

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: 8684/2024

In the application of:

HELEN SUZMAN FOUNDATION

Applicant for leave to
intervene as *amicus*
curiae

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

FILING SHEET

Filed herewith:

- 1 Notice of motion; and
- 2 Founding affidavit.



SIGNED AT CAPE TOWN ON 30 JANUARY 2025.



Norton Rose Fulbright South Africa Inc.

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Tel: 021 405 1323
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To:

REGISTRAR OF THE HIGH COURT
Cape Town

And to:

LAWYERS FOR HUMAN RIGHTS

Applicants' Attorneys
87 De Kort Street
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Heerengracht, Foreshore
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ACKNOWLEDGE OF RECEIPT

WEBBER WENTZEL
15th Floor, Convention Tower
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Tel: 021 431 7000

Date: 30/01/2025

And to:

DENGA INC.

Attorneys for the Respondents
7th Floor, Nedbank Building
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OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000

2025-01-31

GENERAL OFFICE
WESTERN CAPE HIGH COURT

2.1	Annexure “ NF1 ”: Letter from HSF’s attorneys to all parties requesting consent to intervene as <i>amicus curiae</i> , dated 13 January 2025	22 – 24
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SIGNED AT CAPE TOWN ON 30 JANUARY 2025.



Norton Rose Fulbright South Africa Inc.

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Tel: 021 422 2173

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RECEIVED: K. Fortuin

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NOTICE OF MOTION

TAKE NOTICE that the applicant shall make application, at the hearing of the above matter on 27 February 2025, or on such other date as to be allocated by the Court for an order in the following terms:



- 1 The Applicant's non-compliance with the timeframes in Rule 16A of the Uniform Rules of Court, together with the requirements relating to the timing and service of this application is condoned.
- 2 The Applicant is admitted as *amicus curiae* in these proceedings.
- 3 As *amicus curiae*, the Applicant is granted:
 - 3.1 The right to rely on the submissions set out in its founding affidavit together with any submissions set out in any replying affidavit that it may file;
 - 3.2 The right to lodge written argument in this matter; and
 - 3.3 The right to present oral argument at the hearing of this matter, provided that such argument does not repeat matters set forth in the arguments of the other parties, and raises new contentions which may be useful to the court.
- 4 Further and / or alternative relief.

TAKE NOTICE FURTHER that the founding affidavit of **NASEEMA FAKIR** will be used in support of the Applicant's application.

TAKE NOTICE FURTHER that the Applicant has appointed as its attorneys **NORTON ROSE FULBRIGHT INC** at the address set out below, where they will accept service of all notices, documents and other process connected with these proceedings. The Applicant confirm that it will accept email service at the email addresses set out below.

TAKE NOTICE FURTHER that any party intending to oppose this application are required to:

- (a) Notify the applicant's attorneys of their intention to oppose this application by email on or before 5 February 2025;
- (b) File their answering affidavit(s), if any, before 12 February 2025; and
- (c) In that event, the applicant shall file its replying affidavit by 17 February 2025.

Signed at **Cape Town** on **30 January 2025**.



Norton Rose Fulbright South Africa Inc.

Attorneys for the Applicant

9th floor, 117 on Strand

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South Africa

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Ref: Jason Whyte/ Chuma Bubu

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Email: jason.whyte@nortonrosefulbright.com

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FOUNDING AFFIDAVIT

APPLICATION TO BE ADMITTED AS *AMICUS CURIAE*



I, the undersigned,

NASEEMA FAKIR

do hereby make oath and say that:

- 1 I am an adult and the Executive Director of the Helen Suzman Foundation, the applicant herein (**HSF**). I confirm that I am duly authorised to depose to this affidavit on behalf of HSF for leave to intervene as *amicus curiae*.
- 2 The facts contained in this affidavit are within my personal knowledge, save where the contrary appears from the context or it is otherwise stated, and are to the best of my belief true and correct.
- 3 Where I deal with questions of law, I do so on the advice of HSF's legal representatives.

PARTIES

- 4 The Applicant is the Helen Suzman Foundation a non-governmental organisation situated at North Block, La Val Office Park, 45 Jan Smuts Avenue, Westcliff, Gauteng.
- 5 A resolution by the HSF will be filed with the Court on request.
- 6 The parties in the main application are as set out in the founding affidavit to the main application.



