IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: **126/25**

In the matter between:

SCALABRINI CENTRE OF CAPE TOWN	First Applicant
TRUSTEES OF THE SCALABRINI CENTRE OF CAPE TOWN	Second Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR GENERAL OF HOME AFFAIRS	Second Respondent
THE CHIEF DIRECTOR OF ASYLUM SEEKER MANAGEMENT: DEPARTMENT OF HOME AFFAIRS	Third Respondent
THE REFUGEE APPEALS AUTHORITY	Fourth Respondent
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fifth Respondent
HELEN SUZMAN FOUNDATION	First *Amicus Curiae*
AMNESTY INTERNATIONAL	Second *Amicus Curiae*
GLOBAL STRATEGIC LITIGATION COUNCIL FOR REFUGEE RIGHTS	Third *Amicus Curiae*
INTERNATIONAL DETENTION COALITION	Fourth *Amicus Curiae*

FILING NOTICE

KINDLY TAKE NOTICE that the First *Amicus Curiae* hereby presents the following for filing:

1 The First *Amicus Curiae*'s Heads of Argument.

Dated at **Cape Town** on this the **12th** day of **November 2025**.

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IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No 126/2024

In the matter between:

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INTERNATIONAL DETENTION COALITION	Fourth *Amicus Curiae*

WRITTEN SUBMISSIONS
(FIRST *AMICUS CURIAE*)

INTRODUCTION

1. These submissions are filed pursuant to the Constitutional Court's directive dated 29 October 2025 which directed the first *amicus curiae* ("**HSF**") to file written submissions by no later than 12 November 2025.

2. The applicants ("**Scalabrini**") have approached the Constitutional Court for an

order confirming the orders made by the Western Cape Division of the High Court on 15 May 2025 ("**the HC Judgment**") which declared:

2.1. sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Refugees Act 130 of 1998 ("the **Refugees Act**"); and

2.2. regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Regulations to the Refugees Act, published under Government Notice R1707 in GG 42932 on 27 December 2019 ("the **Regulations**") (*collectively* the "**impugned provisions**"[1]),

inconsistent with the Constitution of the Republic of South Africa, 1996 ("the **Constitution**").

3. The impugned provisions, taken together, create a framework that requires would-be asylum seekers to first provide "good cause" before they can access the asylum system. If a person does not provide this "good cause", they are barred from applying for asylum, irrespective of the merits of their asylum claim.

4. The respondents have appealed the HC Judgment, arguing that Scalabrini had brought an abstract challenge when they ought to have brought a review. The respondents further contend that Scalabrini's interpretative approach is flawed and that the impugned provisions could be interpreted to be constitutionally compliant.

5. The HSF participates as *amicus* in these proceedings for a focused and specific purpose: to highlight the negative impact and harms the impugned provisions have on children as unconstitutional and untenable violations of those children's constitutional rights. In terms of section 21B(2A) of the Refugees Act, a child's asylum claim is tied to their parents and, consequently, if a parent cannot meet the good cause requirement, their child cannot either.

6. For this reason, HSF aligns itself with the interpretation and submissions about

[1] HSF makes specific reference to sections 4(1)(f), 4(1)(h) and 21(1B) of the Refugees Act 130 of 1998 (**Refugees Act**), together with Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Regulations to the Refugees Act, published under Government Notice R1707 in GG 42932 on 27 December 2019.

the effect of the impugned provisions made by Scalabrini. For purposes of HSF's submissions, the effect of excluding children from the asylum system through the "good cause" requirement results in far greater harms to an extremely vulnerable group. The harms to children caused by the impugned provisions aggravate the unconstitutionality of the provisions.

7. Specifically, the impugned provisions have the consequence that children of asylum seekers who fail to show "good cause" will be deported with their parents. This operates automatically and in circumstances where the substantive merits of the asylum application are not assessed at all. Moreover, the child's status is entirely outside of their control, hinging on the conduct and application of their parent and in circumstances where the child can have little to no influence on the decisions and conduct of their parent.

8. HSF submits that, in the circumstances, the impugned provisions violate the constitutional and international law rights of children – violating the principle of non-refoulment and failing to give paramount consideration to the best interests of the child. The point is simply this: the consequence of the impugned provisions is that the children of asylum seekers will be returned to their country of origin if their parents have not complied with the impugned provisions, without any assessment of the merits of the children's asylum claims, no matter how strong. That is an unconstitutional and untenable state of affairs.

