

**ASPECTS OF SOUTH AFRICA'S REFUGEE STATUS  
DETERMINATION PROCESS**

**LLM Mini-dissertation**

**By**

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**Prepared under the supervision of**

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**DECLARATION**

I, Olivia Kock, hereby declare that this mini-dissertation is original and has never been presented in the University of Pretoria or any other institution. I also declare that any secondary information used has been duly acknowledged in this mini-dissertation.

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## **ACKNOWLEDGEMENTS**

To Mita Rose and Onalenna Leo. ONE LOVE Mamma.

Professor Frans Viljoen. I admire your wealth of education. I am humbled when in your presence. I aspire to achieve your successes.

## **ABSTRACT**

The Refugees Act 130 of 1998 enabled South Africa to treat asylum seekers in a humanitarian and dignified manner. However, more than 20 years into democracy, the refugee status determination system, which is the responsibility of the Department of Home Affairs (DHA) is overburdened with asylum applications. The core criticism against the DHA is its failure to finalize asylum application within 180 days.

The key attraction of South Africa's asylum regime is its non-encampment policy, which bestows on an asylum seeker the right to work or study pending the outcome of the asylum application.

This mini-dissertation will not focus on challenges that asylum seekers and refugees may encounter when asserting a specific entitlement. The aim is instead to highlight red flags which will assist any interested party to have a basic understanding of what refugee status determination in South Africa entails.

Although refugee status determination is an administrative process, South African courts have laid down jurisprudence confirming the following: (i) At the moment a foreigner expresses an intention to apply for asylum, he or she must be afforded the opportunity to do so; (ii) Illegal entry into the state do not bar application for asylum; (iii) Equality before the law affords asylum seekers suspected of being illegal the right to appear before a competent court within 48 hours of arrest; and (iv) Asylum seekers must apply for immigration permits from abroad. Differently put, an asylum seeker may not apply for a change in status, pending adjudication of an asylum claim in South Africa.

To deter illegal migration to South Africa, the DHA has done the following: (a) It unilaterally closed the Cape Town and Port Elizabeth Refugee Reception Offices (RRO's); (b) It established a Border Management Agency to dispense with adjudication of asylum applications at a border post or point of entry; (c) It granted special dispensation work permits to asylum seekers from Southern African Development Community (SADC) countries.

Refugee status determination and dissecting a persecution claim may be perceived as two different enquiries. The latter enquiry is often the subject matter of statutory tribunals and courts during judicial review proceedings. This study explains the key functions of role-players, their different processes and inherent functions under the umbrella of refugee status determination.

It is recommended that attorneys and non-governmental organisations be allowed to actively participate, from the inception stage, in South Africa's refugee status determination process. This will minimise the life-cycle of an asylum claim which often ends in judicial review proceedings. This forces the DHA to be accountable, transparent and to reflect on its commitment to treat asylum seekers, refugees and foreigners in good faith and dignity.

## **LIST OF ABBREVIATIONS**

CC	-	Constitutional Court
DHA	-	Department of Home Affairs
HC	-	High Court
LSP	-	Lesotho Special Permit
NA	-	National Assembly
NCOP	-	National Council of Provinces
NISS	-	Non-Immigration Information System
RAB	-	Refugee Appeals Board
RRO	-	Refugee Reception Officer/Office
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
UNHCR	-	United Nations High Commissioner for Refugees
ZSP	-	Zimbabwean Special Permit

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## CHAPTER 1: INTRODUCTION

### 1.1 Background to the research problem

Economic migrants, asylum seekers and refugees are inherently specific categories of vulnerable groups of people. Although these terms are often referred to interchangeably, they are distinguishable. Economic migrants are a non-legal umbrella term for a wide variety of people who migrate from one country to another to advance their economic and professional ambitions.<sup>1</sup> An asylum seeker is a foreign national who fled from his or her country of origin due to persecution or serious harm, who applies for asylum in South Africa and awaits the outcome of the asylum application. The term ‘refugee’ refers to a foreign national whose asylum application based on claims of persecution succeeds and receives formal recognition in terms of section 24(3)(a) of the Refugees Act 130 of 1998.<sup>2</sup> In South Africa, asylum seekers and refugees acquire the legal status to reside, to be employed and to study, pending the finalization of their asylum claim. The difference between an asylum seeker and a refugee lies in the outcome of their persecution claim. An asylum seeker becomes a refugee if the persecution claim succeeds. Refugee status may lead to permanent resident status and citizenship. An unsuccessful asylum seeker may be deported to his or her country of origin in terms of the Immigration Act 13 of 2002.<sup>3</sup>

In terms of section 21(2)(a)<sup>4</sup> of the Refugees Act, everyone who expresses an intention to apply for asylum must be afforded the opportunity to do so. Section 21(4)<sup>5</sup> of the Refugees Act grants asylum seekers immunity from arrest until all rights, up to the stage of judicial review, have

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<sup>1</sup> ‘Explainer: the difference between asylum seekers, refugees and economic migrants’ *The Conversation* 4 August 2015 [www.theconversation.com/explainer-the-difference-between-asylum-seekers-refugees-and-economic-migrants-45615](http://www.theconversation.com/explainer-the-difference-between-asylum-seekers-refugees-and-economic-migrants-45615) (accessed on 4 November 2016).

<sup>2</sup> Act 130 of 1998, hereafter the ‘Refugees Act’.

<sup>3</sup> Act 13 of 2002, hereafter the ‘Immigration Act’.

<sup>4</sup> Section 21(2)(a): The Refugee Reception Officer concerned - (a) must accept the application from the applicant.

<sup>5</sup> Section 21(4): Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if - (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and where, applicable, such person has had an opportunity to exhaust his rights of review or appeal in terms of Chapter 4.

been exhausted. South African courts have laid down clear legal principles stating that foreigners who have entered the country illegally or whose status has become illegal subsequent to entering, must be allowed to apply for asylum and that an immigration officer has a discretion not to arrest a foreigner deemed to be illegal.

The DHA is of the view that South Africa's porous boundaries are rationally connected to the amount of economic migrants, asylum seekers and refugees, which result in undue long refugee status determination processes. The solution, according to the DHA, is the establishment of a Border Management Authority, which will adjudicate asylum claims at a border post. The success of such a system can only be ascertained at a future date.

An impending legal action is looming if the DHA fails to grant permanent residency status to recipients of special dispensation permits, dating back to 2009, when it expires in 2020. The DHA, in granting these special dispensation work permits, may be perceived to be giving recognition to economic migrants on South African soil even though economic migrants do not fall within the purview of the Refugees Act and the Immigration Act.

## **1.2 Problem statement**

Migration and movement of people is a worldwide phenomenon. The researcher was fortunate to gain first-hand experience of South Africa's treatment of foreign nationals on its soil, especially protection afforded to asylum seekers, refugees and their dependents under the auspices of the Refugees Act. The opinion I formed of the DHA as member of South Africa's Refugee Appeals Board (RAB), from 1 December 2013 to 16 August 2016, sparked my interest in this mini-dissertation. The researcher contends that the DHA has no intention of providing protection to asylum seekers, refugees and their dependents in South Africa.

The Refugee Status Determination Officer (RSDO) is a key role player in South Africa's refugee status determination process. He or she has the powers to grant or reject an asylum seeker's claim. The Refugees Act and its Regulations are silent on the criteria that constitutes an unfounded or manifestly unfounded, abusive or fraudulent claim. No guidance exists to assist an RSDO to arrive at an informed decision.

A RSDO's prerogative, in the researcher's view, is to reject asylum claims, if he or she is not satisfied as to the veracity of the applicant's claim. The result would effectively shift the onus on to the asylum seeker to lodge an appeal with the RAB or to file a written review with the Standing Committee for Refugee Affairs (SCRA). Although oral evidence is allowed in a RAB

hearing where an appeal was lodged against an adverse finding by the RSDO that the claim is unfounded, a RSDO is not called to give evidence at a RAB hearing. A RSDO is thus barred from stating a proper case for his or her adverse decision. The RSDO cannot also rebut allegations that his or her adverse decision is factually incorrect. An RSDO is also not privy to new evidence placed before the RAB or the SCRA.

What I grappled with was the evidential value the RAB must attach to the file contents having regard to the following: The biometrics form a Refugee Reception Officer (RRO) assisted the asylum seeker to complete is a statement and not an affidavit. An affidavit is duly signed before a commissioner of oaths, and averments contained therein is prima facie proof. A possible solution to this predicament, which is not unheard of in this technological age that we live in, may be to video or mechanically record the application process and subsequent interviews, and to store footage on a proper DHA server. Untarnished evidence will be preserved until the need arises to analyse it.

Of importance will be the extent to which RROs and RSDOs have explained aspects of South Africa's refugee status determination procedure under the Refugees Act to applicants, having regard to the language that was used. More importantly, the enquiry should consider whether a persecution claim was properly interrogated. The demeanour of the DHA official, the asylum seeker and the gender imbalances, if any, would assist a decision maker. The aforementioned is real evidence which will rebut or corroborate either party's claim. Instead, files currently leave only a paper trail; the veracity thereof not being easy to ascertain. The SCRA conducts its review on paper only. An injustice is perpetrated against asylum seekers whose adverse decision for reasons of manifestly unfounded, abusive or fraudulent claims become the subject matter of a SCRA review. Unlike a RAB appeal notice that is in affidavit format, there is no requirement for written representations to the SCRA. The SCRA may set aside or confirm an adverse RSDO decision. The SCRA does not have the power to grant refugee status. Worst case scenario is that if upon re-hearing an asylum seeker's claim, a different RSDO fails to grant asylum, he or she can only reject the asylum seekers claim as unfounded, triggering an appeal to the RAB. This illustrates the never-ending life-cycle of an asylum seeker's claim.

Section 27(c) of the Refugees Act regulating certification of the decision by the SCRA is a setback for refugees who are not permitted to remain indefinitely in South Africa. The onus is on the refugee to trigger the certification process. There is no time frame stipulated on how long the SCRA must adjudicate on the application. A refugee identity document does not

equate to permanent residency status. The dilemma in practice is that without formal section 27(c) certification, a refugee cannot apply for permanent residency status in South Africa. Moreover, the SCRA reserves the right to unilaterally start the section 36, withdrawal of a refugee permit process, if the conditions in the refugees' country that caused him or her to flee has ceased to exist. This is in marked contrast to the expectation created in regulation 3(1) that adjudication of an asylum seeker's application will be dispensed with by the DHA within 180 days.

The aim of this research is to provide a brief overview of certain aspects of South Africa's refugee status determination process. The literature review highlights jurisprudence established by South African courts under the ambit of equality before the law. It also illustrates the hostile attitude of the DHA towards asylum seekers, refugees and foreigner nationals on South African soil. At the core, is the creation of refugee camps while the Border Management Agency attends to refugee status determination at a border post, confirming the perception that it represents the rationale behind the DHA closing of RRO's across South Africa.

Migrants from the Southern African Development Community (SADC) might receive temporary relief in the form of work permits. This is on condition, however, that holders of work permits will not have a claim to permanent residency status when the permit expires.

### **1.3 Main research questions**

The main research question addressed in this research is: Does section 21(2)(a) of the Refugees Act allow for the granting of refugee status to asylum seekers on grounds of economic hardship?

Following from the main question, the following sub-questions are addressed:

- (i) What are the criteria for applying for asylum under the Refugees Act?
- (ii) What roles do statutory tribunals play in South Africa's refugee status determination process?
- (iii) How does the Immigration Act manifest itself in relation to asylum seekers?
- (iv) Is the Border Management Authority Bill, 2015, an effective tool to deter illegal migration to South Africa?
- (v) What actual or perceived recognition is given to economic migrants in South Africa?

## 1.4 Research methodology

The study will employ a desktop research to practically understand the legislative framework of section 21(2)(a) of the Refugees Act. In particular, it will provide insight on how the statutory bodies created under the Refugees Act, namely the Standing Committee for Refugee Affairs (SCRA) and the Refugee Appeals Board (RAB), conduct their review and appeal processes.

Literature review is used to illustrate the human rights centred approach of South African courts when called upon to interpret provisions of the Refugees Act, the Immigration Act and the Constitution of the Republic of South Africa.

## 1.5 Terms and definitions

The following persons or concepts are critical to the understanding and effective implementation of South Africa's Refugees Act:

**Asylum seeker transit permits:** A non-renewable permit issued to a foreign national at a border post instructing the foreign national to report to a RRO within 14 days to apply for asylum.

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

**Refugee:** A person who was forced to flee from his or her country of origin due to persecution, war or violence.

**Refugee Appeals Board (RAB):** An independent statutory body with its headquarters in Pretoria, created in terms of section 12(1) of the Refugees Act. The RAB must hear and determine any questions of law raised during any appeal lodged. Differently put, the RAB reviews, by way of oral hearings, unfounded decisions of the RSDOs.

**Refugee Reception Office (RRO):** A DHA office situated in Cape Town, Port Elizabeth, Pretoria, Musina and Durban where a foreign national may apply for asylum. Currently only RRO's in Musina, Pretoria and Durban accept new asylum applications.

**Refugee Reception Officer (RRO):** A DHA official an asylum seeker encounters who assists an asylum seeker to complete his or her biometrics application form. The RRO will take a photograph and fingerprint of the asylum seeker for the issuing of a section 22-permit.

**Refugee Status Determination Officer (RSDO):** A DHA official who grants or rejects an asylum seekers asylum application after a formal interview.

**Section 22-permit:** An asylum seekers permit allowing the holder to study, to work or conduct business pending the outcome of his or her asylum application that remains valid until the exhaustion of rights to review and appeal.

**Standing Committee for Refugee Affairs (SCRA):** An independent statutory body with its headquarters in Pretoria, created in terms of section 9(1) of the Refugees Act. The SCRA reviews manifestly unfounded, abusive or fraudulent decisions of RSDOs, albeit that such reviews are determined on the papers only.

