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

Case number: 8684/24

In the matter between:

OFFICE OF THE CHIEF JUSTICE
PRIVATE BAG X9020
CAPE TOWN 8000
2024 -04- 26
GENERAL OFFICE
WESTERN CAPE HIGH COURT

SCALABRINI CENTRE OF CAPE TOWN	First Applicant
TRUSTEES OF THE SCALABRINI CENTRE OF CAPE TOWN	Second Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
THE CHIEF DIRECTOR OF ASYLUM SEEKER MANAGEMENT: DEPARTMENT OF HOME AFFAIRS	Third Respondent
THE REFUGEE APPEALS AUTHORITY	Fourth Respondent
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fifth Respondent

NOTICE OF MOTION

Nabeelah Mia | Lawyers for Human Rights
011 339 1960 | nabeelah@lhr.org.za | C/O Norton Rose Fulbright | Box 330

PART A: URGENT INTERIM RELIEF *PENDENTE LITE*

PLEASE TAKE NOTICE that the Applicants intend applying to this Honourable Court on **FRIDAY 24 MAY 2024**, at **10:00** or as soon thereafter as counsel may be heard, for orders in the following terms:

1. The forms, service and time limits prescribed in the Rules of the Court are dispensed with and leave is granted for Part A of this application to be heard as a matter of urgency in terms of Uniform Rule 6(12)(a);

2. Pending the final determination of the relief sought in Part B of the notice of motion, the Respondents are interdicted and restrained from:

   2.1. Deporting or causing any foreign national who has indicated an intention to seek asylum under the Refugees Act 130 of 1998 ("**the Act**") to be deported or otherwise compelled to return to their countries of origin, unless and until their asylum application has been finally rejected on its merits;

   2.2. Implementing sections 4(1)(f), 4(1)(h), 4(1)(i), and 21(1B) of the Act and Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Refugee Regulations, published in GNR 1707, Government Gazette 42932, on 27 December 2019 ("**the Regulations**"), including not arresting and/or detaining foreign nationals pursuant to the application of these provisions; or

2.3. Refusing to allow any person to apply for asylum on the basis of the provisions listed in paragraph 2.2 above ("**the challenged provisions**");

3. The costs of Part A of this application are to be paid by any Respondent who opposes the relief sought herein, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel on scale C as contemplated in Uniform Rule 69(7); and

4. Further and/or alternative relief.

PLEASE TAKE NOTICE FURTHER that the accompanying affidavits of **JAMES CHAPMAN, NABEELAH MIA, NYIKO MANYUSA, LIESL FOURIE, ABDULRAHMAN ABDULAHI MOHAMED, YUSUF AHMED MAGALE, SABRIYE SHARMA MOHAMMED, ABDULA GAADIR MOHAMMED NOOR**, and **HUSSEIN ALI NUR**, together with the annexures attached thereto, will be used in support of this application.

PLEASE TAKE NOTICE FURTHER that if any Respondent intends opposing this application they are required to notify the Applicants' attorney in writing on or before **FRIDAY 10 MAY 2024** of their intention to oppose, and together with such notice to deliver their answering affidavit(s), if any.

PLEASE TAKE NOTICE FURTHER that the Applicants reserve the right to file their replying affidavits on or before **FRIDAY 17 MAY 2024**.

PLEASE TAKE NOTICE FURTHER that the Applicants have appointed **LAWYERS FOR HUMAN RIGHTS** at the address and electronic mail address set out hereunder as their attorneys of record at which they will receive all service and process in this matter.

KINDLY PLACE THIS MATTER ON THE ROLL ACCORDINGLY.

PART B: CONSTITUTIONAL CHALLENGE AND JUDICIAL REVIEW

PLEASE TAKE NOTICE that the Applicants intend applying to the above Honourable Court on a date and time to be determined by the Registrar, for orders in the following terms:

5. Sections 4(1)(f), 4(1)(h), 4(1)(i), and 21(1B) of the Refugees Act 130 of 1998 ("**the Act**") are declared to be inconsistent with the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") and invalid;

6. Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Refugee Regulations, published in GNR 1707, Government Gazette 42932, on 27 December 2019 ("**the Regulations**") are declared to be inconsistent with the Constitution and invalid;

7. Additionally and/or alternatively to paragraph 6 above, Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Regulations are reviewed and set aside as unlawful and invalid.

8. The costs of this application are to be paid by any Respondent who opposes the relief sought herein, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel on scale C as contemplated in Uniform Rule 69(7); and

9. Further and/or alternative relief.

PLEASE TAKE NOTICE FURTHER THAT:

(i) The First Respondent is hereby called upon to dispatch within fifteen (15) days after receipt of this notice, to the Registrar of this Honourable Court, the record of the proceedings ("**the Rule 53 record**") held before the taking of the decisions referred to in paragraph 6 above, including all audio tape recordings, transcripts of audio tape recordings, memoranda, reports, minutes of meetings, letters, reports and other documents which relate to the decisions or were before the First Respondent when the decisions were arrived at, together with such reasons as are by law required or as the First Respondent may decide to give, and to notify the Applicants that he has done so, and;

(ii) the Applicants shall be entitled, within 10 days after the Registrar has made the Rule 53 record available, to deliver a notice and accompanying affidavits, amending, adding to or varying the terms of the notice of motion and supplementing the founding affidavit.

PLEASE TAKE NOTICE FURTHER that if any Respondent wishes to oppose this application, he or she is required to:

(i) within fifteen (15) days of receipt of this notice of motion or any amendment thereof, deliver to the Applicants a notice of opposition appointing an address within twenty-five (25) kilometres of the office of the Registrar of this Honourable Court and an electronic mail address, if available, at either of which addresses he or she will accept notice and service of all process in these proceedings, as well as such person's postal or facsimile addresses where available; and

(ii) within thirty (30) days of the expiry of the time limit referred to in Rule 53(4) of the Rules of this Honourable Court, deliver any affidavits he or she may desire to make in answer to the allegations made by and on behalf of the Applicants.

PLEASE TAKE NOTICE FURTHER that if no such intention to oppose is given, application will be made on a date arranged with the Registrar of this Court for the relief sought in this notice of motion.

PLEASE TAKE NOTICE FURTHER that the accompanying affidavits of **JAMES CHAPMAN, NABEELAH MIA, NYIKO MANYUSA, LIESL FOURIE, ABDULRAHMAN ABDULAHI MOHAMED, YUSUF AHMED MAGALE, SABRIYE SHARMA MOHAMMED, ABDULA GAADIR MOHAMMED NOOR**, and **HUSSEIN ALI NUR**, together with the annexures attached thereto, will be used in support of this application.

PLEASE TAKE NOTICE FURTHER that the Applicants have appointed **LAWYERS FOR HUMAN RIGHTS** at the address and electronic mail address set out hereunder as their attorneys of record at which they will receive all service and process in this matter.

Signed at Cape Town on the 16th day of April 2024.

