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Asylum Seeker Detention in South Africa: Towards Securitisation

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Abstract

This brief explores the evolving role of detention in South Africa's asylum system, focusing on how legal developments have shifted the balance towards state sovereignty and border protection, at the expense of refugee protection. Changes to the legal framework of refugee protection, such as the introduction of 'good cause' interviews and stricter penalties for irregular entry, have made detention a central tool in managing asylum seekers. These developments raise concerns surrounding the accessibility of refugee protection, as new procedural barriers risk preventing legitimate asylum claims from being heard. The principle of non-refoulement, which prohibits the return of individuals to countries where they may face persecution, remains foundational in South Africa's refugee protection framework. However, the imposition of more stringent conditions on asylum seekers threatens this safeguard by obstructing the proper assessment of the merits of asylum claims. Furthermore, the judiciary has struggled to adequately balance these domestic legal changes with South Africa's international obligations. Ultimately, this brief argues that an increased reliance on detention risks criminalising asylum seekers and weakening the country's adherence to international refugee law, raising significant concerns about the future of refugee protection in South Africa.

Asylum Seeker Detention in South Africa: Towards Securitisation

Introduction

Detaining asylum seekers who cross international borders illegally continues to capture political and jurisprudential discourse across the globe. For example, the use of offshore detention centres by Australia and 'transit zones' by Hungary, both employed to detain asylum seekers, has sparked debate and criticism regarding human rights concerns and the legality of these detention methods.[1] A principal tension in the legal framework that governs detaining asylum seekers is found between refugee protection[2] on one side, and State sovereignty and border integrity on the other. International law instruments, such as the 1951 Convention Relating to the Status of Refugees ('Refugee Convention'), place restrictions on detaining asylum seekers pending the assessment of their status. Yet many States test the boundaries of that restriction by enacting domestic laws which provide for detaining asylum seekers to pursue the legitimate aim of securing their borders. South Africa began its own attempt at shifting its domestic law toward ensuring border security with amendments to the Refugees Act No 130 of 1998 ('Refugees Act') that came into effect in 2020. Thereafter, a series of conflicting judicial decisions from South Africa's High Courts and ultimately its Constitutional Court have seen the State's attitude towards asylum detention change from one that did not permit the detention of asylum seekers, to one that allows it.

This brief proposes to investigate these developments and to argue that South Africa's recent legislative amendments have tilted the balance disproportionately towards State sovereignty at the expense of refugee protection. It is argued that the law on detaining asylum seekers in South Africa faces significant challenges, particularly regarding recently introduced

[1] *Australia: End Indefinite, Arbitrary Immigration Detention,* (Human Rights Watch 2022) <https://www.hrw.org/news/2022/02/15/australia-end-indefinite-arbitrary-immigration-detention> Accessed 7th July 2024; *UNHCR concerned by Hungary's latest measures affecting access to asylum,* (UNHCR 2021) <https://www.unhcr.org/news/news-releases/unhcr-concerned-hungarys-latest-measures-affecting-access-asylum> Accessed 7th July 2024

[2] It is important to note that there is a distinction between asylum seekers, also known as *de facto* refugees, who have not yet had their status as refugees determined, and *de jure* refugees who have been formally declared as refugees. Both *de facto* and *de jure* refugees are afforded the same protection by the refugee protection framework.

'good cause' interviews and the criminalisation of asylum seekers. This brief aims to demonstrate that judicial interpretations of South African refugee law often prioritise state sovereignty over refugee protection, with courts inadequately engaging with international law. Compounding these issues is South Africa's poor refugee protection infrastructure, which exacerbates the problems faced by asylum seekers. It is argued that this reflects a global trend towards migration securitisation and a move away from refugee protection towards enhancing state sovereignty and border control.

Legal Framework Pre-Amendment Regarding Detaining Refugees

The legal foundation of refugee protection lies in the Refugee Convention.[3] The cornerstone of the Refugee Convention is the principle of *non-refoulement*, which prohibits States from returning individuals to countries where they possess a well-founded fear of persecution. This principle is encapsulated by article 33 of the Convention, titled "Prohibition of Expulsion and Return."[4] In relation to detention, article 31 of the Convention prohibits the detention of refugees and asylum seekers who have illegally entered a State, provided such individuals initiate their asylum claims without delay and present 'good cause' for their illegal entry.[5] The type of

[3] South Africa became a signatory to the Refugee Convention in 1996, acceding to the Convention with no reservations to any of the articles therein. The Convention was domesticated by the enactment of the Refugees Act of 1998, which in conjunction with the Immigration Act No 13 of 2002 ('Immigration Act'), provided the legal framework for the implementation and regulation of asylum in South Africa.

[4] 1951 Convention Relating to the Status of Refugees, Art. 33:

> "**Article 33 - Prohibition of expulsion or return ("refoulement")**
>
> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

[5] *Ibid*, Art. 31:

> "**Article 31 - Refugees unlawfully in the country of refuge**
>
> 1. 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.

detention prohibited by article 31 is somewhat contested, resulting from a minor conflict between the English and French translations of the text.[6] What is important to note is that *criminal* detention is prohibited by both translations, but administrative detention is not.[7] As will be discussed later, this distinction is crucial because South Africa has increasingly utilised criminal detention for asylum seekers who have illegally entered and remained in the country.