## **CHAPTER 2: APPLYLING FOR ASYLUM IN SOUTH AFRICA**

### **2.1 Introduction**

This chapter is divided into four sections that attempt to explain the criteria needed to apply for asylum under the Refugees Act. First, it will discuss the era prior and post promulgation of the Refugees Act. Second, it will highlight broad implications of the adoption of the first Constitution of the democratic South Africa. Third, a brief synopsis of the key legislative provisions relevant to applying for asylum under section 21(2)(a) of the Refugees Act will be discussed. Last, the conclusion will highlight that the term “everyone” as stated in section 21(2)(a) of the Refugees Act may literally be interpreted to extend to every foreign national on South African soil. Special eligibility criteria, which have been granted to nationals from Zimbabwe and Lesotho, will be discussed in chapter 6 (section 6.2).

### **2.2 Position prior to the Refugees Act 130 of 1998**

Asylum seekers and refugees were not recognised in South Africa until 1993.<sup>6</sup> South Africa did not subscribe to any international refugee conventions during the apartheid regime. It administered its refugee law policy on an ad hoc basis granting refugee status mostly to white nationals from Zimbabwe and Mozambique. Ironically, South Africa refused to grant refugee status to black Mozambican nationals who fled from the civil war during the 1980s.<sup>7</sup>

South Africa became a full democracy in 1994. South Africa’s first fully democratic Constitution was adopted in November 1993 and it came into effect on 27 April 1994,<sup>8</sup> the date which coincided with South Africa’s first democratic elections.

The Aliens Control Act 96 of 1991<sup>9</sup> governed immigration during South Africa’s apartheid regime. Critics of the Aliens Control Act described it as one of the most ignominious remnants

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<sup>6</sup> ‘Refugees and asylum seekers’ *Brand South Africa’s information gateway to South Africa* 25 April 2016.

<sup>7</sup> Crush, J ‘South Africa: Policy in the face of xenophobia’ <https://www.migrationpolicy.org/article/south-africa-policy-face-xenophobia/> (accessed on 11 January 2018).

<sup>8</sup> ‘Timeline 20 years of Democracy 1994 to 2014’ [www.sahistory.org.za/article/timeline-20-years-democracy-1994-2014](http://www.sahistory.org.za/article/timeline-20-years-democracy-1994-2014) (accessed on 25 April 2016).

<sup>9</sup> Hereafter the ‘Aliens Control Act’.

of the apartheid regime, symbolizing the racist and anti-Semitic sentiments inherent in the past society. It institutionalised the preference of whites over non-whites in immigration-related issues.<sup>10</sup> Under section 55 of the Aliens Control Act, no decision of the DHA was reviewable by a court or tribunal and persons could be held in detention indefinitely. In other words, judicial review proceedings were non-existent.

The drafters of the Refugees Act remedied this defect. The Standing Committee for Refugee Affairs (SCRA) and the Refugee Appeals Board (RAB) are statutory tribunal bodies whose decisions may become the subject of judicial review proceedings in terms of the Promotion of Administrative Justice Act 3 of 2002<sup>11</sup> passed pursuant to section 33<sup>12</sup> of the Constitution of the Republic of South Africa.

### **2.3 Promulgation of the Refugees Act 130 of 1998**

The Refugees Act was passed in 1998 and promulgated in April 2000. In so doing, South African law reflected international conventions, protocols and human rights instruments governing specific aspects of refugee problems. Effectively, South Africa committed itself to accept refugees on its soil and to treat such refugees in accordance with international humanitarian law standards.

Soon after passing the Refugees Act, South Africa received an influx of refugees on its soil. The DHA in a statistical analysis fax dated 27 January 1998<sup>13</sup> reported to Human Rights Watch that it received a total of 16, 385 new asylum applications, from 1993 to 1998. Of these, a total of 6, 585 applications were rejected. A total of 1, 588 applications were rejected as manifestly unfounded, abusive or fraudulent in terms of section 24(3)(c) of the Refugees Act. A total of 1, 155 asylum applications were cancelled. 44 asylum seekers were granted immigration

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<sup>10</sup> Hicks, TF 'The constitution, aliens control act, and xenophobia: The struggle to protect South Africa's pariah – the undocumented immigrant' (1999) 7 *Indiana Journal of Global Legal Studies* 1.

<sup>11</sup> Hereafter the 'Promotion of Administrative Justice Act'.

<sup>12</sup> Section 33(1) and (2) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair and that everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. Section 33(3) of the Constitution requires national legislation to be enacted to give effect to those rights, and to – provide for the review of administrative action by a court or, where appropriate, and independent and impartial tribunal.

<sup>13</sup> The source is on file with the author.

permits and 3, 823 were granted temporary resident permits. From these statistics, more asylum seekers adverse decisions were the subject of review by the SCRA. The United Nations High Commissioner for Refugees (UNHCR) describes South Africa's Refugees Act as liberal in that it incorporates all the basic principles of refugee protection from freedom of movement, the right to be employed and the right to access basic social services.<sup>14</sup>

Asylum seekers' right to employment was tested in the *Minister of Home Affairs and Others v Watchenuka* matter.<sup>15</sup> In its decision, the Supreme Court of Appeal (SCA) confirmed that section 11(h)<sup>16</sup> of the Refugees Act empowers the SCRA to determine specific conditions relating to study or work under which an asylum seeker permit must be issued. This matter arose from the fact that the SCRA had taken a decision to lift the general prohibition on employment, because the asylum application of the applicant and her disabled son had not been finalized within 180 days. Confirming the SCRA approach, the SCA held that the general prohibition against employment was a material invasion of the human dignity of asylum seekers.

The last day in office of the immediate past Minister responsible for the DHA, Mr. Malusi Gigaba, was on 30 March 2017. Mr. Gigaba holds a view different to that of the SCA in the *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism* matter<sup>17</sup> on the issue of "spaza shops"<sup>18</sup> run by asylum seekers.<sup>19</sup> In relation to asylum seekers, Mr. Gigaba distinguishes between the right to work, and the right

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<sup>14</sup> Refugees and asylum seekers' *Brand South Africa's* [https://www.brandsouthafrica.com/tourism-south-africa/travel/documents/refugees\\_asylum](https://www.brandsouthafrica.com/tourism-south-africa/travel/documents/refugees_asylum) (accessed on 25 April 2016).

<sup>15</sup> *Minister of Home Affairs and Others v Watchenuka & others* 2004 1 SA 21 (SCA).

<sup>16</sup> Section 11(h): The Standing Committee must determine the conditions relating to study or work in the Republic under which an asylum seeker permit must be issued.

<sup>17</sup> *Somali Association of South Africa v Limpopo Department of Economic Development Environment, And Tourism* (2014) ZASCA 143 (SCA).

<sup>18</sup> In the South African context: a small informal shop in a township, often run from a private house. They also serve the purpose of supplementing household incomes of the owners, selling everyday small household items <http://www.thefreedictionary.com/spaza+shop> (accessed on 13 September 2017)

<sup>19</sup> 'Gigaba not keen on asylum seeker spazas' *Business Day Live* Feb 2015, [www.bdlive.co.za/national/2015/02/09/gigaba-not-keen-on-asylum-seekers-spazas?](http://www.bdlive.co.za/national/2015/02/09/gigaba-not-keen-on-asylum-seekers-spazas?) (accessed on 30 August 2015).

to conduct one's own business. A section 22-permit endorses the right to work, which in the researcher's view incorporates the asylum seeker's right to conduct his or her own business. In line with this view, and contradicting the Minister, the SCA ruled that asylum seekers and refugees are entitled to apply for business or trading licenses in terms of section 2(3)<sup>20</sup> of the Business Act 71 of 1991.<sup>21</sup>

The crux of the dispute in the *Somali Association* matter related to equality before the law and the right to human dignity, in that refugees, asylum seekers, and South African citizens alike are equally entitled to apply for – and be granted – trading licenses. The Somali Association contended that denying asylum seekers and refugees trading licenses would lead to exploitation of an already vulnerable, desperate and destitute group.

The background facts are that the South African Police Services (SAPS) had shut down over 600 foreign owned businesses in Limpopo that operated without proper business permits. The SAPS confiscated stock, equipment, large sums of money, and arrested both traders and their employees under “Operation Hard Stick”, which was only directed at Somali and Ethiopian owned “spaza shops”. The DHA argued that a section 22-permit allows an asylum seeker to work but not to conduct his or her own business. The DHA conceded that refugees can operate their own businesses but reiterated that for a foreign national to apply for a work permit a capital amount of R2.5 million is needed. The SCA rejected the DHA's argument that the right to freely choose a trade, profession or occupation is limited to South African citizens only.

#### **2.4 The Constitution of the Republic of South Africa, 1996**

The Preamble to the Constitution of the Republic of South Africa, 1996 states that South Africa is a diverse country that belongs to everyone who lives in it. The Bill of Rights<sup>22</sup> is the

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<sup>20</sup> Section 2(3): no person shall, with effect from the date specified under a notice under subsection (1) in respect of a specifying licencing authority, carry on any business in the area of that licencing authority – (a) unless, in the case of a business referred to in item 1(1) or 2 of Schedule 1, he is the holder of a opposite license issued to him by the licence authority in respect of the business premises concerned; (b) unless, in the case of a business referred to in item 3(1) of Schedule 1, he is the holder of a hawker's licence issued to him by the licencing authority; (c) contrary to any condition.

<sup>21</sup> Hereafter the ‘Business Act’.

<sup>22</sup> [www.justice.gov.za/legislation/constitution/saconstitution-web-eng-02.pdf](http://www.justice.gov.za/legislation/constitution/saconstitution-web-eng-02.pdf) (accessed on 20 January 2017).

foundation upon which the democratic South Africa is built. Rights enshrined in the Bill of Rights, apart from the right to vote, are not limited to South African citizens. Section 1(a) reaffirms that South Africa is a sovereign and democratic state founded on values such as human dignity, the achievement of equality and the advancement of human rights and freedoms.

## **2.5 The Refugees Act 130 of 1998**

Any person who arrives on South African soil, and who expresses an intention to apply for asylum, must be afforded the opportunity to do so. As stated in section 21(2)(a) of the Refugees Act, “everyone” literally means everyone. No person who expresses an intention to apply for asylum may be denied of the right to apply for asylum. This expression can manifest itself in different ways, ideally freely and voluntarily upon arrival in South Africa or upon encountering an immigration officer or police officer where detention becomes imminent. If the latter, a mere averment by a detainee to apply for asylum will secure his or her release from detention.

An asylum seeker who enters through a border post and who expresses such an intention must be issued with an asylum seeker’s transit permit valid for 14 days in terms of regulation 2(2) of the Refugees Act. This permit, firstly, directs the holder to approach a Refugee Reception Centre (RRO) to apply for asylum. Secondly, it grants the holder immunity from arrest if he or she encounters an immigration officer prior to applying for asylum.

Section 21(2)(a) of the Refugees Act mandates that a Refugee Reception Officer (RRO) accepts an asylum application from an applicant. The RRO must assist the asylum seeker to complete a biometrics application form, known as the BI-1590 (or DHA-1590). Assistance entails interviewing the applicant based on questions depicted on the biometrics form through the assistance of a competent interpreter, if so required.

Every applicant over the age of 16 must have his or her fingerprints, together with two photographs, taken. Having so complied, an applicant whose status now changes to an asylum seeker, will be issued by a RRO with a section 22-permit allowing the holder to study, to work or to conduct business in South Africa pending the finalization of his or her asylum application. A section 22-permit may be extended at regular intervals during the entire lifespan of the

asylum seeker's claim. In terms of regulation 3(1)<sup>23</sup> of the Refugees Act, the adjudication of the claim for refugee status must be finalised within a maximum period of 180 days.

The Refugee Status Determination Officer (RSDO) is the second DHA official whom an asylum seeker encounters. The RSDO conducts an interview based on information contained in the biometrics form. A RSDO must arrive at a decision in terms of section 24(3)<sup>24</sup> of the Refugees Act. A successful asylum seeker becomes a refugee entitled to formal recognition in terms of section 24(3)(a) of the Refugees Act.

An asylum seeker whose claim is rejected as manifestly unfounded, abusive or fraudulent in terms of section 24(3)(b) of the Refugees Act may elect to review the adverse RSDO decision with the SCRA. The SCRA, an independent and unbiased administrative tribunal, is created under section 11 of the Refugees Act. The SCRA sits as a committee in Pretoria, Port Elizabeth, Durban, Cape Town or Musina when reviewing adverse, manifestly unfounded, abusive or fraudulent RSDO decisions. The SCRA considers written representations only. The SCRA does not personally interact with asylum seekers or their legal representatives during the review process. An adverse finding of the SCRA may also result in the asylum seeker applying for judicial review. The SCA in the *Rahim v Minister of Home Affairs*<sup>25</sup> matter reaffirmed that a section 22-permit lapses upon the finalisation of judicial review proceedings, in terms of which an adverse finding is confirmed.

An asylum seeker whose claim is rejected as unfounded in terms of section 24(3)(c) of the Refugees Act has 30 days to appeal to the RAB. The RAB, an independent and unbiased administrative tribunal, created under section 12 of the Refugees Act, sits as a quorum of three in Pretoria, Port Elizabeth, Durban, Cape Town or Musina when reviewing adverse or

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<sup>23</sup> Regulation 3(1): Applications for asylum will generally be adjudicated by the Department of Home Affairs within 180 days of filling a completed asylum application with a Refugee Reception Officer, <http://www.lhr.org.za/policy/regulations-sa-refugees-act> (accessed on 30 June 2017).

