

**BARRIERS TO STATUS DETERMINATION OF ASYLUM SEEKERS
IN SOUTH AFRICA**



UNIVERSITEIT VAN PRETORIA
UNIVERSITY OF PRETORIA
YUNIBESITHI YA PRETORIA

By

MUYIDEEN ADETAYO ALABI

SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE DEGREE

LLM

PREPARED UNDER THE SUPERVISION OF:

PROFESSOR MAGNUS KILLANDER

CO-SUPERVISOR:

DR ROMOLA ADEOLA

AT THE

FACULTY OF LAW, UNIVERSITY OF PRETORIA, SOUTH AFRICA

JANUARY 2021

DECLARATION

I, **Muyideen Adetayo Alabi**, hereby declare that this full dissertation is my original work and has not been presented at the University of Pretoria or any other institution. I also declare that any secondary information used has been duly acknowledged in this dissertation.

Student:

Muyideen Adetayo Alabi

(U11056402)

Signature:

.....

Date:

.....

ACKNOWLEDGEMENTS

All thanks to God Almighty for giving me the grace to complete my research.

A special thanks and acknowledgement to my supervisor, Prof M Killander, for his invaluable guidance. Also, my gratitude goes to my co-supervisor Dr R Adeola, for her guidance and assistance. All thanks the University of Pretoria Library assistants for the outstanding resources made available from start to finish during this research.

To my lovely wife Mrs Halima Alabi, thanks for your encouragement and support. I would not have completed my Master's Degree without your moral support and understanding. Special thanks to my father, my brother and family, for their support and encouragement.

Lastly, thanks to those who assisted me during the completion of this research, particularly to my friends, for their moral support, especially Dr Nzumbululo Silas Siphuma, Mr Admire Muchenje, Dr Babatunde Rotimi and Mr Tunji Adigun.

I dedicate this research to my daughter, Ademide Alveena Alabi, who God blessed us with during the process of my completing this degree.

ABSTRACT

South Africa is party to international treaties on refugee protection, notably, the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. The South African government has put statutory provisions and policies in place to guide refugee status determination – eg, in the Refugees Act.

This dissertation focuses on addressing the barriers to the status determination of asylum seekers in South Africa. It identifies hurdles faced by asylum seekers in the status determination process such as lack of timely decisions; incorrect application of the law; misinterpretation of the law by the Refugee Status Determination Officer (RSDO); lack of professionalism by the refugee reception officers handling asylum-seeker claims; and lack of resources, for example, a shortage of interpreters to help bridge language barriers.

However, when compared to many other African countries, the policies and legal framework in South Africa remain of a relatively high standard. Although there are procedures in place to determine the status of asylum seekers, without proper enforcement the protection of asylum seekers is undermined. The question arising is therefore: “What structural or administrative barriers undermine the South African Government’s effort to implement smooth refugee status determination process in South Africa?”

The solutions to the barriers touched on above lie in the hands of the Department of Home Affairs (DHA) which must put adequate measures in place in the administrative process

governing the status determination under the asylum seeker application system. An adequate administrative process plays an integral role in resolving barriers faced by asylum seekers during their applications. A well-organised administrative process will resolve many of the problems resulting from non-compliance with the legal mechanisms already established by the DHA. The department needs to ensure that their officials and in particular the RSDOs are more competent in exercising their decision-making and application procedures. The department must also ensure that RSDOs have adequate resources to conduct proper interviews and assessments of all claims they deal with – eg, providing interpreters to work permanently with the RSDOs. Finally, the DHA must increase its capacity and facilities to handle the number of applications submitted on a daily basis as it is legally obliged to do.

LIST OF ABBREVIATIONS

CC - Constitutional Court

DHA - Department of Home Affairs

HC - High Court

LHR - Lawyers for Human Rights

LSP - Lesotho Special Permit

RAB - Refugee Appeals Board

RRO - Refugee Reception Officer/Office

RSA - Republic of South Africa

RSDO - Refugee Status Determination Officer

SADC - Southern African Development Community

SAPS - South African Police Services

SCA - Supreme Court of Appeal

SCRA - Standing Committee for Refugee Affairs

SAHRC - South African Human Rights Commission

UDHR - Universal Declaration of Human Rights

UN - United Nations

UNHCR - United Nations High Commissioner for Refugees

ZEP - Zimbabwean Exemption Permit

TABLE OF CONTENTS

DECLARATION	2
ACKNOWLEDGEMENTS.....	3
ABSTRACT	4
LIST OF ABBREVIATIONS.....	6
TABLE OF CONTENTS.....	8
CHAPTER 1.....	11
INTRODUCTION.....	11
1.1 Background to the study.....	11
1.2 Statement of the problem.....	13
1.3 Research question	15
1.4 Definitions	16
1.4.1 Refugee.....	16
1.4.2 Asylum seekers	16
1.5 Other terms and definitions.....	17
1.6 Research methodology.....	17
1.7 Aims and objectives of the study.....	18
1.8 Literature review.....	18
1.9 Chapter outline.....	20
CHAPTER 2.....	22
LEGAL FRAMEWORK FOR THE STATUS DETERMINATION OF ASYLUM SEEKERS IN THE SOUTH AFRICAN LEGAL SYSTEM.....	22
2.1 Introduction.....	22
2.2 International refugee law in South Africa	22
2.2.1 United Nations High Commissioner for Refugees	23
2.2.2 African Union	28
2.3 National legislation on refugee protection in South Africa.....	29
2.3.1 Historical background pre-1994.....	29

2.3.2 Post-1994 development and changes.....	33
2.3.3 Constitutional protection	34
2.3.4 Interim constitutional settlement	35
2.3.5 Refugees Act 130 of 1998	36
2.5.6 Limitation on the rights of asylum seekers.....	38
2.3.7 Refugees Amendment Act.....	39
2.3.8 Immigration Act 13 of 2002.....	39
2.3.9 Status determination process for asylum seekers	44
2.4 Adequacy of legislation on refugee protection in South Africa.....	47
2.4.1 Forms of review in terms of the legislation.....	48
2.4.2 Review under the South African Constitution.....	49
2.5 Conclusion.....	50
CHAPTER 3.....	51
BARRIERS TO THE STATUS DETERMINATION OF ASYLUM SEEKERS	51
3.1 Introduction.....	51
3.2 Barriers faced by asylum seekers	51
3.2.1 Procedural staff capacity	52
3.2.2 Procedural support.....	53
3.2.3 Closure of Reception Centres	57
3.2.4 Refugee Status Determination Officer objectivity in assessment	58
3.2.5 Corruption.....	60
3.2.6 Physical security and xenophobia towards asylum seekers in South Africa.....	61
3.3 Conclusion.....	66
CHAPTER 4.....	68
THE PROTECTION OF ASYLUM SEEKERS UNDER THE SOUTH AFRICAN LEGAL SYSTEM	68
4.1 Introduction.....	68
4.2 Promotion of Administrative Justice Act.....	68
4.2.1 Error of law in decisions	70
4.2.2 Bias	71
4.2.3 Failure to provide adequate reasons	73
4.3 Principle of legality	76

4.4 Asylum seeker constitutional rights approach	77
4.5 Prevention and Combating of Corrupt Activities Act 12 of 2004.....	78
4.6 Border Management Authority Act.....	79
4.7 Conclusion.....	80
CHAPTER 5.....	81
CONCLUSION AND RECOMMENDATIONS	81
5.1 Summary of Chapters	81
5.2 Recommendations	85
5.3 Conclusion	86
BIBLIOGRAPHY	88
Books & chapters in books	88
Journal Articles	89
Internet sources	90
Constitution and Legislation.....	97
Case Law	98
International instruments.....	100
Thesis and dissertations.....	100

CHAPTER 1

INTRODUCTION

1.1 Background to the study

In 1995 South Africa ratified the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees,¹ and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. Before 1998, the Aliens Control Act² was used to control the admission to and departure from the Republic of South Africa of persons and related matters. However, the Aliens Control Act was not designed to deal with the rights of refugees in South Africa.³ After the fall of apartheid, the South African government saw the need to draft a specific Refugees Act. This involved a rigorous consultative process including inputs from civil society representatives whose contributions shaped the eventual outcome of the Refugees Act.⁴ The Refugees Act 130 of 1998 came into effect in 2000.⁵

Given the political stability and relative prosperity in South Africa, it comes as no surprise that the country attracts asylum seekers and refugees from different countries. Data from the UNHCR shows that there was a total of 1 229 046 asylum applications in South Africa between 2000 and 2015 from countries including Rwanda, Burundi, Central African Republic, DRC Congo, Somalia, Zimbabwe, and South Sudan.⁶ Furthermore, the DHA's Annual Report Chart shows there was an increase in applications received between 2008 and 2009 at refugee reception offices (RROs) across South Africa. In 2008, a total number of 207 206 applications were received, and in 2009 a total of 223 324 individual applications were received. However, from 2010 to 2017 applications dropped off dramatically across the country.⁷ It emerges from DHA statistics that 2017 saw only 24

¹ United Nations Protocol Relating to the Status of Refugees 1967.

² Act 96 of 1991.

³ Dugard J *International Law: A South African Perspective* (2011) 353.

⁴ Vigneswaran D 'A Foot in the Door: Access to Asylum in South Africa' (2008) 25(2) *Refugee* 13.

⁵ As above.

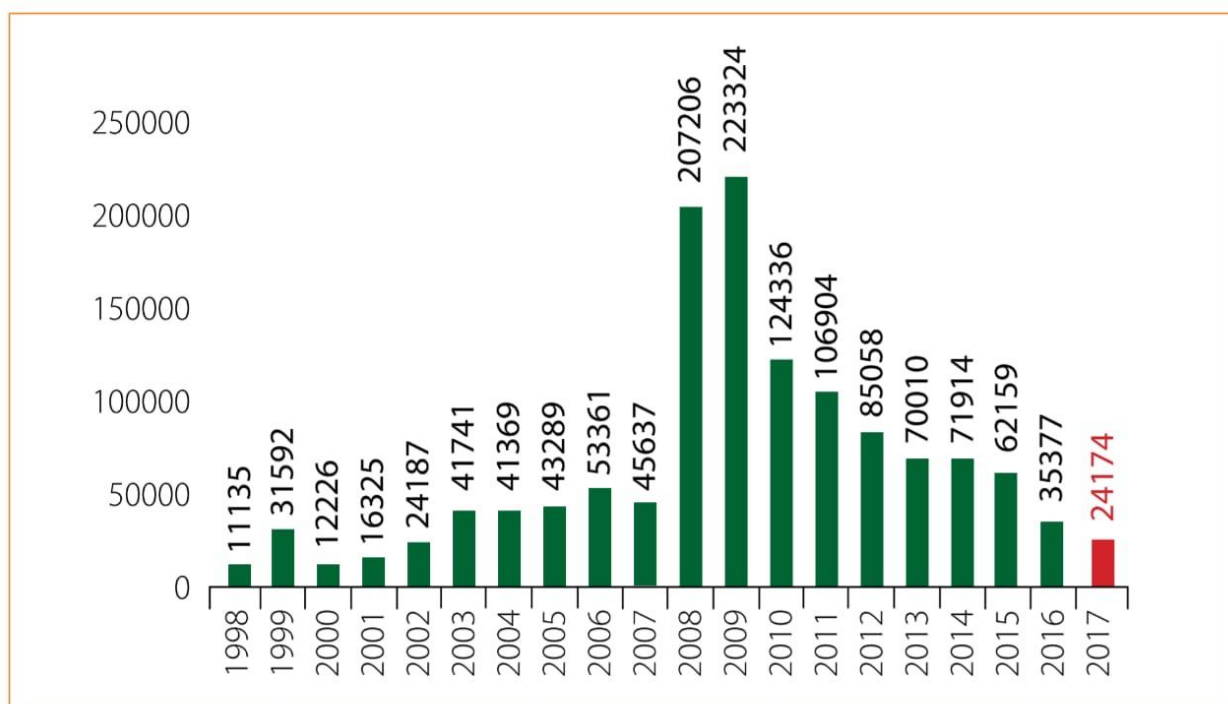
⁶ UNHCR 'Operation in South Africa, Lesotho and Swaziland Factsheet' available at <https://www.unhcr.org/524d87689.pdf> (accessed 10 October 2019).

⁷ There are no statistics available after 2017.

174 asylum-seeker applications, and 15 193 applications were pending to be determined.⁸ In 2018 there were 88 694 successful registered refugees in South Africa.⁹

In 2017, 24,174 asylum seekers applications were received in South Africa according to the Department of Home Affairs and 15,193 applications were pending to be determined.

TOTAL APPLICATIONS RECEIVED IN ALL RECEPTION OFFICES¹⁰



South African Refugees Act is clear on the protection of refugees and asylum seekers. In the matter between *Lawyers for Human Rights v Minister of Home Affairs*, the Constitutional Court stated that the protections in the Bill of Rights of the Constitution of the Republic of South Africa, 1996 (Constitution) applies to all within the country – asylum seekers included.¹¹ However, what emerges in practice is a clear disconnect between law and practice as there are unquestionable challenges to the protection to asylum seekers in South Africa. This dissertation focuses on this issue, examines the barriers to status determination facing asylum seekers in South Africa.

⁸ DHA 'Annual Report 2017-18' available at [http://www.dha.gov.za/files/Annual%20Reports/AnnualReport 2017-18.pdf](http://www.dha.gov.za/files/Annual%20Reports/AnnualReport%202017-18.pdf) (accessed 27 December 2019) 94.

⁹ 'Refugee Population by Country or Territory of Asylum' available at <https://data.worldbank.org/indicator/sm.pop.refg?view=map&year=2017> (accessed 3 April 2019).

¹⁰ DHA 'Annual Report 2017-18' n8 at 95.

¹¹ (CCT 18/03) [2004] ZACC 12, 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) 79.

1.2 Statement of the problem

While South Africa has a strong rights-based system and has laws that protect asylum seekers, there are several challenges that need to be addressed. South Africa is one of the most economically developed countries in Africa. Avowedly, the country places a high premium on human rights protection.¹² Even though the number of asylum seekers in South Africa has decreased, the DHA continues to use new asylum applications at the refugee reception centres as an excuse for its failure to process asylum seeker applications within an acceptable timeframe.¹³ Some scholars have argued that the reason for the decline in the number of individuals seeking asylum in South Africa may well be ascribed to the hostility they face and the impact of xenophobic attacks on foreign nationals.¹⁴ Other factors include: lack of proper integration into the society; unequal treatment; no proper access to opportunities, and anti-migrant refugee policies.¹⁵ Together, these factors may have discouraged many asylum seekers from seeking refuge in South Africa.

Legal barriers to seeking asylum arise where an asylum seeker requires legal assistance – especially once he or she has exhausted all available avenues.¹⁶ For example, an attorney can represent an asylum seeker during an appeal through the Standing Committee on Refugee Affairs (SCRA). SCRA only accepts representation by attorneys on behalf of an asylum seeker. The only time an attorney's representation is permitted in person is once the asylum seeker has exhausted his or her rights of appeal. The attorney can apply to court for judicial review on behalf of the asylum seeker. This is the last option available. As things stand, the asylum seeker must exhaust the available appeal stages

¹² Amit R 'Flawed Status Determination and Failures of South Africa's Refugee System to Provide Protection' (2011) 23 *Int'l J Refugee L* 458.

¹³ Amit (n 12) 459. Also see South Africa: Failing asylum system is exacerbating xenophobia October 2019' available at <https://www.amnesty.org/en/latest/news/2019/10/south-africa-failing-asylum-system-is-exacerbating-xenophobia/> (accessed 23 April 2020).

¹⁴ Dougan L 'Queues of foreign nationals at UN offices illustrate the desperation to leave South Africa' available at <https://www.dailymaverick.co.za/article/2019-10-17-queues-of-foreign-nationals-at-un-offices-illustrate-the-desperation-to-leave-south-africa/> (accessed 11 January 2020).

¹⁵ 'Issues that affect migrants and citizens: Engagement with NGOs & stakeholders' available at <https://pmg.org.za/committee-meeting/29180/> (accessed 7 April 2020).

¹⁶ MRMP Report 'Barriers to Asylum the Marabastad Refugee Reception Office' (2008) available at <http://www.migration.org.za/wp-content/uploads/2017/08/Barriers-to-asylum-the-Marabastad-refugee-reception-office.pdf> (accessed 12 July 2019).

before he or she may call on the services of an attorney. This could best be resolved, and much time saved, by involving legal representation at an early stage in the process – particularly in resolving his or her application to the RRO.

Section 3 of the Regulations to the South Africa Refugees Act states that the DHA must process and adjudicate asylum claims within 180 days.¹⁷ Also in terms of the Refugees Act, an RSDO must, after the conclusion of hearings, grant asylum permits or renew permits when required.¹⁸ However, in practice it can take years before an asylum claim is finalised.¹⁹ Asylum seekers are advised to continue renewing their permits until their claims have been finalised.²⁰

The challenges faced by asylum seekers trying to access asylum at RSDOs in South Africa include:

1. Lack of staff capacity has led to a delay in asylum seeker status determination being settled within the period prescribed. Inexperienced and poorly trained staff do not understand the Refugees Act and the international treaties governing asylum seekers.
2. Procedural and legal support is lacking at RROs, in particular adequate provision of interpreters. Language barriers are a notable hurdle faced by asylum seekers from non-English speaking countries. As regards legal support, cost is very often a factor impacting the asylum seeker's ability to pursue his or her case on a judicial review.
3. There are limited number of RROs in South Africa. The closure of RROs has led asylum seekers to flock to centres which have remained open. This leads to overcrowding and inadequate capacity to deal with the number of asylum seekers knocking at the door. A good example is the closure of the Johannesburg RRO.

¹⁷ Regulations to the South African Refugees Act available at <http://www.lhr.org.za/policy/regulations-sa-refugees-act> (accessed 10 November 2019).

¹⁸ Section 24(3)(a).

¹⁹ Schockaert L, Venables E, Gil-Bazo M-T et al 'Behind the Scenes of South Africa's Asylum Procedure: A Qualitative Study on Long-term Asylum-Seekers from the Democratic Republic of Congo' (2020) 39 (1) *Refugee Survey Quarterly* 28. UNHCR 'South Africa' available at <https://www.unhcr.org/3fc7548e0.pdf> (accessed 13 June 2020). Also see IBP Inc 'South Africa Recent Economic and Political Developments Yearbook - Strategic Information and Developments'.

²⁰ As above.

4. Lack of objectivity in assessment, bias, incorrect application of the law – or indeed a lack of understanding of the law – are common among RSDOs.
5. Corruption is a major barrier facing asylum seekers. Adjudicators frequently demand bribes from asylum seekers before permits will be issued on time. Refusal (or inability) to pay results in the application being rejected or simply ignored.
6. Xenophobia is another serious challenge faced by asylum seekers in South Africa. Most asylum seekers face hostile attitudes among the staff handling applications at the RROs. This is exacerbated by asylum seekers living in fear of their lives and livelihoods at the hands of South African citizens who claim that ‘foreigners’ are taking their jobs.

1.3 Research question

The principal question examined in this study is:

What are the legal, institutional and structural barriers to status determination for asylum seekers in South Africa?

To answer this question, the research poses the following questions:

1. What is the legal framework for the status determination of asylum seekers under the South African legal system, and to what extent is it adequate?
 2. How can barriers to status determination for asylum seekers in South Africa be addressed through legal reform?
 3. How can the legal framework for the determination of refugee status under the South African legal system be improved to protect asylum seekers?
-

1.4 Definitions

1.4.1 Refugee

Section 3 of the Refugees Act²¹ provides that a person will qualify for refugee status if he or she has been:

Forced to flee his [or her] country of origin because of a well-founded fear of persecution by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality, and is unable or unwillingly to avail himself or herself of the protection of that country of origin;

A person who is compelled to leave his or her place of residence as a result of external aggression, foreign domination, or events seriously disturbing or disrupting the whole of his or her country of origin;

A dependant of a person described in the above two.

This definition is in line with the provisions of the relevant treaties to which South Africa is party.

1.4.2 Asylum seekers

The Refugees Act²² defines asylum seeker as: “A person who is seeking recognition as a refugee in the Republic”.²³ An asylum seeker has also been identified as “someone who says he or she is a refugee, but whose claim has not yet been definitively evaluated”.²⁴ It is important to note that the definition of an asylum seeker is administratively expedient as he or she may meet the definition of a refugee under international law even while awaiting status determination within the national context. However, for the purpose of discussion in this dissertation, the term ‘asylum seeker’ is used in accordance with the Refugees Act.

²¹ Act 130 of 1998 (hereafter the Act) was enacted to give effect to the relevant international legal Instruments. Article 14(1) of UDHR provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution”. See also Dugard (n 3) 341.

²² Act 130 of 1998.

²³ Section 1(iv) of the Refugees Act 130 of 1998. “Asylum is the Latin form of a Greek word, ‘asylon’, which means ‘something not subject to seizure’ or freedom from seizure. Also, it is defined as the protection accorded by a State-in its territory or at some other place subject to certain of its organs-to an individual who comes to seek it.” See also Grahl-Madsen A *Territorial Asylum* (1980) 1.

²⁴ UNCHR ‘Asylum seekers’ available at <http://www.unhcr.org/pages/49c3646c137.html> (accessed 09 May 2019).

1.5 Other terms and definitions

The following concepts are important in understanding the Refugees Act.

Asylum seeker transit visa: a non-renewable visa issued to any person who is a non-national of South Africa and who intends to apply for asylum by declaring his or her intentions at the border post or port of entry.

Refugee Status Determination Officer (RSDO): an official of the DHA who issues or rejects an asylum seeker's application after interviewing him or her.

Section 22 visa: a visa or permit issued to an asylum seeker allowing him or her to work, study, and conduct business in South Africa pending the outcome of his or her refugee application.

Standing Committee for Refugee Affairs (SCRA): an independent body which reviews abuse, unfounded, or fraudulent decisions by RSDOs.

Refugee Appeal Board (RAB): an independent body which hears and determines any questions raised regarding the law during any appeal. The RAB reviews unfounded decisions by RSDOs by way of an oral hearing.

Foreigner: a person who is not a South African citizen.

1.6 Research methodology

The study uses a qualitative approach based on desktop research to examine the challenges an asylum seeker faces in the determination of his or her status as refugee. International and national refugee law instruments, human rights conventions, and appropriate literature are examined.

1.7 Aims and objectives of the study

- To examine the barriers asylum seekers experience in their status determination in South Africa.
- To examine the difficulties asylum seekers face in applying for refugee status in South Africa.
- To examine the legal framework available to asylum seekers under the South African legal system.
- To assess how the legal framework under the South African legal system can be improved to protect asylum seekers.

1.8 Literature review

The section deals with existing literature embodying different approaches and opinions of authors pertaining to the topic of this study. It is not novel for South Africa to receive asylum seekers from other African countries. It is the discretion of every state to determine the veracity of every application for asylum, and either to grant or refuse it. Once an individual has been granted asylum, the state is responsible to protect him or her.²⁵

According to Amit, there are serious flaws in the status determination process followed by the RROs. These are characterised as an absence of reasons, errors of law, and a failure to 'apply the mind' or to use sound reasoning.²⁶ The United Nations High Commissioner for Refugees' (UNHCR) Handbook provides that an application for asylum should be examined by a sound and qualified individual with proper knowledge and experience.²⁷ Khan and Schreier note that the powers of the RSDOs demand the highest level of care by a skilled administrator in any determination. This means adequate measures must be in place for an officer to be held accountable for any wrong decision he or she makes in any status determination of an individual.²⁸ Macklin suggests that a credible determination

²⁵ Enwere OC *'Human rights protection of Refugees: Threat or Solution'* (1994-2004) 1.