LAWYERS FOR HUMAN RIGHTS

Attorneys for the Applicants

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Braamfontein

Johannesburg

Per: Nabeelah Mia

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Box: 330

TO: **THE REGISTRAR**

High Court

CAPE TOWN

AND TO: **THE MINISTER OF HOME AFFAIRS**

First Respondent

OFFICE OF THE STATE ATTORNEY

Liberty Life Building

22 Long Street

CAPE TOWN

AND TO: **THE DIRECTOR-GENERAL OF THE**

DEPARTMENT OF HOME AFFAIRS

Second Respondent

56 Barrack Street

CAPE TOWN

AND TO: **THE CHIEF DIRECTOR OF ASYLUM SEEKER**

MANAGEMENT: DEPARTMENT OF HOME AFFAIRS

Third Respondent

Hallmark Building

230 Johannes Ramokhoase Street

PRETORIA

AND TO: **THE REFUGEE APPEALS AUTHORITY**

Fourth Respondent

7th Floor

City Centre Building

266 Pretorius Street

PRETORIA

AND TO: **THE STANDING COMMITTEE FOR REFUGEE AFFAIRS**

Fifth Respondent

7th Floor

City Centre Building

266 Pretorius Street

PRETORIA

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case number:

In the matter between:

SCALABRINI CENTRE OF CAPE TOWN	First Applicant
TRUSTEES OF THE SCALABRINI CENTRE OF CAPE TOWN	Second Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
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THE REFUGEE APPEALS AUTHORITY	Fourth Respondent
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fifth Respondent

FOUNDING AFFIDAVIT

I, the undersigned

JAMES CHAPMAN

do hereby make oath and say that:

1. I am an adult male employed as the Head of Advocacy and Legal Advisor at the offices of the Applicants (who shall be collectively referred to hereafter as "*Scalabrini*") at 47 Commercial Street, Cape Town.

2. The facts contained herein are both true and correct and, unless the context indicates otherwise, fall within my personal knowledge.

3. Where I make averments of a legal nature, I do so under the advisement of the Applicants' legal representatives. I believe those legal averments to be correct.

I. THE PARTIES

4. The First Applicant is the Scalabrini Centre of Cape Town, a trust with registration number IT2746/2006, whose principal place of business is 47 Commercial Street, Cape Town, 8001. The First Applicant is registered with the Department of Social Development as a Non-Profit Organisation (registration number 021-079) and with the South African Revenue Services as a Public Benefit Organisation (number 930012808).

5. The Trustees of the Scalabrini Centre of Cape Town ("*the Trustees*") are collectively cited as the Second Applicant, to the extent that it is necessary to do

so. The Trustees support and have authorised the First Applicant to institute this application. They have also authorised me to depose to all affidavits on behalf of the First Applicant and the Trustees themselves in this litigation. A Resolution in this regard by the Trustees is attached marked "**JC1**".

6. The First Respondent is the Minister of Home Affairs ("*the Minister*"), cited in his official capacity as the member of the national executive responsible for the implementation and administration of the Refugees Act 130 of 1998 ("*the Refugees Act*"). He is served care of the State Attorney at 22 Long Street, Cape Town, 8001.

7. The Second Respondent is the Director-General of the Department of Home Affairs ("*the Director-General*" and "*the DHA*" respectively), cited in his official capacity for his role in the implementation and administration of the Refugees Act. He is served at the offices of the DHA at 56 Barrack Street, Cape Town, 8001.

8. The Third Respondent is the Chief Director of Asylum Seeker Management: Department of Home Affairs, who is the primary senior official tasked with management of asylum seekers and thus with the issues addressed hereunder. He is cited in his official capacity and served at his place of work at 230 Johannes Ramokhoase Street, Pretoria.

9. The Fourth Respondent is the Refugee Appeals Authority ("*the RAA*"), established in terms of sections 12, 13, 14 and 26 of the Act to hear appeals against decisions by Refugee Status Determination Officers ("*RSDOs*") to, *inter alia*, exclude applicants from refugee status. The RAA is served at its offices at the 7th floor, City Centre Building, 266 Pretorius Street, Pretoria.

10. The Fifth Respondent is the Standing Committee for Refugee Affairs ("*the SCRA*") established in terms of section 9A of the Refugees Act. The SCRA is cited insofar as it has an interest in the outcome of this matter. It is served at its offices at the 7th floor, City Centre Building, 266 Pretorius Street, Pretoria.

II. THE NATURE AND PURPOSE OF THIS LITIGATION

11. This application turns on a single question: Can a foreign national be refused the right to apply for asylum in South Africa due to their adverse immigration status?

12. Scalabrini submits that the answer under international law, under the Constitution of the Republic of South Africa, 1996 ("*the Constitution*"), and under the Refugees Act itself must be **no**.

13. On this basis, in Part B of this application Scalabrini challenges the constitutional validity of certain provisions in the Act and the regulations thereto (the Refugees Regulations promulgated in GNR 1707, Government Gazette 42932, 27 December 2019 ("*the Regulations*")), specifically:

    13.1. Sections 4(1)(f), 4(1)(h), 4(1)(i), and 21(1B) of the Act; and

    13.2. Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4).

14. The effect of these provisions ("*the challenged provisions*") is to empower the Respondents to bar foreign nationals from applying from asylum in cases where such nationals hold some adverse immigration status (such as having an expired

asylum transit visa under section 23 of the Refugees Act), save where "*good cause*" or "*compelling reasons*" are found to exist.

15. Although these provisions operate in different ways, their central feature is the same: That a foreign national's ability to seek refugee status (under the Refugees Act) is now subordinate to and dependent upon his/her perceived compliance with South African immigration law (under the Immigration Act 13 of 2002 ("*the Immigration Act*")).

16. Scalabrini contends that this is unlawful in principle. The challenged provisions all infringe unjustifiably upon the right of *non-refoulement* (non-return) enshrined both in customary international law and in section 2 of the Refugees Act:

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

17. As apparent from the above, the right of *non-refoulement* prevents any person, under any law, from being returned to their countries of origin if there is a real

possibility that they will suffer persecution in those countries; that is, if they have an asylum claim. This constitutes the foundational principle and goal of refugee law both internationally and domestically: that those unfortunate individuals who are fleeing inhumane treatment in their homes deserve shelter and have a right not to be returned to the hardships that await them in their countries of origin.

18. The challenged provisions infringe on this right. They permit persons with very strong claims to asylum – for example, a political dissident fleeing oppression, a family fleeing civil war, or a young woman fleeing from the forced mutilation of her genitalia – to be returned to their home countries only because they delayed or erred in how and when they applied for asylum.

19. Scalabrini contends this can never be lawful. An individual's claim to asylum should be determined based on the merits of their claim alone, and not on their ability to navigate the bureaucratic complexities of South African immigration law. To deny an asylum seeker the right to apply for asylum because of the latter, is in violation of South Africa's domestic, regional and international obligations.

20. For this reason, Part B of this application seeks the striking down of the challenged provisions.

21. The challenged provisions came into effect at the beginning of 2020. However, due to, *inter alia*, the COVID-19 pandemic, they were almost never applied until towards the end of last year.

22. Since then, and as described in greater detail below, the Respondents have implemented the challenged provisions so aggressively that new asylum applications appear to have declined by 90% or more. Refugee Reception

Offices ("*RROs*") that have historically overflowed with applicants now stand empty save for those new applicants who are attending on dates appointed to them by the DHA – and even those applicants are being arrested, detained and denied the right to seek asylum.

23. The direct consequence has been to deter would-be asylum seekers from seeking asylum, because almost any person who seeks asylum is arrested, disbarred from asylum in terms of the challenged provisions, detained (unless they have children), and then either deported or ordered to depart South Africa.

24. The scale and severity of these steps by the Respondents cannot be overemphasised. Over the past months, the refugee system in South Africa has been effectively closed to almost all newcomers. Those already in the system are still being processed, but already hundreds (if not thousands) have been denied their rights to the protection of refugee law in South Africa.

25. For these reasons, in Part A of this application, Scalabrini seeks an urgent interim interdict to suspend the operation of the challenged provisions pending the final determination of Part B.

