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## Comparative review of the position of non-citizen migrants in social security law

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*Published in:*  
unpublished

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*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2000

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*

Olivier, M., & Vonk, G. (2000). Comparative review of the position of non-citizen migrants in social security law. unpublished.

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**Comparative review of the position of non-citizen migrants in social security  
M. Olivier; G.Vonk (eds.); report for the South African Treasury 2004**

**Executive Summary**

**Part A : Country Reports**

1. Introduction
2. The Netherlands
3. Germany
4. United Kingdom
5. Canada
6. Mauritius
7. Australia
8. Poland
9. South Africa

**Part B: Non-citizens and Social Security: International Law Summary**

10. European Countries: International and European Law Context
11. South Africa: International Law, Foreign Law and SADC Perspectives

**Part C: Conclusion**

12. Findings
13. Recommendations

**Part D: Appendix: Country Matrix**

14. Summarised Country Matrix
15. Explanatory Matrix

**Part E: Bibliography**

## EXECUTIVE SUMMARY

The research involved an analysis of the social security systems in selected developed and developing countries, with reference to a comparative outline of rights of non-citizens to social benefits in the relevant countries. This report is based on a literature study, with reference to legal materials, including relevant international law instruments/documents, national constitutions and legislation, relevant court judgments, and other authoritative publications, including those reports which have a direct relevance to the research theme. The countries covered include the Netherlands, Germany, the United Kingdom, Canada, Australia, Mauritius, Poland and South Africa. The attempt to investigate other developing country systems had to be aborted, due to a lack of accessible information and/or no or little regulation of the subject matter.

From the two different matrix sets which have been developed on the basis of: (i) the chosen jurisdictions; and (ii) the nature/type of social benefits available to (iii) the different categories of non-citizens, it is clear that:

- (a) The *Khosa* judgment of the Constitutional Court is not entirely out of step with the situation which exists in other constitutional democracies, as regards granting social assistance protection to permanent residents;
- (b) Access to social assistance for *non-permanent residents* in other countries is often severely limited due to the means of subsistence test in immigration law.
- (c) Due to the obligations which arise under the International Convention on the Status of Refugees (1951), formally recognised *refugees* have access to social security – unlike South Africa, which still excludes refugees from social assistance protection.
- (d) *Asylum-seekers* (i.e. those whose refugee status has not yet been confirmed by the authorities) presently enjoy no formal social assistance support in South Africa. The experience in some of the studied jurisdictions indicates that other forms of support outside the regular social security system may be available.
- (e) South African immigration law does not employ the means of subsistence test in the same systematic way as immigration law in other developed countries. Although some conditions have been formulated which serve to guarantee that only those who can maintain themselves or are sufficiently supported are given residence permits (both temporary and permanent), it is not entirely clear that a temporary permit can be withdrawn on the grounds that a person relies on social assistance.
- (f) The exclusion of *non-citizen children* – in particular children whose residence is lawful – also from social assistance, is not supported by the evidence from the countries investigated for purposes of this research, and appears to be in conflict with South Africa's international obligations and constitutional requirements.
- (g) While *illegal/undocumented non-citizens* are generally not entitled to mainstream social insurance and social assistance benefits, one may conclude, given the particular constitutional dispensation obtaining in South Africa, that even illegal or undocumented non-citizens may constitutionally be entitled to core forms of assistance. Also in some of the other studied jurisdictions they may be entitled to and/or receiving other forms of support outside the regular social security system.

- (h) A distinction need to be drawn between cases where the exclusion of certain categories of non-citizens amounts to an unjustifiable form of discrimination (as appears to be the case with refugees and non-citizen children), and the case where the immigration and social protection policy and legal frameworks have to develop further to progressively become more inclusive. In the former case, the likelihood of a constitutional challenge would require immediate remedial steps to be taken.
- (i) At the level of SADC (e.g., citizens of SADC member states who work lawfully in South Africa), it is clear that the present social security policy and legal framework in South Africa does not give effect to notions of regional integration, and the development of minimum levels of social protection for different categories of beneficiaries, on the basis of equality within SADC (i.e. without distinguishing between citizens and non-citizens).
- (j) Also, South Africa has not yet utilised in any significant sense of the word the possible range of cross-border co-ordination arrangements, to be adopted by way of national legislation and bi- and/or multilateral agreements, which would regulate the position of citizens migrating within the SADC region (at least as far as social insurance is concerned).

On the basis of the foregoing, the following recommendations are suggested:

- (a) In the short term, the personal scope of application of the social assistance grants should be extended to non-citizens with *permanent lawful residence status* and *officially recognised refugees*. This will require that the provisions of the Social Assistance Act 13 of 2004 and its Regulations be accordingly amended.<sup>1</sup>
- (b) In the long term, it is recommended that legislative and administrative initiatives be undertaken to systematically introduce the means of subsistence test in immigration law for purposes of residence status. It is in particular recommended that obtaining (a) a *temporary* and (b) a *permanent residence permit* be made subject to a clearly defined means of subsistence test. The withdrawal of the temporary permit<sup>2</sup> in the event and on the basis that the means of subsistence test is no longer met, should also be introduced. This makes it possible to extend the scope of protection of social assistance grants to all lawful residents who have not become a burden to the State, without any major consequences for the South African budget. It should be borne in mind, however, that this system can only operate effectively when there is an infrastructure for the exchange of data between the immigration and social assistance administrations and an effective system of deportation.
- (c) With regard to *asylum-seekers*, it is recommended that South Africa continues to take into account minimum conditions which reflect the human dignity of the persons involved. A possible suggestion in this regard is to make the social relief

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<sup>1</sup> This is any event required as regards permanent residents, in order to give effect to the *Khosa* judgment of the Constitutional Court.

<sup>2</sup> But not the permanent residence permit, in view of the approach adopted by the Constitutional Court in the *Khosa* judgment

of distress programme available to asylum-seekers who are awaiting the outcome of their refugee status application.

- (d) It should be possible that some forms of support can be given to *illegal/ undocumented immigrants* in order to cope with emergency situations. Therefore, we suggest that illegal immigrants should not necessarily be excluded wholly from the South African social assistance framework.
- (e) As regards the position of *non-citizen children*, we recommend that sufficient social assistance support be made available in respect of such children.
- (f) As regards *SADC member states citizens*, it is recommended that the policy concerning the status of these categories of non-citizens in South African social security be aligned with the SADC objectives of regional integration and harmonization. This implies that the said policy – as well as the legal – framework should develop minimum levels of social protection for different categories of beneficiaries, on the basis of equality within SADC, without reference to citizenship status.
- (g) Finally, it is recommended that appropriate cross-border co-ordination arrangements be developed (at least for purposes of cross-border coverage and protection of social insurance entitlement), to be adopted by way of national legislation and bi- and/or multilateral agreements.

**PART A**  
**COUNTRY REPORTS**

# PART A

## COUNTRY REPORTS

### **Comparative review of rights of access of non-citizens to social benefits, with specific reference to social security and social assistance: The Netherlands, Germany, United Kingdom, Canada, Mauritius, Australia, Poland and South Africa**

#### **1. INTRODUCTION**

In this part we will discuss, with reference to the countries concerned, the following:

- The social security systems, with reference to, amongst others, the sources of law, risks and benefits, and personal scope.
- The position of non-citizens in the social security system, with reference to:
  - The criteria for insurance and entitlement to benefits that have an impact on the access of non-nationals to social insurance schemes.
  - National immigration systems/law (criteria for legal residence).
  - The impact of immigration status on entitlement to social benefits, in particular social assistance.

#### **2. THE NETHERLANDS**

##### **2.1 Social security system**

###### *2.1.1 Introduction*

The Dutch social security system is divided into two types of social security schemes: social insurance schemes and social assistance schemes. The social insurance schemes are mainly financed out of contributions whereas the social assistance schemes are fully financed through general taxation. Within the social insurance schemes a distinction has been made between national insurance schemes (*volksverzekeringen*), covering all residents of the Netherlands, and employee insurance schemes (*werknemersverzekeringen*), covering employees.

###### *2.1.2 Sources of law*

The constitutional base of social security in the Netherlands is established in Article 20 of the Dutch Constitution:

“1. It shall be the concern of the authorities to secure the means of subsistence of the population and to achieve the distribution of wealth.

2. Rules concerning entitlement to social security shall be laid down by Act of Parliament.

3. Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to aid from the authorities.”

In addition, many statutory acts and decrees concerning the various risks and benefits of social security exist.

### *2.1.3 Risks and benefits*

The national insurance schemes provide for old age pension insurance, survivors' benefits insurance and child benefits insurance.<sup>3</sup>

The employee insurance schemes provide for sick pay insurance, medical care insurance, invalidity insurance and unemployment insurance. There is no insurance for occupational accidents or diseases; these risks are covered by the general insurance schemes for sickness and invalidity.

### *2.1.4 Personal scope*

The national insurance schemes firstly cover persons who reside in the Netherlands legally. A person is considered a resident if the focus of their social life is in the Netherlands. Social, economic and legal circumstances are taken into consideration. Secondly, non-residents who work in the Netherlands and who are subject to Dutch wage tax law are insured in the Netherlands as well, as are persons who are self-employed in the Netherlands.

The personal scope of the employee insurance schemes includes persons who work in an employment relationship. Illegal residents are excluded from insurance.

The general social assistance scheme and related benefits are residence-based.

## **2.2 Position of non-citizens in the social security system**

### *2.2.1 Criteria for insurance and entitlement to benefits for non-nationals*

As the social security system in the Netherlands is divided into national insurance schemes and employees' insurance schemes, the criteria for insurance cover vary.

The three national insurance acts – the National Old Age Pensions Act (*AOW*), the National Survivors' Benefits Act (*Anw*) and the National Child Benefits Act (*AKW*) stipulate that persons are insured when:

- they are resident; or
- they are employed in the Netherlands and subject to Dutch income tax law.

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<sup>3</sup> The insurance for exceptional medical expenses is also part of the national insurance scheme, but as we do not focus on health benefits in this research, we will not discuss this benefit.



A person is considered a resident if the focus of his social life is in the Netherlands. This must involve having social, economic and legal ties to the Netherlands. In determining whether a person has legal ties to the Netherlands, the residence status of the person plays a role. Persons with a permanent residence status will, in principle, be considered residents. Persons with a temporary residence permit can also be considered residents if social and economic circumstances indicate that they will remain in the Netherlands on a permanent basis and if they have lived in the Netherlands for a certain time. Thus, the determination of whether the focus of one's social life is in the Netherlands depends to a very large extent on the circumstances of the case. As a result of the introduction of the Linkage Act in 1998 (see below) persons who are staying in the Netherlands illegally are excluded from insurance.<sup>4</sup>

If a person is subject to Dutch income tax law, he will be insured for the national insurance scheme as from the start of his employment in the Netherlands.

People are entitled to an old age pension when they turn 65. A full pension is payable if they were insured for the full 50 years between their 15<sup>th</sup> and 65<sup>th</sup> birthdays. This last condition is relevant to immigrants as many of them did not arrive in the Netherlands until after the age of fifteen. These immigrants will not receive a full pension. The other benefits under the national insurance schemes do not depend on periods of residence in the Netherlands.

Coverage under the employees' insurance schemes depends on a person having a valid labour contract. Eligibility and level of benefit depend on the amount of contributions paid and the duration of the employment.

### *2.2.2 Immigration law*

The main source of Dutch immigration law is the Aliens Act 2000 (*Vreemdelingenwet 2000*) and the regulations based on this Act. In the Aliens Act two different types of statuses are distinguished: the regular residence permit and the residence permit on grounds of asylum. Immigrants are firstly admitted on a temporary basis. After a certain period and under certain conditions, a permanent regular residence permit can be issued. Some resident permits are reserved uniquely for temporary purposes, such as study and medical treatment. These permits can never lead to permanent residence or naturalisation.

There are two general criteria for legal residence in the Netherlands:

- One must have durable and sufficient means of subsistence (hereafter: means of subsistence test);
- One may not be a threat to public order or public security.

The word "durable" refers to having an employment contract for at least one year. Means are sufficient if the non-national earns a salary at subsistence level.

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<sup>4</sup> Beleidsregels SVB 2004, p. 72-75.

Contributory benefits are considered to be part of a person's personal income. If an immigrant comes to the Netherlands for family (re)unification, then the partner who is already residing in the Netherlands has to fulfil the first condition.<sup>5</sup>

In case of family (re)unification two other financial conditions have to be fulfilled. Firstly, if the immigrant is a non-European national, the partner residing in the Netherlands has to pay a deposit. This deposit will be paid back as soon as the spouse has passed an exam in the Dutch language. Secondly, the receiving partner has to assume full responsibility for the maintenance of the immigrant during the stay in the Netherlands.

After five years of legal stay in the Netherlands, an immigrant can be issued a permanent residence permit. A permanent residence permit will be refused if the non-national is not able to maintain him/herself without relying on public funds, if he is a threat to public order or public security or if he has moved his main residence outside the Netherlands. Having a permanent residence permit is advantageous because, unlike a temporary residence permit, a permanent residence permit cannot be withdrawn for reasons relating to insufficient means of subsistence.<sup>6</sup>

The permit on grounds of asylum can be issued on a temporary and a permanent basis. The permanent permit on grounds of asylum will be issued after a three years' stay as an asylum seeker in the Netherlands. There is no means of subsistence test. Permanent admittance depends on the situation in the country of origin and on the behaviour of the asylum seeker. Being a threat to public order or having visited the country of origin will affect the asylum status.<sup>7</sup>

### *2.2.3 Immigration status and social protection*

The immigration status determines the entitlement to social security benefits. Since 1 July 1998 the Linkage Act links benefit insurance and entitlement to immigration status. This means that migrants who are not residing in the Netherlands legally are unable to be insured for or receive any social benefit. Residing in the Netherlands legally means either having a regular residence permit or a residence permit on grounds of asylum, both whether temporary or permanent. Hence, only people who have received a definite and positive decision from the immigration authorities have access to the Dutch social security system. Furthermore, persons whose resident permits have expired and who have applied for an extension are considered to be legal residents on the condition that they have permission to stay in the country pending the outcome of the procedure.

Social protection of asylum seekers is organised through a special scheme of allowances.<sup>8</sup> This scheme provides for housing, weekly financial allowances, leisure and educational activities, money for clothing (once-off allowance), financial support for medical

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<sup>5</sup> Holterman 2002, p. 36-39.

<sup>6</sup> Kuijer/Steenbergen 2002, p. 115-123.

<sup>7</sup> Kuijer/Steenbergen 2002, p. 132-135.

<sup>8</sup> "Regeling verstrekking asielzoekers en andere categorieën vreemdelingen 1997".

expenses, liability insurance and support for exceptional expenses. Asylum seekers are excluded from the regular social security system.

Asylum seekers who are not recognised as refugees but fail to leave the Netherlands and other illegal immigrants are fully excluded from the social security system. Health benefits are provided only in case of urgent need. Local authorities and other civil initiatives may grant illegal migrants benefits in kind. This support falls outside the legal framework.

Illegal and undocumented immigrants have no rights under the system whatsoever. In practice, municipalities sometimes provide forms of emergency relief on a strictly discretionary basis.

### **3. GERMANY**

#### **3.1 Social security system**

##### *3.1.1 Introduction*

Three branches of social security are distinguished in the German system: social insurance, social compensation and social assistance. Besides the traditional social insurance schemes (the health insurance scheme, industrial injuries and invalidity insurance scheme and old age insurance scheme), social insurance provides for unemployment and long-term care benefits. Social compensation was introduced after the First World War for war victims. This branch of social security was later extended to include victims of violent crime as well.<sup>9</sup>

##### *3.1.2 Sources of law*

Social security law in Germany is codified in one social security Codex, the *Sozialgesetzbuch*. Article 1 of the general section sets out the general objectives of the Codex. These are to guarantee human existence, to protect family life and to create equal conditions for everyone – and especially for young people – to develop one’s personality. The Codex is the main source of the social security law in Germany.

##### *3.1.3 Risks and benefits*

The five branches of social security are: Statutory Sickness Insurance, Statutory Long-term Care Insurance, Statutory Accident Insurance, Unemployment Insurance and Statutory Pension Insurance. The Statutory Pension Insurance scheme covers the risks of old age, death and permanent disability.

##### *3.1.4 Personal scope*

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<sup>9</sup> Pieters 2002, p. 117.

In general, persons who are employed are compulsorily covered by the social insurance schemes. Exemption from compulsory insurance is granted to employees with only insignificant employment.<sup>10</sup> Under certain conditions insurance cover will continue for persons who cease their employment relationship. This applies, for example, to persons who join military service or receive unemployment benefit.

The general social assistance scheme is residence-based.

### **3.2 Position of non-citizens in the social security system**

#### *3.2.1 Criteria for insurance and entitlement to benefits relevant for non-nationals*

The main condition for coverage under the social insurance scheme is that the employment activities must be carried out in Germany. Neither the place of residence nor the nationality of the employee is taken into account.

Benefits that fall under the heading of social compensation or social assistance are only provided in case of residence in Germany. The place of residence is considered to be the place where the insured person ordinarily resides.

There is a waiting period for entitlement to pension benefits. One must have been insured for a minimum period of time. The level of benefits under the social insurance scheme depends on the length of time that one has paid contributions. Certain periods during which no contributions were paid are taken into account as if contribution has taken place (periods of military service or child rearing).

Under the social compensations schemes certain benefits are only provided to Germans or to persons who have resided legally in Germany for a certain length of time. In the social assistance scheme a less restrictive condition of ‘staying’ – instead of residing – in Germany applies.

#### *3.2.2 Immigration law*

The most important act governing German immigration law is the Aliens Act (*Ausländergesetz*) 1990. In addition, various regulations on different aspects of immigration law exist. Recently the German government introduced a new bill on immigration that consolidates all aspects of immigration and naturalisation.

In the Aliens Act four categories of permits are distinguished which represent different types of residence status. The residence permit (*Aufenthaltserlaubnis*) sets no conditions on the purpose of stay in Germany. It can become permanent when a person has legally resided in Germany for at least five years. In order to be issued a permanent residence permit the non-national must be self-supporting or find someone who will guarantee his

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<sup>10</sup> I.e. employment generating up to € 325 per month and involving a weekly work schedule of less than 15 hours; or short-term employment up to 2 months or 50 working days per year.

maintenance for five years. He must also have basic knowledge of the German language. Recognised refugees immediately receive a permanent residence permit.<sup>11</sup>

Comparable to this permit is the permanent residence permit without any restrictions whatsoever (*Aufenthaltsberechtigung*). A person must have had a residence permit for eight years or a permanent residence permit for three years in case the residence permit was granted on humanitarian grounds. The *Aufenthaltsberechtigung* is issued to a person provided that he is able to maintain himself (by employment or own capital). The person must also have paid contributions to the social insurance scheme for at least 60 months. These two types of residence permits are usually meant for residents staying in Germany on account of family (re)unification or employment.<sup>12</sup>

The third type of residence permit is a permit which is connected to a certain purpose of stay in Germany and which, as a consequence, has a temporary character (*Aufenthaltsbewilligung*). These permits cannot be extended and the duration of the stay in Germany will not be taken into account when applying for another residence permit (*Aufenthaltsurlaubnis* or *Aufenthaltsberechtigung*).

The fourth type of residence permit is also a temporary one and is issued on humanitarian grounds (*Aufenthaltsbefugnis*). The permit is granted to persons who do not qualify for refugee status but who can, for various reasons, not be expelled from Germany. This permit can, in certain circumstances, lead to the granting of a temporary residence permit.<sup>13</sup>

If a person is residing in Germany on the basis of a temporary residence permit and applies for family (re)unification, family members will not be admitted if it is not certain that the family can be supported without relying on social assistance. Asylum seekers are granted a specific permit to stay in a certain area during the application procedure.

When a person is accepted as a refugee, he is granted a permanent residence permit without any restrictions (*Aufenthaltsberechtigung*).

### 3.2.3 Immigration and social protection

Participation in social insurance schemes in Germany is primarily linked to employment. People who are not employed can participate only in as far as special provisions allow for participation. Benefits concerning old age, death, disability, unemployment and sickness are granted to insured persons who are habitually resident in Germany. Nationality is irrelevant. The place of habitual residence is considered to be the place where the insured person ordinarily resides.

Social assistance can be granted to anyone staying in Germany, regardless of habitual residence. However, it is conditional upon nationality. Only German citizens and

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<sup>11</sup> §§15, 24 *Ausländergesetz*.

<sup>12</sup> § 27 *Ausländergesetz*.

<sup>13</sup> § §28, 29 *Ausländergesetz*.

immigrants who can be treated as German citizens are entitled to full social assistance. Full social assistance comprises financial support on a subsistence level as well as assistance in case of special circumstances (such as pregnancy or disability, for instance, blindness). Migrants who are treated as German citizens are recognised refugees and EU-citizens, for example.

Other immigrants are entitled to financial support on a subsistence level and assistance in case of special circumstances. However, in contrast to when full social assistance is provided, this last type of assistance is limited to support in case of sickness, pregnancy and attendance. Even then, in exceptional circumstances full social assistance can be paid to migrants by way of exception. Immigrants who come to Germany for the purpose of receiving social assistance benefits are excluded from social assistance. Hence, all migrants can be granted social assistance, regardless of immigration status. As has been stated before, applying for social assistance might affect one's legal status in Germany.<sup>14</sup>

On the basis of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*), asylum seekers are entitled to support in kind or in the form of vouchers for the necessities of life (food, housing, clothing, health care, etc.). Medical treatment in case of emergency and pregnancy is also granted.

Recognised refugees have the same rights to social protection as German nationals when they fulfil the conditions.

## **4. UNITED KINGDOM**

### **4.1 Social security system**

#### *4.1.1 Introduction*

The social security system in the United Kingdom consists of contributory, non-contributory (non-means-tested benefits) and means-tested benefits. The costs of the contributory benefits are covered by the contributions paid by insured persons and employers. There are six contribution classes related to factors such as employment, self-employment and level of income. Entitlement to benefits depends on the class and amount of contributions paid. The non-contributory benefits and the means-tested benefits are financed through general taxation.<sup>15</sup>

#### *4.1.2 Sources of law*

Social security legislation in the UK consists of Acts of Parliament (statutes) and Regulations (statutory instruments). The main source of statute law is the Social Security Contribution and Benefits Act 1992.

#### *4.1.3 Risks and benefits*

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<sup>14</sup> § 120 *Bundessozialhilfegesetz*.

<sup>15</sup> MISSOC 2003, p. 48.

The contributory benefits cover old age, widowhood, sickness, maternity and unemployment. The non-contributory benefits are dependent on individual circumstances and include various disability allowances and child benefits. Housing benefits and income support for people who are not working are means-tested benefits and form a safety net for people in need.<sup>16</sup>

#### *4.1.4 Personal scope*

Employees and self-employed persons are compulsorily insured for contributory benefits. The non-contributory benefits and means-tested benefits are residence-based schemes.