OVERVIEW

- 7 This is an application in terms of Rule 16A(6) of the Uniform Rules of Court (**Uniform Rules**), for the admission of the HSF as *amicus curiae* in the main application. The main application has been brought by the Scalabrini Centre of Cape Town in which it seeks, in Part B of the main application, to have declared as Constitutionally invalid and unlawful, sections 4(1)(f), 4(1)(h) and 21(1B) of the *Refugees Act*, 1998 (the **Refugees Act**) as well as Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) (the **Regulations**). These provisions (the **impugned provisions**) collectively seek to impose conditions upon asylum seekers when they have not complied with the strict requirements of immigration laws.
- 8 HSF believes that it is able to provide useful and novel submissions that will assist the Court in the main application and wishes to intervene as *amicus curiae* to do so. It therefore seeks this Court's authorisation to make both written and oral submissions to the Court on the issues set out below.
- 9 In what follows, I canvass:
- 9.1 HSF's interest in this matter;
 - 9.2 Overview of HSF's proposed submissions; and
 - 9.3 The timing of this application.

HSF'S INTEREST IN THIS MATTER

- 10 The HSF is an independent and not-for-profit institute in South Africa, dedicated to promoting constitutional democracy, human rights, and the rule of law in South Africa. The HSF engages in various activities, including research, publications, litigation, and submissions to the South African Parliament. It advocates for policies that translate the aspirations of the South African Constitution into reality for all who live in South Africa, emphasizing good governance, transparency, and accountability.
- 11 The HSF regularly participates in public interest litigation both as a party as well as an *amicus*. The HSF's key focus areas include the rule of law, defence of Constitutional and international law rights, as well as the defence of migrant rights.
- 12 In this regard some of the matters in which the HSF has participated include:
- 12.1 *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490, involving the withdrawal of the Zimbabwe Exemption Permit. The HSF successfully litigated this matter as co-applicant through to the Constitutional Court.
- 12.2 *Helen Suzman Foundation v Judicial Service Commission (CCT289/16)* [2018] ZACC 8. The HSF successfully litigated this matter in multiple fora, including the Constitutional Court.
- 12.3 *McBride v Minister of Police and Another* [2016] ZACC 30 where the HSF acted as *amicus* in proceedings concerning the independence of IPID.

- 12.4 *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 where the HSF acted as amicus in the litigation concerning Mr Nxasana's removal as Director of the NDPP.
- 12.5 *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32. The so-called Glenister II matter.
- 13 The litigation in the main application falls directly into HSF's mandate and the HSF is well equipped to deal with the issues raised and to provide high quality assistance to the Court as *amicus curiae*.
- 14 On a practical level, HSF's day-to-day work in respect of migrant rights has included, operating a service for asylum seekers and holders of the Zimbabwean Exemption Permit to obtain advice and access to justice.
- 15 HSF has also produced publications in the area of asylum seeker detention. For example, [Asylum Seeker Detention in South Africa: Towards Securitisation](https://hsf.org.za/publications/special-publications/hsf-brief-asylum-detention-in-south-africa-towards-securitisation.pdf) (<https://hsf.org.za/publications/special-publications/hsf-brief-asylum-detention-in-south-africa-towards-securitisation.pdf>). This publication details many of HSF's concerns regarding the impugned provisions and has informed HSF's desire to participate in these proceedings.
- 16 As a result of its experience and organisational objectives, HSF is well placed to provide submissions on matters concerning the Refugees Act and the Regulations and to be able to provide the Court with information related to the challenges occasioned by the Refugees Act and Regulations as well as the current implementation thereof.

17 Consequently, HSF has a clear interest in the main application.

OVERVIEW OF HSF'S PROPOSED SUBMISSIONS

18 HSF agrees broadly with the Applicants' overall submission that the provisions of sections 4(1)(f), 4(1)(h) and (i) and section 21(1B) of the Refugees Act together with Regulation 8(1)(c)(i), (2), (3) and (4) of the Regulations are inconsistent with the Constitution, unlawful and invalid.

19 In this regard, if granted leave to intervene as *amicus curiae*, HSF intends to assist the Court by addressing the following legal and practical issues that arise from this submission:

19.1 **First**, the Refugees Act and the Regulations have the consequence that children of asylum seekers who fail to show 'good cause' will be deported with their parents or separated from their parents and rendered stateless. This in circumstances where the substantive merits of the asylum application are not assessed at all, and where deportation back to the country of origin will expose children to gross human rights violations. This, I will submit, is contrary to the Constitution, international law obligations and national legislation.