26. In support of the above relief, this application deals with:

    26.1. Scalabrini's standing to bring this litigation & the jurisdiction of this Court;

    26.2. The right of *non-refoulement* and the nature of asylum applications both internationally and domestically;

    26.3. The content of the challenged provisions;

26.4. The recent implementation of the challenged provisions by the Respondents;

26.5. Scalabrini's correspondence with the Respondents and the question of urgency;

26.6. Part B: The violation of rights created by the challenged provisions;

26.7. Part B: The irrationality of and lack of any legitimate public purpose to the challenged provisions;

26.8. Part B: The unjustifiability of the challenged provisions under section 36 of the Constitution;

26.9. Part B: The basis for the judicial review of the relevant Regulations;

26.10. Part A: The interim relief sought;

26.11. The appropriate remedy.

III. STANDING AND JURISDICTION

27. Scalabrini brings this application in:

27.1. Its own interest in terms of section 38(a) of the Constitution;

27.2. In the interest of those asylum seekers who cannot act in their own name, due to their poverty or lack of legal means, in terms of section 38(b) of the Constitution;

27.3. In the interest of all new asylum seekers in South Africa whose ability to apply for asylum has been unjustifiably limited by the challenged provisions, in terms of section 38(c) of the Constitution; and

27.4. In the public interest in terms of section 38(d) of the Constitution.

28. Scalabrini's core mandate concerns assisting migrant communities and displaced people, including asylum seekers and refugees. In this regard, Scalabrini runs various asylum seekers and refugees focused programmes related to legalisation, integration and development. Across all of Scalabrini's programmes the organisation assists approximately 6 000 individuals annually.

29. Through its work in Cape Town, Scalabrini has gained a deep understanding of the systemic barriers experienced by asylum seekers and refugees, and where such barriers have not been resolved through consultation and dialogue, Scalabrini Centre has engaged in public interest litigation on behalf of this vulnerable group.

30. This has included litigation regarding, *inter alia*, the unlawful closure of the Cape Town Refugee Reception Office, litigation regarding the cessation of refugee status to Angolan refugees, and successfully challenging the constitutionality of other provisions of the Refugees Act (in *Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others* [2023] ZACC 45 (12 December 2023) ("*Scalabrini 3*")). Scalabrini Centre also engages in advocacy with Chapter 9 Institutions, Parliament, as well as international bodies such as the Human Rights Mechanisms at the United Nations.

31. As will become clear throughout this affidavit, the challenged provisions have far-reaching effects on the fundamental rights of one of the most vulnerable members of society, namely asylum seekers. The provisions under scrutiny have the potential to have catastrophic and even life-threatening consequences.

32. Accordingly, Scalabrini contends that it has a demonstrated interest in this matter in terms of its own objectives as well as in its representative capacity on behalf of the asylum seekers who it assists daily that will be affected by the provisions.

33. Scalabrini further acts on behalf of those asylum seekers who cannot act on their own behalf – which, given the relative poverty, marginalisation and lack of legal resources of asylum seekers as a class, is the overwhelming majority of asylum seekers. It is simply not within the means of most asylum seekers to launch a constitutional challenge against provisions of the Refugees Act and the Regulations, and/or to litigate it to finality to the Constitutional Court. It is therefore incumbent on refugee service providers, such as Scalabrini, to act on their behalf.

34. Finally, on consideration of the vulnerability of the persons affected, the significance of the constitutional rights infringed and the dire consequences of the challenged provisions, it is evident that it is in the public interest to have this application heard.

35. This Court has jurisdiction over this matter on three bases. First, the Refugees Act and Regulations apply to all asylum seekers throughout South Africa. They apply with equal force in the Western Cape as they do in Gauteng. As the cause of this application is the unconstitutionality and illegality of the Impugned Provisions, such cause arises within the jurisdiction of this Court. This factor

accords this Court jurisdiction. Indeed, *Scalabrini 3* (a similar constitutional challenge) was successfully launched in this Court.

36. Secondly, Part B of this application comprises both a constitutional challenge and a judicial review.

37. The Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*"), which controls judicial review applications, provides in section 1 thereof that such applications may be heard by the court "*within whose area of jurisdiction the administrative action occurred or the administrator has his or her or its principal place of administration or the party whose rights have been affected is domiciled or ordinarily resident or the adverse effect of the administrative action was, is or will be experienced*".

38. The Western Cape is the jurisdiction in which the Applicants are domiciled or ordinarily resident, and in which they will experience the adverse effect of the administrative action in question. As explained above, the principal offices of the First Applicant are at 47 Commercial Street, Cape Town, 8001. For this reason as well, this Court has jurisdiction to hear this matter in terms of PAJA.

39. Thirdly, this Court has already found that the First and Second Respondents have a principal place of business in Cape Town.

40. In *Johnson and Others v Minister of Home Affairs and Others; Delorie and Others v Minister of Home Affairs and Others* [2014] ZAWCHC 101 (30 June 2014) ("*Johnson*"), Yekiso J held at paragraph 29 that "*the National Executive, as all of us have come to know, has two principal places of business, one in Tshwane and one in Cape Town.*" The respondents in that matter appealed that decision

to the Constitutional Court, but did not seek to appeal the ruling as to jurisdiction by Yekiso J.

41. And in *De Saude Attorneys & Another v The Director-General of the Department of Home Affairs & Others* (WCD 22797/16), judgment of Allie J of 25 August 2017 (unreported), Allie J held at paragraph 14 – on the basis of the Minister's own version – that:

> *"On respondents' case, the Minister, who is the second respondent has a principal place of business in the jurisdiction of this court. Accordingly since the other respondents who do not operate within the jurisdiction of this court have been joined with the Minister in this application, this court has jurisdiction over them in this matter."*

42. This judgment was appealed to the Supreme Court of Appeal ("*SCA*") by the DHA, but on 29 March 2019 the SCA dismissed the appeal, finding (in paragraph 65) that "*the essential conclusions of the court below cannot be faulted*".

43. The First and Second Respondents thus have a principal place of business within the jurisdiction of this Court.

44. For all the reasons set out above, the Applicants have *locus standi* to bring this application and this Court has jurisdiction to hear it.

IV. THE RIGHT OF *NON-REFOULEMENT* & REFUGEE PROTECTION INTERNATIONALLY AND LOCALLY

45. Modern refugee law arose in the aftermath of the atrocities committed during World War 2, as nations recognised the pressing moral duty and practical

necessity of providing legal protections to vulnerable persons fleeing inhumane treatment.

46. As the Constitutional Court has thus held in, *inter alia*, paragraph 3 of *Ahmed and Others v Minister of Home Affairs and Another* 2017 (2) SA 417 (CC) ("*Ahmed*"), refugee law is hence about the protection of vulnerable groups of people or individuals.

47. At its most basic and essential level, this inevitably requires not returning these persons to their countries of origin. Persons returned (*refouled*) to countries where they will face persecution – such as death, torture, rape, imprisonment without trial, discrimination or other forms of inhumane treatment – are self-evidently exposed to violations of their human and constitutional rights, including but not limited to the rights to dignity, life, equality, and freedom and security of the person.