## **4.2 Position of non-citizens in the social security system**

### *4.2.1 Criteria for insurance and entitlement to benefits for non-nationals*

Entitlement to contributory benefits is established through the payment of contributions. The conditions under which contributions must be paid vary according to the benefits. A non-national can only pay contributions when his stay in the UK is within the law. Nationality bears no relevance to the entitlement to contributory benefits.

Relevant for entitlement to non-contributory means-tested benefits is the condition of residency and presence in Great Britain (GB). GB comprises Wales, Scotland, England and the adjacent islands. The UK includes GB and Northern Ireland. Depending on the kind of benefit, one has to be “ordinarily” or “habitually” resident in the United Kingdom in order to be entitled. The House of Lords determined that ordinary residence means: “a person’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.” To be considered ordinarily resident, a person need not intend to live in the UK permanently.<sup>17</sup>

Habitual residence means that a person is ordinarily resident in the UK, Ireland, Channel Islands or Isle of Man and has been resident for an appreciable period of time. Relevant circumstances to consider in deciding whether or not one is habitually resident include: bringing family or possessions, ties to the UK, preparing for establishing residence before coming and having the right of abode. There is no minimum period of time for habitual residence. A person has to undergo a habitual resident test by the local authorities before receiving this benefit. If one is not habitually resident in the UK, Channel Islands or Isle of Man, they are not entitled to income support, income-based jobseeker’s allowance or housing benefit. For some benefits a person needs to be physically present in GB.

Immigration status is important with regard to non-contributory benefits. Entitlement to benefits is directly linked to British nationality (of which there are several types) or

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<sup>16</sup> Pieters 2002, p. 142-143.

<sup>17</sup> CPAG 2002, p. 132.

immigration status. An application for non-contributory benefits can have consequences for one's immigration status.

Claiming non-contributory and means-tested benefits can also affect the right to stay in the UK or the chance of being awarded permanent residence status.

#### *4.2.2 Immigration law*

The Immigration Act 1971 sets out the framework for immigration control in the UK. Subsequently, extensive legislation has been passed on different aspects of immigration. The Immigration and Asylum Act of 1999 consolidates parts of this legislation. Hence, a substantial number of statutory instruments work out the details regarding immigration aspects. The "Nationality, Immigration and Asylum Bill 2002" continues to build upon the previous legislation but has not yet fully entered into force.<sup>18</sup>

Different types of British nationalities exist: British citizens, British overseas territories citizens, British subjects, British protected persons, British nationals (overseas) and British overseas citizens. Only British citizens have the right of abode in the UK and, therefore, do not require leave to enter or remain in the UK. The other types of British nationalities, being non-nationals, require leave to enter or remain – although some of them enjoy immigration advantages.

People who are subject to British immigration law require leave to enter (on arrival) and leave to remain (after entry). Leave is of two kinds: limited and indefinite. Limited leave allows the non-national to stay in the UK for a certain period of time. Indefinite leave is awarded without a time restriction and corresponds to a right of permanent residence in the UK. No conditions relating to public funds can be attached to an indefinite leave and non-nationals are, in principle, not subject to immigration control. However, indefinite leave can be granted on the basis of an undertaking by another person to provide maintenance for the non-national. In that case, the non-national is subject to immigration control.

A person who has indefinite leave to remain has usually also settled in the UK. This status is obtained when the person is lawfully ordinarily resident and the stay is not time-limited. Certain categories of admittance lead to a settled status, others do not. Persons coming to the UK to live with family members who are settled in the UK will also have the settled status. If a person qualifies for a refugee status, he will normally be given the settled status.

Since July 1998 refugees have immediately been granted indefinite leave to remain. Before that date refugees were first admitted for four years' limited leave.<sup>19</sup>

#### *4.2.3 Immigration status and social protection*

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<sup>18</sup> CPAG 2002, p. 14.

<sup>19</sup> CPAG 2002, p. 48-50, 62.



Entitlement to contributory benefits is derived directly from previous contributions. No conditions as to immigration status are attached.

Entitlement to non-contributory means-tested benefits is subject to a legal residence test. In British terminology “a person subject to immigration control” (PSIC) is excluded. An immigrant is a PSIC when he:

- requires leave to enter or remain but does not have it;
- has leave to enter or remain with a public funds restriction (in which case the immigrant was admitted under the condition that the immigrant shall not have recourse to public funds);
- has leave to enter or remain and is the object of a formal undertaking by a third person to maintain the immigrant;
- has appealed a decision about his immigration status.

An application for non-contributory benefits can affect the immigration status.<sup>20</sup>

Recognised refugees, like British citizens, are entitled to all benefits if they meet the general conditions of entitlement. They are exempt from the habitual residence test.<sup>21</sup>

In the Immigration and Asylum Act 1999 a new system for the support of asylum seekers was introduced. This system enables asylum seekers to be supported outside the system of means-tested benefits. The new system comprises:

- Asylum support provided by the National Asylum Support Service (NASS).
- Asylum support provided by local authorities under the ‘interim asylum support scheme’.

Asylum support is provided in the form of accommodation and can serve to assist asylum seekers with their expenses in pursuing their asylum claim and services in the form of education, like English language lessons.<sup>22</sup>

The new system means that only certain categories of asylum seekers have access to means-tested-benefits. These are people who were already asylum seekers when the Immigration and Asylum Act came into force. They are only entitled to a few benefits: income support, income-based jobseeker’s allowance, housing benefit and council tax benefit.<sup>23</sup>

A person will receive asylum support as long as he has asylum seeker status, which will at least be until the decision on the application. If there are dependent children, an asylum seeker will keep this status for as long as he remains in the UK (also after appeals) or until the child turns 18.

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<sup>20</sup> CAPG 2002, p. 157.

<sup>21</sup> CAPG 2002, p. 214-221.

<sup>22</sup> CAPG 2002, p. 64-65.

<sup>23</sup> CAPG 2002, p. 283.

## **5. CANADA**

### **5.1 Social security system**

#### *5.1.1 Introduction*

Under the Canadian Constitution, the federal and the provincial government share responsibility for social security. The provincial and territorial governments are responsible for workers' compensation, health care programmes and social assistance programmes. Hence, every province has its own legislation on these programmes.

Old Age Security (OAS), the Canada Pension Plan (CPP) and Employment Insurance (EI) fall under the jurisdiction of the federal government. Employers and employees are required to pay contributions to the CPP and the EI. In Québec the Québec Pension Plan (QPP) operates in the place of the CPP. The two plans run parallel in terms of coverage and benefits. The CPP provides benefits to contributors in the event of retirement, disability and death.

OAS is financed from the general tax revenues of the federal government which are paid through the taxable income of people who are considered residents of Canada under Canada's Income Tax Act. The OAS programme ensures a basic income to all persons in Canada aged 65 or over who meet the residence requirements.<sup>24</sup>

#### *5.1.2 Sources of law*

Social security law in Canada consists of consolidated statutes concerning the various insurance schemes and regulations. Health care and social assistance legislation has a provincial character.

#### *5.1.3 Risks and benefits*

The CPP ensures a measure of protection against the loss of income due to retirement, disability and death. EI benefits are payable to employees who are unemployed and available for work, and include maternity, parental and sickness benefits. Retirement benefits are OAS pension, Guaranteed Income Supplement (GIS) and Allowances. The GIS is a benefit granted to residents of Canada who receive an OAS pension and who have little or no other income. Allowances are income-tested benefits which are paid to couples who have difficulties with living on the pension of one person.<sup>25</sup>

#### *5.1.4 Personal scope*

The Canada Pension Plan and the Unemployment Insurance scheme apply to employees and self-employed persons in Canada. OAS pension is payable to Canadian citizens and legal residents of Canada.

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<sup>24</sup> Social Development Canada 2004, p.1-5.

<sup>25</sup> Bedee 1995, p. 72-76.

## **5.2 Position of non-citizens in the social security system**

### *5.2.1 Criteria for insurance and entitlement to benefit for non-nationals*

Under the Canadian Pension Plan (CPP) there are no criteria for insurance or entitlement to benefits based on citizenship. The CPP is a contributory programme and everyone who has contributed to the programme can qualify for the benefit regardless of nationality. The same applies to the Employment Insurance scheme.

The workers' compensation programmes fall under the jurisdiction of the provinces. As benefits under these programmes are linked to employment, residence is not relevant. The benefits under the Workers Compensation Act of British Columbia as well as the Workplace Safety & Insurance Board benefits are granted to employed persons.

Old Age Security pension (OAS) is not paid out of contributions but from general tax revenues. To be entitled to OAS one must be a Canadian citizen or a legal resident of Canada on the day preceding the approval of his application. A minimum of 10 years of residence in Canada after the 18<sup>th</sup> birthday is required to receive an OAS pension.<sup>26</sup>

The provincial social assistance schemes are residence-based and differentiate according to immigration status.

### *5.2.2 Immigration law*

The Immigration and Refugee Act 2001 is the main source of legislation on immigration in Canada. According to this Act various categories of non-nationals are allowed to come to Canada: persons who are family members of Canadian citizens, persons coming for the purpose of employment who are selected on the basis of their ability to become economically established in Canada, and non-nationals who are recognised as refugees or who otherwise require protection.<sup>27</sup>

### *5.2.3 Immigration status and social protection*

A direct link with immigration status has been established under the OAS pension scheme. Here the condition is imposed that a person must be a Canadian citizen or a legal resident of Canada on the day preceding the approval of his application.

Further restrictions based on immigration status can be found in the provincial social assistance schemes. For example, the employment and assistance scheme of British Columbia (BC) provides social assistance and disability grants for permanent resident permit holders, temporary resident permit holders and refugees. Asylum seekers and immigrants can only receive support under a separate hardship allowance scheme. This scheme provides for temporary payments under strict conditions. Illegal immigrants have

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<sup>26</sup> Social Development Canada 2004, p. 1-6.

<sup>27</sup> [www.cic.gc.ca](http://www.cic.gc.ca)

no rights under BC's provincial social assistance scheme. The province of Ontario has adopted similar arrangements.<sup>28</sup>

Canada has no national support scheme for asylum seekers. Asylum seekers fall under the various provincial social assistance programmes.

With regard to the consequences for the immigration status of relying on social assistance the situation in Canada is more complex than in other countries because under Canadian immigration law provinces may set their own selection criteria for immigration. Persons with permanent residence status have the right to move to and take up residence in any province. However this does not apply to other categories of immigrants who fall under the provincial rules.<sup>29</sup> These rules provide for strict selection criteria and a means of subsistence test. In section 25(2) of the Immigration and Refugee Protection Act 2001 it is stipulated that the Minister may not grant residence status to a foreign national if he does not meet the provincial selection criteria applicable to him.

## **6. MAURITIUS**

### **6.1 Social security system**

#### *6.1.1 Introduction*

The social security system of Mauritius consists of a contributory social insurance scheme and non-contributory social assistance benefits. Non-contributory benefits are entirely financed by the state.<sup>30</sup>

#### *6.1.2 Risks and Benefits*

Non-contributory benefits include a basic pension,<sup>31</sup> allowances such as the Social Aid, Food Aid, Unemployment Insurance Relief and Funeral Grants<sup>32</sup> as well as Inmate Allowance and Indoor Relief.<sup>33</sup> Earnings-related or contributory benefits are payable to persons who have contributed towards the National Pensions Fund (NPF). The fund provides for benefits in respect of retirement, invalidity, and survivors' benefits to widows and orphans.<sup>34</sup>

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<sup>28</sup> [www.mhr.gov.bc.ca](http://www.mhr.gov.bc.ca)

<sup>29</sup> [www.legislationline.org](http://www.legislationline.org)

<sup>30</sup> Ministry of Social Security, National Solidarity, Senior Citizens Welfare and Reform Institutions "Non Contributory Benefits" in <http://www.ncb.intnet.mu/ssns/ministry/nocontri.htm>, accessed on 2 August 2004.

<sup>31</sup> Which caters for the elderly, invalids, widows and orphans, irrespective of their economic status.

<sup>32</sup> Paid out to low-income groups of the population.

<sup>33</sup> Provided to those living in state-subsidised institutions – such as old age homes, infirmaries and orphanages. This benefit is paid provided they would otherwise qualify for the basic pension or from Social Aid.

<sup>34</sup> Ministry of Social Security, National Solidarity, Senior Citizens Welfare and Reform Institutions "Contributory Benefits" in <http://www.ncb.intnet.mu/ssns/ministry/contri.htm>, accessed on 2 August 2004.

### *6.1.3 Sources of Social security law*

Chapter Two of the Constitution of Mauritius protects certain fundamental rights and freedoms of individuals. However, the right to social security is not amongst the rights guaranteed in the Constitution. Social security is provided for in Acts of Parliament and regulations thereto. Contributory benefits are mainly regulated by the Pensions Act of 1976 and relevant regulations. The Unemployment Hardship Act and the Social Aid Act are the main sources of law providing for non-contributory social security benefits.

### *6.1.4 Personal scope of benefits*

Non-contributory benefits are payable to citizens of Mauritius and to certain categories of non-citizens. Earnings-related benefits are paid to Mauritians employed in the private sector and earning a minimum prescribed amount, to temporary or part-time employees in para-statal organisations, employees in the sugar industry and non-citizens with a valid work permit. The self-employed and the unemployed are covered on a voluntary contribution basis.<sup>35</sup>

## **6.2 Position of non-citizens in the social security system**

### *6.2.1 Criteria for entitlement to benefits by non-citizens*

#### 6.2.1.1 Contributory Pensions

Non-citizens who have a valid work permit are covered under the National Pension Scheme after residing in Mauritius for three years. They can only make contributions after two years of residence. Contributing non-citizens qualify for the following benefits. These are the Contributory Retirement Pension (CRP), the Contributory Widow's Pension (CWP), the Contributory Invalid's Pension (CIP) and the Contributory Orphans Pension (COP). A person can only receive the retirement pensions benefit if he/she had contributed until retirement at age 60.

#### 6.2.1.2 Non-contributory Benefits

The Basic Retirement Pension is paid to non-citizens who have resided in Mauritius for at least 15 years in aggregate since attaining the age of 40, three of the 15 years being immediately before making a claim for benefits.

Non-citizen widows under the age of 60 will be granted the Basic Widows Pension if they have resided in Mauritius for at least five years, in the 10 years preceding the application. One of those five years must be immediately before the claim. For a non-citizen to also benefit from a Basic Invalids Pension, he/she must also meet the residence criteria and be between the ages of 15-60.

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<sup>35</sup> *Ibid.*

A Basic Orphan's Pension is also payable up to age 20 if the applicant is in full-time education. In the case of non-citizens, one of the parents must have resided in Mauritius for at least five years in aggregate, in the 10 years before the claim, one of them being before an application is made.

Guardian's Allowances to a person who is the care-giver of an orphan: Non-citizens must also have resided for at least five years in aggregate, in the 10 years immediately before the claim. One of the five years must also be immediately before the claim. A Child Allowance is paid out to the children of non-citizen beneficiaries of the Basic Widows Pension and the Basic Invalids Pension.

#### 6.2.1.3 Social Aid

This is an income-tested scheme that provides cash benefits to the head of a family who is incapable of earning a living adequately and who has insufficient means to support himself and his dependants.<sup>36</sup> It is paid to the poorer members of society, including the dependants of prisoners and abandoned spouses, especially those with dependent children. The allowance is calculated as the difference between the total income and the expected overall expenditure of the family.

#### 6.2.2 *The impact of immigration laws*

The Immigration Act RL 3/87 of 17 May 1973 regulates immigration issues in Mauritius. This Act makes no distinction between temporary and permanent residents as these two categories are generally termed residents. Migrant workers, non-citizen students and holders of a permanent residence permit are all considered residents. The length of residence and the immigration status of an applicant will determine eligibility for social security entitlements.

In addition, section 8(1) of the Act regards certain categories of immigrants as prohibited persons and such persons are not admitted to Mauritius. These include those who appear to be suffering from any physical or mental disability and who are likely to be a charge on public funds,<sup>37</sup> persons who are dumb, blind or otherwise physically defective or physically handicapped and who are likely to be a charge on public funds,<sup>38</sup> and any other persons who are likely to become a charge on public funds.<sup>39</sup>

To ensure that immigrants will not depend on social security benefits, any person who applies for a residence permit has to pay a deposit of not more than 20 000 Rupees (about R5 000) to indemnify the state for any expense or charge likely to be incurred for his/her

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<sup>36</sup> Mauritius *Social Security Statistics 1997/98 – 2002/2003*, accessed from <http://statsmauritius.gov.mu/ei450/intro.doc> on 30-07 2004.

<sup>37</sup> S 8 (1) (a).

<sup>38</sup> S 8 (1) (c).

<sup>39</sup> S 8 (1) (g).

maintenance or support or for his/her repatriation.<sup>40</sup> The deposit or balance is only repayable when the permit holder leaves Mauritius or, on his death, his/her survivor.

In line with the prohibition of non-citizens who are likely to become a public charge, no law in Mauritius provides for the granting of a residence permit to “refugees” and “asylum-seekers”, as defined by the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol. The government provides protection against *refoulement*,<sup>41</sup> but does not grant refugee or asylum status on the grounds that the country is small, has limited resources, and does not want to become a haven for large numbers of refugees. In 2003, no immigrants were recognised as refugees or asylum seekers, with the result that no social security benefits were extended to a non-citizen on the basis of his/her refugee or asylum-seeker status in Mauritius.<sup>42</sup>

## **7. AUSTRALIA**

### **7.1 Social security system**

#### *7.1.1 Introduction*

The Australian social security system is a dual system, consisting of a mandatory occupational or earnings-related social insurance framework and a non-contributory, means-tested social assistance framework. The social insurance schemes cover employees earning a minimum prescribed monthly salary and exclude the self-employed. Contributions are mainly received from employers – they are, for example, compelled to contribute 9% of an employee’s basic wages to the superannuation fund. Mandatory contribution by workers is not provided for but voluntary contribution is encouraged.<sup>43</sup> Social assistance is financed by the state and covers citizens and residents. Eligibility for social assistance benefits depends on an applicant’s residential status as well as his/her financial circumstances.

#### *7.1.2 Sources of social security law*

The fundamental law in the Australian legal system is the Australian Constitution (which came into effect in 1901) and so the first place to look for “fundamental” rights is that document. However, the Australian Constitution contains few express “rights” and certainly nothing that resembles a “Bill of Rights”. The term “rights” can only be loosely used when looking at the Australian Constitution. In the Australian Constitution rights are more understood as constraints on governmental power, emanating either from the

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<sup>40</sup> S 10 (1).

<sup>41</sup> Non-refoulement is the principle underlying voluntary repatriation. “*that no refugee should be returned to a place where his or her life or freedom is under threat (non-refoulement) and that the involuntary return of refugees would raise refoulement concerns.*” Repatriation Handbook, UNHCR, March 1996.

<sup>42</sup> US Department of State Mauritius: Country Reports on Human Rights Practices - 2002 accessed from <http://www.state.gov/g/drl/rls/hrrpt/2002/18216.htm>

<sup>43</sup> Social Security Administration *Social Security Programs Throughout the World: Asia and the Pacific, 2002 - Australia* at [www.ssa.gov/policy/docs/progdsc/ssptw/2002-2003/asia/Australia .pdf](http://www.ssa.gov/policy/docs/progdsc/ssptw/2002-2003/asia/Australia.pdf).

nature of the institutions of government or from the federal nature of the Australian community.<sup>44</sup>

Australia is a federation and each of the Australian States also has its own Constitution, which is subject to the *Australian Constitution*. However, State Constitutions also do not generally contain provisions protecting fundamental rights, with the exception of some limited recognition of civil and political rights. Social security is provided for in legislation such as the Social Security Act of 1991, the Social Security Administration Act of 1999, the Social Security (International Agreements) Act of 1999 and the Family Assistance Act of 1991. In addition, Australia has entered into 13 bilateral social security agreements covering, amongst others, reciprocal equality of treatment, maintenance of acquired rights, and exportability of benefits.<sup>45</sup> Migrants can accumulate rights only under the terms of these agreements: "If a person resides in the agreement countries they can generally claim specified payment and accumulate residence periods. Australian residents or former Australian residents who are residing in any non-agreement country are unable to claim Australian social security payments."<sup>46</sup>

### *7.1.3 Risks and Benefits*

Australia's social assistance system accords benefits in relation to the contingencies of old age, unemployment, disability, survivorship, sickness and maternity and family responsibility. Social insurance also covers old age, sickness and maternity and work injury.

### *7.1.4 Personal scope*

#### 7.1.4.1 Social Assistance (non-contributory) benefits

Most social assistance benefits cover persons who are resident in Australia or possess certain categories of temporary visas. As an example, the Family Tax Benefit – consisting of a large family supplement, multiple birth allowance, rent assistance, maternity payment, maternity immunisation allowance and health care cards – require that claimants must be Australian residents, or be in possession of a temporary visa (within certain subclasses), or be a Special Category Visa holder residing in Australia.<sup>47</sup>

The Child Care Benefit is paid to a claimant who is an Australian resident, or a New Zealand citizen holding a Special Category Visa residing in Australia, or an Australian Government sponsored student, holders of certain temporary visas or a non-resident experiencing hardship or special circumstances.

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<sup>44</sup> Owens R J, Pearce K and Stillwell A "Labour Law and the Fundamental Rights of the Person: Australian National Report" presented at the XVII World Congress of Labour Law and Social Security, Montevideo, Uruguay 3-5 September 2003.

<sup>45</sup> "Australia" in *ILO Migration Survey 2003: Country Summaries*, p 3-4.

<sup>46</sup> *Ibid*, p 7.

<sup>47</sup> Australian Government *A guide to Australian Government Payments on behalf of the Department of Family and Community Services and the Department of Education, Science and Training* July – September 2004, pp2-5.



To qualify for the parenting payment, the residential requirements include being an Australian resident for 104 weeks (not including absences), a refugee, or becoming a sole parent while an Australian resident, or having a qualifying residence exemption.

The Double Orphan Pension is only paid to Australian residents, or Special Category Visa holders and holders of certain temporary visa subclasses. The Carer Allowance further requires both the carer and the care recipient to be residents.

For a non-citizen to be eligible for the Old Age Pension, he/she must meet the following requirements. A non-citizen must be an Australian resident and in Australia on the day the claim is lodged – unless claiming under an International Social Security Agreement; must have been an Australian resident for a total of at least 10 years, at least five of these years in one period (residence in certain countries with which Australia has an International Social Security Agreement may count towards Australian residence); must have a qualifying residence exemption (arrived as a refugee or under a special humanitarian program); must be a woman who is widowed in Australia, when both she and her late partner were Australian residents and who has 104 weeks residence immediately prior to claim or a person who was in receipt of Widow B Pension, Widow Allowance, Mature Age Allowance or Partner Allowance immediately before turning Age Pension age.