Key Provisions: Pre-Amendments

The key provision of the Refugees Act is section 2, which codifies the principle of *non-refoulement,* essentially mirroring article 33 of the Convention.[8] Notably, section 2 begins with the phrase "notwithstanding any provision of this Act or any other law to the contrary", meaning that the protection provided by the section stands above any other law of South Africa, other than the Constitution. Whilst there is a distinction between *refoulement* and detention, it is important to note that the two share a connection. If detention is used to facilitate the deportation of asylum seekers, or to prevent them from gaining access to refugee status determination processes, such detention could ultimately lead to *refoulement*. In such cases,

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> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

[6] Goodwin-Gill, *Article 31 of the 1951 Convention Relating to the Status of Refugees: non-penalization, detention, and protection* in Feller, Türk, Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003), p194

[7] Goodwin-Gill & McAdam, *The Refugee in International Law* (Fourth Edition, Oxford University Press 2021), p591

[8] Refugees Act No 130 of 1998, s2:

> **"General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances**
>
> Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such
>
> person is compelled to return to or remain in a country where—
>
> (a) he or she may be subjected to persecution on account of his or her race, religion, nationality,
>
> political opinion or membership of a particular social group; or
>
> (b) his or her life, physical safety or freedom would be threatened on account of external
>
> aggression, occupation, foreign domination or other events seriously disturbing public order in
>
> any part or the whole of that country."

detention would be straightforwardly unlawful for running afoul of the principle of *non-refoulement* because implicit in section 2 is an undertaking to assess whether an applicant of asylum is at risk of persecution. It is quite a separate matter whether detaining asylum seekers *per se* – that is detention that issues no risk of *refoulement* – is unlawful.

On the issue of detention, the unamended Refugees Act was relatively quiet, only contemplating detention following the Minister of Home Affairs withdrawing an asylum seeker permit for unlawful behaviour.[9] However, section 21(4) of the Refugees Act states that "no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic"[10] so long as such person has made an application for asylum "in accordance with the prescribed procedure to a Refugee Reception Officer at a Refugee Reception Office."[11]

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[9] Refugees Act No 130 of 1998, s22(6), s23, s29

[10] *Ibid*, s21:

> "21. (1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.
>
> (2) The Refugee Reception Officer concerned-
>
> (a) must accept the application form from the applicant;
>
> (b) must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard;
>
> (c) may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and
>
> (d) must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of section 24.
>
> (3) When making an application for asylum, every applicant must have his or her fingerprints or other prints taken in the prescribed manner and every applicant who is 16 years old or older must furnish two recent photographs of himself or herself of such dimensions as may be prescribed.
>
> (4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if-
>
> (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or
>
> (b) such person has been granted asylum.
>
> (5) The confidentiality of asylum applications and the information contained therein must be ensured at all times."

[11] *Ibid*, s21(1)

Conversely, the Immigration Act makes relatively clear provision for detaining and deporting people who enter or stay in the country illegally, defining such individuals as "illegal foreigners".[12] And, whilst section 23 of the Immigration Act creates powers for immigration officials to grant asylum transit visas to allow individuals to transit through the country in order to apply for an asylum permit at a Refugee Reception Office, section 23(2) asserts that upon expiry of such transit visa, individuals who have not presented at a Refugee Reception Office are to be dealt with as "illegal foreigners" under the Immigration Act. Specifically, section 34(1)[13] provides for the administrative detention and subsequent deportation of "illegal foreigners", and section 49(1)[14] provides for criminal sanctions of a fine or imprisonment for such individuals.

The application of the above provisions of the Refugees Act and Immigration Act, in relation to asylum detention, was tackled by a string of cases heard at the Supreme Court of Appeal and the Constitutional Court.

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[12] Immigration Act No 13 of 2002, s34, s49

[13] *Ibid*, s34(1):

> "**34. Detention and deportation of illegal foreigners**
>
> (1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned-
>
> (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
>
> (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
>
> (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;
>
> (d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and
>
> (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights."

[14] *Ibid*, s49(1):

> "**49. Offences**
>
> (1)(a) Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.
>
> (b) Any illegal foreigner who fails to depart when so ordered by the Director-General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years."

Key Cases: Pre-Amendments

In the Supreme Court of Appeal, the so-called 'quartet' of cases,[15] established a number of key principles in relation to refugee protection and asylum detention under South Africa's refugee and immigration law before the amendments to the Refugee Act.

1. In *Abdi SCA,* Bertelsmann AJA noted that it is not uncommon for asylum seekers to enter countries illegally, that in those circumstances "such persons have the right to apply for refugee status", and that officials "have a duty to ensure that intending applicants for refugee status are given *every reasonable opportunity*[16] to file an application with the relevant Refugee Reception Office."[17]

2. In *Arse SCA,* Malan JA stressed the importance of the constitutional right to freedom and security of person in approaching the tension created between the Refugees Act and the Immigration Act. Malan JA stressed that "the importance of this right can never be overstated", that the "right belongs to both citizens and foreigners", and that "enactments interfering with elementary rights should be construed restrictively".[18]

3. In *Bula SCA,* Navsa JA placed importance on section 21 and 22(1)[19] of the Refugees Act, noting that Refugee Reception Officers are obliged to accept asylum applications, and to issue asylum seeker permits pending the outcome of such application.[20]

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[15] *Arse v Minister of Home Affairs and Others* (25/2010) [2010] ZASCA 9 ('*Arse SCA*'); *Abdi and Another v Minister of Home Affairs and Others* (734/2010) [2011] ZASCA 2 ('*Abdi SCA*'); *Bula and Others v Minister of Home Affairs and Others* (589/11) [2011] ZASCA 209 ('*Bula SCA*'); and *Ersumo v Minister of Home Affairs and Others* (69/2012) [2012] ZASCA 31('*Ersumo SCA*').