48. The fundamental principle of *non-refoulement* is enshrined in section 2 of the Refugees Act, quoted above.

49. Of this provision, the Constitutional Court, in *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) ("*Ruta*") at paragraphs 24-26, said the following:

> *"This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of non refoulement, the concept that one fleeing persecution or threats to "his or her life, physical safety or freedom" should not be made to return to the country inflicting it.*

<u>It is a noble principle – one our country, for deep-going reasons springing from persecution of its own people, has emphatically embraced</u>. The provenance of section 2 of the Refugees Act lies in the Universal Declaration of Human Rights (Universal Declaration), which guarantees "the right to seek and to enjoy in other countries asylum from persecution". The year in which the Universal Declaration was adopted is of anguished significance to our country, for in 1948 the apartheid government came to power. Its mission was to formalise and systematise, with often vindictive cruelty, existing racial subordination, humiliation and exclusion. From then, as apartheid became more vicious and obdurate, our country began to produce a rich flood of its own refugees from persecution, impelled to take shelter in all parts of the world, but especially in other parts of Africa. That history looms tellingly over any understanding we seek to reach of the Refugees Act.

. . . .

South Africa as a constitutional democracy became a State Party to the 1951 Convention and its 1967 Protocol when it acceded to both of them on 12 January 1996 – which it did without reservation. <u>In doing so, South Africa embraced the principle of non-refoulement as it has developed since 1951. The principle has been a cornerstone of the international law regime on refugees. It has also become a deeply-lodged part of customary international law and is considered part of international human rights law</u>. As refugees put agonising pressure on national authorities and on national ideologies in Europe, North America, and elsewhere, the response to these principles of African countries, including our own, is of profound importance."

(Emphasis added.)

50. So central is the principle of *non-refoulement* to refugee law locally and comparatively, that it is enunciated not only in section 2 of the Refugees Act but

also in international law. Section 1A of the Refugees Act states that it must be interpreted and applied in a manner consistent with the:

50.1. 1951 United Nations Convention Relating to the Status of Refugees ("*UN Refugees Convention*") which South Africa ratified on 12 January 1996;

50.2. 1967 United Nations Protocol Relating to the Status of Refugees ("*UN Refugees Protocol*");

50.3. 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("*OAU Refugees Convention*");

50.4. 1948 United Nations Universal Declaration of Human Rights ("*Universal Declaration*"); and

50.5. Any domestic law or other relevant convention or international agreement to which South Africa is or becomes a party.

51. The obligation not to *refoul* persons to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture is also enshrined in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which South Africa is a party.

52. The Constitutional Court has held that the right of *non-refoulement* "*forms part of customary international law and international human rights law*" (in *Scalabrini 3* at paragraph 31).

53. In sum, Scalabrini contends that any provision of the Refugees Act or Regulations which violates the right to *non-refoulement*, also violates

international law as well as the constitutional rights of the affected person. Which constitutional right specifically is impacted may vary depending on the circumstances of each individual asylum seeker, but they include:

53.1. The right to dignity (section 10 of the Constitution);

53.2. The right to life (section 11 of the Constitution);

53.3. The right to equality (section 9 of the Constitution);

53.4. The right to freedom and security of the person (section 12 of the Constitution); and

53.5. The right to a fair trial (section 35 of the Constitution).

54. The centrality of *non-refoulement* to refugee law has (prior to the events described below) resulted in important substantive and procedural protections being afforded to asylum seekers, including that:

54.1. "*false stories, delay and adverse immigration status nowise preclude access to the asylum application process*" (*Ruta* at paragraph 16);

54.2. The absence or expiry of an asylum transit visa in terms of section 23 of the Immigration Act does not preclude a migrant from seeking asylum (*Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA) at paragraph 19);

54.3. "*Once an intention to apply for asylum is evinced the protective provisions of the Act and the associated regulations come into play and the asylum seeker is entitled as of right to be set free subject to the*

provisions of the Act" (*Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA) at paragraph 80); and

54.4. "*Until the right to seek asylum is afforded and a proper determination procedure is engaged and completed, the Constitution requires that the principle of non-refoulement as articulated in s 2 of the Refugees Act must prevail. The 'shield of non-refoulement' may be lifted only after a proper determination has been completed*" (*Ruta* at paragraph 54).

55. Such protections are afforded not only to those who are recognised as asylum seekers (*de jure* asylum seekers), but to all those with claims to asylum even if they have yet to be so recognised (*de facto* asylum seekers). The Refugees Act defines an "*asylum seeker*" as "*a person who is seeking recognition as a refugee in the Republic*", not as, *inter alia*, a person who actually holds an asylum seeker visa.

56. The Refugees Act itself further provides that "*no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if*" such person is still in the process of seeking asylum (section 21(4) of the Refugees Act).

57. Accordingly, up to at least 2020, it did not matter what visa a foreign national held, or how they entered South Africa, or when they sought to apply. In all cases, they were still able to apply. Put differently, the sole determinant of an asylum claim was the <u>merit</u> of the claim: Could the applicant demonstrate well-founded fear of persecution or that they were compelled to leave violence and war in their country of origin?

58. This was a deliberate – indeed, necessary – feature of the asylum system in order to ensure that no *de facto* refugees had their rights to *non-refoulement* violated.

59. At the start of 2020, however, the Refugees Act and the Regulations were amended to bring into effect, *inter alia*, all of the challenged provisions.

V. THE CONTENT OF THE CHALLENGED PROVISIONS

60. On 1 January 2020 (through publication in Proc R60, *Government Gazette* 42932, 27 December 2019), three Amendments Acts altered material aspects of the Refugees Act. These Acts are:

    60.1. The Refugees Amendment Act 33 of 2008 ("*2008 Refugees Amendment Act*") assented to on 21 November 2008;

    60.2. The Refugees Amendment Act 12 of 2011 ("*2011 Refugees Amendment Act*") assented to on 21 August 2011, which, according to section 14 thereof, came into effect immediately after the commencement of the 2008 Refugees Amendment Act came into effect; and

    60.3. Refugees Amendment Act 11 of 2017 assented to on 14 December 2017 ("*2017 Refugees Amendment Act*") which, according to section 33 thereof, came into effect immediately after the 2008 (and 2011) Refugees Amendment Acts came into effect.

61. The Regulations were published on 27 December 2019 and repealed the previous regulations (contained in GNR 366, *Government Gazette* 21075, 6 April 2000). The Regulations also came into effect on 1 January 2020.

62. All of the challenged provisions hence came into effect on 1 January 2020.

63. Scalabrini challenges sections 4(1)(f), 4(1)(h), 4(1)(i), and 21(1B) of the Refugees Act, as well as Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4).

64. Section 4(1) provides in relevant part:

"An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she-

. . . .

(f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or

. . . .

(h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or

(i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum."

65. Section 4 of the Refugees Act regulates the circumstances under which a foreign national may be "*excluded*" from asylum – that is, found to be undeserving of being granted refugee status for a range of reasons. Exclusion decisions are carried out by RSDOs as part of the asylum application process, and persons who are excluded are provided with written reasons which they can take on internal appeal to the Refugee Appeals Authority.

66. The three subsections challenged by Scalabrini exclude an asylum seeker from refugee status if he/she is convicted of an immigration-related offence, enters South Africa other than through a port of entry without "*compelling reasons*" to do so, or fails in the absence of "*compelling reasons*" to report to an RRO within five days of entering South Africa.

67. The next section challenged is section 21(1B). This section provides:

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

68. Section 21(1B), unlike section 4, is implemented by an immigration officer and not an RSDO. Immigration officers are not retained to conduct refugee status determinations as that is the sole mandate of RSDOs. It also applies (at least in practice) <u>prior</u> to the foreign national being allowed to apply for asylum.