²⁶ Amit (n 12) 458.

²⁷ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (1979).

²⁸ Khan F & Schreier T *Refugee Law in South Africa* (2014) 115.

should not be perceived as discovering the truth, but as choosing to accept or to reject what to believe and when to draw the line.²⁹

The Convention Relating to the Status of Refugee lays down no substantive procedures for determining refugee status, but leaves all states that receive or accept asylum seekers the choice of means of implementation at the national level.³⁰ As regards the status determination process, section 33 of the Constitution further provides that all administrative action must be reasonable, lawful, and procedurally fair. This has been embodied in the Promotion of Administrative Justice Act (PAJA)³¹ which gives effect to the section 33 assurance of administrative justice. It establishes grounds for review of administrative decisions. Handmaker, De la Hunt, and Klaaren³² are of the view that the DHA's refugee adjudicators do not act appropriately under immigration laws. Refugees in South Africa are subjected to a complex administrative system of which they have little understanding, to determine their status.³³ A 2015 UNHCR report shows that the South African refugee system is struggling.³⁴ The vast number of applications have created a backlog, which has affected the quality and efficacy of refugee status determination. Even though the number of applications has declined, the quality and efficacy of refugee status determination has not improved.³⁵ The field research carried out by Schockaert, Venables, Gil-Bazo et al in 2019, shows that some asylum seekers who applied for refugee status from 2003 to date are still waiting for their applications to be finalised.³⁶ Due to the stringent immigration system in South Africa, most migrant workers end up making use of the asylum system to stay in South Africa legally.³⁷ The citizens of countries such as Zimbabwe and Lesotho

²⁹ As above 163.

³⁰ Goodwin-Gill and McAdam J *The Refugee in International Law* (2007) 304.

³¹ Act 3 of 2000.

³² Handmaker J, De la Hunt L & Klaaren J '*Advancing Refugee Protection in South Africa*' (2008) 63.

³³ 'Issues that affect migrants and citizens: engagement with NGOs & stakeholders' available at <https://pmg.org.za/committee-meeting/29180/> (accessed 7 April 2020).

³⁴ As above.

³⁵ Schockaert (n 19) 28.

³⁶ As above 35.

³⁷ News Deeply 'South Africa Steps up deportation of asylum seekers' available at <https://www.newsdeeply.com/refugees/articles/2017/10/17/south-africa-steps-up-deportation-of-asylum-seekers> (accessed 2 April 2019). See UNHCR 'Global Statistics 2015: South Africa' available at <https://www.unhcr.org/5461e604b.pdf> (accessed 10 June 2019). There are no statistics to back up the number of migrant workers making use of the asylum system to stay legally in South Africa.

are placed on a special permit, and this has resulted in an increase in neighbouring citizens applying for asylum.³⁸

Manicom and Mullagee³⁹ state that one of the biggest challenges facing asylum seekers is the efficient processing of their applications. They argue that government departments need to act within their mandates, ensuring that the rights of asylum seekers are upheld. It is imperative that the DHA, which is solely responsible for issuing valid documentation, be held accountable for failing to fulfil its legal obligations towards asylum seekers in South Africa.

Segatti is of the view that due to mismanagement, the DHA is facing an abuse of office practice and lack of administrative capacity.⁴⁰ Scholars argue that asylum seekers need protection, but maladministration is a problem asylum seekers are facing. Also, the DHA lacks the resources and capacity to handle the level of applications they receive on a daily basis. The studies cited above have set out some of the barriers asylum seekers face and are discussed in greater detail in the substantive chapters of this work.

1.9 Chapter outline

The status determination of refugees is guided by legislation – notably, the Refugees Act, the Promotion of Administration Justice Act, and not to mention the South African Constitution in place to address issues faced by asylum seekers at the DHA. But the implementation of the law by the DHA is failing. However, the importance of fair access to the asylum application process in South Africa is not exaggerated.⁴¹ Therefore Chapter 2 of this research addresses South Africa's legal framework for the status determination of asylum seekers in the South African legal system. Chapter 3 considers the barriers to the status determination of an asylum seeker; while Chapter 4 discusses the improvement of the legal framework for the status determination of an asylum seeker in South Africa. This

³⁸ 'Zim special permit application process to reopen' available at <https://www.sanews.gov.za/south-africa/zim-special-permit-application-process-reopen> (accessed 18th December 2020).

³⁹ Manicom D & Mullagee F 'The Status of Asylum Seekers and Refugees in South Africa: An Independent (2010) *Africa Insight* 39 available at <http://www.ajol.info/index.php/ai/article/view/54672> (accessed 12 July 2019).

⁴⁰ Segatti A & Landau BL *Contemporary Migration to South Africa: A Regional Development Issue* (2011) 31-66.

⁴¹ Khan (n 28) 152.

focuses on what mechanism can be used to improve asylum seekers' status determination. The final chapter, Chapter 5, ties things up and offers recommendations.

CHAPTER 2

LEGAL FRAMEWORK FOR THE STATUS DETERMINATION OF ASYLUM SEEKERS IN THE SOUTH AFRICAN LEGAL SYSTEM

2.1 Introduction

South Africa has taken significant steps towards domesticating international legal standards that improve protection for refugees and asylum seekers. Since its liberation in 1994, South Africa has ratified international treaties relevant to these categories of person, including the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees, and the 1969 OAU Refugee Convention. Post-1994, South Africa has adopted national laws in the furtherance of protection for refugees and asylum seekers. Constitutionally, all individuals in South Africa enjoy a broad range of fundamental human rights.⁴² Consequently, asylum seekers too enjoy a measure of protection. This chapter examines the legal framework for the status determination of asylum seekers under the South African legal system, and to what extent it is adequate.

2.2 International refugee law in South Africa

The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees set out the principles on which the global refugee law regime operates. These instruments have been ratified by South Africa. At the regional level, the 1969 OAU Refugee Convention is also instructive and relevant to South Africa. The Constitution of the Republic of South Africa, 1996, (Constitution) adopts a progressive stance to international law requiring the courts to 'consider international law' in the interpretation of the Constitution's Bill of Rights.⁴³ By implication, courts must be guided by the international legal regime when considering constitutional provisions. Therefore, in relation to asylum seekers and refugees, for example, courts must look to international refugee law. South Africa has a constitutional obligation to respect international law and, according to Killander,

⁴² 'South Africa's Obligations under International Human Rights Law' available at <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> (accessed 2 July 2019).

⁴³ As above.

international law plays an integral role in framing national laws.⁴⁴ International human rights law is also important, beginning with the Universal Declaration of Human Rights (UDHR) which provides that “everyone has the right to seek asylum and also to enjoy in other countries asylum from persecution”.⁴⁵ While the UDHR is non-binding, it has significantly crystallised, with some of its provisions gaining recognition as customary international law. Moreover, it has led to the formation of human rights frameworks at global and regional levels.⁴⁶ In this section of the dissertation, the international legal regime applicable to refugees and asylum seekers is discussed.

2.2.1 United Nations High Commissioner for Refugees

The United Nations (UN) is an organisation dedicated to maintaining international peace and security and developing friendly relations among nations.⁴⁷ The UNHCR deals with asylum seekers and refugees. It⁴⁸ is a vital organisation when it comes to the legal protection of the rights of asylum seekers and to finding permanent solutions to their problems.⁴⁹ Its main task is to ensure the implementation of international refugee law and related principles, in particular, the status determination of an asylum seeker, and the rights of those persons entitled to refugee status or protection from being returned to their countries of origin against their will.⁵⁰

⁴⁴ Killander M ‘How International Human Rights Law Influences Domestic Law of Africa’ (2003) 17 *Law, Democracy & Development* 278.

⁴⁵ Section 14(1) of the UDHR.

⁴⁶ UNCHR ‘The foundation of International law’ available at <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (accessed 9 August 2020).

⁴⁷ United Nations available at <https://www.un.org/en/> (accessed 09 August 2020).

⁴⁸ This body was established in 1950 by the General Assembly with the principal object of resettling millions of refugees as a result of World War II. More than 120 countries around the world are signatories to it. It is one of the principal humanitarian agencies in the United Nations. Under the Statute, the work of the High Commissioner is humanitarian and social and entirely non-political. Chapter 1 para 2 of the Statute of the Office of the UNHCR.

⁴⁹ Goodwin-Gill GS & McAdam J *The Refugee in International Law* (2007) 5. The concept of protection encompasses all activities aimed at ensuring equal access to and enjoyment of the rights of women. UNHCR *Handbook for the Protection of Women and Girls* (2008) available at <http://www.un.org> (accessed 17 February 2013).

⁵⁰ Buergenthal T, Shaw D & Stuart D *International Human Rights* 3rd ed (2004). The UNHCR is tasked with supervising the international conventions for the protection of refugees and to recognise that the effective measures to deal with problems of refugees depend on the cooperation of states with the In terms of Commissioner. In terms of article 35 of the UN Convention, state parties are obliged to cooperate with the UNHCR. Simultaneously, the UNHCR has a legal duty to monitor the application of UN Conventions to ensure adequate protection and assistance for refugees. Naldi GJ ‘The Organization of African Unity: An Analysis of its Role’ (1989) 99.

The UNHCR has become increasingly involved in providing essential assistance, mainly to the vulnerable groups and especially in providing humanitarian aid to asylum seekers in need, including refugees.⁵¹ It promotes and protects the rights of all asylum seekers and refugees around the world.⁵² It works to promote gender equality and to ensure that all asylum seekers and refugees have equal access to protection and assistance. For instance, it provides safe shelter for asylum seekers and refugees, but not in all countries such as South Africa.⁵³ This body has managed to build upon asylum seekers' empowerment by providing support and strengthening their protection by promoting full participation in decisions that affect them.⁵⁴

The UNHCR believes that the status determination of an asylum seeker is a legal and administrative process in which the government of a country must determine whether a person seeking international protection is considered a refugee under international and national law.⁵⁵ However, the status determination of an asylum seeker is also a vital process in helping an asylum seeker realise his or her rights under international law.

Most states conduct their own refugee status determination. However, the UNHCR can conduct its own status determination for asylum seekers or refugees under its own mandate when a certain state is not a party to the 1951 Refugee Convention, or does not have a fair and efficient national asylum procedure in place.⁵⁶ The UNHCR is not involved in status determination in South Africa. It provides capacity building through training of RSDO's and other forms of support to the DHA.

Furthermore, the UNHCR has adopted *Guidelines on the Protection of Asylum Seekers*.⁵⁷ These deal with how member states should protect the rights of asylum seekers and

⁵¹ UN Agencies in SA available at <http://www.un.org.za/agencies/> (accessed 03 August 2019).

⁵² The UNHCR has implemented activities and programs aimed at empowering refugee and returnee women for many years. These include actions to encourage the participation of women in all refugee committees in an effort to support the participation of refugee women as negotiators in peace processes and projects. UNHCR *Handbook for the Protection of Women and Girls* (2008) available at <http://www.un.org> (accessed 17 February 2013).

⁵³ Courbet F 'UNHCR: The UN Refugee Agency' available at <http://www.unhcr.org/pages/49c3646c1d9.html> (accessed 14 June 2019).

⁵⁴ As above

⁵⁵ UNCHR 'Refugee Status Determination' available at <https://www.unhcr.org/refugee-status-determination.html> (accessed 09 August 2020).

⁵⁶ As above.

⁵⁷ This was prepared by the UNHCR in Geneva in July 1991. 'Its main agenda is to integrate the resources and needs of refugee women into all aspects of programming to ensure equal protection and assistance activities. The guidelines also recognize that special efforts may be required to resolve problems encountered by the women refugees. Guidelines on the Protection of Women

refugees. The *Guidelines* provide that, in addition to international law, the national law of the country must govern the protection of asylum seekers. These national laws and policies should determine the legal status determination of asylum seekers and the nature of assistance they should receive. The *Guidelines* also emphasise that all offences against asylum seekers, such as rape, torture, and other human rights abuses, should be made punishable by national laws.⁵⁸

The *Guidelines* additionally state that apart from the legal framework for the protection of asylum seekers, there must be planning in establishing programs and priorities for enforcement which support the safety and well-being of asylum seekers by ensuring that they are protected.⁵⁹ For instance, asylum seekers who are unable to obtain necessities like food, clothes, and shelter, are more open to manipulation and physical and social abuse to sustain life. In these circumstances, the protection of the asylum seeker can be addressed through assistance-related measures.

The principle of *non-refoulement* is another principle of international law which the UNHCR encourages states to apply to asylum seekers.⁶⁰ Certain states, including South Africa, have legislated the *non-refoulement* principle in their national law applicable to asylum seekers and refugees. In South Africa, the Refugees Act protects all asylum seekers in South Africa against *refoulement*. Section 2 of the Refugees Act states that:

Notwithstanding any provision of this Act or any other law to the contrary, no person may be declined entry into South Africa, expelled, extradited or returned to any other country or subject to any other similar measure, if as a result of such refusal, expulsion, extradition, return or other measures, such a person is compelled to return to or remain in a country where:

- a) Such a person may be subjected to persecution on account of his or her race, religion, nationality, or membership of a particular social group; or
- b) Such person life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination, or other events seriously disturbing or disrupting public order in either part or the whole of that country.

Refoulement can take the form of deportation at the border, known as direct *refoulement*.

There is also an indirect form of *refoulement* which can occur, for example, by making an

Refugee' prepared by the Office of UNHCR' available at <http://www.unhcr.org/3d4f915e4.html> (accessed 5 July 2019).

⁵⁸ UNHCR (1979).

⁵⁹ As above.

⁶⁰ Khan (n 28) 3.

asylum seeker's life so miserable that he or she feels compelled to leave the country in which they sought asylum and return to their country of origin.⁶¹ Article 33 of the 1951 Convention provides that: "No State shall expel or return an asylum seeker in any manner whatsoever to the frontiers of territories where the life or freedom of an asylum seeker will be threatened on account of race, religion, nationality, membership of a particular social group."⁶²

The purpose of *non-refoulement* is to protect any person who meets the requirements in terms of the 1951 Convention and the 1967 Protocol.⁶³ The principle of *non-refoulement* is a rule of international customary law based on constant practice (*usus*) and acknowledgement an obligation to act in that way (*opinion iuris*) on the part of states.⁶⁴

The principle of *non-refoulement* is also set out in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁶⁵ (Convention against Torture). Before expelling or extraditing anyone to another country, article 3 of the Convention against Torture must be applied to ensure that the person does not face torture in the country to which he or she is being sent. If the answer is affirmative, the person cannot be returned to that country.⁶⁶

The Convention against Torture protects both asylum seekers and refugees, and also other individuals who do not qualify as refugees. However, if a person is protected by a state in terms of the Convention against Torture, it does not mean that he or she will be

⁶¹ Clayton G *Immigration and Asylum Law* 3rd ed (2017) 409.

⁶² Article 1(1) of the 1967 UN Protocol.

⁶³ *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1979): 'A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. It would occur before the time at which his refugee status determined. Recognition of his refugee status does not, therefore, make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee' at para 28.

⁶⁴ UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' available at <https://www.unhcr.org/4d9486929.pdf> (accessed 08 April 2020).

⁶⁵ 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> (accessed on the 24 March 2020)

⁶⁶ Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that: '1. No State Party shall expel, return ('*refouler*') or extradite any person to another State where it is believed that he or she would be in danger of being subjected to torture. 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.'

granted refugee status in that specific country. For example, an individual can be protected by a country against the actions of another state if that individual will face degrading, cruel, and inhuman treatment, if returned. Article 3 of the Convention against Torture provides guidelines on the grounds for believing that a person would be in danger of being tortured if returned to his or her country of origin.⁶⁷

In international refugee law, the principle of *non-refoulement* requires that asylum seekers or refugees must not be expelled or returned to their country when their application is yet to be determined by the authorities.⁶⁸

A state cannot transfer any asylum seeker to another country if it would expose him or her to serious human rights violations, especially torture. The decision not to return an asylum seeker implies that he or she has a right to a temporarily dwelling place in the country, as well as a right to a reliable status determination of his or her refugee status.⁶⁹

In South Africa, before an asylum seeker can be returned to his or her country, a RSDO must consider objectively whether, if he returns the asylum seeker to his or her country he or she will face a real risk of ill-treatment. If the answer is affirmative, the asylum seeker or refugee cannot be returned. If the DHA authorities reject an asylum seeker's application and return him or her to his or her country while he or she is in fact eligible for asylum, its actions will result in South Africa breaching its international obligation of *non-refoulement*.⁷⁰

Khan argues that South Africa could be liable for violating the principle of *non-refoulement* indirectly based on the experience asylum seekers face when accessing the asylum system; such as lack of procedurally fair status determination procedures, and the barriers to accessing the civil and socio-economic rights afforded refugees.⁷¹

Once all existing avenues for possible review and appeal have been exhausted and the application for asylum is denied, the asylum seeker will be asked to leave South Africa on

⁶⁷ Goodwin-Gill GS *The Refugee in International Law* (2007) 304.

⁶⁸ 'Non-refoulement and the Scope of its Application' available at <https://www.unhcr.org/4d9486929.pdf> (accessed 6 August 2019).

⁶⁹ Helton A & Jacobs E 'What is Forced Migration?' in *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (ed) (2006) 7.

⁷⁰ Goodwin-Gill GS 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' available at <https://www.refworld.org/docid/470a33b10.html> (accessed 6 August 2019).

⁷¹ Khan (n 28) 12.

the basis that he or she is not entitled to asylum. An asylum seeker can be removed from South Africa on the basis of public order. In terms of section 28(1) of the Refugees Act 130 of 1998, an individual can only be removed in the exercise of a directive from the Minister of Home Affairs which directs the Director-General of the DHA to detain an individual or remove him or her from the Republic.⁷² Once the directive has been issued by the Minister to the Director-General, the latter must act in terms of section 21(2) of the Refugee Amendment Act.⁷³ The asylum seeker is, however, entitled to the rights in section 33 of the Constitution and those provided under international law.⁷⁴

2.2.2 African Union

The African Union (AU), the continental union for Africa, has 55 member states.⁷⁵ The AU's predecessor, the Organization of African Unity (OAU) adopted the 1969 OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa (OAU Refugee Convention). South Africa has ratified this Convention. The Convention complements the provisions of the 1951 Convention and its 1967 Protocol.

The OAU Convention strives to resolve problems facing asylum seekers in light of characteristics common to asylum seekers on an African context.⁷⁶ It provides a broader definition of refugee than the UN Convention. Refugees include affiliates of national liberation movements, those fleeing from ethnic conflict, and individuals escaping from human rights abuses. Unlike the UN Convention, which does not refer to national order, the OAU Convention also emphasises the exception to the principle of *non-refoulement*.⁷⁷ Member states of the AU are obliged to use their best efforts to receive asylum seekers by making sure asylum seekers have a secure place to settle.⁷⁸ Furthermore, states must

⁷² Section 21 of the Refugees Amendment Act.

⁷³ Sub-regulation 2 provides: "(a) must forthwith withdraw any asylum seeker visa or certificate of recognition of refugee status, identity document or card or travel document issued to any person named in order; (b) must forthwith submit a copy of the order to a representative of the UNHCR; (c) may enlist the assistance of any law enforcement officer or structure to trace, arrest, and detain the person; (d) may collaborate with any state officer or any other person to transport the person to any destination within the Republic, and to remove the person from the territory of the Republic; and (e) may take any steps necessary to execute the order, including contracting the services of any private service provider."

⁷⁴ Section 28 of the Refugees Act.

⁷⁵ Africa Union available at <https://au.int/> (accessed on 7 April 2020).

⁷⁶ Naldi (n 49) 89.

⁷⁷ As above.

⁷⁸ Article 2 of the OAU Convention Concerning the Specific Aspects of Refugee Problems in Africa.

ensure that asylum seekers are not discriminated against on the basis of race, religion, nationality, and membership of particular social or political groups.⁷⁹ On the other hand, an asylum seeker also has the responsibility to obey the laws of the host country, including ensuring they maintain public order. Any violation of the host country's law may result in the loss of their refugee status.⁸⁰

2.3 National legislation on refugee protection in South Africa

South Africa took a progressive decision to enact legislation specifically for asylum seekers and refugees in 1998. This national legislation – the Refugees Act – applies only to asylum seekers and refugees seeking refuge in South Africa. However, there is other South African legislation that protects asylum seekers, notably the Constitution, which sheds light on the rights, process, and procedures in the protection and status determination of asylum seekers in South Africa.

Before 1994 there was no legislation specifically aimed at protecting asylum seekers as South Africa recognised only migrant workers and laborers, as opposed to asylum seekers. This section analyses the historical background of asylum seekers before 1994, the legislation applicable to refugees and asylum seekers in South Africa post-1994, and the South African Constitution.

2.3.1 Historical background pre-1994

The history of migration is a well-researched and documented academic field in Southern Africa.⁸¹ Even before the creation of South Africa in 1910, the territories that now make up the country made extensive use of migrant labour from the rest of Southern Africa, in particular in the mining industry.⁸²

Under the white minority rule, South Africa's immigration policy was categorised under four pillars: racist policy and legislation; tough legislation enforcement; exploitation of migrant

⁷⁹ As above article 4.

⁸⁰ As above article 3.

⁸¹ Kok P, Oucho J et al *Migration in South and Southern Africa: Dynamics and Determinants* (2006).

⁸² As above.

labour from neighboring countries; and the rejection of the international Refugee Convention.⁸³

The first pillar was the immigration policy used by the white government based on racial and religious criteria in deciding who would be allowed into the country and on what terms.⁸⁴ In the 1980s anyone with white skin was welcomed into South Africa, including workers. People of colour were not welcome, especially Africans from another country.⁸⁵ Furthermore, the apartheid regime enforced economic and social segregation between different 'races'. Segregation was enforced through a gamut of laws relying on the Population Registration Act of 1950 which classified every individual according to racial group.⁸⁶ During the dying years of apartheid, the state accepted selected skilled black immigrants⁸⁷ – South Africa and Botswana were the only African countries that offered income growth for well-skilled professionals which prompted professionals to move to South Africa and Botswana.⁸⁸ In 1986 influx control was abolished for Africans and migrants from neighbouring countries even though the migrant labour system continued unabated. Nonetheless, foreign workers were not granted permanent rights.⁸⁹

In 1962 the apartheid regime established Bantustans in terms of which a large percentage of the black population was moved to a secluded area reserved for blacks who were by and large not permitted to live in the urban areas. The Bantustans were established for the permanent removal of the black population from the South African political system to live under different laws and policies created by apartheid.⁹⁰

Black freedom of movement was governed by a 'pass system'. This meant that all blacks had to carry their pass with them if they were moving to or within certain specified areas in

⁸³ Crush J & McDonald D 'Evaluating South African Immigration Policy after Apartheid' (2001) 48(3) *Africa Today* 2.

⁸⁴ Peberdy S 'Selecting immigrants: Nationalism and National Identity in South Africa's Immigration Policies, 1910-1998' Ph D thesis (Queen's University, Canada 1999).

⁸⁵ Crush (n 82) 2.

⁸⁶ Liebenberg S 'Human Development and Human Rights: South African Country Study' available at http://hdr.undp.org/sites/default/files/sandra_liebenberg.pdf (accessed 11 June 2019) at 3.