[16] Emphasis added.

[17] *Abdi and Another v Minister of Home Affairs and Others* (734/2010) [2011] ZASCA 2, [22]

[18] *Arse v Minister of Home Affairs and Others* (25/2010) [2010] ZASCA 9, [10]

[19] Refugees Act No 130 of 1998, s22(1):

> "22. (1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit."

[20] *Bula and Others v Minister of Home Affairs and Others* (589/11) [2011] ZASCA 209, [64]-[67]

4. In *Ersumo SCA*, Wallis JA held that a delay in applying for asylum could not be sufficient grounds for denying an application. Wallis JA argued that only grounds for refusing an application are set out in s24 of the Refugees Act; that the application is 'manifestly unfounded, abusive or fraudulent', or that the application is 'unfounded'.[21]

Significantly, in *Bula SCA* and *Ersumo SCA,* the Court held that the central provision in determining the lawfulness of detention was, the now repealed, regulation 2(2) to the Refugees Act.[22] Regulation 2(2) stated that an individual who has been detained for illegal entry, or failure to report to a Refugee Reception Office, and then indicates an intention to apply for asylum, must be issued with a transit visa in order to attend a Refugee Reception Office and formally apply for asylum.[23]

In *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52 ('*Ruta CC*'), the Constitutional Court was tasked with assessing the SCA quartet. In Cameron J's view, the quartet "established a body of doctrine that thrummed with consistency, principle and power."[24] In essence, the quartet established that detention of asylum seekers was unlawful if a final status determination was still pending, or if an intention to apply for asylum was evinced.[25] Crucially, although he affirmed the quartet's jurisprudence, Cameron J made no mention of regulation 2(2). Whilst this may have been a simple oversight, there is an argument that Cameron J's choice to stress the

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[21] *Ersumo v Minister of Home Affairs* (69/2012) [2012] ZASCA 31, [15]

[22] *Bula and Others v Minister of Home Affairs and Others* (589/11) [2011] ZASCA 209, [70],[72]

[23] Refugees Regulations (form and procedure) 2000, Regulation 2:

> "**2 Application for asylum**
>
> (1) An application for asylum in terms of section 21 of the Act-
>
> (a) must be lodged by the applicant in person at a designated Refugee Reception Office without delay;
>
> (b) must be in the form and contain substantially the information prescribed in Annexure 1 to these Regulations; and
>
> (c) must be completed in duplicate.
>
> (2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to subregulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."

[24] *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52, [15]

[25] *Ibid*, [16]

importance of *non-refoulement* implies that a prohibition on asylum detention could be grounded in the principle itself as opposed to regulation 2(2). Cameron J argued that the Refugee Convention is explicit in providing protection to both asylum seekers awaiting status determination as well as refugees who have been granted status. Further, Cameron J argued that "a very possibly insuperable burden" would be placed upon individuals who could only access the Refugees Act protection through an appeal against a determination of their 'illegal foreigner' status.[26] Cameron J held that "the principle of *non-refoulement* as articulated in section 2 of the Refugees Act must prevail. The 'shield of *non-refoulement*' may be lifted only after a proper determination has been completed."[27]

Legal Framework Post-Amendment

Prior to 2020, the legal position on asylum detention was therefore clear. The Constitutional Court had affirmed that the protection provided by the Refugees Act trumped any punitive measures of the Immigration Act, provided an intention to apply for asylum had been evinced, and regardless of delay or any other reason. An aspirant asylum seeker could only be categorised as an 'illegal foreigner' under the Immigration Act if a final determination on their status as a refugee had been made and denied.

However, this position was put into question upon the enactment of the Refugees Amendment Act of 2020.[28] Whilst the amendments make no specific mention of detention, their general effect has been to prevent individuals from applying for asylum and to label them as 'illegal foreigners' as defined by the Immigration Act, with section 49 of the Immigration Act providing the enforcement mechanism for detention.[29]

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[26] *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52, [52]

[27] *Ibid*, [54]

[28] Refugees Act No 130 of 1998 (as amended), ss4-5

[29] Van Hout & Wessels, *#ForeignersMustGo versus "in favoured libertatis": Human rights violations and procedural irregularities in South African immigration detention law* (2023), Vol 22 Journal of Human Rights, p556; See also: Ziegler, *Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?* (2020), Vol 10 Constitutional Court Review, pp65-106

Section 4(1)(h) of the amended Refugees Act exempts individuals from qualifying for refugee status if a Refugee Status Determination Officer (RSDO) has reason to believe that they entered the Republic illegally without 'compelling reasons' for such entry.[30] Section 4(1)(i) exempts any individual who does not already hold an asylum visa from qualifying for refugee status if they fail to report to a Refugee Reception Office within five days of entering the Republic, unless they can