<sup>24</sup> Section 24 (3): The RSDO must at conclusion of the hearing – (a) grant asylum; or (b) reject the application as manifestly unfounded, abusive or fraudulent; or (c) reject the application as unfounded; or (d) refer any question of law to the Standing Committee; (4) If an application is rejected in terms of subsection 3(b) - (a) written reasons must be furnished to the applicant within five working days after the date of the rejection or referral; (b) the record of proceedings and a copy of the reasons referred to in paragraph (a) must be submitted to the Standing Committee within 10 working days after the date of the rejection or referral

<sup>25</sup> *Rahim v The Minister of Home Affairs* 2015 3 SA 425 (SCA)

unfounded RSDO decisions. The test in the normal sense of an appeal that another court is likely to reach a different finding based on the law or the facts or both is not a prerequisite for lodging an appeal at the RAB. There is no onus on the asylum seeker to deal with prospects of success. The asylum seeker need only state on affidavit the appeal grounds. Differently put, why he or she disagrees with the RSDO.<sup>26</sup>

Asylum seekers may submit documents in support of their case before statutory tribunals. It may be difficult for an asylum seeker who fled from his or her country of origin to provide supporting documentation given the circumstances under which he or she fled the country of origin.

Asylum seekers who appeal to the RAB are not on equal footing with asylum seekers who file written submissions to the SCRA. The RAB conducts oral hearings. After having taken an oath, asylum seekers may elaborate or substantiate on an existing claim or provide a new claim. The RAB may exercise its discretion to accept the new evidence placed before it, or to refer the matter to the RSDO for a re-hearing on new facts.

Unequal footing refers to the right of an asylum seeker to adduce oral evidence. An asylum seeker whose claim is rejected as manifestly unfounded, abusive or fraudulent is denied his or her right to orally state a case to the SCRA. What happens in practice is that the SCRA refers matters back to the RSDO, with directives, unlike with the RAB where oral evidence may be adduced to remedy a material defect. Of concern to the researcher is the time occasioned with the re-interview and secondary victimization that a vulnerable asylum seeker may face. The SCRA should in line with just and fair administrative action determine a new practice that allows for oral hearings, the same as the RAB.

It is a strategic move on the part of a RSDO to readily reject claims as manifestly unfounded, abusive or fraudulent. The SCRA does not have the power to grant refugee status. The worst-case scenario is that if upon re-hearing an asylum seeker claim a different RSDO fails to grant asylum he or she can only reject the asylum seekers claim as unfounded, triggering an appeal

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<sup>26</sup> Rule 4(2) Refugee Appeal Board Rules of 2013: The notice of appeal shall be in the form prescribed by Form RAB (01) and shall include: - (b) an affidavit in which the reasons for appeal are set out and documents or certified copies thereof on which the Appellant seeks to rely; and such documents may be in duplicate.

to the RAB. This illustrates the practice of seemingly never-ending asylum seeker claim as they are not dealt with in expeditious manner.

## **2.6 Conclusion**

The DHA is the custodian of all asylum seekers, refugees and foreign nationals on South African soil. Accordingly, asylum seekers must avail themselves to a RRO and express an intention to apply for asylum within a reasonable time of arrival in South Africa. A RRO must accept such an application and assist the asylum seeker to complete the biometrics form. After a photograph and fingerprints of the asylum seeker have been taken, a section 22-permit will be issued allowing the holder to work, to conduct business or to study, pending the finalization of the asylum claim. A RSDO will grant or reject an asylum seeker claim as unfounded or manifestly unfounded, abusive or fraudulent. A section 22-permit remains valid until an asylum seeker exhausts rights, up to judicial review proceedings.

The Promotion of Administrative Justice Act, which gives effect to section 33 of the Constitution, regulates the right to fair, reasonable and lawful implementation of the Refugees Act throughout the application process and is equally relevant in the case of the judicial review of any adverse decision pertaining to a claim for asylum. The SCRA and the RAB are statutory bodies whose adverse decisions may become the subject of judicial review proceedings.

The RSDO is a key role player in South Africa's refugee status determination process. He or she has the powers to grant or reject an asylum seeker's claim.

## **CHAPTER 3: STATUTORY TRIBUNALS IN SOUTH AFRICA'S REFUGEE STATUS DETERMINATION PROCESS**

### **3.1 Introduction**

The role of statutory tribunals in South Africa's refugee status determination process is to oversee adverse Refugee Status Determination Officer (RSDO) decisions. This chapter deals with the composition, powers, functions and modus operandi of the Refugee Appeals Board (RAB) and Standing Committee for Refugee Affairs (SCRA), respectively. It will become apparent that these two statutory tribunals function inherently differently from each other. The conclusion reaffirms the unequal footing alluded to earlier between an asylum seeker who appeals to the RAB and an asylum seeker who files a written review to the SCRA.

### **3.2 The Refugee Appeals Board**

Section 13(2) of the Refugees Act states that one RAB member must be legally qualified. By implication, a RAB chairperson need not have a legal degree or background. The entire RAB in the researcher's opinion must be experts in different facets of the law for it to adjudicate matters effectively under section 26(2) of the Refugees Act.<sup>27</sup>

During the researcher's term as a member of the RAB, from December 2013 to August 2016, the RAB consisted of a chairperson, an acting chairperson, five members at different intervals, a registrar and 12 administrative staff. The administrative work of both the RAB and the SCRA is performed by support staff. Support staff are Department of Home Affairs (DHA) officials, designated by the Director-General, stationed at a specific statutory body.

The day to day functioning of the RAB is summarized as follows:

Members receives appeal files on the morning of the oral hearing to ascertain the facts of each case. This practice is not ideal. Attorneys draft heads of arguments in complex matters resulting in a postponement so that members can acquaint themselves with the facts of the case to avoid any prejudice to the asylum seeker.

Members must verify that the RSDO recorded the word 'unfounded' in part 9B of the biometrics form. In the absence of an 'unfounded' endorsement, the RAB lacks jurisdiction to

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<sup>27</sup> Section 26(2): The Refugee Appeal Board may after hearing an appeal, confirm, set aside or substitute any decision taken by the Refugee Status Determination Officer in terms of section 24(3).

proceed with the appeal hearing. The file must be returned to the relevant RSDO for compliance.

The RSDO's adverse decision must be accompanied by RSDO hearing notes. The RSDO hearing notes depict the questions posed in the interview and the applicants' responses thereto.

Members of the RAB must verify that an asylum seeker deposed an affidavit narrating appeal grounds. If no affidavit is filed, the RAB lacks jurisdiction to dispense with the appeal on the day.

Members must verify that a notice of hearing was duly issued to an asylum seeker, 10 days prior to the hearing date. If all the above are complied with, the oral hearing is ready to proceed. A RAB oral appeal hearing is confidential and inquisitorial. Apart from the asylum seeker and RAB members, the only other role-players are a legal representative and an interpreter if so elected. A witness may be called to corroborate a specific aspect of an asylum seeker's claim.

RAB members, in addition to fulfilling an inquisitorial role, are burdened with recording appeal proceedings manually. The danger of manual recording lies with attorneys challenging the facts relied upon in adverse decisions. Members must within 90 days of a hearing write a decision.

The registrar updates result on the asylum seekers Non-Immigration Information System (NISS) profile to read 'awaiting RAB-decision'. Previously, the condition read 'awaiting RAB-interview'. NISS is the computer programme used by the DHA to update the status and to track and trace the movement and control of section 22 and section 24-permit holders. A cover letter accompanies the RAB decision to a RRO for issue to the asylum seeker. The RAB has no control over when a RSDO issues a decision to an asylum seeker. The time a RSDO takes to serve an adverse decision on an asylum seeker often becomes the core argument at judicial review proceedings.

The RAB, as recently as 2013, did not have a discretion to allow the media or any interested party to observe its proceedings. The Constitutional Court (CC) in *Mail and Guardian Media Limited and Others v Chipu NO*<sup>28</sup> ruled that the blanket confidentiality rule in all RAB hearings is a limitation of the right to freedom of expression. The CC declared section 21(5)<sup>29</sup> of the

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<sup>28</sup> *Mail and Guardian Media Limited and Others v Chipu NO and Others* 2013 (6) SA 367 (CC).

<sup>29</sup> Section 21(5): The confidentiality of asylum applications and the information therein must be ensured at all times.

Refugees Act invalid to the extent that it does not allow the RAB to exercise a discretion to waive the confidentiality rule, circumstances permitting. The CC on 27 September 2013 suspended the declaration of invalidity for 2 years to enable Parliament to remedy this defect through legislation.<sup>30</sup> The current position is that the RAB has a discretion to waive the right to confidentiality.<sup>31</sup>

Most RAB judicial review applications contest decisions of a single board member. The Western Cape High Court (HC) in the *Harerimana v Chairperson of the Refugee Appeal Board & Others*<sup>32</sup> matter recommended that the RAB sits as a quorum of 50% plus one or at least two members. A quorum facilitates the decision-making process.<sup>33</sup> As a result, from December 2013, the RAB sat as a quorum of three.

Instances where the RAB must postpone an oral hearing due to defects in a particular file are often received with contempt by the asylum seeker as he or she might have to wait indefinitely for a new oral hearing date to be allocated. Such an asylum seeker has no alternative but to wait patiently for his or her case to be rescheduled. It is at this juncture where attorneys and non-governmental organisations come into play to liaise new hearing dates with the registrar of the RAB.

The RAB is more formal in the sense and there is a process that needs to be followed from when an appeal is lodged to when the actual oral hearing proceeds. Attorneys and non-governmental organisations are watchdogs who police compliance. The aforesaid stakeholders

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<sup>30</sup> English, I ‘Concourt: RAB must rule on Krejcer’ <http://www.iol.co.za/news/crime-courts/concourt-rab-must-rule-on-krejcir-case-1583633> (accessed on 19 June 2017).

<sup>31</sup> The substituted section 21(5) reads: The confidentiality of asylum applications and the information contained therein must be ensured at all times, except that the Refugee Appeals Board, may on application and conditions it deems fit, allow any person or the media to attend or report on its hearing if – (a) the asylum seeker consents or (b) the Refugee Appeals Board concludes that it is in the public interest to allow any person or the media to attend or report on its hearing, after taking into account all relevant factors.

<sup>32</sup> *Harerimana v Chairperson of the Refugee Appeal Board & Others* 2014 5 SA 550 (WCC).

<sup>33</sup> Hoosen, MH ‘Question NW267 to the Minister of Home Affairs’ <https://pmg.org.za/committee-question/4690/> (accessed on 20 June 2016).

will not hesitate to cry foul play and threaten to institute judicial review proceedings if a client for instance proves that his appeal notice was issued under 10 days.

Unlike the SCRA, the RAB accepts oral evidence under oath, a material difference in the functioning of the statutory tribunals. An attorney or interpreter may represent or assist litigants at RAB hearings to ensure that the relevant evidence is placed before it. Rules of procedure require that the RAB afford an asylum seeker the opportunity to respond to material discrepancies which may lead to an adverse credibility finding. If the applicant is not given the opportunity to respond, this omission may become a topic of discussion during judicial review proceedings. This is not the case with SCRA matters.

An aggrieved asylum seeker has 14 days to submit written representations to the SCRA. Prior to the *Mohamed v Minister of Home Affairs & others*<sup>34</sup> matter, the SCRA did not consider written submissions filed outside of 14 days.

The *Mohamed* matter relates to the failure of a RSDO to timeously issue an adverse SCRA decision. Mr. Mohamed, a Somali national, applied for asylum at Cape Town on 4 October 2011. Shortly thereafter his claim was rejected as manifestly unfounded, abusive or fraudulent. His section 22-permit was extended until 5 April 2012.

He filed representations on 27 March 2012, which the SCRA acknowledged a day later. On 4 February 2013, his attorney became aware that their submissions were ignored when the review took place. Despite being in possession of his adverse SCRA decision, the RSDO failed to issue it when he extended his section 22-permit on 5 April 2012. The Supreme Court of Appeal (SCA) found that the SCRA erred by not considering Mr. Mohammed's submissions, after the review, but prior to the RSDO issuing his adverse decision. The SCRA was ordered to take Mr. Mohammed's late submissions into account during their review process.

The Western Cape HC in the matter of *Makumba v Minister of Home Affairs and Others*<sup>35</sup> ordered the RSDO to re-interview the asylum seeker, a lesbian Malawi national, specifically on the grounds of persecution due to her sexual orientation.

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<sup>34</sup> *Mohamed v Minister of Home Affairs* 2016 13 (ZAWCHC)

<sup>35</sup> *Makumba v Minister of Home Affairs and Others* 2012 184 ZAGPJHC SA 659

The applicant applied for asylum in Cape Town in January 2012. In her biometrics form she stated that she came to South Africa due to economic reasons. She claimed that she lost her job in Malawi and that she came to South Africa to make money. In her RSDO interview in May 2013 she was not informed that she had 14 days to make written representations to the SCRA, who upheld the adverse RSDO decision.

On the advice of a friend, she consulted the Legal Resources Centre and disclosed that she fled from Malawi due to being a lesbian. Through her attorney she became aware that she was entitled to refugee status due to persecution based on her sexual orientation.

The applicant's founding affidavit during judicial review stated that *'I hid the real reason as I feared facing the same homophobic persecution in South Africa that I had suffered in Malawi'*. She claimed that she was assaulted and abused by her employer, family members and the community when they became aware of her sexual orientation. The DHA did not rebut the 5-year penal code applicable to lesbians in Malawi. The Western Cape HC instead of granting refugee status referred the matter back to the RSDO for an interview on the new grounds raised.

If the latter scenario manifested during an oral hearing the RAB may not only have exercised its discretion to accept the new oral evidence under oath, it may have granted refugee status.

The above two case studies highlight the unequal footing between an asylum seeker who appeals to the RAB and an asylum seeker who files a written review to the SCRA. The researcher recommends that aggrieved asylum seekers who files a written review with the SCRA should be afforded an opportunity to state his or her case orally in person or through the assistance of an attorney. Keeping in mind that it is impossible for an asylum seeker to articulate his or her claim in detail in the biometrics form.