⁸⁷ Crush (n 82) 2.

⁸⁸ Kok (n 80) 78.

⁸⁹ As above 76.

⁹⁰ 'The Homelands' available at <https://www.sahistory.org.za/article/homelands> (accessed 7 June 2019).

which they were blacks not permitted to move freely. Failure to produce a 'pass' when requested to do so by a police officer was a criminal offence.⁹¹

The second key pillar under the apartheid immigration policy related to the commercial farming and mining sectors. In the 1960s there were no borders controls between South Africa, Swaziland, Lesotho, and Botswana. Most migrants from these neighbouring countries did not qualify for the organised trade in cheap contract labour.⁹² Some migrants crossed into South Africa of their own accord to work in white homes, on farms, and in factories. The state turned a blind eye to migrants working in these three sectors (Domestic, Farming and Manufacturing) as the country was starved of an adequate labour force. During the 1980s, because of a substantial increase in illegal workers in the country, the apartheid government adopted measures to arrest and deport illegal immigrants who were seen as a threat by the state.⁹³ However, the apartheid government signed bilateral treaties favouring the South African apartheid government and employers, but to the detriment of the interests of migrants and their dependants.⁹⁴ The treaties were concluded under the condition of the exception clause in the immigration legislation which created one policy for white immigrants, and another for black migrant workers.⁹⁵ Before 1994, foreign workers were employed under agreements between the mining conglomerates and the supplying countries' governments.⁹⁶ The contracts signed between the two parties were always of limited duration – generally one or two years – and upon expiry of the contract, the migrant workers were transported back to their home countries. The harshest aspect of the system was that these workers were not permitted to bring their wives or families with them to South Africa. The supply of labour to South Africa was in the main from neighbouring countries.⁹⁷ These workers were documented migrants, but they were strictly limited and regulated as they were in the country solely as cheap labour for mines and farms.⁹⁸ Migrant workers from the neighbouring countries who spent their entire lives

⁹¹ Liebenberg (n 85) 4.

⁹² Crush (n 82) 3.

⁹³ As above.

⁹⁴ As above 2.

⁹⁵ As above.

⁹⁶ Steinberg J 'A mixed reception: Mozambican and Congolese Refugees in South Africa' (2005) available at <http://www.iss.co.za/pubs/Monographs/No117> (accessed 6 April 2019).

⁹⁷ Zlotnik H 'Migrants Rights, Forced Migration and Migration Policy in Africa' (2003) 4 Paper prepared for African Migration in Comparative Perspective Johannesburg, South Africa 13.

⁹⁸ Khan F 'Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach' (2007) available at <https://www.researchgate.net/publication/237673324> (accessed 6 April 2019).

working on South African farms and mines qualified for permanent residence in South Africa.⁹⁹

The third pillar was enforcement of the legislation by the apartheid government. In 1991, the apartheid government adopted the Aliens Control Act¹⁰⁰ to tighten border security and introduce tough penalties for unauthorised migration into South Africa.¹⁰¹ Section 4(1) of the Aliens Control Act specified that a person who wished to immigrate to South Africa had first to be approved by an immigration officer before he or she could enter the country.¹⁰² However, this did not mean that citizens from other Southern African countries were stopped from visiting South Africa.¹⁰³ The Act was used by the apartheid government to control the influx of migrants who were forced to flee the war in Mozambique. The Mozambique migrants can be seen as asylum seekers or refugees who fled their country due to war to seek refuge in South Africa. However, the apartheid government classified them as illegal migrants because South Africa was not a signatory to any treaty or convention which protected asylum seekers who sought refuge in the country. In 1991 some 47 000 Mozambicans were arrested and deported to Mozambique. All ports of entry were under the control of police during the apartheid regime, which was driven and directed by intelligence units until 1992.¹⁰⁴ After 1992 immigration officers were introduced, and the DHA assumed responsibility for the general control at all port of entry into South Africa.¹⁰⁵ The Alien Control Act covered the entry of all foreigners into South Africa, but not asylum seekers.¹⁰⁶ The Act made it clear that the major aim of the South African government was to control the entry of aliens into the country. However, it is clear that the pre-1994 policy was race-based and premised on white supremacy.¹⁰⁷ According to Statistics SA, before 1994 the number of immigrants and migrant workers who moved to South Africa between

⁹⁹ Crush (n 82) 3.

¹⁰⁰ 96 of 1991.

¹⁰¹ As above.

¹⁰² Khan (n 97) 1.

¹⁰³ As Above.

¹⁰⁴ 'White Paper on International Migration for South Africa' available at <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf> (accessed 4 July 2019).

¹⁰⁵ As Above.

¹⁰⁶ Act 96 of 1991. 'Aliens are any person who is not a South African. Aliens does not have the same rights and obligations as South African Citizen, although some States confer on aliens certain rights otherwise enjoyed only by their South African Citizen.' See also Aust A *Handbook of International law* (2010) 168.

¹⁰⁷ Khan (n 97).

1970 and 1994 totaled 1 100 342.¹⁰⁸ The apartheid government rejected both the UN and the OAU refugee conventions. Any asylum seeker who approached South Africa was treated as an illegal alien in terms of the Aliens Control Act.¹⁰⁹

In 1991, after years of being refused entry, the UNHCR was permitted to establish its presence in South Africa to assist those who sought asylum from other countries and those who returned to South Africa from exile having fled the country during apartheid.¹¹⁰ After receiving the mandate to operate in South Africa, the UNHCR began addressing 'durable solutions' for those returning to South Africa from exile.¹¹¹ During the apartheid era, many black South Africans fled South Africa for other African countries to seek asylum such as Botswana, Angola, Zimbabwe, Zambia, Tanzania, and Nigeria. Most African countries supported these South Africans by granting them asylum.¹¹²

In conclusion, the apartheid administration appeared to choose security elements of 'control', in preference to accepting asylum seekers. However, South Africa was a classic example of a refugee-producing country due to blacks fleeing from the white oppressors within their country.¹¹³

Currently, the most significant number of migrants entering South Africa are from other African countries. The country is perceived to be economically prosperous. At a time when European asylum policies are becoming more restrictive, South Africa is one of the countries they can approach to seek asylum.¹¹⁴

2.3.2 Post-1994 development and changes

In 1994 a new era of democratic reform and a new government came into existence which committed itself to protection human rights and to regional cooperation.¹¹⁵ Since 1994 the

¹⁰⁸ 'Documented Migration' (2003) available at <http://www.statssa.gov.za/publications/Report-03-51-03/Report-03-51-032003.pdf> (accessed 09 November 2019).

¹⁰⁹ Crush (n 82) 4.

¹¹⁰ UN Agencies in SA available at <http://www.un.org.za/agencies/> (accessed 5 June 2019).

¹¹¹ As above.

¹¹² As Above.

¹¹³ Crush J & McDonald D 'Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid.' (2001) 48 *Africa Today* available at www.jstor.org/stable/4187430 (accessed 6 June 2019).

¹¹⁴ Khan (n 97) 3.

¹¹⁵ Handmaker (n 32) 29.

migration pattern in Southern Africa has changed.¹¹⁶ South Africa has also committed itself to the protection of refugees by allowing them into the country and enacted its Constitution, which set a very high benchmark for promoting human rights, benefits, and socio-economic rights for South African citizens and residents.¹¹⁷ The Refugees Act of 1998 was implemented in 2000. This Act encourages asylum seekers to move freely in the Republic with the benefits of protection and equal right under the South African Constitution.¹¹⁸

It is clear from this Act that the new South African government aimed for a law which treated refugees as human beings with rights, rather than merely housing them for protection.¹¹⁹

2.3.3 Constitutional protection

The South African Constitution is the supreme law in the Republic and protects both citizens and non-citizens within its borders in accordance with the international law obligation on all states to protect asylum seekers. Furthermore, “the South African Constitution is the supreme law of the Republic, and any law which is inconsistent with the Constitution is invalid”¹²⁰ Asylum seekers can enjoy all the human rights set out in the Constitution save for the rights expressly reserved for citizens. For example, section 9(1)¹²¹ of the Constitution provides that “everyone is equal before the law and should receive equal benefit and protection”.

The rights of asylum seekers are embraced in the Constitution. Some rights in Chapter 2 – the Bill of Rights¹²² – are enjoyed by everyone, including asylum seekers, living in South Africa. These rights include the right to equality in terms of which everyone is equal before

¹¹⁶ Christie K ‘Security and forced migration concerns in South Africa’ (1997) 6 *African Security Review* 43.

¹¹⁷ Kavuro C ‘Refugees and asylum seekers: Barriers to accessing South Africa's labour market’ available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072015000100012 (accessed 14 October 2019).

¹¹⁸ ‘The State of the South Africa Refugee Protection Regime’ available at <https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-i-current-status> (accessed 14 October 2019).

¹¹⁹ Khan (n 97) 2.

¹²⁰ Section 2 of the Constitution of the Republic of South Africa, 1996.

¹²¹ The Constitution of the Republic of South Africa, 1996.

¹²² As above.

the law and enjoys equal protection and benefit of the law; the right to dignity; the right to life, which includes the right to basic healthcare, water, food, and social security; the right to education; to access to information; and access to courts.¹²³

In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another*, the High Court held that:¹²⁴ ‘The South African Constitution gives asylum seekers access to securing their rights.’ Section 7(2)¹²⁵ provides that: ‘The State has a duty to respect, protect, and fulfil the rights in the Bill of Rights, which are subject only to the limitations referred to in section 36 of the South African Constitution.’ There may be limitations in terms of the general application of the South African law, justifiable and reasonable in an open democratic society based on equality, human dignity, and freedom.

2.3.4 Interim constitutional settlement

The road to democracy in South Africa was mainly from the change from apartheid to democracy and from the white minority rule to liberation. In South Africa’s history, there is one crucial turning point,¹²⁶ which is the unbanning of the South African liberation movement the African National Congress (ANC) in 1990 which coincided with the release of political prisoners. This led to the transition and negotiation towards a political settlement and a new constitutional dispensation for South Africa.¹²⁷

Numerous negotiations took place between the ANC, the governing National Party, and other political organisations. These were held against the background of violence in the country, but finally resulted in South Africa's first multi-racial election, which the ANC won.¹²⁸ This was a turning point for South Africa democracy which unlocked barriers facing asylum seekers seeking asylum in South Africa.

In the early 1990s the liberation movements and ordinary South Africans citizens brought the South African apartheid government to the negotiating table. The interim Constitution

¹²³ As above.

¹²⁴ 2002 (8) BCLR 891 (T), the court confirmed that the Bill of Rights applies to all persons except where they have been expressly excepted (at 897C-D).

¹²⁵ The Constitution of the Republic of South Africa, 1996.

¹²⁶ ‘Negotiation, Transition and Freedom’ available at <http://www.sahistory.org.za/archive/chapter-1-transition-context> (accessed 11 June 2019).

¹²⁷ Liebenberg S ‘*Socio-Economic Rights: Adjudication under a Transformative Constitution*’ (2010).

¹²⁸ Inman RP & Rubinfeld DL ‘Understanding the Democratic Transition in South Africa’ (2012) Working Paper 17799 1.

accommodated asylum seekers even though South Africa had not signed anything recognising asylum seekers or refugees. The South African interim Constitution¹²⁹ was succeeded by the Constitution which is the fundamental law of South Africa.¹³⁰ It provided a future that recognises the rights of the people, infrastructure development for all South Africans, and a democratic society irrespective of colour, race, sex, and belief.¹³¹

2.3.5 Refugees Act 130 of 1998

South Africa acceded to U.N Convention and its 1967 protocol on refugees in 1996 and enacted the Refugees Act to give effect to the obligations governing the protection of asylum seekers within the country. In 2000, the Refugees Act entered into force. The Act was enacted to regulate applications from asylum seekers and refugees, including the recognition of refugee status in South Africa.

Refugees are treated as human beings under the Act which confers rights rather than merely providing housing and protection. Therefore, South Africa has met its obligations under international law by putting in place the Refugees Act to protect the affairs of asylum seekers.¹³² For an individual to qualify for refugee status, he or she must fit the definition of a refugee in the Refugees Act, and meet the requirements of section 21 of the Refugees Act.¹³³ Moreover, South Africa follows an individual refugee status determination procedure.¹³⁴

Asylum seekers can come to South Africa directly from their country of origin, or from another country they are permanent resident in.¹³⁵

¹²⁹ Interim Constitution of the Republic of South Africa, Act 200 of 1993.

¹³⁰ Liebenberg S 'Human Development and Human Rights South African Country Report' (2000) available at http://hdr.undp.org/sites/default/files/sandra_liebenberg.pdf (accessed 11 June 2019).

¹³¹ Liebenberg (n 85) 7.

¹³² Khan (n 97).

¹³³ See s 8(1) of the Refugees Act: "An application for asylum under s 21 of the Act must: "(a) be made in person by the applicant upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office; (b) be made in a form substantially corresponding with Form 2 (DHA-1590) contained in the Annexure; (c) be submitted together with— (i) a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted circumstances, a valid visa issued in terms of the Immigration Act; (ii) proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and (iii) the biometrics of the applicant, including any dependant."

¹³⁴ Individualism from the 1951 Convention and the broader definition from the AU Refugee Convention.

¹³⁵ Ramoroka V 'The Determination Of Refugee Status In South Africa: A Human Rights Perspective' (LLM Dissertation Unisa 2014) at 14.

The Constitution provides that: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport and object of the Bill of Rights.”¹³⁶ Also, “When interpreting any legislation, every court must give prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”¹³⁷ Therefore, the Refugees Act must be interpreted according to the instruments listed in section 6(1) of the Refugees Act.¹³⁸

The Refugees Act provides for the protection and the general rights to which asylum seekers and refugees are entitled. The Act guarantees freedom of movement, full legal security, identity documents, healthcare, education, and all additional rights contained in the Bill of Rights.¹³⁹ Chapter Five of the Refugees Act provides for the rights and obligations of refugees; specifically, section 27 deals with protection and general rights of refugees. It states that a refugee:

- (a) is entitled to formal written recognition of refugee status in the prescribed form;
- (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic;
- (c) is entitled to apply for an immigration permit;
- (d) is entitled to an identity document;
- (e) is entitled to a South African travel document on the application;
- (f) is entitled to seek employment.
- (g) is entitled to the same essential health services and basic primary education which the inhabitants of the Republic receive from time to time.

In terms of the obligation under international refugee law, it pinpoints the rights to which a refugee or asylum seeker is entitled. These include the rights to *non-refoulement*, to liberty and security of the person, to access to justice, and other fundamental rights.¹⁴⁰ The Refugees Act draws heavily on international law, for example, section 2 of the Act addresses the *non-refoulement* of an asylum seeker or refugee.

¹³⁶ Section 39(2) of the South African Constitution.

¹³⁷ As above s 233 of the Constitution.

¹³⁸ Section 6(1): “This Act must be interpreted and applied with due regard to - (a) the Convention Relating to the Status of Refugees (UN, 1951); (b) the Protocol Relating to the Status of Refugees (UN, 1967); (c) the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU, 1969); (d) the Universal Declaration of Human Rights (UN, 1948); and (e) any other relevant convention or international agreement to which the Republic is or becomes a party.”

¹³⁹ Refugees Act 130 of 1998 s 27(b).

¹⁴⁰ ‘Asylum and The Rights of Refugees’ available at <https://ijrcenter.org/refugee-law/> (accessed 21 January 2020). *Non-refoulement*: Not to return an asylum seeker to his or her country where his or her life would be threatened base on race, religion, nationality.

2.5.6 Limitation on the rights of asylum seekers

Although asylum seekers have rights, in South Africa these are limited in that not all rights in the Constitution apply to asylum seekers. Also, asylum seekers are entitled to study and work in South Africa, but they are restricted as to the type of work they are permitted to do.¹⁴¹ However, the Refugees Act was amended on 12 December 2019 by section 34 of the Refugee Amendment Act which came into operation on 1 January 2020. The new amendment prohibits an asylum seeker from working or studying in the Republic while awaiting the outcome of his or her asylum application.¹⁴² This means an asylum seeker cannot seek employment in any institution or company for work or study until his or her status has been determined by an RSDO and he or she has been granted an asylum seeker visa.¹⁴³

In the *Watchenuka* case, asylum seekers were granted the right to work as prohibiting them from working deprives them of their human dignity.¹⁴⁴ The judgment in the *Watchenuka* case found that: “[W]here employment is the only reasonable means for the person’s support, depriving such person the freedom to work threatens them positively to degrade rather than to inhibit the realization of self-fulfillment.”¹⁴⁵ The Refugees Amendment Act of 2019 did not take away the right of an asylum seeker to work; it did however, impose strict conditions in order to qualify to work and study. In terms of section 5(3)(i) of the Refugees Amendment Act, “the standing committee must determine the conditions under which qualifying asylum seekers may be employed or study”. Further, the sectors in which asylum seekers can work are restricted. But, notwithstanding that they may indeed be employed or study, section 5(b) of the Amendment Act of 2019 states that: “The Standing Committee may, from time to time, publish in the *Gazette* the list of sectors in which asylum seekers may not be employed or study.” This can be seen as a form of discrimination against asylum seekers as regards restricting the type of job in which they can be employed. This provision is aimed at protecting South Africans, particularly in the current economic climate where the unemployment rate is high and jobs are scarce.

¹⁴¹ Refugee Amendment Act 2020 s 5(3)(i).

¹⁴² As above at s 5(3)(ii).

¹⁴³ As above s 12.

¹⁴⁴ *Minister of Home Affairs & Others v Watchenuka & Others* (010/2003) [2003] ZASCA 142 para 24.

¹⁴⁵ As above para 32.

Asylum seekers have been seen to have contributed to unemployment in South Africa in that they are perceived as 'cheap labour'.¹⁴⁶

Asylum seekers and refugees can also enjoy the right to freedom of movement inside South Africa. But asylum seekers are restricted from traveling out of South Africa after being granted asylum until they have been granted permanent residence.¹⁴⁷

2.3.7 Refugees Amendment Act

The Refugee Amendment Act 2008 commenced 1 January 2020¹⁴⁸ replaced the Refugees Regulations (Forms and Procedure), 2000 published in GN R 366 of 6 April 2000.

The new regulations replaced some regulations issued under the Refugees Act, for example, the granting of an asylum transit visa. Before any asylum seeker can be issued with an asylum transit visa, he or she intends to apply for asylum in South Africa must declare the intention at any port of entry, before entering South Africa and such person must provide his or her biometrics and other necessary data as required which includes: (a) fingerprints; (b) photograph; (c) names and surname; (d) date of birth and age; (e) nationality or origin; and (f) habitual place of residence prior to travelling to the Republic.¹⁴⁹

2.3.8 Immigration Act 13 of 2002

The Immigration Act 13 of 2002 is an important Act that deals with the entry of foreigners into South Africa. However, there is a conflict between the Immigration Act and the Refugees Act. For example, any person, including an asylum seeker, who enters South Africa illegally falls under the definition of illegal foreigner in the Immigration Act. But, the principle of *non-refoulement* allows a foreign national to apply for asylum.¹⁵⁰ The Refugees

¹⁴⁶ Chamunorwa W 'The Unemployment Impact of Immigration in South Africa' available at https://www.researchgate.net/publication/272708139_The_Unemployment_Impact_of_Immigration_in_South_Africa/link/5e45438a299bf1cdb925052a/download (accessed 20 June 2020).

¹⁴⁷ LRC 'How an application for asylum is made' available at http://lrc.org.za/art_external/pdf/2015_Asylum_seeker_guide2_How_to_apply_for_asylum_LRC%20Publication.pdf (accessed 20 June 2020).

¹⁴⁸ Act 33 of 2008.

¹⁴⁹ Section 7 of the Refugee Amendment Act.

¹⁵⁰ Ampofo-Anti OY 'Concourt takes compassionate approach to people who enter country unlawfully' available at <https://www.groundup.org.za/article/concourt-takes-compassionate-approach-people-who-enter-country-unlawfully/> (accessed 30 January 2020).

Act is the only piece of legislation that determines who can apply for asylum and how the application can be made.

Before the Immigration Act was enacted, the Aliens Control Act was in place.¹⁵¹ In 2003, the DHA promulgated the new Immigration Act which restricted the entry of non-South African citizens into South Africa.¹⁵² Citizens of most African countries will need to apply for a South African visa either at the South African consulate or at Visa Facilitation Services (VFS) offices in their home country or country of residence, in order to enter the Republic.¹⁵³ In terms of this Act, immigrants who will contribute to the expansion of South Africa's economy are welcome to apply for a residence permit. Applicants who qualify as having 'exceptional skills' are encouraged to apply – especially where there is shortage of their skills in South Africa. The same applies to industrialists or entrepreneurs who plan to move their established business to South Africa as a new concern. An individual who wishes to retire in South Africa may, at the discretion of the Minister of Home Affairs, enter the country but may be required to provide (and prove) their income statement. There are different types of permit issued by the DHA:¹⁵⁴

- **Visitor's Permit:** applied for at any South African embassy in order to be permitted to enter South Africa temporarily.
- **Study Permit:** applied for at the South African embassy or VFS office on the basis that a person is registered as a student at a recognised institution for the duration of the course at the institution.¹⁵⁵

¹⁵¹ Aliens Control Act 96 of 1991.

¹⁵² Landau L, Ramjathan-Keogh K & Singh G 'Xenophobia in South Africa and problems related to it' (2005) available at https://www.academia.edu/2447383/Xenophobia_in_South_Africa_and_problems_related_to_it (accessed 17 June 2019).

¹⁵³ South Africa's New Immigration Act. Summary available at <https://www.intergate-immigration.com/blog/south-africas-new-immigration-act-summary-may-2014/> (accessed 2 July 2019).

¹⁵⁴ 'Temporary Residence Visa' available at <https://www.vfsglobal.com/dha/southafrica/temporary-residence.html> (accessed 2 July 2019).

¹⁵⁵ Section 31(1) of the Immigration Act: "A study visa may be issued, in the prescribed manner, to a foreigner intending to study in the Republic for a period not less than the period of study, by the Director-General: Provided that such foreigner complies with the prescribed requirements."

- **Relative Permit:** applied for when an immediate family member of a South African citizen or permanent resident may be issued a relative's permit once his or her financial means verified.¹⁵⁶
- **Work Permit:** a general work permit is applied for at a VFS office or South African embassy and allows the individual to enter and reside in the country for the duration of his or her contract of employment or a period not exceeding five years.¹⁵⁷
- **Permanent Residence:** To apply for permanent residence, the applicant must qualify for direct residence in terms of section 26(a)-(d) of the Immigration Act.¹⁵⁸

As regards South Africa's immigration policy, an individual will need to prove that the skills available in South Africa cannot meet the country's needs.¹⁵⁹ An immigrant is only welcome if he or she will add value to the economy through his or her critical skills. South Africa has no problem in employing professional "and skilled people but it is clear that the country is not open to unskilled immigrants. It is clear, therefore, that South Africa's immigration policy as reflected in the Immigration Act is highly restrictive.¹⁶⁰

¹⁵⁶ Section 18(1): "A relative's visa may be issued for the prescribed period by the Director-General to a foreigner who is a member of the immediate family of a citizen or a permanent resident, provided that such citizen or permanent resident provides the prescribed financial assurance."

¹⁵⁷ Section 19(2) of the Immigration Act: "A general work visa may be issued by the Director-General to a foreigner not falling within a category contemplated in subsection (4) and who complies with the prescribed requirements."

