

Navigating the System: Challenges Faced by Undocumented Migrants in Accessing Healthcare in South Africa

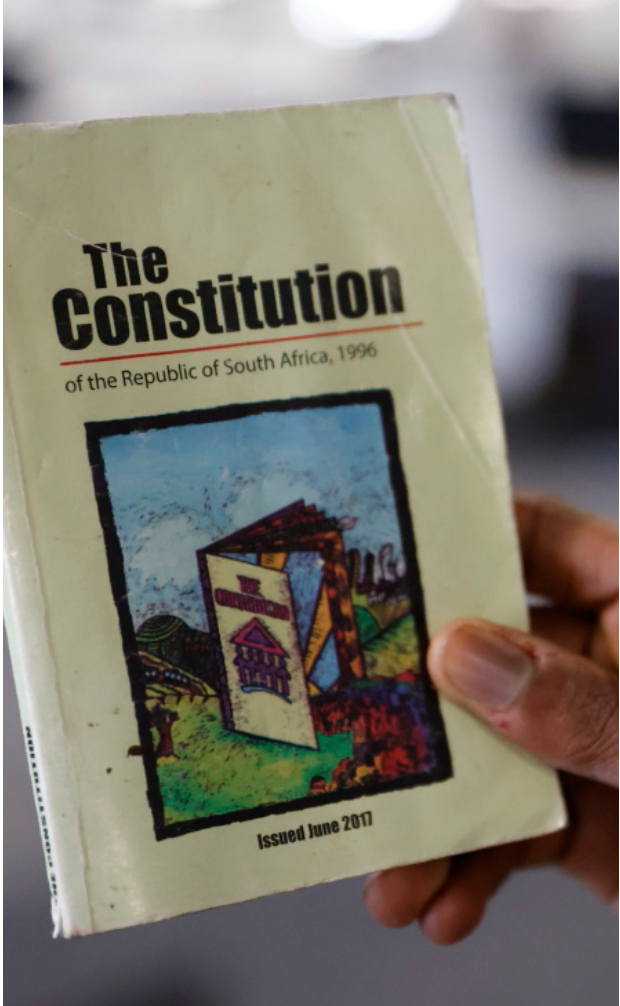
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Definition of Undocumented Migrant

"A non-national who enters or stays in a country without the appropriate documentation" - IOM Glossary on Migration

1. Introduction

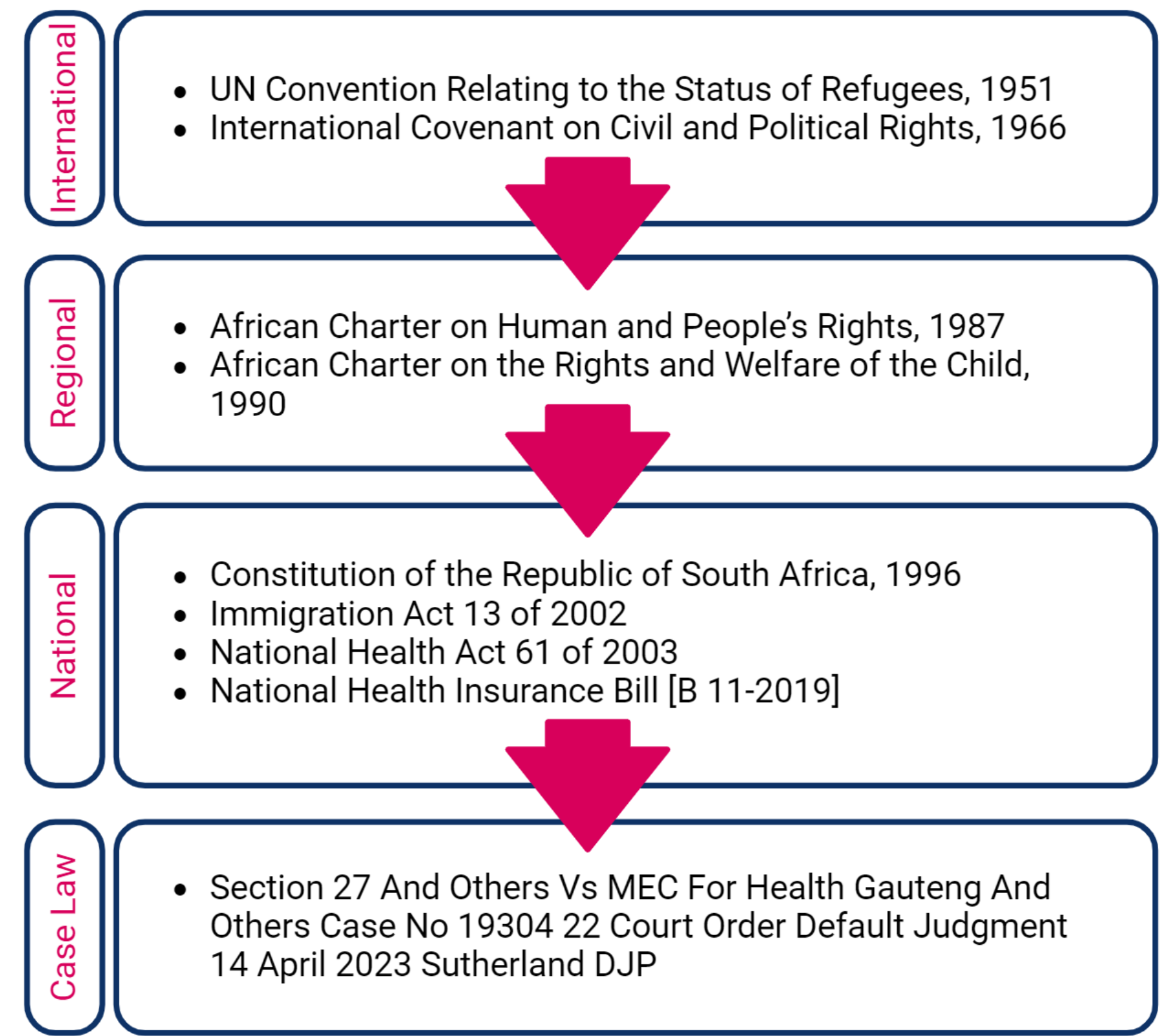
Drafted in 1996 after the end of Apartheid, the Constitution of the Republic of South Africa was intended as an ambitious step towards equality, including via Universal Health Coverage; according to section 27(2), **everyone has "access to health care services,"** and **"no one may be refused emergency medical treatment".**¹