9. The HC Judgment accepted these submissions, recognising that children are not "mere appendages of their parents" but individual right bearers and should not be penalised for the "missteps of their parents".[2] The High Court noted that the state has positive obligations to protect children and, innate with the Constitutional framework of children's rights is a right to be heard in all matters concerning their interests.[3] The High Court held, in no uncertain terms that:

> *"Even if it could be justified to disbar an asylum seeker based on conduct unrelated to the merits of their claim, it cannot be justifiable to disbar their*

[2] HC judgment at para 59, Record at 1082.
[3] HC judgment at para 62, Record at 1082.

children from applying for asylum based on the conduct of those parents."[4]

10. The High Court further held that "the impugned provisions are not capable of an interpretation that protects the best interests and dignity of children in their own right."[5]

11. In the wake of these findings, HSF submits that the High Court rightly found the sections unconstitutional and declared the sections invalid, and that this Honourable Court ought to confirm the declaration of invalidity. The framework of these submissions is structured around HSF's four main submissions:

    11.1. *First*, children of asylum seekers face a "double harm" under the legislative scheme created by the impugned provisions.

    11.2. *Second*, it is unjust and a breach of the constitutional rights of children of asylum seekers to prevent them from applying for asylum due to actions outside their control.

    11.3. *Third*, the impugned provisions are not in the best interests of the child and are an unjustifiable limitation of the child's constitutional rights.

    11.4. *Fourth*, the impugned provisions are not compliant with international law and the principle of non-refoulment.

    11.5. *Fifth*, the impugned provisions conflict with other domestic legislation, particularly the legislation requiring asylum and protection by the state.

    11.6. *Sixth*, we address certain defences the respondents have raised.

12. We deal with each of the above in turn.

THE SCHEME CAUSES A DOUBLE HARM TO CHILDREN OF ASYLUM SEEKERS

13. These submissions focus on a particular sub-set of asylum seekers, being children who are accompanied by parents/guardians in their asylum claims ("**a**

[4] HC Judgment at para 62, Record at 1083.
[5] HC Judgment at para 65, Record at 1084.

dependent child").

14. The starting point is that a dependent child[6] is entirely reliant on the conduct of their parents/guardians, for both a transit visa and an asylum application.

    14.1. In respect of a transit visa: section 23 of the Immigration Act 13 of 2002 (the **Immigration Act**) provides for the application of a transit visa and requires that such an application must be made in terms of Form 17 to the Immigration Regulations.[7] Form 17 provides that the person applying for the transit visa must fill in the form for their dependents as well. Consequently, the dependent child relies on their parents to complete Form 17 on their behalf.

    14.2. In respect of an asylum seeker application, the Refugees Act defines a child as anyone under 18 years of age[8] and includes children under the definition of dependents.[9] The person seeking asylum is instructed to include their dependents on their application and thus, children are treated as dependents on their parents/guardians' asylum applications.[10]

15. The legislative scheme, as described above, not only renders children dependent on their parent/guardian's asylum application, but also ties their fate directly to the fate of their parent/guardian's application. Section 21(2A) of the Refugees Act provides that,

> *"(2A) Any child of an asylum seeker born in the Republic and any person included as a dependant of an asylum seeker in the application for*

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[6] As opposed to unaccompanied minors whose circumstances are regulated by other provisions in the Refugees and Immigration Act.
[7] The Immigration Regulations Published under Government Notice R413 in Government Gazette 37679 of 22 May 2014
[8] Section 1 definitions: "child" means any person under the age of 18 years
[9] Section 1 definitions: "dependant" in relation to an asylum seeker or a refugee, means any unmarried minor dependant child, whether born prior to or after the application for asylum, a spouse or any destitute, aged or infirm parent of such asylum seeker or refugee who is dependent on him or her, and who is included by the asylum seeker in the application for asylum or, in the case of a dependant child born after the application for asylum, is registered in terms of section 21B (2);
[10] Section 21 B of the Refugees Act provides:
"*21B Spouse and dependants of asylum seekers and refugees*
(1) A person who applies for refugee status in terms of section 21 and who would like one or more of his or her spouse and dependants to be granted refugee status must, when applying for asylum, include the details of such spouse and dependants in the application."

asylum has the same status as accorded to such asylum seeker." (emphasis added)

16. The effect of these provisions, considered with the impugned provisions, is that if a parent is disbarred from applying for asylum for failing to comply with the procedural requirements of the impugned provisions (i.e. showing good cause), their child is similarly disbarred from applying for asylum - even if they have a meritorious asylum claim. In this way, children are placed in harm of refoulement.[11]

17. In addition, children face a host of other harms, as they live with the fear of arrest and detention by virtue of being excluded from the asylum system. These children are also denied a host of other rights, whilst being in the country. Children without documentation experience many difficulties, including gaining access to health care, education, and available social assistance.[12] The difficulties faced by children in such a position has been recognised by the Constitutional Court, in *Scalabrini 3*:[13]

> *"Children's applications for asylum are generally tied to those of their parents. The deemed abandonment of parents' asylum applications has had drastic consequences on their children. CoRMSA adduced evidence that the children of an asylum seeker whose application was deemed to be abandoned could not attend school for the entire 2020 academic year because they had no visas. In another case, an asylum seeker's son could not register for matric. Like their parents, without visas, children also face the risk of arrest, detention and deportation." (our emphasis)*

18. It is this double harm, of refoulement and deprivation of a host of constitutional rights, which HSF requests the Honourable Court to consider and take account of in confirming the orders of invalidity.