¹⁵⁸ Section 26(a)-(d): "Subject to section 25 and any prescribed requirements, the Director-General may issue a permanent residence permit to a foreigner who –
 (a) has been the holder of a work visa in terms of this Act for five years and has proven to the satisfaction of the Director-General that he or she has received an offer for permanent employment;
 (b) has been the spouse of a citizen or permanent resident for five years and the Director-General is satisfied that a good faith spousal relationship exists: Provided that such permanent residence permit shall lapse if at any time within two years from the issuing of that permanent residence permit the good faith spousal relationship no longer subsists, save for the case of death; (c) is a child under the age of 21 of a citizen or permanent resident, provided that such permit shall lapse if such foreigner does not submit an application for its confirmation within two years of his or her having turned 18 years of age; or (d) is a child of a citizen.

¹⁵⁹ Khan (n 97).

¹⁶⁰ As above.

2.3.10.1 Section 34(1) of the Immigration Act

This section deals with the detention and deportation of illegal foreigners in South Africa under the Immigration Act.¹⁶¹ The Immigration Act allows warrant officers or an arresting officer to detain an asylum seeker and anyone without a valid residence permit of some sort.¹⁶² If an asylum seeker fails to extend his or her section 22 visa within 30 days of it having lapsed, he or she will be required to pay an admission of guilt fine which would result in a criminal record. Once the fine has been paid, the asylum seeker is allowed to apply to renew his or her section 22 visa at the relevant RRO.¹⁶³

In the case of *Kiliko v Minister of Home Affairs* it was held that until an asylum seeker obtains an asylum seeker visa in terms of section 22 of the Refugees Act, he or she will remain an illegal foreigner who is subject to restriction and limitation which will impact on his or her human dignity and freedom and security of the person. The court made it clear that failure to allow an asylum seeker to apply for asylum leaves him or her exposed to the general immigration laws of South Africa and so vulnerable to arrest and deportation.¹⁶⁴

In the case of *Ersumo v Minister of Home Affairs & Others*,¹⁶⁵ the applicant was in South Africa unlawfully at the time of his arrest and detention. The court addressed the relationship between an illegal foreigner and someone with an intention to apply for asylum. The court held that once a foreigner has revealed an intention to apply for asylum,

¹⁶¹ Section 34(1): “(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 - (Words preceding paragraph (a) substituted by section 35(a) of Act 19 of 2004) (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.”

¹⁶² Khan (n 97).

¹⁶³ Section 12(3) Refugee Amendment Act of 2020.

¹⁶⁴ 2006 (4) SA144 (C) and *Tafira v Ngozwane* [2006] ZAGPHC 136 (12 December 2006) para 28.

¹⁶⁵ (69/2012) [2012] ZASCA 31, 2012 (4) SA 581 (SCA), [2012] 3 All SA 119 (SCA) (28 March 2012).

he or she is entitled to be granted a permit. In *Arse v Minister of Home Affairs*,¹⁶⁶ the court held that “the detention of an asylum seeker under section 34(1) of the Immigration Act was unlawful and impermissible especially where the asylum seeker had applied for asylum in terms of the Refugees Act.”¹⁶⁷

In *Rahim v Minister of Home Affairs*,¹⁶⁸ the appellants were asylum seekers who had applied for asylum in terms of section 21 of the Refugees Act 130 of 1998 and had been granted asylum seeker permits. The appellants were arrested at the Port Elizabeth RRO on the basis that their refugee applications had been rejected by the Refugee Appeals Board (RAB). The Supreme Court of Appeal held that the applicants' arrest and detention were unlawful and that their asylum seeker section 22 permits remained valid until finalisation of judicial review proceedings. The Supreme Court of Appeal held further that detention is not a prerequisite for the deportation of an asylum seeker and arrest should be a last resort once other available processes have been exhausted.¹⁶⁹

In *Moustapha Dabone & Others v Minister of Home Affairs*¹⁷⁰ the court held that permanent residence permits may be issued to asylum seekers and refugees unconditionally. In response to the *Moustapha Dabone* decision, the DHA withdrew its Circular 10 of 2008 which allowed asylum seekers to effect changes to their status.¹⁷¹

The Western Cape High Court declared on 21 September 2016 that: “The decision of Department of Home Affairs stopping foreigners from applying for a visa in terms of the Immigration Act is inconsistent with the South African Constitution.” The court further set aside the withdrawal of the asylum seeker visa in terms of the DHA’s Circular 10 of 2008.¹⁷² It went further to say that rejected asylum seekers may by law apply for a visa affording them the same opportunity in terms of section 32¹⁷³ of the Immigration Act. In September

¹⁶⁶ (25/2010) [2010] ZASCA 9, 2010 (7) BCLR 640 (SCA), [2010] 3 All SA 261 (SCA), 2012 (4) SA 544 (SCA) (12 March 2010).

¹⁶⁷ (25/2010) [2010] ZASCA 9, 2010 (7) BCLR 640 (SCA), [2010] 3 All SA 261 (SCA), 2012 (4) SA 544 (SCA) (12 March 2010) para 18.

¹⁶⁸ (965/2013) [2015] ZASCA 92, 2015 (4) SA 433 (SCA), [2015] 3 All SA 425 (SCA) (29 May 2015).

¹⁶⁹ As above para 9.

¹⁷⁰ *Dabone & Others v Minister of Home Affairs & Another* 2003 11 HC.

¹⁷¹ Furlong A ‘HA taken to Court’ available at <http://imcosa.co.za/news/589-home-affairs-to-court.html> www.groundup.org.za/article/home-affairs-to-be-taken-to-court (accessed 06 September 2019).

¹⁷² *Tashriq Ahmed & Others v The Minister of Home Affairs & Others* (2017) 2 WCC SA 417 available at http://www.workpermitsouthafrica.co.za/High-Court-JudgementSKM_36716092111390.pdf (accessed 6 September 2019).

¹⁷³ Section 32(1): “Any illegal foreigner shall depart, unless authorised by the Department to remain in the Republic pending his or her application for status.”

2017, the Supreme Court of Appeal reversed the *Moustapha Dabone* decision and in so doing overruled a practice dating back to 2003, which allowed asylum seekers to apply for immigration permits.¹⁷⁴ The Supreme Court of Appeal further ruled that asylum seekers may no longer effect changes to their status within South Africa and that the only time an asylum seeker is eligible to apply for immigration permit is before he or she enters South Africa with the aim of applying for asylum.

2.3.10.2 The Zimbabwean Exemption Permit (ZEP)

Zimbabwe is a country neighbouring on South Africa from which, due to political instability and the breakdown of its economy, there has been an influx of people into South Africa. This has, in turn, contributed to the high number of asylum seekers in the country.¹⁷⁵ South Africa refused to recognise Zimbabweans who flee Zimbabwe into South Africa as refugees.¹⁷⁶ Because of the increase in the influx of illegal Zimbabweans into South Africa, the DHA introduced the Zimbabwean Exemption Permit. This permit allows Zimbabweans holding a passport to apply for a work permit according them the right to work temporarily in South Africa. While in South Africa, a Zimbabwean with a Zimbabwean Exception Permit cannot change his or her status or conditions.¹⁷⁷

2.3.9 Status determination process for asylum seekers

The refugee status determination procedure provides that all applicants are interviewed individually to determine if they are eligible for refugee status in South Africa.¹⁷⁸ Regulation 3(1) of the Refugees Act states clearly that applications for asylum must be decided by the

¹⁷⁴ Smith C 'No more visas in country for asylum seekers' available at <http://www.702.co.za/articles/274331/nomore-visas-in-country-for-asylum-seekers?> (accessed 28 December 2019).

¹⁷⁵ Kruger 'Understanding Asylum Outcomes for Zimbabweans' (2011) available at <http://africanarguments.org/2011/06/27/understanding-asylum-outcomes-for-zimbabweans-in-theunited-states-and-south-africa/> (accessed 23 June 2019).

¹⁷⁶ As above.

¹⁷⁷ 'Zimbabweans Restless Regarding the Expiry of ZSP Permit' (2016) available at www.topsanews.co.za/Zimbabweans-restless-regarding-the-expiry-of-zsp-permits (accessed 23 June 2019).

¹⁷⁸ Manicom D & Mullagee F 'The Status of Asylum Seekers and Refugees in South Africa: An Independent WHAT?' (2010) *Africa Insight* 39 available at <http://www.ajol.info/index.php/ai/article/view/54672> (accessed 12 July 2019). Also see s 14(1) of the Refugee Amendment Act of 2020.

DHA within 180 days of the filing a completed asylum application with an RRO. Furthermore, to qualify as a refugee at an RRO, the refugee must submit the following documents: an Eligibility Determination Form 2 (BI-1590) in duplicate; proof of identity from his or her country of origin; and a travel document if he or she has one.¹⁷⁹

However, new procedures for application for asylum are set out in section 8 of the new refugee regulations. Section 38 of the Refugees Act 1998¹⁸⁰ provides that:

An application in terms of Section 21 of the Refugees Act must:

- a. Applied in person by the applicant upon reporting to a Refugee Reception Office or -on a date allocated to such a person upon reporting to the Refugee Reception Office.
- b. Be made in form substantially corresponding with Form 2 (DHA-1590) contained in the annexure;
- c. Be submitted together with-
 - (i) a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted circumstances, a valid visa issued in terms of the Immigration Act;
 - (ii) proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and
 - (iii) the biometrics of the applicant, including any dependant.¹⁸¹

¹⁷⁹ 'Refugees and Asylum seekers in South Africa' available at <https://www.immigrationsouthafrica.org/refugees-and-asylum-seekers-in-south-africa/> (accessed 3 June 2019).

¹⁸⁰ Refugee Amendment Act of 2020.

¹⁸¹ Continuation of s 8 of the new refugee regulation. Section 38 of the Refugees Act of 1998 subsection (2): "Any person who submits a visa other than an asylum transit visa issued in terms of section 23 of the Immigration Act must provide proof of change of circumstances in the period between the date of issue of the visa and the date of application for asylum. (4) A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub regulation (3). (5) An applicant must indicate his or her language of proficiency on Form 2 (DHA-1590), which language will be presumed to be the language which the applicant understands. (6) All information contained on Form 2 (DHA-1590) or any documentation submitted together with, or in support of, the application for asylum, is binding on the applicant and may not be amended. (7) A Refugee Status Determination Officer may require any person who made an assertion in his or her application for asylum, to furnish him or her with proof or corroboration of the correctness of the assertion. (8) If at any stage a Refugee Status Determination Officer reasonably suspects that a child, who has been declared a dependant in any application for asylum, has been trafficked or smuggled into the Republic, he or she may require proof of relationship in the form of the results of a paternity test, and must refer such child to into the care of a representative of the Department of Social Development. (9) Any person who fails to declare a dependent child as contemplated in section 21(2A) and subsequently returns to the Refugee Reception Office to make a claim in terms of section 3(c) of the Act on behalf of such dependent child, he or she shall be required to provide proof of relationship in the form of the results of a paternity test, failing which, such child shall be dealt with as an unaccompanied child as

The new regulations affect only on the requirements which an asylum seeker must satisfy before his or her application can be processed at the RROs. The new regulation does not contribute a great deal to how to tackle the barriers asylum seekers face during the process of their status determination. Save for section 8(3)¹⁸² of the regulations which makes a positive contribution to the changes in the position of an immigrant who enters South Africa illegally through the border, or an asylum seeker who could not get a transit visa at the border, can apply for asylum on condition that he or she can show good cause why he or she entered the Republic illegally or did not apply for a visa at the port of entry.

Moreover, the South African government has enacted the Border Management Authority Act.¹⁸³ The Act came into effect on 16 July 2020 and regulates all aspects of the border environment. The Border Management Authority Act makes no reference to the Refugees Act on how the border control management officers must handle and treat asylum seekers at the border post. However, section 15(3)¹⁸⁴ of the Border Management Authority Act details how a border law enforcement officer must act in exercising his or her powers. It remains unclear, however, just how the Border Management Agency officers will handle asylum seekers in that the Refugees Act is not referenced as regards the procedures and steps to take in handling asylum seekers.

South Africa is an identity-driven society where there is no service if you do not have an identity document, whether in dealing with the government or the private sector. Whether you are applying to open a bank account or want to study at a school, you require an identity document – which for an asylum seeker is an asylum permit.¹⁸⁵ The issuing of

contemplated in regulation 10. (10) When required to do so by a Refugee Status Determination Officer, the principal asylum seeker or a dependant must provide proof of their relationship. (11) Each dependant included on an asylum application shall be issued an asylum seeker visa and must comply with the terms of the visa. (12) Any dependant of an asylum seeker contemplated in section 3(c) of the Act must appear in person for a hearing before a Refugee Status Determination Officer.”
¹⁸² Refugee Amendment Act of 2020. “(3) 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.”

¹⁸³ Act 2 of 2020

¹⁸⁴ Section 15(3) of the Border Management Act: “When performing any border law enforcement function, an officer must exercise his or her powers in a manner that takes due regard of the fundamental rights of persons, as guaranteed under Chapter 2 of the Constitution, and public international law obligations of the Republic, with proper consideration of the rights and interests of vulnerable groups, including victims of trafficking, refugees and asylum seekers.”

¹⁸⁵ Khan (n 97) 3.

identity documents for both foreigners and citizens in South Africa is the responsibility of the DHA.

As we saw above, the Act sets 180 days as the time allowed for adjudicating an application for asylum.¹⁸⁶ In practice, however, asylum seekers are frequently left with no choice but to wait years before being afforded an interview with an RDSO.¹⁸⁷ According to Amnesty International, some asylum seekers have been trapped in the asylum system without a final decision on their cases for as long as nineteen years.¹⁸⁸ According to UNHCR, South Africa still had 184 200 pending asylum cases in 2018¹⁸⁹ – this despite the parameters mandated in the Refugees Act.¹⁹⁰ In *Eisenberg & Associates v Director-General, Department of Home Affairs*,¹⁹¹ the high court sought a declaration that the DHA had failed to comply in considering their temporary residence application within the 180 day period. The court found that the DHA was unable to make the decisions required in a lawful, reasonable, and procedurally fair manner. It held that this refusal to make decisions on time reduces the Immigration Act to an ineffective piece of legislation and undermines the rule of law.¹⁹² The administrative and legislation implementation process by the DHA cannot be justified.

2.4 Adequacy of legislation on refugee protection in South Africa

Since 1998, the Refugees Act has undergone various amendments as regards the protection and status determination of asylum seekers. However, these amendments have been characterised by contradictions, negligence, and deterrence.¹⁹³ This notwithstanding,

¹⁸⁶ See Chapter 2 above.

¹⁸⁷ Khan (n 28) 157. See Schockaert, Venables, Gil-Baos M-T et al 'Behind the Scenes of South Africa's Asylum Procedure: A Qualitative Study on Long-term Asylum-Seekers from the Democratic Republic of Congo' (2020) 39(1) *Refugee Survey Quarterly* 28.

¹⁸⁸ 'South Africa: Failing asylum system is exacerbating xenophobia' October 2019 available at <https://www.amnesty.org/en/latest/news/2019/10/south-africa-failing-asylum-system-is-exacerbating-xenophobia/> (accessed 23 April 2020).

¹⁸⁹ UNHCR 'Global Trends: Forced Displacement in 2019' available at <https://www.unhcr.org/globaltrends2018/> (accessed 24 April 2020) 47. There are no further updated data for 2019 and 2020.

¹⁹⁰ Schockaert (n 183).

¹⁹¹ 2012 (3) SA 508 (WCC).

¹⁹² *Eisenberg & Associates v Director-General, Department of Home Affairs* 2012 (3) SA 508 (WCC) para 85.

¹⁹³ HSF 'The state of the South African Refugee Protection Regime' available at <https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-i-current-status> (accessed 14 October 2019).

the Refugees Act is the principal extant legislation relevant and adequate to address issues relating to the status determination and protection of asylum seekers in South Africa. A good example is the 2020 amendment to the Act. Even though the Refugees Act is the only legislation that focuses on refugees' nationally, there are other laws that stand as checks and balances to support the Act if it fails to carry out its main purpose and duties. If an asylum seeker feels he or she has been treated unfairly during his or her status determination, review is available under both the Refugees Act and the Constitution that can be used for further recourse. Moreover, the question is whether the Refugees Act and other legislation is adequate to deal with the barriers and problems asylum seekers face. There are still flaws and lacunae facing the DHA in managing the affairs of asylum seekers, starting with proper implementation to the status determination of asylum seekers. This has led to barriers that asylum seekers face before their status is determined. These barriers are discussed in Chapter 3 below. This section will consider the forms of review under the South African legislation to determine whether they are adequate to address the status determination and protect the asylum seeker.

2.4.1 Forms of review in terms of the legislation

There are different forms of review available to asylum seekers under the Refugees Act.¹⁹⁴ Moreover, the Act has its process for dealing with reviews when an asylum seeker is not satisfied with a RSDO's decision. An asylum seeker has the right to take his or her application on review or appeal in terms of sections 25(1) and 26(1). If the asylum seeker fails in his or her review or appeal, he or she has the right to take the matter further on judicial review by approaching the High Court. The PAJA makes it clear in section 7(1) that the procedure for judicial review must be instituted without unreasonable delay.¹⁹⁵

¹⁹⁴ See page 33 above.

¹⁹⁵ Section 7(1)–(4): “Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date – (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for it or might reasonably have been expected to have become aware of the action and the reasons. (2)(a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act. (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt

2.4.2 Review under the South African Constitution

There are different forms of review under the Constitution available to asylum seekers regarding their status determination. The Constitution provides for Chapter 9 institutions in section 181(1)(a)–(d).¹⁹⁶ These institutions can be approached by an asylum seeker regarding any matter subject to the Constitution and the law. For example, the role of the Public Protector is to investigate any conduct in the public administration in any sphere of government which is suspected to be improper as a result in any impropriety.¹⁹⁷ This means that the mandate of the Public Protector is to investigate or redress any maladministration, disputes, improper conduct, and failure of service in all state or public administration. In this regard the Public Protector may act on a complaint or on his or her own initiative by investigating or taking any appropriate action.¹⁹⁸ He or she must also perform his or her functions without fear, favour, or prejudice.¹⁹⁹ An asylum seeker can approach the Public Protector to investigate or remedy any matter relating to misconduct involving the DHA before proceeding to judicial review. However, the Public Protector and other Chapter 9 institutions, cannot make a status determination for asylum seekers in South Africa. The only role the Public Protector can play is to investigate maladministration in the DHA but cannot interfere in the status determination of any asylum seeker. The best option available to an asylum seeker is to approach the courts to decide on his or her application.²⁰⁰

such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice. The Rules Board for Courts of Law established by section 2 of the Rules Board for Courts of Law Act, 1985 (Act 107 of 1985), must, before 28 February 2009, subject to the approval of the Minister, make rules of procedure for judicial review. (4) Until the rules of procedure referred to in subsection (3) come into operation, all proceedings for judicial review under this Act must be instituted in a High Court or another court having jurisdiction.

¹⁹⁶ Section 181(1) sets out the institutions that strengthen the constitutional democracy in the Republic: (a) the Public Protector; (b) the South African Human Rights Commission; (c) the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities; (d) and the Commission for Gender Equality.'

¹⁹⁷ 'South Africa's Public Protector' available at <https://www.brandsouthafrica.com/people-culture/democracy/south-africa-s-public-protector-frequently-asked-questions> (accessed 9 April 2020).

¹⁹⁸ Office of the Public Protector 'UCT Safer workshop' available at https://www.uct.ac.za/usr/refugee/Information_Sources/SAFER_July_2012-Day_3.pdf (accessed 04 March 2020).

¹⁹⁹ Section 181(2) of the Constitution, 1996.

²⁰⁰ See page 4 above. An explanation on approaching the court.

2.5 Conclusion

In light of the above, South Africa has a solid legal framework for the status determination of asylum seekers. Also, there is no doubt that South Africa complies with international refugee law. This is evidenced by the prominent role accorded international law in its national legislation, and in particular, the Constitution. Under Chapter 2 of the Constitution – the Bill of Rights – the treatment of refugees and asylum seekers corresponds to the treatment accorded to nationals and citizens in South Africa. The principle of *non-refoulement* is recognised and legislated in the South African Refugees Act. However, whether South Africa applies it in practice, remains a moot point.

The UNHCR in South Africa plays a significant role in ensuring that asylum seekers and refugees are protected. This body is, however, required to work closely with the DHA when it comes to the status determination of asylum seeker in South Africa.

It is also clear that the: “Constitution is the supreme law of South Africa, and any law which is inconsistent with it is invalid.”²⁰¹ The Constitution is available to asylum seekers and there are measures in place to protect their physical security.

The Refugees Act was enacted to protect asylum seekers, and South African refugee law has not fully complied with the international standards – especially by incorporating the UN and OAU Conventions. Also, all aspects of human rights instruments related to the protection of asylum seekers were considered. However, the rights of an asylum seeker to seek asylum can be violated, particularly when they are left with no choice but to leave the country in which they found refuge. Infringement can also occur where an asylum seeker’s application is rejected before he or she is able to submit his or her application. The state and its organs must, therefore, at all times ensure that they comply with the principles of human rights as set out in Constitution. South Africa does not, however, fully comply with international law. Although, there are adequate legal frameworks in place for the status determination of asylum seekers, proper implementation of the detail within these frameworks remains a challenge for the asylum seeker. This requires the attention of the South African government.

²⁰¹ Section 2 of the Constitution.

CHAPTER 3

BARRIERS TO THE STATUS DETERMINATION OF ASYLUM SEEKERS

3.1 Introduction

Seeking asylum in South Africa is governed by laid down procedures to be followed by the asylum seeker who wishes to remain in the country legally. Some believe it is a challenge, some believe it is part of nature they need to face. To meet the criteria set for an asylum seeker in South Africa, he or she must meet the requirements set in the Refugees Act before an asylum visa will be issued. This chapter looks into the following questions: “What barriers exist as regards status determination for asylum seekers?” and “What are the procedures for an asylum seekers status to be determined?”

3.2 Barriers faced by asylum seekers

In Chapter 1 a summary of barriers faced by asylum seekers was provided. However, there are other barriers confronting asylum seekers once they leave their country of origin due to a well-founded fear of persecution based on tribe, race, religion, nationality, or political opinion. The first barrier arises at the border post and continues until he or she reaches the RRO.²⁰²

The refugee status application process has been a challenge for individuals seeking refuge legitimately in South Africa in that – despite some improvements – most asylum seekers still struggle to actually get into the RROs due to lack of capacity and resources, language barriers, lack of assessment, corruption, security, and xenophobia.

²⁰² MRMP Report 'Barriers to Asylum the Marabastad Refugee Reception Office' (2008) available at <http://www.migration.org.za/wp-content/uploads/2017/08/Barriers-to-asylum-the-Marabastad-refugee-reception-office.pdf> (accessed 12 July 2019) 8.

3.2.1 Procedural staff capacity

Lack of staff capacity and resources is one of the barriers asylum seekers face at the RROs.²⁰³ The asylum seeker is issued with an asylum transit visa at the border. But this visa only secures a short legal stay of a few days in the country before it expires. Although some asylum seekers are fortunate to be able to lodge their applications at an RRO close to their places of residence,²⁰⁴ many must travel long distances to secure an appointment.²⁰⁵ Upon arrival at the reception office, some asylum seekers are turned away because of the high number of asylum seekers attempting to either apply for asylum or renew their visas, and the lack of adequate staff.²⁰⁶ If an applicant is lucky on the day of his or her application, he or she will be assisted by the RRO.

