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Protection of irregular migrants in South Africa

1. Introduction

People crossing borders without the necessary immigration authorisation is an feature of migration around the world. We’ve heard yesterday that more than 200 million migrants around the world today and it’s estimated that approximately 15% of them live without the necessary immigration status, earning them the rather dubious label of being irregular migrants.

It also appears, according to the ILO that the percentage of irregular migrants is on the increase mainly as a result of restrictive immigration laws forcing migrants to crossing borders without authorisation.

In my presentation I will briefly focus on irregular migrants in SA and will briefly touch on the following:
- Legal framework for protection of migrants, irregular migrants
- Specific aspects relating to the legal protection of IM and the role of the courts
  - Access to nationality and immigration protection
  - Labour rights and social insurance
  - Social assistance
  - Access to criminal justice
  - Health
- Conclude with a recommendation to expand protection for IM

Draw on recent writing and research by Ockert Dupper, ACMS, SAMP

2. Legal framework

The core rights of irregular migrants are protected by various international regional and domestic treaties and statutes
International law: ILO Conventions and protocols. Various UN human rights treaties, e.g. Migrant Worker Convention
Regional framework: SADC Social Charter, SADC labour migration protocol,
South Africa: Constitution – broadly inclusive rights, Immigration Act, and Citizenship

3. Irregular migrants in SA

Let me make just a few observations regarding irregular migration in SA:

- Long history of migration in region – employment, forced migrants despite limited avenues for legal protection

- Irregular migration is seen as an economic and security risk by SA government.
Darshan Vigneshawaran has described the government’s response to exclude irregular
migrants from government services and to criminalise irregular migration and harsh immigration enforcement.

- more than a million people were deported from SA in the last two decades, mainly to Mozambique and Zimbabwe

- MiWorc findings: Migrants in SA more likely to be employed than SA citizens. Mostly employed in informal sector and in precarious employment where there is less access to benefits and labour protection.

4. **How do people become irregular migrants**

I know i may be stating the obvious

a. Majority of IM are those who do not qualify for immigration permits, arrive through irregular means, children

b. Family of recognised workers not qualifying for immigration status

c. People fall in and out of irregularity
   i. Failed asylum seekers
   ii. Job seekers

5. **Protection themes**

a. **Immigration protection**
   i. Lacking documentation is important barrier to access to fundamental rights, particularly socio-economic rights
   ii. Increased tightening of immigration laws and policies excluding more and more regional migrants, exception of special Zimbabwean dispensations almost 300 000
   iii. Courts play important protection role re
      1. Access to constitutional protection for irregular migrants – CC LHR
      2. Ulde – decision making in Immigration enforcement must be lawfully at every step

b. **Nationality / statelessness**

   Due to a conflict of citizenship laws between various African nations, and intentionally discriminatory laws and practice, many African migrants find themselves *de jure* stateless as they do not qualify for citizenship under any nation’s legal system. In addition, due to a range of factors including low birth registration rates and lack of documentation; and difficulties in accessing government services, many would-be citizens are *de facto* stateless – effectively stateless due to an inability to prove or access their nationality.

SA Courts recently ordered DHA to grant citizenship to a Cuban child who was left stateless when her parents were unable to register the child’s birth and nationality with the Cuban government.

Also of concern is the recent amendments to the immigration regulations that makes it impossible to register the births of undocumented mothers.
c. Labour protection - Formal employment
   1. Social insurance
      a. Limited to formal employment / authorised migrant workers
      b. Unemployment Insurance Act and Compensation for Occupational Injuries and Diseases Act limit its benefits to an ‘employee’ or ‘contributor’
      c. However, the recent Labour Court decision in *Discovery Health Limited v CCMA and Others*, the court:
         i. extended labour rights to an undocumented foreign worker whose work permit expired,
         ii. rejected the conventional view that a person without a work permit is not an employee, as defined by labour and social security laws.
         iii. In other words a breach of immigration laws does not affect the validity of employment contracts.

   d. Case law
      i. **Union of Refugee Women**: Refugees cannot be arbitrarily excluded from working in the private security industry.
      ii. **Limpopo traders case**: in 2012/13 police in the Limpopo province carried out a crackdown on businesses which were perceived to be operating illegally.

      The crackdown known as “Operation Hardstick” saw police closing businesses and confiscating the stock of refugee and asylum-seeker traders. The closures and confiscations led to the traders losing their livelihoods. These are largely small tuckshops and spaza shops operating in remote areas in Limpopo.

      SCA found that inability to trade means that asylum seekers and refugees have no other way of supporting themselves, this is an unjustifiable limitation of their dignity.

      Implications: Court confirmed the importance of informal trading

   d. SA Social Assistance Act
      i. Section 27 Constitution: state must progressively realise the right to have access to social security
      ii. SSA offers financial assistance in the form of the following monthly grants old age, disability, care dependency, child support, grant-in-aid, war veterans and social relief of distress grants
iii. Social assistance not available to irregular migrants as compared to social insurance.
iv. Previously, SA migrants did not ordinarily benefit from any Social Assistance provided in terms of the SA Social Assistance Act.
v. The courts have gradually extended the social assistance to other
   1. Khosa – CC held that perm residents may not be discriminated against regarding social assistance
   2. Somali Refugee Forum – SRD
   3. Disability grants to refugees

e. Criminal justice
   i. SAMP/ACMS surveys highlighting dominant views that foreign nationals to blame for high crime levels, despite independent evidence pointing to the opposite
   ii. In fact, foreign nationals are often more vulnerable to general crime and targeted incidents of hate crime.
   iii. Some access to legal aid
   iv. Bail never an options
   v. Police under perception that they may detain any foreigner up to 48hrs
   vi. Unnecessary criminalisation of immigration enforcement

f. Health
   i. Constitution protects IM’s access to basic health care. However, access to clinics / hospitals limited. Negative attitudes of health workers
   ii. Court interventions:
      1. ARV’s access for undocumented migrants
      2. Matter of little C – access to brain surgery. Children’s Act, National Health Act
      3. Pretoria ordered Steve Biko to admit undocumented Somali child for urgent and life-saving heart surgery

6. Conclusion
   a. Court in SA generally generous interpretation of laws. However, there are severely constrained by the ever-narrowing legal protection of IM
   b. Need for law reform to gradually expand rights framework for migrant workers
      i. Regionally – labour migration protocols
      ii. Immigration reform greater access to permits, decriminalisation of immigration enforcement
      iii. Social security
   c. Importance of research and data – to inform evidence-based policy reform
   d. Finally, the role of institutions in government and civil society
      i. trade union representation
      ii. civil society
1. NGO should expand limited focus on refugees to include migrants
2. Join broader social movements to