[30] Refugees Act 130 of 1998 (as amended), s4(1):

> "**4. Exclusion from refugee status**
>
> (1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she—
>
> (a) has committed a crime against peace, a crime involving torture, as defined in the Prevention and Combating of Torture of Persons Act, 2013 (Act 13 of 2013), a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
>
> (aA) has committed any of the following offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act, 2004 (Act 33 of 2004):
>
> (i) The offence of terrorism referred to in section 2 of the said Act;
>
> (ii) an offence associated or connected with terrorist activities referred to in section 3 ofthe said Act;
>
> (iii) any Convention offence as defined in section 1 of the said Act; or
>
> (iv) an offence referred to in section 13 or 14 of the said Act (in so far as it relates to the aforementioned sections).
>
> (b) has committed a crime outside the Republic, which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment without the option of a fine; or
>
> (c) has been guilty of acts contrary to the objects and principles of the United Nations or the African Union; or
>
> (d) enjoys the protection of any other country in which he or she is a recognised refugee, resident or citizen; or
>
> (e) has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), or which is punishable by imprisonment without the option of a fine; or
>
> (f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or
>
> (g) is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary; or
>
> (h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or
>
> (i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum."

provide 'compelling reasons'.[31] Section 21(1B) requires that an asylum seeker without an asylum seeker transit visa must be interviewed by an immigration officer to determine if there are 'valid reasons' for not possessing such visa.[32]

In terms of the new regulations, the first thing to note is that regulation 2(2) was repealed in its entirety. In its place, a new regulation 8(3) now asserts that "any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees."[33] As will be demonstrated, the effect of these new provisions and regulations is to create new restrictions on status determination, as well as to require asylum seekers to produce new categories of information in order to benefit from refugee protection.

Before exploring post-amendment jurisprudence, it is important to note a conceptual distinction between the language of section 4 of the Refugees Act and regulation 8(3) of the Refugees Regulations. Whilst section 4 precludes individuals from 'qualifying' for refugee status, regulation 8(3) appears to set procedural thresholds which could bar individuals from even initiating the application process. Recognising this distinction, between exclusion from status and disbarment from application, is crucial for understanding how recent judicial interpretations of these provisions may have impacted the accessibility of the asylum process in South Africa.

[31] Refugees Act 130 of 1998 (as amended), s4(1)(i)

[32] *Ibid,* s21(1B):

> "(1B) An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa."

[33] Refugees Regulations 2019, Regulation 8(3)

Key Cases: Post-Amendments

The first significant case to deal with the amended provisions and new regulations, in relation to detention, was the Constitutional Court judgment, *Abore v Minister of Home Affairs and Another* (CCT 115/21) [2021] ZACC 50 ('*Abore CC*'). Notably, the Court in *Abore CC* confirmed that *Ruta* is, in principle, still good law. Tshiqi J held that the core of the *Ruta CC* judgment is that section 2 directly empowers the principle of *non-refoulement.*[34] Given that section 2 has not been amended, the Court reasoned that this principle is still in force, and that individuals are protected by section 2 until a determination on refugee status is made.[35] However, in reaching this conclusion, Tshiqi J acknowledged that the amendments have altered the position of undocumented asylum seekers, with the new regulations being described as more stringent.[36] Tshiqi J argued that when read together, section 21(1B) and regulation 8 require an asylum seeker lacking a valid transit visa to provide 'good cause' for the absence of such visa.[37] Ultimately, as the unlawfulness of the detention in this case was located in procedural irregularities and not the application of refugee and immigration provisions, Tshiqi J refrained from adjudicating on the general lawfulness of asylum detention.

Following *Abore CC,* a full bench of the High Court was tasked with adjudicating on the lawfulness of asylum detention in *Abraham and Others v Minister of Home Affairs and Another* (A5053/2021; A5054/2021; A5055/2021) [2023] ZAGPJHC 253 ('*Abraham (2) HC*').[38] The High Court was particularly concerned with regulation 8(3), noting that the provision empowers immigration officials to make decisions on 'good cause' that could preclude individuals from applying for asylum. In the Court's view "this would have the result that the Refugees Act never becomes applicable."[39] The Court was concerned that in creating a pre-condition for the benefit

[34] *Abore v Minister of Home Affairs and Another* (CCT 115/21) [2021] ZACC 50, [22]

[35] *Ibid*, [42],[45], [48]

[36] *Ibid*, [27]

[37] *Ibid*, [29]

[38] *Abraham and Others v Minister of Home Affairs and Another* (A5053/2021; A5054/2021; A5055/2021) [2023] ZAGPJHC 253, [3]

[39] *Ibid*, [27]

of South Africa's refugee determination process, the State could be risking potential *refoulement*.