The noticeable absence of attorneys and non-governmental organisations throughout the entire refugee status determination process at Refugee Reception Officer (RRO) and RSDO level infringes on an asylum seekers constitutional right to legal representation. The researcher's view is that should stakeholders enter the arena earlier their assistance will facilitate effective and efficient refugee status determination. RRO'S and RSDO's in turn will gain from the assistance of experts in the field who will place all the relevant factors before role-players to assist at arriving at an informed decision. Impressing accountability on a RSDO to grant asylum more readily. Limiting automatic appeals and reviews to statutory body's in turn reducing the amount of judicial review applications.

### 3.3 The Standing Committee for Refugee Affairs

The SCRA performs primarily three distinct core functions: two applies to refugees and one to asylum seekers.

During the researcher's term as a member of the RAB the SCRA consisted of a chairperson, two members, a registrar and 12 administrative staff.

The first function of the SCRA relates to the withdrawal of refugee status regulated by section 36<sup>36</sup> of the Refugees Act. The SCRA may receive a withdrawal submission from a RSDO. This occurs, for instance, where a RSDO suspects that favourable refugee status was improperly conferred. In this case, support staff may issue a withdrawal notification to the refugee. He or she must reply within 30 days. The SCRA will consider the response it receives. If the SCRA rejects the refugee's explanation, it will withdraw his or her refugee status. Such a refugee may be handed over to DHA immigration officials for deportation proceedings. In theory, this withdrawal process may be initiated by a RSDO up to 30 days before the expiry of a section 24(3)(a)-permit. An aggrieved refugee's only right of recourse is to institute judicial review proceedings.

The second function of the SCRA relates to certification in terms of section 27(c)<sup>37</sup> of the Refugees Act. The SCRA must acknowledge the refugee's application on the NISS. Support staff prepare a country of origin report to investigate past persecution reasons advanced. The aim of this report is to corroborate or justify the refugee's refusal to return to his or her country of origin.

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<sup>36</sup> Section 36(1): If a person has been recognised as a refugee erroneously on an application which contains any materially incorrect or false information, or was so recognised due to fraud, forgery, a false or misleading representation of a material or substantial nature in relation to the application or if such person ceases to qualify for refugee status in terms of section 5 – (a) the Standing Committee must inform such person of its intention of withdrawing his or her classification as a refugee and the reasons therefor; and (b) such person may, within the prescribed period, make a written submission with regard thereto. (3) Any refugee whose recognition as such is withdrawn in terms of subsection (1) may be arrested and detained pending being dealt with in terms of the Aliens Control Act.

<sup>37</sup> Section 27(c): A refugee is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.

If conditions in the refugee's country of origin have fundamentally changed but not to the extent that circumstances that caused him or her to flee has ceased to exist, the SCRA may certify and allow the refugee to remain indefinitely in South Africa, provided that the movement and control results on NISS show that the refugee never departed from South Africa. After 5 years of continuous stay, a refugee is eligible to apply for a temporary residence permit. If the NISS results show that the refugee departed from South Africa at any time, entitlement to temporary residency status may lapse.

If the SCRA is of the view that certification is not applicable, or if it fails to find that withdrawal grounds exist, the SCRA must consider the principle of non-refoulment articulated in section 2<sup>38</sup> of the Refugees Act. In this case, the SCRA, instead of certification, may order that a RSDO renew the refugee's identity document for two years with the aim of monitoring conditions in the refugee's country of origin.

There is no stipulated time for the SCRA to finalize a certification request. The prejudice occasioned to a refugee and any dependants are immense, as the entire family's livelihood or permanent residency entitlement will be placed on hold indefinitely.

What happens in practice is that a refugee resident in Durban lodges a request for certification through post or by hand to the SCRA in Pretoria. Support staff request by email the refugee's file from Durban RRO before the request can be attended to. In a system where the DHA still operates manually and considering that the last activity on the refugees file was more than 4 or 5 years ago, it may take an inordinate amount of time to secure the refugee's file from the Durban RRO. The onus is ultimately on the refugee to make constant follow ups with the SCRA as his or her permanent residency entitlement is at stake. If the file is lost one may be reconstructed at the refugee's expense as proof of bona-fide refugee status.

The third function of the SCRA is to review manifestly unfounded, abusive or fraudulent decisions of the RSDO. Here the SCRA is only dealing with asylum seekers. After receiving

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<sup>38</sup> Section 2: Notwithstanding any provision of this Act or any law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return or to remain in a country where – (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.

the requisite documents, support staff endorse the NISS on the relevant section 22-permit to read 'awaiting SCRA-review'. Previously, the condition read 'awaiting RSDO-interview or decision'. The file will then be given to a SCRA member to verify if it is complete.

The SCRA may confirm or set aside an adverse RSDO decision. Setting aside does not empower the SCRA to substitute an adverse RSDO decision with formal refugee status. Setting aside may be interpreted to mean that the SCRA will direct that a different RSDO re-interview the asylum seeker, based on new averments in written representations submitted during the review process. If a different RSDO also comes to an adverse finding, the asylum seekers claim will likely be rejected as unfounded. Leaving the asylum seeker with no alternative but to lodge an appeal with the RAB.

In cases where the RSDO referred a point of law to the SCRA prior to reaching a decision, the SCRA may decide on the issue in dispute and return the file with directives to the RSDO.<sup>39</sup> After capturing an adverse decision on NISS, the support staff will prepare a rejection letter for issue by the RSDO where after deportation proceedings may follow. An unsuccessful asylum seekers' only right of recourse is judicial review proceedings.

### **3.4 Conclusion**

The RAB members must comply with a long list of checks and balances before proceeding with an oral appeal hearing. This is in line with rules of procedural fairness, more specifically to ensure that an asylum seeker's right to a fair trial is not violated. Adducing oral evidence under oath implies that an asylum seeker may be afforded the opportunity to present new evidence. Equally, he or she must respond to discrepancies which may lead to an adverse finding. The RAB may grant formal refugee status, if an appeal succeeds. Attorneys or non-governmental organisations, which are ordinarily absent during the entire refugee status determination process, may take part in an oral RAB hearing.

The SCRA review is conducted on the papers only; no interaction takes place with the asylum seeker. An asylum seeker whose claim was rejected as manifestly unfounded, abusive or fraudulent is not on equal footing to an asylum seeker whose claim was rejected as unfounded.

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<sup>39</sup> Section 24(5): After the Standing Committee has decided a question of law referred to it in terms of section (24)(3)(d), the Standing Committee must refer the application back to the Refugee Status Determination Officer with such directives as are necessary and the Refugee Status Determination Officer must decide the application based on the directives.

He or she is barred from adducing oral evidence. The SCRA does not have powers to grant formal refugee status, at best, it may order that an asylum seekers claim be set down for hearing in front of a different RSDO.

The RAB mandate extend to asylum seekers only, the SCRA has additional mandates which pertains to withdrawal of refugee status and certification of refugees.

## CHAPTER 4: THE IMMIGRATION ACT 13 OF 2002

### 4.1 Introduction

There are three shortcomings of the Immigration Act discussed in this chapter. First, the question is posed at what time the intention to apply for asylum must be expressed. Second, it is shown that illegality and the method of entry into the state is also no bar to applying for asylum. Third, the question is posed whether asylum seekers may apply for immigration permits. In conclusion, reflections are provided on all three areas under the umbrella of an asylum seeker or a refugee's right to equality before the law.

An immigrant is someone who moves to South Africa with the intention of making South Africa his or her permanent home. An immigrant will not be allowed to enter or depart from South Africa if he or she is not in possession of a passport issued by the state of which he or she is a citizen. The general rule is that an application for a visa by a foreigner must be made abroad and not in South Africa.

### 4.2 Section 34(1)<sup>40</sup> of the Immigration Act 13 of 2002

The Supreme Court of Appeal (SCA) in *Ersumo v Minister of Home Affairs*<sup>41</sup> contextualized the relationship between an illegal foreigner in relation to when an intention to apply for asylum is expressed. Once a foreigner has revealed an intention to apply for asylum, the protective

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<sup>40</sup> Section 34(1): Without the need for a warrant, an immigration officer may arrest and illegal foreigner or cause him to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or cause him to be deported and may, pending his deportation, detain him or cause him to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned - (a) shall be notified in writing of the decision to deport him and of his right to appeal such decision in terms of this Act; (b) may at any time request any officer attending to him that his detention for the purposes of deportation be confirmed by a warrant of 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 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 extended 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 dignity and relevant human rights.

<sup>41</sup> *Ersumo v Minister of Home Affairs & Others* 2012 3 SA 119 (SCA).

measures of the Refugees Act and associated regulations come into play and the asylum seeker is entitled to have access to the application process stipulated in the Refugees Act.<sup>42</sup>

In the *Bula & Others v Minister of Home Affairs & Others*<sup>43</sup> matter, 19 Ethiopian nationals arrived in South Africa on 16 June 2011. None of them were in possession of a section 22-permit at the time of their arrest. The police deemed them illegal and detained them at a police station until 24 June 2011, where after, they were transferred to the Lindela holding facility. The Ethiopian Embassy subsequently refused to issue emergency travel certificates to facilitate their deportation. The issue before the SCA was whether the foreign nationals should be released to enable them to apply for asylum, knowing very well that at the time of their arrest, none of them had done so. The SCA referred to the principle of legality<sup>44</sup> implied in the interim Constitution,<sup>45</sup> read with section 12(1)(b)<sup>46</sup> of the Constitution of the Republic of South Africa. The SCA endorsed the *Ersumo* judgment by ordering the DHA to release all 19 detainees because they had expressed an intention to apply for asylum.

In the *Rahim v Minister of Home Affairs*<sup>47</sup> matter, 14 Bangladeshis were holders of section 22-permits. They sued the state for damages, resulting from their arrest at the Port Elizabeth Refugee Reception Office (RRO) emanating from the issue of adverse Refugee Appeals Board (RAB) decisions, dated a year earlier. The SCA declared their arrest and detention unlawful. The SCA ruled that the 14 section 22-permits remained valid until finalization of judicial review proceedings. The SCA emphasized that detention is not a prerequisite for deportation and that an immigration officer has a discretion to not arrest an asylum seeker.

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<sup>42</sup> *Minister of Home Affairs v Ruta* 2017 ZASCA 186.

<sup>43</sup> *Bula & Others v Minister of Home Affairs & Others* 2012 2 SA 1 (SCA).

<sup>44</sup> The Court quoted from the article by Mnguni, L & Muller, J titled ‘The principal of legality in constitutional matters with reference to *Masiya v Director of Public Prosecutions and Others* 2007 (5) SA 30 (CC)’, published in the journal *Law Democracy and Development*, which described the principle of legality in the following terms: ‘A mechanism to ensure that the state, its organs and its officials do not consider themselves to be above the law in the exercise of their functions but remain subject to it’.

<sup>45</sup> Act 200 of 1993, thereafter the ‘Interim Constitution’.

<sup>46</sup> Section 12(1)(b): Everyone has the right to freedom and security of the person, which includes the right not to be detained without a trial.

<sup>47</sup> Note 25 above.

The 14 detainees were detained at prison and police stations in Port Elizabeth. The SCA reiterated that asylum seekers are not criminals and that places of detention must safeguard their vulnerabilities and protect their human rights. The SCA prompted the Director-General of the DHA to designate specific police stations provincially, where illegal foreigners must be detained in lieu of transfer to the Lindela holding facility in terms of section 34(1) of the Immigration Act.<sup>48</sup>

Section 34(1) of the Immigration Act also manifest itself in relation to the arrest and detention of an asylum seeker whose section 22-permit has expired. An arresting officer may exercise his or her discretion, firstly, not to arrest. He or she may issue a verbal warning and escort the asylum seeker to the closest RRO. Alternatively, he or she may take the asylum seeker to the nearest police station to open a criminal case because the asylum seeker has overstayed the permission to remain within the state. It is pertinent to state that an asylum seeker is deemed to have overstayed if he or she fails to extend his or her section 22-permit within 30 days after it has lapsed. The asylum seeker will have the option of paying an admission of guilt fine, resulting in a criminal record. After both eventualities, the relevant RRO may extend the expired section 22-permit.

#### **4.3 Sections 18 and 26 of the Immigration Act 13 of 2002**

A foreigner who is a member of the immediate family of a South African citizen or permanent resident qualifies for a relative's permit in terms of section 18 of the Immigration Act.<sup>49</sup> The holder of a relative's permit is prevented from working in South Africa. The holder of a relative's permit may only in exceptional circumstances apply for a change to his or her status in South Africa and this must take place no less than 60 days prior to the expiry of the visa using the prescribed forms. Regulation 9<sup>50</sup> of the Immigration Act defines exceptional circumstances. Firstly, in relation to a holder of a relative's visa in need of emergency life saving medical treatment for more than 3 months. Secondly, where the holder of a relative's

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<sup>48</sup> 'Determination of places of detention of illegal foreigners pending deportation'  
<http://www.dha.gov.za/index.php/immigration-services/places-of-detention-for-those-pending-deportation> (accessed on 21 June 2016).

<sup>49</sup> Section 18(1): A relative's permit may be issued by the Department to a foreigner who is a member of the immediate family of a citizen or a resident, provided that such citizen or resident provides the prescribed financial assurance, (2) The holder of a relative's permit may not conduct work.

<sup>50</sup> Government Gazette 37679 published on 16 May 2014.

permit is an accompanying spouse or child of a holder of a business work visa, who wishes to apply for a study or work visa.

An asylum seeker who is married to or who fathers or conceives a child from a South African citizen may apply for a permanent residence permit in terms of section 26(b) of the Immigration Act,<sup>51</sup> without cancelling his or her section 22-permit.