69. Regulation 8 implements and/or amplifies section 21(1B). This Regulation states in relevant part:

"(1) An application for asylum in terms of section 21 of the Act must—

(a) *be made in person by the applicant upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office;*

(b) *be made in a form substantially corresponding with Form 2 (DHA-1590) contained in the Annexure;*

(c) *be submitted together with—*

(i) *a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted circumstances, a valid visa issued in terms of the Immigration Act;*

(ii) *proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and*

(iii) *the biometrics of the applicant, including any dependant.*

(2) *Any person who submits a visa other than an asylum transit visa issued in terms of section 23 of the Immigration Act must provide proof of change of circumstances in the period between the date of issue of the visa and the date of application for asylum.*

(3) *Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees.*

(4) *A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in subregulation (3)."*

70. Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees provides:

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

71. There is, as described below, variance and unpredictability in how the DHA implements the challenged provisions in practice.

72. However, the abovementioned sections appear *ex lege* to operate in the following manner:

    72.1. Any foreign national who arrives in South Africa intending to apply for asylum must do so via a port of entry.

    72.2. At the port of entry, the asylum seeker must declare their intention to apply for asylum and be issued an asylum transit visa valid for five days.

    72.3. They must then attend on an RRO to apply for asylum within those five days.

    72.4. If the asylum seeker does not have a valid asylum transit visa when applying for asylum, they:

        72.4.1. Must, if they are relying on any other visa, provide proof of change of circumstances between the date of issuance of the visa and the date of applying for asylum (Regulation 8(2));

72.4.2. Must, if they have no visa, show "*good cause*" or "*valid reasons*" to an immigration officer for their illegal entry and stay in South Africa (section 21(1B) and Regulation 8(3));

72.5. If they fail to demonstrate such good cause, they are not allowed to apply for asylum and they may be detained for purposes of deportation (this is distinct from arrest and detention for an infraction under section 49 of the Immigration Act);

72.6. If an asylum seeker is brought before a court and indicates their intention to apply for asylum, they must show "*good cause*" to the presiding judicial officer, failing which they are not allowed to apply for asylum (Regulation 8(4));

72.7. If the asylum seeker demonstrates "*good cause*" and is allowed to file an asylum application with an RSDO, they must still be excluded unless they can:

72.7.1. Show "*compelling reasons*" for why they entered South Africa other than through a port of entry (section 4(1)(h)); and

72.7.2. Show "*compelling reasons*" for why they did not apply at an RRO within five days (section 4(1)(i));

72.8. An asylum seeker will also be excluded from refugee status if they have been convicted of an immigration offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit (section 4(1)(f)).

73. As can be seen from the above, the challenged provisions overlap to a degree, sometimes in confusing or redundant ways. For example, an applicant may have to face the same questions two or three times, and show "*good cause*" to one official but "*compelling reasons*" to another.

74. Another difference is that an applicant who is found by an RSDO to have no compelling reasons to have waited more than five days to apply is excluded (under section 4). Excluded persons are (at least in principle) provided with, *inter alia*, written reasons for the decision and a right of appeal to the RAA. However, an applicant who fails the substantively-identical query under section 21(1B) before an immigration officer is simply denied the right to apply for asylum. No written reasons are provided and there is no right of appeal.

75. For convenience, persons who are denied the right to apply for asylum as a result of one of the challenged provisions shall be referred to collectively as "*disbarred persons*".

76. The common theme to all of the challenged provisions, however, is the principle that one's adverse immigration status can now disqualify an applicant from asylum.

77. This constitutes a fundamental – indeed, radical – alteration of the nature of the South African asylum system. Both in principle and in practice, the challenged provisions strike at the very heart of the asylum system. As explained below, in practice the asylum system is now closed to almost all asylum seekers. In principle, the challenged provisions now allow the right of *non-refoulement* to be effectively overridden by immigration-related requirements.

78. These changes are, it is contended, unlawful and unconstitutional.

79. Before addressing Scalabrini's challenges, it is appropriate to deal with the manner in which the challenged provisions have been brought into effect by the DHA.

VI. THE IMPLEMENTATION OF THE CHALLENGED PROVISIONS

The delayed implementation of the challenged provisions

80. Although the challenged provisions have been on the statute books since the beginning of 2020, they were almost never implemented.

81. Initially this was due to the COVID-19 pandemic and the consequent closure of the refugee and immigration systems.

82. Furthermore, on 30 December 2021, the Constitutional Court in *Abore v Minister of Home Affairs and Another* 2022 (2) SA 321 (CC) ("*Abore*") considered whether the protections and principles laid down in *Ruta* still applied after the 2020 amendments. The Court concluded, in general, that they did. At paragraphs 45-48, the Constitutional Court stated:

"As s 2 is still applicable, the principle of non-refoulement as aptly stated by this court in Ruta is still applicable and protects Mr Abore from deportation until his refugee status has been finally determined.

. . . .

In Ruta this court said that, although a delay in applying for asylum is highly relevant insofar as it is a crucial factor in determining credibility and authenticity, which must be made by the Refugee Status Determination Officer, it should at

no stage 'function as an absolute disqualification from initiating the asylum application process'. In finding against Mr Abore on the basis that the delay before he evinced an intention to apply for asylum was a bar to him being afforded an opportunity to exercise his rights under the Refugees Act, the High Court, Johannesburg, ignored Ruta and thus erred in law. Furthermore, the amendments have no bearing on the ratio laid down in Ruta regarding the approach to be adopted when dealing with a delay.

Mr Abore has indicated his intention to apply for asylum. He has not yet been afforded an opportunity to do so. His refugee status has not been finally considered or determined. Until this happens, the principle of non-refoulement protects him. The delay in indicating his intention is of no moment as stated in Ruta. The amendments do not affect his eligibility to be afforded this protection, irrespective of whether he arrived in the country before or after the Refugees Act was amended, nor do they deprive him of the entitlement to be granted an interview envisaged in reg 8(3) and (4), read with s 21(1B)."

(Emphasis added.)

83. Based on, *inter alia*, *Abore*, the DHA generally did not implement the challenged provisions. As an illustration thereof, I note that despite engaging with all manner of asylum seekers and asylum-related problems on a daily basis, Scalabrini never previously encountered any asylum seeker disbarred under the challenged provisions.

84. The "trigger" for the DHA's change in attitude appears to have been the Constitutional Court's decision in *Ashebo v Minister of Home Affairs and Others* 2023 (5) SA 382 (CC) ("*Ashebo*"), which was handed down on 12 June 2023.

85. Although *Ashebo* upheld *Ruta* and *Abore*, it also dealt with the question of whether a foreign national being detained for deportation is entitled to be released from detention after expressing an intention to seek asylum. The Court

held that merely expressing an intention to seek asylum was no longer sufficient for the foreign national to be immediately released from detention. Instead, under *Ashebo*, the DHA:

85.1. Cannot deport the foreign national;

85.2. May detain him pending his/her application for asylum, which application must be facilitated within a reasonable time by the DHA; and

85.3. Must release the foreign national from detention once the foreign national has applied for asylum.

86. *Ashebo* hence allowed, for the first time, asylum seekers to be detained (albeit for a short time in principle, and without infringing on the right of *non-refoulement*). It appears that the unintended consequence of *Ashebo* was that the DHA re-visited how it approaches and implements the challenged provisions.

Practices at the Refugee Reception Offices

87. The impact of the implementation of the challenged provisions was not immediately felt. It was only in early 2024 that persons began to be disbarred at RROs across Cape Town, Gqeberha, Durban and Musina. I refer to these RROs as the "*CTRRO*", "*GRRO*", "*DRRO*", and "*MRRO*" respectively, and as the "*CGDM RROs*" collectively.