In particular, the High Court held that any regulation which purports to prevent an asylum application from being initiated conflicts with section 2 of the Refugees Act and is therefore invalid. This, as discussed before, is because section 2 creates an implicit requirement to determine whether an individual is actually a genuine refugee, so as to prevent any possibility of *refoulement*. As the applicants in *Abraham (2) HC* were detained under section 34 of the Immigration Act, they were liable to be deported, and the Court appears to have been concerned that such deportation could have taken place without an assessment of their refugee status. In the Court's view, understanding the 'good cause' requirement as a condition precedent to asylum application creates an artificial bifurcation of the asylum application process that is not borne out of the Refugees Act or the Refugee Convention. Instead, the Court held that the 'good cause' interview must be part of section 21(1B) information gathering process, such that a 'good cause' interview "seamlessly leads to a finalisation of the application in the prescribed form".[40]

Additionally, the Court held that regulation 8 is *ultra vires*, stating that it does "not speak to any provision in the Refugees Act which confers a power on a state official or on a judicial officer or court, to block an application for asylum from being lodged."[41] The Court's argument appears to highlight the distinction between disbarment and exclusion – whilst section 4 of the Refugees Act excludes individuals from qualifying for refugee status, regulation 8 imposes procedural hurdles which could disbar individuals from applying in the first place. The distinction is significant because, in the Court's view, it implies that regulation 8 oversteps its statutory authority by creating barriers to refugee protection that are not envisioned by the Refugees Act, which instead focuses on the substantive assessment of claims.

The precedent set in *Abraham (2) HC* was short-lived, as whilst it was being penned the Constitutional Court handed down Ashebo *v Minister of Home Affairs and Others* (CCT 250/22)

[40] *Abraham and Others v Minister of Home Affairs and Another* (A5053/2021; A5054/2021; A5055/2021) [2023] ZAGPJHC 253, [31]

[41] *Ibid,* [28]

[2023] ZACC 16 (‘*Ashebo CC*’). There, Maya DCJ[42] held that the new ‘good cause’ assessment “must be done before the person is permitted to apply for asylum”,[43] though she did not make it clear whether this means that the assessment is a condition precedent to asylum applications or merely the first stage of such application. This lack of clarity indicates that Maya DCJ may have conflated exclusion from status with disbarment from application, thereby overlooking the inherent tension between Section 4 of the Refugees Act and regulation 8 of the Refugees Regulations. Maya DCJ argued that the new provisions are “by no means out of kilter” with article 31 of the Refugee Convention, as the article itself “does not provide an asylum seeker with unrestricted indemnity from penalties.”[44] Furthermore, since regulation 2(2) is no longer in place, Maya DCJ held that a mere intention to apply for asylum is no longer sufficient to grant release from detention.[45]

On the issue of continued detention, Maya DCJ held that the obligation on the part of immigration officials when faced with an illegal foreigner who evinces an intention to apply for asylum is to “assist him with the process of applying”, or in other words to organise a ‘good cause’ interview.[46] However, Maya DCJ suggested that a failure to do this does not always result in the detention becoming unlawful, arguing that “to the extent that the applicant’s detention was authorised pursuant to section 49(1) of the Immigration Act read with the Criminal Procedure Act, the immigration officials’ failure to facilitate his asylum application would not render his detention unlawful.”[47]

In cases where individuals are detained under section 34, and where ‘good cause’ has been established, Maya DCJ held that continued detention “would become unlawful because [the applicant] would no longer be an ‘illegal foreigner’ for purposes of the Immigration Act.”[48] Thus, a failure to establish ‘good cause’ for individuals detained under section 34 could ultimately

[42] Now Maya CJ

[43] *Ashebo v Minister of Home Affairs and Others* (CCT 250/22) [2023] ZACC 16, [41]

[44] *Ibid*, [44]

[45] *Ibid*, [50], [54]

[46] *Ibid*, [56]

[47] *Ibid*, [58]

[48] *Ibid*, [60]

result in the deportation of asylum seekers who have been precluded from having their status as refugees determined, raising the spectre of *refoulement*. Unfortunately, Maya DCJ did not make it clear whether the detention of those detained under section 49 becomes unlawful after demonstrating 'good cause'. If not, then there is a strong argument that article 31 of the Refugee Convention is being violated. This is because the article is explicit in stating that no criminal penalties are to be imposed on individuals, who enter or stay illegally, provided they demonstrate 'good cause'.

The High Court was afforded an opportunity to apply the judgment of *Ashebo CC* in *Lembore and Others v Minister of Home Affairs and Others* (2023-097427, 2023-097292, 2023-097111, 2023-097076,2023-100081, 2023-100526) [2024] ZAGPJHC 102 (*'Lembore HC'*). Mlambo JP interpreted the 'good cause' requirement as creating a condition precedent for asylum applications, stating that "the requirement to show good cause, in section 21(1B) of the Refugees Act read with regulation 8(3), precedes and is disjunctive to the main application for asylum."[49] This suggests that Mlambo JP also failed to distinguish the exclusion from status outlined in Section 4 of the Refugees Act and the procedural disbarment from application set out in regulation 8 of the Refugees Regulations.

In Mlambo JP's view, *Ruta CC* and *Abraham (2) HC* had incorrectly understood the purpose of section 2 of the Refugees Act, conflating detention with deportation.[50] Mlambo JP stated that the detention of asylum seekers who are classified as illegal foreigners "doesn't violate the *non-refoulement* principle as it doesn't amount to countenancing the deportation of asylum seekers fleeing persecution."[51] Again, Mlambo JP was particularly concerned with State sovereignty and border integrity, stating that "it must be in the interest of any country desiring to protect its borders, to expect anyone entering its territory to do so lawfully".[52] Furthermore, as the detention in *Ashebo CC* and *Lembore HC* was in terms of section 49 of the Immigration Act, as opposed to section 34, as in *Abraham (2) HC,* Mlambo JP argued that there was no risk of *refoulement*.