19.2 **Second**, the bifurcation of a good cause determination and an asylum seeker status determination is contrary to the rights of asylum seekers under international law, is not sanctioned by Article 31 of the 1951 Convention Relating to the Status of Refugees (the **Refugees Convention**), and is impractical and ultimately in contravention of constitutional rights.



- 20 HSF does not intend to repeat any submissions made by the applicants or the respondents.
- 21 Accordingly, HSF submits that its proposed submissions are unique and will assist this Court in coming to a determination of the issues in the application.

Children's rights

Introduction

- 22 Whilst I do not wish to repeat what is set out in the affidavits already filed in the main application, I summarise the structure of asylum seeking in South Africa following the amendments to the Refugees Act (which became effective on 1 January 2020) and the promulgation of the new Regulations (which took effect on 27 December 2019) as follows:
- 22.1 An asylum seeker (being a person seeking refugee status in terms of the Refugees Act) must enter the country at a recognised point of entry and obtain an asylum transit visa, regulated by section 23 of the *Immigration Act, 2002* (the **Immigration Act**). The failure to obtain such a visa would render a person an illegal foreigner, liable to arrest, detention and deportation to their country of origin in terms of section 34 of the Immigration Act.
- 22.2 The asylum transit visa is only valid for five days. Sub-section 23(2) of the Immigration Act specifically provides that if the asylum transit visa expires before the person reports to a Refugee Reception Office (**RRO**) in order to apply for asylum, the holder shall become an illegal foreigner, and thus subject to arrest, detention and deportation to their country of origin.



- 22.3 Assuming that a person obtains an asylum transit visa, that person must report in person at a RRO where an application for asylum can be made, whereupon the applicant is provided with an asylum seeker visa. At this stage, the person becomes a 'presumptive refugee' and is afforded almost all of the rights and privileges attendant upon someone with recognised refugee status.
- 22.4 If an asylum seeker has either failed to obtain an asylum transit visa, or that visa, once obtained, has expired, that person is precluded from applying for asylum. Rather, that person has to demonstrate to an immigration officer that they have 'good cause' or 'valid reasons' why they are not in possession of a valid visa. This is provided for by section 21(1B) which was introduced by the amendments to the Refugees Act. Prior to the amendment, an asylum seeker could apply for asylum, and have their claim determined on its merits, irrespective of whether they had a valid asylum transit visa.
- 22.5 I must stress that an asylum seeker simply does not qualify for asylum if they are unable to show good cause. Moreover, section 4(1) of the Refugees Act now provides that if that person has failed to enter through a valid point of entry, or does not have a valid transit visa, that person must persuade a Refugee Status Determination Officer (**RSDO**) that there are '*compelling reasons*' for such entry or failure. This would appear to create an extremely high bar where an applicant for asylum has not strictly complied with the provisions of the Refugees or Immigration Acts. In fact, in respect of those persons who do not attend at an RRO within the mandatory five days, they are required to establish compelling reasons such as hospitalisation or institutionalisation.

- 22.6 These provisions are essentially repeated in Regulation 8 of the Regulations, where sub-Regulation 8(3) provides that an asylum seeker must show good cause prior to being permitted to apply for asylum.
- 23 I point out that prior to the amendments and new Regulations, an applicant for asylum was entitled to apply for asylum at any stage after their entry into the country and irrespective of whether they had entered via a valid point of entry. Their asylum claim would then be determined on the basis of whether it had substantive merit and met the definitions as set out in section 3 of the Refugees Act.
- 24 Under the new regime, an applicant for asylum might never have the substantive merits of their application considered simply because they do not have good or compelling reasons for entering the country inappropriately or failing to have a valid transit visa. As the applicants point out in the main application this would raise, at the very least, significant inroads into the customary international law principle of non-refoulement, the content of which has been incorporated into section 2 of the Refugees Act.