88. The remaining RRO in Pretoria seems to be following a different approach, which I address further below.

89. At the CDGM RROs, asylum seekers cannot simply attend on the RRO, apply for asylum, and promptly receive a section 22 asylum seeker visa. An asylum

seeker must first either apply via email for an appointment to attend on an RRO, or if they go directly to an RRO they will typically be given an "appointment slip" which tells the asylum seeker to return on a future date.

90. Such "appointment slips" are not provided for in any legislation or regulation, and follow no uniform format. Often, they are no more than handwritten slips of paper with a date and sometimes a stamp included thereon. I attach examples of such slips as **"JC2"**.

91. An appointment slip does not ensure that an asylum seeker is heard on the allocated date. In most cases, despite queueing all day, asylum seekers are instead issued with yet another appointment date. The initial appointment given is usually for three or more months later, but some are given appointments for a year later. Asylum seekers who are attending on their second, third or subsequent appointment are commonly given shorter extensions of a month or two. This leaves new asylum seekers vulnerable to repeated arrests, detentions, and on occasion even extortion by corrupt officials.

92. On average, it has taken about 6-8 months for an asylum seeker to receive their first interview. However, there is wide variance and uncertainty with regards to such dates. At the GRRO, for example, only three officials carry out three immigration interviews per day (for a total of 9 each day). And on Wednesdays and Fridays, one of these officials is otherwise preoccupied attending on court to handle all the arrests made that week.

93. The first interview an asylum seeker will receive, prior to any asylum assessment, is an interview by immigration officers in terms of the challenged provisions. The immigration officers ask questions such as:

93.1. When did the applicant arrive in the country?

93.2. What efforts did the applicant make to get an asylum interview, and when were those efforts were made?

93.3. What the applicant has been doing in the country, and whether he/she has been working or studying?

93.4. Does the applicant have any minor children that reside with him/her in South Africa?

94. Based on the above and similar questions, the official will make a decision as to whether the applicant has good cause for delaying in making their asylum application.

95. Approximately 90% of applicants which Scalabrini and its partners have encountered are found not to have shown good cause. There is some variance per RRO: Gqeberha seems more forgiving, Cape Town not at all so. Overall it seems clear that the large majority of asylum seekers who have received decisions are disbarred (that is, found not to have good cause and refused the right to apply for asylum).

96. A problem that has grown ever more severe in the past month or so is that even if the interview is held relatively swiftly, the outcome of the interview is often only available after even more delay. During this time, asylum applicants are either left undocumented or are given further appointment slips. I attach as **"JC3"** an example of such a slip from the CTRRO, telling the applicant to return on 17 September 2026 – more than two years from now. I have received reports of dates as late as 2027 being issued.

97. Although a small percentage may be found to have good cause for their delays and adverse status, the chilling effect created by the Respondents' conduct is immense and effectively deters even those who might succeed in proving good cause from attending on an RRO. Asylum seekers are simply too afraid to attend on an RRO if they perceive that there is a significant risk that instead of being allowed to apply for asylum, they will be arrested, detained, and/or deported to their countries of origin.

98. Such a chilling effect is already evident. In Cape Town, for example, since the re-opening of the RRO (and before its closure), there have been extensive queuing and access challenges at the CTRRO. Now, however, the queues have all but disappeared with the frequent arrest of new applicants at their appointments. Such queues as do exist, for example in Durban, appear to be the result of persons with pre-existing appointments (that is, persons who received their dates prior to the Respondents' implementation of the challenged provisions).

99. Persons who are found to have good cause for any adverse status are allowed to apply for asylum.

100. But persons who are found <u>not</u> to have good cause are usually immediately arrested and detained for the purposes of deportation. The only exception to this rule (at the CGDM RROs) is for mothers or single fathers of minor children. Such parents are instead issued with orders to depart South Africa within 10 days, in terms of section 32(1) of the Immigration Act.

101. The fact that an asylum applicant is arriving on a date allocated in an "appointment slip" is seldom, if ever, a valid reason or "*good cause*" for a belated asylum application.

102. Detained migrants are then brought before the relevant Magistrate's Court, which Court will likewise inquire into whether the person has shown good cause for their adverse immigration status (in terms of Regulation 8(4)).

103. In the experience of Scalabrini and its partners, in the vast majority of cases, the absence of good cause first found by the immigration officers is confirmed by the courts. Written judgments are typically not provided. In Musina at least, these "hearings" occur in chambers and not in open court. The asylum seekers' detention for the purposes of deportation is also confirmed, and the persons concerned will remain in prison typically until removed from South Africa.

104. Initially, such persons were detained for the entire period from their immigration interview until their deportation. However, it appears that this required the detention of too many people for the various detention sites to contain. Accordingly, if a foreign national is brought before a court and the matter postponed to a return date (as is common), the foreign national may be released from detention and merely warned to return.

105. In Cape Town, it is rare for a foreign national to be released from detention. However, at the GRRO, applicants have been issued with a "Form 29A", which purports to allow their conditional release from detention for the purposes of deportation. I attach an example of such a Form 29A as **"JC4".**

106. The Respondents are called upon to clarify in terms of what statute this form was issued.

107. Regardless, however, on the return date when the deportation is (almost invariably) confirmed, the foreign national is re-arrested and detained pending deportation.

108. Very few, if any, asylum applicants are being excluded under section 4 of the Refugees Act – but that is because no asylum applicant with anything less than an unimpeachable procedural history is being allowed to appear before an RSDO in the first place. In practice, the majority of asylum seekers are disbarred via the "*good cause*" mechanism created in Regulation 8.

109. As a consequence of the above:

    109.1. Almost all new asylum applicants attending on the CGDM RROs are refused the right to apply for asylum, and are either arrested for deportation or are ordered to depart South Africa.

    109.2. Almost no new asylum applicants are, in fact, attending on the CTRRO, since they have become aware that such attendance amounts, in practice, to being expelled from South Africa.

110. It is unlikely in the extreme that persons fleeing persecution will simply leave South Africa because the asylum system has been closed to them. Far more probably, they will remain in South Africa as undocumented foreigners.

111. The prejudice to asylum seekers in these circumstances is patent.

112. But it is also not in South Africa's interests to create a subclass of undocumented foreigners in this way. Providing asylum seekers with a lawful status has a myriad of benefits: It ensures that South Africa knows who is and is not an asylum seeker; it defuses xenophobic tensions by demonstrating that asylum seekers are in South Africa lawfully; it gives South Africa the information about asylum seekers as a class it needs to plan legislation and budget government resources; it creates and promotes trust, credibility and social capital between government and asylum seekers; it allows and encourages asylum seekers to engage in lawful work, business and studies; it prevents asylum seekers having to resort out of desperation to criminal acts, begging or sex work; and it removes opportunities and incentives for corruption in the asylum and immigration spheres.

113. While the Respondents' current practices may thus (falsely) appear to have certain short-term benefits, in the long-term these practices are severely detrimental to South Africa.

Practices in Pretoria

114. At the Desmond Tutu RRO ("*DTRRO*") in Pretoria, applicants are also subjected to an appointment system.

115. However, they are generally not subjected to a "good cause" interview. The practice in Pretoria has instead been to insist specifically that applicants provide passports. Even with identity documents from their country of origin, such as voting cards or birth certificates, they are still required to bring a translated copy or a passport.

116. Such asylum applicants are not arrested. Rather, they are permitted to return on such dates as they may have their passports available.