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[49] *Lembore and Others v Minister of Home Affairs and Others* (2023-097427, 2023-097292, 2023-097111, 2023-097076,2023-100081, 2023-100526) [2024] ZAGPJHC 102, [76]

[50] *Ibid*, [82]

[51] *Ibid*, [68]

[52] *Ibid*, [68]

This is because "an arrest and detention in terms of section 49(1)(a) is not for the purpose of deportation, but rather for the prosecution of an illegal foreigner charged with committing an offence in terms of this section."[53]

Thus, in Mlambo JP's view, "there is not an undue burden on genuine asylum seekers", as the "amendments have simply affirmed that there is no automatic release from detention once an intention to apply for asylum has been evinced."[54] Mlambo JP argued that even in the case of asylum seekers who fail to demonstrate 'good cause', they are still protected by the appeal and review mechanisms available with regard to all administrative decisions.[55] Ultimately, Mlambo JP held that 'illegal foreigners' who are arrested and detained should be afforded the opportunity to evince their intention to apply for asylum at a court within 48 hours of their arrest, at which point a 'good cause' interview should be arranged.[56] Furthermore, Mlambo JP held that the 'good cause' interview has the effect of suspending a prosecution in terms of section 49, and that should such 'good cause' be established "the whole basis of the charge and prosecution would have been extinguished."[57]

Making Sense of *Ashebo CC and Lembore HC*

The High Court was afforded an opportunity to make sense of *Ashebo CC* and *Lembore HC* in *Shamore v Minister of Home Affairs and Others* (2024/021421) [2024] ZAGPJHC 414 ('*Shamore HC*'). The judgment, penned by Wilson J, a member of the full bench in *Abraham (2) HC,* was concerned with assessing the legality of the detention of asylum seekers who claimed their 'good cause' interview had not been carried out despite repeated attempts to initiate an asylum claim. In assessing the Constitutional Court's rejection of *Abraham (2) HC* in *Ashebo CC*, Wilson J argued that the Court was animated by concerns "about releasing an asylum seeker who had not yet shown that they are entitled to apply for asylum, because they had not yet shown good

[53] *Lembore and Others v Minister of Home Affairs and Others* (2023-097427, 2023-097292, 2023-097111, 2023-097076,2023-100081, 2023-100526) [2024] ZAGPJHC 102, [73]

[54] *Ibid*, [81]

[55] *Ibid*, [81]

[56] *Ibid*, [85]

[57] *Ibid*, [85]

cause for being present in South Africa without a visa."[58] Given the State's failure to organise an opportunity for the applicants to provide such 'good cause', Wilson J held that such concerns were not applicable.

Turning to the State's failure to organise a 'good cause' interview, Wilson J noted that it was impossible to "say whether the failure to organise a good cause interview in the applicants' cases is part of a wider pattern of behaviour on the respondents' part, or whether the facts of this case are an unusual exception to an otherwise well-oiled immigration machine, which regularly organises prompt and fair good cause interviews."[59] In Wilson J's view, it was at least possible that the problem is not located in dishonest or fraudulent migrants, but in the State's lack of "capacity or the will to process asylum seekers' claims promptly and fairly".[60] This, Wilson J argued, carried the potential consequence "that the amendments to the Refugees Act and its regulations have done little to improve the efficiency of the refugee system, while at the same time making aspirant asylum seekers more vulnerable to official neglect and arbitrary detention."[61] Thus, if the failure to organise a 'good cause' interview is indicative of a broader pattern of behaviour, then "potentially large numbers of asylum seekers may be refouled, in breach of the Refugees Act and international law, while they wait in detention for a 'good cause' interview that never takes place."[62]

To combat this, Wilson J held that it is "incumbent upon a court faced with an application for an asylum seeker's release to take positive steps to establish whether there is a lawful basis for the applicant's detention."[63] In other words, Wilson J held that even when detained under section 49 of the Immigration Act, a determination of the continuing lawfulness of such detention may be required. Wilson J argued that such determination requires the court to establish if there has been a 'good cause' interview.[64] In the case where such an interview has been conducted, "if

[58] *Shamore v Minister of Home Affairs and Others* (2024/021421) [2024] ZAGPJHC 414, [12]

[59] *Ibid*, [15]

[60] *Ibid*

[61] *Ibid*

[62] *Ibid*, [18]

[63] *Ibid*, [19]

[64] *Ibid*, [20]

good cause has been shown, detention must end."[65] Where no 'good cause' interview has been conducted, the court must then determine whether the authorities have had a reasonable period to organise one. In the event that a reasonable period of time has elapsed, Wilson J held that release must follow.[66] If the authorities have not had a reasonable opportunity to organise a 'good cause' interview before appearing before a court, Wilson J argued that the court must set a definite period for them to conduct one.[67] Finally, if a court-ordered 'good cause' interview is not conducted within the definite period set, Wilson J held that the court must release the applicant.[68]

Remaining Questions

As of 2024, the law surrounding the detention of asylum seekers who have illegally entered or stayed in the country is somewhat settled. Such individuals may be legally detained under section 49 of the Immigration Act. Such detention becomes unlawful if a 'good cause' interview is not arranged, or at the point that such interview is conducted and 'good cause' for illegal entry or stay is established. However, as it stands, practical and legal questions remain for asylum seekers in South Africa.