For any Disability Support Pension claims, non-citizens must satisfy the following requirements. They must be an Australian resident and in Australia on the day the claim is lodged, unless claiming under an international social security agreement; they must have been an Australian resident for a total of at least 10 years, at least five of these years in one period (residence in certain countries with which Australia has an international social security agreement may count towards Australian residence); they must have a qualifying residence exemption (arrived as refugee or under special humanitarian programme) or are immediately eligible if inability to work occurred while an Australian resident or during temporary absence.

A Bereavement Allowance is paid to those who have been an Australian resident and in Australia for a total of 104 weeks; or have a qualifying residence exemption. They are immediately eligible if both the person and the partner were Australian residents when the partner died.

A Carer Payment is due only to Australian residents, unless covered by an agreement. It may be available to newly arrived migrants after 104 weeks as an Australian resident in Australia (some exemptions may apply)

A Newstart Allowance (NSA) is paid to unemployed non-citizens, capable of undertaking employment, available for and actively seeking work, undertaking an activity to improve employment prospects or temporarily incapacitated for work. They must be aged 21 or over but under the Age Pension age and be registered as unemployed. They must also be willing to enter into an activity agreement if required, allowing participation in a broad

range of activities. Claimants must be Australian residents, although it is available to newly arrived migrants after 104 weeks as an Australian resident in Australia (some exemptions may apply).

A Youth Allowance is payable to full-time students aged 16 to 24 years, or temporarily incapacitated for study; the unemployed, aged under 21, looking for work or combining part-time study with job search, or undertaking any other approved activity, or temporarily incapacitated for work; and to an independent, aged 15 and above the school leaving age (e.g. homeless) who are in full-time study or undertaking a combination of approved activities. Non-citizen applicants must be residents and, subject to some exemptions, this allowance may be available to newly arrived migrants after 104 weeks as an Australian resident in Australia. The same is true of the Sickness Allowance.

A Widow Allowance is payable to a woman aged 50 or over, who is not a member of a couple and who has been widowed, divorced or separated (including separated de facto) since turning 40. She must have no recent workforce experience (recent workforce experience means work of at least 20 hours a week, for 13 weeks or more during the last 12 months) and must be an Australian resident. It is only provided if both the woman and her partner were Australian residents when she was widowed, divorced or separated. Newly arrived non-citizens are eligible after 104 weeks as an Australian resident in Australia (some exemptions may apply).

Special Benefit Allowance is awarded if an applicant is in financial hardship and unable to earn a sufficient livelihood for themselves and their dependants due to reasons beyond their control and he/she is unable to get any other income support payment. Recipients must either be Australian residents, or holders of the temporary visa with certain subclasses or a Criminal Justice Stay Visa (CJSV) – issued specifically for the purpose of assisting in the administration of criminal justice in relation to the offence of people trafficking, sexual servitude or deceptive recruiting. Non-citizens receive this allowance only after 104 weeks in Australia, unless they have experienced a substantial change in circumstances beyond their control since making an irrevocable decision to come to Australia.

For a non-citizen to receive a Crisis Payment, he/she must qualify for a social security pension or benefit, be in severe financial hardship, and the pension or benefit must be payable. They must have left their home and be unable to return home because of an extreme circumstance, such as domestic violence or have served at least 14 days in prison, and have established or intend to establish a new home. They must also be in Australia at the time the extreme circumstance occurs.

#### 7.1.4.2 Social Insurance (contributory) benefits

Australia has an occupational (earning-based) pension system. Every worker is required to register with the superannuation fund. The fund is a savings programme for every employed person to make sure they have a retirement income. In most cases, an employer is required by law to pay an amount equal to nine percent (9%) of an employee's wages

into the superannuation fund. Workers are not compelled to contribute but can also provide for themselves. Social insurance contingencies covered include old age, sickness and maternity and work injury.

## **7.2 Position of non-citizens in the social security system**

### *7.2.1 Immigration laws and their impact on social protection*

The Australian income support system differs from those of most other developed countries, in that it is funded from general revenue, rather than from direct contributions by individuals and employers. Instead of reflecting the level and duration of contributions into a social insurance fund, Australian income support entitlement is based on residence (discussed below) and need (as defined by income and assets tests). In general, a person must be an 'Australian resident', as defined in the *Social Security Act 1991*, in order to qualify for Australian social security payments. An Australian resident is a person who resides in Australia and has permission to remain permanently – either because they are: an Australian citizen; the holder of a permanent visa; or a protected Special Category visa holder (as described below). In deciding whether a person is residing in Australia, factors such as the person's domestic, financial and familial ties to Australia are taken into account, as well as the frequency and duration of any absences from Australia and the reasons for such absences.<sup>48</sup>

The principle that only Australian residents should qualify for social security payments is fundamental to the Australian income support system. Exceptions to this principle are kept to a minimum and are limited to Special Benefit (the 'payment of last resort') and family payments (comprising Family Tax Benefit, Maternity Allowance, Maternity Immunisation Allowance, Child Care Benefit and Double Orphan Pension).

Citizens of New Zealand entering Australia before February 2001 were considered holders of Special Category Visas – under Trans Tasman Travel Arrangements and could meet the definition of an Australian resident if they were residing in Australia and likely to remain permanently. At present, they have to fall within a 'protected' group.<sup>49</sup> Holders of Special Category visas who are residing in Australia continue to be able to meet the residence requirements for family assistance and concession cards for low-income earners.

Under the Social Security Law, the Minister for Family and Community Services has powers to make determinations to allow the holders of particular temporary visas to meet the residence requirements for Special Benefit. These powers exist to cater for situations where Australia has a legal or moral obligation to provide social security assistance to a

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<sup>48</sup> Australian Government Department of Family and Community Services *Australian Income Support – Residence Criteria* accessed at [http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/international/res\\_criteria.htm](http://www.facs.gov.au/internet/facsinternet.nsf/aboutfacs/international/res_criteria.htm)

<sup>49</sup> Persons who were present in Australia on 26 February 2001; or had been in Australia for at least 12 months in the two years immediately before 26 February 2001 and returned to Australia after that day; or were residing in Australia on 26 February 2001 but were temporarily absent on that day; or commenced (or recommenced) residing in Australia within three months of that day.

particular class of people, even though those people do not have permission to remain permanently in Australia. Currently, such determinations are in force for nine types of temporary visa.<sup>50</sup> The residence requirements for Family Tax Benefit and other family assistance payments are also satisfied by a person who is not an Australian resident, if the person satisfies the residence requirements for Special Benefit.

In addition to the requirement to be an Australian resident at the time of claiming, some social security payments (generally, the 'pension' type payments which are intended as long-term support) require that a person has been an Australian resident for a certain period of time. For example, to qualify for Age Pension generally a person must have ten years residence in Australia. This residence requirement is called a 'qualifying residence requirement' for social security purposes. These ten years can be made up of periods of residence at any time in a person's life, as long as at least one period is more than five continuous years. Other payments with prior residence requirements include Disability Support Pension (ten years), Parenting Payment (two years) and Widow Allowance (two years).

People seeking asylum on the Australian mainland may be granted one of two types of refugee visas. If they arrived lawfully in Australia and are found to be owed protection they will generally be granted a Permanent Protection Visa (PPV). If they arrived unlawfully in Australia and are found to be owed protection they will generally be granted a Temporary Protection Visa (TPV) in the first instance. This provides temporary residence for three years.

Asylum seekers who are assessed as genuine refugees and who are granted permanent visas on this basis are exempt from the qualifying residence requirements for income support payments. The Social Security Act definition of a refugee includes all people who were granted permanent residence under the Humanitarian Program, that is, those granted Refugee, Special Humanitarian or Special Assistance Category visas. To protect their access to benefits, such people continue to be defined as refugees for social security purposes, even if they cease to hold a Humanitarian Program visa (eg, if they become Australian citizens). Refugees are not, however, exempt from the basic requirement to be an Australian resident at the time of claiming a payment.

A person does not need to meet the prior residence requirements for Disability Support Pension if their disability occurred while they were an Australian resident. Similarly, a woman who is widowed while she and her partner were both Australian residents does not need to wait two years for access to Widow Allowance.

Some payments (generally, the 'allowance' type payments which are intended as shorter-term income support) do not have prior residence requirements, but instead have a 'newly arrived resident's waiting period'. Technically, this means that a person may meet all the

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<sup>50</sup> Subclasses 309 and 820 (spouse, provisional); subclasses 310 and 826 (interdependency, provisional); subclass 785 (temporary protection); subclass 786 (humanitarian concerns); subclass 447 (Secondary Movement Offshore Entry); subclass 451 (Secondary Movement Relocation); and Criminal Justice Stay visas relating to the offence of people trafficking, sexual servitude or deceptive recruiting.

qualification criteria for the payment, but it may not be 'payable' to them because of the waiting period. In practice, from the claimant's point of view, the effect of the prior two year residence requirements and of the newly arrived resident's waiting period requirement is effectively the same.

For the applicable payments, a newly arrived resident's waiting period applies to people who have not been Australian residents and in Australia for a period of, or periods totaling, 104 weeks (two years). Periods spent in Australia, as an Australian resident, at any time in a person's life can be counted towards the waiting period.

The following social assistance allowances to newly arrived residents require the satisfaction of a waiting period: Newstart Allowance, Mature Age Allowance, Partner Allowance, Youth Allowance and Austudy Payment (for the unemployed and their partners and for students), Sickness Allowance, Carer Payment and Special Benefit. There is no waiting period for family assistance payments: that is, income supplements intended to assist families with the cost of raising children (such as Family Tax Benefit). These payments are available to all Australian residents (and holders of special category visas and prescribed temporary visas, as described above), if they have children in their care and meet the relevant income tests.

The waiting period also applies to the Health Care Card, the Commonwealth Seniors Health Care Card and Mobility Allowance which is payable to those who are medically assessed as unable to use public transport without assistance and who work at least eight hours per week.

### *7.2.2 Exemptions*

Refugees are exempt from the newly arrived resident's waiting period. Their immediate family members (partners and dependent children) are also exempt, as long as they were the refugee's family members at the time the refugee first came to Australia. This policy recognises the fact that the sponsored family members of refugees have often been in refugee-like situations themselves, and will face the same sorts of settlement barriers.

The former holders of spouse and interdependency provisional visas are also exempt from the newly arrived resident's waiting period (and from the two year residence requirement for Parenting Payment and Widow Allowance), once they hold a permanent visa. This policy recognises the fact that, in general, these people have already spent two years living in Australia before being granted permanent residence.

'Innocent illegals' are also exempt from the newly arrived resident's waiting period for all payments (and from the two year qualifying residence requirement for Parenting Payment and Widow Allowance). These 'innocent illegals' are young people who have lived in Australia for their formative years, and are granted permanent residence when they reach the age of 18. It would not be appropriate to treat them as newly arrived residents upon grant of their permanent visa.

People whose migration to Australia is approved on the basis that they will act as a carer for a disabled relative are exempt from the newly arrived resident's waiting period for Carer Payment (but not for any other payment).

As required by the Migration Act of 1958 illegal immigrants to Australia are detained and unless granted permission to remain in Australia, they are removed as soon as reasonably practicable. The 2001 amendments to the Migration Act bar persons who arrive without lawful authority at 'excised offshore places' from applying for any visa. The purpose behind these changes was to remove the ability for unauthorised arrivals who land on Australian offshore places from being able to access Australia's comprehensive visa application and review processes. These amendments also provide a discretion to detain these people in those offshore places. In addition, the amendments provide that these people may be removed to a declared safe country (such as Nauru) where their claims, if any, for refugee status can be determined.<sup>51</sup> Illegal immigrants cannot access social security but social security-related services are provided at each detention facility, which contribute to detainee development and quality of life. These include 24 hour medical services, dental services, culturally responsive physical and psychological health services, and educational programmes for adults and children, including English-language instruction. In most facilities, the majority of school-aged children attend government or non-government schools in the community during school term. Detainees are also assisted to prepare and lodge Protection Visa applications through the Immigration Advice and Application Assistance Scheme (IAAAS).

## **8. POLAND**

### **8.1 Social security system**

#### *8.1.1 Introduction*

Poland is a constitutional state. Article 87 of the Constitution of the Republic of Poland of 1997 lists ratified international agreements as a source of generally binding law. Such agreements enjoy priority in the event of conflict between such agreements and any national law. The Republic of Poland has also concluded several bilateral agreements and treaties on social security:<sup>52</sup> "Migrant workers are able to maintain their acquired rights with respect to benefits regardless of whether they stay in the country or not. They can accumulate rights in situations where work is carried out in different countries under the condition of being covered by the social insurance system of a country with whom Poland has concluded a social security agreement. The European Social Charter has also been ratified by Poland."<sup>53</sup>

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<sup>51</sup> Fact Sheet 82. Produced by Public Affairs Section, Department of Immigration and Multicultural and Indigenous Affairs, Canberra. Revised 2 July 2004. <http://www.immi.gov.au/facts/82detention.htm>.

<sup>52</sup> At least 22 such agreements existed in 2002. See Social Insurance Institution *Social Insurance in Poland: information, facts* (Warsaw 2002).

<sup>53</sup> "Poland" in *ILO Migration Survey 2003: Country Summaries*, p 5.

The social protection system is anchored in a merger between government, local communities and regional policy makers.<sup>54</sup> It is widely acknowledged that the main determinant of social status in the Polish society is having a job. Consequently, it has been stated that “[t]he social protection system provides rather poor benefits for unemployed and poor people”.<sup>55</sup> Contrasted to this is a relatively well developed system of social insurance (pensions for old age and disabled employees).

It is estimated that no more than 3% of the country’s residents represent national minorities.<sup>56</sup> A person who is a Polish citizen cannot be a citizen of another state at the same time.<sup>57</sup> Any person who does not have Polish citizenship is regarded as an alien (foreigner).<sup>58</sup>

### 8.1.2 Sources of law

The constitutional basis for social security in Poland is found in the Constitution of the Republic of Poland of 1997. Article 67 provides that a citizen has the right to social security in case of incapacity for work due to illness or disability, or after reaching retirement age or, in the event of unemployment of a citizen whose unemployment is not caused by his/her own doing and who does not have any other income. Article 68 provides that everyone is entitled to health care (to have his/her health protected) and that public authorities must, without considering citizens’ financial situation, provide them with equal access to health care benefits financed from public funds. Article 71 provides that families, who are in difficult material and social circumstances, particularly single parent families or large families, must have the right to special assistance from public authorities. In addition, the article also provides that a mother, before and after birth, must have the right to special assistance from public authorities. Finally, article 72 provides that the State must ensure protection of the rights of the child. A child deprived of parental care must have the right to care and assistance provided by the State.

The Act of Social Welfare, which came into effect on 1 May 2004, regulates social assistance (see also the prior Law of the 11<sup>th</sup> Nov 1990 on social assistance). Other statutes that are relevant include: the Family and Nursing Benefits Act, which came into effect in 1996; and the Law on Employment and Countering Unemployment, which came into effect in 1995.

As mentioned above, Poland has entered into several bilateral social security co-ordination agreements, which serve as the basis for social security entitlements of Polish citizens and the citizens of other countries with whom Poland has entered into such an agreement.

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<sup>54</sup> See GVG *Study on the Social Protection Systems in the 13 Applicant Countries* (2003), study financed by the European Commission 37.

<sup>55</sup> *Ibid.* Estimates are that the relative poverty rate (% of households under the level of poverty) has risen from 12% in 1992/93 to 17% in 2000 (*ibid* 18).

<sup>56</sup> *Ibid* 89.

<sup>57</sup> Art 2 of the Law of 15 February 1962 on Polish Citizenship.

<sup>58</sup> Art 2 of the Law of 13 June 2003 on Aliens.

### 8.1.3 Risks and benefits

In Poland a categorical approach to social protection exists. The social security system consists of the following:

- Social insurance schemes (old age; invalidity; work injuries; occupational diseases; and survivors pensions)
- Sickness benefits
- Health care services
- Maternity and family benefits
- Insurance allowances (care allowance and funeral allowance)
- Unemployment social protection
- Social assistance

Financing of the above schemes is complex. In general, the following schemes are financed from general revenue:

- Social assistance
- Family policy
- Long-term care
- Invalidity / sickness benefits (different sources of financing but also taxes)
- Old-age pensions for soldiers, policemen and prison employees

#### 8.1.3.1 Social Assistance - Poverty (Minimum resources/social assistance)

Benefits are means-tested (system does not address aid to individuals but to the entire family, thus the income criterion is related to the level of income per family member) – in some instances, e.g. the social pension for disability, no income threshold is required. In addition to the means test there is a condition related to a “dysfunctionality” in the family (e.g. unemployment; homelessness; alcohol or drug addiction; maternity protection; chronic disease; physical or mental impairment; and ecological catastrophe and other elemental disasters.)

Homeless people are targeted by anti-poverty policy. Therefore, housing allowances can be provided. In addition, tax relief, support for private housing construction and subsidies are also relevant.

The following forms of assistance and support can be identified:

- Permanent benefit – persons capable of work but who are not working due to rearing a child requiring constant care or nursing
- Periodical benefit – persons and families whose family income is not adequate to fulfill their vital needs. In particular, in cases of prolonged illness, disability, lack of employment prospects, etc.
- Guaranteed periodical benefit – persons who lost the right to unemployment benefits and whose family income does not exceed the income criterion, provided that at the time of losing the right to unemployment benefits and throughout the period of receiving the grant these persons are single parents rearing at least one child under seven years old



- Periodical maternity benefit – to mother, or to father in case of mother’s death or abandonment of the child (also to another person who rears such child), subject to means test
- Non-refundable special periodical or purpose benefit – to persons or families who fail to meet the income criterion but who need support from social assistance (in particular justifiable cases)
- Permanent compensatory benefit – a person entirely unable to work due to age or disability, subject to means test

#### 8.1.3.2 Family benefits

It appears that family allowances were systematically reduced in the 1990s and are not granted exclusively to less affluent families (i.e. it is no longer a universal scheme).

Family benefits are targeted, e.g., on families with disabled children, single parent families and, very rarely, large families.

Certain categories of families and children enjoy protection allowances:

- Family allowance (child up to 16)(means test)
- Nursing allowance (disabled or chronically sick children and old family members above 75)
- Alimony (abandoned children)(means test)
- Grant for starting independent life (children leaving institutions due to reaching the majority age)
- Numerous family allowances (for family before school beginning)

#### 8.1.3.3 Unemployment protection

Unemployment benefits in Poland are flat rate benefits (linked to the average wage for all workers). The benefits are payable for a maximum of one year.<sup>59</sup>

#### 8.1.3.4 Pensions

The present system that was introduced in 1999 covers all employed persons outside agriculture, except lawyers. All persons self-employed in agriculture as well as their family members are covered by the previous KRUS system. Therefore, all workers are covered. It is a compulsory system. There is also a second funded pillar (also an obligatory scheme), with no possibility of leaving it at any time before retirement.<sup>60</sup> Finally, there is a voluntary third pillar.

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<sup>59</sup> According to a European Commission study (see above) only 20% of the unemployed in Poland are eligible to receive benefits. Poor families with children are protected as in the case of a family with double unemployed family members the eligibility for benefits is extended to 18 months.

<sup>60</sup> *ibid* 57: “In this way the new Polish pension system combines a pension based on contributions (and through them: earning) from a pay-as-you-go system with a defined contribution annuity from the pension fund”.

Cash transfers are concentrated on almost only one category – pensions – 80% of redistribution is channeled towards this group.<sup>61</sup> Consequently very few other groups receive social benefits other than pensions.

#### 8.1.3.5 Health care

The health system can be described as a mixed system. It is a combination of social health insurance, the so-called internal market model (contracting for services at provider level) and the market model (purchasing of health services by patients).<sup>62</sup> Primary health care services must be provided by all sickness funds. The system also has a number of elements of state regulation. Health care is financed by universal health insurance. Individual taxpayers' contributions are tax deductible. There are, however, also central budget funds that are relevant.

#### 8.1.4 *Personal scope*

##### 8.1.4.1 Social assistance

According to the Act of Social Welfare the following persons are entitled to be beneficiaries of social assistance:

- Polish citizens residing and staying within the territory of the Republic of Poland.
- Foreigners residing and staying on the territory of the Republic of Poland, holding a residence permit or refugee status.
- After 1 May 2004 the right to benefit was extended to citizens of the European Union and European Economic Area, who stay on the territory of Poland and who hold a stay permit.

##### 8.1.4.2 Family benefits

Family benefits may be granted to a Polish citizen residing on the territory of the Republic of Poland and an alien/foreigner holding a residence card or enjoying refugee status.

##### 8.1.4.3 Health care

According to the Constitution, in article 68, all citizens, regardless of their “material” status (i.e. income), are guaranteed equitable access to health care financed from public funds.<sup>63</sup>

Compulsory Universal Health Insurance covers almost all Polish citizens resident in Poland as well as foreign persons who are resident in Poland and who have a working visa, permanent or temporary residence permits if they have to be insured or insure themselves optionally.

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<sup>61</sup> *Ibid* 59.

<sup>62</sup> Nearly 100% of the Polish population is covered by the universal health insurance system.

<sup>63</sup> This guarantee does not provide for access to all services or financing all services from public funds.

Persons who are not insured are entitled to a range of services related to emergencies, conditions related to accidents, poisoning, labour and life-threatening situations and so forth. The right to free treatment is enjoyed by patients suffering from specified conditions, including tuberculosis, AIDS, mental conditions and so forth. These treatments are paid from the state budget.

#### 8.1.4.4 Pensions

Old age pensions cover employees; private farmers, soldiers and policemen, prison employees and clerks; and the self-employed.<sup>64</sup> Certain minimum periods of contribution and employment are required.

#### 8.1.4.5 Unemployment

Benefits are paid to the following categories of beneficiaries:

- Persons who are Polish citizens resident in Poland, seeking and entering into employment or other gainful occupation in the territory of the Republic of Poland or taking up employment abroad from foreign employers.
- Foreign nationals staying in the territory of the Republic of Poland and holding a permanent resident card or who have been granted refugee status seeking and entering employment or other gainful occupation in the territory of Poland.
- Foreign nationals who obtained consent of the relevant department (labour) to be employed, or take up other gainful occupation, in the territory of Poland.
- Unemployment benefits are paid subject to certain criteria regarding minimum periods of employment and contribution.

## **8.2 Position of non-citizens in the social security system**

### *8.2.1 Immigration law*

The Aliens Act of 2003 provides that a residence visa can be issued to a foreigner either as a short-term visa or a long-term visa. The period of validity of the residence visa may, however, not exceed five years.<sup>65</sup> A residence visa is also issued to a minor foreigner born on the territory of the Republic of Poland, at the request of the child's legal representative who resides in Poland on the basis of a visa.<sup>66</sup> The Act, in article 42, clearly provides that a foreigner will be refused a visa if he/she does not possess the financial means necessary to cover the costs of residence in Poland. A residence permit for a fixed period is issued to a foreigner who will obtain a work permit and who carries

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<sup>64</sup> In the case of self-employed only Polish citizens are covered.

<sup>65</sup> Art 31.