In the Western Cape matter of *Kiliko v Minister of Home Affairs*,²⁰⁷ the High Court held that the policy and practice in 2006 at the RRO in Cape Town of accepting a limited number of new applications per day, constituted a serious violation of international and South African refugee law. The judge referred to the:

graphic and debilitating picture of the gross inhumanity which is being meted out to asylum seekers because of the failure on the part of the South African authorities to fully adhere to the International instruments as regards the treatment of refugees assented to by the Government and to fully comply with the laws passed by it in order to give effect thereto.²⁰⁸

In addition, the judge in *Tafira v Minister of Home Affairs*²⁰⁹ stated that the DHA had too few officers in the field and an increase in the backlog of applications for asylum. The court went on to criticise the predicament of asylum seekers not given an appointment slip or being pre-screened, both of which were founded to be unlawful.

²⁰³ 'Issues that affect migrants and citizens: engagement with NGOs & stakeholders' available at <https://pmg.org.za/committee-meeting/29180/> (accessed 7 April 2020).

²⁰⁴ As above.

²⁰⁵ Freedman J, Crankshaw T & Mutambara V 'Sexual and reproductive health of asylum seeking and refugee women in South Africa: understanding the determinants of vulnerability' available at <https://www.tandfonline.com/doi/pdf/10.1080/26410397.2020.1758440> (accessed 26 July 2020).

²⁰⁶ Schockaert (n 183) 28.

²⁰⁷ *Kiliko v Minister of Home Affairs* 2008 ZAWCHC 124 the main applicant was arrested with other asylum seekers while applying for asylum at the Cape Town RRO because the DHA officials wished to reduce the number of applicants, especially those from Malawi and Mozambique.

²⁰⁸ *Kiliko v Minister of Home Affairs* 2008 ZAWCHC para 8.

²⁰⁹ *Tafira and others v Ngozwane and others* 2006 ZAGPHC 136.

3.2.2 Procedural support

Procedural support is a process where there are supports in place to support asylum seekers such as interpreters which is one of the things the RROs lack. There are no language interpreters to assist at the RRO. This is particularly acute for an asylum seeker who does not understand English or understand the application process. With no interpreters available to explain the whole process and procedures, the asylum seeker finds him- or herself at a distinct disadvantage.²¹⁰ The regulations to the Refugees Act set out how a refugee status determination hearing should be conducted. Firstly, the hearing must be non-adversarial. It is aimed at eliciting information relevant to the applicant's eligibility for refugee status, and also ensure that the applicant fully understands the procedures, rights, and responsibilities involved.²¹¹ At the hearing, the RSDO may, among other things, verify the identity of any interpreter present; verify the identity of any dependant seeking refugee status; receive any evidence; and question the applicant and any witnesses.²¹²

To ensure an applicant is afforded a fair opportunity to be heard, the Refugees Act²¹³ requires the RSDO to ensure that the applicant fully understands the proceedings and his or her responsibilities and rights.

As regards language, the challenge faced by both the RSDO and the applicant, is the use of an interpreter which is of paramount importance in ensuring that requirements are met. The regulations to the Refugees Act²¹⁴ make it clear that the DHA must provide competent interpretation for all applicants where it is practicable and necessary. An interpreter need not be a representative or employee of the Department of Home Affairs.²¹⁵

In *Mayemba v Chairperson of Standing Committee for Refugee Affairs and Others*,²¹⁶ the applicant had fled the Democratic Republic of Congo due to war in the southern part of the South Kivu region. In his eligibility form, the interpreter did not relay the facts surrounding the persecution of his father, that his mother and brothers were missing, or why he had fled the Democratic Republic of Congo. He could not say whether the interpreter correctly

²¹⁰ Ramoroka (n 138). See MRMP Report (n 198).

²¹¹ Regulation 10(1).

²¹² Regulation 10(2)(a)–(d).

²¹³ Section 24(2).

²¹⁴ Regulation 5(1).

²¹⁵ Regulation 5(2).

²¹⁶ (1996/2014) [2015] ZAWCHC 86 (10 June 2015).

wrote down what he said because the interpreter's dialect differed from his making it difficult to communicate effectively. At no stage did he talk to an RRO or received any explanation of the asylum process.²¹⁷ The RSDO's decision was that the applicant did not qualify for asylum as he was not a 'refugee' within the meaning of the Act.²¹⁸ The problem with this decision was that the RSDO had failed to elicit the information relevant to the area from which the applicant had fled, and so was unable to judge whether or not it qualified as a serious disturbance of the peace under section 3(b) of the Act.²¹⁹ The court held that the applicant should submit a new application to the RSDO and should not be returned home.²²⁰

There are two stages in the process in which an interpreter is necessary.

The first stage is when the asylum seeker lodges his or her application in person at the RRO and an admissibility hearing is held. This involves the following procedures: the applicant's fingerprints are taken; an interpreter is secured; and the initial interview is conducted by an RRO. An asylum permit is then issued.²²¹ The second stage is the determination of the asylum seeker's application. This interview is between the RSDO and the asylum seeker assisted by an interpreter if necessary. The RSDO interviews the asylum seeker in the presence of the interpreter and then decides whether or not asylum will be granted on the basis of the claims in the application.²²²

It may happen that there is no interpreter available for the language the asylum seeker speaks. In such instances, the asylum seeker is required to source an interpreter. Khan argues that when an applicant is required to source his or her own interpreter, the individual is placed in a vulnerable position and may be open to exploitation.²²³ One of the directors of the Durban Refugee Social Service stated in an interview that:

²¹⁷ *Mayemba v Chairperson of Standing Committee for Refugee Affairs and Others* (19960/2014) [2015] ZAWCHC 86 at 6–11.

²¹⁸ As above 20.

²¹⁹ As above 28.

²²⁰ As above 53.

²²¹ 'Refugee Status and Asylum' available at <http://www.dha.gov.za/index.php/refugee-status-asylum> (accessed 20 October 2019).

²²² As above.

²²³ Khan F 'Interpreting for refugees: where practicable and necessary only?' (2011) 28.2 *Refuge* 93 available at <https://refuge.journals.yorku.ca/index.php/refuge/article/view/36482/33169> (accessed 21 May 2019) 96.

Refugee Reception Offices only accept applicants from certain countries on certain days to allow for the correct interpreters to be available. But that system has changed as well. That the Refugee Reception Centre used to have interpreters at the refugee reception offices, probably like two or three years ago. But currently, they now have this call centre where the interpretation comes via the telephone. And if that doesn't work, it doesn't work.²²⁴

In *Deo Gracias Katsshingu v The Standing Committee for Refugee Affairs*,²²⁵ the issue of interpretation was raised. The applicant was a student activist at the University of Goma in the Congo. He fled his country in fear of his life and sought refuge in South Africa. He was persecuted for his political opinion and for organising events which disturbed the public order. Upon application as an asylum seeker, he completed his application form partly in French and partly in poor English. He was also interviewed without the assistance of an interpreter. The application was rejected by the standing committee. The court overturned the standing committee's decision to reject the applicants' claim. Bozalek J held that in a situation where language is a problem, the failure to provide a competent interpreter for an applicant renders the decision unfair.

In the face of a persistent shortage of interpreters,²²⁶ some asylum seekers no longer demand an interpreter as this could lead to a delay in the processing of their applications until an interpreter is available. It is important for asylum seekers who cannot speak English to be heard in their language of choice for the purpose of effective communication and procedural fairness.²²⁷

Legal barriers continue to exist in South Africa for asylum seekers – in particular for those who cannot afford legal representation to pursue the matter on judicial review. Some asylum seekers are fortunate to be able to approach the courts with the support of NGOs after they have exhausted all the review procedures available under the Refugees Act.

For an application to be challenged in court, a decision must be made regarding the application by the RSDO. The RSDO has only two options: to grant or to reject the

²²⁴ Bornman J 'Durban Refugee Office turns away asylum applicants' available at <https://mg.co.za/article/2019-07-23-durban-refugee-office-turns-away-asylum-applicants> (accessed 20 October 2019).

²²⁵ *Deo Gracias Katsshingu v The Standing Committee for Refugee Affairs* unreported Western Cape High Court 19726/2010.

²²⁶ Khan (n 28) 96.

²²⁷ Khan (n 28) 96.

application.²²⁸ If the application is rejected, the asylum seeker may within ten days either proceed or not proceed with a review before the standing committee.²²⁹ Once the standing committee has rejected the review, the asylum seeker can lodge an appeal with the Appeal Board. This is when a legal representative is permitted to appear before the board in terms of section 26(4)²³⁰ of the Refugees Act. During the Standing Committee on Refugee Affairs (SCRA) stage, legal representation on behalf of an asylum seeker is not permitted.

The final avenue available to the asylum seeker is an application for judicial review at which a legal representative can represent him fully to exercise his or her rights by applying to court. However, this results in long delays in resolving a matter. If an attorney is involved at an early stage, it could reduce the extent of the review and appeal procedures at the DHA as an attorney will ensure that the asylum seeker meets all the requirements and follows all the procedures.

It has also emerged clearly that the DHA at times ignores or disobeys orders granted by the courts.²³¹ For example, in the case of *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others*,²³² the DHA ignored the two court orders granted in favor of the applicants requiring the DHA to reopen its refugee reception office in Cape Town.²³³ The DHA's behaviour in fact amounts to an act of contempt of court.

In conclusion, most asylum seekers find the process involved in applying for asylum onerous – eg, because the officials manning the RROs within the DHA fail to act timeously and that an asylum seeker must apply for an extension of his or her asylum permit within three months, forces many to give up completely on the South African asylum system.²³⁴

²²⁸ Section 24 of the Refugees Act.

²²⁹ Section 25 of the Refugees Act.

²³⁰ The Appeal Board must allow legal representation upon the request of the applicant.

²³¹ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (1107/2016) [2017] ZASCA 126, [2017] 4 All SA 686 (SCA), 2018 (4) SA 125 (SCA) (29 September 2017). Also see Hamilton L 'How Home Affairs has been ignoring 2 court orders, putting asylum seekers at risk' available at <https://www.news24.com/Columnists/GuestColumn/how-home-affairs-has-been-ignoring-2-court-orders-putting-asylum-seekers-at-risk-20180404> (accessed 30 April 2020).

²³² (1107/2016) [2017] ZASCA 126, [2017] 4 All SA 686 (SCA), 2018 (4) SA 125 (SCA) (29 September 2017).

²³³ As above.

²³⁴ Khan (n 28) 15.

3.2.3 Closure of Reception Centres

The closure of some RROs exacerbated asylum seekers' problems in accessing the asylum determination process in South Africa.²³⁵ There were seven RROs across five provinces in South Africa at which asylum seekers could apply for an asylum visa. However only four of these are currently functioning adequately – Pretoria, Durban, Musina, and Cape Town. Two of the others are closed and the one in Port Elizabeth is closed for new applications.²³⁶ The closure of the Johannesburg reception office without establishing a replacement office, resulted in asylum seekers flocking to the Pretoria RRO and led to an even greater delay in issuing asylum visas.

The Cape Town RRO is currently open for new asylum application and for the renewal of permits for asylum seekers who registered before 2012.²³⁷ As of July 2012, the Cape Town RRO stopped processing new applications. However, in *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others*,²³⁸ the High Court ordered the DHA in Cape Town again to start serving new applicants. The court held that the cost to the DHA of assisting newcomers was negligible compared to the harm inflicted on asylum seekers. The DHA disregarded the court order. In 2017 the Legal Resources Centre appealed²³⁹ the Supreme Court of Appeal against the DHA on behalf of Scalabrini Centre and the Somali Association. The court ordered the DHA to reopen and maintain a fully functional refugee reception office in Cape Town.²⁴⁰

²³⁵ As above 143.

²³⁶ See Khan (n 28) 143. Also see 'Refugee Centre' available at <http://www.dha.gov.za/index.php/contact-us/24-refugee-centres> (accessed 10 August 2020).

²³⁷ Mphahlele M 'Calls mount for reopening of refugee reception office in Cape Town' available at <https://www.iol.co.za/news/politics/calls-mount-for-reopening-of-refugee-reception-office-in-cape-town-16599664> (accessed 1 April 2019). See *Scalabrini Centre, Cape Town and others v Minister of Home Affairs and others* (11681/12) [2013] ZAWCHC 49, 2013 (3) SA 531 (WCC), [2013] 2 All SA 589 (WCC), 2013 (7) BCLR 819 (WCC) (19 March 2013).

²³⁸ (11681/12) [2013] ZAWCHC 49, 2013 (3) SA 531 (WCC), [2013] 2 All SA 589 (WCC), 2013 (7) BCLR 819 (WCC) (19 March 2013).

²³⁹ *Scalabrini Centre, Cape Town and others v Minister of Home Affairs and others* (1107/2016) [2017] ZASCA 126, [2017] 4 All SA 686 (SCA), 2018 (4) SA 125 (SCA) (29 September 2017).

²⁴⁰ As above. See also Washinyira T 'Home Affairs to open refugee office in Maitland' available at <https://www.timeslive.co.za/news/south-africa/2019-01-26-home-affairs-to-open-refugee-office-in-maitland/> (accessed 16 March 2019).

3.2.4 Refugee Status Determination Officer objectivity in assessment

There are serious flaws in the DHA's status determination process applied to asylum seeker applications – eg, negative status determination decisions, or rejection letters from its RROs.²⁴¹ For example, poor decision-making by RSDOs, which include mistakes of fact and lack of sound reasoning, has resulted in a 96 per cent rejection rate of asylum applications and a massive backlog of appeals and reviews estimated at 190 000 in 2019.²⁴² In *Kiliko v Minister of Home Affairs*²⁴³ the court held that: “The Department of Home Affairs failed to introduce effective measures to address the worsening issues and was responsible for the lack of inadequate facilities to handle applications for asylum permits”.²⁴⁴

The main duty and responsibility of both an RRO and an RRSD is to assist asylum seekers with their applications. The Refugees Act stipulates that an RRO must accept application forms²⁴⁵ from the asylum seeker, check that the application has been correctly completed, and if necessary assist the asylum seeker to complete the form.²⁴⁶ The RRO must issue a temporary asylum seeker permit to the asylum seeker.²⁴⁷ Furthermore, the RRO is authorised to carry out any enquiry he or she deems appropriate relating to the information provided on the form.²⁴⁸

²⁴¹ Amit (n 12) 2.

²⁴² ‘South Africa: Failing asylum system is exacerbating xenophobia’ October 2019 available at <https://www.amnesty.org/en/latest/news/2019/10/south-africa-failing-asylum-system-is-exacerbating-xenophobia/> (accessed 23 April 2020).

²⁴³ 2006 (4) SA 114 (C) 25.

²⁴⁴ *Kiliko v Minister of Home Affairs* 2006 (4) SA 114 (C) para 28. The applicants had been unsuccessful in gaining access to the refugee office. The judge noted that “the respondents were not in a good position to refute the averments of the applicant. The best they could do was to attribute the Department’s inability to provide the required facilities of the influx of refugees into South Africa, and lack of capacity to deal with the enormous applications efficiently. These has led to backlog of applications for asylum. Extensions of asylum seeker permits and the finalization of status determination has increased.”

²⁴⁵ Refugees Act s 21(2)(a). The official form, the B1-1590 Eligibility Determination Form (Annexure 1 to the Refugees Act), must be provided to the applicant by the official.

²⁴⁶ Refugees Act s 21(2)(b). Due to the length and relative complexity of the form and the need for interpretation in a large percentage of cases, the RRO normally fills out the form for the asylum seeker. Regulation 4 provides that an RRO must ensure that an applicant is given adequate interpretation. The requirement of interpretation is somewhat diluted by reg 5, which provides that “where practicable and necessary, the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process”.

²⁴⁷ Refugees Act s 22(3).

²⁴⁸ As above s 22(2)(c).

The RRO makes no decision; this is the responsibility of the RSDO who must base his or her decision on the information provided by the applicant.²⁴⁹ Research has shown that many RSDOs in South Africa are not carrying out their obligations in terms of the law consistently.²⁵⁰ In this regard, urgent attention is required in the training, and regular updating the training, of RSDOs to allow them to assess and apply the law appropriately according to the merits of each application they handle.

The DHA is also guilty of mal-administration in certain of its decisions which negatively impact on the asylum seekers in the Republic. Some of these decisions violate the administrative principles set out in the Constitution.²⁵¹ These may affect an asylum seeker's ability to access basic health care and other basic social-economic rights. Although there are constitutional and legislative provisions that entitle asylum seekers and refugees in South Africa to health services, as 'foreigners' they frequently experience discrimination, often as a result of failure by the Department of Health adequately to inform hospital workers that asylum seekers are indeed entitled to basic health care.²⁵²

Furthermore, the refusal to extend an asylum seeker permit at the office of issue, is a problem for asylum seekers despite section 22(3) of the Refugees Act stipulating that:

A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.

If asylum seekers are not ready to buy their way out of renewing their documents by way of corruption, they will be left with an expired asylum permit rendering them vulnerable to

²⁴⁹ 14(6) of the Refugee Amendment Act.

²⁵⁰ Khan (n 28) 152.

²⁵¹ As above 15.

²⁵² Carlito S & D'Orsi C 'Access to Socio-Economic Rights for Refugees: A Comparison Across Six African Countries' available at http://sihma.org.za/wp-content/uploads/2017/03/Access-to-socio-economic-rights_refugees.pdf (accessed 10 November 2019) 39. According to the Human Rights Watch Report: 'No Healing Hear violence, discrimination and Barriers to Health for Migrants in South Africa' available at <https://www.hrw.org/report/2009/12/07/no-healing-here/violence-discrimination-and-barriers-health-migrants-south-africa> (accessed 12 February 2020) "There are four major barriers to migrant access to health care: (a) discrimination – the denial of access to health services on the basis of national origin or legal status; (b) inadequate, inaccurate and misleading information – the failure of the Department of Health to inform migrants and health workers of the rights of asylum seekers and refugees to obtain basic health care and antiretroviral treatment; (c) barriers to emergency care for rape survivors; and (d) extra-legal user fees - charging of exorbitant (and sometimes illegal) fees by health workers at facilities."

arrest rather than the imposition of a fine which would at least allow them to redo their applications for an asylum permit.²⁵³ These are some of the socio-legal issues faced by asylum seekers which the DHA needs to look into carefully.

3.2.5 Corruption

We have just mentioned corruption as a problem, and this is indeed a major issue within the DHA where adjudicators solicit bribes from asylum seekers to issue their permits on time.²⁵⁴ Corruption starts at the point of entry when the asylum seeker must obtain or renew an asylum permit.²⁵⁵ However, corruption at the RROs involves security guards, interpreters, and RSDOs asking for bribes to help an asylum seeker at the RRO.²⁵⁶ For example, asylum seekers who cannot wait in the queue will end up bribing some officials to ‘assist’ them to get their asylum visas on time.²⁵⁷ Although there is legislation in place to fight corruption in South Africa – the Prevention and Combating of Corrupt Activities Act²⁵⁸ – it does not focus specifically on asylum seekers or refugees. According to Corruption Watch it is believed that the Desmond Tutu Refugee Reception Centre in Marabastad, Pretoria is a ‘corruption hot spot’.²⁵⁹

It can be said that corruption at the RROs undermines the rule of law, plunges the entire public service into disrepute, and is a threat to everyone living in South Africa.²⁶⁰

²⁵³ Khan (n 28) 15.

²⁵⁴ ‘In South Africa, immigration feeds corrupt officials and race hate’ <https://www.reuters.com/investigates/special-report/safrica-migrants-corruption/> (accessed 11 January 2020). See IBP Inc ‘South Africa Recent Economic and Political Developments Yearbook - Strategic Information and Developments’ (2018) 81.

²⁵⁵ Amit R ‘Paying for Protection: Corruption in South Africa’s Asylum System’ (2015) available at <https://www.migrationpolicy.org/article/paying-protection-corruption-south-africa%E2%80%99s-asylum-system> (accessed 25 January 2020).

²⁵⁶ As above.

²⁵⁷ As above. Also see Fuzile B ‘Corruption crackdown looms at Pretoria refugee office’ available at <https://www.timeslive.co.za/news/south-africa/2018-09-01-corruption-crackdown-looms-at-pretoria-refugee-office/> (accessed 25 April 2020). Also See IBP Inc n245 at 81.

²⁵⁸ Act 12 Of 2004

²⁵⁹ ‘Corruption watch raises concerns over unchecked corruption at refugee reception centre’ available at <https://www.corruptionwatch.org.za/cw-raises-concerns-unchecked-corruption-desmond-tutu-refugee-centre/> (accessed 29 August 2020).

²⁶⁰ Corruption Watch ‘Asylum at a price available: How corruption impacts those seeking for legal protection in South Africa’ available at <https://www.corruptionwatch.org.za/wp-content/uploads/2016/12/Project-Lokisa-Digital-FINALRRU-Logo-2Dec2016.pdf> (accessed 29 August 2020).

3.2.6 Physical security and xenophobia towards asylum seekers in South Africa

Xenophobia is a widespread problem and a barrier to refugee status processes in South Africa.²⁶¹ An asylum seeker is entitled to protection, and one of the rights that protects such an individual is the right to security of a person.²⁶² Asylum seekers are regularly subjected to mental and physical persecution.²⁶³ The negative attitude of DHA officers towards asylum seekers has resulted in a failure to achieve what the Act seeks to do: to protect the interests of asylum seekers and refugees.²⁶⁴ Migrants in South Africa, including asylum seekers and refugees, are faced with several difficulties ranging from prejudice and discrimination, to outright intimidation and violence.²⁶⁵ Most South African citizens do not recognise the documents issued to asylum seekers. That is, most prospective employers are unaware of the rights attached to documents issued to asylum seekers.²⁶⁶

The violation of an asylum seeker's physical security entails the violation of his or her dignity.²⁶⁷ Some asylum seekers do not fully enjoy their rights because of the ordeal they face in South Africa from physical violence, harassment, attack, not to mention direct violations of their rights by some South African police officers.²⁶⁸ In *Minister of Home Affairs v Watchenuka*²⁶⁹ the Supreme Court of Appeal stated that:

Human dignity has no nationality it is inherent in all people, citizens and non-citizens, because they are human. While someone happens to be in South Africa for whatever reasons, they must be respected and protected by section 10 of the Bill of Rights.²⁷⁰

²⁶¹ HRW Report 'They Have Robbed Me of My Life' Xenophobic Violence Against Non-Nationals in South Africa available at <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south> (accessed 18 December 2020).

²⁶² Article 3 UDHR.

²⁶³ Schockaert (n 183) 26.

²⁶⁴ As above.

²⁶⁵ Murray MJ 'Alien Strangers in our Midst: The Dreaded Foreign Invasion and 'Fortress South Africa' (2003) *Canadian Journal of African Studies* 441.

²⁶⁶ Khan (n 28) 15.

²⁶⁷ Khan (n 97) 207.

²⁶⁸ Wallis L 'The Right to Physical Security for Refugees: A South African Perspective' (2013) available at http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_2_of_2013.pdf (accessed 14 June 2019) 6.

²⁶⁹ 2004 (4) SA 326 (SCA).

²⁷⁰ AS above para 4.