As highlighted, both *Ashebo CC* and *Lembore HC* illustrate that recent jurisprudence has blurred the distinction between the exclusion from refugee status under section 4 of the Refugees Act and disbarment from application under regulation 8 of the Refugees Regulations. It is important to recognise that in both scenarios, individuals are effectively prevented from accessing refugee protection – whether through exclusion after some form of assessment, or disbarment at the initial stage of application. Nevertheless, the conflation between exclusion and disbarment is problematic as regulation 8, by providing procedural disqualifications not authorised by the Refugees Act, may be *ultra vires*, raising concerns about the legality of its

[65] *Shamore v Minister of Home Affairs and Others* (2024/021421) [2024] ZAGPJHC 414, [21]

[66] *Ibid*, [22]

[67] *Ibid*, [24]

[68] *Ibid*, [25]

application. Although the practical outcome is the same, the lack of substantive assessment also raises questions about the legitimacy and fairness of the process.

Significant concerns surrounding the application of the amendments are also highlighted by the latest case, *Shamore HC*. The facts of this case demonstrate that in some circumstances, 'good cause' interviews could be summarily rejected or even not take place. There are already reports of such instances forming a broad pattern of behaviour, just as Wilson J postulated, with the Scalabrini Centre reporting arrests of new asylum applicants where the "majority of applicants are found lacking good cause, resulting in their arrest for deportation."[69] Such individuals are precluded from ever making an application for asylum, and could also be criminalised under the Immigration Act, despite being at genuine risk of persecution in their home countries, and therefore *bona fide* refugees. The fact that the Courts have given little guidance on what constitutes 'good cause' only further compounds this risk.

Such considerations appear to have been neglected by Maya DCJ in *Ashebo CC*. In Maya DCJ's view, the effect of the amendments is to prevent a "highly undesirable scenario that could result if an illegal foreigner… were simply allowed to remain at large on their mere say-so that they intend to seek asylum."[70] Whilst it could be said that this observation demonstrates that Maya DCJ was animated by concerns of border integrity and State sovereignty, this overlooks the practical realties that asylum seekers may face, including the possibility that they never encounter an immigration official to initiate the application process or to have their 'good cause' interview. Maya DCJ seems to assume that all asylum seekers will be afforded an opportunity to be assessed by the correct officials, thus disregarding systemic failures and procedural obstacles which prevent access to the application process. Maya DCJ's observation appears to have exonerated the State from its own failure to implement refugee protection in an effective manner, placing the blame for inefficiencies in status determination on applicants instead of State officials.[71]

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[69] *PRESS RELEASE: Scalabrini Centre of Cape Town and Lawyers for Human Rights to Challenge Unlawful Arrests of New Asylum Seekers,* (Scalabrini Centre of Cape Town 2024), <https://www.scalabrini.org.za/press-release-unlawful-arrests-of-new-asylum-seekers/> Accessed 3rd July 2024

[70] *Ashebo v Minister of Home Affairs and Others* (CCT 250/22) [2023] ZACC 16, [54]

[71] Lawyers for Human Rights, *Status of Immigration Detention in South Africa* (December 2023), pp26-27

Additionally, there are unresolved issues surrounding the application of section 49 of the Immigration Act. A conviction under section 49 could further complicate asylum applications by creating a criminal record which may be viewed negatively during any subsequent assessments, undermining their credibility and potentially disqualifying them from the refugee protection system on procedural or discretionary grounds. Therefore, a conviction under section 49 can have broader implications on asylum seekers and their ability to access the refugee protection framework. This intersection of criminality and asylum processes places individuals in a precarious position, potentially undocumented and unable to access protection.

Given that section 49 provides for imprisonment or a fine, it remains unclear what would happen to an asylum seeker who pays a fine or completes their sentence, as they could still be re-identified as illegal foreigners without having undergone any substantive assessment of their refugee status. Despite this, the State's supposed adherence to the principle of *non-refoulement,* reflected in section 2 of the Refugees Act, would prevent the deportation of such individuals. This ties the State's hands as it cannot legally deport these individuals, whilst simultaneously failing to provide a clear path to regularise their status, exacerbating the legal limbo asylum seekers find themselves in. This concern extends to the jurisprudence of *Shamore HC*, which does not give direction on the correct procedure for individuals who are released from detention due to a failure to organise a 'good cause' interview. This demonstrates that the Courts have failed to understand the nuances of the principle of *non-refoulement,* overlooking the fact that a failure to assess whether an individual is a *bona fide* refugee gives rise to a very real possibility of *refoulement*.