<sup>66</sup> Art 34.

out an economic activity and who demonstrates that he/she possesses financial means necessary to cover the costs of residence in Poland. A residence permit can also be granted to a spouse of a Polish citizen.<sup>67</sup> It is expressly provided, in article 53.4, that sufficient financial means will be such means necessary to cover the costs of accommodation, maintenance and medical assistance of the foreigner as well as of his/her family members dependent on him/her – *without the need to claim social assistance*.

A permit to settle can also be granted.<sup>68</sup> However, stringent requirements have to be met.<sup>69</sup> A residence card can be issued to foreigners who were granted any of the above permits/status.<sup>70</sup>

Significant in this context is the stipulation contained in article 88, which provides for the expulsion of aliens/foreigners and the obligation to leave the territory of Poland. One of the grounds for such expulsion is that the person does not possess the necessary financial means to cover his/her costs in Poland and he/she is unable to show any credible sources of obtaining those means.

#### *8.2.2 Criteria for entitlement to benefits by non-citizens and link between immigration status and social protection*

See the discussion in par 8.1.4 above.

## **9. SOUTH AFRICA**

### **9.1 Social security system**

#### *9.1.1 Introduction*

South Africa has inherited a social security system which is remarkably comprehensive by a middle income developing country standard.<sup>71</sup> The system is characterised by a strict distinction between social assistance and social insurance.<sup>72</sup> Due to historical reasons, some of the traditional social security contingencies are not regulated on a public insurance fund basis, but covered in terms of essentially private mechanisms – in particular retirement and health,<sup>73</sup> though health care is provided for the bulk of the

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<sup>67</sup> Art 53.

<sup>68</sup> Art 64.

<sup>69</sup> See art 64 – the foreigner must jointly show (amongst other requirements): permanent family or economic ties in Poland; secured accommodation and maintenance (sufficient financial means); residence in the Republic continuously for at least 5 years on the basis of visas, residence permits for a fixed period or in connection with being granted refugee status.

<sup>70</sup> Art 72. A residence card issued to a foreigner who had been granted a permit to settle is valid for a period of 10 years.

<sup>71</sup> Olivier MP & Kalula ER “Scope of Coverage” in Olivier M *et al Social Security: A Legal Analysis* (Butterworths Durban 2003) p 127.

<sup>72</sup> *Ibid.*

<sup>73</sup> In these cases public provision is made to cover in particular those without sufficient means – such as by means of the state old-age grant and public health services. In the South African context the private measures must be seen as part of the social assistance system.

population by limited public measures in terms of free primary health care, as well as hospital care for women with young children and the aged. For the rest medical services are covered by private schemes.<sup>74</sup> Social insurance usually refers to earned benefits of workers and their families and is often linked to formal employment.<sup>75</sup> Social assistance<sup>76</sup> is financed through taxes, regulated by legislation and is the exclusive responsibility of the state.<sup>77</sup> Social relief<sup>78</sup> forms part of the social assistance branch of the South African social security system, and entails short-term measures undertaken by the State, and private institutions, to assist persons during individual or community crises that have caused the persons or communities to be unable to meet their most basic needs.<sup>79</sup>

### 9.1.2 Sources of Law

Section 27(1)(c) of the Constitution<sup>80</sup> guarantees the right to access to social security.<sup>81</sup> Other provisions accord fundamental rights related to social security (such as the right to access to adequate housing).<sup>82</sup> The Constitution is the supreme law of the country, and the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of State.<sup>83</sup>

The State is obliged to take reasonable legislative and other measures within its available resources, to achieve the progressive realisation of these rights. Though the Constitution places an obligation on the State to ensure universal access to social security, it simultaneously allows a certain degree of latitude in relation to these aspects: the progressive realisation of the right, the taking of reasonable measures and the availability of resources.<sup>84</sup> The justiciability and inter-relatedness of these rights, in particular in the South African context, has been emphasised by the Constitutional Court.<sup>85</sup>

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<sup>74</sup> Alexander P & Shindondola H *Social Security for Non-Citizens in South Africa*. A draft report on Sociological Research (RAU October 2002).

<sup>75</sup> Liebenberg S & Tilley A *Poverty and Inequality Hearings Social Security* Theme Background paper for SANGOCO & South African Human Rights Commission and the Commission for Gender Equality (April 1998).

<sup>76</sup> According to the Social Assistance Act 13 of 2004, this means a social grant including social relief of distress.

<sup>77</sup> Strydom EML *et al Essential Social Security Law* (Juta 2001) p 7.

<sup>78</sup> As defined in the Fund Raising Act 107 of 1978. See now also the definition of social assistance in s 1 of the Social Assistance Act 13 of 2004.

<sup>79</sup> Mpedi LG, Kuppan GY and Olivier MP "Welfare and legal aid" in Olivier M *et al Social Security: A Legal Analysis* (Butterworths Durban 2003) p 205.

<sup>80</sup> 108 of 1996.

<sup>81</sup> The Constitution grants everyone the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

<sup>82</sup> S 26(1).

<sup>83</sup> S 8(1).

<sup>84</sup> S 27(2).

<sup>85</sup> *Government of the Republic of South Africa v Grootboom* (2000) 11 BCLR 1169 (CC), *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa* 1996 1996 (4) SA 744; (1006) 10 BCLR 1253 (CC); *Minister of Health & Others v Treatment Action Campaign & Others* 2002 10 BCLR 1033 (CC); 2002 5 SA 713 (CC); *Khosa & Others v The Minister of Social Development & Others; Mahlaule & Others v The Minister of Social Development & Others* 2004 (6) BCLR 569 (CC).

Overarching legislation in South Africa deals with the various social security contingencies. In the area of social assistance the Social Assistance Act<sup>86</sup> is the most important instrument. Common law, particularly administrative law<sup>87</sup> plays an important role as far as social security discretion exercise and social delivery is concerned.<sup>88</sup> Social insurance contingencies are regulated by individual pieces of legislation.

Outside social assistance retirement coverage is regulated mainly in terms of the Pension Funds Act 24 of 1956. However, some occupational-based retirement schemes are provided for by other statutes and cover particular categories of workers. These include the Military Pensions Act 84 of 1976; Special Pensions Act 69 of 1996; and General Pensions Act 29 of 1979.

Health care for the bulk of the population is provided by the limited public measures in this area: free primary health care, as well as free hospital care for women with young children and the aged. For the rest, medical services are covered for a selected part of the population by private schemes, which are regulated by the Medical Schemes Act 131 of 1998.<sup>89</sup> Private sector health provision has always been mainly occupational- and insurance-based.

Different sets of legislation deal with employment-related injuries and diseases in- and outside the mining sector, and are administered by different government departments. In terms of the Compensation for Occupational Injuries and Diseases Act (COIDA) 130 of 1993, compensation for employment injuries and diseases is paid to employees and their dependants out of the Compensation Fund, to which employers contribute on the basis of industry-based risk assessments.<sup>90</sup> In the mining context protection against employment-related injuries and diseases is provided for in separate legislation.<sup>91</sup> On the level of preventative safety measures, the most significant are the *Occupational Health and Safety Act (OHSA)*<sup>92</sup> and the *Health and Safety in Mines Act*.<sup>93</sup>

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<sup>86</sup> 13 of 2004.

<sup>87</sup> The Promotion of Administrative Justice Act 3 of 2000 gives expression to the constitutional requirement that national legislation be enacted, setting out the details of the broad framework of administrative law rights enshrined in the Bill of Rights.

<sup>88</sup> See Olivier M & Mhone G "South Africa" (country report) in Olivier MP & Kalula ER *Social Protection in SADC: Developing an Integrated and Inclusive Framework* (CICLASS & Institute of Development and Labour Law) (Creda 2004) p121-122.

<sup>89</sup> In terms of the Medical Schemes Act 131 of 1998 medical schemes may, as a rule, no longer refuse membership or differentiate between members of a scheme on the basis of age and medical history. Certain core medical services have to be covered by these schemes.

<sup>90</sup> Established in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>91</sup> Occupational Diseases in Mines and Works Act (ODMWA) 78 of 1977. There are several major differences between ODMWA benefits and compensation payable under COIDA. The net result of these differences is that ODMWA benefits are generally inferior to those under COIDA, although it offers free benefit examinations, which are not available under COIDA.

<sup>92</sup> Act 85 of 1993.

<sup>93</sup> Act 29 of 1996.

The Unemployment Insurance Act 63 of 2001 (UIA) covers workers and their dependants against temporary unemployment arising from termination of service, illness, maternity, and adoption.

A non-employment based social insurance scheme is the Road Accident Fund established under the Road Accident Fund Act (RAFA) 56 of 1996. The Fund, which is primarily funded from a compulsory fuel levy, pays out compensation to a third party for any loss or damage suffered as a result of any bodily injuries or death, caused by the negligent driving of motor vehicles.

Finally, as discussed elsewhere in this report, both international law and foreign law serve as an important source for the development of a legal framework of social security for non-citizens. This flows, firstly, from the provisions of the Constitution which require the consideration of international law in the interpretation of the right to have access to social security and appropriate social assistance<sup>94</sup> and the adoption of an international-friendly approach when interpreting legislation pertaining to social security.<sup>95</sup> Secondly, South Africa has ratified a number of international treaties which are relevant to the social security position of different categories of non-citizens – in particular treaties relating to the position of children and refugees. Thirdly, the Constitution supports the consideration of the legal systems of other countries when grappling with the interpretation of a right such as the right to have access to social security and appropriate social assistance.<sup>96</sup>

### *9.1.3 Risks and Benefits*

The social insurance part of the South African social security system is aimed at some measure of income maintenance.<sup>97</sup> This is subject to at least two qualifications. First, the social insurance schemes do not envisage complete income maintenance, and the various schemes (with the exception of the Road Accident Fund (RAF) system) usually pay out benefits on the basis of a percentage of remuneration.<sup>98</sup> The Road Accident Fund (RAF) system is a non-employment based social insurance scheme, funded from a compulsory fuel levy. The State social assistance system rests on two pillars: the provision of various kinds of social services (also in the area of institutional care) and the payment of social grants. No universal coverage exists, as a needs-based and categorical approach is

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<sup>94</sup> S 39(1)(b).

<sup>95</sup> S 233: "... when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

<sup>96</sup> S 39(1)(c).

<sup>97</sup> *Ibid.*

<sup>98</sup> E.g. the Unemployment Insurance Fund (UIF), the Workmen's Compensation system, regulated mainly in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA), and defined benefit retirement funds.

followed.<sup>99</sup> The main social assistance grants, namely the child support grant, the disability grant and the old age grant, are all means-tested.

#### *9.1.4 Personal Scope of Benefits*

The social insurance system covers mostly people in formal employment. The self-employed, the informally employed, and several categories of the atypically employed are for all legal purposes excluded from the South African social insurance system – with the notable exception of the Road Accident Fund scheme.<sup>100</sup> In the area of social assistance no universal coverage exists, as a needs-based and categorical approach is followed. People who do not fall within one of the categories covered by the social assistance system are excluded. Effectively this means that those who are not old enough, young enough, or disabled enough, and yet poor, are excluded.

## **9.2 Position of non-citizens in the social security system**

### *9.2.1 Introduction*

Apart from certain exceptions made for foreigners with permanent residence status, non-nationals are generally excluded from social security protection, in particular social assistance.<sup>101</sup> In terms of the Social Assistance Act<sup>102</sup> one of the eligibility criteria for accessing almost all social assistance benefits (such as old age grants and disability benefits and in contrast to the previous act the foster child grant as well) is South African citizenship. This applies to certain branches of social insurance as well, such as the unemployment insurance scheme, since non-citizens are excluded from the operation of the Unemployment Insurance Act if they have to be repatriated upon termination of their services.<sup>103</sup> Special arrangements exist with regard to certain categories of non-citizens. Refugees in principle enjoy full legal protection which includes the rights set out in Chapter 2 of the Constitution.<sup>104</sup> Persons who have obtained refugee status<sup>105</sup> therefore qualify for constitutionally entrenched socio-economic rights in terms of section 27 of the Constitution, amongst which the right to access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.

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<sup>99</sup> See part 1 of Olivier M & Mhone G "South Africa" (country report) in Olivier MP & Kalula ER *Social Protection in SADC: Developing an Integrated and Inclusive Framework* (CICLASS & Institute of Development and Labour Law) (Creda 2004).

<sup>100</sup> Notably compensation for workplace injuries and diseases and unemployment insurance.

<sup>101</sup> Olivier MP, Khoza JF, Jansen van Rensburg L & Klinck E "Constitutional Issues" in Olivier M *et al Social Security: A Legal Analysis* (Butterworths/Lexis Nexis Durban 2003) p 98.

<sup>102</sup> 13 of 2004: see s 5(c).

<sup>103</sup> S 3(1)(d) of the Unemployment Insurance Act 63 of 2001.

<sup>104</sup> S 27(b) of the Refugees Act 130 of 1998.

<sup>105</sup> S 3(a) of the Refugees Act 130 of 1998 defines people who qualify for refugee status as those persons who have fled their own country fearing persecution by reason of their race, religion, nationality, political opinion or their membership of a particular social group. Section (3)(b) mentions certain other categories of persons, namely people who have fled their own country owing to external aggression, occupation, foreign domination or events seriously disturbing public order. According to section 3(c) dependants of those who have been granted refugee status also qualify for refugee status.



However, the Social Assistance Act<sup>106</sup> does not extend protection to refugees. An apparent conflict therefore exists between the two Acts.<sup>107</sup>

### 9.2.2 *Social Insurance*

Non-citizens who have acquired permanent residence status are eligible for social protection on the same basis as South Africans. For example, non-citizens with permanent resident status are entitled to workers compensation in the event of an accident or disease.<sup>108</sup> In terms of the Unemployment Insurance Act (UIA)<sup>109</sup> they will be entitled to benefits, if they are retrenched, become ill or pregnant, or adopt young children. Their dependants will also be entitled to benefits in the event of their death. Employers often make private arrangements for limited private benefits for contract workers. The most extensive is in the mining industry, where housing, medical care, life insurance and matching contributions for a provident fund (where established) are provided to migrants recruited by the Employment Bureau of Africa (TEBA).

#### 9.2.2.1 Unemployment Insurance

Though citizenship for purposes of contributions and benefits is generally not a requirement, as far as non-citizen fixed-term contract workers are concerned, the Unemployment Insurance Act (UIA) excludes persons who enter the Republic for the purpose of carrying out a contract of service, apprenticeship or learnership, if there is a legal or a contractual requirement or any other agreement or undertaking that such persons must leave the Republic, or that such person be repatriated upon termination of the contract.<sup>110</sup> The UIA itself appears to be inconsistent as far as different categories of fixed-term contract workers are concerned. Fixed-term contract workers who lose their employment as a result of the termination of their contract remain entitled to receiving UIF benefits.<sup>111</sup> However, non-citizen fixed-term contract workers, who have to return home upon completion of the contractual period, are specifically excluded.

#### 9.2.2.2 Employment injuries and diseases

The Compensation for Occupational Injuries and Diseases Act<sup>112</sup> (COIDA) provides a system of no-fault compensation for employees who are injured in accidents that arise out of and in the cause of their employment or who contract occupational diseases. In the mining industry this function is fulfilled by the Occupational Diseases in Mines and Works Act (ODMWA),<sup>113</sup> as far as occupational diseases are concerned.

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<sup>106</sup> 13 of 2004.

<sup>107</sup> The Social Assistance Act and the Refugees Act 130 of 1998.

<sup>108</sup> See Compensation for Occupational Injuries and Diseases Act 130 of 1993.

<sup>109</sup> 63 of 2001.

<sup>110</sup> S 3(1)(d) UIA; s 4(1)(d) Unemployment Insurance Contributions Act of 2002.

<sup>111</sup> See UIA s 16(1)(a)(i).

<sup>112</sup> 130 of 1993.

<sup>113</sup> 78 of 1973.

Generally non-citizens would qualify for coverage under the various laws dealing with employment injuries and diseases. Also, South African benefits may be remitted through government to government agreements or through the mines' major recruitment agency. However, illegal immigrants or migrant workers would not qualify for compensation under COIDA or ODMWA. The reason is that a person who is not in possession of a work permit as required by section 19 of the Immigration Act<sup>114</sup> is not an employee for labour law and, one could add, social security law purposes (such as for purposes of bringing a case before the CCMA<sup>115</sup>), as no valid contract of employment exists and such a person cannot be understood to be "an employee".<sup>116</sup> Finally, in terms of section 60 of the COIDA, an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for a period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension.

### 9.2.2.3 Motor Vehicle Accidents

In terms of section 17 of the Road Accident Fund Act<sup>117</sup> the Fund shall be obliged to compensate any person. Apart from illegal non-citizens, no other limitations in respect of citizenship exist.

### 9.2.3 *Social Assistance*

In terms of section 5(c) of the Social Assistance Act<sup>118</sup> social grants are restricted to South African citizens. However, the majority of the Constitutional Court in the *Khosa* judgment<sup>119</sup> held that permanent residents are entitled to social assistance grants, namely those grants which were the subject of the enquiry in the case, namely the old age grant, the child support grant, and the care dependency grant. To access these grants beneficiaries must comply with a means test. Non-citizens who have temporary resident status are not entitled to the same level of protection as citizens.<sup>120</sup>

Two further important qualifications are contained in the Social Assistance Act 13 of 2004. In the first place, section 2(1) extends coverage to non-citizens in the event of a bilateral agreement providing for this. However, this provision, read with the power of the Minister to determine groups or categories of persons to be covered,<sup>121</sup> is restricted, as it only covers bilateral agreements, and does not take into account possible obligations on

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<sup>114</sup> 13 of 2002.

<sup>115</sup> *Moses v Safika Holdings (Pty) Ltd* 2001 22 ILJ 1261 (CCMA); *Vundla v Millies Fashions* 2003 24 ILJ 462 (CCMA); *Lende v Goldberg* 1983 2 SA 284 (C); see, however, *Mackenzie v Paparazzi Pizzeria Restaurant obo Pretorius* 1998 BALR 1165 (CCMA).

<sup>116</sup> Smit N "Employment Injuries and Diseases" in Olivier M *et al Social Security: A Legal Analysis* (Butterworths 2003) p 472.

<sup>117</sup> 56 of 1996.

<sup>118</sup> 13 of 2004.

<sup>119</sup> *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

<sup>120</sup> See now generally the *Khosa* case, which drew a clear distinction between permanent residents, on the one hand, and temporary residents who have less tenuous links with South Africa, on the other hand.

<sup>121</sup> See the definition of South African citizen, contained in s 1.

South Africa to extend protection in terms of international instruments, such as the UN Convention on the Rights of the Child and the various refugee conventions ratified by South Africa. In the second place, the payment of social assistance benefits will, as a rule, be suspended in the event that a beneficiary is absent from the country for more than 90 days.<sup>122</sup>

#### 9.2.3.1 Older Persons Grant<sup>123</sup>

Beneficiaries are in the case of a woman, if she has attained the age of 60 years and in the case of a man, if he has attained the age of 65 years. Residency and citizenship are qualifying conditions.<sup>124</sup> Beneficiaries will now include permanent residents<sup>125</sup> who meet the criteria mentioned in section 5.<sup>126</sup>

#### 9.2.3.2 Child Support Grant

A person is eligible for a child support grant if he or she is the primary caregiver of that child. Section 5(b) and (c) of the Act<sup>127</sup> requires residency and citizenship. By virtue of recent constitutional case law, permanent residents could also apply for this grant.<sup>128</sup>

#### 9.2.3.3 Disability Grant<sup>129</sup>

Beneficiaries must have attained the prescribed age, and owing to his physical or mental disability is unfit by virtue of any service, employment or profession to provide for his or her maintenance. The beneficiary must be resident in the Republic and a South African citizen.<sup>130</sup> Although not directly the subject of the enquiry in the *Khosa* case, one should assume that this grant is now also available to permanent residents.

#### 9.2.3.4 Care Dependency Grant<sup>131</sup>

A parent, primary care giver or foster parent of a child who requires and receives permanent care or support due to a physical or mental disability will be eligible, if the criteria in section 5<sup>132</sup> (amongst others, citizenship and residency) are met. By virtue of recent constitutional case law, permanent residents could also apply for this grant.<sup>133</sup>

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<sup>122</sup> S 16 of the Social Assistance Act 13 of 2004.

<sup>123</sup> S 10 of Social Assistance Act 13 of 2004.

<sup>124</sup> S 5(b) and s 5(c) of the Social Assistance Act 13 of 2004.

<sup>125</sup> *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

<sup>126</sup> Act 13 of 2004.

<sup>127</sup> 13 of 2004.

<sup>128</sup> *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

<sup>129</sup> S 9 of Act 13 of 2004.

<sup>130</sup> S 5(b) and 5(c) of Act 13 of 2004.

<sup>131</sup> S 7 of Act 13 of 2004.

<sup>132</sup> Act 13 of 2004.

<sup>133</sup> *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

#### 9.2.3.4 Foster Child Grant

A foster parent is, subject to the provisions of section 5, eligible if the foster child is in need of care and he or she satisfies the requirements of the Child Care Act of 1983.

Section 5 of the Social Assistance Act 13 of 2004 requires the foster parent to be a South African citizen. This appears to be an oversight in the drafting of the Act, as the relevant provision of the previous Act<sup>134</sup> required only residency.<sup>135</sup> In any event, based on the recent judgment of the Constitutional Court in the *Khosa* case, one should assume that this grant is also available to permanent residents.

#### 9.2.3.5 War Veterans' Grant<sup>136</sup>

This grant is payable to citizens and residents of the Republic if they meet the criteria in section 11.

#### 9.2.3.6 Grant in Aid<sup>137</sup>

This grant is payable to or in respect of a person who is in such a physical or mental condition that he or she requires regular attendance by another person. This grant requires of a beneficiary to be a South African citizen and resident in the Republic. Presumably, by virtue of recent constitutional case law, permanent residents could also apply for this grant.<sup>138</sup>

#### 9.2.3.7 Social Relief of Distress<sup>139</sup>

Social relief of distress programmes are aimed at the alleviation of both chronic and transient poverty. Social relief is regulated by legislation and financed through taxation. Social relief is provided for individuals in the event of an individual crisis or for whole communities where they face a crisis.<sup>140</sup> This grant is usually offered for three months but this period may in exceptional circumstances be extended to six months. Beneficiaries

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<sup>134</sup> Social Assistance Act 59 of 1992.

<sup>135</sup> S 4A which required residency only was inserted into the Social Assistance Act 59 of 1992 by the provisions of the Welfare Laws Amendment Act 106 of 1997.

<sup>136</sup> S 11 of Act 13 of 2004.

<sup>137</sup> S 12.

<sup>138</sup> *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

<sup>139</sup> The Fund Raising Act 107 of 1978 defines social relief as the "alleviation of need of persons by means of the temporary rendering of material assistance to them." See now s 1 of the Social Assistance Act 13 of 2004 (definition of "social assistance" and of "social relief of distress"), as well as s 13 which provides for the granting of social relief of distress.

