Health care for all?
Asylum seekers, refugees and health care

By Anthony Sterne

Is an asylum seeker in South Africa entitled to, for example, a kidney transplant in terms of the constitutional obligation to provide health care?

An asylum seeker is a person who flees his country of origin and seeks refuge in another country. Once asylum is granted, the person becomes a recognised refugee. This process of granting asylum and the obligations and rights that arise therefrom are governed by the Refugees Act 130 of 1998 (the Act).

The rights and protection of refugees are specifically set out in s 27 of the Act, without mention of asylum seekers, thus giving rise to the question of whether asylum seekers are entitled to less rights in South Africa's Constitution than refugees.

The law

The Act deals with the rights of refugees in s 27, which in part reads:

'Protection and general rights of refugees

27 A refugee –

…

(*b*) enjoys full legal protection, which includes the rights set out in chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;

…

(*g*) is entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.'

Section 22 of the Act deals with asylum seekers; s 22(1) reads:

'The refugee reception officer must, pending the outcome of an application in terms of section 21(l), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the standing committee, which are not in conflict with the Constitution or international law and are endorsed by the refugee reception officer on the permit.'

The Constitution sets out health care rights in chapter 2, s 27 of which reads:

'Health care, food, water and social security

27(1) Everyone has the right to have access to –

(*a*) health care services, including reproductive health care;

(*b*) sufficient food and water; and

(*c*) social security; including, if they are unable to support themselves and their dependants, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

(3) No one may be refused emergency medical treatment.'

Although the Act bestows specific rights on refugees, and seemingly excludes asylum seekers, the wording of s 22(1) of the Act prevents the reception officer imposing a condition in an asylum seeker permit that is in conflict with the Constitution.

In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 (6) SA 505 (CC) the court held that equality in respect of socio-economic rights is implicit in the use of the word 'everyone' in s 27(1) of the Constitution in respect of those entitled to the rights set out therein. According to the court, the word 'everyone' in this section 'cannot be construed as referring only to "citizens"'. Had the legislator intended to limit health care rights to citizens it would have worded the section accordingly, as it did with political rights (s 19) and citizenship rights (s 20).

In *Minister of Home Affairs and Others v Watchenuka and Others* [2004] 1 All SA 21 (SCA) the court dealt with socio-economic rights and the right to work and study, and held:

'Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights.'

In *Larbi-Odam v Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC) the Constitutional Court held that discrimination between permanent residents (a person who has been a recognised refugee for five years and who meets the necessary requirements is eligible for permanent residency in terms of the Immigration Act 13 of 2002) and citizens for employment purposes was not justifiable, pointing out at para 25 that:

'The government has made a commitment to permanent residents by permitting them to so enter, and discriminating against them in this manner is a detraction from that commitment.'

J Klaaren notes that, in terms of the criteria in the *Larbi-Odam* case, temporary residents bear similarity to permanent residents with respect to non-citizens in the equality context (J Klaaren 'Non-citizens and constitutional equality – *Larbi-Odam v The Member of the Executive Council for Education (North-West Province)* 1998 (1) SA 745 (CC)' (1998) 14 *SAJHR* 286 at 294).

In my opinion, this supports the view that by allowing a person into the country, the government accepts the obligation to extend the rights in the Bill of Rights to such a person. Further, in my view, discrimination based purely on residency is not justifiable and a blanket policy based on this is discriminatory and unfair. While other non-permanent residents also fall under the term 'everyone', they – unlike asylum seekers and refugees – have a choice to return to their countries of origin, thus providing a rational basis on which the limitation clause can be implemented. I therefore submit that refugees and asylum seekers are entitled to the same rights as citizens unless specifically excluded in the Constitution. This includes the same health care rights as citizens in s 27 of the Constitution.

An argument that refugees are entitled to basic health care only due to the wording of s 27(1)(*g*) of the Act is nonsensical due to the Act being subordinate to the Constitution, and a refugee is specifically afforded the rights set out in chapter 2 of the Constitution.

Further, s 27(1)(*g*), via the additional words, 'which the inhabitants of the Republic receive from time to time' reaffirms that refugees are entitled to the same health care as South African citizens.

Limitation of health care rights

The state's right to limit access to health care based on available resources was dealt with in *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC). In this matter, Sachs J observed at para 57 that 'there is no meaningful way in which [the right to life] can constitutionally be extended to encompass the right indefinitely to evade death'.

The provision of health care services constitutes a positive obligation and is dependent on resources. I submit that health care rights, as socio-economic rights, should not be viewed as individual rights when interpreting their content, but should rather be viewed as part of the other socio-economic rights, as expounded in *Government of the Republic of South Africa and Two Others v Grootboom* 2001 (1) SA 46 (CC), where the court held, at para 25:

'Rights … need to be intepreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality.'

The court added that when determining how to enforce socio-economic rights, this should be done on a case-by-case basis, considering the relevant constitutional provision and its application to the circumstances of the matter.

I submit that any policy that denies refugees and asylum seekers a transplant operation, and even dialysis treatment, is discriminatory and is therefore unconstitutional. In my experience, such a policy is being implemented at state hospitals (see J Green 'Renal failure sufferer denied state treatment' *IOL* 31-1-2005 (www.iol.co.za/news/south-africa/renal-failure-sufferer-denied-state-treatment-1.232752#.UQ7D-X26LMI, accessed 4-2-2013)).