The Western Cape High Court, in the *Moustapha Dabone & Others v Minister of Home Affairs*<sup>52</sup> matter ruled that permanent residence permits may be issued to foreign nationals unconditionally. In response to the *Moustapha Dabone* decision, the DHA withdrew Circular 10 of 2008 which allowed asylum seekers to effect changes to their status.<sup>53</sup> On 21 September 2016 the Western Cape High Court declared the decision of the DHA to prevent foreigners from applying for a visa in terms of the Immigration Act inconsistent with the Constitution of the Republic of South Africa. The Western Cape High Court set aside the withdrawal of the DHA Circular 10 of 2008.<sup>54</sup> The High Court went further to say that failed asylum seekers may by law apply for a visa affording them the same opportunity as illegal foreigners in terms of section 32<sup>55</sup> of the Immigration Act.

Subsequently, in September 2017, the SCA overturned the *Moustapha Dabone* decision.<sup>56</sup> The SCA ruled that asylum seekers may no longer effect changes to their status in South Africa. Asylum seekers must apply for an immigration permit before entry into South Africa. The SCA overruled a practice dating back to 2003, which allowed for asylum seekers to apply for immigration permits. This ruling does not have retrospective effect. This means that asylum

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<sup>51</sup> Section 26: Subject to section 25, the Department shall issue a permanent residence permit to a foreigner who – (b) is a spouse of a citizen or resident

<sup>52</sup> *Dabone & Others v Minister of Home Affairs & Another* 2003 11 HC

<sup>53</sup> Furlong, A ‘HA taken to Court’ <http://imcosa.co.za/news/589-home-affairs-to-court.html>  
[www.groundup.org.za/article/home-affairs-to-be-taken-to-court](http://www.groundup.org.za/article/home-affairs-to-be-taken-to-court) (accessed on 11 June 2018)

<sup>54</sup> *Tashriq Ahmed & Others v The Minister of Home Affairs & Others* 2017 2 WCC SA 417  
[http://www.workpermitsouthafrica.co.za/High-Court-JudgementSKM\\_36716092111390.pdf](http://www.workpermitsouthafrica.co.za/High-Court-JudgementSKM_36716092111390.pdf)  
(accessed on 30 June 2017)

<sup>55</sup> 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.

<sup>56</sup> Smith, C ‘No more visas in country for asylum seekers’ <http://www.702.co.za/articles/274331/no-more-visas-in-country-for-asylum-seekers?> (accessed on 28 December 2017).

seekers who applied for an immigration permit prior to September 2017 continue to be dealt with in terms of the 2003 ruling. The matter is presently before the Constitutional Court (CC), which will have the final say.

A final point regarding the interplay between the Refugees Act and the Immigration Act is that a child born in South Africa to foreign national parents qualifies for South African citizenship when he or she attains majority age, provided that South Africa is the major's habitual residence and that he or she is in possession of a South African birth certificate. The Director-General may decide on such an application within 10 days of receipt of such application.<sup>57</sup>

#### **4.4 Conclusion**

Every foreign national living in South Africa is equal before the law and entitled to equal protection of the law. The right to equality before the law was tested before the CC as recently as February 2017.<sup>58</sup> Equality entails that a foreigner detained on immigration related charges must appear in court within 48 hours of arrest to enable the court to confirm, extend or set aside his or her detention warrant. This is in stark contrast to the earlier position, which was that a foreigner, suspected of being illegal, was not brought before a Magistrates' Court within 48 hours of his or her arrest.<sup>59</sup>

The North Gauteng High Court<sup>60</sup> declared section 34(1)(b) and (d) of the Immigration Act inconsistent with section 12(1) of the Constitution, which prevents arbitrary detention and section 35(2)(d), which provides for the rights of arrested, detained and accused persons. The CC affirmed the High Court's ruling in June 2017, confirming that illegal foreigners in detention, including persons presently incarcerated, must appear before a competent court

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<sup>57</sup> Coetzee, R 'Children born in SA to Foreign Parents Can Apply for Citizenship' <http://www.relocationafrica.com/children-born-sa-foreign-parents-can-apply-citizenship/> (accessed on 11 September 2017).

<sup>58</sup> Mabuza, E 'Rights of detained suspected foreigners under spotlight in ConCourt' <http://www.sowetanlive.co.za/news2017-03-14-rights-of-detained-suspected-illegal-foreigners-under-spotlight-in-concourt/> (accessed on 2 May 2018).

<sup>59</sup> Section 35(1) of the Constitution: Everyone who is arrested for allegedly committing an offense has the right – (d) to be brought before a court as soon as is reasonably possible, but not later than – (i) 48 hours after the arrest; or (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day.

<sup>60</sup> *Lawyers for Human Rights v Minister of Home Affairs & Others* 2016 45 ZAGPPHC.

within 48 hours of arrest. Lawyers for Human Rights remarked on the significance of the CC ruling as affording protection to those vulnerable foreigners whose detention had previously fallen beyond the reach of judicial oversight thus resulting in widespread violation of rights. The CC gave Parliament two years to remedy the defect and to put safeguards in place which governs the detention of foreigners who are suspected of being in the state illegal.<sup>61</sup>

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<sup>61</sup> Mzantsi, S 'Illegal immigrants' ruling hailed as 'groundbreaking'  
<https://www.iol.co.za/capetimes/news/illegal-immigrants-ruling-hailed-as-groundbreaking-10060555>  
(accessed on 17 August 2017).

## CHAPTER 5: THE RAMIFICATIONS OF THE BORDER MANAGEMENT AUTHORITY BILL, 2015

### 5.1 Introduction

This chapter focuses on the nexus between the closure of Refugee Reception Offices (RROs) across South Africa and the establishment of a Border Management Agency. The idea of legal reform in this area is that first instance refugee status determination adjudication would take place at a border post, managed by the Border Management Authority. The purpose of this chapter is to critique the proposed legislation.

### 5.2 Closure of Refugee Reception Centres

The *Somali Association of South Africa & another v Minister of Home Affairs & others*<sup>62</sup> matter dealt with the closure of the Port Elizabeth Refugee Reception Office (RRO) on 30 November 2011. The Port Elizabeth RRO subsequently dealt with extensions of section 22-permits only, and no new asylum applications were effectively considered. However, the Port Elizabeth High Court (HC) declared the closure unlawful.

Despite the Supreme Court of Appeal (SCA) directing the Department of Home Affairs (DHA) to restore the Port Elizabeth RRO by 1 July 2015 in order to open its doors to new asylum seekers, this had not yet been done. The DHA was also ordered to report to the applicants monthly regarding the steps that have been taken to restore the Port Elizabeth RRO, as from 15 April 2015.<sup>63</sup>

On 7 August 2015, the Constitutional Court (CC) dismissed the DHA's appeal against the decision to reopen the Port Elizabeth RRO.<sup>64</sup> The current position is, nevertheless, that the Port Elizabeth RRO remains closed for new asylum seeker applications. The DHA is accordingly in contempt of a binding CC order.

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<sup>62</sup> *Somali Association for South Africa & Another v Minister of Home Affairs & Others* 2012 5 SA 634 (ECP).

<sup>63</sup> [http://www.justice.gov.za/sca/judgements/judgem\\_sca2017.html](http://www.justice.gov.za/sca/judgements/judgem_sca2017.html) (accessed on 31 December 2017).

<sup>64</sup> Evans, S 'Concourt dismisses home affairs 's PE refugee office appeal' [mg.co.za/article/2015-08-07-concourt-rules-closing-pe-refugee-office-unlawful](http://mg.co.za/article/2015-08-07-concourt-rules-closing-pe-refugee-office-unlawful) (accessed on 4 November 2016).

The *Minister of Home Affairs & others v Scalabrini Centre* case,<sup>65</sup> dealt with the unilateral closure of the Cape Town RRO by the Director-General of the DHA in May 2010. The DHA argued that Cape Town was not the usual port of entry for asylum seekers and that most asylum seekers serviced at Cape Town RRO were economic migrants. The DHA expressed concern that authorities often lost track of economic migrants the moment they integrate with the general population. On 24 June 2016, the Cape High Court confirmed the closure of the Cape Town RRO as lawful.<sup>66</sup> The *Scalabrini Centre* case was then heard by the Supreme Court of Appeal on 29 September 2017. The SCA found that a RRO was necessary for its purpose in terms of section 8(1)<sup>67</sup> of the Refugees Act, because the Cape Town RRO was the second busiest RRO at the time of its closure and that the remaining DHA offices were inadequate to deal with new asylum applications and related matters. Not only was the DHA unable to substantiate its claim that most foreigners served at the Cape Town RRO were economic migrants, but the Director-General of the DHA also failed to look for alternative premises after the Cape Town RRO was closed in 2010. As such, the SCA directed the Director-General of the DHA to open the Cape Town RRO by 31 March 2018.<sup>68</sup>

Notwithstanding the judgments discussed above, on 20 June 2016 – World Refugee Day - the DHA announced that the TIRRO RRO, would be amalgamated with Marabastad RRO in Pretoria.<sup>69</sup> On 17 February 2017 the then President of South Africa, Mr. Jacob Gedleyihlekisa Zuma, announced that the Marabastad RRO would henceforth be known as the Desmond Tutu RRO.<sup>70</sup>

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<sup>65</sup> *Minister of Home Affairs & Others v Scalabrini Centre, Cape Town & Others* 2013 4 SA 571 (SCA) (*Scalabrini Centre* case).

<sup>66</sup> Digital, TMG ‘Cape Town court judgement confirms closure of Refugee Reception Office’ [www.timeslive.co.za/local/2016/06/24/Cape-Town-court-judgement-confirms-closure-of-Refugee-Reception-Office](http://www.timeslive.co.za/local/2016/06/24/Cape-Town-court-judgement-confirms-closure-of-Refugee-Reception-Office) (accessed on 4 November 2016).

<sup>67</sup> Section 8(1): The Director-General may establish as many Refugee Reception Offices in the Republic as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of this Act.

<sup>68</sup> Note 66 above.

<sup>69</sup> ‘SA slams the door on expats on Refugee Day’ [samigration.com/blog/2016/06/](http://samigration.com/blog/2016/06/) (accessed on 11 June 2018).

<sup>70</sup> Ndlazi, S ‘Zuma launches Desmond Tutu Refugee Centre’ <http://m.news24.com/South-Africa/News/zuma-launches-desmond-tutu-refugee-centre-20170217> (accessed on 2 May 2018).

Closures of the Port Elizabeth, Cape Town and TIRRO RROs are in line with the policy of the DHA to establish the Lebombo Border Post on the Mozambican border as sole refugee reception centre. In doing so, the DHA hopes to decrease the number of economic migrants and or illegal immigrants who overburden South Africa's asylum regime. The aim is to prevent economic migrants and or illegal immigrants from integrating into urban communities.

### **5.3 The Border Management Authority Bill, 2015**

The aim of the Border Management Authority Bill, 2015 is to deter economic migrants or illegal immigrants from integrating and permanently settling into communities across South Africa. South Africa's non-encampment or freedom of movement policy represents a very attractive regime to asylum seekers or foreign nationals. The danger of the Bill, read with the Green Paper on International Migration (June 2016), is the inference that asylum seekers may be required to live near border post refugee reception centres pending the outcome of their asylum applications.<sup>71</sup>

The Green Paper not only aims to reduce the number of undesirable travellers entering South Africa, it also aims to attract skilled persons and investors who impact on South Africa's economic growth. In relation to genuine asylum seekers, it undertakes to protect their human rights by rendering efficient services to them.

Managing asylum seekers who abuse South Africa's asylum regime is another desired outcome under the Bill.<sup>72</sup> The DHA acknowledges that to remedy its inability to effectively manage the cross-border management of foreigners upon admission and departure, consensus on policy and better collaboration with government departments, different stakeholders and the community is needed.<sup>73</sup> The effectiveness of the Bill remains to be seen at implementation stages. Valid criticism has been levelled against it. At the core, it seems to anticipate the possible encampment of asylum seekers in South Africa.

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<sup>71</sup> Pertsovsky, N 'South Africa: Asylum Seekers Will Have to Live Near Borders If Home Affairs Has Its Way' <http://allafrica.com/stories/201707250132.html> (accessed on 13 September 2017)

<sup>72</sup> Brophy, S 'DHA: What you need to know about SA's new international migration policy plans' <http://www.traveller24.com/TravelPlanning/VisaInfo/dha-what-you-need-to-know-about-sas-new-international-migration-policy-20160729> (accessed on 13 September 2017)

<sup>73</sup> <https://pmg.org.za/committee-meeting/23944/> (accessed on 13 September 2017)

The Border Management Authority Bill, 2015<sup>74</sup> was passed by the National Assembly (NA) on 9 June 2017. The Bill will now go to the National Council of Provinces (NCOP) for processing before it is returned to the NCOP for final consideration. Once the legislative progress is completed South Africa will be ready to establish and integrated Border Management Authority.

In terms of its long title, the Act provides, in the first instance, for the establishment, organization, regulation and control of the Border Management Agency. Secondly, it provides for the transfer, assignment and designation of law enforcement border related functions to the Border Management Agency. Thirdly, it provides for matters in connection thereto. While the Act has many facets, the discussion relating to asylum seekers and refugees is of particular importance to the present study.