The fact that the Bill of Rights refers to ‘everyone’ as opposed to ‘every citizen’, shows that the drafters of the Constitution intended that it should apply to both nationals and non-nationals.²⁷¹

Asylum seekers and refugees in South Africa are entitled to the right to equality and to benefit from the laws of South Africa. Section 12(1)(c), (d) and (e)²⁷² provide:

- Everyone has the right to freedom and security of the person which includes –
- (c) to be free from all forms of violence from either public or private sources;
 - (d) not to be tortured in any way;
 - (e) not to be treated or punished in a cruel, inhuman or degrading way.

Section 23(1)²⁷³ states that “Everyone has the right to fair labour practice”; while section 25(1)²⁷⁴ provides for the right not to be deprived of property; the right of access to information;²⁷⁵ the right to administrative action,²⁷⁶ the right to have fair access to courts;²⁷⁷ and all the specified rights of being arrested and accused persons.²⁷⁸ In *Osman v Minister of Safety and Security*,²⁷⁹ the applicants were attacked violently by people in the community. The armed police officers on duty refused to come to the applicants’ assistance. The applicants argued that the South African police officers discriminated against them as victims of xenophobic attacks and that their refusal to assist was based on their nationality. The High Court held that the South African Human Rights Commission should provide training to the police regarding their attitude. The court also affirmed that the attitude of the police towards foreigners needs to improve.²⁸⁰ Given the discrepancy between provision and implementation, it is clear that the physical security of asylum seekers remains a pipe dream.

²⁷¹ Wallis (n 261) 11.

²⁷² The Constitution of the Republic of South Africa, 1996.

²⁷³ As above.

²⁷⁴ As above.

²⁷⁵ Section 32 of the South African Constitution.

²⁷⁶ Section 33 of the South African Constitution.

²⁷⁷ Section 34 of the South African Constitution.

²⁷⁸ Section 35 of the South African Constitution.

²⁷⁹ 2011 JOL 27143 (WCC).

²⁸⁰ De Jager J ‘Addressing xenophobia in the equality courts of South Africa’ (2011) 28.8 *Refuge* 107. Attack on blacks by South African citizens is believed to be Afro-phobia and not Xenophobia as black Africans are always targeted. Attacks on Asian shopkeeper such as those from Bangladesh and Pakistan are believed to be xenophobia.

During the first five years of constitutional democracy, the South African government set out to recognise the special needs and status of asylum seeker and refugees in accordance with international norms and conventions.

The spike in the number of foreign nationals entering South Africa brought with it feelings of jealousy and hatred towards foreign nationals in the new democratic state.²⁸¹ Xenophobia finds its roots in political and economic considerations.²⁸² The South African government officials and the media created a false image of foreigners in South Africa among South African citizens.²⁸³ This false image led to a negative attitude among South African citizens towards foreigners which has, in turn, led to violent attacks on and hostility towards asylum seekers and other non-citizens.²⁸⁴ Between 2008 and 2019, xenophobic attacks caused the death of more than 62 people including Somalians, Mozambicans, and Zimbabweans.²⁸⁵ The 2019 xenophobic attacks started in Pretoria after a taxi driver was killed by an immigrant. The killing of the taxi driver led to South Africans retaliating by attacking asylum seekers and foreigners' shops which spread to some areas of Johannesburg.²⁸⁶

Many South Africans believe that foreign nationals are responsible for an increase in crime in South Africa, which has prompted them to blame crime in general on immigrants,²⁸⁷ and it has proved difficult to protect asylum seekers from sporadic outbursts of xenophobic attacks on asylum seekers and refugees. This has prompted the South African government to review its policy regarding the admission of asylum seekers and migrants.²⁸⁸ This, too, may be seen as a barrier to asylum seekers receiving asylum at the borders. In addition, the White Paper on International Migration discusses the strict determination of admission of foreigners into South Africa at all its borders. However, South Africa needs to improve its border management for the entry of foreigners into the country. South Africa has

²⁸¹ Okem A, Asuelime L & Adekoye R 'Re-visiting Xenophobia in South Africa and its Impact on Africa's Integration' available at www.academia.edu/25206831 (accessed 19 October 2019) 80.

²⁸² As above.

²⁸³ As above 81.

²⁸⁴ As above 81.

²⁸⁵ As above.

²⁸⁶ EWN Newspaper available at <https://ewn.co.za/2019/09/20/1-500-flee-homes-in-s-africa-amid-xenophobic-violence-un> (accessed 19 October 2019).

²⁸⁷ Singh SB 'Voices from behind Bars: Xenophobia and Foreign Nationals Incarcerated in a South African Correctional Centre' (2013) *Alternation Journal* 215.

²⁸⁸ As above.

relatively lenient immigration policies which is why foreigners are flocking to the country.²⁸⁹ Furthermore, if South Africa's immigration policy is tightened it is assumed that xenophobic attacks will decline.²⁹⁰

Xenophobia has been attributed to the country's apartheid racist immigration policies, hostility, attitudes of exclusivity, and a sense of superiority as regards the rest of Africa.²⁹¹ Though apartheid has long since been abolished, South African society is still nursing deep scars and wounds that remain from the apartheid's culture of violence. Xenophobia was caused by the misconception that South Africans have about asylum seekers. Xenophobia in South Africa demonstrates the absence of tolerance towards other African nationals. Benedek argues that:

These xenophobic and paranoid attitudes in society are being reinforced by the media and utilised by populist or racist politicians, which results in ever stricter migration and asylum laws and policies and in ignoring or even violating international human rights obligations and commitments to effectively protect persons from persecution.²⁹²

The media depicts asylum seekers in South Africa as job takers, drug dealers, and criminals, even though the Constitution and immigration laws provide legal protection to foreigners.²⁹³ However, the Preamble to the Constitution explicitly states that: "South Africa belongs to all those who live in it." This shows that the Constitution does not exclude asylum seekers and refugees in South Africa.²⁹⁴

According to a Statistics SA report for 2018/19 crime levels in South Africa are rampant.²⁹⁵ However, the increase in crime can be triggered by the escalating unemployment rate and the abuse of social services – and these are frequently laid at the door of foreigners.²⁹⁶

²⁸⁹ Makgotho S 'SA must implement stricter immigration laws' available at <https://citypress.news24.com/Voices/sa-must-implement-stricter-immigration-laws-20190917> (accessed 02 December 2019).

²⁹⁰ As above.

²⁹¹ As above.

²⁹² Benedek W (ed) '*Understanding Human Rights European Training and Research Centre for Human Rights and Democracy Manual on Human Rights Education*' available at http://humra.org/wp-content/uploads/2016/03/Manual_HR-education.pdf (accessed 12 January 2020) 475.

²⁹³ Pineteh EA 'Illegal Aliens and Demons that Must be Exorcised from South Africa: Framing African Migrants and Xenophobia in Post-Apartheid Narratives' (2017) *Cogent Social Sciences* 5.

²⁹⁴ As above.

²⁹⁵ South Africa Crime Statistics for 2018/2019 available at <http://www.statssa.gov.za/?cat=26> (accessed 24 November 2019).

²⁹⁶ Singh (n 271) 214.

Therefore, the increase of crime in the society has led to serious strain between South African citizens, law enforcement officials, and foreigners.²⁹⁷ Because of unfulfilled political promises, youth unemployment is rampant and has led to social problems such as crime and poverty. That the South African government and its citizens have sought a scapegoat in African migrants comes as no surprise.²⁹⁸ As such, asylum seekers and refugees have often been targets of xenophobic attacks. Nevertheless, the fact of being a migrant or without legal status means they are subject to violence or criminal, arbitrary or inhumane treatment. Xenophobia, therefore, poses a serious threat to asylum seeker protection and democracy in South Africa by negating the principles of human rights.

There are different recommendations from different organisations in South Africa to curb xenophobia. However, the South African government launched a national plan to combat xenophobia, discrimination, and racism. The plan was to develop a consultative process between civil society and government in order to improve access to justice; provide proper protection for victims; create greater public awareness about anti-racism and equality; and adopt measures to help promote the anti-discrimination campaign for better justice and equality.²⁹⁹

However, the government's action plan fails to address the important challenge that continues to fuel xenophobic attack which is the lack of accountability. No one has been held responsible or convicted for the past xenophobic attacks. Even though some individuals were arrested, they were released and not held liable.³⁰⁰ The combatting of xenophobia demands stringent action by government. The government and law enforcement officers need to take decisive action by investigating those who incite attacks, and arrest and punish individuals who attack foreign nationals and their property. Politicians, too, should be held liable for inflammatory public statements – eg, in 2016 during a public address, the former mayor of Johannesburg, Herman Mashaba, blamed illegal immigrants for all crimes and called for them to leave the city of

²⁹⁷ As above 215.

²⁹⁸ Pineteh (n 286) 5.

²⁹⁹ Mavhinga D 'South Africa Launches Plan to Combat Xenophobia and Racism: Crucial Step in South Africa's Path to Justice and Equality' available at <https://reliefweb.int/report/south-africa/south-africa-launches-plan-combat-xenophobia-and-racism> (accessed 18 April 2020).

³⁰⁰ As above.

Johannesburg. The statement made was supposed to be condemned by the South Africa government, but was not.

It is high time that the South African government takes punishing xenophobic attacks more seriously. These attacks have impacted negatively on asylum seekers and refugees, not least through the government's tightening of its scrutiny of status determination for an asylum seeker or migrant into South Africa.

3.3 Conclusion

There is no doubt that asylum seekers face a number of hurdles to secure a determination of their status. These hurdles start at the port of entry and continue to and at RROs across South Africa and include the language barrier, corruption, lack of capacity, and poor administrative procedures and decision making at the RROs. This is not to imply that South Africa must accede to every request for asylum, but the administrative procedures and processes need to be aligned with the prescripts of Refugees Act. A start could be made by the introduction of 21st century technology or artificial intelligence to facilitate the smooth status determination of asylum seekers.

The admission of asylum seekers to South Africa is in need of urgent revision by the DHA. In particular, the department must ensure that adequate resources and sufficiently trained officials are available to deal with asylum seekers.

South African legislation and case law confirm that the rights in the Bill of Rights apply equally to asylum seekers. The right to physical security for refugees is linked to other rights in the Bill of Rights. The PAJA addresses procedural fairness in any administrative process – including the asylum seeker status determination process. Most crucial, however, is that the asylum seeker's status determination process can, subject to the exhaustion of the Refugees Act's internal remedies, be challenged in the courts when irregularities have occurred in the status determination of an asylum seeker.

In addition, the issue on the barrier faced by asylum seekers based on the error of law and bias of the RSDOs. The DHA needs to reconsider, for example, access to facilities, proper documentation, and making the right decision while determining the in the status of asylum seekers.

In conclusion, the refugee status determination process forms an integral part of South Africa's refugee regime. However, it is essential that the process in the status determination of asylum seekers must be lawful and procedurally fair.³⁰¹

³⁰¹ Khan (n 28) 170.

CHAPTER 4

THE PROTECTION OF ASYLUM SEEKERS UNDER THE SOUTH AFRICAN LEGAL SYSTEM

4.1 Introduction

There are different legal frameworks in place to protect asylum seekers within the South African legal system. However, lack of proper implementation is a challenge facing the DHA. The South African government has created policies and legislation that cater for asylum seekers, but the listed international and national frameworks discussed in Chapter 2 need to be implemented in practice to resolve the hurdles faced by asylum seekers in South Africa.

A policy or legislation enacted to protect asylum seekers cannot be actualised if asylum seekers' rights are not respected and protected. The issues and barriers faced by asylum seeker as discussed in Chapter 3 of this research, need to be addressed by the South African government. If these are not addressed asylum seekers will forever be a burden on the South African judicial system as their port of last call.

Without the judicial system, there would have been a total collapse in the status determination process of asylum seekers in South Africa. However, in the section below we discuss and analyse the legal instrument available to improve the status determination process of an asylum seeker in South Africa.

4.2 Promotion of Administrative Justice Act

The PAJA is one of the instruments available to asylum seekers if their application has been dealt with unfairly – especially as regards their status determination. In the main, the PAJA is applied in any unfair administrative issues experienced by individuals or entities. However, an asylum seeker has the right to appeal y if his or her application has been

rejected based on section 25(1)³⁰² and 26(1)³⁰³ of the Refugees Act. The PAJA promotes administrative review, especially in a situation where a decision on the status determination of an asylum seeker was not procedurally fair.

The Preamble to the PAJA refers to section 33(1) and (2) of the Constitution which provides that everyone has a right to administrative action that is lawful, reasonable, and procedurally fair, and that anyone whose rights are adversely affected by the administrative action has the right to be given written reasons. However, section 33(3) of the Constitution further provides what is required for the national legislation to be enacted as regards on the duty impose on the state to give effect to the right in subsection 1 and 2 of the South African Constitution. The PAJA gives asylum seekers hope and the freedom to probe any application. However, there is a procedure to be followed in the Refugees Act which deals with any procedural unfairness by any RSDO in that an asylum seeker may take the decision of any officer on review.

The PAJA was enacted for administrative actions; that is, for any decision taken, or failure to decide, by:

an organ of state, when:

- (i) exercising power in terms of the Constitution or a Provincial Constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation; or a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

Which adversely affects the rights of any person and which has a direct, external legal effect.³⁰⁴

Section 1 of the PAJA also applies to the DHA and does not exempt RSDOs who take decisions on the status of an asylum seeker in the country. Therefore, any administrative action that adversely affects any rights of any individual, including an asylum seeker, must be procedurally fair.³⁰⁵ The condition of 'being affected' implies a marked denial of the

³⁰² The Standing Committee must review any decision taken by a RSDO in terms of s 24(3)(b).

³⁰³ Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the RSDO has rejected the application in terms of s 24(3)(c).

³⁰⁴ Section 1 of the PAJA. The last part of s 1 excludes the exercise of certain powers and the performance of certain actions from the definition of administrative action.

³⁰⁵ Section 3(1) of the PAJA.

rights of the individual.³⁰⁶ Consequently, an RSDO must apply the law. A legal administrative action means that a decision in the execution of administrative action must be authorised by law, and any exercise of power must be within the law and comply with its attendant statutory provisions. The decisions of any adjudicator must be fair and reasonable. Procedural fairness is concerned with the process followed in arriving at a decision rather than with whether or not the decision was correct of the adjudicator's decision.³⁰⁷

4.2.1 Error of law in decisions

Error of law in decisions is a major issue in the DHA asylum system. The PAJA provides that any decision made by an administrator may be judicially reviewed if it was materially influenced by an error of law. As regards the refugee status determination of an asylum seeker, an error may occur where the RSDO wrongly or mistakenly interprets a legislative provision.³⁰⁸ The PAJA permits the review of the wrong decision, which is one of the grounds for judicial review.³⁰⁹

In *M v Minister of Home Affairs and Others*,³¹⁰ the applicant applied for asylum under the Refugees Act. The RSDO rejected the application on unfounded reasons in terms of section 24(3)(b) of the Refugees Act. The applicant applied for review and this too was rejected by SCRA. The procedural and substantive grounds under the PAJA were questioned. The court emphasised section 3(2) of the PAJA which states that administrative action which materially and adversely affects a person's rights must be procedurally fair, and fair administrative procedure depends on the fact of each case.³¹¹

³⁰⁶ Brynard DJ 'The duty to act fairly: A flexible approach to procedural fairness in public administration' available at <http://uir.unisa.ac.za/bitstream/handle/10500/6460/brynardadminipub2010184.pdf?sequence=1> (accessed 19 June 2019).

³⁰⁷ Ramoroka (n 138).

³⁰⁸ Hoexter C *Administrative Law in South Africa* (2012) 282.

³⁰⁹ Section 6(2)(i) of the PAJA. Grounds for judicial review may relate to the administrator (s 6(2)(a)(i)–(ii)), the manner in which the decision was taken (s 6(2)(b)–(e)), or administrative action (6(2)(f)–(j)). The review proceedings must be instituted within 180 days after domestic remedies have been exhausted.

³¹⁰ (6871/2013) [2014] ZAGPPHC 649 (22 August 2014).

³¹¹ *M v Minister of Home Affairs and Others* (6871/2013) [2014] ZAGPPHC 649 (22 August 2014) para 80. In order to give effect to the right to procedurally fair administrative action, the administrator concerned must, among other things, provide the affected person with a reasonable opportunity to make representations; provide a clear statement of the administrative action; provide adequate

The court also emphasised that the Refugees Act imposes the need for procedural fairness and the obligations imposed on RSDOs under PAJA. This also applies to the relevant duties falling to DHA officials involved in the process of administering and vetting asylum applications. In this the RSDO failed.³¹²

The court held that “the decision of the refugee status determination officer was ... unlawful and invalid”. It continued that the

refugee status determination officer and the standing community for refugee affairs made their decisions without a consideration of the necessary facts. This had led to an erroneous conclusion on the part of the refugee status reception officer that the applicant did not meet the requirements of section 3 of the Refugees Act.³¹³

The court concluded that “the decisions by the refugee status determination officer were tainted by a material error of law”.³¹⁴

4.2.2 Bias

Bias is a widespread problem in the DHA adjudication system. Section 6(2)(a)(iii) of the PAJA addresses how a decision must be made, but the Act permits the review of decisions by an administrator who is biased or where there is reasonable suspicion of bias. This provision is based on common-law prohibition on bias which provides a decision-maker should be impartial.³¹⁵ Hoexter reiterates that any form of bias is a serious issue, based

notice of a right of review or internal appeal; and provide adequate notice of the right to request reasons.

³¹² *M v Minister of Home Affairs and Others* (6871/2013) [2014] ZAGPPHC 649 para 81. “The Department is obliged to ensure adequate and competent interpretation for an asylum applicant at all stages of the process, from inception when written application is made to the RRO. If the Department is unable to provide interpretation services, an applicant must be given at least 7 days notice that he or she will be required to bring his or her own interpreter to the interview before the RRO or RSDO. The RRO is required to assist an applicant where necessary and to ensure that the relevant application form is properly completed. The RSDO is expressly enjoined to ensure that an applicant’s constitutional rights under section 33 are given effect to and must also ensure that the applicant fully understands the procedure, his or her rights and the evidence presented. The RSDO must take into account the specific facts of each case before him or her, including the conditions in the country of feared persecution or harm. To this end, the RSDO is given specific powers to request, seek and obtain relevant information. The RSDO is expressly required to give written reasons in the event that an asylum application is rejected.”

³¹³ *M v Minister of Home Affairs and Others* (6871/2013) [2014] ZAGPPHC 649 para 160.

³¹⁴ As Above

³¹⁵ Hoexter (n 292) 451.

on the professional conduct and ethics of the decision-maker.³¹⁶ She further notes that the finding of actual bias is rare as it is very difficult to prove.³¹⁷

In *Commissioner, Competition Commission v General Council of the Bar of South Africa*,³¹⁸ Hefer AP held that:

It is unfortunate that one of the facts of life that administrative bodies perform their functions with varying degrees of competence. Sometimes, depending mostly on the expertise of their members and staff, they meticulously observe the requirements of natural justice; but often they do not, not because they are biased, but because they are not skilled in administrative law or because a particular requirement of natural justice is overlooked. Thus, the mere fact that *audi alteram partem* was not observed does not by itself justify an inference of bias.³¹⁹

Unfortunately, the South African refugee status determination system often lacks competency and is characterised by non-adherence to requirements of procedural fairness.³²⁰ In *S v Roberts*,³²¹ the court held that “with the reasonable apprehension of bias, the Supreme Court of Appeal held that there must be a suspicion the judicial officer might be biased. The suspicion must be a reasonable person in the position of the accused. The suspicion must be based on reasonable grounds.” Lastly, the suspicion must be one which indicates that the decision is one which a reasonable person would not have reached.³²² *Tantoush v Refugee Appeal Board*³²³ is a refugee determination case in which the Interpol officers pressured the RSDO to render a negative decision in the application of the refugee. At the appeal stage, the chairperson of the Refugee Appeal Board met with the Interpol officers for twenty minutes before the commencement of the hearing. Based on this, the applicant alleged in his founding papers that the Board’s findings were tainted with bias. In his analysis, Murphy J states that the allegation of bias has two legs. The first is the meeting between the chairperson and the Interpol officers. The judge accepted that the Appeal Board is empowered by the Act to request the attendance of a person to provide evidence. However, in the absence of conclusive evidence to suggest that the Board had

³¹⁶ As above 452.

³¹⁷ As above 453.

³¹⁸ 2002 (6) SA 606 (SCA).

³¹⁹ *Commissioner, Competition Commission v General Council of the Bar of South Africa* 2002 (6) SA 606 (SCA) para 16.

³²⁰ Amit (n 12).

³²¹ 1999 (4) SA 915 (SCA).

³²² *S v Roberts* 1999 (4) SA 915 (SCA) paras 32–34.

³²³ 2008 (1) SA 232 (T).

acted under undue dictation, which is a finding of actual bias, in the sense that the Board approached the matter with a prejudiced mind. In the result, Murphy J found that the Board had compromised its independence and that the applicant had raised a legitimate and reasonable apprehension of bias.³²⁴

4.2.3 Failure to provide adequate reasons

Asylum seekers do not get reasons for decision in terms of the outcome of their application. Section 5 of the PAJA states that “the recipients of administrative decisions are entitled to reasons”.³²⁵ Section 6 provides that “administrative decisions must be rationally connected to the reasons given”.³²⁶ However, rationality demands a decision supported by solid evidence and information before the administrator.³²⁷ There are rejection letters that contain no reasons at all and which consist of no more than ‘cut-and-paste’ paragraphs with no reference to the individual claim.³²⁸ For example, In *Katabana v The Chairperson*

³²⁴ *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para 86.

³²⁵ Section 5(1): “Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.”

³²⁶ Section 6(1) any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. Section 6(2): “A court or tribunal has the power to judicially review an administrative action if – (a) the administrator who took it – (i) was not authorised to do so by the empowering provision; (ii) acted under a delegation of power which was not authorised by the empowering provision; or (iii) was biased or reasonably suspected of bias; (b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with; (c) the action was procedurally unfair. (d) the action was materially influenced by an error of law; (e) the action was taken – (i) for a reason not authorised by the empowering provision; (ii) for an ulterior purpose or motive; (iii) because irrelevant considerations were taken into account or relevant considerations were not considered; (iv) because of the unauthorised or unwarranted dictates of another person or body; (v) in bad faith; or (vi) arbitrarily or capriciously; (f) the action itself – (i) contravenes a law or is not authorised by the empowering provision; or (ii) is not rationally connected to – (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator; (g) the action concerned consists of a failure to take a decision; (h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or (i) the action is otherwise unconstitutional or unlawful.”

³²⁷ Amit ‘NO WAY IN: Barriers to Access, Service and Administrative Justice at South Africa’s Refugee Reception Offices’ (2012) ACMS Research Report 475.