<sup>140</sup> Mpedi LG, Kuppan GY, Olivier MP "Welfare and Legal Aid" in Olivier M *et al Social Security: A Legal Analysis* (Butterworths Durban 2003) p 205.

must be a citizen of South Africa and living in South Africa at the time of applying for the grant.<sup>141</sup>

Outside the legal framework of social assistance provision in South Africa, the Jesuit Refugee Services, a private institution, offers a social grant to seriously disabled, chronically and terminally ill refugees and asylum seekers. The beneficiary must be without any possibility of ever becoming self-reliant or contributing to their daily living needs.<sup>142</sup> The grant amount has been fixed in line with the government disability grant.

Food parcels, school fees and medical referrals form part of the assistance provided for refugees or asylum seekers by the Jesuit Refugee Services.

#### *9.2.4 Linkages with immigration law*

The Immigration Act 13 of 2002 regulates non-citizens' entry into and residence in South Africa. In this connection, immigration legislation has always been a tool used by the government to determine who they will allow to become new members of this nation and on what terms.<sup>143</sup> The Act distinguishes, as does preceding immigration legislation, between permanent and temporary residence. Permanent residents are not regarded as 'foreigners' and they are granted all the rights of a citizen, except for those that a law or the Constitution explicitly ascribes to citizenship (for instance, the right to vote).<sup>144</sup> As such they are the elite of non-South Africans, and, since they are able to apply for citizenship after five years,<sup>145</sup> their status might be regarded as that of probationary citizens.

The second category consists of temporary residents. According to the Act, a foreigner may only remain in the country if he or she is in possession of one of 14 different kinds of temporary residence permit. In addition to the ordinary visitor's permit provided to tourists, the most important of these are the work, study and business permits.

Thirdly, the new Immigration Act also includes asylum seekers as a category of temporary residents. However, as the Act makes clear, the position of asylum seekers is subject to the Refugees Act 130 of 1998. The fourth category consists of undocumented migrants, those who either enter South Africa legally and then 'overstay' or who enter the country illegally.

In terms of section 9(4)(b) of the Act, a non-citizen may only enter the Republic if issued with a valid temporary or permanent residence permit. Sections 11-23 set out the various

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<sup>141</sup> Social assistance according to s 1 of the Social Assistance Act 13 of 2004 now includes social relief of distress. A person is only entitled to social relief, if he or she complies with the eligibility criteria in terms of s 5 of the Act, and the additional requirements which may be prescribed in terms of s 13 of the Act.

<sup>142</sup> For example: refugees who are confined to a wheel chair should be prioritised under other programmes, such as skills training.

<sup>143</sup> Perbady S "A brief history of South African immigration policy" accessed from <http://www.polity.org.za/govdocs/greenpapers/migration/hista.html>

<sup>144</sup> S 25(1) of the Immigration Act 13 of 2002.

<sup>145</sup> See s 5 of the South African Citizenship Act 88 of 1995.

types of temporary residence permits granted to non-citizens. A temporary residence permit is issued on condition that the non-citizen is not, or does not become a 'prohibited or undesirable person' as defined in sections 29 and 30.

According to section 26(a) one of the conditions for a direct permanent residence permit is that the non-citizen has been the holder of a particular category of temporary residence permit in terms of the Act, i.e. the work permit – which includes one issued under a corporate permit – for a period of five years, and has received an offer of permanent employment. A non-citizen can also be issued with such a permit if he/she is of good and sound character and has received an offer of permanent employment.<sup>146</sup> The Act further provides in section 27(c) for the granting of a permanent residence permit to a person who is considered a refugee in terms of section 27(c) of the Refugees Act.<sup>147</sup> This appears to be an attempt to provide for a 'refugee protection regime'. Asylum-seekers are also issued an asylum permit in terms of section 23. The section states that 'the department may issue an asylum permit to an asylum seeker subject to the Refugees Act 130 of 1998, and any other prescribed terms and conditions.'

Subject to section 26(b) of the Immigration Act, a direct permanent residence permit is also issued to the spouse of a citizen or resident if the department is satisfied that a good faith spousal relationship exists. However, a permit issued under this section lapses if at any time within three years of its application, the good faith spousal relationship no longer subsists, except in the case of death. A permanent residence permit will also be issued to the child of a citizen or resident under twenty-one years of age. This is subject to the condition that it shall lapse if the child fails to apply for its confirmation within two years of attaining majority.<sup>148</sup>

Finally, as far as refugees are concerned, it should be added that recently both the Cape High Court<sup>149</sup> and the Constitutional Court<sup>150</sup> endorsed the international law principles in respect of the *non-refoulement* of a refugee to a state where he or she would be likely to face persecution or inhuman treatment or punishment. Also, in line with the refugee protection regime provided for in the legislation, the Refugees Act contains a far-reaching prohibition on *non-refoulement*. It states that: "Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country to be subject to any other measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in the country where:  
(a) he or she may be subject to persecution on account of ...; or  
(b) his or her life, physical safety or freedom would be threatened on account of..."<sup>151</sup>

### 9.2.5 Links between immigration status and social protection

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<sup>146</sup> S 27(d).

<sup>147</sup> 130 of 1998.

<sup>148</sup> S 26(c) and (d).

<sup>149</sup> *Kabuika v Minister of Home Affairs* 1997 4 SA 341 (C).

<sup>150</sup> *Mohamed v President of the RSA* 2001 7 BCLR 685 (CC).

<sup>151</sup> S 2 of the Refugees Act 130 of 1998.

The requirement of a permanent employment offer could be construed as the government's attempt to ensure that all permanent residence permit holders have a guaranteed steady income before they are permitted to reside in the Republic. This is to prevent non-citizens from relocating to South Africa and ending up as public charges if they are unable to provide for themselves and their dependants.

One of the means by which this is also attained in relation to temporary residents, is by including various financial requirements for the issue of permits, and therefore the granting of lawful entry into South Africa. Section 10 requires a permit to be issued only on condition that the holder is not or does not become a prohibited or undesirable person. An example is anyone who has been judicially declared incompetent or an unrehabilitated insolvent. In terms of section 30, an undesirable person includes anyone who is likely to become a public charge. This may imply that a non-citizen is deemed to be undesirable and denied entry if he/she lacks financial resources and is in need of social assistance or welfare.

In view of the recent Constitutional Court decision in *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others*<sup>152</sup> immigration status will be a major determinant for a non-citizen's eligibility for social security.

As regards refugees, section 27(b) of the Refugees Act states that 'a refugee enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution'. In principle, neither the Social Assistance Act 59 of 1992, nor the Social Assistance Act 13 of 2004 or any other law extend social security benefits to refugees. Those who have obtained refugee status therefore qualify for the constitutionally entrenched socio-economic rights in terms of section 27 of the Constitution. The Refugees Act also states that all refugees are entitled to the same basic health services and basic primary education which the inhabitants of the Republic receive from time to time.<sup>153</sup>

Unlike most countries with refugee camps, South Africa's policy promotes local integration, which allows refugees to settle anywhere in the country. As a result of this policy, refugees are required to survive without any assistance from government.<sup>154</sup> The Refugees Act allows for any person to apply for asylum and states that no person should be denied the right to apply for asylum in South Africa.<sup>155</sup> A most controversial clause in the Act has been the one stating that applicants, awaiting procession of their applications are not entitled to work or access education, since no subsistence or welfare support is provided to them during the time their application is processed.

The asylum applicant is however entitled to apply for permission to work and receive education if their status is not determined within six months. Whether other public

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<sup>152</sup> 2004 (6) BCLR 569 (CC).

<sup>153</sup> S 27(g) of the Refugees Act 130 of 1998.

<sup>154</sup> Baguley D "Asylum seekers can now work and study" in *Botshabelo Sanctuary* (2003) vol. 6 no 1 p 11.

<sup>155</sup> Sec 21(2)(a) of the Refugees Act 130 of 1998.

services such as housing and health care can be accessed during this time is not clear.<sup>156</sup> There is also no indication whether these services, if accessible, should be delivered under the same conditions as delivered to South Africans.

In *Watchen-uka and Another v The Minister of Home Affairs and two Others*<sup>157</sup> the court held the prohibition on work and study contained in regulation 7 of Refugee Regulations (Forms and Procedure) 2000 to be *ultra vires* and inconsistent with the Constitution and invalid. The Department of Home Affairs has decided to take the matter on appeal and the court in the meantime granted an interim execution order, leaving the judgment in force pending the appeal judgment.

Section 32 of the Immigration Act stipulates that an illegal foreigner shall depart, unless authorised by the Department to remain in the Republic pending an application for a status. It is also expressly provided that “any illegal foreigner shall be deported”. Deterring and preventing people from illegally migrating to South Africa appears to be a major aim of the Act. This objective is found in the immigration law of most states and is obviously a genuine concern. It is the method by which a country seeks to achieve such deterrence and prevention, however, which may be problematic.

#### 9.2.6 Lack of co-ordination arrangements

Barring a limited number of exceptions, South Africa is not yet linked to the network of bilateral and multilateral conventions on the coordination of social security. This may operate to the disadvantage of both non-citizens in South Africa and of South Africans who take up temporary or permanent employment or residence in other countries.<sup>158</sup> In terms of comparative approaches, the territorial principle operative in social security is – in these conventions – replaced by a personal entitlement to benefits, which follows the beneficiary. The general principles which constitute the content of bi- and multilateral arrangements in this regard, usually relate to:<sup>159</sup>

- the choice of law principle, identifying the legal system which is applicable (as a rule, the applicable law is that of the place of employment, the *lex loci laboris*);
- equal treatment (in the sense that all discrimination based on nationality is prohibited);
- aggregation of insurance periods (in that all periods taken into account by the various national laws are aggregated for the purposes of acquiring and maintaining an entitlement to benefits, and of calculating such benefits); and

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<sup>156</sup> Palmary I *Refugees, Safety and Xenophobia in South African Cities: The Role of Local Government* A Research Report for the Centre for the Study of Violence and Reconciliation. Accessed at <http://www.csvr.org.za/papers/papalm4.htm> on August 30, 2004.

<sup>157</sup> Cape High Court Case no 1486/20002.

<sup>158</sup> Eg, in terms of s 60 of the COIDA, an employee or dependant of an employee who is resident outside the Republic or is absent from the Republic for a period(s) of more than six months, and to whom a pension is payable, can be awarded a lump sum, thereby losing any entitlement to the pension.

<sup>159</sup> Barnard C *EC Employment Law* (Oxford: OUP 2002) 302, commenting on the position in the EU.



- maintenance of acquired benefits and the payment of benefits to residents, irrespective of the country to the agreement where they reside (“exportability” principle).

Various ILO Conventions require co-ordination on the part of State parties in order to guarantee migrant workers comprehensive and continuous protection on the basis of effective equality and reciprocity.<sup>160</sup>

As mentioned above, South Africa is not yet linked to multilateral and bilateral agreements on the co-ordination of social security. In fact, the absence of proper bi- or multilateral arrangements in this regard between South Africa and other states may cause South Africa to be in breach of its international obligations.<sup>161</sup>

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<sup>160</sup> Cf e.g. the Maintenance of Social Security Rights Convention (No 157 of 1982) and the supplementing Recommendation (No 167 of 1983).

<sup>161</sup> See art 3 of ILO Convention 2 of 1919, to which South Africa is a party (South Africa ratified the Convention 20 February 1924). It stipulates: "The Members of the International Labour Organisation which ratify this Convention and which have established systems of insurance against unemployment shall, upon terms being agreed between the Members concerned, make arrangements whereby workers belonging to one Member and working in the territory of another shall be admitted to the same rates of benefit of such insurance as those which obtain for the workers belonging to the latter."

## **PART B**

# **NON-CITIZENS AND SOCIAL SECURITY: INTERNATIONAL LAW SUMMARY**

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# **NON-CITIZENS AND SOCIAL SECURITY: INTERNATIONAL LAW SUMMARY**

### **10. EUROPEAN COUNTRIES: INTERNATIONAL AND EUROPEAN LAW CONTEXT:**

#### **THE IMPLICATION OF INTERNATIONAL AND EUROPEAN LAW FOR THE POSITION OF NON-CITIZEN IMMIGRANTS IN EUROPEAN COUNTRIES**

##### **10.1 Introduction**

The extent to which non-citizen migrant workers are given access to social security in Europe cannot be understood without taking into account the impact of international and European standards and the way these are interpreted and applied in the national legal orders. This is particularly the case for European Union law. On the basis of the EC Treaty, European law has supremacy over national law as well as direct effect. This means that EU Member States do not have to incorporate their European obligations into national legislation; these obligations are applicable in their own right. As a result, national legislation need not automatically reflect European requirements. The national legal provisions concerning access to social security may give a very distorted picture of the actual legal situations.

The consequences of European Union law for access to social security for non-citizens are extremely complex. This is caused by the fact that there are different “levels of interference” with this subject matter. The following levels can be identified:

- the level of the traditional provisions on freedom of movement of persons and the protection of social security rights, principally applying to EU-citizens only. Here almost all obstacles for access to social security have been removed; difficult border cases still remain, in particular as regards access to social assistance and other social advantages for persons who fall within the EU-concept of “worker” or their relatives.
- the level of so-called co-operation and association agreements which the EU has concluded with third states. Some of these agreements include provisions on the protection of social security rights for migrant workers from the respective third state. These so called “social clauses” have been given direct effect by the European Court of Justice (ECJ)
- the level of the EU migration law vis-à-vis third states. For decades the EU did not have any competence in this field, but since the treaty of Amsterdam (1996) a new Title has been included in the Treaty (Title IV) which allows the

community legislator to take measures in this field. The Commission has developed an ambitious legislative programme under this title which has so far been partially adopted by the Council. Both the new legislation (in particular regarding asylum seekers and permanently-resident third country nationals) and pending proposals contain certain standards on social security rights.

- the level of the fundamental European standards, as recently enshrined in the Union Charter on fundamental rights, adopted under the Treaty of Nice (2000) and made part of the recently adopted European Convention. This charter, too, contains provisions on the treatment of non-citizens in social security
- the jurisprudence of the ECJ. There are some general principles and standards on the treatment of non-citizen migrants in social security which can be deduced from the combined judgments and rulings.

There are also non-EU sources which must be taken into account. For the purposes of this contribution, the most important are:

- Council of Europe instruments, most notably the European Convention on social and medical assistance (1953), European Social Charter (1961, as revised), the European Code on social security (1964) and the revised Code, the European Convention on social security (1972), the European Convention on the legal status of migrant workers (1977), and last but not least the European Convention on human rights and fundamental freedoms (1950). The latter convention has become particularly important for our subject in view of recent jurisprudence of the European Court of Human Rights (ECRM).
- The international Conventions on the position of stateless persons (1954) and refugees (1951); both conventions contain obligations regarding access to social security; both conventions have been widely ratified.
- The UN-Conventions on civil and political rights and economic, social and cultural rights (1966).
- ILO-standards, in particular as adopted in Conventions nos. 118 (equal treatment in social security) and 157 (protection of social security rights for migrant workers).
- Bilateral social security agreements concluded by European states.

The sources referred to play a role in determining the legal position of non-citizen migrants in social security. These are taken into consideration in the legislative process or actively or less actively applied by national courts. Within the ambit of this contribution a comprehensive overview of the effect of each of the instruments cannot be given. Rather, a different approach has been adopted which takes into account the combined effect of the various international instruments and focuses on a number of selected issues which are relevant in the European context. The following issues will be dealt with:

- a brief description of the state of the law for EU-citizens
- access to social security for non-EU citizens
  - a. from the nationality test to the legal residence test

- b. the legal residence test and the right to social assistance
- c. the status of refugees and asylum seekers
- d. the position of illegal residents
- Summary

## **10.2 Access to social security for EU citizens**

EU-citizens enjoy full and equal protection in the field of social security and may under no circumstance be treated less favourably than national citizens. This is a consequence of the right of freedom of movement and the general non-discrimination rule which lies at the heart of the EC treaty and the meaning of which has been clarified both in secondary community legislation and the jurisprudence of the ECJ. The most important legal sources to be referred to are Regulation 1408/71 on the co-ordination of social security schemes, which applies to all statutory social insurance schemes and non-contributory benefits,<sup>162</sup> and the prohibition of discrimination in the field of social and fiscal advantages as embodied in art. 7(2) of Regulation 1612/68 on the freedom of movement of workers (especially relevant for social assistance).<sup>163</sup>

Full access to social security entails that entitlement to benefit or insurance may not be made subject to a nationality test or any other criterion which may be deemed indirectly discriminatory for non-nationals. Administrative requirements, such as the possession of proper residence cards, may also not be imposed; EU nationals derive their legality of residence directly from the EC Treaty. Recent jurisprudence has emphasized that even minimum periods of residence may not be imposed as a condition for entitlement to benefit. Thus in the *Collins*-case the ECJ ruled that the “habitual residence test” (which presupposes a longer duration of residence) in the British job seekers allowance scheme was potentially suspect as it may operate to the disadvantage of non-citizen migrant workers who enjoy the right of freedom of movement. Only in this particular case the test was deemed to be acceptable by reason of the fact that the claimant had not entered the UK as a worker, but as a person looking for employment. In this circumstance the requirement of habitual residence was considered proper in order to exclude those with no sufficient links with the British labour market.<sup>164</sup>

There are, however, still some exceptions to be taken into account. The state of the law in this respect has recently been codified by Regulation 2004/38/EC which will soon replace all previous legislation concerning the freedom of movement of persons. The situation is that no access to social assistance is guaranteed:

- a. during the first three months of stay
- b. for persons who have entered the country in order to look for employment, after a period of three months
- c. for persons whose legality of residence is dependent upon the condition that they have sufficient means of subsistence of their own, i.e. temporary

<sup>162</sup> This regulation will be replaced by Regulation 883/2004 (not yet entered into force)

<sup>163</sup> This regulation will be replaced by Directive 2004/38/EC (not yet entered into force)

<sup>164</sup> ECJ 23 March 2004, case C-138/02, *Brian Francis Collins v. Secretary for Work and Pensions*.

residents who do not qualify as (ex-)workers or self-employed persons, or members of their family and students.<sup>165</sup>

EU-nationals with permanent residence status (obtainable after five years of residence) enjoy unlimited access to social assistance.

Finally, a word about the personal scope of Regulation 1408/7, dealing with the protection of social security rights of migrants in relation to social insurance and non-contributory benefits (but excluding social assistance). As from July 2003 this Regulation also applies to non-EU citizens. As a result, non-EU citizens moving within the territory of the Union are treated the same as EU citizens. However, third country nationals who have migrated to one Member State without subsequently moving on to another member state are still outside the scope of the Regulation. In other words the Regulation only applies in an intra-community context.

### **10.3 Access to social security for non-EU citizens**

#### ***10.3.1 General assumptions: from citizenship to legal residence***

As is the case in South Africa in view of the *Khosa* judgment of the Constitutional Court, the single requirement of citizenship is not considered suitable for delimiting the scope of protected persons in social security in the European context. Obviously the nationality condition may not be imposed on EU nationals within the context of EU legislation, but also outside this context citizens tests are no longer considered permissible.

#### ***ECHR-jurisprudence***

The principle and most decisive indication for this was given on 16 September 1996 by the ECHR in the *Gaygusuz v. Austria* case.<sup>166</sup> The applicant in question was a Turkish national living in Austria. With some interruptions, he had worked in Austria from 1973 to 1984 when he became unemployed. On account of this he qualified for an unemployment benefit. After this benefit had expired he claimed emergency assistance at the *Arbeitsamt* in Linz. His claim was rejected on the sole ground that he did not have the Austrian nationality. After lengthy legal proceedings in Austria the case was brought before the Court of Human Rights. According to Mr Gaygusuz, the refusal to grant emergency assistance constituted a violation of the non-discrimination clause in Article 14 of the ECHR in conjunction with Article 1 of the First Protocol.

This was the first case where the Court had to rule on the meaning of the non-discrimination clause in Article 14 of the ECHR in relation to social security. The Court dealt with this issue in a decisive manner. The question of whether the entitlement to Austrian emergency assistance could be described as property within the meaning of the First Protocol was broached by an examination of the link between payment of contributions and entitlement to benefit. Such a link was found to exist in an indirect but sufficient manner. The emergency assistance benefit could only be granted after the

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<sup>165</sup> See Art. 24(2) of Directive 2004/38/EC.

<sup>166</sup> RJ&D 1996-IV, 14, 1129-1157.

entitlement to regular unemployment benefit, for which contributions had been paid, had expired.

As the Austrian emergency assistance benefit was thus brought under the scope of the First Protocol, it was subsequently examined whether this case constituted a violation of the non-discrimination clause laid down in Article 14 of the ECHR. Here the Court repeated the general principles developed in its judgments on the non-discrimination clause: unequal treatment constitutes a violation of Article 14 unless objective and reasonable justification can be provided. The contracting states enjoy a certain 'margin of appreciation' in assessing to what extent such justification can be accepted, but added that if nationality is the sole distinguishing factor, 'very weighty reasons' must be put forward to justify unequal treatment. The Court then established that Mr Gaygusuz had always stayed in Austria legally and had paid contributions and concluded that the grounds for justification put forward by the Austrian government could not stand the test of criticism. The disqualification from entitlement to emergency assistance was a violation of Article 14 of the ECHR.

The *Gaygusuz* case has left some doubt as to whether, from the perspective of the applicability of the first Protocol, the consequences of the judgment can be fully extended to social assistance schemes which are not based upon the payment of personal contributions. However, this doubt has recently been taken away in the *Poirrez*- case.<sup>167</sup> This case dealt with a refusal of the French authorities to grant a disabled, adopted child of Ivory Coast nationality a social assistance allowance for disabled person on grounds of his nationality. The ECHR was satisfied that – also in the absence of any contribution obligation – this allowance was a possession within the meaning of the first protocol and concluded that the refusal amounted to unjustified discrimination.

#### *The emergence of the legal residence requirement*

As the citizens test in social security is now clearly rejected, the question arises along the lines of which alternative criteria the delimitation of the scope of protected persons will develop. Recent international instruments as well as jurisprudence include clear indications that this is the criteria of *legal* residence. A number of indications are referred to:

- the ECJ-case in *Sürül*.<sup>168</sup> this case dealt with a Turkish woman who was entitled to stay in Germany on grounds of immigration law, but who was not in the possession of a regular residence permit. The Court ruled that under the association regime established between Turkey and the EU it is contrary to the principle of equal treatment to refuse family allowances to Turkish nationals who are – as such – *legally residing* in the territory of an EU member state.
- Both in the *Gaygusuz* en the *Poirrez* case, the ECHR referred explicitly to the fact that the claimants held legal residence in their host states.
- Newly adopted international instruments which offer equality of treatment and the right to social security often include explicit reference to legal

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<sup>167</sup> ECHR *Koa Poirrez v. France*, 30 September 2003

<sup>168</sup> ECJ 4 May 1999, case 262/96, ECR 1999, 1210.

residence. Thus, the new Euro-Mediterranean Association Agreement EC-Morocco signed in 1996 now limits equality of treatment in the field of social security to persons working and residing legally in the territories of the host countries.<sup>169</sup> A similar restriction has been formulated in the recently adopted Charter of Fundamental Rights of the European Union in Art. 34(2) dealing with the right to social security for migrants who move within the territory of Europe.<sup>170</sup>

The requirement of legal residence which emerges in the wider European context does not mean to say that in national legislation different criteria are established, based for example on employment or plain residence (in all its shapes and forms: such as presence, residence, ordinary residence). What it does mean, however, is that it is considered proper for European states to exclude non-citizens from their social security system on grounds of the fact that no proper residence title exists under immigration law. The Dutch social security system goes the furthest in this respect. Under the Linkage Act of 1998, illegal residents are systematically excluded from entitlement to benefit under public social protection schemes.

