

Freedom of Movement and Detention Presentation

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INTRODUCTION

The Freedom of Movement of Refugees and the Penalisation of illegal entry and stay are contested areas in the African Continent

Many parts of Africa (particularly Southern and Eastern Africa) have adopted refuge camp policies and reservations to the 1951 Refugee Convention that limit the right to freedom of movement and other related socio-economic rights

The argument supporting this stance is that these countries cannot allow freedom of movement in their territories and that they cannot afford the provision of socio-economic rights to refugees in the grander scheme

This stance is based on the premise that freedom of movement rights are often linked with socio-economic rights such as the right to work, access to health and education

It is also argued that countries that do not have the infrastructure to maintain their own local populace on these socio-economic rights may not be compelled to affording these to refugees who are seen as 'temporary issues' (related fears may also arise out of displeasing local populations which are not provided for e.g. xenophobic incidents)

Other countries have adopted more 'free' approaches to this issue, granting refugees, freedom of movement and not making their maintenance a government issue, stating that they have a right to work and education eg South Africa and Egypt

FREEDOM OF MOVEMENT – ARTICLE 26

- Article 26 of The 1951 UN Convention provides - “Each Contracting State shall accord to refugees lawfully in its territory the right to choose their place of residence to move freely within its territory, subject to any regulations applicable to aliens generally in the same circumstances.”
- No restrictions – in Egypt and South Africa
- Egypt: whilst registering reservations against some articles in the UN Convention, it applies a free settlement and movement hosting approach.
- South Africa - Constitution, section 21 (1)- “Everyone has the right to freedom of movement.”
- Section 27 of the Refugees Act – Entitlement to all rights in the Bill of Rights
- South Africa has no reservations to the 1951 Convention
- Currently all asylum seekers and refugees have the right to freely move and reside anywhere within the Republic

FREEDOM OF MOVEMENT (Continued)

▶ Kenya –

- Constitution, section 39 (1)- “Every person has the right to freedom of movement.”
- Previously refugees were confined to two refugee camps: Kakuma and Dadaab
- Under the new Refugees Act of 2021 refugees have freedom of movement in the “designated area,” the right to work, rights, and property. Refugees are also integrated into its national systems, and refugee children can access free primary education.
- Designated Area defined as “any reception area, transit point or settlement area as may be declared by the Cabinet Secretary.”

RESTRICTIONS IN FREEDOM OF MOVEMENT

- ▶ Uganda, Malawi, Sudan, Namibia -
 - These countries follow a strict encampment model and have filed reservations against the UN Convention
 - Previously Kenya applied this policy until this was relaxed with the new amendments to legislation
 - Even with these amendments though, freedom of movement is not as it applies in Egypt and South Africa

DETENTION – Jurisprudence in South Africa

- Until 2022 asylum seekers were not detained in South Africa – on the simple assertion that they wanted to apply for status
- Long line of SCA decisions to this effect – Arse; Abdi; Bula; Ersumo
- Ruta decision – even if found to have contravened the Immigration Act and liable to criminal prosecution – ConCourt decreed that such a person must be released from detention and allowed to apply for status
- The Court specifically said – “Until the right to seek asylum is afforded and a proper determination procedure is engaged and completed, the Constitution requires that the principle of *non-refoulement* as articulated in s 2 of the Refugees Act must prevail. The ‘shield of non- refoulement’ may be lifted only after a proper determination has been completed”
- In fact the ConCourt in Ruta said that the non refoulment protection applied to detention as well. The Court said that provision trumped all others
- Effect of this was that – illegality was effectively not penalized

DETENTION JURISPRUDENCE IN SA (Continued)

▶ Ashebo –

- ConCourt changed tack – Recognizing effect of amendments to the Refugees act and regulations, the ConCourt dealing with the detention of so-called illegal foreigners – said – “*it is significant to mention that article 31 of the Convention does not give an illegal foreigner unrestricted indemnity from penalties.*”
- This was a game changing decision – it accepted the necessity of detaining persons who were in the country in contravention of the Immigration act BUT stated that they must still be assisted to establish good cause.
- Human Rights Lawyers don't like this decision, and they openly argue that the ConCourt was wrong
- Effect of Ashebo – DHA now in overdrive in arresting and detaining illegal foreign nationals, Lower Courts are swamped with these cases
- DHA using “Good Cause” stage as a gateway to Status applications – no rocket science involved – according to the DHA – if good cause is not established – deportation must follow as that person cannot be allowed to apply for refugee status
- Is the DHA correct – what about *non refolement*?

DIFFICULT QUESTIONS RELATED TO THE FREDDOM OF MOVEMENT AND CALLS FOR RELAXING DETENTION PENALISATION

- A difficult question sometimes asked is the genuine nature of some applicants for asylum, mainly in countries that receive many asylum seekers and refugees (e.g. Kenya, Egypt and South Africa)
- This is related to the question of the "safe third country" or "first country of asylum" principle as described by academic James Hathaway
- The principle essentially states that asylum seekers or refugees should seek assistance in the first country they enter from their country of origin. This is a point Hathaway states is flawed based on a number of mistaken assumptions, including the belief that refugees have a choice in determining their country of asylum; that all countries are equally capable of providing protection (as well as social and economic stability), and that the international refugee regime is able to ensure that all countries meet minimum standards of protection.
- The question cannot be posed as much in countries such as Egypt or Kenya where these are indeed the first countries many arrive in. However, these questions have been posed in some southern African countries, such as Namibia, Botswana and South Africa, where many asylum seekers in the region have transited a number of other countries without seeking asylum there

Difficult questions (Continued)

- Questions then arise around whether some are simply 'economic migrants', abusing the asylum system as a shortcut to what would be more difficult immigration procedures (e.g. applying for work permits)
- The large degree of movement between countries has also led to several issues of unsafe movement of people and even the rise of trafficking rings
- In Senegal there is a growing problem in the form of Senegal being a transit country into Europe for many in West Africa (especially from The Gambia and Mali).
- Many, including local Senegalese, attempt to take boats to the Canary Islands of Spain and from there make their way further into Europe.
- This has prompted Senegal to become part of the Global Detention Project in an attempt to curb this issue. Despite this there has been a 161% increase in these types of migrations from 2022 to 2023

DIFFICULT QUESTIONS – QUO VADIS?

- In the context of Malawi, in 2020, the United Nations Office on Drugs and Crime (UNDOC) uncovered a human trafficking ring at the refugee camp, involving women and children – “Sunday market” statement by UNODC re the sale of children into prostitution and forced labour market
- Malawi is a popular transit country from central and northern Africa coming to countries in Southern Africa
- Most of the victims rescued from these movements are men from Ethiopia, aged between 18 and 30. There are girls and women too, aged between 12 and 24 from Ethiopia, Burundi, and the Democratic Republic of Congo (DRC).

QUO VADIS?

- **Human trafficking – yes**
- **Internal security threats – yes**
- **Economic migration abusing asylum protection system – yes**
- **There are no easy answers, but we should always remember that there are always some in these multitudes who are genuine asylum seekers**
- **Therefore asylum system protection remains paramount**



THANK YOU

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