The Development of the South African Constitution, FW de Klerk Foundation

"Refugees and asylum seekers – **with or without a permit** – should be assessed according to the current means test as applied to South African citizens when accessing public healthcare."² This means, in theory, that anyone, regardless of their legal status, can access healthcare services on South African territory.

2. Legal Framework



3. Case Law: Gauteng Province



Map of Gauteng province (Google Maps)

In 2023, Gauteng High Court³ ruled that provincial legislation contravened:

- Section **4(3)(a)** of the NHA, stipulating free public health services for children under six and pregnant or lactating women; and
- Sections **27(1)** and **28(1)(c)** of the Constitution, recognising that all children have an immediately realisable right of access to basic healthcare services.

4. Analysis of Healthcare Access



Socialist Project - The Bullet, March 23, 2020

Under the Uniform Patient Fee Schedule,⁴ **undocumented migrants from the SADC** are entitled to the same health services as SA citizens, on a mean-test basis; the only exception is for specialized treatment, for which they could be denied service. **Non-SADC** migrants have to pay the full rate for services.

The **National Health Act** also specifies that the people of South Africa's **constitutional right to access to healthcare** is subject to progressive rather than immediate realisation, with the exception of recognized vulnerable groups.

The **NHA** states that PHC services are available to all, regardless of nationality or immigration status, in accordance with the constitutional right to health.

HOWEVER...

The **National Health Insurance Bill**, on the other hand, aims to amend the NHA and reduce access of asylum-seekers and undocumented migrants to emergency care; it is seen as an advancement for citizens with wide popular support.

The **Immigration Act** obligates healthcare providers to ascertain the legal status of migrants before providing services and to report all undocumented migrants to the Department of Home Affairs.

"The South African Constitution and the National Health Act facilitate UHC, while the Immigration Act and the 2019 NHI Bill make the legal status of migrants the most significant determinant of healthcare access."⁵

RECENT DEVELOPMENTS

→**12/2023**: report by OHCHR CERD criticizes South Africa for violating undocumented migrants' right to access healthcare.⁶

→ **4/2024**: White Paper on Citizenship, Immigration and Refugee Protection published; calls for exit from 1951 Refugee Convention and reaccession with reservations.⁷

KEY POINTS

- Inconsistencies within the international, regional, and national legal environments create confusion over who is eligible for which healthcare services.
- This results in a significant implementation gap in the provision of healthcare services to undocumented persons.
- The government is trying to curtail its ambitious goals of reaching UHC due to lack of resources, as evident in its recent White Paper.

References

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