The main criticism by Loren Landau is that the Agency created in the Bill appears to be unaccountable. Further, Landau's view is that the Bill leans more towards assisting the DHA with the profiling of asylum seekers, rather than protecting the rights of migrants.<sup>75</sup> Profiling paves the way for greater levels of exploitation of asylum seekers. Landau debunks the myth that the aim of the Bill is to solve the problem of uncontrolled immigration into South Africa. In fact, he is of the view that South Africa has no such problem.<sup>76</sup>

Ms. Roshan Dadoo, the Director of the Consortium of Refugees and Migrants in South Africa, perceives the wording of the Bill to allow for an inference in favour of detention centre's at border posts.<sup>77</sup> In her view, asylum seekers whose claims are rejected by a RSDO run the risk of being detained in refugee camps. She alludes to the administrative flaws in the DHA's current refugee status determination process, which results in huge backlogs prejudicing asylum seekers. She urged the DHA to focus its attention on improving its refugee status determination process, to ensure that interviews are conducted in a more efficient way.

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<sup>74</sup> The Border Management Agency Bill, 2015 Government Gazette 39056, published on 5 August 2015, thereafter the 'Bill' <http://discover.sabinet.co.za/document/GGD138008> (accessed on 30 June 2017).

<sup>75</sup> Akoob, R 'SA's borders mat become even more unwelcoming to asylum seekers' *Mail & Guardian* June 21, 2017 <http://samigration.com/blog/south-africas-borders-may-become-even-more-unwelcoming-to-asylum-seekers/> (accessed on 29 June 2017).

<sup>76</sup> Note 75 above.

<sup>77</sup> Note 75 above.

At the opening of the National House of Traditional Leaders in March 2017, in relation to the Bill, President Jacob Zuma expressed the opinion that South Africans are aggrieved about the country's porous boundaries.<sup>78</sup> He urged the DHA to curb the flow of illegal immigrants into the state. He averred that it is dangerous not to know who is in the country and what unknown persons are doing here. He expressed dismay with South Africa being the only country globally that allows for unqualified immigration. He applauded the substantial progress in realizing the Border Management Agency responsible for border law enforcement at ports of entry across South Africa. The President expressed his confidence that the Border Management Agency will enhance the DHA's mandate in managing South Africa's borders and unqualified migration.<sup>79</sup>

#### **5.4 Conclusion**

The DHA in acceding to the Refugees Act vowed to treat asylum seekers, refugees and foreign nationals on its soil with humanity and dignity. South Africa's non-encampment policy is rationally connected to the influx of foreign nationals on its soil. An inference in favour of border post refugee detention camps – which would result after the adoption of the Border Management Authority Bill, 2015 -- will be in direct contrast with the freedom of movement concept in South Africa. The DHA was unable to substantiate its claim that most asylum seekers serviced at Cape Town RRO were economic migrants. The DHA will fail if it were to advance the same argument in relation to border post refugee detention camps.

South Africa is a constitutional democracy. The CC is unlikely to endorse the establishment of border post refugee detention camps.

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<sup>78</sup> <http://www.gov.za/speeches/annual-official-opening-national-house-traditional-leaders-3-mar-2017-0000> (accessed on 30 June 2017).

<sup>79</sup> Note 75 above.

## CHAPTER 6: RECOGNITION GIVEN TO FOREIGN NATIONALS ON GROUNDS OF ECONOMIC HARDSHIP

### 6.1 Introduction

Zimbabwe, Lesotho and South Africa are member states of the Southern African Development Community (SADC). An influx in foreign nationals from SADC due to a lack of strictness at South Africa's porous boundaries led to immigration laws not being adhered to. The Department of Home Affairs (DHA) accordingly relaxed its visa requirements for nationals from SADC, resulting in foreign nationals, including from the SADC region, being permitted to stay indefinitely in South Africa.<sup>80</sup>

### 6.2 Eligibility criteria for asylum seeker work permits

President Jacob Zuma rolled out a programme in mid July 2017 intended to issue over one million work permits to asylum seekers in possession of a passport who arrived in South Africa not more than 20 years ago. According to the DHA, this programme was aimed at those beneficiaries who hold jobs legally, with the result that they will be protected from undue sanctions in the workplace. This programme aims to broaden economic opportunities for asylum seekers. Work permits will be renewable at the end of a two-year period.<sup>81</sup>

As we recall from the *Minister of Home Affairs and Others v Watchenuka*<sup>82</sup> discussion, the right to study and work is conferred on an asylum seeker upon issue of a section 22-permit. Moreover, the right to fair labour practices is a constitutional obligation. Therefore, it is the study's view, that unless an individual intends to fully utilize a work permit, it is not necessary for an asylum seeker who fits the criteria of 20-years and under to apply for a work permit.

A possible danger in applying for a work permit rolled out in 2017 lies with the passport qualification which is not a pre-requisite to apply for asylum. Many asylum seekers will travel home to apply for a passport. A passport proves nationality and it may even disclose the

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<sup>80</sup> <http://www.sanews.gov.za/south-africa/home-affairs-reviewing-migration-policy> (accessed on 13 September 2017).

<sup>81</sup> 'Asylum seekers now eligible to submit for permit to change immigration status in South Africa' <http://raziliconsulting.co.za/2017/06/11/asylum-seekers-now-eligible-to-submit-for-permit-to-change-immigration-status-in-south-africa/> (accessed on 7 May 2018).

<sup>82</sup> Note 15 above.

habitual residence of the holder. It reflects travel particulars facilitating the DHA to track and trace and movement and control of the holder. It may give rise to concerns around the validity of an asylum seekers' persecution claim.<sup>83</sup>

### **6.3 The Zimbabwean Special Permit (ZSP)**

During 2009, Zimbabwean nationals lodged 158 000 new asylum claims in South Africa, a figure that represents 95% of Zimbabwean asylum claims, across the globe, in the same year.<sup>84</sup> Despite the reasons for Zimbabweans fleeing Zimbabwe, South Africa refused to recognize Zimbabweans as refugees. In response, the Zimbabwean Special Permit (ZSP) was introduced in 2009 by the Department of Home Affairs (DHA) to stop the influx of illegal Zimbabwean nationals into South Africa. The ZSP entails that Zimbabweans in possession of a passport are issued with a work permit conferring the right to temporarily work in South Africa. The ZSP permit holder cannot change conditions of his or her permit whilst in South Africa. Despite the DHA giving an undertaking that permits will not be renewable or extendable it announced that permits that expired on 31 December 2017, will be extended until 2020.<sup>85</sup>

The first ZSP was introduced in 2009. By 2020, 11 years since its introduction would have elapsed. The exact number of Zimbabwean nationals in South Africa is unknown. The reality is that Zimbabwe's economic situation has been dire for years, leaving some with no option but to come to South Africa, not for a better life, but to survive.<sup>86</sup>

Zimbabwean nationals may be eligible to apply for permanent residency status due to having worked in South Africa for an uninterrupted period of five years. An express condition of the ZSP was that the permit does not entitle the holder the right to apply for a permanent residency

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<sup>83</sup> UNHCR 'Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees' at paragraph 49.

<sup>84</sup> Kruger, M 'Understanding Asylum Outcomes For Zimbabweans' *June 27, 2011* <http://africanarguments.org/2011/06/27/understanding-asylum-outcomes-for-zimbabweans-in-the-united-states-and-south-africa/> (accessed on 12 September 2017).

<sup>85</sup> 'Zimbabweans Restless Regarding The Expiry of ZSP Permits' *January 12, 2016* [www.topsanews.co.za/zimbabweans-restless-regarding-the-expiry-of-zsp-permits/](http://www.topsanews.co.za/zimbabweans-restless-regarding-the-expiry-of-zsp-permits/) (accessed on 5 November 2016).

<sup>86</sup> Chiumia, S 'How many Zimbabweans in South Africa' *June 23, 2009* [www.news24.com/SouthAfrica/News/How-many-Zimbabweans-inSA-20090621](http://www.news24.com/SouthAfrica/News/How-many-Zimbabweans-inSA-20090621) (accessed on 21 September 2017).

permit irrespective of the period of work and stay in South Africa.<sup>87</sup> Therefore, should the DHA fails to concede to the permanent residency entitlement of eligible Zimbabweans, courts may be approached to decide on the issue in 2020.

#### **6.4 The Lesotho Special Permit (LSP)**

Lesotho is the country from which the DHA deports the fourth highest number of nationals. The Lesotho Special Permit (LSP) is aligned to South Africa's National Development Plan, thus allowing Lesotho nationals to lawfully work, to pay taxes and to contribute to the economic growth and development of both countries.<sup>88</sup> The LSP expires in 2019. It applies to Lesotho nationals who resided in, studied in or carried on a business in South Africa prior to 30 September 2015. Only Lesotho nationals whose names are endorsed on the Lesotho population register may apply for a LSP. Amnesty for Lesotho nationals in possession of fraudulent documents was extended until 31 December 2016 and the permit remains valid until 31 December 2019.

#### **6.5 Conclusion**

It is not always possible to distinguish between an asylum seeker and an economic migrant. From the discussion in this chapter, the DHA has rolled out various programmes to broaden economic opportunities for asylum seekers and migrants in possession of a national passport. These work permits may confer recognition on economic migrants, thereby entailing that they may legitimately seek employment and be so employed.

The ZSP and the LSP, which were rolled out in 2009 and 2015, respectively, are unique to immigrants from the SADC region. A dispute is bound to end up in court if the DHA fails to renew work permits in 2019 and 2020, as recipients are likely to assert a valid entitlement to permanent residency status in South Africa. It remains to be seen what the Constitutional Court

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<sup>87</sup> Mabhena, M 'ZSP 2017 renewal also needs Zimbabwe government's buy-in' <http://zimsinsa.com/zsp-renewal-needs-zimbabwe-governments-buy-in> (accessed on 13 January 2017).

<sup>88</sup> Statement by Home Affairs Minister Malusi Gigaba at the Media Briefing on the closing of the Zimbabwe Special Permit Programme and the opening of the Lesotho Special Permit' <http://www.home-affairs.gov.za/index.php/statements-speeches/704-statement-by-home-affairs-minister-malusi-gigaba-at-the-media-briefing-on-the-closing-of-the-zimbabwe-special-permit-programme-and-the-opening-of-the-lesotho-special-permit> (accessed on 12 June 2018).

(CC) rules on the question of whether an asylum seeker can apply for an immigration permit from within South Africa.

## CHAPTER 7: CONCLUSION ON RESEARCH QUESTIONS

Aspects of South Africa's refugee status determination process analysed in this research do not extend to an evaluation of persecution, which is at the core of any asylum seeker enquiry. The ideal way to analyse a persecution claim is to focus on a specific group of vulnerable persons. The focus of this research is a broad overview of South Africa's refugee status determination process. It is for this reason that the researcher did not deem it necessary to evaluate specific averments of a persecution claim. A persecution enquiry does not end at statutory tribunals, as courts are engaged on a regular basis to intervene and make certain proclamations.

This study has sought to provide some valuable insights into the research questions addressed in each chapter. Indeed, chapter 2 addresses the first sub-research question, namely: what is the criteria for applying for asylum under the Refugees Act? The eligibility criteria of applying for asylum are stipulated in the Refugees Act. The only criteria in applying for asylum is that a foreign national presents him or herself at a Refugee Reception Office (RRO) with an averment that he or she was forced to flee their country of origin due to persecution, instability or unrest in the whole or a part of his or her country of origin. The role of the Refugee Reception Officer (RRO) in facilitating a section 22-permit and subsequent interview by the Refugee Status Determination Officer (RSDO) as the final refugee status determination officer was interrogated.

A section 22-permit allows the holder the right to study, to work or to conduct business pending the finalization of his or her asylum claim. The *Minister of Home Affairs and Others v Watchenuka* matter<sup>89</sup> forced the Standing Committee for Refugee Affairs (SCRA) to use its powers to bestow these rights on asylum seekers whose asylum applications took longer than 180 days to finalise. On 18 September 2002, the SCRA adopted a resolution that every section 22-permit must contain a condition prohibiting employment and study. Should an application for asylum not be finalised within 180 days, the holder could apply to the SCRA to lift the restriction. It is because of the *Watchenuka* matter that every section 22-permit that is issued is automatically endorsed with a condition relating to work and study.

The position prior to the *Watchenuka* decision was that the right to seek employment was limited to a refugee and his or her dependants only in terms of section 27(1)(f) of the Refugees

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<sup>89</sup> Note 15 above.

Act. However, the Minister of Home Affairs may in terms of section 38(1)(c) of the Refugees Act make regulations relating to the forms to be used under certain circumstances and the permit to be issued. Furthermore, in terms of section 38(1)(e) of the Act, the Minister may determine conditions of sojourn of an asylum seeker in the Republic, while his or her application is under consideration.

The form alluded to in section 38(1)(c) of the Refugees Act is prescribed by Annexure 3 which contained a legally binding condition that prohibited employment and study. The effect of regulation 7(1)(a),<sup>90</sup> read with the prescribed form, is that every asylum seeker is prohibited by the conditions on his or her section 22-permit from undertaking employment and from studying. When this situation was challenged, the Supreme Court of Appeal (SCA) found that the Minister of Home Affairs did not have the power to prohibit an asylum seeker from taking up employment or from studying. The Minister purporting to do so acted in conflict with the Constitution of the Republic of South Africa. Annexure 3 was correctly set aside by the court *a quo*.

In *Rahim v Minister of Home Affairs*,<sup>91</sup> courts confirmed that an asylum seeker permit remains valid until the end of judicial review proceedings. Judicial review proceedings must be instituted within 90 days from the date on which the adverse decision of a statutory tribunals comes to the attention of an asylum seeker.

Addressing the second sub-research question, chapter 3 deals with the role, functions and modus operandi of the statutory tribunals created under the Refugees Act, which is primarily aimed at reviewing adverse RSDO decisions. Statutory tribunals are independent of the Department of Home Affairs (DHA). The SCRA conducts its review process without calling for oral evidence. The SCRA has the power to confirm or to set aside (but not to substitute) an adverse RSDO decision. The SCRA also has other administrative functions that pertain to refugees in terms of sections 36 and 27(c) of the Refugees Act. The Refugee Appeals Board (RAB) conducts oral hearings after a long list of checks and balances have been complied with by its members. In conducting procedurally and substantively fair oral hearings, members play an inquisitorial role. Members are burdened with having to manually transcribe oral hearings

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<sup>90</sup> Regulation 7(1)(a): A permit issued in terms of section 22 of this Act must be in the form and contain substantially the information prescribed in annexure 3 to these regulations.