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[11] *Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others* [2023] ZACC 45 (12 December 2023) (**Scalabrini 3**) at para 42.
[12] See, for example, *Centre for Child Law v Minister of Basic Education* 2020 (3) SA 141 (ECG) concerning the exclusion of undocumented children from schools; and *Centre for Child Law v Director-General: Department of Home Affairs* [2020] ZAECGHC 43, concerning a challenge to the Births and Deaths Registration Act to the extent that it leaves children without birth certificates. The latter challenge was subsequently upheld by the Constitutional Court in *Centre for Child Law v Director General: Department of Home Affairs* [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC).
[13] *Scalabrini 3* id.

IT IS UNJUST TO PREVENT CHILDREN FROM APPLYING FOR ASYLUM DUE TO ACTIONS OUTSIDE THEIR CONTROL

19. There are two key principles that underpin HSF's submission that children cannot be penalised for the conduct of their parents.

    19.1. First, children are individual right bearers and not mere appendages of their parents.

    19.2. Second, even if it can be justified that their parents ought to be barred from applying for asylum for procedural missteps – which HSF denies – children are not to be penalised for the missteps of their parents.

Children as individual rights holders

20. Sections 28(1)(d) and 28(2) of the Constitution place positive obligations on the state to protect children given their high level of vulnerability. The right springs from the realisation that children are individuals with personality distinct from that of their parents.

21. As the Constitutional Court noted in *S v M* that "*every child has his or her own dignity*" and, as the Court further noted

> *"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children."*

22. This recognition of children as rights-holders in their own individual right and capacity has been repeatedly endorsed by the Courts.[14]

23. It is also well-recognised that there should be individualised decision-making in

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[14] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 18. See also *AD and Another v DW and Others* (CCT48/07) [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC) at para 55; see also *Centre for Child Law and Others v Media 24 Limited and Others* [2019] ZACC 46; 2020 (3) BCLR 245 (CC); 2020 (1) SACR 469 (CC) at paras 71-2.

all matters concerning children,[15] in which children must be seen as individuals, not as mere "*appendages*".[16] The Constitutional Court has stressed that:

> *"the recognition of the innate vulnerability of children is rooted in our Constitution, and protecting children forms an integral part of ensuring the paramountcy of their best interests"* and underscored *"the importance of the development of a child, and the need to protect them and their distinctive status as vulnerable young human beings."*[17]

24. Included in this, is a procedural component to be heard. Children are to be heard in all matters concerning their interests, before actions are taken that have an adverse effect on their rights.

25. In *AB v Pridwin*,[18] this Honourable Court confirmed that "*section 28(2) incorporates a procedural component, affording a right to be heard where the interests of children are at stake*".[19] In the same matter, this Court also recognised that the specific right afforded to children to participate in decisions affecting them, must serve as the *overarching principle*" in matters involving children's rights and interests."[20]

26. The impugned provisions are directly at odds with this principle. As the legislative scheme currently operates, there is no scope for children to be considered or treated as applicants and individuals in their own right. There is also no provision for children to be heard in their own right – or otherwise participate in the applications that determine their status.

27. The impact of the impugned provisions is, effectively, a disbarment of the adults' asylum application, which, in turn, equates to a refusal to consider the merits of the children's asylum claims. In this way, the impugned provisions regard children as appendages, whose fate is tied to the conduct of their parents, with no regard to the merits of their own asylum claims. We submit that, in light of the

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[15] *AD v DW* supra note 14 at para 55; *Centre for Child Law v Minister for Justice and Constitutional Development* [2009] ZACC 18; 2009 (2) SACR 477 (CC); 2009 (6) SA 632 (CC); 2009 (11) BCLR 1105 (CC) at para 46 – 47 and *S v M* supra note 14 at para 24.
[16] *S v M* supra note 14 at para 18; *AB and Another v Pridwin Preparatory School* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC) at para 234.
[17] *Centre for Child Law and Others v Media 24* supra note 14 at para 64.
[18] *AB v Pridwin* supra note 16 at para 141.
[19] Ibid at para 143.
[20] Ibid at para 143.

above, this is constitutionally impermissible.

Traumas of parents not to be visited on children

28. In addition, assume for a moment that a child's parents erred in not accessing the asylum system upon arrival in South Africa and cannot meet the good cause standard. In such an instance, they will not be able to show good cause to be permitted to gain access to the asylum system. For reasons set out by Scalabrini, this is irrational and unconstitutional and HSF makes common cause with this position.

29. However, even if this disbarment of an asylum seeker for conduct which is unrelated to the merit of their asylum claim is justifiable, it could never be justifiable to disbar children from applying for asylum based on the conduct of their parents. This principle has three times been repeated by our Constitutional Court, in various contexts.