³²⁸ Amit ‘All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination’ available at <http://www.migration.org.za/wp-content/uploads/2017/08/All-Roads->

of the *Standing Committee for Refugee Affairs*,³²⁹ the RSDO's decision records the applicant's claim as follows: "You claim your mother was burned to death because of witchcraft and you fled".³³⁰ The RSDO reasoned that: "Your application for asylum is made on grounds other than those on which an application may be made under the Act".³³¹ The inadequacy of the findings in this matter moved Davis J to hold the decision of the RSDO unjustifiable and unrelated to the facts.³³² Also, in *Mulugata Daniel Jamole v Director General Home Affairs and Another*,³³³ the applicant was an asylum seeker with an asylum permit. He entered South Africa in 2006 having fled his home country, Ethiopia, for South Africa due to political unrest. He managed to transfer his assets in Ethiopia in excess of R2 500 000 to South Africa in order to establish a business. In 2011 he was issued with a valid business visa to conduct his own business. Before the visa lapsed, he applied to have it extended. The extension application was rejected in 2016 with a letter received from the respondent stating the reason as follows: "Application is rejected. The reason for the decision is the following: The applicant is not meeting the requirements in respect of feasibility and national interest." The applicant appealed this decision but again failed and was informed in the following terms: "I refer to your appeal in respect of a business visa application. I wish to inform you that I have decided to uphold the decision to reject your application for a temporary visa based on your previous rejection letter is still valid." The applicant moved to the next level of the internal remedies available. He again received a rejection letter giving the following reason: "Your application for an appeal bears reference. I wish to inform you that I have decided to uphold the decision to reject your application for business visa [in] that no person holding an asylum seeker permit is allowed to change status whilst in Country. Your application for Temporary Residence permit is rejected." On further appeal, the court held that "the lack of adequate reasons, both in itself and as purported justification for the decision, when weighed against the facts set out by the

Lead-to-Rejection-Persistent-Bias-and-Incapacity-in-South-African-Refugee-Status Determination.pdf (accessed 19 February 2020) 18.

³²⁹ (WC) unreported case no 25061/2011 of 14 December 2012.

³³⁰ In *Katabana v The Chairperson of the Standing Committee for Refugee Affairs* (WC) unreported case no 25061/2011 (14 December 2012) para 74.

³³¹ *Katabana* (n 323) para75.

³³² *Katabana* (n 323) para 24. Davis J accepted that the RSDO is not a court and, therefore, not required to prepare a long judgment. The judge further stated that what is required is that decisions are carefully considered and that some reason for the decision needs to be set out.

³³³ (40010/2017) [2018] ZAGPPHC 805.

applicant it is unreasonable that a reasonable person would have made the same decisions.”³³⁴

Based on the facts above, if an RSDO does not apply the law correctly and also applies the credibility standard inappropriately in determining an asylum claim due to incompetence, he or she acts wrongfully. Certain RSDOs are not diligent in handling asylum claims – eg, it is clear that they have not sufficiently examined the application to allow them to provide meaningful and sound reasons for the rejection of the application.

In *Gavric v Refugee Status Determination Officer, Cape Town and Others*,³³⁵ the applicant entered South Africa illegally in 2007 under a false name and passport in order to hide his identity as he was fleeing his native country. He had fled his country because he feared for his life following the assassination of Željko Ražnatović, better known as Arkan. On 21 January 2012, the applicant applied for refugee protection in terms of section 3 of the Refugees Act on the ground that he was falsely believed to be a member of the political group which orchestrated Arkan’s assassination and so feared for his life. The RSDO refused to grant the applicant refugee status finding that he was excluded from being granted refugee status in terms of section 4(1)(b) of the Refugees Act on the ground that he had committed a serious non-political crime. The RSDO found that since the murder was a non-political crime, the applicant was excluded, regardless of the political context surrounding the crime. An application was lodged with the Constitutional Court by the applicant for leave to appeal against the entire judgment of the Cape Town High Court. The High Court’s decision had confirmed the refusal of the RSDO, Cape Town, to grant the applicant refugee status in terms of section 3 of the Refugees Act.³³⁶ The High Court held that it was procedurally unfair for the RSDO not to provide adequate reasons for her decision. In *Koyabe v Minister of Home Affairs*,³³⁷ the Constitutional Court offered an

³³⁴ *Mulugata Daniel Jamole v Director-General Home Affairs* para 28.

³³⁵ (CCT217/16) [2018] ZACC 38, 2019 (1) SA 21 (CC), 2019 (1) BCLR 1 (CC) (28 September 2018). The applicant appealed the decision to the Standing Committee on Refugee Affairs, but the Standing Committee did not decide the issue because it believed it did not have jurisdiction. The applicant launched an application in the High Court seeking to have the RSDO’s decision to be reviewed and set aside, and a declaration that s 4(1)(b) of the Refugees Act is unconstitutional.

³³⁶ *Gavric v Refugee Status Determination Officer, Cape Town and Others* CCT217/16) [2018] ZACC 38, 2019 (1) SA 21 (CC), 2019 (1) BCLR 1 (CC) (28 September 2018).

³³⁷ 2010 (4) SA 327 (CC). The applicants, Mr and Mrs Koyabe, were both from Kenya. They were granted permanent residence in 2006. In 2007 their permanent resident permits were withdrawn in a letter addressed to them by the Director-General of the DHA. The letter indicated that an investigation by the DHA had revealed that the applicants previously obtained their South African identity documents by fraudulent means. The letter further informed the applicants that they had also failed to submit a request for review within the required three days and, therefore, their right to a

understanding of the requirement involved in providing adequate reasons.³³⁸ Mokgoro J stated that the declaration that a person is an illegal foreigner has a serious impact on that person. He or she will want to know the basis on which he or she has been found to be an 'illegal foreigner' – especially in circumstances where it might be based on incorrect information.³³⁹ Providing adequate reasons is important in seeking a meaningful review and improving the asylum seeker's chances of having the decision overturned. Mokgoro J further explained that a reason need not to be specified in minute detail, but it must be sufficient. An adequate reason must reflect a sound decision on which a complainant can base a review or appeal.³⁴⁰

4.3 Principle of legality

According to Burns: "The principle of administrative legality is that the administration must promote public interest, must protect and respect individual rights."³⁴¹ The principle of legality dictates that one must act in accordance with legal prescripts which must be aimed at protecting individuals from possible indiscriminate action on the part of the state. The principle of legality remains a vital safeguard against actions that do not fall within the PAJA's definition of administrative action and offers some administrative law control.³⁴²

In *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council*, the Constitutional Court held that "it seems central to our constitutional order that the

review by the Minister had lapsed. The applicants were therefore prohibited persons and did not qualify for the permanent residence permits. The letter also stated that the applicants would be deported but that they were entitled to request the Minister for Home Affairs, to review the decision to withdraw their permits. The Immigration Act 2002 (the Act) therefore provides an internal remedy which must in terms of PAJA, be exhausted before a court is approached to review the department's decision. The applicants failed to submit an application for review arguing that in order to do so they needed a meaningful reason for the withdrawal of their permits.

³³⁸ The applicants in this matter were foreign nationals who had applied for the South African identity document. The DHA informed the applicant by way of written notice, that an investigation had revealed that they had previously obtained South African Identity documents by fraudulent means; that they did not qualify for permanent residence; that, in terms of the Immigration Act, they were prohibited persons and did not qualify for visas, admission to South Africa, and temporary or permanent resident permits; that they were to be deported; and that they were entitled, under s 8 of the Act, to request the Minister to review the decision to deport them. The applicants then requested the Minister to furnish reasons for the decision to withdraw or terminate their residence permits. The department wrote to the applicants' attorney, stating that the reasons for the decision had been adequately set out in the initial notice. The applicants applied to the High Court for review of the decision to withdraw the permanent residence permits.

³³⁹ *Koyabe v Minister of Home Affairs* 2010 (4) SA 327 (CC) para 61.

³⁴⁰ As above para 63.

³⁴¹ Burns *Y Administrative Law under the 1996 Constitution* 95.

³⁴² Ramoroka (n 138) 14.

legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”³⁴³ In simple terms, decision-makers must act within the scope of their duties.

When applying and interpreting the Refugees Act or the Immigration Act, the principle of legality must be respected. Failure to meet the principle of legality renders the decision taken by the RSDO invalid. Every decision made by an RSDO or any government official must not exceed his or her duty.³⁴⁴

4.4 Asylum seeker constitutional rights approach

The significance of asylum seeker status requires a careful analysis and a human rights approach.³⁴⁵ The international and statutory law applicable to asylum seekers and refugees in South Africa is entrenched in the Constitution. Chapter 2 of the Constitution contains the Bill of Rights. These rights are seen as foundational in a free and democratic society. Irrespective of being an asylum seeker in South Africa or not, the South African Constitution applies to anyone that lives in the Republic of South Africa.³⁴⁶

Asylum seekers are entitled to access to the Bill of Rights by virtue of section 7(1) and (2) of the Constitution³⁴⁷ which provides that the South African government must respect, protect, promote, and fulfil the rights in the Bill of Rights. This also applies to asylum seekers. The question, however, arises whether the South African government is fulfilling its obligations to respect and protect the rights of asylum seekers in the Bill of Rights? The answer is ‘no’. The South African government has in part failed to protect and carry out its mandate to protect asylum seekers in South Africa, especially in the status determination of asylum seekers. However, these rights granted by legislation are not always respected

³⁴³ *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 37 (CC) 37–45.

³⁴⁴ Section 2(a)(i) of the PAJA provides that a court or tribunal has the power to review an administrative action if the administrator who took it was not authorised to do so by the empowering provision.

³⁴⁵ Khan (n 28) 35.

³⁴⁶ The Constitution of the Republic of South Africa, 1996.

³⁴⁷ Section 7(1) clearly states: “The Bill of rights is a cornerstone to democracy in South Africa as alluded in Chapter two of this research. It enshrines the rights to all people in South Africa and affirms democratic values of human dignity, equality, and freedom.” This means that it applies to ‘all people’ including asylum seekers.

or enjoyed in practice. This is illustrated by the xenophobic attacks which the South African government has to date done nothing to curb or punish the perpetrators.³⁴⁸

4.5 Prevention and Combating of Corrupt Activities Act 12 of 2004

Corruption is common in South Africa and also affect the asylum seeking process at the DHA.³⁴⁹ According to the ACMS report, and a report from Lawyers for Human Rights, corruption is common throughout the asylum application process in South Africa.³⁵⁰ One third of asylum seeker must pay a bribe to find their way into the Refugee Reception Office especially those who do not meet the requirements of the Refugees Act.³⁵¹ Moreover, incompetence and graft within the DHA also contribute to the number of undocumented asylum seekers.³⁵²

Corruption is also a problem the South African government is struggling to curb day by day including the DHA. Even though the Prevention and Combating of Corrupt Activities Act does not speak directly to issues facing asylum seekers and refugees, corruption is one of the barriers faced by asylum seekers in their status determination as discussed in Chapter 3 of this research. However, the aim of the Act is:

To strengthening measures to prevent and combat corruption and corrupt activities; is to provide for the offence of corruption and offences relating to corrupt activities; to investigative measures in respect of corruption and related corrupt activities; to provide for the establishment and endorsement of a Register in order to place certain restrictions on persons and enterprises convicted of corrupt activities relating to tenders and contracts; to place a duty on certain persons holding a position of authority to report certain corrupt transactions; to provide for extraterritorial jurisdiction in respect of the offence of corruption and offences relating to corrupt activities; and to provide for matters connected therewith.³⁵³

³⁴⁸ Landau L *Exorcising the Demons Within: Xenophobia, Violence, and Statecraft in Contemporary South Africa* (2011).

³⁴⁹ Mitchley A 'Corruption still rife at all stages of asylum process in South Africa' available at <https://www.news24.com/news24/southafrica/news/corruption-still-rife-at-all-stages-of-asylum-process-in-south-africa-lhr-report-20200916> (accessed 18 December 2020).

³⁵⁰ 'Corruption plagues South Africa's asylum system' available at <https://reliefweb.int/report/south-africa/corruption-plagues-south-africa-s-asylum-system> (accessed 16 August 2020).

³⁵¹ 'Obstacles in the Refugee Status Determination Process' available at <https://www.hrw.org/reports/2005/southafrica1105/5.htm> (accessed 16 August 2020).

³⁵² Note 333 above.

³⁵³ Act 12 of 2004.

At the Marabastad RRO it was reported that two thirds of applicants experience graft and if they are unable to pay, their rejection for asylum permit is guaranteed.³⁵⁴

Kabelo Sedipane of Corruption Watch, a non-profit organisation, states that

their undercover operation reveals that there are other types of corruption that are not taken notice of. Which for example paying a translator putting a fake story for an illegal asylum seeker for money. However, when people are asked to testify against the corrupt officials at the refugee reception office, they are always afraid of compromising their application.³⁵⁵

It is advisable for the South African government to create an institution that will address the issue of corruption involving asylum seekers or refugees in South Africa.

4.6 Border Management Authority Act

The Border Management Authority Act was enacted to manage the affairs at all South African borders. As discussed in Chapter 3, the Border Management Authority Act came into effect in 2020. According to the Preamble to the Act, one of its aims is to prevent illegal cross-border movement.³⁵⁶ Furthermore, section 5(a) of the Act³⁵⁷ states that the function of the authority is to facilitate and manage the legitimate movement of persons within the border law enforcement areas and ports of entry. This means that Boarder Management Authority Act is a means to limit asylum seekers who cross into South Africa illegally in search of asylum.

In relation to asylum seekers, it is concerning that at the border which is their first contact with the South African administrative system, the Border Management Authority Act fails to refer to either the Refugees Act or the Immigration Act. It is unclear how law enforcement by Border Management Authority Act officers will be applied to these Acts.

There is also a belief that the Border Management Authority Act aims to restrict asylum seekers and to violate their rights, although the border management officers are mandated

³⁵⁴ As above.

³⁵⁵ As above.

³⁵⁶ Act 2 of 2020. Aims of the Border Management Authority are to “contribute to the socio-economic development of the Republic; ensure effective and efficient border law enforcement functions at ports of entry and the border; contribute to the facilitation of legitimate trade and secure travel; contribute to the prevention of smuggling and trafficking of human beings and goods; prevent illegal cross-border movement; contribute to the protection of the Republic’s environmental and natural resources; and protect the Republic from harmful and infectious diseases, pests and substances.”

³⁵⁷ Border Management Authority Act.

by the Act to respect the fundamental rights of refugees and asylum seekers.³⁵⁸ However, according to the past poor track record of the DHA in managing asylum seekers, there are concerns that the border management officers will not treat asylum seekers fairly and will ignore their rights.³⁵⁹

The Border Management Authority Act would have been a good piece of legislation to improve the protection of asylum seekers at the border and also it would have been good if it could have address issues that affect asylum seekers at the borders; especially on entry process and procedures.³⁶⁰

4.7 Conclusion

There is no doubt that there is legislation which has improved the status determination of asylum seekers – the PAJA, for example. However, some of the legislation such as the Prevention and Combating of Corrupt Activities and the Border Management Authority Act, do not speak to the Refugees Act or matters relating to the asylum seeker.

This shows that there are gaps which need to be addressed in combating issues affecting asylum seekers such as corruption and xenophobia – in the main in relation to the implementation of the mandates in the relevant legislation.

³⁵⁸ See s 15(3) of the Border Management Act.

³⁵⁹ Maunganidza O & Mbiyozo 'South Africa's Border Management Authority dream could be a nightmare' available at <https://www.dailymaverick.co.za/article/2020-08-11-south-africas-border-management-authority-dream-could-be-a-nightmare/> (accessed 28 August 2020).

³⁶⁰ Botha C 'In the shadow of the Border Management Authority Bill' available at <http://www.politicsweb.co.za/opinion/world-refugee-day--in-the-shadow-of-the-border-man> (accessed 19 March 2019).

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Summary of Chapters

This research has focused on barriers to the status determination of an asylum seeker in South Africa. In Chapter 1 it is shown that as an African country South Africa is party to the 1969 OAU Convention Governing Specific Aspect of the Refugee Problem in Africa and 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

This study concentrates on the research questions that were addressed in each chapter. Chapter 2 dealt with the legal framework for the status determination of an asylum seeker in the South African legal system. How international law plays a significant role in the implementation of the rule law regarding asylum seekers in South Africa was also examined – especially how asylum seekers are to be treated. One of the common principles upheld internationally is the principle of *non-refoulement* found in international refugee law. This principle was also discussed in the chapter. However, a state can *refoule* an individual in several ways, exposing different dimensions of the concept.

South Africa formally started to abide to international refugee law in 1993 after signing the Basic Agreement with UNHCR and acceding to the UN and OAU refugee conventions in 1995 and 1996. This research shows that South Africa is a popular destination for asylum seekers from around the world.

Since South Africa had its first democratic elections in 1994, the country has progressed in establishing a free and fair democratic society based on respect for human rights. Fast-forwarding to 2020, some sectors of the South African citizenry do respect the rights of asylum seekers and refugees and continue to blame immigrants for aggravating social problems such as the rise in unemployment, poverty, and crime in the country. Frequently these accusations stem from lack of knowledge or understanding of the the rights which accrue to asylum seekers under the Constitution and the Refugees Act.

Based on international law, the OAU conventions, national law, and the South African legal system, there is no doubt that those seeking asylum in South Africa are entitled to human rights protection despite South Africa not having a long history of protecting refugees and asylum seekers. The South African government needs to ensure that asylum seekers are treated with respect. Any provisions involving asylum seeker status, especially asylum seekers rights and responsibilities, are to be found in the Refugees Act. The South African legislation is supported by the Constitution under which asylum seekers are also entitled to the rights in the Constitution, including the rights human dignity, equality, access to information, and education. However, the practice in dealing with asylum seekers, does not always live up to undertakings under regional and international conventions on refugee law. The analysis undertaken in this research indicates that despite all the policies in place and the responsibilities placed on South Africa by the domestic, international, and regional instruments the implementation of these obligations remains problematic. Asylum seekers continue to encounter various barriers which restrict their enjoyment of the rights to which they are entitled.

South Africa adheres to the principles of refugee law. However, the adoption of international law alone does not suffice – interpretation of the Refugees Act, regulations, policies, and the procedures involved in classifying asylum seekers are still problematic.

The Constitution is the supreme law in South Africa, and it gives asylum seekers direct access to securing their rights. Asylum seekers are entitled to protection, notably the right to security of a person which is recognised as a human right in South Africa. However, the violation of an asylum seeker's physical security entails the violation of his or her dignity. The Refugees Act was enacted to guide and protect those who seek for refuge in South Africa and to guide RSDOs in implementing and following due process when granting refugee status to an asylum seeker.

In addition, there are statutory provisions and policies in place that guide the status determination of asylum seekers in South Africa. The Refugees Act, Immigration Act, and other relevant legislation that support asylum seekers.

Undoubtedly, South Africa has a legal framework within which to protect asylum seekers and monitor their status determination in South Africa. On this basis, it is clear that asylum seekers are protected by the South African law, and that there are measures in place available to asylum seekers to get their status determined in South Africa.

Chapter 3 of this research addresses the question: “What are the barriers to status determination for asylum seekers?” The challenge faced by asylum seekers before applying for asylum is at the South African border at which an asylum seeker will be given a transit visa to enter South Africa so that he or she can apply for asylum at the nearest RRO. The Refugees Act stipulates the eligibility criteria for asylum but these are conditional on him or her reporting to the nearest RRO immediately after entering the Republic with intention of stating that he or she was forced to flee his or her country of origin due to fear of persecution in his or her country of origin. Pending the outcome of the application, the RRO will issue an asylum seeker permit to the applicant pending a subsequent interview by the RSDO. The holder of asylum seeker permit is allowed the right study and work until the finalisation of his or her asylum application.

The first barrier an asylum seeker faces is procedural staff capacity at the RRO. This is particularly true of RROs with limited staff to attend to asylum seekers or handle the number of applications received daily by the office.

The second barrier is procedural support which is a serious issue that has turned into a nightmare for some asylum seekers who cannot speak English and need an interpreter to interpret for them. Although, the RRO is supposed to provide an interpreter, it often happens that no qualified interpreter is available for the asylum seeker to be heard timeously.

The third barrier is the inadequate number of RROs as stated in Chapter 3. Of the country's nine provinces, only five have RROs. Musina (Limpopo province) RRO is one of the offices primarily used by asylum seekers entering the country on foot. Those who can afford transport can go to other RROs to apply for the asylum permit after receiving their asylum transit visas at the border. The moment an asylum seeker is given an asylum transit visa, he or she must report to the nearest RRO within a period that has been reduced to five days. This reduction in the reporting period from fourteen to five days appears somewhat unreasonable and places serious pressure on both the RROs and the asylum seekers. Lack of cooperation from immigration officers and slow service by functionaries at the RROs exacerbates things still further.

The fourth barrier faced is the lack of procedural objectivity as regards an asylum seeker application. Mistakes are frequently made by the DHA officials during the status determination process particularly as regards negative status determination decisions, or

rejection letters. This includes mistakes of fact and lack of sound reasoning. The fifth barrier is corruption which is rife at some RROs. Officers solicit bribes in order to assist an asylum seeker to ensure that his or her status is determined within the timeframe provided. The sixth barrier is physical security and xenophobia. Asylum seekers are victims of violence. Sadly, this is a common occurrence in South Africa where South African citizens attack foreigners – especially asylum seekers and refugees – in the belief that they are filling local jobs. In the light of the above it cannot be said that asylum seekers enjoy a safe life. This has led some asylum seekers in South Africa to seek relocation outside of the country where they can be assured of shelter and protection.

The final challenges faced are the legal and socio-legal barriers. Asylum seekers are faced with these barriers by having to take the DHA to court on judicial review. Most asylum seekers are not financially able to hire a lawyer to the denial of their applications in court. This leaves many without asylum simply because they lack the resources to challenge their status determination based on the unfair procedure followed by the DHA>

Chapter 4 discussed the legal instruments available to improve the protection available to asylum seekers. The legal instruments that can be used in South Africa to protect asylum seekers was investigated. These are the PAJA and the Prevention and Combatting of Corrupt Activities Act. These are applied to curb corruption and unfair administrative procedure during the status determination of an asylum seeker. The PAJA gives asylum seekers the right to just administrative action, and also plays a role in protecting asylum seekers whose status determination process not procedurally fair. The PAJA provide an opportunity for asylum seekers to challenge any unfair procedure.

The PAJA also affords asylum seekers the rights of appeal or review against any negative decisions by the DHA which affect them by. However, these procedures are costly and cause delays.

The Border Management Authority Act was also discussed in this chapter, however it is seen that the Act does not speak to the real issues facing asylum seekers but rather takes a more general approach providing only that the Border Management Authority must respect the fundamental rights of vulnerable groups, including asylum seekers and refugees.

5.2 Recommendations

The main objective of this chapter is to present the recommendations and possible solutions to the hurdles facing an asylum in his or her quest to have his or her status adequately considered and correctly determined. The Refugees Act sets out procedures to be followed in determining the status of an asylum seeker. The asylum application must be evaluated in accordance with the provisions of the Act and be free of bias. A fair asylum seeker status determination process allows individuals who are fleeing persecution in their home countries to find a safe refuge in South Africa.

The starting point for my findings within the scope of this research is that most asylum seekers do not understand the asylum process at the South African ports of entry. There is scant, if any, signage explaining this process at border posts. This leaves asylum seekers who do not know or understand the process with little option but to 'jump the border' illegally. This already dire situation is exacerbated by fear among some asylum seekers that they will be turned away or harassed by the border officials.

It is recommended that the DHA must create awareness at all ports of entry into South Africa and, more importantly, must train its officials to deal with asylum seekers and to be less hostile to those who seek asylum within our borders.

There are numerous inconsistencies in the evaluation of asylum seeker applications. It is therefore further recommended that a uniform standard of assessment must be introduced which applies in all refugee reception centres. Also, a guideline must be adopted for the RSDO before determining the status of an asylum seeker. The status determination officers must judge the asylum seeker's conduct when deciding his or her application. The guidelines must be flexible in order to allow the RSDO to adjust to the different personal circumstances of the applicants.

It is also recommended that the DHA reduce delays and ensure that asylum seekers are issued with the correct documents within the timeframes stipulated in the Act. The administrative process is currently sluggish and frustrating. For the length time spent at the refugee reception office to be reduced, it is suggested that the DHA employ additional staff to service the huge number of applications for asylum.