<sup>91</sup> Note 25 above.

which accounts for a high number of judicial review applications. The RAB may substitute an adverse RSDO decision with refugee status. The RAB may accept new evidence under oath and exercise its discretion to grant refugee status depending on the facts at hand.

An impediment to the roles of both statutory tribunals is that each consist of three members only, which must sit as a quorum in Pretoria, Port Elizabeth, Durban and Musina during its sittings. The issue of whether statutory tribunals should combine into a single forum to better serve asylum seekers and refugees is an interesting question, but which does not fall within the remit of the present research.

The crux of sub-question 3, analysed in chapter 4, lies with a Western Cape High Court (HC) decision of 2003, which was overturned by the SCA in September 2017 in the *Minister of Home Affairs & another v Ahmed & others* matter.<sup>92</sup> The SCA decision had no retrospective effect, so different categories of asylum seekers will have different entitlement in as far as an immigration permit is concerned. It is necessary to note that the wheels of justice turn very slowly in South Africa. Asylum seekers will have to be patient in awaiting the decision of the Constitutional Court (CC) in this matter. Therefore, the CC will ultimately have to decide if it is practical for all foreign nationals to apply for immigration permits from their country of origin as the law always provide for an exception. The reality is that asylum seeker claims are not timeously adjudicated in South Africa, which may allow for an inference in favour of a change of status which may lead to refugee status. In relation to asylum seekers, the researcher contends that this contentious dispute is the most common area where the Refugees Act and the Immigration Act intersect with each other.

Chapter 5 deals with sub-question 4. The drafters of the Refugees Act did not have the foresight of the huge influx of foreign nationals that the post-1994 South Africa would receive. The current definition of who or what constitutes an asylum seeker may be distorted by the migration of people globally.

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<sup>92</sup> *Minister of Home Affairs & another v Ahmed & others* 2017 ZASCA 123  
[http://www.justice.gov.za/sca/judgements/judgem\\_sca2017.html](http://www.justice.gov.za/sca/judgements/judgem_sca2017.html) (accessed on 31 December 2017).

From the literature it become clear that the cases of *Ersumo v Minister of Home Affairs*<sup>93</sup> and *Bula & others*<sup>94</sup> can arguably be interpreted to mean that there is no time limit to when a foreign national may express an intention to apply for asylum. Illegality of the method of entry into the state is also no bar to applying for asylum.

The Border Management Agency cannot substitute RROs. The validity of the closures of both the Cape Town and Port Elizabeth RROs has been pending before the courts since 2010. The DHA deliberately avoids any reference to the ratio of RROs and RSDOs in relation to asylum seeker numbers which may contribute to the undue delay in adjudication of asylum seeker claims.

The DHA sought to answer South Africa's migration problems through enacting relevant laws. The Green Paper on Migration aims to regulate migration to sustain and create economic growth and development, aimed at facilitating nation building. The ideal is that South Africa may reserve the right to determine who it allows on its shores, and under what conditions.

Part of the mandate of the Border Management Agency, to be established if the Border Management Authority Bill, 2015 would be finally adopted and entered into force, is to attend to refugee status determination at porous South African borders. The proposed Border Management Agency will consist of a minimum of two officials charged with border post asylum adjudication. The decision of the DHA to close RROs and to substitute these with the Border Management Agency may be a futile exercise if the DHA fails to assign sufficient staff ratio to attend to refugee status determination at border posts.

Ultimately, it is the researcher's finding that section 21(2)(a) of the Refugees Act does indeed allow for the granting of refugee status, particularly in the light of liberal legislation such as the Refugees Act welcoming every foreign national on South African soil. Moreover, the Refugees Act also affords asylum seekers freedom of movement, the right to work or to conduct business, and to study. In addition, entitlement to socio-economic rights implies that the balance of convenience favours asylum seekers.

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<sup>93</sup> Note 41 above.

<sup>94</sup> Note 43 above.

In answering the main research question, chapter 7 illustrates the DHA's attitude when engaging economic migrants from the SADC region, which situation arises primarily out of the inability of the DHA to timeously adjudicate asylum claims.

Legislation without proper implementation equates to a violation of rights. In as much as every asylum seeker has the right to apply for asylum, the DHA has the corresponding duty to adjudicate claims within a reasonable time. The time and cost of litigation is another factor that should be taken account of. From the literature we have seen that courts are engaged on a regular basis, often at the expense of vulnerable asylum seekers.

The fact that in 2017 one million work permits have been issued to asylum seekers who have been in South Africa for less than twenty years speaks volumes in and of itself. We have seen the steep court battle for over a decade in as far as a change in the status of asylum seekers are concerned. The DHA appears to be reactive in that it waits for court processes to be finalized. Even where courts rule against the DHA, they remain in contempt in court, as is the case of the closure of the Port Elizabeth RRO.

Zimbabwean nationals in possession of the Zimbabwean Special Permit (ZSP) is a classic example of how section 21(2)(a) of the Refugees Act may bestow refugee status to economic migrants even though economic deprivation is not a requirement for the granting of political asylum.

The introduction of border post refugee camps will not suit Zimbabwean nationals as their motif for coming to South Africa has been to seek employment, requiring them to integrate into urban and rural communities to secure employment.

In conclusion, it is recommended that attorneys and non-governmental organizations be allowed to actively participate in South Africa's refugee status determination processes to minimize the life-cycle of an asylum claim, which often ends in judicial review proceedings. In so doing, the DHA will be forced to be accountable and transparent, in turn requiring the DHA to demonstrate a fresh commitment to treat asylum seekers, refugees and foreigners on its soil in a dignified manner.

## **BIBLIOGRAPHY**

### **Books**

Arendt, H *The origins of totalitarianism* The World Publishing Company Cleveland

Edwards, E 'Refugee or migrant –word choice matters' (2015) UNHRC Geneva

Moussalli, M *Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the status of refugees* (1992) Geneva UNHRC

Goodwin-Gill, GS *The refugee in international law* (1983) Clarendon Press

Viljoen, F (ed) *Beyond the law: Multidisciplinary perspectives on human rights* (2012) Pretoria University Law Press

### **Journal articles**

Colville, R 'Refugee or migrant' (2007) 4 *The Editor's Desk* 148

Darshan, VA 'A foot in the door, access to asylum in South Africa' (2008) 25 *Canada's Journal on Refugees* 41

Hicks, TF 'The constitution, aliens control act, and xenophobia: The struggle to protect South Africa's pariah-the undocumented immigrant' (1999) 7 *Indiana Journal of Global Legal Studies Issue* 1

Mnguni, L & Muller, J 'Forum contribution: The principal of legality in constitutional matters with reference to Masiya v Director of Public Prosecutions and Others 2007 (5) SA 30 (CC) (2009)' 13 *Law Democracy & Development* 112

Nirmal, BC 'Refugees and human rights' (2001) 3 *ISIL Yearbook of International Humanitarian and Refugee Law* 94

### **Newspaper articles**

Chiumia, S 'How many Zimbabweans in South Africa' *news 24 archives* June 23, 2009 [news24.com/SouthAfrica/News/How-many-Zimbabweans-in-SA-20090621](http://news24.com/SouthAfrica/News/How-many-Zimbabweans-in-SA-20090621)

‘Gigaba not keen on asylum seeker spazas’ *Business Day Live* 9 Feb 2015  
[bdlive.co.za/national/2015/02/09/gigaba-not-keen-on-asylum-seeker-spazas](http://bdlive.co.za/national/2015/02/09/gigaba-not-keen-on-asylum-seeker-spazas)

Mawarire, T ‘Migrant problem, radical answer’ *Mail and Guardian* 14 August 2015  
[mg.co.za/article/2015-08-14-migrant-problem-radical-answer](http://mg.co.za/article/2015-08-14-migrant-problem-radical-answer)

Akoob, R ‘SA’s borders may become even more unwelcoming to asylum seekers’ *Mail & Guardian* June 21, 2017 [samigration.com/blog/south-africas-borders-may-become-even-more-unwelcoming-to-asylum-seekers/](http://samigration.com/blog/south-africas-borders-may-become-even-more-unwelcoming-to-asylum-seekers/)

Kruger, M ‘Understanding Asylum Outcomes For Zimbabweans’ *AA Insiders’ Newsletter* June 27, 2011 <http://africanarguments.org/2011/06/27/understanding-asylum-outcomes-for-zimbabweans-in-the-united-states-and-south-africa/> (accessed on 12 September 2017).

## **Reports**

Mazaras, C ‘The well-being of economic migrants in South Africa: Health gender development: Working paper for the world migration report (2003)’

Roni, A ‘No way in barriers to access, service and administrative justice at South Africa’s refugee reception offices (2012)’ *ACMS RESEARCH REPORT*

## **Websites**

[702.co.za/articles/274331/no-more-visas-in-country-for-asylum-seekers?](http://702.co.za/articles/274331/no-more-visas-in-country-for-asylum-seekers?)

[accommodationmozambique.co.za/mozambique/komatipoort.php](http://accommodationmozambique.co.za/mozambique/komatipoort.php)

[africacheck.org/2015/04/17/analysis-are-foreigners-stealing-jobs-in-south-africa](http://africacheck.org/2015/04/17/analysis-are-foreigners-stealing-jobs-in-south-africa)

[africanarguments.org/2011/06/27/understanding-asylum-outcomes-for-zimbabweans-in-the-united-states-and-south-africa/](http://africanarguments.org/2011/06/27/understanding-asylum-outcomes-for-zimbabweans-in-the-united-states-and-south-africa/)

[allafrica.com/stories/201707250132.html](http://allafrica.com/stories/201707250132.html)

[aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp0001/01RP05](http://aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp0001/01RP05)

[bangla2000.com/bangladesh/religion.shtm](http://bangla2000.com/bangladesh/religion.shtm)

[bdlive.co.za/national/2015/02/09/gigaba-not-keen-on-asylum-seekers-spazas?](http://bdlive.co.za/national/2015/02/09/gigaba-not-keen-on-asylum-seekers-spazas?)

[brandsouthafrica.com/tourism-south-africa/travel/documents/refugees\\_asylum](http://brandsouthafrica.com/tourism-south-africa/travel/documents/refugees_asylum)

[beta2.statssa.gov.za/publications/D03514/D035142013.pdf](http://beta2.statssa.gov.za/publications/D03514/D035142013.pdf)

[cc.bingj.com/cache.aspx?q=Green+Paper+on+International+Migration+\(June+2016\)](http://cc.bingj.com/cache.aspx?q=Green+Paper+on+International+Migration+(June+2016))

[brownpoliticalreview.org/2015/01/political-persecution-in-bangladesh/](http://brownpoliticalreview.org/2015/01/political-persecution-in-bangladesh/)

[carebd.org/government-politics-bangladesh.html](http://carebd.org/government-politics-bangladesh.html)

[cscd.osaka-u.ac.jp/user/rosaldo/101010OHA.htm](http://cscd.osaka-u.ac.jp/user/rosaldo/101010OHA.htm)

[dha.gov.za/index.php/immigration-services/places-of-detention-for-those-pending-deportation](http://dha.gov.za/index.php/immigration-services/places-of-detention-for-those-pending-deportation)

[dha.gov.za/index.php/statements-speeches](http://dha.gov.za/index.php/statements-speeches)

[discover.sabinet.co.za/document/GGD138008](http://discover.sabinet.co.za/document/GGD138008)

[distancesfrom.com/za/distance-from-Port-Elizabeth-to-Komatipoort-Komatiepoort/DistanceHistory/1573599.aspx](http://distancesfrom.com/za/distance-from-Port-Elizabeth-to-Komatipoort-Komatiepoort/DistanceHistory/1573599.aspx)

[en.m.wikipedia.org/wiki/Politics\\_of\\_Bangladesh](http://en.m.wikipedia.org/wiki/Politics_of_Bangladesh)

[en.wikipedia.org/wiki/Audi\\_alteram\\_partem](http://en.wikipedia.org/wiki/Audi_alteram_partem)

[eycb.coe.int/compasito/chapter\\_6/pdf/1.pdf](http://eycb.coe.int/compasito/chapter_6/pdf/1.pdf)

[eps.revues.org/3496](http://eps.revues.org/3496)

[fhr.org.za/files/5413/8503/7665/no\\_way\\_in\\_barriers\\_to\\_access\\_service\\_and\\_administrative\\_justice\\_final\\_report.pdf](http://fhr.org.za/files/5413/8503/7665/no_way_in_barriers_to_access_service_and_administrative_justice_final_report.pdf)

[gov.za/speeches/annual-official-opening-national-house-traditional-leaders-3-mar-2017-0000](http://gov.za/speeches/annual-official-opening-national-house-traditional-leaders-3-mar-2017-0000)

[gov.uk/government/uploads/system/uploads/attachment\\_data/file/406042/BGD\\_CIG\\_Political\\_opponents\\_v1\\_0.pdf](http://gov.uk/government/uploads/system/uploads/attachment_data/file/406042/BGD_CIG_Political_opponents_v1_0.pdf)

[gov.za/sites/www.gov.za/files/images/a108-96.pdf](http://gov.za/sites/www.gov.za/files/images/a108-96.pdf)

[gov.za/sites/www.gov.za/files/39067\\_gen806.pdf](http://gov.za/sites/www.gov.za/files/39067_gen806.pdf)

[gov.za/sites/www.gov.za/files/a130-98\\_0.pdf](http://gov.za/sites/www.gov.za/files/a130-98_0.pdf)