30. *First*, in the context of criminal sanctions of parents, in *S v M* the Constitutional Court held:

> *"Every child … cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children."*[21] *(our emphasis)*

31. *Second*, the Constitutional Court found in *Centre for Child Law v Director General: Department of Home Affairs*,[22] that it is fundamentally unjust to penalise children for matters over which they have no power or influence.[23]

32. *Third*, this principle was repeated, subsequently, in *Scalabrini 3.*[24] There are significant similarities between *Scalabrini 3* and the present application that make the principle particularly apposite. *Scalabrini 3* dealt with the lapsing of asylum seeker permits due to procedural missteps of asylum seekers. The

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[21] *S v M* supra note 14 at para 18. See also *AD v DW* supra note 14 at para 55; see also *Centre for Child Law v Media 24 Limited* supra note 14 at paras 71-2.
[22] *Centre for Child Law v Director General: Department of Home Affairs* supra note 12.
[23] Id at paras 71-74.
[24] *Scalabrini 3* supra note 13.

Constitutional Court struck down the sections that provided for the permits to lapse as they violated the right of *non-refoulement* for an asylum seeker to be disbarred from obtaining refugee status due to procedural missteps, no matter how severe. The Constitutional Court specifically considered the rights of children and concluded that the fact that a parent's asylum seeker permit had lapsed could not prejudice the child of the asylum seeker. The Court held that it would be "*unjust to penalise children for matters over which they have no power or influence.*"[25]

33. The impugned provisions are in direct conflict with this principle, as they visit the errors and traumas of parents on their children. Effectively, the merits of a child's asylum claim will not be considered if their parents did not comply – without fail – to a stringent procedural process prescribed by the impugned provisions.

34. We submit that this too is at odds with the Constitutional dispensation and jurisprudence of this Court.

THE IMPUGNED PROVISIONS ARE NOT IN THE BEST INTERESTS OF THE CHILD AND ARE AN UNJUSTIFIABLE LIMITATION OF THE CHILD'S CONSTITUTIONAL RIGHTS

35. Section 28(1)(b), (c) and (d) of the Constitution provides that every child has the right to family or parental care; to basic nutrition, shelter, basic healthcare services and social services; and to be protected from maltreatment, neglect, abuse or degradation.

36. Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. The right-holders of these rights are all children present in the country. All organs of state are required to uphold these rights and legislation may not limit these rights save where it is reasonable and justifiable. We highlight that sections 28(1)(d) and 28(2) place positive obligations on the state to protect children given their high level of vulnerability. It is difficult to see how the impugned provisions, when examined through the lens of the rights of the child, could ever be constitutionally compliant.

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[25] *Scalabrini 3* id para 42.

37. In *Centre for Child Law and Others v Media 24 Limited and Others*,[26] the Constitutional Court explained that the "*best interests of the child principle enshrined in section 28(2) of the Constitution is a right in and of itself and has been described as the 'benchmark for the treatment and protection of children'*."[27] This is the "golden thread" which runs throughout our law relating to children.[28]

38. The impugned provisions are not capable of an interpretation that protects the best interests and dignity of children. Even if they were capable of a generally benign interpretation, their effect would necessitate prejudice to children if their parents were unable to show good cause or compelling reasons. The children have no say in the determination at all.

39. For this reason, and subject to what we say regarding the limitations clause, the impugned provisions must be struck down simply as a means of protecting children. In *S v M*, the Constitutional Court emphasised a court's obligation in the following terms:

> *"What the law can do is create conditions to protect children from abuse and maximise opportunities for them to lead productive and happy lives. [...] It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk."*[29]

40. In *Sonderup*,[30] the Constitutional Court referred to an "*expansive guarantee*" that a child's best interests will be paramount in all matters concerning the child. Citing that case, that Court went on to find that:

> *"This provision thus imposes an obligation on all those who make decisions concerning a child to ensure that the best interests of the child enjoy paramount importance in their decisions."*[31]

41. Although the Constitutional Court has accepted that the section 28 rights are not

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[26] Supra note 14.
[27] Id at para 37.
[28] Brigitte Clark 'A "golden thread"? Some aspects of the application of the standard of the best interest of the child in South African family law' (2000) *Stellenbosch Law Review* 3.
[29] *S v M* supra note 14 at para 20.
[30] *Sonderup v Tondelli and Another* [2000] ZACC 26; 2001 (2) BCLR 152 (CC); 2001 (1) SA 1171 (CC) at para 29.
[31] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development and Others* (CCT 36/08) [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (2) SACR 130 (CC); 2009 (7) BCLR 637 (CC) at para 73.

absolute,[32] the positive obligation resting upon the state, coupled with the court's obligation to act in the best interests of the child generally, has consequences for the application of section 36 of the Constitution, simply because section 28(2) requires the rights of the child to take precedence over other state interests.