#### *The concept of “legal residence”*

What exactly is meant by legal residence? European law offers few indications as yet. It is clear that the concept is not confined to permanent legal residence as is the case in the South-African constitutional context (see the *Khosa* judgment). But where the boundaries do lie is not fully clear. For example, does it presuppose the possession of an ordinary residence permit, or is it sufficient that non-citizens can prove that there is some form of official authorisation of their stay in the host country by the immigration authorities? There are some indications in the jurisprudence of the ECJ, though, that persons who initially entered the country illegally may have difficulties in relying on the protection of European standards in subsequent phases.<sup>171</sup>

#### *Minimum periods of residence*

In older international instruments the equal treatment of non-citizen migrants in social security was often made subject to the possibility to adopt minimum periods of residence for a number of years in respect of certain branches of social security (e.g. family allowances) or types of benefits (non-contributory benefits). This approach was adopted in the Interim Agreements on social security of the Council of Europe and ILO Convention no. 118, for example. However, in the modern approach the imposition of minimum periods of insurance seems to be overruled by the legal residence test. A clear indication of this is offered by the EC Commission proposal for a directive concerning labour immigration of third country nationals.<sup>172</sup> This proposal prescribes full equal treatment in the field of social security for immigrants who enter the Union on the basis

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<sup>169</sup> Art. 66 of the Agreement reads: “The provisions of this Chapter shall not apply to nationals of the parties residing or working illegally in the territory of their host countries”. See OJ EC 2000, L 70/16.

<sup>170</sup> Art. 34(2) of the Charter: “Everyone residing and moving legally within the European Union is entitled to social security benefits, and social advantages in accordance with Community law and practices”.

<sup>171</sup> See for example the analogy with the ruling of the ECJ in the *Akrich*-case, PM.

<sup>172</sup> COM (2001) 380 def.



of the directive, without any minimum-residence requirement. On the other hand, the directive does impose such a requirement for access to vocational training (one year) and public housing (three years).<sup>173</sup>

### ***10.3.2 The legal residence test and the right to social assistance***

On the basis of the foregoing one may be tempted to conclude that in Europe non-citizen migrants with temporary resident status enjoy full access to social assistance. This conclusion is incorrect. This is a result of the *reciprocal link* that is established between immigration law and social assistance law. On the one hand, temporary residents are admitted on the condition that they have sufficient means of subsistence and do not become a burden on public funds. On the other hand, entitlement to social assistance is reserved for those who reside legally in the country. The effect of this state of the law is simply that temporary residents with insufficient means who claim social assistance run the risk of losing their residence status, which in turn excludes them from the right to social assistance payments.

The effects of the state of the law as described here are only mitigated to some extent by the European Convention on social and medical assistance (1953). On the basis of this convention legally residing persons may not be excluded from the right to social assistance. Legal residence is thereby considered to become illegal only as from the date of a deportation order, unless stay of execution is granted. Furthermore, non-citizens may not be repatriated on the sole ground that they enjoy social assistance, unless they:

- have resided in the host country on a continuous basis for less than five years (for those who arrived before the age of 55; for elderly immigrants a 10-year period of residence applies)
- are in a fit state of health to be transported
- do not have close ties to the host state.

Reference should be made to the recently adopted EU directive on the status of permanent residents from third countries (Directive 2003/109/EC). This directive harmonises the conditions under which non-EU nationals should be granted permanent resident status. The right to a permanent resident status will exist after five years of continuous and legal residence and on the condition that the immigrant can prove that he has regular income which is sufficient to maintain himself and his family without having to rely on social assistance. Once a permanent status is granted, however, it cannot be withdrawn on grounds of insufficient means, and full access to social security, including social assistance, is guaranteed.

### ***10.3.3 The position of refugees and asylum seekers***

Both the stateless persons (1954) and the refugees (1951) convention include provisions on the equality of treatment in the area of social security and social assistance for those who are legally resident.<sup>174</sup> The consensus of opinion in European states seems to be that

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<sup>173</sup> See Art. 11 of the proposal.

<sup>174</sup> cf. Articles 23 and 24 of both Conventions.

these (and many other) provisions of the Conventions can only be invoked once the national authorities have given a positive decision on the request for admission.<sup>175</sup> This is the crucial element which separates refugees and asylum seekers: the former are "in" while the latter are "out".

The social protection of asylum seekers in European countries is a story of its own. Throughout the 1980s and 1990s the growth of restrictive measures regarding the reception of asylum seekers went hand in hand with steps to exclude these persons from the regular social security schemes.<sup>176</sup> Initially, in many countries asylum seekers were still covered by the national social assistance schemes, but gradually, separate schemes have been set up, which provide alternative and often very minimal forms of care: benefits in kind, vouchers, pocket money, or in some cases no care at all. The exclusion from social security is often linked to all sorts of other restrictions with regard to the choice of housing and work. Some countries impose a time limit on exclusionary measures. In Belgium this limit is short (only three months), in Germany it is three years or longer. In other countries such limits simply do not exist. Restrictive measures for asylum seekers have been purposefully introduced in order to avoid integration in the society. Furthermore, in the eyes of the governments these measures make the respective countries less attractive for the asylum seekers to apply for refugee status.

A major European instrument has only recently been developed which contains minimum standards for the reception of asylum seekers. On the 27<sup>th</sup> of January 2003 Directive 2003/9/EC was adopted which provides for minimum care conditions in a wide range of areas concerning sufficient material care for a decent standard of living, such as freedom of movement within the national territories, the unity of the family, education for minors, the duration of the period for access to employment, vocational training, medical care, housing, etc. The new regulation is a very important landmark as it is the first instrument which should be able to stop the race to the bottom with respect to reception conditions for asylum seekers, which has taken place in recent history.

#### ***10.3.4 Illegal immigrants***

Of all the groups of non-citizen migrants, illegal citizens are definitely at the bottom of the ladder. They live on the dark side of international and European standards and the modern "legal residence approach" referred to above. Rigid exclusions applying to illegal immigrants also exist in national law. In some countries access to social assistance is fully denied, while other countries only recognise reduced entitlement to certain forms of minimal aid.<sup>177</sup> In practice, this state of affairs often means that local communities or charitable institutions take over the role of providing some form of care and protection. As mentioned above, the exclusion of illegal immigrants goes the furthest in the

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<sup>175</sup> Cf. G.J. Vonk, *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap*, 1991, 227-232, with reference to national jurisprudence and literature.

<sup>176</sup> For an overview see Roland Bank, "Europeanising the reception of asylum seekers: the opposite of welfare state policies" in: *Immigration and welfare, challenging the borders of the welfare state*, Micheal Bommers and Andrew Geddes, London/New York, 2000, 148-169.

<sup>177</sup> For the state of the law in Belgium, Britain, Germany and the Netherlands, cf. extensively G.J. Vonk, *De coördinatie van bestaansminimumuitkeringen in de Europese Gemeenschap*, 1991.

Netherlands, where, as a consequence of the Linkage Act of 1998, this category is now fully excluded from all public services, including social insurance benefits.

There is little that international standards can do in order to improve the plight of illegal residents. Some rulings by local courts have been reported in which an obligation to provide forms of relief was assumed to exist on the basis of international socio-economic rights, such as those adopted in the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966), but this approach appears to be very exceptional in European countries.

Nonetheless, there are some indications that the European countries are at least willing to put the problem of social rights for illegal immigrants on the agenda. An important initiative has been taken this year by the Council of Europe which recently adopted a report prepared by Prof. Schoukens and Prof. Pieters on access to social protection for illegal labour immigrants.<sup>178</sup> This report does not contain any concrete proposals but it does offer a conceptual framework relating to which type of social protection should be granted and how to distinguish between different circumstances and categories of persons.

#### **10.4 Summary**

The impact of international and European law on the position of non-citizen migrants in European countries can be summarised as follows:

- EU nationals enjoy full access to social security, including social assistance, albeit that no right to social assistance is guaranteed:
  - a. during the first three months of stay
  - b. for persons who have entered the country in order to look for employment, after a period of three months
  - c. for persons whose legality of residence is dependant upon the condition that they have sufficient means of subsistence of their own, i.e. temporary residents who do not qualify as (ex-)workers or self-employed persons, or members of their family and students
- non-EU citizens may not be excluded from social security on the basis of their nationality
- non-EU citizens may be excluded from social security when they are not legally resident
- *de facto*, the right to social assistance for non-EU citizens is severely limited during the first five years of their stay. After five years, non-EU citizens can obtain a permanent resident status which allows full access to social security, including social assistance.
- refugees are fully protected by the system, asylum seekers are not. Recent European standards have been introduced on the quality of the social protection for asylum seekers.
- illegal immigrants are mostly outside the system and cannot effectively rely on international protective standards.

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<sup>178</sup> Exploratory Report on the access of social protection for illegal labour immigrants, PM.

## **11. SOUTH AFRICA: INTERNATIONAL LAW, FOREIGN LAW AND SADC PERSPECTIVES**

### **11.1 Impact of international law and foreign law on the position of non-citizens in South African social security**

#### ***11.1.1 Introduction***

International law instruments are influential in the development of a legal framework of social security for non-citizens. Firstly, section 39(1)(b) of the Constitution of the Republic of South Africa<sup>179</sup> compels a court, tribunal or forum, when interpreting the Bill of Rights, to consider international law. This is important when a court has to give meaning and effect to the constitutional right to access to social security and to appropriate social assistance.<sup>180</sup> This “international-law friendly” approach has been followed in several constitutional and other court cases,<sup>181</sup> and is also in accordance with the requirements of the Constitution. Section 233 of the Constitution provides that “... when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”<sup>182</sup> In *S v Makwanyane and Another*,<sup>183</sup> the Constitutional Court stated that non-binding international law, as well as binding international law, must be taken into consideration.

Also the general limitation clause (section 36) itself imports an international and comparative law friendliness in its requirement that a right “may be limited ... to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” It is, therefore, no wonder that the courts have not hesitated to invoke the provisions of international instruments when interpreting fundamental rights, including those rights which have a socio-economic character. However, as stated by the Constitutional Court in the *Grootboom* judgment:<sup>184</sup> “The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the

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<sup>179</sup> 108 of 1996.

<sup>180</sup> S 27(1)(c) of the Constitution.

<sup>181</sup> The following constitutional cases are some examples where the South African Constitutional Court considered binding as well as non-binding international law when interpreting the Bill of Rights: *S v Williams* 1995 3 SA 632 (CC); *Ferreira v Levin NO* 1996 1 SA 984 (CC); *S v Rens* 1996 1 SA 1218 (CC); *Coetzee v Government of South Africa* 1995 4 SA 631 (CC); *Bernstein v Bester* 1996 2 SA 751 (CC); *In re Gauteng School Education Bill 1995* 1996 3 SA 165 (CC); *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) par 26.

<sup>182</sup> For a recent application of this principle, see *NUMSA & others v Bader Bop (Pty) Ltd & another* 2003 2 BCLR 182 (CC).

<sup>183</sup> 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC) par 35 – as referred to in the case of *Grootboom*.

<sup>184</sup> *In re Gauteng School Education Bill 1995* 1996 3 SA 165 (CC); *The Government of the Republic of South Africa and Others v Grootboom and Others* 2000 11 BCLR 1169 (CC) par 26.

relevant principle of international law binds South Africa, it may be directly applicable."<sup>185</sup>

Secondly, South Africa has ratified some international agreements and is in the process of ratifying others. Agreements which may be relevant in the area of social security for non-citizens include the Convention on the Rights of the Child and the various refugee conventions ratified by South Africa. Section 231 of the Constitution deals with international agreements or treaties. In order for an international agreement to become law in the Republic, it must be signed by the national executive, approved by parliament (ratified) and enacted into law by national legislation (transformed). Certain exceptions are, however, mentioned in the section. An agreement which has been signed and ratified, but not yet transformed, remains binding on South Africa within the international arena. In those instances where South Africa is not legally-bound by obligations under a treaty, section 39(1)(b) of the *Constitution* – as mentioned above – will still apply.<sup>186</sup>

In addition to the above, foreign law may also be considered.<sup>187</sup> Systems which provide for the constitutional entrenchment of fundamental rights therefore are highly relevant for the South African context – in particular the body of law developed by courts which function in those systems. However, it should be noted that the South African courts and other institutions have to interpret the South African Constitution and are not obliged to follow foreign law when interpreting the Bill of Rights.<sup>188</sup> This is in particular true when reviewing the constitutionality of the exclusion of categories of non-citizens from South African social security. In the *Khosa* case the Constitutional Court refused to follow the approach adopted by the United States appellate court,<sup>189</sup> which held that *rationality* is the applicable test for reviewing whether the statutory exclusion of permanent residents from a particular social security scheme constituted an infringement of the equal protection clause of the US Constitution. Instead, so the Court held in *Khosa*, the relevant test under the South African Constitution is much stricter, since it requires that the *reasonableness* of the exclusion must be evaluated.<sup>190</sup> Furthermore, regarding the allegation that citizenship is a requirement for social benefits in "almost all developed countries", the Court had this to say: "That may be so in respect of certain benefits. But unlike ours, those countries do not have constitutions that entitle 'everyone' to have access to social security, nor are their immigration and welfare laws necessarily the same as ours."<sup>191</sup>

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<sup>185</sup> See also *Prince v The President of the Law Society, Cape of Good Hope* 1998 8 BCLR 976 (C) 984-986, 988-989.

<sup>186</sup> See the cases referred to in footnote 179 above. It is important to note that in the *Grootboom* case, the Court expressed concern about the difficulty of determining the core content of socio-economic rights.

<sup>187</sup> S 39(1)(c).

<sup>188</sup> See *Shabalala v Attorney General, Transvaal; Gumede v Attorney-General, Transvaal* 1995 (1) SA 608 (T) at 628D-E; 1994 (6) BCLR 85 (T); *S v Makwanyane* 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) par 37, 39).

<sup>189</sup> *City of Chicago v Shalala* 189 F 3d 598 (7th Cir 1999).

<sup>190</sup> *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) 595H-586C.

<sup>191</sup> 592D.

### ***11.1.2 Exclusion of non-citizens from South African social security***

In the judgment of the Constitutional Court in *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others*<sup>192</sup> the Court held that non-citizens are included in the constitutional entitlement of "everyone" to access to social security and appropriate social assistance.<sup>193</sup> Their exclusion from the social security system must therefore pass the constitutional test of *reasonableness*.<sup>194</sup> As indicated above, but subject to the qualifications mentioned, the consideration of international law and of foreign law may be of assistance in this regard.

#### **11.1.2.1 Non-citizen children**

It would appear that some of the statutory exclusions found in our social security system are contrary to the treaty obligations to which South Africa is bound. This applies in particular to the position of non-citizen children and refugees. As far as non-citizen children are concerned, the position is that their exclusion from certain child grants flies in the face of the non-discrimination clause of the International Convention on the Rights of the Child.<sup>195</sup> Given the particular vulnerable position of children, in particular impoverished children, and the constitutional focus on the protection of children,<sup>196</sup> also for purposes of social security,<sup>197</sup> it is doubtful whether the exclusion of children to forms of social assistance will pass constitutional muster. Of significance in this regard is the following finding made by the Constitutional Court in the *Khosa* case, with reference to the provision in the relevant legislation which allowed children to be excluded from the social assistance grant system if the applicant does not meet the citizenship test:

"The respondents did not seek to support these provisions, which discriminate against children on the grounds of their parents' nationality. It was therefore conceded that citizenship is an irrelevant consideration in assessing the needs of the children concerned. Moreover, the denial of support in such circumstances to children in need trenches upon their rights under section 28(1)(c) of the Constitution."<sup>198</sup>

The exclusion of non-citizen children – in particular children whose residence is lawful – also from social assistance, is also not supported by the evidence from the countries investigated for purposes of this research.<sup>199</sup>

#### **11.1.2.2 Refugees**

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<sup>192</sup> 2004 (6) BCLR 569 (CC).

<sup>193</sup> 590D.

<sup>194</sup> See above.

<sup>195</sup> See art 2(1) of the Convention on the Rights of the Child, which has been signed and ratified by South Africa.

<sup>196</sup> See s 28 of the Constitution.

<sup>197</sup> Cf the *Khosa* case 600B-C.

<sup>198</sup> *Ibid.*

<sup>199</sup> See the summarised matrix in Part D below.

The Refugees Act<sup>200</sup> places a general prohibition on the refusal of entry, expulsion, extradition or return of refugees to another country if the aforementioned acts will result in them being persecuted or in their lives, physical safety and freedom being threatened.<sup>201</sup> The significance of this is that, in principle, refugees enjoy full legal protection, which includes the enjoyment of the fundamental rights set out in chapter 2 of the Constitution.<sup>202</sup> Concomitant to this is that refugees qualify for the constitutionally entrenched right to access to social security and appropriate social assistance, as well as the other socio-economic rights in terms of section 27 of the Constitution. Note should also be taken here of the relevant international conventions dealing with the position of refugees. For example, the 1951 UN Convention Relating to the Status of Refugees specifically obliges state-parties to grant refugees either the same treatment accorded to nationals of that state or, as a minimum, “the most favourable treatment accorded to nationals of a foreign country in the same circumstances”, in respect of a variety of different rights.<sup>203</sup> South Africa has ratified this Convention<sup>204</sup> and is, therefore, constitutionally bound to comply with its provisions.<sup>205</sup> As mentioned above, these provisions have to be taken into account when the right to access to social security and appropriate social assistance, as well as the other social security-related fundamental rights, are interpreted.<sup>206</sup>

From a statutory perspective, as was noted earlier in the South African country report, there appears to be a conflict between the intention of the Refugees Act with regard to the entitlement to social security and appropriate social assistance, on the one hand, and the particular provision of the Social Assistance Act,<sup>207</sup> which does not draw a distinction between refugees and other categories of non-citizens as far as their exclusion from social assistance is concerned, on the other hand.<sup>208</sup>

From a comparative perspective, it is clear that in almost all the systems discussed elsewhere in this Report,<sup>209</sup> refugees enjoy full protection as regards both social insurance and social assistance benefits. The foreign law evidence therefore suggests that the exclusion of refugees from South African social security is clearly out of step with the position in other comparable and constitutional systems.

It is, therefore, from a South African constitutional perspective, and bearing in mind the international and foreign law regulation and evidence, difficult to see how the present exclusion of refugees from in particular social assistance will withstand a constitutional

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<sup>200</sup> Act 130 of 1998. See now also ss 2(1)(l), 23 and 27(d) of the Immigration Act 13 of 2002, as well as Part A par 9.2.4 and par 9.2.5 above (South African country report).

<sup>201</sup> S 2(a) and (b) of the Act.

<sup>202</sup> S 27(b) of the Act.

<sup>203</sup> See arts 3, 16, 22, 23 and 24.

<sup>204</sup> South Africa acceded on 12 Jan 1996. It also acceded to the UN Protocol Relating to the Status of Refugees of 1967 on 12 Jan 1996.

<sup>205</sup> See ss 231–233 of the Constitution.

<sup>206</sup> S 39(1)(b) of the Constitution.

<sup>207</sup> 13 of 2004.

<sup>208</sup> See Part A par 9.2.1 above.

<sup>209</sup> See the various country reports in Part A above, as well as the summarised matrix in Part D below.

challenge. In addition, considerations of human dignity and the extremely vulnerable position of non-refugees (which is one of the constitutional considerations to be taken into account in any constitutional discrimination enquiry),<sup>210</sup> militate against their continued exclusion.

It should be added that while almost all the countries investigated for purposes of this Report extend their social security protection to refugees, a lower threshold or level of support may be adopted, on the basis of the 1951 UN Convention Relating to the Status of Refugees. This level of support would, however, have to pass constitutional muster, with reference to the reasonableness of the measures adopted to support refugees – also as regards social assistance.

#### 11.1.2.3 Temporary residents

In the *Khosa* case the Constitutional Court accepted that a distinction could be drawn between permanent residents and temporary residents, as regards the legislative scheme pertaining to social assistance. This flows from the tenuous link which temporary residents have with this country.<sup>211</sup> It has to be indicated, in addition, that in several of the jurisdictions investigated for purposes of this Report, temporary residents are only allowed entry if they comply with a means of subsistence test; in other cases they may qualify for social assistance support after a period of residence in the country concerned.<sup>212</sup>

As far as social insurance is concerned, one would expect that temporary residents who are entitled to work in South Africa, should be able to participate in the various social security schemes on a basis comparable to South African citizens. This appears to be the case in all the countries investigated for purposes of this Report.<sup>213</sup>

#### 11.1.2.4 Illegal/undocumented non-citizens

From a social security point of view, this does not mean that all categories of non-citizen migrants would have to be treated alike. It may be that non-citizens who are *illegally* in the country may be treated differently from lawful residents and citizens. This also appears to be the case in most other jurisdictions, as is evident from the country reports discussed elsewhere in this Report.<sup>214</sup> Illegal/undocumented non-citizens are not entitled to mainstream social insurance and social assistance benefits,<sup>215</sup> but may be entitled to and/or receiving other forms of support outside the regular social security system.<sup>216</sup>

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<sup>210</sup> See, amongst others, the *Grootboom* and the *Khosa* Constitutional Court judgments in this regard.

<sup>211</sup> Cf the *Khosa* case 593E-H.

<sup>212</sup> See the various country reports in Part A above, as well as the summarised matrix in Part D below.

<sup>213</sup> See the various country reports in Part A above, as well as the summarised matrix in Part D below.

<sup>214</sup> See the various country reports in Part A above, as well as the summarised matrix in Part D below.

<sup>215</sup> Except for Germany – see the German country report in Part A above.

<sup>216</sup> As is the case in Australia and the Netherlands – see Part A above, and the summarised matrix in Part D below.