The impact upon children

- 25 Whilst it might be argued that adult asylum seekers are required to abide by the laws of South Africa and can not complain if they do not (I of course make no concession), this logic cannot possibly apply to the *children* of asylum seekers. I am advised that the Constitutional Court has expressed the view that under the Constitutional Dispensation, "*the sins and traumas of fathers*



and mothers should not be visited upon their children.” (S v M [2007] ZACC 18 at para 18)

26 The children of asylum seekers are not able to influence the decision made by their parents as to where they enter into the country; whether they obtain an asylum transit visa; or how quickly they report to a RRO. Notwithstanding this, if the parents' good cause application is declined (which it could be for any number of reasons), the children will automatically be subject to deportation back to their country of origin – this in circumstances where it may be readily apparent that the children will be subject to egregious human rights abuses, torture or co-optation into military forces.

27 The above would place the respondents in conflict with their Constitutional, international law and legislative obligations, the nature of which I briefly describe below:

27.1 The Constitution:

27.1.1 Section 28(1)(d) of the Constitution provides that every child has the right to be protected from maltreatment, neglect, abuse or degradation. This right-holders of this right are all children present in the country.

27.1.2 Section 28(2) provides further, and by way of emphasis, that a child's best interests are of paramount importance in every matter concerning a child.

27.1.3 It is trite that all organs of state are required to uphold these rights and that legislation may not limit these rights save where it is reasonable and justifiable. I also emphasise that the right contained in section 28(1)(d) imposes a positive obligation on the State to protect children, given their high level of vulnerability.

27.1.4 It is difficult to see how the impugned provisions, when examined through the lens of the right of the child, could ever be Constitutionally compliant.

27.2 International law:

27.2.1 South Africa ratified the United Nations Convention on the rights of the Child (the **CRC**) on 16 June 1995. It is significant that this was the first international treaty that the post-apartheid government had ratified.

27.2.2 Aside from requiring states to always act in the best interests of the child (Article 3), the CRC specifically enjoins states to:

- (1) Ensure a child's survival (Article 6);
- (2) Protect children from abuse and neglect (Article 19);
- (3) Specifically protect children seeking refuge (Article 22);
- (4) Protect children against torture and deprivation of liberty (Article 37); and



- (5) Protect children generally from all forms of exploitation (Article 36).

27.2.3 The CRC also requires ratifying states to ensure the protection of children who may become subject to armed conflicts (Article 38). This is particularly important where persons affected by armed conflict seek refuge in another country.

27.2.4 South Africa is also a signatory to the African Charter on the Rights and Welfare of the Child (the **Charter**). Similarly to the CRC, the Charter applies to all children and requires signatory states to at all times act in the best interest of the child.

27.2.5 Specifically, the Charter protects children against abuse and torture (Article 16) and protection in armed conflicts (Article 22).

27.2.6 Of particular note is Article 23 which provides that:

"States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status ... 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."

27.2.7 The impugned provisions would accordingly directly conflict with South Africa's international law obligations.



27.3 Legislation:

27.3.1 The *Children's Act*, 2005 (the **Children's Act**) was enacted in compliance with the State's obligations in terms of section 28 of the Constitution. It specifically references in its preamble, the need to comply with the CRC and the Charter.

27.3.2 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)) and that the best interests of the child are of paramount importance (section 2(b)(iv) and section 9).

27.3.3 All organs of state are required to respect children's rights and to cooperate in doing so (section 5).

27.3.4 The impugned provisions are thus contrary to the Children's Act.

International law

28 Regulation 8(3) seeks to pre-empt the challenge made in the main application by stating that a good cause interview is contemplated by Article 31(1) of the Refugees Convention.

29 This slight of hand misrepresents what the Refugees Convention actually states. In this regard, Article 31(1) provides as follows:



“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” (my emphasis)

- 30 In context a “penalty” is not a blanket refusal to consider the asylum seeker application at all, but contemplates a fine or other form of sanction for not complying with domestic immigration laws. Moreover, such an interpretation would be in direct conflict with Article 33 (non-refoulement).
- 31 In summary, there is no basis for the respondents to suggest that the good cause requirement, as a precondition for the granting of refugee status, is consistent with the Refugees Convention or international law generally.

TIMING OF THIS APPLICATION

- 32 I am advised that in terms of Rule 16A of the Uniform Rules, an applicant raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing of the application. The registrar is then required to place such notice on the notice board designated for that purpose.
- 33 The Applicants filed the main application, together with a Notice in terms of Rule 16A, on 26 April 2024.
- 34 I am advised that, in terms of Rule 16A(2) and (3) of the Uniform Rules, an applicant for admission as *amicus curiae* must request consent from the



parties to be admitted within twenty days of the filing of the application, and, if successful in securing such consent, must lodge the such consent with the registrar within five days.