42. In addition, section 28 of the Constitution sets out the rights of *every child*, irrespective of status. The drafters of the Constitution consciously included all children within our borders as rights holders and did not reserve the section 28 rights only for citizens.

43. Of relevance here, section 28(1)(d) obliges the State to ensure that children are protected from maltreatment, neglect, abuse or degradation. Second, a child's best interests are of paramount importance in every matter concerning the child in accordance with section 28(2). The Constitutional Court has held[33] that the second right is in addition to, and stand-alone from, those specific rights set out in section 28(1).

44. We highlight that sections 28(1)(d) and 28(2) place positive obligations on the state to protect children given their high level of vulnerability.

45. The right springs from the realisation that children are individuals with personality distinct from that of their parents[34]. But further, the Courts are required to recognise the innate vulnerability of children "*and the need to protect them and their distinctive status as vulnerable young human beings*."[35]

46. We rely most specifically on the requirement in section 28(1)(d) that children are to be protected from maltreatment, neglect, abuse or degradation. There is no basis to suggest that this is restricted to abuse that takes place within the country's borders. Thus legislation that enables the State to send children to jurisdictions where they may be subject to such abuse is in conflict with section

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[32] *S v M* supra note 14 at para 26; *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development* supra note 31 at para 72; *AB v Pridwin Preparatory School* supra note 16 at 70.
[33] *Minister for Welfare and Population Development v Fitzpatrick* [2000] ZACC 6 at para 17. Confirmed in *J v National Director of Public Prosecutions* [2014] ZACC 1 at para 35 and Pridwin (supra note 16) at para 70.
[34] *S v M* supra note 14 at para 18. See also *AD v DW* supra note 14 at para 55; see also *Centre for Child Law v Media 24 Limited* supra note 14 at paras 71-2.
[35] *Centre for Child Law v Media 24 Limited* supra note 14 at para 64.

28(1)(d). Moreover, it is difficult to see how this could not also be contrary to section 28(2).

47. In *Christian Education South Africa*[36], the Constitutional Court expressed the view that the state is under a duty "*to take steps to help diminish the amount of public and private violence in society generally and to protect all people and especially children from maltreatment, abuse and degradation*".[37] We submit that the Refugees Act and South Africa's refugee-rights obligations generally must be consistent with this principle.

48. HSF aligns itself with Scalabrini's submissions that the impugned provisions are not rational.[38] If that is the case, then there is no saving the provisions and they must be declared unconstitutional and invalid. HSF also agrees with Scalabrini that the impugned provisions cannot pass the section 36 justification analysis. As Scalabrini note[39] in their submissions, once it is established that the impugned provisions infringe a right in the Bill of Rights (and we say that this is abundantly the case in respect of section 28), then the onus rests on the State to justify the violation.

49. Part of the justification the state offers for the scheme is that, as put in the Department of Home Affair's (**DHA**) response to HSF's request in terms of Rule 16A(2) for consent to intervene as *amicus curiae*:

> *"… the fact that an applicant for asylum seeker status is a child, could be raised in their good cause hearing. In the latter, a parent could raise the impact on their children in their good cause hearing."*

50. However, not only would this be irrelevant to a good cause hearing, but it would be irrelevant in respect of the need to show compelling reasons for non-compliance. We accordingly submit that there is no benign interpretation of the impugned provisions vis-à-vis children.

51. HSF agrees and aligns itself with the general submissions made by Scalabrini to

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[36] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC).
[37] *Christian Education* id at para 40.
[38] Scalabrini heads of argument at paras 89–100.
[39] Scalabrini heads of argument at para 42.

the effect that the limitation cannot be justified in terms of section 36, but we make the following submissions regarding each section 36 provision in so far as they relate to children.

51.1. The nature of the right: as noted above, the section 28 rights are foundational in that they seek to protect the most vulnerable of persons and guarantee them the role of right holder. An infringement, particularly of section 28(1)(d), by its nature means that children will be exposed, at least potentially, to abuse, violence and neglect. This is entirely destructive of the right.

51.2. The purpose of the limitation: in as much as the DHA will allege that the purpose of the limitation is to penalise those who do not enter the asylum system with 'clean hands', this logic cannot possibly apply to children who simply had no choice as to whether their parents were remiss in complying with the immigration requirements.

51.3. The nature and extent of the limitation: in respect of children, this is absolute. If they are refused access to the asylum system and are, as a consequence, deported to their country of origin, those with meritorious claims will be subject to a violation of their section 28 rights in the most egregious of ways.

51.4. The limitation and its purpose: as noted above, the limitation is an absolute one and would serve no purpose in respect of children.

51.5. Less restrictive means: in the light of the absence of any legitimate purpose in respect of children, there are no less restrictive means.