The South African government needs to ensure that asylum seekers receive adequate access to the basic rights to which are entitled, as well as legal protection.

It is recommended that greater effort is made to curb discrimination in any application made by an asylum seeker. The DHA must develop an independent process for managing asylum seeker status determination. An asylum seeker or refugee's status determination must be independent and impartial. The adjudicator at the RRO must be sound and conversant with the law, especially the Immigration Act and the Refugees Act. The adjudicator must be free from any political intervention.³⁶¹

The training of staff at the RROs must be ongoing – RSDOs in particular, need to be adequately trained on how to handle asylum seekers and how to interview them. It is essential that all due processes are followed before a determination of the status to be awarded (or not awarded) is made.

The language barrier is also a considerable problem for asylum seekers who cannot speak English. The DHA needs to look into employing qualified interpreters who will be on the ground to assist asylum seekers at the RROs, especially as regards those who cannot complete the application form in English, and who need to be assisted in filling in the correct information on the form. The problem of asylum seekers having to travel to provinces in which they do not reside before they can apply for asylum, is a matter that also requires the attention of the DHA. The closure of Cape Town and Johannesburg RROs saw an increase in number of asylum applications at other RROs. This led to long delays in the process of status determination at these RROs especially the Marabastad RRO. However, if the other RROs can be reopened (as the courts have ordered), the pressure on the remaining offices will be relieved.

5.3 Conclusion

Asylum seekers need to be informed of their rights. The rights contained in both national and international law instruments are there to protect asylum seekers. Creating awareness and an understanding of these rights can point the way to solutions to protect asylum seekers, especially in a situation where the government is reluctant to do so. States have an obligation to ensure that asylum seekers are aware of their rights and must protect these rights when necessary. The South African Government also need to continue

³⁶¹ PROHIBITED PERSONS 'Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa' (1998) available at <http://www.hrw.org/legacy/reports98/sareport/> (accessed 02 July 2019).

educating and training staffs and all public officials on implicit of bias, xenophobia and racism.

In conclusion, these realities emphasise how essential it is that the DHA addresses the shortcomings the status determination process for asylum seekers in South Africa. Unlike many other African countries, South Africa has both policies and a legal framework in place to process of the status determination of asylum seekers. However, without proper enforcement, the status determination process of asylum seekers is of limited value.

BIBLIOGRAPHY

Books & chapters in books

Burns Y Administrative Law under the 1996 Constitution (Butterworths 2006)

Buergenthal T Shaw D & Stuart D, International Human Rights 3 ed (West Academic 2004)

D'Orsi C Asylum Seekers and Refugee Protection in Sub-Saharan Africa (Routledge 2016)

Dugard J International Law: A South African Perspective (Juta 2005)

Goodwin-Gill GS & McAdam J The Refugee in International Law (OUP 2007)

Handmaker J, De la Hunt L & Klaaren J Advancing Refugee Protection in South Africa (Berghahn Books 2008)

Handmaker J, De la Hunt L & Klaaren J Advancing Refugee Protection in South Africa (Berghahn 2010)

Helton A & Jacobs E 'What is Forced Migration?' in Human Rights and Refugees, Internally Displaced Persons and Migrant Workers (ed) Human Rights and Refugees, Internally Displaced Persons and Migrant Workers Refugees and Human Rights (2006)

Hoexter C Administrative Law in South Africa (Juta 2012)

IBP Inc South Africa Recent Economic and Political Developments Yearbook - Strategic Information and Developments (International Business Publication USA 2018)

Kok P, Oucho J et al Migration in South and Southern Africa: Dynamics and Determinants (Human Sciences Research Council 2006)

Khan F & Schreier T Refugee Law in South Africa (Juta 2014)

Landau L Exorcising the Demons Within: Xenophobia, Violence, and Statecraft in Contemporary South Africa (United Nations University Press 2011)

Liebenberg S Socio-Economic Rights: Adjudication under a Transformative Constitution (Juta 2010)

Segatti A & Landau BL Contemporary Migration to South Africa: A Regional Development Issue (Agence Française de Development and the World Bank 2011)

Journal Articles

Amit R 'Flawed Status Determination and Failures of South Africa's Refugee System to Provide Protection' (2011) 23 *Int'l J Refugee L* 458

Amit R 'NO WAY IN: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices' (2012) ACMS Research Report 37

Belvedere F 'The struggle for the inclusion of asylum seekers and refugees' (2008) 24 *Refuge* 57-70

Christie K 'Security and forced migration concerns in South Africa' (1997) 6(1) *African Security Review* 42-48

Crush J & McDonald D 'Evaluating South African Immigration Policy after Apartheid' (2001) 48 *Africa Today* 1-13

Inman RP & Rubinfeld DL 'Understanding the Democratic Transition in South Africa' (2012) Working paper 17799

De Jager J 'Addressing xenophobia in the equality courts of South Africa' (2011) 28.8 *Refuge* 107-116

Grahl-Madsen A Territorial Asylum (1980) 75 *American Journal of International Law* 189-191

Killander M 'How International Human Rights Law Influences Domestic Law of Africa' (2003) 17 *Law, Democracy and Development* 378-392

Naldi GJ 'The Organization of Africa Unity: An Analysis of its Role' (1989) 35 *Journal of African Law* 217-219

Murray MJ 'Alien Strangers in our Midst: The Dreaded Foreign Invasion and Fortress South Africa' (2003) 37 *Canadian Journal of African Studies* 440-466

Schockaert L, Venables E, Gil-Bozo M-T et al 'Behind the Scenes of South Africa's Asylum Procedure: A Qualitative Study on Long-term Asylum-Seekers from the Democratic Republic of Congo' (2020) 39(1) *Refugee Survey Quarterly* 26-55

Vigneswaran D 'A Foot in the Door: Access to Asylum in South Africa' (2008) 25(2) *Refuge: Canada's Journal on Refugees* 41-52

Weissbrodt D & Hortreiter I 'The Principle of Non-Refoulement: Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in Comparison with the Non-Refoulement Provisions of Other International Human Rights Treaties' (1999) 5 *Buffalo Human Rights Law Review* 1-73

Zlotnik H 'Migrants' Rights, Forced Migration and Migration Policy in Africa' (2003) *In Conference on African migration in comparative perspective, Johannesburg, South Africa* 4-7

Internet sources

Africa Union available at <https://au.int/> (accessed 7 April 2020)

Amit R 'Paying for Protection: Corruption in South Africa's Asylum System' available at <https://www.migrationpolicy.org/article/paying-protection-corruption-south-africa%E2%80%99s-asylum-system> (accessed 25 January 2020)

Amit R 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination' available at <http://www.migration.org.za/wp-content/uploads/2017/08/All-Roads-Lead-to-Rejection-Persistent-Bias-and-Incapacity-in-South-African-Refugee-Status-Determination.pdf> (accessed 19 February 2020)

Ampofo-Anti OY 'Concourt takes compassionate approach to people who enter country unlawfully' available at <https://www.groundup.org.za/article/concourt-takes-compassionate-approach-people-who-enter-country-unlawfully/> (accessed 30 January 2020)

'Asylum & The Rights of Refugees' available at <https://ijrcenter.org/refugee-law/> (accessed 21 January 2020)

Bornman J 'Durban Refugee Office turns away asylum applicants' available at <https://mg.co.za/article/2019-07-23-durban-refugee-office-turns-away-asylum-applicants> (accessed 20 October 2019)

Botha C 'In the shadow of the Border Management Authority Bill' available at <http://www.politicsweb.co.za/opinion/world-refugee-day--in-the-shadow-of-the-border-man> (accessed 19 March 2019)

Brynard DJ 'The duty to act fairly: A flexible approach to procedural fairness in public administration' available at <http://uir.unisa.ac.za/bitstream/handle/10500/6460/brynardadminipub2010184.pdf?sequence=1> (accessed 19 June 2019)

Chamunorwa W 'The Unemployment Impact of Immigration in South Africa' available at https://www.researchgate.net/publication/272708139_The_Unemployment_Impact_of_Immigration_in_South_Africa/link/5e45438a299bf1cdb925052a/download (accessed 20 June 2020)

Christie K 'Security and forced migration concerns in South Africa' (1997) 6 *African Security Review* available at <http://www.iss.co.za/ASR/6No1/Christie> (accessed 6 April 2019)

'Corruption plagues South Africa's asylum system' available at <https://reliefweb.int/report/south-africa/corruption-plagues-south-africa-s-asylum-system> (accessed 16 August 2020)

'Corruption watch raises concerns over unchecked corruption at refugee reception centre' available at <https://www.corruptionwatch.org.za/cw-raises-concerns-unchecked-corruption-desmond-tutu-refugee-centre/> (accessed 29 August 2020)

Corruption Watch 'Asylum at a price available: How corruption impacts those seeking for legal protection in South Africa' available at <https://www.corruptionwatch.org.za/wp-content/uploads/2016/12/Project-Lokisa-Digital-FINALRRU-Logo-2Dec2016.pdf> (accessed 29 August 2020)

Courbet F 'UNHCR: The UN Refugee Agency' available at <http://www.unhcr.org/pages/49c3646c1d9.html> (accessed 14 June 2019)

Crush J & McDonald D 'Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid' (2001) 48(3) *Africa Today* 3 available at www.jstor.org/stable/4187430 (accessed 6 June 2019)

Department of Home Affairs 'Annual Report' available at <http://www.dha.gov.za/files/Annual%20Reports/AnnualReport2017-18.pdf> (accessed 27 December 2019) 94

DHA 'Annual Report' available at <http://www.dha.gov.za/files/Annual%20Reports/AnnualReport2017-18.pdf> (accessed 27 December 2019)

'Documented Migration' (2003) available at <http://www.statssa.gov.za/publications/Report-03-51-03/Report-03-51-032003.pdf> (accessed 09 November 2019)

Dougan L 'Queues of foreign nationals at UN offices illustrate the desperation to leave South Africa' available at <https://www.dailymaverick.co.za/article/2019-10-17-queues-of-foreign-nationals-at-un-offices-illustrate-the-desperation-to-leave-south-africa/> (accessed 11 January 2020)

EWN Newspaper '1,500 Flee Homes in SA Amid Xenophobic Violence: UN' available at <https://ewn.co.za/2019/09/20/1-500-flee-homes-in-s-africa-amid-xenophobic-violence-un> (accessed 19 October 2019)

Freedman J, Crankshaw T & Mutambara V 'Sexual and reproductive health of asylum seeking and refugee women in South Africa: understanding the determinants of vulnerability' available at <https://www.tandfonline.com/doi/pdf/10.1080/26410397.2020.1758440> (accessed 26 July 2020)

Fuzile B 'Corruption crackdown looms at Pretoria refugee office' available at <https://www.timeslive.co.za/news/south-africa/2018-09-01-corruption-crackdown-looms-at-pretoria-refugee-office/> (accessed 25 April 2020)

'Global appeal 2015' available at <http://www.unhcr.org/5461e604b.html> (accessed 15 June 2019)

'Global focus' UNHCR operation worldwide available at <http://reporting.unhcr.org/population> (accessed 4 June 2019)

Goodwin-Gill GS 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-Penalization, Detention, and Protection' available at <https://www.refworld.org/docid/470a33b10.html> (accessed 6 August 2019)

Hamilton L 'How Home Affairs has been ignoring 2 court orders, putting asylum seekers at risk' available at <https://www.news24.com/Columnists/GuestColumn/how-home-affairs-has-been-ignoring-2-court-orders-putting-asylum-seekers-at-risk-20180404> (accessed 30 April 2020)

HRW 'No Healing Hear violence, discrimination and Barriers to Health for Migrants in South Africa' available at <https://www.hrw.org/report/2009/12/07/no-healing-here/violence-discrimination-and-barriers-health-migrants-south-africa> (accessed 12 February 2020)

HRW 'South Africa's Obligations under International Human Rights Law' available at <https://www.hrw.org/legacy/reports98/sareport/App1a.htm> (accessed 2 July 2019)

HRW Report 'They Have Robbed Me of My Life' Xenophobic Violence Against Non-Nationals in South Africa available at <https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south> (accessed 18 December 2020)

HRW 'PROHIBITED PERSONS Abuse of Undocumented Migrants, Asylum-Seekers, and Refugees in South Africa 1998' available at <http://www.hrw.org/legacy/reports98/sareport/> (accessed 02 July 2019)

HSF 'The State of the South Africa Refugee Protection Regime' available at <https://hsf.org.za/publications/hsf-briefs/the-state-of-the-south-african-refugee-protection-regime-part-i-current-status> (accessed 14 October 2019)

'Issues that affect migrants and citizens: Engagement with NGOs & stakeholders' available at <https://pmg.org.za/committee-meeting/29180/> (accessed on 7 April 2020)

Kavuro C 'Refugees and asylum seekers: Barriers to accessing South Africa's labour market' available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072015000100012 (accessed 14 October 2019)

Khan F 'Interpreting for refugees: where practicable and necessary only?' (2011) 28.2 *Refuge* 93' available at <https://refuge.journals.yorku.ca/index.php/refuge/article/view/36482/33169> (accessed 21 May 2019)

Khan F 'Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach' (2007) available at <https://www.researchgate.net/publication/237673324> (accessed 6 April 2019)

LRC 'How an application for asylum is made' available at http://lrc.org.za/art_external/pdf/2015_Asylum_seeker_guide2_How_to_apply_for_asylum_LRC%20Publication.pdf (accessed 20 June 2020)

LHR 'Regulation to the South African Refugees Act' available at <http://www.lhr.org.za/policy/regulations-sa-refugees-act> (accessed 10 November 2019)

Landau L, Ramjathan-Keogh K & Singh G 'Xenophobia in South Africa and problems related to it 2005' available at https://www.academia.edu/2447383/Xenophobia_in_South_Africa_and_problems_related_to_it (accessed 17 June 2019)

Liebenberg S 'Human Development and Human Rights South African Country' available at http://hdr.undp.org/sites/default/files/sandra_liebenberg.pdf (accessed 11 June 2019)

Makgotho S 'SA must implement stricter immigration laws' available at <https://citypress.news24.com/Voices/sa-must-implement-stricter-immigration-laws-20190917> (accessed 02 December 2019)

Manicom D & Mullagee F 'The Status of Asylum Seekers and Refugees in South Africa: An Independent' (2010) *Africa Insight* 39 available at <http://www.ajol.info/index.php/ai/article/view/54672> (accessed 12 July 2019)

Maunganidza O & Mbiyozo AN 'South Africa's Border Management Authority dream could be a nightmare' available at <https://www.dailymaverick.co.za/article/2020-08-11-south-africas-border-management-authority-dream-could-be-a-nightmare/> (accessed 28 August 2020)

Mavhinga D 'South Africa Launches Plan to Combat Xenophobia and Racism: Crucial Step in South Africa's Path to Justice and Equality' available at <https://reliefweb.int/report/south-africa/south-africa-launches-plan-combat-xenophobia-and-racism> (accessed on 18 April 2020)

Mitchley A 'Corruption still rife at all stages of asylum process in South Africa' available at <https://www.news24.com/news24/southafrica/news/corruption-still-rife-at-all-stages-of-asylum-process-in-south-africa-lhr-report-20200916> (accessed 18 December 2020)

Mphahlele M 'Calls mount for reopening of refugee reception office in Cape Town' available at <https://www.iol.co.za/news/politics/calls-mount-for-reopening-of-refugee-reception-office-in-cape-town-16599664> (accessed 1 April 2019)

MRMP Report 'Barriers to Asylum the Marabastad Refugee Reception Office' (2008) available at <http://www.migration.org.za/wp-content/uploads/2017/08/Barriers-to-asylum-the-Marabastad-refugee-reception-office.pdf> (accessed 12 July 2019)

News Deeply 'South Africa Steps up deportation of asylum seekers' available at <https://www.newsdeeply.com/refugees/articles/2017/10/17/south-africa-steps-up-deportation-of-asylum-seekers> (accessed 2 April 2019)

'Obstacles in the Refugee Status Determination Process' available at <https://www.hrw.org/reports/2005/southafrica1105/5.htm> (accessed 16 August 2020)

Ramoroka V 'The Determination of Refugee Status in South Africa: A Human Rights Perspective' available at http://uir.unisa.ac.za/bitstream/handle/10500/13850/dissertation_ramoroka_v.pdf?sequence=1&isAllowed=y (accessed 25 August 2019)

'Refugee Centre' available at <http://www.dha.gov.za/index.php/contact-us/24-refugee-centres> (accessed 10 August 2020)

'Refugee Population by Country or territory of asylum' available at <https://data.worldbank.org/indicator/sm.pop.refg?view=map&year=2017> (accessed 3 April 2019)

Smith C 'No more visas in country for asylum seekers' available at <http://www.702.co.za/articles/274331/nomore-visas-in-country-for-asylum-seekers?> (accessed 28 December 2019)

'South Africa: Failing asylum system is exacerbating xenophobia' available at <https://www.amnesty.org/en/latest/news/2019/10/south-africa-failing-asylum-system-is-exacerbating-xenophobia/> (accessed 23 April 2020)

Steinberg J 'A mixed reception; Mozambican and Congolese Refugees in South Africa' (2005) 117 *Monograph* available at <http://www.iss.co.za/pubs/Monographs/No117> (accessed 6 April 2019)

UN Agencies in SA available at <http://www.un.org.za/agencies/> (accessed 03 August 2019)

United Nation available at <https://www.un.org/en/> (accessed 09 August 2020)

UNHCR 'Asylum seekers' available at <http://www.unhcr.org/pages/49c3646c137.html> (accessed 09 May 2019)

UNHCR 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' available at <https://www.unhcr.org/4d9486929.pdf> (accessed 08 April 2020)

UNHCR 'Guidelines on the Protection of Women Refugee' available at <http://www.unhcr.org/3d4f915e4.html> (accessed 05 July 2019)

UNHCR 'Global Trends: Forced Displacement in 2018' available at <https://www.unhcr.org/globaltrends2018/> (accessed on 24 April 2020)

UNCHR 'Refugee Status Determination' available at <https://www.unhcr.org/refugee-status-determination.html> (accessed 09 August 2020)

UNCHR 'The foundation of International law' available at <https://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html> (accessed 9 August 2020)

UNHCR 'Non-refoulement and the Scope of its Application' available at <https://www.unhcr.org/4d9486929.pdf> (accessed 6 August 2019)

UNHCR 'Operation In South Africa, Lesotho and Swaziland Factsheet' available at <http://www.unhcr.org/protection/operations/524d87689/south-africa-fact-sheet.html> (accessed 10 October 2019)

UNHCR 'South Africa' available at <https://www.unhcr.org/3fc7548e0.pdf> (accessed 13 June 2020)

Wallis L 'The Right to Physical Security for Refugees: A South African Perspective' available at http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Paper_2_of_2013.pdf (accessed 14 June 2019)

Washinyira T 'Home Affairs to open refugee office in Maitland' the timeslive' available at <https://www.timeslive.co.za/news/south-africa/2019-01-26-home-affairs-to-open-refugee-office-in-maitland/> (accessed 16 March 2019)

White Paper 'White Paper on International Migration for South Africa' available at <http://www.dha.gov.za/WhitePaperonInternationalMigration-20170602.pdf> (accessed 4 July 2019)

Constitution and Legislation

Alien Control Act 96 of 1991

Administrative Justice Act 3 of 2000

Border Management Authority Act 2 of 2020

Constitution of the Republic of South Africa, 1996

Immigration Act 13 of 2002

Interim Constitution of the Republic of South Africa Act 200 of 1993

Prevention and Combating of Corruption Activities Act 12 of 2004

Refugees Act 130 of 1998

Refugees Amendment Act 11 of 2017

Regulations to the Refugees Act, 6 April 2000.

Refugees Regulations of Section 38 of the Refugees Act, 2020.

Case Law

Arse v Minister of Home Affairs (25/2010) [2010] ZASCA 9, 2010 (7) BCLR 640 (SCA), [2010] 3 All SA 261 (SCA), 2012 (4) SA 544 (SCA) (12 March 2010)

Commissioner, Competition Commission v General Council of the Bar of South Africa 2002 (6) SA 606 (SCA)

Deo Gracias Katsshingu v The Standing Committee for Refugee Affairs unreported case Western Cape High Court 19726/2010 (2 November 2011)

Eisenberg & Associates v Director-General, Department of Home Affairs 2012 (3) SA 508 (WCC)

Ersumo v Minister of Home Affairs & Others (69/2012) [2012] ZASCA 31, 2012 (4) SA 581 (SCA), [2012] 3 All SA 119 (SCA) (28 March 2012)

Gavric v Refugee Status Determination Officer, Cape Town and Others (CCT217/16) [2018] ZACC 38, 2019 (1) SA 21 (CC), 2019 (1) BCLR 1 (CC) (28 September 2018)

Jamole v Director-General Home Affairs and Another (40010/2017) [2018] ZAGPPHC 805 (12 February 2018)

Katabana v The Chairperson of the Standing Committee for Refugee Affairs (WC) unreported case no 25061/2011 (14 December 2012)

Kiliko v Minister of Home Affairs 2006 (4) SA144 (C)

Lawyers for Human Rights v Minister of Home Affairs (CCT 18/03) [2004] ZACC 12, 2004 (4) SA 125 (CC), 2004 (7) BCLR 775 (CC) 79

Lawyers for Human Rights and Another v Minister of Home Affairs and Another 2002 (8) BCLR 891 (T)

M v Minister of Home Affairs and Others (6871/2013) [2014] ZAGPPHC 649 (22 August 2014)

Mayemba v Chairperson of Standing Committee for Refugee Affairs and Others (19960/2014) [2015] ZAWCHC 86 (10 June 2015)

Minister of Home Affairs & Others v Watchenuka & Others (010/2003) [2003] ZASCA 142

Osman v Minister of safety and security 2011 JOL 27143 (WCC)

Rahim v Minister of Home Affairs (965/2013) [2015] ZASCA 92, 2015 (4) SA 433 (SCA), [2015] 3 All SA 425 (SCA) (29 May 2015)

S v Roberts 1999 (4) SA 915 (SCA)

Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others (11681/12) [2013] ZAWCHC 49, 2013 (3) SA 531 (WCC), [2013] 2 All SA 589 (WCC), 2013 (7) BCLR 819 (WCC) (19 March 2013)

Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others (1107/2016) [2017] ZASCA 126, [2017] 4 All SA 686 (SCA), 2018 (4) SA 125 (SCA) (29 September 2017)

Tafira and Others v Ngozwane and Others (12960/06) [2006] ZAGPHC 136 (12 December 2006)

Tantoush v Refugee Appeal Board 2008 (1) SA 232 (T)

International instruments

1951 Convention Relating to the Status of Refugees

1967 Protocol Relating to the Status of Refugees

1969 OAU Convention Governing Specific Aspects of Refugee Problems in Africa

Universal Declaration of Human Rights (UDHR) 1948

Thesis and dissertations

Enwere OC '*Human rights protection of Refugees: Threat or Solution*' (1994-2004) (LLM-dissertation University of the Witwatersrand 2006)

Peberdy S '*Selecting immigrants: Nationalism and National Identity in South Africa's Immigration Policies, 1910-1998*' (Ph D thesis, Queen's University, Canada 1999)

Ramoroka V '*The Determination Of Refugee Status In South Africa: A Human Rights Perspective*' (LLM Dissertation Unisa 2014)