In the South African context, however, it has to be noted that the *White Paper on International Migration*<sup>217</sup> has recognised that there is no constitutional basis for excluding the application of the Bill of Rights,<sup>218</sup> *in toto*, based on the status of a person in South Africa – including illegal immigrants.<sup>219</sup> One could, therefore, conclude that even illegal non-citizens may constitutionally be entitled to core social assistance.<sup>220</sup>

## **11.2 Impact of the SADC framework on the position of non-citizens in South African social security**<sup>221</sup>

### ***11.2.1 Introduction***

Southern African Development Community (SADC) objectives as set out in the founding Treaty aim at the promotion of economic and social development, the establishment of common ideals and institutions, among other objectives.<sup>222</sup> While SADC is, unlike the European Union, not a supra-national institution, but a regional organisation, its emphasis has shifted decisively from "development coordination" to developmental, economic<sup>223</sup> and regional<sup>224</sup> integration". The Treaty, as is the case with its antecedent Protocols,<sup>225</sup> is a legally binding document providing an all-encompassing framework, by which countries of the region shall co-ordinate, harmonise and rationalise their policies and strategies for sustainable development in all areas of human endeavour. The Treaty commits Member States to fundamental principles of sovereign equality of members, solidarity, peace and security, human rights, democracy and rule of law, equity, balance and mutual benefit.<sup>226</sup> According to article 5 of the Treaty, some of SADC's objectives are to achieve development and economic growth, *alleviate poverty*, enhance the quality of life of the peoples of Southern Africa and *support the socially disadvantaged through regional integration*.<sup>227</sup> "Human resources development" and "social welfare" are specifically mentioned as areas on which SADC member states agreed to co-operate with a view to foster regional development and integration, and in respect of which the member states undertook, through appropriate institutions of SADC, to coordinate,

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<sup>217</sup> GN 529 in GG 19920 of 1 April 1999.

<sup>218</sup> Ch 2 of the Constitution.

<sup>219</sup> *White Paper on International Migration* par 2.2–2.4.

<sup>220</sup> Which does not necessarily imply monetary support, as long as basic amenities are made available.

<sup>221</sup> See also Olivier, M & Kalula, ER "Regional social security" in Olivier, M *et al Social Security: A Legal Analysis* (Butterworths/Lexis Nexis 2003) Ch 22.

<sup>222</sup> See generally art 5.

<sup>223</sup> The Preamble of the Treaty emphasises the importance of economic interdependence and integration, while SADC is defined as "the organisation for economic integration established by art 2 of the Treaty" (see art 1).

<sup>224</sup> See art 5(1)(a)). The Preamble also refers to the "need to mobilise our own and international resources to promote the implementation of national, interstate and regional policies, programmes and projects within the framework for economic integration".

<sup>225</sup> The definition of "Protocol" in art 1 of the Treaty refers to a Protocol as an instrument of implementation of the Treaty, having the same legal force as the Treaty.

<sup>226</sup> Art 4.

<sup>227</sup> Emphasis added.

rationalise and harmonise their overall macro-economic and sectoral policies and strategies, programmes and projects.<sup>228</sup>

### *11.2.2 Relevant regional instruments and responses*

In foundational instruments of SADC there are several indications pointing towards the creation of a special regime of SADC-wide social security coverage for citizens of the different member states. Recalling the above objectives of the SADC Treaty, the Charter of Fundamental Social Rights in SADC ("Social Charter") imposes on SADC member states the obligation<sup>229</sup> to create an enabling environment so that every worker in the region shall have a right to adequate social protection.<sup>230</sup> Persons who have been unable to either enter or re-enter the labour market and have no means of subsistence shall be entitled to receive sufficient resources and social assistance.<sup>231</sup> No distinction is drawn between citizens and non-citizens. Such a distinction is also not contemplated, given the Treaty emphasis on regional integration<sup>232</sup> and Charter focus on harmonisation of social security schemes.<sup>233</sup>

Even more explicit are the provisions of the draft Code on Social Security in the SADC, which encourage member states to ensure that all lawfully employed immigrants<sup>234</sup> are protected through the promotion of certain core principles.<sup>235</sup> In terms of two of these principles migrant workers should, firstly, be able to participate in the social security schemes of the host country<sup>236</sup> and, secondly, enjoy equal treatment alongside citizens within the social security system of the host country.<sup>237</sup> Member states are further encouraged to introduce, by way of national legislation and bi- or multilateral arrangements, cross-border co-ordination principles – such as maintenance of acquired rights, aggregation of insurance periods, and exportability of benefits.<sup>238</sup>

The draft Code further suggests that illegal residents and undocumented migrants should be provided with basic minimum protection and should enjoy coverage according to the laws of the host country.<sup>239</sup> As regards refugees it stipulates that social protection

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<sup>228</sup> Art 21.

<sup>229</sup> Art 3.2 requires of member states to observe the basic rights referred to in the Charter

<sup>230</sup> Art 10.1.

<sup>231</sup> Art 10.2.

<sup>232</sup> See art 5(1)(a) of the Treaty.

<sup>233</sup> Cf art 2(e) of the Charter.

<sup>234</sup> As well as self-employed migrant workers – cl 17.2(f).

<sup>235</sup> Cl 17 of the Draft Code.

<sup>236</sup> Cl 17.2(a).

<sup>237</sup> Cl 17.2(b).

<sup>238</sup> Cl 17.2(d) & (e). This is also made clear as far as pension arrangements in the region are concerned. According to cl 10.5: "Member States should aim at achieving equality of access, as well as the maintenance and aggregation of social security contributions and benefits and the aggregation of insurance periods on a cross-country basis among Member States, through national laws and bilateral and other arrangements."

<sup>239</sup> Cl 17.3.

extended to them should be in accordance with the provisions of international and regional instruments.<sup>240</sup>

While the Code, unlike the provisions of the Charter,<sup>241</sup> does not attempt to lay down binding norms,<sup>242</sup> there is a clear tendency in both these documents to create a regime within SADC which ensures minimum levels of social protection on the basis of equality, regardless of, amongst others, citizenship.

### *11.2.3 Implications for South Africa*

In its recent report submitted to Cabinet, the *Committee of Inquiry into a Comprehensive System of Social Security for South Africa*,<sup>243</sup> noted that the growing interdependence in the region, and the more extensive migration of the region's workforce and residents, suggests the need for a common response. The Committee also noted that provisions in South African social assistance and in some social insurance laws distinguish between nationals and non-nationals. It is, therefore, necessary, firstly, to consider these distinctions between South African citizens and citizens of other SADC member states.<sup>244</sup> Secondly, the Committee suggested, it is necessary:

"... to develop a common framework and charter on social protection and to ensure a consistent approach is implemented. Thirdly, it will be necessary for South Africa as a SADC member state to engage actively in promoting the social protection dimension of SADC integration and interdependence. Fourthly, active involvement in developing acceptable baseline standards in the area of social protection for the region is required. These standards should be implemented with reference to the particular socio-economic status of each of the member countries, as suggested above. Finally, it will be necessary for South Africa to adopt measures aimed at co-ordinating its social security system with those of the other SADC member states. This can be done either bilaterally and/or (preferably) multilaterally."<sup>245</sup>

It is suggested that the development of policy concerning the status of non-citizens in South African social security should heed these sentiments and the provisions and intentions of the regional instruments referred to above. This implies that the said policy – as well as the legal – framework should develop minimum levels of social protection for different categories of beneficiaries, on the basis of equality within SADC, and (at

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<sup>240</sup> CI 17.4.

<sup>241</sup> In terms of art 3.2 of the Charter member states are required to observe the basic rights contained in the Charter, while art 17 stipulates that the Charter enters into force upon signature by the member states. The Charter is already in force – the SADC heads of state and government signed the document in August 2003.

<sup>242</sup> CI 3 describes the purposes of the Code to be: firstly, to provide Member States with strategic direction and guidelines in the development and improvement of social security schemes, in order to enhance the welfare of the people of the SADC region (cl 3.1); secondly, to provide SADC and Member States with a set of general principles and minimum standards of social protection, as well as a framework for monitoring at national and regional levels (cl 3.2); and, thirdly, to provide SADC and Member States with an effective instrument for the coordination, convergence and harmonisation of social security systems in the region (cl 3.3).

<sup>243</sup> *Transforming the Present – Protecting the Future (Draft Consolidated Report)* (March 2002) 151.

<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

least as far as social insurance coverage is concerned) with reference to cross-border coordination arrangements, to be adopted by way of national legislation and bi- and/or multilateral agreements.

**PART C**  
**CONCLUSION**

# PART C

## CONCLUSION

### 12. FINDINGS

#### 12.1 General observations

We can conclude from the research that the exclusion of non-citizens *in toto* from the social security system, is no longer acceptable in any of the countries which operate in a comparable constitutional context as the one that exists in South Africa. The notion of lawful residence has largely replaced the previous situation in which countries imposed nationality conditions, or the requirement of reciprocity with other countries. This applies particularly in relation to social assistance schemes. With regard to social insurance schemes the situation is more varied. Some countries, as for example the Netherlands, exclude unlawful immigrants from affiliation, in other countries affiliation to social insurance schemes depends *prima facie* on a valid labour contract.

With the introduction of the lawful residence criterion a link between entitlement to benefit and immigration law has been established. It is important to point out that this link is of a *reciprocal nature*, i.e. on the one hand residence status under immigration law is subject to the requirement that an immigrant has sufficient means of subsistence of his own (without relying on public funds), on the other hand access to benefits depends on the immigration status. The prevailing situation, recently codified in directives and regulations of the European Union, is that temporary residence status is subject to the means of subsistence test, whereas permanent residence status is not, at least not once the permanent residence status has been granted.

From a *policy perspective* the link between immigration law and social assistance implies that considerations of immigration policy have priority over social policy considerations. It is immigration law which dictates the question of whether a non-citizen can claim benefit rights. Under this law the immigration rules are drawn up so as to prevent needy persons from developing such close links with the host state that they can become a burden on the welfare state for longer periods of time. In this way the social security system is less likely to operate as a “pull factor” for immigrants who are considered to be unwelcome.

From a *legal perspective* the priority of immigration law over social security law acts as the primary ground of justification for excluding non-citizens from social security on the basis of the lawful residence test. This exclusion is considered to be a logical and necessary consequence of the state of immigration law, which imposes by its very nature restrictive conditions on non-citizens. Obviously, the more immigration law systematically imposes a means of subsistence test, the more convincingly can the exclusion of non-citizens on grounds of their immigration status be argued.

The right of lawfully residing immigrants to social security does not infer that separate entitlements to benefit have to be created for this group. It simply means that lawful residents cannot be treated less favorably than national citizens who are otherwise in comparable circumstances. This is the consequence of applying the non-discrimination principle.

The inclusion of lawful residents in the system goes hand in hand with the exclusion of unlawful residents. The main categories to be considered here are asylum seekers (refugees who have not yet been officially admitted as such) and illegal and undocumented immigrants. Most of the countries that were studied, accept minimum responsibility for the support of asylum seekers, mostly provided outside the “regular social security system”. For illegal and undocumented immigrants some states do not accept any responsibility at all. In practice, in these states illegal immigrants often rely on illegal work, informal support systems and NGO’s and unofficial forms of relief, provided by the local government.

## **12.2 Conclusions for the South African situation**

There are several conclusions which can be drawn for the South African situation.

- (k) The *Khosa* judgment is not entirely out of step with the situation which exists in other constitutional democracies.
- (l) At first sight the special position which the Constitutional Court has prescribed for *permanent* lawful residents seems to be less generous than the situation in other countries. However, it must be taken into account that – although other countries accept the wider concept of lawful residence – access to social assistance for *non-permanent residents* may be severely limited due to the means of subsistence test in immigration law.
- (m) Due to the obligations which arise under the International Convention on the Status of Refugees (1951), formally recognised *refugees* have access to social security. This is accepted in all the countries which have been studied where the issue is regulated. Even though a lower threshold could be developed, in accordance with the position in the studied jurisdictions refugees should be included in the personal scope of protection of all South African social assistance grants and social insurance schemes.
- (n) *Asylum-seekers* (i.e. those whose refugee status has not yet been confirmed by the authorities) presently enjoy no formal social assistance support in South Africa. The experience in some of the studied jurisdictions, whereby other forms of support outside the regular social security system may be available, could serve as a basis for further developing the South African policy and legal framework.
- (o) Unlike many developed countries, South Africa does not have a comprehensive social assistance system which provides a general safety net. Instead, the social assistance scheme is of a categorical nature. From the point of view of government policy, the positive consequence of this is that the "able bodied"

- refugees and permanent immigrants cannot easily become a burden on the system, simply because they do not qualify for grants on other grounds.
- (p) South African immigration law does not employ the means of subsistence test in the same systematic way as immigration law in other developed countries. Although some conditions have been formulated which serve to guarantee that only those who can maintain themselves or are sufficiently supported are given residence permits (both temporary and permanent), it is not entirely clear that a temporary permit can be withdrawn on the grounds that a person relies on social assistance. The consequence is that the exclusion of immigrants without permanent residence status from social assistance may be vulnerable to challenges before South African courts, despite the distinction drawn in the *Khosa* case between permanent and temporary residents. Already as regards the position of permanent residents the Court in *Khosa* made it clear that if a mistake is made in terms of granting a person permanent residence status under the immigration policies, in the sense that the permanent resident later becomes a burden to the State, that may be a "cost we have to pay for the constitutional commitment to developing a caring society, and granting access to socio-economic rights to all who make their homes here."<sup>246</sup>
  - (q) The exclusion of *non-citizen children* – in particular children whose residence is lawful – also from social assistance, is not supported by the evidence from the countries investigated for purposes of this research, and appears to be in conflict with South Africa's international obligations and constitutional requirements.
  - (r) While *illegal/undocumented non-citizens* are generally not entitled to mainstream social insurance and social assistance benefits, one may conclude, given the particular constitutional dispensation obtaining in South Africa, that even illegal or undocumented non-citizens may constitutionally be entitled to core forms of assistance. Also in some of the other studied jurisdictions they may be entitled to and/or receiving other forms of support outside the regular social security system.
  - (s) A distinction need to be drawn between cases where the exclusion of certain categories of non-citizens amounts to an unjustifiable form of discrimination (as appears to be the case with refugees and non-citizen children), and the case where the immigration and social protection policy and legal frameworks have to develop further to progressively become more inclusive. In the former case, the likelihood of a constitutional challenge would require immediate remedial steps to be taken.
  - (t) At the level of SADC (e.g., citizens of SADC member states who work lawfully in South Africa), it is clear that the present social security policy and legal framework in South Africa does not give effect to notions of regional integration, and the development of minimum levels of social protection for different categories of beneficiaries, on the basis of equality within SADC (i.e. without distinguishing between citizens and non-citizens).
  - (u) Also, South Africa has not yet utilised in any significant sense of the word the possible range of cross-border co-ordination arrangements, to be adopted by way of national legislation and bi- and/or multilateral agreements, which would regulate the position of citizens migrating within the SADC region (at least as far

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<sup>246</sup> *Khosa* judgment 595E-F.



as social insurance is concerned). It is suggested that pure reciprocal arrangements, such as the one contained in the Social Assistance Act 13 of 2004, are insufficient to deal effectively with the position of migrating citizens of member states.

### **13. RECOMMENDATIONS**

On the basis of the foregoing, the following recommendations are suggested:

- (h) In the short term, the personal scope of application of the social assistance grants should be extended to non-citizens with *permanent lawful residence status* and *officially recognised refugees*. This will require that the provisions of the Social Assistance Act 13 of 2004 and its Regulations be accordingly amended.<sup>247</sup>
- (i) In the long term, it is recommended that legislative and administrative initiatives be undertaken to systematically introduce the means of subsistence test in immigration law for purposes of residence status. It is in particular recommended that obtaining (a) a *temporary* and (b) a *permanent residence permit* be made subject to a clearly defined means of subsistence test. The withdrawal of the temporary permit<sup>248</sup> in the event and on the basis that the means of subsistence test is no longer met, should also be introduced. This makes it possible to extend the scope of protection of social assistance grants to all lawful residents who have not become a burden to the State, without any major consequences for the South African budget. It should be borne in mind, however, that this system can only operate effectively when there is an infrastructure for the exchange of data between the immigration and social assistance administrations and an effective system of deportation.
- (j) With regard to *asylum-seekers*, it is recommended that South Africa continues to take into account minimum conditions which reflect the human dignity of the persons involved. A possible suggestion in this regard is to make the social relief of distress programme available to asylum-seekers who are awaiting the outcome of their refugee status application.
- (k) It should be possible that some forms of support can be given to *illegal/undocumented immigrants* in order to cope with emergency situations. Therefore, we suggest that illegal immigrants should not necessarily be excluded wholly from the South African social assistance framework.
- (l) As regards the position of *non-citizen children*, we recommend that sufficient social assistance support be made available in respect of such children.
- (m) As regards *SADC member states citizens*, it is recommended that the policy concerning the status of these categories of non-citizens in South African social security be aligned with the SADC objectives of regional integration and harmonization. This implies that the said policy – as well as the legal – framework should develop minimum levels of social protection for different

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<sup>247</sup> This is any event required as regards permanent residents, in order to give effect to the *Khosa* judgment of the Constitutional Court.

<sup>248</sup> But not the permanent residence permit, in view of the approach adopted by the Constitutional Court in the *Khosa* judgment

- categories of beneficiaries, on the basis of equality within SADC, without reference to citizenship status.
- (n) Finally, it is recommended that appropriate cross-border co-ordination arrangements be developed (at least for purposes of cross-border coverage and protection of social insurance entitlement), to be adopted by way of national legislation and bi- and/or multilateral agreements.

**PART D**  
**COUNTRY MATRIX**

## PART D: COUNTRY MATRIX

<b>14. SUMMARISED COUNTRY MATRIX</b>			
<b>CATEGORIES</b>	<b>Social Insurance Schemes</b>	<b>Social Assistance Schemes</b>	<b>Other forms of support (outside regular social security systems)</b>
1. Permanent Residents	Australia, Canada, Germany, United Kingdom, Mauritius, Netherlands, Poland, South Africa.	Australia, Canada (provincial arrangements), Germany, United Kingdom, Mauritius, Netherlands, Poland, South Africa (see explanatory matrix).	
2. Temporary Residents (usually subject to either means of subsistence and/or residence test)	Australia, Canada, Germany, United Kingdom, Mauritius, Netherlands, Poland, South Africa.*	Australia (see explanatory matrix), Canada (limited entitlement – provincial arrangements), Germany, United Kingdom, Netherlands, Mauritius, Poland (see explanatory matrix).	
3. Non-Citizen Children (a) General – temporary lawful residence assumed**  (b) Illegal/ Undocumented Children	Canada, Germany, United Kingdom, Netherlands, Mauritius, Poland, South Africa.	Australia, Canada (provincial arrangements) Germany, United Kingdom, Mauritius, Netherlands, Poland.  Australia, Germany.	Canada, Netherlands.
4. Refugees (officially admitted)	Australia, Canada, Germany, United Kingdom, Netherlands, Poland, <i>South Africa</i> .***	Australia, Canada, Germany, United Kingdom, Netherlands, Poland.	<i>South Africa</i> (outside legal framework; no formal support – see explanatory matrix).
5. Asylum-seekers	<i>South Africa</i> .***		Australia, Canada, Germany, United Kingdom, Netherlands, <i>South Africa</i> (outside legal framework; no formal support – see explanatory matrix).
6. Illegal/Undocumented Non-Citizens	Germany.	Germany (in restricted form).	Australia, Netherlands (see explanatory matrix).

\* Except UIF.

\*\* Holders of permanent residence status are entitled to all available children's benefits in the countries selected.

\*\*\* Once a work permit has been issued, asylum-seekers would in principle be able to contribute to/benefit from social insurance schemes.

# **15. EXPLANATORY MATRIX**

## **I. INTRODUCTION**

It has to be made clear what exactly is understood by temporary migrants and permanent migrants in relation to temporary and permanent residence permits. In most of the countries permits are granted for a certain period of time. This does not automatically mean that one has a temporary immigration status. Whether or not one is a permanent migrant depends on the grounds on which access to the country has been allowed. In this study migrants are considered as temporary migrants when the purpose of their stay is temporarily by nature. Examples of temporary migrants are students, apprenticeship, au pairs and temporary employment like seasonal work. Migrants who come on grounds of family (re)unification or working (other than temporary employment) are regarded as permanent migrants. In this part we will set out what benefits are granted to the different categories of migrants.

## **II THE NETHERLANDS**

As discussed elsewhere in this report, special provision is made for EU country citizens and certain other categories of non-citizens, on the basis of dedicated EU arrangements and instruments.

As regards the Dutch national provisions, on 1 July 1998 the Linkage Act came into force with the purpose of linking the access to social benefits to immigration status. Since then migrants who are not legally residing in the Netherlands are unable to be insured for or to receive any social benefit. Only migrants who have a residence permit are legally residing in the Netherlands. However, some exemptions have been created. Migrants without a residence permit will be granted certain support: emergency medical treatment, legal aid and education to minors.

*\* Permanent migrants*

Child benefit

Invalidity benefit

Maternity benefit

Old age benefit

Sickness benefit

Social assistance

Survivors benefit

Unemployment benefit

*\* Temporary migrants<sup>249</sup>*

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<sup>249</sup> Compliance with a means of subsistence test is required in order to obtain this status, and for progressing to permanent status.

Entitlement in theory to above benefits under limited circumstances<sup>250</sup>

\* *Non-citizen children*

Child benefit

Survivors benefit

\* *Refugees (officially admitted)*<sup>251</sup>

Child benefit

Invalidity benefit

Maternity benefit

Old age benefit

Sickness benefit

Social assistance

Survivors benefit

Unemployment benefit

\* *Asylum seekers*

Allowance for asylum seekers (special scheme)

\* *Illegal/undocumented non-citizens (including asylum-seekers not recognized as refugees)*

No legal entitlement. Emergency medical care and benefits outside the legal framework may be available (local authorities and civil initiatives).

### **Employees' insurances**

- Sickness

- Maternity

- Invalidity

- Unemployment

As the employees' insurances are contribution-related nationality is irrelevant. Migrants require a working permit and subsequent one will be granted a residence permit. According to the Linkage Act it is not possible to be insured without having a working permit and/or a residence permit.

Migrants who work in the Netherlands are insured for employees' insurances and are paying contributions. So they are entitled to benefits if they meet the other conditions.

### **National insurances**

- Old Age insurance

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<sup>250</sup> When temporary status has been obtained, there may be an in principle entitlement to *national insurance* benefits dependent on having his/her residence in the Netherlands; as well as in principle entitlement to *employees' insurance schemes* benefits dependent on whether the person is working in terms of a valid labour contract. Of course, under the Linkage Act reliance on these benefits may lead to termination of the status.

<sup>251</sup> No means of subsistence test applies for purposes of obtaining either a temporary or permanent permit.

- Survivor's benefit
- Family benefits

As mentioned before, to be entitled to the national insurances one has to be resident of the Netherlands. Whether or not one is considered as a resident depends on the circumstances. Permanent migrants will be resident after a certain period of time. It is unlikely that temporarily migrants will be regarded as residents, as it is usually clear in advance that they will not stay in the Netherlands for a longer time. However, there might be exceptional circumstances that lead to residence.