35 On a strict reading of the Rule, HSF was required to have requested consent to intervene in the matter by 24 May 2024. Instead, HSF delayed until 13 January 2025 before directing its consent letter to the applicant and respondents' legal representatives.

36 The circumstances surrounding the delay are as follows:

36.1 The applicants' application sought initial Part A relief on an urgent basis. This application was subsequently set down for 15 May 2024, but ultimately heard after a postponement was granted on 27 August 2024.

36.2 Firstly, it was not appropriate to intervene as amicus at this stage as the applicants' were only seeking interim relief designed to suspend the implementation of the impugned provisions until such time as their Constitutional validity could be tested in Part B. This is what the Court's judgment of 13 September 2024 ordered.

36.3 In any event, even if it was appropriate for the HSF to intervene at that stage, there simply would not have been sufficient time to file papers without upsetting the urgency of the application, at least as originally envisaged.

36.4 After the Court had made an order in the applicants' favour in Part A, HSF took the decision, on legal advice, to await the receipt of the Rule 53 Record, the applicants' supplementary affidavit and the respondents' answering affidavit.



This would allow HSF to make an informed decision regarding intervention, rather than simply seeking to intervene without a full understanding of the respondents' justification for defending the impugned provisions.

- 36.5 The respondents' answering affidavit was filed on Friday, 13 December 2024. This was the date on which HSF's offices closed for the end of year break and when HSF's legal team became unavailable.
- 36.6 On 10 January 2025 a meeting was conducted between myself and HSF's legal team and a decision was taken to proceed with this application. On 13 January 2025, a consent letter was sent to the parties and they were requested to provide their consent or objection to HSF's intervention by 20 January 2025. I attach a copy of this letter as **NF1**.
- 36.7 On 22 January 2025, the attorneys acting for the applicant responded, consenting to HSF's intervention as an amicus. I attach their correspondence as **NF2**.
- 36.8 On 28 January 2025, the respondents' attorneys responded, declining to consent to HSF's intervention as an amicus. I attach their correspondence as **NF3**.
- 36.9 This application was then prepared with a view to being filed as soon as possible after 28 January 2025. Moreover, I record that on 28 January 2025, Amnesty International, the Global Strategic Litigation Council for Refugee Rights and International Detention Coalition applied to intervene as *amici curiae* in the matter.



37 In summary, I submit that there is a reasonable explanation for HSF's failure to comply with Rule 16A and I pray that condonation be granted.

38 Whilst I am appreciative of the fact that the application is to be heard on 27 February 2025, I am of the view that there will be adequate time for the parties to deal with all of the issues that the HSF wishes to advance. There will accordingly not be any prejudice to the other parties.

39 I submit that HSF's submissions will be of assistance to the Court in making a just and equitable determination of the issues.

CONCLUSION

40 Accordingly, HSF submits that it has satisfied the requirements for admission as *amicus curiae*.

41 I pray for the orders set out in the Notice of Motion to which this affidavit is attached.



NASEEMA FAKIR

I certify that the deponent has acknowledged that she knows and understands the contents of this declaration and informed me that she does not have any objection to taking the oath and that she considers it to be binding on her conscience and that the deponent uttered the following words "I swear that the contents of this declaration are true, so help me God". I certify further that the provisions of Regulation R1258 of the 21st July 1972 (as amended) have been complied with.

Signed and sworn to before me at Johannesburg on this the 30 day of January 2025.

Willem Kruger De Klerk
Practising Attorney
Le Val, North Block
45 Jan Smuts Avenue
Westcliff, Johannesburg
South Africa
Tel: 011 486 0242/3
Commissioner of Oaths



COMMISSIONER OF OATHS

13 January 2025

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Your reference Our reference
PBO2329

Dear Colleagues

Request to intervene as amicus curiae: Helen Suzman Foundation
In re: Scalabrini Centre of Cape Town // Minister of Home Affairs and others (Case No.: 8486/24)
Western Cape High Court