52. In summary, the limitation to the rights of children is not capable of justification.

THE IMPGUNED PROVISIONS ALSO VIOLATE INTERNATIONAL LAW OBLIGATIONS AND *NON-REFOULEMENT*

53. The Refugees Act provides that its purpose is to, inter alia, give effect to "*the relevant international legal instruments*". Importantly, section 1A of the Refugees Act provides that it must be interpreted and applied consistently, not only with

the main conventions dealing with refugee rights, but with "*<u>any</u> domestic law or other <u>relevant convention</u> or international agreement to which the Republic is or becomes a party*."[40] (our emphasis)

54. South Africa has ratified two key 'relevant conventions', namely the United Nations Convention on the Rights of the Child (**CRC**)[41] and the African Charter on the Rights and Welfare of the Child (**Charter**).[42]

CRC

55. South Africa ratified the CRC on 16 June 1995. This was the first international treaty that the post-apartheid government had ratified.[43] As noted above, it has informed the content of section 28 of the Constitution.

56. Article 3(1) provides that, "*in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, <u>the best interests of the child shall be a primary consideration</u>*." (our emphasis)

57. The CRC directs states to ensure a child's survival (Article 6); protect children from abuse and neglect (Article 19); specifically protect children seeking refuge (Article 22); protect children generally from all forms of exploitation (Article 36); protect children against torture and deprivation of liberty (Article 37); and ensure the protection of children who may become subject to armed conflicts (Article 38).

Charter

58. South Africa ratified the Charter on 7 January 2000. The Charter applies to all children (see Article 3). It requires signatory states to at all times act in the best interest of the child (Article 4).

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[40] Section 1A.
[41] General Assembly Resolution 44/25, adopted 20 November 1989.
[42] Adopted by the 26th Ordinary Session of the Assembly of Heads of State and Governance of the OAU, July 1990 and entered into force on 29 November 1999.
[43] Promoting Children's Rights in South Africa: Fast Facts – United Nations Convention of the Rights of the Child (UNCRC), published by Parliament of the Republic of South Africa, p 2.

59. The Charter contains protections for refugee children (Article 23):

> *"1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human right and humanitarian instruments to which the States are parties."*

60. South Africa is thus bound to the provisions of the CRC and the Charter, and the provisions of the Refugees Act and Regulations must be consistent with these instruments. Moreover, section 39(1)(b) of the Constitution provides that the Court *must* consider international law when interpreting the Bill of Rights.

61. In *S v M*, the Constitutional Court stressed that section 28 of the Constitution "*must be seen as responding in an expansive way to our international obligations as a State party to the [CRC]*".[44] Further,

> *"The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation. What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care."*[45]

62. Accordingly, the Constitution and the Refugees Act must be applied in conformity with the CRC and (we submit) the Charter.

63. It is clear that the impugned provisions do not meet the standards set by these instruments. Rather they enable the DHA to return children to countries where they will be subject to exactly the sort of abuse that the instruments forbid.

64. Finally, guidance may be obtained from General Comments published under the United Nations. First, the UN Committee on the Rights of Children, General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). General Comment No 14

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[44] *S v M* supra note 14 at para 16. See also *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA) at para 13.
[45] *S v M* id at para 17.

provides that:

> *"The right of a child to have their best interests assessed creates an intrinsic obligation on States, is directly applicable (self-executing) and can be invoked before a Court;*
>
> *The interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the CRC and its Optional Protocols provide the framework for interpretation; and*
>
> *States must show how the interests of the child have been respected when making any decision."*

65. Second, the Joint general comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return:

> *"Every child, at all times, has a fundamental right to liberty and freedom from immigration detention. The Committee on the Rights of the Child has asserted that the detention of any child because of their or their parents' migration status constitutes a child rights violation and contravenes the principle of the best interests of the child. In this light, both Committees have repeatedly affirmed that children should never be detained for reasons related to their or their parents' migration status and States should expeditiously and completely cease or eradicate the immigration detention of children.*

66. This is directly analogous to the deportation of children as a consequence of the immigration status of their parents.

Non-refoulement

67. Section 2 of the Refugees Act enshrines the principle of *non-refoulement*, which prohibits returning asylum seekers to countries where they face persecution.

68. The Constitutional Court pronounced itself on the principle of non-refoulement (non-return) enshrined in the Refugees Act, holding that "*one fleeing persecution or threats to 'his or her life, physical safety or freedom' should not be made to*

return to the country inflicting it".[46]

69. In another case, adding to the principle of non-refoulement, that Court stated that:

> *"And this, merely because asylum seekers failed to meet a procedural requirement. Even if the failure was the asylum seeker's fault, such harmful and inhumane consequences could not be justified under the Constitution."*[47]

70. Deporting children under the impugned provisions, without first determining their asylum claims, violates non-refoulement by:

> *"Failing to consider whether a child faces persecution or harm upon return.*
>
> *Neglecting to assess whether children are entitled to protection under international refugee law.*
>
> *Ignoring the distinct vulnerabilities of children in armed conflicts, gender-based violence, and human trafficking."*

THE IMPUGNED PROVISIONS CONFLICT WITH OTHER DOMESTIC LAW

71. The Children's Act 38 of 2005 (the **Children's Act**) and the Refugees Act form part of a coherent domestic legislative scheme that gives practical effect to the Constitution's protection of children and particularly imperative that the best interests of the child is paramount. Read with South Africa's binding obligations under international law as outlined above, these statutes require that decisions affecting children be individualised, child-sensitive, and guided by the imperative to preserve life, dignity, family unity and development.