Non-national children who have lost both parents are entitled to an orphan's benefit if the parent was insured and the child was dependant of him. This means that the child has lived with his parent and will have a residence permit.

### **Social assistance**

Migrants who have a residence permit are entitled to social assistance. As for a better immigration status one has to meet the maintenance condition; a claim to social assistance might affect the immigration status (see the Linkage Act).

### **Refugees**

Recognised refugees have the same position in the social security system as nationals and are therefore entitled to all benefits if they meet the other conditions.

### **Asylum-seekers**

There is a specific regulation on allowances for asylum seekers. On grounds of this regulation an asylum seeker is granted the following: housing, weekly financial allowance, recreative and educational activities, money for clothing (once), financial support for medical expenses, liability insurance and support for exceptional expenses.

## **III GERMANY**

As discussed elsewhere in this report, special provision is made for EU country citizens and certain other categories of non-citizens, on the basis of dedicated EU arrangements and instruments.

Entitlement to social insurance in Germany is in the first place related to employment. Other people who are not employed can be included in the insurance if regulations on that insurance make that possible. Benefits concerning old age, survivors, disability, unemployment and sickness are granted to insured people who are habitually resident in Germany, so nationality is not relevant.

Habitual residence means that the migrant's social circumstances concentrate in Germany and that residence in Germany is continual, but not necessarily permanent.

\* *Permanent migrants*  
Accident insurance

Child benefits  
Child-raising allowance  
Maternity benefits  
Pension insurance  
Sickness insurance  
Social assistance  
Unemployment insurance

\* *Temporary migrants (excluding project-linked migrants)*  
Social assistance

\* *Non-citizen children*  
Child benefit and child-raising allowance (if residing in Germany)  
Survivors benefit

\* *Refugees (officially recognised)*<sup>252</sup>  
Child benefits  
Child-raising allowance  
Maternity benefits  
Social assistance

\* *Asylum seekers*  
Asylum Seekers Benefits Act benefits – support in kind; vouchers for necessities of life; medical care in case of emergency and pregnancy

\* *Illegal/undocumented non-citizens*  
Limited social assistance

- For **Unemployment insurance** one must have habitual residence in Germany
- The **Pension insurance** (*Rentenversicherung*) covers old age insurance, survivors' benefit, and permanent disability. The amount of benefits under the pension insurance depends on the paid contributions. Paying contributions means that one is legally residing in Germany and as a consequence entitled to these benefits. Entitlement to the pension insurance requires habitual residence in Germany. Non-national children are entitled to survivors' pension if their parents were insured.
- **Sickness insurance** requires habitual residence in Germany.
- For entitlement to **Accident insurance** (*Unfallversicherung*) the employment of the insured person must be in Germany and habitual residence of the migrant is required.
- **Social assistance** (*Sozialhilfe*): The Act on Social Assistance enables migrants to receive social assistance in Germany. Relevant criterion is staying in Germany; it is not necessary that a migrant has a residence permit. In order to protect the public funds, if the migrant is eligible for specific assistance, he is to be paid those benefits instead of social assistance. Full social assistance comprises an amount of money and support in kind in unusual circumstances.

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<sup>252</sup> Officially recognised refugees have the same rights to social protection when they fulfill the necessary conditions and are, therefore, entitled to these benefits.



Regularly a migrant is only entitled to the financial support and to support in case of sickness, pregnancy and attendance. However, in exceptional circumstances exemptions can be made and full social assistance can be paid. Only German citizens and people who are treated as German citizens are always entitled to full social assistance.

Although migrants are entitled to social assistance, claiming social assistance can affect the immigration status as it is not sure the migrant will be able to provide for himself in the future.

- For **Child benefit** (*Kindergeld*) as well as **child-raising allowance** (*Erziehungsgeld*) migrants have to be habitually resident and require a residence permit or a permit without restrictions (§§1-14 BErzGG).

- **Maternity insurance** (*Mutterschutz*): residence is irrelevant because the insurance is eligible for all mothers in employment.

### **Asylum seekers**

On the basis of the Asylum Seekers Benefits Act (*Asylbewerberleistungsgesetz*) asylum seekers are entitled to support in kind or in the form of vouchers for necessities of life (food, housing, clothing, health, etc). Medical treatment in case of emergency and pregnancy is also granted.

### **Project-linked workers** (*Werkvertragsarbeitnehmer*)

In accordance with agreements between Germany and countries in Central and Eastern Europe foreign companies that execute a certain project in Germany are allowed to take their own employees to Germany. The employees can stay in Germany for a maximum period of three years. They will not be able to qualify for a residence permit. The project-linked workers do not pay contributions and are excluded from the German social insurance system.

## **IV UNITED KINGDOM**

As discussed elsewhere in this report, special provision is made for EU country citizens and certain other categories of non-citizens, on the basis of dedicated EU arrangements and instruments.

Relevant for entitlement to benefits is the criterion of residency and presence in the Great Britain (GB). GB comprises Wales, Scotland, England and the adjacent islands. The UK includes GB and Northern Ireland. Depending on the kind of benefit, one has to be an “ordinarily” or “habitually” resident in the United Kingdom in order to be entitled. The House of Lords has determined that ordinary residence means: “a person’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or long duration.”

To be considered as an ordinarily resident, a person does not have to intend to live in the UK permanently.<sup>253</sup>

Habitual residence means that a person is ordinary resident in the UK, Ireland, Channel Islands or Isle of Man and has been resident for an appreciable period of time. Relevant circumstances to deciding whether or not one is habitually resident include: bringing family or possessions, ties with the UK, preparing for establishing residence before coming and having a right of abode. There is no minimum period of time for habitual residence. A person has to undergo a habitual resident test by the local authorities before receiving this benefit. If one is not habitually resident in the UK, Channel Islands or Isle of Man, you are not entitled to income-support, income-based jobseeker's allowance or housing benefit. For some benefits a person needs to be physically present in GB.<sup>254</sup>

Hence, entitlement to benefits is not directly linked to the kind of leave but linked to the degree of residency. This means that generally people with indefinite leave are not excluded from entitlement to benefits – except if the person with indefinite leave is subject to a formal sponsorship undertaking or if he fails the habitual residence.<sup>255</sup> In theory, temporary migrants could also be eligible for certain benefits if they can be considered as habitually residents.

Recognised refugees are entitled to all benefits, like British citizens, if they meet the general conditions of entitlement. They are exempt from the habitual residence test.<sup>256</sup>

*\* Permanent residents*

Child benefit and guardian's allowance  
Contribution-based jobseeker's allowance  
Disability benefits  
Housing benefits  
Incapacity benefit  
Income support  
Income-based jobseeker's allowance  
Industrial injuries benefits  
Maternity allowance  
Retirement pensions and bereavement benefits  
Social fund  
Statutory sick pay, statutory maternity pay and maternity allowance

*\* Temporary migrants (if habitually resident)*

Child benefit  
Contribution-based jobseeker's allowance  
Disability benefits

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<sup>253</sup> Child Poverty Action Group (CPAG) *Welfare benefits and tax credits handbook*, CPAG: London 2004, p. 132.

<sup>254</sup> CPAG, p. 136-137

<sup>255</sup> CPAG p. 158-160.

<sup>256</sup> CPAG, p. 158, 215-221.

Housing benefit  
Incapacity benefit  
Income support  
Income-based jobseeker's allowance  
Industrial injuries benefits  
Retirement pensions and bereavement benefits  
Social fund  
Statutory sick pay, statutory maternity pay and maternity allowance

*\* Non-citizen children*

Child benefit and guardian's allowance  
Widowed parent's allowance

*\* Refugees (officially admitted)*

Child benefit and guardian's allowance  
Contribution-based jobseeker's allowance  
Disability benefits  
Housing benefit  
Incapacity benefit  
Income support  
Income-based jobseeker's allowance  
Industrial injuries benefits  
Maternity allowance  
Retirement pensions and bereavement benefits  
Social fund  
Statutory sick pay, statutory maternity pay and maternity allowance

*\* Asylum-seekers*

Asylum support scheme

*\* Illegal/undocumented non-citizens*

- **Child benefit and guardian's allowance:** Child must be in the GB and the child or one of the parents must have been in the UK for at least 182 in the last 52 weeks<sup>257</sup>

- **Contribution-based jobseeker's allowance:** There are no residence conditions, because entitlement depends on having worked and paid contributions and that includes you must have been present. People with indefinite leave are, even when they are sponsored immigrants, not excluded from access.<sup>258</sup>

- **Disability benefits** include disability living allowance (DLI), attendance allowance (AA), and invalid care allowance (ICA).

For DLI and AA: One must be an ordinary resident, and present in the GB, and must have been present in the UK for at least 26 weeks in the last 52 weeks. If one is abroad

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<sup>257</sup> CPAG, p. 177, 209.

<sup>258</sup> CPAG, p. 172, 210.

for certain reasons (military service, offshore worker) the 26-week presence rule does not apply and in that case one is treated as present.<sup>259</sup>

For ICA the residence rules are the same except for the temporary absence.<sup>260</sup>

- **Housing benefit.** If a person is receiving income support or income-based jobseeker's allowance, he is also entitled to housing benefit without causing the authorities to make inquiries about the immigration status or habitual residence. If a person is not being paid these payments, one has to be habitually resident or exempt from the habitual residence test.<sup>261</sup>

- To **income support** one is only entitled as a habitually resident in the UK, Ireland, the Channel Islands, Isle of Man and if one is present in GB or temporarily absent from GB.<sup>262</sup>

- To **Incapacity benefit** one is only entitled if one is present in GB.<sup>263</sup>

- **Income-based jobseeker's allowance:** rules for income-based jobseeker's allowances are the same as for income support – a person has to be habitually resident in the UK, Ireland, the Channel, Isle of Man and present in GB.<sup>264</sup>

- **Industrial injuries benefits:** cover disablement benefit, reduced earning allowance, retirement allowance, constant attendance allowance and exceptionally severe disablement allowance. One must have been in GB when the accident happened. There are exceptions on the presence rule for offshore workers, etc. For entitlement to disablement benefit and retirement allowance a person does not have to be present or resident in GB. For other payments under the industrial injuries benefits scheme, one needs to be present in GB or temporarily absent from GB. Sponsorship agreements do not affect entitlements to these benefits.<sup>265</sup>

- **Retirement pensions and bereavement benefits** include retirement pension (category A,B,C and D), bereavement payment and widowed parent's allowance. These payments are contribution-based. There are no residence conditions, but since the benefits are contribution-based, it is unlikely that a person will qualify unless one has lived in the UK for several years. Only the category D pension requires residency conditions. Sponsorship agreements do not affect entitlements to these benefits.<sup>266</sup>

- **Social fund** benefits comprise maternity expenses payment, funeral expenses payment, cold weather payment, winter fuel payment. There are no residency conditions for entitlement to these benefits, but one is only eligible for these benefits if one is receiving certain other benefits.<sup>267</sup>

- **Statutory sick pay and statutory maternity pay:** related to employment rather than presence. So whenever a migrant is employed, he is entitled to sickness payments. Sponsorship agreements do not affect entitlements to these benefits.<sup>268</sup>

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<sup>259</sup> CPAG, p.191.

<sup>260</sup> CPAG, p. 193, 212.

<sup>261</sup> CPAG, p. 209.

<sup>262</sup> CPAG, p. 166.

<sup>263</sup> CPAG, p.183, 220.

<sup>264</sup> CPAG, p.208.

<sup>265</sup> CPAG, p. 190, 211.

<sup>266</sup> CAPG, p.184, 211.

<sup>267</sup> CPAG, p. 198,212.

<sup>268</sup> CPAG, p. 194.

- There are no residential criteria for entitlement to **maternity allowance**, but working in the GB implies that one is legally residing in the UK. In addition, one must have been working for a period of time before the expected birth.<sup>269</sup>

### **Asylum seekers**

In the Immigration and Asylum Act 1999 a new system for the support of asylum seekers is introduced. This system enables asylum seekers to be supported outside the system of means-tested benefits. The new system comprises:

- \* Asylum support provided by the National Asylum Support Service (NASS).
- \* Asylum support provided by local authorities under the 'interim asylum support scheme'.

Asylum support is provided in the form of accommodation and can be provided to assist asylum seekers with their expenses in pursuing their asylum claim and services in the form of education, like English language lessons.<sup>270</sup>

The new system means that only certain categories of asylum seekers have access to means-tested-benefits. These are people who were already asylum-seekers when the Immigration and Asylum Act came into force and people who are subject to a European Agreement. They are only entitled to a few benefits: income support, income-based jobseeker's allowance, housing benefit and council tax benefit. If the asylum seeker is subject to a European Agreement he will also be able to claim a social fund payment.<sup>271</sup>

A person receives asylum support as long as he has the status of an asylum seeker, which continues till the decision on the application. If there are children who are dependent on the asylum-seeker, he continues to be an asylum seeker for as long as he remains in the UK (also after appeals) or till the child turns eighteen years old.

## **V CANADA**

Under the Canadian Constitution, the federal and the provincial government share responsibility for social security. The provincial and territorial governments are responsible for the workers' compensation, health care programs and social assistance programs. As a consequence every province has its own legislation on these programs. The Old Age Security, the Canada Pension Plan and the Unemployment Insurance fall under the jurisdiction of the federal government. Employers and employees are required to pay contributions to the Canada Pension Plan (CPP) and the Employment Insurance (EI).

Under the CPP there are no criteria for insurance or entitlement to benefits based on citizenship – everybody who has contributed is entitled to benefits. The same applies to EI. The workers' compensation programmes fall under the jurisdiction of the provinces. As benefits under this programme are linked to employment, residence is not relevant either.

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<sup>269</sup> CPAG, p. 188.

<sup>270</sup> CPAG, p. 65, 275.

<sup>271</sup> CPAG, p. 283.

Old Age Security pension (OAS) is not paid from contributions but from general tax revenues. To be entitled to OAS one must be Canadian resident or a legal resident of Canada on the day preceding the approval of his application. A minimum of 10 years of residence in Canada after the 18<sup>th</sup> birthday is required to receive an OAS pension.

Entitlement to social assistance is dependent on residence status as well.

*\* Permanent residents*

Canada Pension Plan (CPP) (including disability, survivors and retirement benefits)

Old Age Security pension (OAS)

Guaranteed Income Supplement

Allowances

Employment Insurance (EI) (including maternity, parental and sickness benefits)

Workers compensation programmes (provincial level)

Social assistance (provincial level)

*\* Temporary migrants*

CPP

EI

OAS (only if legally resident for 10 years)

Workers' compensation, social assistance and disability grant (limited – provincial arrangements)

*\* Non-citizen children*

*\* Refugees (officially admitted)*

Social assistance

Disability grants

*\* Asylum-seekers*

Separate hardship allowance scheme

*\* Illegal/undocumented non-citizens*

## **VI MAURITIUS**

The Immigration Act RL 3/87 of 17 May 1973 regulates immigration issues in Mauritius. This Act makes no distinction between temporary and permanent residents as these two categories are generally termed residents. Migrant workers, non-citizen students and holders of a permanent residence permit are all considered residents. The length of residence and the immigration status of an applicant will determine eligibility for social security entitlements. The government does not grant refugee or asylum status, with the result that no social security benefits are extended to a non-citizen on the basis of his/her refugee or asylum-seeker status in Mauritius.

Non-contributory benefits are payable to certain categories of non-citizens. Earnings-related benefits are paid to non-citizens with a valid work permit, who are employed in the private sector and earning a minimum prescribed amount, to temporary or part-time employees in para-statal organisations, employees in the sugar industry and non-citizens with a valid work permit.

\* *Permanent residents*

Social Insurance

Retirement Pension

Invalids Pension

Widows Pension

Social Assistance

Basic retirement Pension

Basic Invalids Pension

Basic Widows Pension

Social Aid

Food Aid

Unemployment Insurance Relief

Funeral Grants

Guardians Allowance

\* *Temporary residents*<sup>272</sup>

Social Insurance

Retirement Pension

Invalids Pension

Widows Pension

Social Assistance

Basic retirement Pension

Basic Invalids Pension

Basic Widows Pension

Social Aid

Food Aid

Unemployment Insurance Relief

Funeral Grants

Guardians Allowance

\* *Non-citizen Children*<sup>273</sup>

Social Insurance

Orphans Pension

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<sup>272</sup> Different periods of residence are required for the different benefits. See par 6.2.1 of the relevant country report.

<sup>273</sup> Different periods of residence (for the different benefits) must be fulfilled by the applicant.

Social Assistance

Basic Orphans Pension  
Child Allowance

\* *Refugees and Asylum seekers*

\* *Illegal immigrants*

## VII AUSTRALIA

In order for a non-citizen to qualify for most Australian social security payments, he/she must be an Australian 'resident', as defined in the *Social Security Act 1991*. An Australian resident is a person who resides in Australia and has permission to remain permanently – either because they are: an Australian citizen; the holder of a permanent visa; or a protected Special Category visa holder. In deciding whether a person is residing in Australia, factors such as the person's domestic, financial and familial ties to Australia are taken into account, as well as the frequency and duration of any absences from Australia and the reasons for such absences. In addition, prior residence requirements or waiting periods are sometimes prescribed. Illegal immigrants to Australia are detained and unless granted permission to remain in Australia, they are removed as soon as reasonably practicable. Illegal immigrants cannot access social security but social security-related services.

\* *Permanent residents **and** officially admitted Refugees*

Social Insurance

Old age pension  
Sickness  
Maternity  
Work injury

Social Assistance

Old age pension  
Unemployment benefits  
Disability Support Pension  
Survivors' benefits  
Sickness benefits  
Maternity Benefits  
Family responsibility benefits  
Widow B Pension  
Mature Age Allowance  
Partner Allowance  
Bereavement Allowance  
Newstart Allowance  
Youth Allowance  
Carer Allowance



Large family supplement  
Multiple birth allowance  
Rent assistance  
Maternity payment  
Health care cards  
Special Benefit Allowance  
Maternity Allowance  
Maternity Immunisation Allowance  
Widow Allowance  
Mobility Allowance  
Crisis Payment

*\* Temporary residents*

Social Insurance

Old Age Pension  
Sickness  
Maternity  
Work injury

Social Assistance<sup>274</sup>

Large family supplement  
Multiple birth allowance  
Rent assistance  
Maternity payment  
Health care cards  
Special Benefit Allowance  
Maternity Allowance  
Maternity Immunisation Allowance

*\* Non-citizen Children*

Child Care Benefit  
Double Orphan Pension

*\* Asylum-Seekers and Illegal Immigrants*<sup>275</sup>

Medical services  
Dental services  
Certain other health services  
Educational facilities

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<sup>274</sup> Holders of certain categories of temporary visas, Australian government sponsored students and a non-resident experiencing hardship or special circumstances.

<sup>275</sup> A special dispensation exists for so-called "innocent illegals".

## **VIII POLAND**

As discussed elsewhere in this report, special provision is made for EU country citizens and certain other categories of non-citizens, on the basis of dedicated EU arrangements and instruments.

According to the Act of Social Welfare the following persons are entitled to be beneficiaries of social assistance: Polish citizens residing and staying within the territory of the Republic of Poland; and foreigners residing and staying on the territory of the Republic of Poland, holding a residence permit or refugee status. After 1 May 2004, the right to benefit was extended to citizens of the European Union and European Economic Area, who stay on the territory of Poland and who hold a stay permit.

*\* Permanent residents*

Social Insurance

Old Age

Invalidity

Work injuries and diseases

Survivors' benefits

Sickness benefits

Health care benefits

Unemployment benefits

Social Assistance

Care Allowance

Funeral Allowance

Nursing Allowance

Alimony Allowance

Numerous family allowances

*\* Temporary Migrants*

Social Insurance

Health care services

Unemployment benefits

Social Assistance

Care Allowance

Funeral Allowance

Nursing Allowance

Alimony Allowance

Numerous family allowances

*\* Refugees (officially admitted)*

Social Insurance

Old Age

Invalidity

Work injuries and diseases  
Survivors' benefits  
Sickness benefits  
Health care benefits  
Unemployment benefits

Social Assistance

Care Allowance  
Funeral Allowance  
Nursing Allowance  
Alimony Allowance  
Large family allowances

\* *Non-citizen children*

Family Allowance  
Nursing Allowance  
Grant for starting independent life

\* *Illegal Immigrants*

## **IX SOUTH AFRICA**

Non-citizens who are lawfully employed in South Africa, usually qualify for employment-based social insurance benefits, such as unemployment insurance (see, however, the qualification referred to below), compensation for occupational injuries and diseases, and occupational-based retirement benefits. Apart from certain exceptions made for foreigners with permanent residence status, non-nationals are generally excluded from social security protection, in particular social assistance. In terms of the Social Assistance Act of 2004 one of the eligibility criteria for accessing almost all social assistance benefits (such as old age grants and disability benefits and in contrast to the previous act the foster child grant as well) is South African citizenship. This must, however, be understood to be qualified by the recent *Khosa* judgment of the Constitutional Court, which held that the citizenship-requirement does not apply to permanent residents. In terms of the unemployment insurance scheme, non-citizens are excluded from the operation of the Unemployment Insurance Act if they have to be repatriated upon termination of their services. Refugees are also not provided any protection.

\* *Permanent residents*<sup>276</sup>

Social Insurance

Employment injuries and diseases  
Motor Vehicle Accidents (RAF)  
Unemployment Insurance Benefits

- Illness benefits

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<sup>276</sup> Entitlement of permanent residents to social assistance benefits is indicated in the Constitutional Court decision of *Khosa and Others v The Minister of Social Development and Others; Mahlaule and Others v The Minister of Social Development and Others* 2004 (6) BCLR 569 (CC).

- Maternity benefits
- Adoption benefits
- Unemployment benefits
- Dependants' benefits

Retirement benefits (via pension or provident funds)  
Health insurance (occupational based)

Social Assistance

Old Age Grant  
Child Support Grant  
Disability Grant  
Care Dependency Grant  
Foster Child Grant  
War Veterans' Grant  
Grant in Aid  
Social Relief

\* *Temporary Residents*<sup>277</sup>

Social Insurance

Employment Injuries and Diseases  
Motor Vehicle Accidents (RAF)  
Health Insurance (occupational based)  
Retirement Benefits (if rules of fund allow this)

\* *Refugees and Asylum-Seekers*<sup>278 279</sup>

Motor Vehicle Accidents

\* *Non-citizen children*

Motor Vehicle Accidents

\* *Illegal Immigrants*

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<sup>277</sup> Migrant workers on a work permit.

<sup>278</sup> Once a work permit has been granted, asylum-seekers and refugees would in principle qualify to contribute to and benefit from employment-based social insurance.

<sup>279</sup> The Jesuit Refugee Services, a private institution, offers a social assistance grant to seriously disabled, chronically and terminally ill refugees and asylum-seekers. The beneficiary must be without any possibility of ever becoming self-reliant or contributing to their daily living needs. The grant amount is in line with the government disability grant.

**PART E**  
**BIBLIOGRAPHY**

# PART E

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