[google.co.za/amp/s/southafricanimmigration.org/online-application-zimbabwean-special-permit-zsp/amp](http://google.co.za/amp/s/southafricanimmigration.org/online-application-zimbabwean-special-permit-zsp/amp)

[google.co.za/search?q=Maduma%2C+T+\(2009\)](http://google.co.za/search?q=Maduma%2C+T+(2009))

[groundup.org.za/article/home-affairs-be-taken-court/](http://groundup.org.za/article/home-affairs-be-taken-court/)

[home-affairs.gov.za/files/GreenPaper\\_on\\_InternationalMigration-%2022062016.pdf](http://home-affairs.gov.za/files/GreenPaper_on_InternationalMigration-%2022062016.pdf)

[home-affairs.gov.za/index.php/statements-speeches/704-statement-by-home-affairs-minister-malusi-gigaba-at-the-media-briefing-on-the-closing-of-the-zimbabwe-special-permit-programme-and-the-opening-of-the-lesotho-special-permit](http://home-affairs.gov.za/index.php/statements-speeches/704-statement-by-home-affairs-minister-malusi-gigaba-at-the-media-briefing-on-the-closing-of-the-zimbabwe-special-permit-programme-and-the-opening-of-the-lesotho-special-permit)

[hrw.org/legacy/reports98/sareport/Adv4a.thm](http://hrw.org/legacy/reports98/sareport/Adv4a.thm)

[imcosa.co.za/news/589-home-affairs-to-court.html](http://imcosa.co.za/news/589-home-affairs-to-court.html) [www.groundup.org.za/article/home-affairs-to-be-taken-to-court](http://www.groundup.org.za/article/home-affairs-to-be-taken-to-court)

[iol.co.za/capetimes/news/illegal-immigrants-ruling-hailed-as-groundbreaking-10060555](http://iol.co.za/capetimes/news/illegal-immigrants-ruling-hailed-as-groundbreaking-10060555)

[iol.co.za/news/crime-courts/concourt-rab-must-rule-on-krejcir-case-1583633](http://iol.co.za/news/crime-courts/concourt-rab-must-rule-on-krejcir-case-1583633)

[iom.int/files/live/sites/iom/files/What-We-Do/wmr2013/en/Working-Paper\\_SouthAfrica.pdf](http://iom.int/files/live/sites/iom/files/What-We-Do/wmr2013/en/Working-Paper_SouthAfrica.pdf)

[justice.gov.za/legislation/acts/2000-003.pdf](http://justice.gov.za/legislation/acts/2000-003.pdf)

[justice.gov.za/legislation/constitution/saconstitution-web-eng-02.pdf](http://justice.gov.za/legislation/constitution/saconstitution-web-eng-02.pdf)

[justice.gov.za/sca/judgements/judgem\\_sca2017.html](http://justice.gov.za/sca/judgements/judgem_sca2017.html)

[lawsoc.co.za/upload/files/alienscontrolact.htm](http://lawsoc.co.za/upload/files/alienscontrolact.htm)

[lhr.org.za/policy/regulations-sa-refugees-act](http://lhr.org.za/policy/regulations-sa-refugees-act)

[mg.co.za/article/2015-08-07-concourt-rules-closing-pe-refugee-office-unlawful](http://mg.co.za/article/2015-08-07-concourt-rules-closing-pe-refugee-office-unlawful)

[migrationpolicy.org/article/south-africa-policy-face-xenophobia/](http://migrationpolicy.org/article/south-africa-policy-face-xenophobia/)

[m.polity.org.za/article/dha-home-affairs-on-new-process-at-desmond-tut-refugee-reception-centre-2017-02-20](http://m.polity.org.za/article/dha-home-affairs-on-new-process-at-desmond-tut-refugee-reception-centre-2017-02-20)

[mpr.a.ub.uni-muenchen.de/19182/1/MPRA\\_paper\\_19182.pdf](http://mpr.a.ub.uni-muenchen.de/19182/1/MPRA_paper_19182.pdf)

[news24.com/SouthAfrica/News/How-many-Zimbabweans-inSA-2](http://news24.com/SouthAfrica/News/How-many-Zimbabweans-inSA-2)

[refuge.journals.yorku.ca/index.php/refuge/article/view/26030](http://refuge.journals.yorku.ca/index.php/refuge/article/view/26030)

[pmg.org.za/committee-meeting/22163](http://pmg.org.za/committee-meeting/22163)

[pmg.org.za/committee-meeting/23944/](http://pmg.org.za/committee-meeting/23944/)

[pmg.org.za/committee-question/4690/](http://pmg.org.za/committee-question/4690/)

[politics.web.co.za/party/concourt-rules-on-mg-vs-kreijcir](http://politics.web.co.za/party/concourt-rules-on-mg-vs-kreijcir)

[relocationafrica.com/children-born-sa-foreign-parents-can-apply-citizenship/](http://relocationafrica.com/children-born-sa-foreign-parents-can-apply-citizenship/)

[reports-tv.com/asylum-seekers-now-eligible-to-submit-for-permit-to-change-immigration-status-in-south-africa-breaking/](http://reports-tv.com/asylum-seekers-now-eligible-to-submit-for-permit-to-change-immigration-status-in-south-africa-breaking/)

[repository.law.indiana.edu/ijgls/vol7/iss1/15](http://repository.law.indiana.edu/ijgls/vol7/iss1/15)

[ruralpovertyportal.org/country/home/tags/bangladesh](http://ruralpovertyportal.org/country/home/tags/bangladesh)

[saflii.org/za/journals/LDD/2009/9.pfd](http://saflii.org/za/journals/LDD/2009/9.pfd) [sahistory.org.za/article/timeline-20-years-democracy-1994-2014](http://sahistory.org.za/article/timeline-20-years-democracy-1994-2014)

[saflii.org/za/cases/ZAECPEHC/2012/12.html](http://saflii.org/za/cases/ZAECPEHC/2012/12.html)

[saflii.org/za/cases/ZASCA/2010/9.html](http://saflii.org/za/cases/ZASCA/2010/9.html)

[saflii.org/za/cases/ZAECPEHC/2011/40.html](http://saflii.org/za/cases/ZAECPEHC/2011/40.html)

[saflii.org/za/cases/ZASCA/2011/209.html](http://saflii.org/za/cases/ZASCA/2011/209.html)

[saflii.org/za/cases/ZASCA/2012/31.html](http://saflii.org/za/cases/ZASCA/2012/31.html)

[saflii.org/za/cases/ZAGPHC/2006/101.html](http://saflii.org/za/cases/ZAGPHC/2006/101.html)

[saflii.org/za/cases/ZAWCHC/2016/13.html](http://saflii.org/za/cases/ZAWCHC/2016/13.html)

[saflii.org/za/cases/ZASCA/2013/134.html](http://saflii.org/za/cases/ZASCA/2013/134.html)

[saflii.org/za/cases/ZASCA/2015.html](http://saflii.org/za/cases/ZASCA/2015.html)

[saflii.org/za/cases/ZASCA/2015/92.html](http://saflii.org/za/cases/ZASCA/2015/92.html)

[saflii.org/za/cases/ZASCA/2014/143.html](http://saflii.org/za/cases/ZASCA/2014/143.html)

[saflii.org/za/cases/ZASCA/2003/142.html](http://saflii.org/za/cases/ZASCA/2003/142.html)

[saflii.org/za/journals/LDD/2009/9.pfd](http://saflii.org/za/journals/LDD/2009/9.pfd)

[saflii.org/za/legis/consol\\_act/ia2002138.pdf](http://saflii.org/za/legis/consol_act/ia2002138.pdf)

[saflii.org/za/legis/consol\\_reg/ra130o1998rangnr955542.pdf](http://saflii.org/za/legis/consol_reg/ra130o1998rangnr955542.pdf)

[sahistory.org.za/article/state-nation-address-president-south-africa-nelson-mandela](http://sahistory.org.za/article/state-nation-address-president-south-africa-nelson-mandela)

[sahistory.org.za/article/timeline-20-years-democracy-1994-2014](http://sahistory.org.za/article/timeline-20-years-democracy-1994-2014)

[samigration.com/blog/south-africas-borders-may-become-even-more-unwelcoming-to-asylum-seekers/](http://samigration.com/blog/south-africas-borders-may-become-even-more-unwelcoming-to-asylum-seekers/)

[sanews.gov.za/south-africa/home-affairs-reviewing-migration-policy](http://sanews.gov.za/south-africa/home-affairs-reviewing-migration-policy)

[thefreedictionary.com/spaza+shop](http://thefreedictionary.com/spaza+shop)

[timeslive.co.za/thetimes/2016/06/21/SA-slams-the-door-on-expats-on-Refugee-Day](http://timeslive.co.za/thetimes/2016/06/21/SA-slams-the-door-on-expats-on-Refugee-Day)

[timeslive.co.za/local/2016/06/24/Cape-Town-court-judgement-confirms-closure-of-Refugee-Reception-Office](http://timeslive.co.za/local/2016/06/24/Cape-Town-court-judgement-confirms-closure-of-Refugee-Reception-Office)

[timeslive.co.za/local/2017/03/14/Rights-of-detained-suspected-illegal-foreigners-under-spotlight-in-ConCourt1?platform=hootsuite](http://timeslive.co.za/local/2017/03/14/Rights-of-detained-suspected-illegal-foreigners-under-spotlight-in-ConCourt1?platform=hootsuite)

[theconversation.com/explainer-the-difference-between-asylum-seekers-refugees-and-economic-migrants-45615](http://theconversation.com/explainer-the-difference-between-asylum-seekers-refugees-and-economic-migrants-45615)

[topsanews.co.za/zimbabweans-restless-regarding-the-expiry-of-zsp-permits/](http://topsanews.co.za/zimbabweans-restless-regarding-the-expiry-of-zsp-permits/)

[traveller24.com/TravelPlanning/VisaInfo/dha-what-you-need-to-know-about-sas-new-international-migration-policy-20160729](http://traveller24.com/TravelPlanning/VisaInfo/dha-what-you-need-to-know-about-sas-new-international-migration-policy-20160729)

[un.org/en/universal-declaration-human-rights/](http://un.org/en/universal-declaration-human-rights/)

[unhcr.org/45dc1a682.html](http://unhcr.org/45dc1a682.html)

[unhcr.org/4ca34be29.pdf](http://unhcr.org/4ca34be29.pdf)

[unhrc.org/3d58e13b4.html](http://unhrc.org/3d58e13b4.html)

[unhrc.org/news/latest/2015/8/55df0e556/unhrc-viewpoint-refugee-migrant-right.html](http://unhrc.org/news/latest/2015/8/55df0e556/unhrc-viewpoint-refugee-migrant-right.html)

[unhcr.org/refmag/148/](http://unhcr.org/refmag/148/)

[vsfglobal.com/lsp/southafrica/Lesotho\\_special\\_permit.html](http://vsfglobal.com/lsp/southafrica/Lesotho_special_permit.html)

[workpermitsouthafrica.co.za/High-Court-JudgementSKM\\_36716092111390.pdf](http://workpermitsouthafrica.co.za/High-Court-JudgementSKM_36716092111390.pdf)

[worldii.org/int/journals/ISILYBIHRL/2001/6.rtf](http://worldii.org/int/journals/ISILYBIHRL/2001/6.rtf)

[zimsinsa.com/zsp-renewal-needs-zimbabwe-governments-buy-in](http://zimsinsa.com/zsp-renewal-needs-zimbabwe-governments-buy-in)

### **Case law**

*Alam v Minister of Home Affairs* (3414/2010) [2012] ZAECPEHC 12 (16 February 2012)

*Arse v Minister of Home Affairs and Others* (25/2010) [2010] ZASCA 9 (12 March 2010)

*Bhuiyan and Others v Minister of Home Affairs and Another* (2585/2011, 2599/2011) [2011] ZAECPEHC 40 (15 September 2011)

*Bula & others v Minister of Home Affairs & others* (589/11) [2011] ZASCA 209 (29 November 2011)

*Ersumo v Minister of Home Affairs and Others* (69/2012) [2012] ZASCA 31 (28 March 2012)

*Fang vs Refugee Appeal Board & others* (40771/05) [2006] ZAGPHC 101 (15 November 2006)

*Mail and Guardian Media Limited and Others v Chipu N.O and Others* 2013 (6) SA 367 (CC) (27 September 2013)

*Mohamed v The Minister of Home Affairs & 5 others* (A287/2015) ZAWCHC 13 (12 February 2016)

*Moustapha Dabone and 12 Others v Minister of Home Affairs* (7526/03) [2003] HC 11 (5 April 2016)

*Minister of Home Affairs v Ruta* (30/2017) [2017] ZASCA 186 (13 December 2017)

*Minister of Home Affairs and Others v Scalabrini Centre, Cape Town & others* (735/12.360/13) [2013] ZASCA 134 (27 September 2013)

*Minister of Home Affairs & others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* (831/2013) [2015] ZASCA 545 (25 March 2015)

*Rahim v The Minister of Home Affairs* (965/2013) [2015] ZASCA 92 (29 May 2015)

*Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and others* (48/2014) [2014] ZASCA 143 (26 September 2014)

*Minister of Home Affairs and Others v Watchenuka & others* (010/2003) ZASCA 142 (28 November 2003)

### **Legislation and draft legislation**

Aliens Control Act 96 of 1991

Border Management Agency Bill, 2015

Constitution Act 130 of 1998

Draft Refugees Amendment Bill, 2015

Green Paper on International Migration (June 2016)

Immigration Act 13 of 2002

Interim Constitution Act 200 of 1993

Promotion of Administrative Justice Act 3 of 2002

Refugees Act 130 of 1998

### **Government Gazette**

Government Gazette 37679 published on 16 May 2014

Government Gazette 39056 published on 5 August 2015

Government Notice 955 in Government Gazette 37122 dated 6 December 2013