72. The impugned provisions do the opposite. They impose a rigid, mechanical bar that leads to the deportation, detention, or effective exclusion of children without any consideration of their circumstances or interests.

73. The consequence is that the impugned provisions conflict directly with both Acts,

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[46] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 25.
[47] *Scalabrini 3* supra note 13 para 7.

and are constitutionally invalid.

The Children's Act

74. The Children's Act applies, again, to all children and again, in accordance with South Africa's constitutional and international law obligations. To ensure that children are protected from maltreatment, neglect, abuse or degradation (section 2(b)(iii)), the state must ensure a child's survival 2(b)(iv) and that the best interests of the child are of paramount importance (section 2(b)(iv) and section 9).

75. The Children's Act gives further content and effect to section 28(2) of the Constitution and obliges courts and decision-makers to consider the best interests of children in all matters concerning children. All proceedings, actions or decisions in matters concerning children must respect, protect, promote and fulfil the child's rights set out in the Bill of Rights.[48]

76. The impugned provisions are at odds with the Children's Act by creating a rigid procedural barrier that results in:

    76.1. The automatic deportation of children without considering their individual circumstances.

    76.2. Family separation, as children may be detained separately from parents.

    76.3. The risk of statelessness, where children cannot obtain nationality in their country of origin.

The Refugees Act

77. As noted above, section 1A(e) of the Refugees Act requires that it be interpreted and applied in accordance with domestic law.

78. Moreover, the Refugees Act, through section 2, has implemented a general right of non-return where asylum seekers may be subjected to persecution, or their lives, physical safety or freedom would be threatened on account of external

[48] Sections 6(2) and 9 of the Children's Act.

aggression, occupation, foreign domination or other events seriously disturbing public order. This is consistent with the customary international law principle of *non-refoulement*.

79. The Refugees Act further guarantees the protection of the family unit through sections 3(c) and 21B. This confers the protections on the making of an asylum application to all family members, particularly children, thereby allowing them full access to basic rights whilst their applications are considered, and full refugee rights where asylum is granted.

80. The impugned provisions, which we point out only came into effect 12 years after the initial enactment of the Refugees Act, are also in conflict with these principles, particularly section 2. HSF agrees with Scalabrini that the impugned Regulations are *ultra vires* the Minister's powers as constrained by section 2.

The impugned provisions do not meet these standards

81. Our international law obligations, and particularly the CRC, inform the Constitutional rights set out in section 28 of the Bill of Rights. These rights in turn inform our domestic legislation, particularly the Children's and Refugees Acts.

82. The impugned provisions limit the rights contained in section 28, either because they are not, objectively, in the best interests of the child; or they, at least potentially, expose children to maltreatment, neglect, abuse or degradation.

83. These limitations are not justifiable. In summary they are disproportionate to any purpose that they are designed to achieve and are destructive of the rights themselves.

84. The impugned provisions are not capable of a benign interpretation that takes children's rights into account or are child sensitive. They simply impose a strict bar to asylum where parents (or children) are unable to demonstrate that they have compelling reasons for not complying with immigration laws.

85. Accordingly, HSF submits that the impugned provisions stand to be declared constitutionally invalid, inter alia because they are in conflict with the right of the child.

BRIEF RESPONSE TO THE APPEAL

86. In their appeal, the respondents advance a number of grounds of appeal. Scalabrini has comprehensively responded to these issues in their submissions and HSF aligns itself with Scalabrini's arguments. In this section, we deal briefly with why the appeal, as it relates to dependent children, is without merit.

87. First, the respondents contend that Scalabrini's challenge is "abstract" and that the impugned provisions can or should be read in a constitutionally compliant manner. That is incorrect.

88. The HC Judgment was not based on hypothetical future applications but on the objective legal effect of the provisions: they prevent the reception of asylum applications where "good cause" is not shown, regardless of the merits of the protection claim. That legal consequence applies to every affected asylum seeker and is not dependent on individual factual disputes.

