right of asylum seekers to access primary health care services is contrary to section 27 of the *Constitution* and South Africa's obligations under international law. It has been shown that in international law asylum seekers enjoy special status and ought to be protected by being provided with primary health care services at a bare minimum. They ought to be distinguishable from undocumented migrants because they enjoy a special status in international law. It has also been demonstrated that clause 4 of the Bill reduces the existing right of asylum seekers guaranteed by the NHA to access primary health care services. Thus, clause 4 constitutes a retrogressive measure and to implement it the state is required to advance the most rigorous justification. This has not been done and it is unlikely that the state will be successful in justifying this retrogression. The state has not provided any alternative arrangement to accommodate asylum seekers excluded by the Bill. The restriction of the health care services available to this group will severely impact on their dignity and leave them in a desperate situation, which cannot be justified in our constitutional democracy.

In differentiating between the services available to asylum seekers on the one hand and South Africans, refugees and permanent residents on the other, clause 4 of the Bill also unfairly discriminates against asylum seekers. While the concern that non-nationals may cause an undue financial burden to the state may be a legitimate one, it is argued that there are less

restrictive ways of ensuring that the state is not overburdened and at the same time of preserving the dignity of asylum seekers. Asylum seekers constitute a small percentage of the population and will not undermine the effectiveness of the NHI if afforded better access. Furthermore, the government has been taking steps aimed at streamlining the asylum seeker process and the immigration policies are being made stricter to restrict access to the country.¹⁰⁸ It is therefore also highly unlikely that clause 4 can be justified as being rationally connected to its supposed purpose.

It is recommended that the drafters of the NHI give serious consideration to affording asylum seekers access to primary health care services inclusive of treatment for diseases like HIV/AIDS and tuberculosis. It is further recommended that pregnant women who are asylum seekers have access to free pre- and post-natal care to reduce the rate of the mortality of their infants. This proposal is constitutionally sound and appropriately balances the right of asylum seekers with the need to enact legislation that gives effect to the right of everyone to access health care services.

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List of Abbreviations

ECOSOC	United Nations Economic and Social Council
HIV	Human Immunodeficiency Virus
Hum Rts L Rev	Human Rights Law Review
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICON	International Journal of Constitutional Law
LDD	Law, Democracy and Development
NHA	National Health Act 61 of 2003
NHI	National Health Insurance
NILQ	Northern Ireland Legal Quarterly
OHCHR	United Nations Office of the High Commissioner on Human Rights
PAHO	Pan American Health Organisation
PMG	Parliamentary Monitoring Group
SAHR	South African Health Review
SAHRC	South African Human Rights Commission
SAJHR	South Africa Journal on Human Rights
Stell LR	Stellenbosch Law Review
UNCERD	United Nations Committee on the Elimination of Racial Discrimination
UNCESCR	United Nations Committee on Economic, Social and Cultural Rights
UNCRC	United Nations Committee on the Rights of the Child
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations Human Rights Committee
WHO	World Health Organisation