

Justice delayed is Justice denied: Tackling maladministration to protect the human rights of asylum seekers and refugees

In January 1961, African heads of state gathered in Casablanca, Morocco where they approved The African Charter of Casablanca. This document committed its signatories to the irradiation of colonialism, the consolidation of African independence, and the equitable distribution of resources. Signatories also pledged cooperation amongst African states and unity on the continent.

The African Charter of Casablanca paved the way for the establishment of the Organisation of African Unity (OAU) in 1963, which became the African Union in 2002. Expressions of pan African collaboration embodied by the formation of the OAU and the Charter of Casablanca were based on a recognition of the systematic way in which forces of colonial domination had stripped the human rights and dignity of African subjects and sought to undo the damage of this painful past.

Independence brought freedom and the opportunity to build new societies, but it also came with unprecedented powers, which called for accountability. Newly formed African governments had little experience of governing. In 1966, close on the heels of the establishment of OAU, the continent saw the founding of its first Ombudsman office, the Permanent Commission of Enquiry (PCE) in Tanzania.

The Ombudsman is an independent, high level or senior public officer appointed to protect members of the public, gratuitously, against maladministration - actions of a government body, which can be seen to cause an injustice. These include delay, incorrect action or failure to take action, failure to follow the procedures of the law, failure to reply, provide information, inadequate liaison and broken promises. In the case of dual or multiple mandates, the Ombudsman deals with complaints of corruption and human rights abuses too. Following Tanzania other countries on the continent soon followed. Today 46 African countries have national Ombudsman institutions.

The role of the Ombudsman is to address the imbalance of power between the individual and the state. One of its most important functions is to protect the vulnerable, those who are unable to speak for themselves. The continent's population of asylum seekers and refugees represent one such group. According United Nations Refugee Agency (UNHCR) statistics, Africa hosts the largest number of displaced persons worldwide, with figures standing at 24.2 million (including refugees, asylum-seekers, stateless persons, internally displaced persons (IDPs) and returnees), as of January 2018. In recognition of this growing concern, 2019 has been declared the African Union's Year of refugees, returnees and internally Displaced Persons.

The commemoration of Human Rights Day on 21 March offers a good opportunity to reflect on how the Ombudsman could address some of the administrative injustices and human rights violations that asylum seekers and refugees face. In South Africa, unjustified delays have been identified as a reoccurring problem for asylum seekers applying for refugee status and appealing the rejection of their applications by the Institute of Security Studies, Amnesty

International and Lawyers for Human Rights. Maladministration, in turn, enables corruption. If the system is not working fairly and efficiently, it creates both the opportunity and the demand for illegal shortcuts including bribery.

Take the case of Congolese national Celeste. Fleeing ongoing conflict in her country she arrived in South Africa with her infant daughter in 2008, after a perilous two-month journey. On arrival, Celeste went to Home Affairs in Umgeni Road Durban to apply for refugee status. The language barrier made it difficult to understand what was going on. She was issued with a three-month permit. When it expired, she returned and was given a six-month permit. She has been renewing this permit ever since, while waiting to hear about a date for the interview she needs to sit as part of her refugee application. Despite repeated visits and requests, the date for this has never been set, nor has any explanation been given for its deferral.

Denise, also a Congolese asylum seeker, has been waiting since 2012 to hear about the outcome of her appeal against the initial rejection of her asylum seekers application. When she first appealed and had no response, she went to a human rights lawyer in frustration. Under pressure, Home Affairs gave her a date for an interview, but when she arrived on this date, she was told the interview panel was not available. To date – more than seven years later - she remains in limbo on an asylum-seekers permit, which must be renewed every six months.

There is also the experience nineteen year-old social science student Josephine, who was born in South Africa to the parents of refugees. Josephine is eager to train as a nurse, a profession for which there is a demand in South Africa. According to Law, children whose parents are non-citizens, but who were born here, qualify to apply for citizenship. In 2017 she applied. She waited one year then began to follow up, but every time she returned to Home Affairs, she encountered a different worker who kept telling her to return later. In 2019 she was verbally told her application was denied because she did not have a South African ID but was not given any official documentation.

Human Rights activists have raised concerns that such delays provide a way of stalling applications until such time as South Africa's refugee laws are made more restrictive and punitive for asylum seekers and refugees. According to Amnesty International, the Department of Home Affairs has a backlog of 400 000 appeals, which remain unattended and unresolved. Behind each of these is an anxious and frustrated asylum seeker such as Celeste, Denise or Josephine who must live in a state of limbo while they wait for the state to decide their fate.

With a Section 22 permit, an asylum seeker such as Celeste is entitled to work, however, employers are reluctant to employ her, even though she has a three-year course in financial management. 'What happens if we invest in training you only for Home Affairs to decide six months down the line that you need to leave', they tell her. Such a situation also leaves asylum seekers open to exploitation from unscrupulous employers who bargain on their insecure position and desperation for work to pay below minimum wage.

Employment is one of a number of barriers asylum seekers face in their struggle to build new lives and support themselves. With a Section 22 permit you cannot open a bank account or apply for a driver's license. Nor can you obtain a passport to travel internationally.

The children of asylum seekers and refugees sometimes face great difficulty in enrolling in school. They are turned away because they are seen not to have the correct documentation for enrolment, or because they take too much time off school to renew their permits. At hospitals, the moment staff see a Section 22 or Section 24 permit, 'they make you pay', Sophie, a refugee rights activist tells us. In fact, without a South African ID, asylum seekers experience great difficulty in accessing a host of essential state services, including public health care, schooling, social welfare and education.

Referring to her often brusque, confusing and inaccessible engagement with government officials, 'It makes you feel so small' Celeste, tells us. For Josephine the uncertainty about her application for South African citizenship has 'created a lot of worry in me' 'There's nothing out there for us as refugees'. Being refused medical treatment because one is an asylum seeker or refugee, could be a matter of life or death. Maladministration, in particular unwarranted delay and failure to reply and provide correct information in the processing of asylum seekers and refugee status applications, offers a perfect illustration of how administrative injustice can facilitate human rights violations, including; dehumising treatment, denial of access to health, education, social welfare services and economic livelihoods. After all, justice delayed is ultimately justice denied.

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