117. Those new applicants who do not have passports are advised to go to their embassies to get a new passport. However, approaching the embassy of one's country of origin is itself a basis on which asylum seekers can be refused asylum, in terms of section 5(1)(a) of the Refugees Act read with Regulation 4(1)(a).

118. This system thus itself constitutes a significant barrier to seeking asylum, and in Scalabrini's view is unlawful.

119. The DTRRO's insistence on passports is not, however, the focus of this litigation. No relief is sought in regard thereto.

120. It is not clear to Scalabrini why the practice of the DTRRO has diverged from the general national practice. It may simply be that the DTRRO has not yet had enough time to adapt to the Respondents' sudden implementation of the challenged provisions.

Asylum transit visas

121. In principle, a foreign national who arrives at a South African port of entry and indicates a wish to apply for asylum in South Africa should receive an asylum transit visa in terms of section 23 of the Immigration Act.

122. Such a "*transit visa*" is not to be confused with an asylum seeker visa in terms of section 22 of the Refugees Act. Section 23(1) provides that transit visas are "*valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum*".

123. The theory thus appears to be that an asylum applicant would:

123.1. Receive a transit visa at the border;

123.2. Speedily (within five days) make their way to the nearest RRO;

123.3. Pass any immigration interview provided for under the challenged provisions (because they would have the necessary transit visa, would have entered lawfully, and so on);

123.4. Would be interviewed by a refugee status determination officer and issued a decision with an asylum seeker file reference number; and

123.5. Be issued with an asylum seeker visa with the file reference number which would protect and document them for the duration of their asylum application process.

124. But this theoretical approach is almost impossible in practice. This is primarily the fault of the DHA, not asylum seekers.

125. As explained above, even if an asylum applicant arrived at an RRO with a valid transit visa (that is, within five days), they would be given an appointment slip to return on a future date approximately 3-6 months in the future.

126. And in all cases that Scalabrini has seen, when such asylum applicants arrive on their allocated appointment date (but with their now-expired transit visas), the DHA still treats such applicants as being in South Africa illegally and still refuses to find that they have the necessary "*good cause*" for their delay.

127. In other words, asylum seekers who obey the instructions of DHA officials and dutifully return to RROs on distant dates appointed to them by the DHA itself, are rewarded for such patience and obedience by being disbarred from the asylum system, arrested, detained and ultimately deported. The injustice of this approach is obvious.

128. But in any event, even at ports of entry, the DHA generally does not issue transit visas.

129. In some cases, the DHA outright refuses to issue such visas. An example of this practice is the case of *Faqirzada & others v Minister of Home Affairs & others* [2023] ZAGPPHC 1647 (28 February 2023), in which 22 Afghani asylum seekers who were being hunted by the Taliban sought to enter South Africa via the Beitbridge port of entry. Instead of being granted transit visas, DHA officials sought to expel the asylum seekers to Zimbabwe. It was only after urgent applications to court that the transit visas were granted.

130. In other cases, transit visas are not refused, but the asylum seeker does not know to ask for one and the DHA officials processing the asylum seeker do not issue one. It is reiterated that for many years, an asylum transit visa was not necessary for a foreign national to apply for asylum and they were hence relatively rarely issued.

131. In yet other cases, the asylum seeker may have entered South Africa other than through a port of entry. Such irregular travel is commonplace in refugee cases globally, as persons fleeing persecution in their countries of origin may have many reasons not to travel via usual means. For example, they may be trying to hide from agents of persecution, they may have little knowledge of or trust in

government, or their travel movements may be dictated by others (including but not limited to human traffickers). They are in almost all cases poor, unfamiliar with South Africa and ill-informed of their legal rights or how to claim them.

132. In South Africa, the usage of a passport while entering the country is often taken as evidence that the applicant is still under the protection of their country of origin, and hence undeserving of refugee protection. In other cases, the passport is confiscated. Both practices discourage asylum applicants entering South Africa from producing or relying upon their passports.

133. It is because irregular travel is an inherent part of the refugee experience that section 21(4) of the Refugees Act provides that "*no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if*" such person is still in the process of seeking asylum. This section was not amended or restricted in any way by the 2020 amendments.

134. Whatever the reason, the fact is that vanishingly few transit visas are issued by the DHA. This was confirmed in the answer to Parliamentary Question NW453 dated 1 March 2024 (attached as **"JC5"** and available at https://pmg.org.za/committee-question/25218/), where the Minister was asked how many transit visas had been issued in the (a) 2022-2023 and (b) 2023-2024 financial years.

135. His answer was:

"a) During the 2022/23 financial year, the Department of Home Affairs issued 30 asylum transit visas in terms of Section 23 of the Immigration Act, Act 13 of 2002.

b) In the 2023/24 financial year to date, the Border Management Authority issued 61 asylum transit visas in terms of Section 23 of the Immigration Act, Act 13 of 2002."

136. In other words, over the past two years, 91 transit visas have been issued.

137. But South Africa receives approximately 200 times that number of asylum seekers annually.

138. I attach as proof a Parliamentary question and answer, number NW72 dated 20 June 2019 (attached as **"JC6"** and available at https://pmg.org.za/committee-question/11801/). It records the total number of asylum cases processed between 2009 and 2018 (figures for subsequent years were affected by the COVID-19 pandemic and may not be an accurate representation of asylum flows to South Africa).

139. In 2018, 18 104 persons sought asylum in South Africa – and that was the lowest figure in a decade.

140. In sum, for whatever reason, the DHA issues only a tiny fraction of the number of transit visas required for the asylum system to function in the way the challenged provisions envisage.

141. A person's claim to asylum should depend on the merits of their claim, not on whether they have the correct visa. This fundamental proposition applies *a fortiori* when the visas that they need to access the asylum system are not being issued by the DHA.

Case studies of affected asylum applicants

142. As demonstrated above, thousands of people seek asylum in South Africa every year. Thousands are being prejudiced by the Respondents' conduct and the challenged provisions.

143. To illustrate the lived experiences of asylum seekers under the challenged provisions, Scalabrini provides a number of case studies below. These case studies are not definitive of all asylum seekers at issue in this litigation. They are examples only.

144. The case studies are all Somali asylum seekers. Somalia, including the capital city of Mogadishu, is very unsafe for civilians due to continued fighting between the Somali government and al-Shabaab, an Islamic extremist group. This conflict is part of the larger Somali Civil War, which has been ongoing since 1991. Somalia is considered the textbook example of a "failed State", which is why so many Somalis have deservingly been granted refugee status in South Africa.

145. <u>The first case is that of Abdulrahman Abdulahi Mohamed:</u>

145.1. Mr. Mohamed is from Mogadishu, Somalia, and belongs to the Hawiye tribe. In 2017, his brother was killed, and in 2021 his cousin was killed by Al-Shabaab. His sister fled to Saudi Arabia.

145.2. Mr. Mohamed also fears he would be killed in Somalia and fled to South Africa, arriving in February 2021. He crossed the border in the back of a vehicle which did not stop at the border, and therefore entered South Africa without declaring himself. He does not have a passport.

145.3. He repeatedly went to the CTRRO in attempts to apply for asylum, but the CTRRO only re-opened to new applicants in mid-2023. He first successfully approached the RRO in July 2023, but was given an appointment for the 8 August 2023, then September 2023, then 24 October 2023, then 22 November 2023, then 22 January 2024, then 28 February 2024. On 28 February 2024 he was told to come for the interview on 4 March 2024.