1 Introduction

- 1.1 We confirm that we act on behalf of the Helen Suzman Foundation (the HSF).
- 1.2 We write to you to obtain written consent on behalf of your respective clients for the HSF to be admitted as *amicus curiae* in the above matter (the **Scalabrini application**) as contemplated by Rule 16A(2) of the Uniform Rules of Court.
- 1.3 If granted admission, the HSF intends to draw on its expertise and interest in the issues raised in the Scalabrini application and will introduce limited evidence, as well as make written and oral submissions which will be of assistance to the Court as it is of the view that the matter will undoubtedly have wide-reaching impacts for the public interest, well beyond the parties alone. The submissions intended to be advanced are underpinned by a deep commitment to acting in the public interest, specifically the best interests of the child and asylum seekers generally. The HSF does not intend on duplicating any of the submissions to be made by the main parties in the Scalabrini application.

2 The Helen Suzman Foundation's standing

- 2.1 The HSF is an independent and not-for-profit research institute in South Africa, dedicated to promoting liberal democratic values, human rights, and the rule of law in South Africa. The HSF engages in various activities, including research, publications, litigation, and submissions to the South African Parliament. It advocates for policies that translate the aspirations of the South African Constitution into reality for all citizens, emphasizing good governance, transparency, and accountability.
- 2.2 The foundation is not aligned with any political party but actively participates in public debates to uphold constitutional values. More specifically, it also provides support to asylum seekers and engages in international anti-corruption efforts.
- 2.3 The HSF regularly participates in public interest litigation both as a party as well as an amicus. In this regard some of the matters in which the HSF has participated include:
 - (1) *Helen Suzman Foundation and Another v Minister of Home Affairs and Others* [2023] ZAGPPHC 490, involving the withdrawal of the Zimbabwe Exemption Permit. The HSF successfully litigated this matter as co-applicant through to the Constitutional Court.

HSF Amicus consent letter Final - 13.01.25(3530927.1)

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Consultants: GG Beumer AJ Chappell PM Christie RA de la Harze AGS Dizon GCS Kalle WP le Roux E Limprecht P Maude HJ van Rensburg
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13 January 2025

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- (2) *Helen Suzman Foundation v Judicial Service Commission* (CCT289/16) [2018] ZACC 8. The HSF successfully litigated this matter in multiple fora, including the Constitutional Court.
- (3) *McBride v Minister of Police and Another* [2016] ZACC 30 where the HSF acted as amicus in proceedings concerning the independence of IPID.
- (4) *Corruption Watch NPC and Others v President of the Republic of South Africa and Others* [2018] ZACC 23 where the HSF acted as amicus in the litigation concerning Mr Nxasana's removal as Director of the NDPP.

2.4 From this it can be concluded that the HSF has the capacity and experience to meaningfully contribute to the Court's determination of the dispute between the parties.

3 The Helen Suzman Foundation's interest

3.1 The HSF acts frequently in defence of constitutional and human rights, the rule of law and the need to fostering deliberative, reasoned decision-making. The Scalabrini application impacts upon all of these issues and underpins HSF's interest in the matter.

3.2 One of the main focus areas pursued by HSF concerns the abuses inherent in South Africa's migration systems. This includes the application of the *Refugees Act*, 1998 following its amendment with effect from 1 January 2020 and the new Regulations that were promulgated in terms thereof. The Scalabrini application impugns sections 4(h) and (i) of the *Refugees Act*, read with Regulation 8(3) and (4). The impact of these provisions is that a person wishing to apply for asylum, inclusive of their dependents and children, are prevented from entering the asylum system at all.

3.3 Pursuant to its consideration of the papers filed to date, the HSF is of the view that it can present a relevant but different perspective to that of the parties, and thereby to assist the Court in the determination of the matter.

3.4 If admitted, the HSF will broadly advance the following submissions:

- (1) The practical impact of the impugned provisions on children's constitutional rights, particularly how they result in children being rendered stateless or returned to their country of origin in breach of international law, particularly the principle of non-refoulement. In this regard, the impact of the impugned provisions at play in the Scalabrini application are that children may be returned to their country of origin simply because their parents have failed to show good cause for failing to be in possession of the requisite transit visa or in having failed to apply for asylum timeously.
- (2) The circumstances of asylum seekers in Gauteng who are not being provided with good cause interviews at all and who, as a result, are subject to arbitrary detention and deportation contrary to international law and their rights under the Constitution. Because these asylum seekers are not afforded a good cause hearing, they never have an opportunity to enter the asylum seeker system. This is again contrary to their rights under international law.
- (3) Why the bifurcation of a good cause determination and an asylum seeker status determination is contrary to the rights of asylum seekers under international law, is not sanctioned by Article 31 of the 1951 Convention Relating to the Status of Refugees, and is impractical and ultimately in contravention of constitutional rights.