The refusal to afford an asylum seeker or refugee dialysis treatment is possibly justified in terms of the *Soobramoney* decision (although a blanket policy of refusing treatment to asylum seekers and refugees may be open to constitutional challenge; alternatively, it may constitute unjust administrative action, particularly in light of the case-by-case statement in the *Grootboom* case mentioned above).

Madala J in the *Soobramoney* case acknowledged that the attainment of constitutional guarantees is limited by the scarcity of resources:

'[T]he appeal before us brings into sharp focus the dichotomy in which a changing society finds itself and in particular the problems attendant upon trying to distribute scarce resources on the one hand, and satisfying the designs of the Constitution with regard to the provision of health services on the other. It puts us in a very painful situation in which medical practitioners must find themselves daily when the question arises: "Should a doctor ever allow a patient to die when the patient has a treatable condition?"'

CLW Githaiga submits that the overstretching of health systems neither justifies discrimination against refugees nor remedies the issue of scarcity. The author submits these reasons in support of this assertion –

• evidence contradicts the belief among South Africans that most foreigners are health migrants and a burden; and

• consideration of international and national obligations places a duty on the state to equitably distribute available resources and that the scarcity thereof exists only as a limitation to fulfil the constitutional guarantee of s 27 and not as a limit of the content of the right (CLW Githaiga 'Keeping the flame of hope alight: Refugees and right to access to healthcare services in South Africa' MSc thesis University of the Witwatersrand (2010) (http://wiredspace.wits.ac.za/bitstream/handle/10539/9283/THESIS-KEEPING%20THE%20FLAME%20OF%20HOPE%20ALIGHT.pdf?sequence=1, accessed 14-2-2013) at 54 – 57).

I further submit that the limitation of a right on the basis of scarcity of resources is fundamentally different to denying a right where the resource exists.

In *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) the court, referring to the *Grootboom* case, held that it is clear that 'section 26 does not expect more of the state than is achievable within its available resources' and that 'the state is not obliged to go beyond available resources or to realise the rights immediately'.

In the *Khosa* case the court held that the mere statement that the state would not extend benefits to a group for which it had not planned was unacceptable. The court further held that any exclusion must be consistent with the Bill of Rights and must not amount to unlawful discrimination or impact negatively on dignity. In terms of the *Soobramoney* case, rationing access to health care services is legitimate and is a necessity – the constitutional right cannot overshadow the reality of a scarcity of resources.

In a case where the patient is undergoing dialysis but has been refused a transplant on the basis that it does not constitute basic health care, I submit that a transplant operation would constitute a better use of public funds as a transplant is usually a once-off procedure, while dialysis is ongoing, and the dialysis machine would be freed up for the benefit of others. This, in my opinion, renders the state's defence of a lack of resources, in terms of the limitation clause, moot. A similar argument exists where the public health sector provides ongoing supportive type care, rather than corrective care in the form of an operation, which could end the burden on the public health system in a short period of time and therefore provide better use of resources gauged over a period of time, notwithstanding the complications that may arise where discontinuation of treatment may place the patient at risk.

I submit that an organ transplant does not constitute emergency treatment and a discussion on this aspect is not necessary for purposes of this article.

Dignity

I submit that in certain circumstances denying a transplant constitutes a gross failure to protect and enhance the fundamental value of dignity. A transplant affords a patient an opportunity to enagage in a 'normal' life by increasing the prospects for employment, thereby allowing the patient to enhance or sustain his dignity and that of his family. As such, rationing on this basis fails to uphold a person's dignity and is therefore discriminatory and a violation of the equality clause, which negates the effect of the *Soobramoney* decision.

In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) O'Regan J highlighted the significance of the right to dignity at para 328:

‘The importance of dignity as a founding value of the new Constitution cannot be over-emphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: Human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched … .’

In the *Watchenuka* case the court held, at para 27:

‘The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity … for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.’

Further, the court acknowledged that it was reasonable and justifiable to exclude a right to work from the scope of the right to dignity, but added that where employment is the only reasonable means for a person’s support, other considerations arise. What is in issue, the court noted, is a restriction on the person’s ‘ability to live without positive humiliation and degradation’ (at para 32).

In discussing equality and the issue of unfair discrimination, the majority in *President of the Republic of South Africa and Another v Hugo* 1997 (4) SA 1 (CC) held at para 41:

‘At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.’

I submit that the socio-economic challenges refugees and asylum seekers face, compounded by xenophobia and their vulnerability as a group, are the very essence of what the court had in mind with reference to the goals of the Constitution, and the refusal of health care treatment is therefore discriminatory.

I further submit that the refusal of treatment that can afford a person the opportunity to enter into employment or, more pertinently, removes a barrier to employment, is the equivalent of refusing a person the right to work and, as per the *Watchenuka* case, such a restriction is unconstitutional.

Conclusion

In my view:

• Asylum seekers are entitled to the same health care rights as refugees.

• A blanket policy prohibiting or barring refugees and asylum seekers from receiving certain health care is unconstitutional and, when considering the curtailment of a right, such right must be considered as part of a basket of socio-economic rights in the context of available resources. I also submit that where the right restricted infringes the dignity of the person, it is discriminatory and constitutes a violation of the equality clause.

• The state is constitutionally obliged to use public funds resourcefully and, therefore, providing for an asylum seeker or a refugee to undergo continuous treatment instead of performing an operation that can resolve the health issue, burdens the state and is not the best use of public funds. It is, in my view, a dereliction of the state’s obligations.

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