89. This Court has repeatedly confirmed that where legislation itself creates a constitutional violation, a facial challenge is appropriate. Moreover, where the defect lies in the terms of the law itself, the statute is unconstitutional even if officials claim they will enforce it sensitively or in good faith. As was noted in *National Coalition*[49]

> *"The test is objective. It is the legislation itself that is under attack, not the manner in which it is applied in a particular case."*[50]

90. In light of *Teddy Bear Clinic*, this is so specifically in matters that concern children.[51]

91. Second, the respondents claim that any harm is merely a matter of "implementation" and should be challenged case-by-case. That misunderstands the nature of the violation. The constitutional defect lies in the statutory design,

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[49] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

[50] Ibid at para 28.

[51] *See Teddy Bear Clinic* 2014 (2) SA 168 (CC) at paras 65–73.

which bars entry into the asylum system before the merits can be heard and without any child-sensitive safeguards. Where a statute authorises or permits a rights infringement, the law itself must be struck down. Constitutional invalidity cannot be excused by saying an unlawful scheme might hypothetically be applied lawfully.

92. If an asylum seeker, together with their family are refused refugee status simply due to the operation of section 4, and the failure to show compelling reasons, they will be rendered 'illegal foreigners' in terms of the Immigration Act[52] and thus liable to arrest, detention and ultimately deportation to their country of origin.[53]

93. We stress, that this determination is made without any assessment of the merits of the asylum claim itself. This is due to the fact that the RSDO is only required to consider whether there are 'compelling reasons' for non-compliance with the Immigration Act and Refugees Act (such as hospitalisation or institutionalisation). The merits of the application do not come under consideration at all.

94. The obvious consequence of this is that an asylum seeker family, with a meritorious claim, will be deported to their country of origin where they will be subject to persecution and other abuses to their constitutional rights. This includes children.

95. The respondents contend that these provisions are constitutionally defensible because asylum seekers who do not enter the system with 'clean hands' cannot be expected to be granted refugee status. Moreover, the respondents allege that there are sufficient safeguards – such as that those who can show 'good cause' or 'compelling reasons' will be forgiven and allowed to enter the asylum system where their claims will be assessed on their merits.

96. Yet Scalabrini has demonstrated that in practice, this schematic is disingenuous at best and that the impugned provisions create an impermissible barrier to asylum claimants who, in many if not all cases, are unable to approach a RSDO within the parameters of the impugned provisions. However, more

[52] Immigration Act section 1.
[53] Ibid section 34.

fundamentally, the impugned provisions will always operate contrary to the provisions of section 2 of the Refugees Act and the customary international law principle of non-refoulement.[54]

97. Third, the respondents attempt to soften the effect of the impugned provisions and contend that the provisions of section 4 do not act as an absolute barrier but are 'part of the mix' of factors, including the merits, circumstances of children etc, that the RSDO will consider in assessing an application for asylum.

98. This defence is without merit. Even if it is correct, the impugned provisions still violate *non-refoulement*, as the merits of an asylum claim must always trump any non-compliance by an applicant. Second, such an interpretation is contrary to the wording of section 4(1) itself which provides that *"[a]n asylum seeker does not qualify for refugee status …*". This imposes a barrier to refugee status irrespective of how strong the merits are.

99. The effect of the impugned provisions is most particularly felt in respect of children. The Constitutional Court has endorsed the principle that "*the sins and traumas of fathers and mothers should not be visited upon their children*".[55] In accordance with this principle, we contend that irrespective of how remiss the parents of children might have been in respect of the making of an asylum seeker application, there is no basis to enact provisions which result in the enforced return of children to countries where they will be subject to gross human rights violations. Such provisions would be contrary to our international law commitments, the Constitution and domestic law.

100. Finally, we emphasise that the impugned provisions apply irrespective of whether children are involved or not. As such, they cannot be said to be "*child sensitive*".[56] The fact that an aspirant asylum seeker parent has children is not a factor that enters the analysis made by the Immigration Officer of the RSDO *at all*. Their enquiry is directed only at the explanation for non-compliance given by the

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[54] See *Scalabrini 3* supra note 13 at para 31. See also *Ruta v Minister of Home Affairs* supra note 46 at paras 25 – 27.
[55] *S v M* supra note 14. See also *AB v Pridwin Preparatory School supra* note 16 at paras 69 – 75.
[56] *S v M* ibid para 15.

parents.

CONCLUSION

101. The impugned provisions violate the constitutional, international, and statutory rights of children by exposing them to deportation and denying them an opportunity to seek asylum on their own merits.

102. This Honourable Court is respectfully urged to confirm the High Court's declaration that sections 4(1)(f), 4(1)(h), 4(1)(i), and 21(1B) of the Refugees Act, as well as Regulations 8(1)(c)(i), 8(2), 8(3), and 8(4) are unconstitutional and invalid.

103. The state must be directed to ensure that all children seeking asylum have their best interests considered first before any determination on their status or potential deportation is made.

104. In light of the fundamental breaches of constitutional and international law, this Honourable Court should grant relief that ensures the protection of one of the most vulnerable groups in society – children seeking refuge.

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12 November 2025

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