3.5 Whilst the HSF does intend to refer to select case studies which would constitute new evidence in the matter, this will be circumscribed and in accordance with the principles established by the apex courts. This evidence will not prejudice the parties but will allow the Court to gain a full understanding of the issues at stake.

4 Conclusion

4.1 Should you or your clients consent to the Helen Suzman Foundation's admission as an *amicus curiae*, the Helen Suzman Foundation will ensure that its application for admission is delivered without delay and by no later than 27 January 2025, being the date on which the applicant is due to file its replying

13 January 2025

NORTON ROSE FULBRIGHT

affidavit in the Scalabrini application. If admitted, our client intends to make brief written submissions and will deliver these according to the timetable set by the Registrar of the Western Cape High Court and with due deference to the parties and make short oral submissions at the hearing of the matter.

- 4.2 Kindly confirm by no later than 20 January 2025 that you or your respective clients consent to our client being admitted as amicus curiae.

Yours faithfully



Jason Whyte, Director
Norton Rose Fulbright South Africa Inc



LAWYERS FOR HUMAN RIGHTS

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22 January 2025

ATT: Jason Whyte
Director: Norton Rose Fulbright South African Inc
By email: Jason.whyte@nortonrosefulbright.com

CC: Denga Inc
Respondents' Attorneys
By email: alpheus@dengainc.co.za

Dear Sir

RE: SCALABRINI CENTRE OF CAPE TOWN AND ANOTHER // MINISTER OF HOME AFFAIRS AND OTHERS
(CASE NO: 8486/24)

1. We refer to your letter dated 13 January 2025.
2. We confirm our clients' consent to your client, Helen Suzman Foundation, being admitted as *amicus curiae* in the abovementioned matter.
3. We trust you find the above in order.

Yours faithfully,



LAWYERS FOR HUMAN RIGHTS

Per: Nabeelah Mia

Paulette Nyeleti Baloyi LLB (NMMU); Thato Goffane LLB (UNISA) LLM (UJ); Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayon Leung LLB (UNISA) LLM (Wits); Palesa Maloisane BSocSci (Political Studies and Gender Studies) (UCT) LLB (Wits); Nabeelah Mia BSocSci Honours (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Millicent Mthunzi BA (Political Studies and Sociology) (Wits) LLB (Wits); Wayne Ncube LLB (NMMU) LLM (Wits); Mamethwe Sebel BA Law (UP) LLB (UNISA) and MA (Wits); Charné Tracey LLB (Wits)





Our Ref. Denga/nm/AM15/24

Your ref.

Date: 28 January 2025

Mr Jason Whyte
Norton Rose Fulbright South Africa Inc
117 Strand Street
Cape Town
Email: jason.whyte@nortonrosefulbright.com

Sir

**RE: WCC CASE NO 8486/2024: SCALABRINI CENTRE OF CAPE TOWN AND
ANOTHER / THE MINISTER OF HOME AFFAIRS AND OTHERS; ADMISSION
AS AN *AMICUS CURIAE***

1. We refer to your letter of 13 January 2025, in which you seek the written consent of the parties in the above matter for the admission your client, the Helen Suzman Foundation ("**the HSF**"), as an *amicus curiae*.

ATTORNEYS • ADMINISTRATORS OF ESTATES – PROKUREURS • BOEDELBEREDDERAARS

Director: Alpheus Denga, B.Juris, LLB (Wits), H Dip Tax (RAU) • Registration number 2003/021402/21
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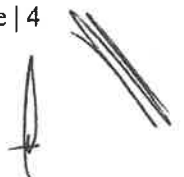
2. We represent the First to Fifth Respondents ("**the Respondents**"), and are instructed to inform you that they do not consent to the admission of the HSF.
3. The reasons for the opposition to the HSF's admission will be dealt with if and when the HSF brings an application for its admission – as required in terms of Rule 16A(6) of the Uniform Rules. For current purposes, the Respondents note the following:
 - 4.1. The application was launched on 29 April 2024, and included a notice in terms of Rule 16A of the Uniform Rules. You note that "*one of the main focus areas pursued by the HSF*" involved the migration system, including the application of the Refugees Act 130 of 1998 ("**the Act**"). As such, the HSF should have been aware of the application for some time.
 - 4.2. The interim interdictory relief sought in Part A of the original notice of motion came before the Court on 27 August 2024, and the judgment and order of the Court followed on 13 September 2024. The order made it clear that the final relief, then contained in part B of the original notice of motion, would be heard on 27 February 2025; and laid out a timetable for filing of further pleadings and heads of argument.