This is a point that the Constitutional Court itself has recognised in a recent case concerning provisions of the amendments that have not been discussed here. The provisions in question provided for the abandonment of asylum claims in circumstances where claimants failed to renew their asylum seeker visas within strict timeframes. The Court held that the State's obligation with regard to the principle of *non-refoulement* "necessarily requires a determination

of the merits of the asylum claim."[72] The Court went further, holding that the provisions in question, in preventing refugee status determination, violated asylum seekers' constitutional rights. The Court argued that *refoulement* negatively impacts asylum seekers' constitutional rights to dignity, life, personal security, and just administrative action.[73] Similarly, it is currently being argued, in the Western Cape High Court, that the provisions of section 4 of the amended Refugees Act, as well as regulation 8, which seek to prevent refugee determination from ever taking place are unconstitutional, and that any limitation of the impugned constitutional rights is unjustifiable.[74]

A further concern relates to statutory interpretation and international law. Notably, the amended section 1A of the Refugees Act creates a strong interpretive requirement. Section 1A states that "this Act must be interpreted and applied in a manner that is consistent with" the Refugee Convention and its Protocol, the OAU Refugee Convention, the UN Declaration of Human Rights, and any other international agreement to which South Africa is a party. The subject of detention, as well as asylum detention, is featured in many international instruments and mechanism, yet the only provision engaged with by South African courts is article 31 of the Refugee Convention. Further, the engagement with this article has been cursory at best. This may point more towards the ambiguous nature of the Refugee Convention than any purported incompetence of South African courts. However, there are many examples of academic and jurisprudential discourse that demonstrate a more nuanced understanding the 'good cause' requirement found in article 31. Academics such as Goodwin-Gill and Costello have held that "having a well-founded fear of persecution is generally recognised in itself as constituting 'good cause'".[75] This accords with the High Court judgment in *Abraham (2) HC*, which viewed the requirement as forming part of the overall asylum application process, and not a condition precedent to an application.

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[72] *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* (CCT 51/23) [2023] ZACC 45, [35]

[73] *Ibid*, [36-39]

[74] *Scalabrini Centre of Cape Town v The Minister of Home Affairs, Founding Affidavit* (Case No: 8648/24) (Case No: 8684/24) (2024)

[75] Costello & Ioffe, *Non-Penalization and Non-Criminalisation* in Costello, Foster, & McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford University Press 2021), p924; Goodwin-Gill & McAdam, *The Refugee in International Law* (Fourth Edition, Oxford University Press 2021), p276; Hathaway, The Rights of Refugees (Second Edition, Cambridge University Press 2021), p496

It is not only in the interpretation of 'good cause' that concerns surrounding the application of article 31 are found. It seems that Maya DCJ and Mlambo JP have completely missed the point of article 31; it places hard, and at times uncomfortable, restrictions against favouring border integrity over refugee protection. This was recognised by Lord Justice Brown in the English case of *R v Uxbridge Magistrates Court & Another, Ex Parte Adimi* [1999] EWHC Admin 765 ('*Adimi*'). Brown LJ argued that "the need for article 31 has not diminished. Quite the contrary. Although under the Convention subscribing States must give sanctuary to any refugee who seeks asylum (subject only to removal to a safe third country), they are by no means bound to facilitate his arrival. Rather they strive increasingly to prevent it. The combined effect of visa requirements and carrier's liability has made it well nigh impossible for refugees to travel to countries of refuge without false documents."[76] Thus, in Brown LJ's view, article 31's purpose is "to provide immunity for genuine refugees whose quest for asylum reasonably involved them in breaching the law."[77]

Conclusion

Ultimately, the story of refugee protection in South Africa is not novel, but rather forms part of the global pattern of migration securitisation.[78] That said, there is a question about the purpose of South Africa's new permissive attitude toward asylum detention. Given the fact that even pre-amendments the proportion of successful claims was low, with as many as 96% of applications being denied in 2016,[79] it is perplexing that the State felt the need to deny even more individuals from ever being granted refugee status. Beyond securitisation, the current legal framework has the effect of criminalising asylum seekers in large numbers. This is compounded by the use of terms such as "illegal asylum seekers"[80] in contemporary jurisprudence. This pattern reveals a deeper concern surrounding the State's overall commitment to refugee protection, best

[76] *R v Uxbridge Magistrates Court & Another, Ex Parte Adimi* [1999] EWHC Admin 765, [3]

[77] *Ibid,* [15]

[78] For more on the securitisation of refugee protection, see: Hathaway, *The Global Cop-Out on Refugees* (2018), Vol 30 International Journal of Refugee Law, pp591-604

[79] Moyo & Zanker, *No Hope for the 'Foreigners': The Conflation of Refugees and Migrants in South Africa* (2022), Vol 20 Journal of Immigrant & Refugee Studies, p257; See also: Costello, Ioffe, & Büchsel, *Article 31 of the 1951 Convention Relating to the Status of Refugees*, PPLA/2017/01, UN High Commissioner for Refugees (UNHCR 2017), pp56-57

[80] *Lembore and Others v Minister of Home Affairs and Others* (2023-097427, 2023-097292, 2023-097111, 2023-097076,2023-100081, 2023-100526) [2024] ZAGPJHC 102, [85]

encapsulated by the recent White Paper on migration, which seeks to withdraw from the Refugee Convention with a view to re-acceding with reservations.[81] This would make South Africa the first country to withdraw from the Convention, suggesting that the State has tipped the scales completely away from refugee protection, in favour of State sovereignty and border integrity.

[81] White Paper on Citizenship, Immigration and Refugee Protection: Towards a complete overhaul of The Migration System in South Africa, Government Notices No.5030 (17 April 2024), [52]