

## VIEWPOINT

# Punishment over Protection: A Reflection on Distress Migrants, Health, and a State of (Un)care in South Africa

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## Introduction

Since South Africa's democratic transition in 1994, the country has been associated with a progressive Constitution and a rights-based legislative framework enshrining rights for all those within its borders.<sup>1</sup> For 30 years, the post-apartheid government's commitment to building robust and accessible public services, such as health and education, has offered hope of an inclusive and equitable approach to socioeconomic development for all.

However, in recent years, South Africa's legislative, political, and social erosion of its commitments to human rights and development has deepened inequalities and worsened development indicators.<sup>2</sup> The interplay of poor governance (characterized by corruption and political interference), resource constraints, and historical inequalities has negatively impacted all in South Africa and trapped many in cycles of poverty and unemployment.<sup>3</sup>

For distress migrants (asylum seekers, refugees, and undocumented migrants), these challenges are exacerbated by discriminatory policies and practices and institutional neglect.<sup>4</sup> Having left their countries of origin in search of safety, employment opportunities, and improved livelihoods, many distress migrants remain undocumented or in limbo for years in South Africa due to institutional inefficiencies and corruption.<sup>5</sup> Unable to regularize their status, distress migrants face barriers to accessing basic socioeconomic rights, including health care, secure housing, income-generation activities, and general safety.

Despite claims to the contrary, non-nationals (distress migrants and other migrant groups) compose only 3.9% of the overall population.<sup>6</sup> Yet distress migrants are targeted by the government's deliberate and

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public strategy of scapegoating them for its failures to deliver on post-apartheid promises.<sup>7</sup> Experienced as negative determinants of health, these challenges not only increase inequity in South Africa but compromise the health and well-being of distress migrants by exposing them to neglect and (un)care in the very spaces where they seek support.<sup>8</sup>

### A state of (un)care in health care

The state of (un)care is particularly evident in the poorly managed and inefficient public health system. While most South Africans relying on public health care (approximately 80%) face challenges accessing care, it is distress migrants who are disproportionately vulnerable to poor treatment, denial of medication, and limited access to health care facilities.<sup>9</sup>

South Africa's Refugees Act guarantees asylum seekers and refugees the rights to work, study, access medical services and life-saving treatment, and enjoy freedom of movement.<sup>10</sup> Similarly, the National Health Act upholds the constitutional right to health by providing free primary health care access for all (with no mention of nationality or legal status).<sup>11</sup> The Uniform Fee Schedule confirms that refugees, asylum seekers, and undocumented migrants from the Southern African Development Community states are entitled to be treated in the same way as South African citizens in hospitals and to be means tested to determine their ability to pay for services.<sup>12</sup> Yet despite these legal protections, migrants frequently encounter discrimination, exclusion, and xenophobic attitudes from health care workers, negatively impacting their mental well-being (see Table 1).<sup>13</sup>

This neglect is also increasingly formalized through the deliberate exclusion of specific migrant groups in national policies, limiting the country's likelihood of achieving global health targets and negatively affecting health outcomes for all in South Africa.<sup>14</sup> For example, in 2020 the Gauteng Province Department of Health (where Johannesburg is located) violated the National Health Act, the Constitution, and the Bill of Rights by restricting

access to free health care for pregnant and lactating migrant women and children under six years of age on the basis of their nationality and documentation status. Despite a court order mandating the provincial department of health to amend the policy, discriminatory practices reportedly continue unchecked.<sup>15</sup>

Furthermore, national strategies for addressing both communicable and noncommunicable diseases lack migration awareness.<sup>16</sup> This is evident in the exclusion of migration and migrants from pandemic preparedness plans, including, most recently, the national COVID-19 vaccine program.<sup>17</sup> Additionally, the newly passed National Health Insurance Act, based on the principles of universal health coverage, is poised to restrict access to free basic health care for asylum seekers and undocumented migrants.<sup>18</sup> This not only undermines South Africa's global health targets but contradicts the fundamental right to health enshrined in various global, continental, and regional governance frameworks the country has ratified (see Table 1).

### Systemic neglect in the Department of Home Affairs

The state of (un)care is reflected by the Department of Home Affairs through its bureaucratic inefficiencies and corruption, which have led to massive backlogs in processing and adjudicating applications for asylum and other various visas and permits.<sup>19</sup> Instead of addressing the manifold structural challenges, the government has focused on an increasingly restrictive and securitized approach to immigration.<sup>20</sup> The recently revised White Paper on International Migration, for example, proposes relocating asylum processing to border areas, creating a dangerous *de facto* encampment policy while reducing access to basic services.<sup>21</sup> Additionally, the introduction of the Border Management Act, coupled with arbitrary arrests, detention, and deportation, all contribute to a climate of fear and vulnerabilities for distress migrants.<sup>22</sup>

## Conclusion: Prioritizing punishment over protection

South Africa's current migration and health agenda, characterized by xenophobia and a prioritization of punishment over protection, disproportionately undermines the health and well-being of distress migrants. To foster a more inclusive and equitable society, the government must adopt a fundamentally different approach. This involves implementing migrant-inclusive health policies, strengthening anti-discrimination laws, and addressing the complex interplay between governance and structural and systematic factors that contribute to health disparities among distress migrants. Providing migrants with opportunities to regularize their immigration status is also critical to addressing the structural determinants of poor health and well-being for all in South Africa. By effectively addressing the contradictory position taken by the government, South Africa can align its policies with the principles of universal health coverage and the numerous international human rights and health agreements it has

ratified. Ultimately extending care and protection toward distress migrants will contribute to a more just and equitable society for all.

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TABLE 1. National laws and policies protecting the right to health for all in South Africa

Measure	Description
National Health Act (2003)	Section 4(3)(a) obliges public clinics and community health centers to provide free primary health care to all lactating and pregnant women and children under six and in emergencies.
Constitution (1996)	Section 27 provides that everyone has the right to have access to health care services, including reproductive health care services, and that no one may be refused emergency medical treatment.
Immigration Amendment Act (2004)	Section 42 states that "when possible, any organ of state shall endeavour to ascertain the status or citizenship of the persons receiving its services and shall report to the Director-General any illegal foreigner, or any person whose status or citizenship could not be ascertained, provided that such requirement shall not prevent the rendering of services to which illegal foreigners and foreigners are entitled under the Constitution or any law."
Refugee Amendment Act (2017) & 2019 regulations	Section 27(g) provides that refugees have the same right to access health care as South African citizens. This right is widely interpreted to include asylum seekers. This also applies to undocumented migrants who are citizens of any country in the Southern African Development Community. For higher levels of care, refugees and migrants must pass a means test.
Department of Health 2007 Circular	Confirms that refugees and asylum seekers, with or without permits, can access the same basic health care services as South African citizens, including antiretroviral treatment in cases of HIV (this means free at the point of use but can be charged thereafter).
Uniform Fee Schedule	Confirms that refugees, asylum seekers, and undocumented migrants from countries in the Southern African Development Community who go to a hospital in South Africa are entitled to be treated in the same way as South African citizens and to be means tested to determine their ability to pay for services.
National Health Insurance Act (2023)	Repeals the provision of the National Health Act that provides free health services. Chapter 2 (4.2) states that asylum seekers and "illegal foreigners" are entitled only to emergency medical services and services for communicable diseases.

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