- 4.3. In terms of the timetable, the pleadings would close with the Applicant filing a further replying affidavit on 23 January 2025. The parties are currently preparing heads of argument, which must be filed by 6 and 13 February 2025.
- 4.4. Your request envisages that the HSF will present new evidence, albeit on narrow issues. This will require the exchange of further affidavits. It is simply impracticable for this to occur, and for comprehensive heads of argument to be prepared, before the hearing on 27 February 2025.
5. **Second**, you state (in paragraph 3.4(2) of your letter) that you propose to deal with the "*circumstances of asylum seekers in Gauteng who are not being provided with good cause interviews at all*". However:
- 5.1. The relief sought in the application is based on an abstract challenge to impugned provisions of the Act and the regulations, based on the requirements of the Constitution, international law, and the principle of non-refoulment (as set out in section 2 of the Act). This essentially raises the proper interpretation of the impugned provisions of the Act and the Regulations – which is an objective and legal determination. The application (or possible misapplication) of the impugned provisions by officials in Refugee Reception Offices ("**RROs**") in Gauteng, is not directly relevant to the objective and legal question before the Court.



- 5.2. The Applicant has already included evidence regarding the manner in which the impugned provisions were applied in different RROs in the past – including those in Gauteng. The Respondents have accepted that the provisions were misapplied in some RROs. This does not, however, affect the objective, legal question regarding the proper interpretation of the impugned provisions.
- 5.3. The proper interpretation of the impugned provisions has already been dealt with in *Ashebo v Minister of Home Affairs and Others* 2023 (5) SA 382 (CC).
- 5.4. To the extent that officials in the RROs in Gauteng are still misapplying the impugned provisions, and fail to undertake good cause interviews “*at all*”, this could be more appropriately addressed in review proceedings concerning such cases. We further invite you to present evidence to us of any individual cases in which applicants for asylum seeker status are refused any good cause interview, which we shall take up with the Minister and the Director-General.
6. **Third**, you state (in paragraph 3.4(3) of your letter) that you propose to make submissions that the impugned provisions unlawfully “bifurcate” the process and separate the “*good cause determination and an asylum seeker status determination*” – which you allege is “*contrary to the rights of asylum seekers under international law, is not sanctioned by Article 31 of the 1951 Convention Relating to the Status of Refugees, and is impractical and ultimately in contravention of constitutional rights.*” This is indistinguishable from the main



argument raised by the Applicant, which includes reliance on international law, Article 31, the Constitution, and the principle of non-refoulement as codified in section 2 of the Act.

7. **Fourth**, you state (in paragraph 3.4(1) of your letter) that one of the main submissions that the HSF proposes to advance regards the “*practical impact of the impugned provisions on children’s constitutional rights*”. We appreciate that the interests of vulnerable groups, including children, must be considered in the proper interpretation of the impugned provisions. It is not, however, explained how the impugned provisions, properly interpreted and properly implemented, violate the rights of children. In particular, you do not explain whether you are referring to cases in which a child has a self-standing application for asylum seeker status (independent of their parent or parents); or whether you are referring to cases in which a child’s right to lawfully remain in the country is dependent on their parent or parents obtaining asylum seeker status. We note that in the former, 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. Any unlawful action in respect of the child would then flow from unlawfulness against the parent.

8. In the circumstances, your letter fails to indicate any areas in which your clients will “*advance relevant, useful and new contentions*” beyond those of the parties (per *Maledu and others v Itereleng Bakgatla Mineral Resources (Pty) Ltd And Another*¹). On the contrary, the focus of the proposed involvement by your clients appears to be to raise issues of international law, which lie at the centre of the Applicants’ case. Your clients’ repetition of the same arguments will add nothing.



Yours faithfully



A DENGA