145.4. But when he arrived on 4 March 2024, DHA officials interviewed him, gave him a decision finding he did not have good cause, and arrested him.

145.5. He was detained at the Elsies River Police Station, and was brought to the Bishop Lavis Magistrate's Court on 5 March 2024 where his detention was confirmed. On 10 April 2024 he was transferred to the Lindela Repatriation Centre ("*Lindela*") where he is currently detained.

146. <u>The second case study is that of Yusuf Ahmed Magale:</u>

146.1. Mr Magale is from Johar, Somalia. He left the country after becoming caught up in the conflict there and suffering injuries that resulted in the loss of his use of his left arm.

146.2. He arrived in South Africa by truck on 5 May 2018. His then-fiancée arrived a year later in 2019. He got married traditionally in South Africa and has two children aged 1 and 3 years old.

146.3. Despite living in Cape Town, the closure of the CTRRO compelled him to approach the RRO in Gqeberha. He did so on a number of occasions between 2018 and 2019 (until the national lockdown) to apply for asylum,

but he was always told to return on a later date. He also tried to apply with the online process without any success.

146.4. In 2023, when the CTRRO re-opened to new asylum applicants, he repeatedly attended at the CTRRO and was given numerous appointments until 28 February 2024.

146.5. On 28 February 2024, he attended on the RRO as appointed, but was told to come back on Monday 4 March 2024 without his wife and children.

146.6. When he duly returned alone on 4 March 2024, he was swiftly interviewed by immigration officers, rejected for not having shown good cause, and arrested.

146.7. He was detained at the Elsies River Police Station since 4 March 2024, with his detention for purposes of deportation having been confirmed on 5 March 2024. He was subsequently transferred to Lindela.

147. The third case study is Sabriye Sharma Mohammed:

147.1. Mr Mohammed is a Somalian national whom Al-Shabaab repeatedly sought to recruit, though he always refused. His family became worried that his multiple rejections of Al-Shabaab would lead to his death, and advised him to leave the country.

147.2. On 5 August 2023, Mr Mohammed took his family's advice and left Somalia.

147.3. On 15 November 2024, Mr Mohammed arrived in South Africa. He used the Beitbridge port of entry to enter South Africa. He arrived with Zimbabweans and Ethiopians. DHA officials refused to allow the Zimbabweans to enter

South Africa, but when Mr Mohammed's turn came, the officials only asked him one question: What country did he come from? When he said Somalia, the officials said he could pass. He never said anything about asylum, and they never asked anything about any documents. Similar treatment was given to the Ethiopians.

147.4. On 30 November 2023, Mr Mohammed approached the Musina RRO with the intention of applying for asylum.

147.5. He was interviewed, after which he was informed that he was under arrest as an illegal foreigner. He was arrested and taken to the Musina Magistrate's Court, where he and others were informed that they must come to court on 5 December 2023.

147.6. On 5 December 2023, the matter was postponed to 6 December 2023 to allow for an interpreter. On 6 December 2023, a deportation order was granted. They were then detained at Musina Police Station until 21 December 2023, whereafter they were transported by the DHA to Lindela for deportation.

147.7. On 10 January 2024, they were seen by an official from the Somali Embassy. Mr Mohammed was released from Lindela after being issued with a notice to depart South Africa on 15 March 2024. The departure notice was issued despite the serious danger to Mr Mohammed if he returns to Somalia, and the absence of any assessment of his asylum claim on its merits.

148. <u>The fourth case study is that of Abdula Gaadir Mohammed Noor:</u>

148.1. Mr. Noor is a Somali national from the town of Horseed. On 14 October 2022, he arose early with the intention of traveling to Mogadishu to seek employment to support his family. Upon disembarking from the taxi, an explosive device planted by Al-Shabaab detonated, causing severe injury to his foot.

148.2. This incident convinced Mr. Noor that further life in Somalia was untenable. He departed Somalia on 12 September 2023 and made his way to South Africa on trucks.

148.3. On 30 November 2023, Mr. Noor visited the Musina RRO to apply for an asylum visa. He was interviewed, whereupon the interviewer told him to wait outside with other Somali nationals as they were all going to be arrested for being "illegal immigrants".

148.4. On 6 December 2023, Mr. Noor was escorted to the Musina Magistrate's Court but did not have a formal hearing before a Magistrate. Instead, he and three others were led to an office to wait while lawyers seemed to discuss them. Mr. Noor did not personally engage with a lawyer or seek legal aid. No interpreter was present during this time.

148.5. Subsequently, he was returned to the police van without any explanation of what happened in the court building. He was thereafter detained first in Musina and then at Lindela.

148.6. Like Mr Mohammed, he was released from Lindela after receiving a notice to depart South Africa, which notice was issued without regard to Mr Noor's circumstances, his history of injury in Somalia, or his claim to asylum.

149. <u>The fifth case is that of Hussein Ali Nur</u>:

149.1. Mr. Nur is a Somali national who came to South Africa on 15 January 2024 to seek asylum.

149.2. Mr. Nur attended on the CTRRO on Thursday 22 February 2024, but was not among those attended to. He was told to return the following Thursday (29 February 2024) as that is the day that the CTRRO has Somali interpreters present.

149.3. Mr. Nur had planned to return to the CTRRO on the allocated day, but he was arrested in a shop in Cape Town on Wednesday 28 February 2024.

149.4. He was taken to a police station in Somerset West and criminally charged under section 49 of the Immigration Act. When he appeared before the Somerset West Magistrate's Court, the Court found that Mr. Nur had no good cause for failing to apply for asylum. It further convicted him and imposed a suspended sentence.

149.5. However, when he left the court, he was immediately re-arrested by DHA officials and detained for the purposes of deportation.

149.6. Mr. Nur has been in jail since 11 March 2024. He is currently detained at Lindela.

150. All of these individuals illustrate the difficulties besetting asylum seekers under the challenged provisions. All were denied the right to apply for asylum not on the merits of their claim, but due to their adverse immigration statuses and histories. They have thus all – like every other *de facto* refugee affected by the

challenged provisions – had their constitutional and human rights unjustifiably infringed.

VII. CORRESPONDENCE WITH RESPONDENTS & URGENCY

151. The conduct of the Respondents as described above was not uniformly implemented across South Africa. Nor was there any formal "decision", "notice" or "publication" (that Scalabrini is aware of) by the Respondents indicating their intention to begin applying the challenged provisions.

152. Scalabrini first became aware of cases of asylum seekers being arrested before being allowed to apply for asylum in or around November 2023. However, when explanations were sought from DHA officials, the officials tended to justify their conduct with reference to the recent judgment of *Ashebo*.

153. On 14 December 2023, Scalabrini (represented by Lawyers for Human Rights ("*LHR*")) wrote to the Respondents to challenge their interpretation of *Ashebo*. I attach a copy of this letter as **"JC7"**. A follow up email was sent on 11 January 2024, and a further letter on 25 January 2024 (attached as **"JC8"**).

154. None of these letters elicited a reply from the Respondents.

155. By February 2024, I, on behalf of Scalabrini, had a series of further meetings planned with DHA officials. We hoped that these meetings might result in an amicable resolution of our different views, but the meeting initially planned for 23 February 2024 was postponed for various reasons by the officials until 20 March 2024.

156. At that meeting, it became apparent that the fundamental issue was not *Ashebo* (though reference was made to that judgment), but rather how the DHA now saw its duties and powers to enforce the challenged provisions.

157. On or about 28 March 2024, a further letter (attached as **"JC9"**) was sent to the Respondents which the unconstitutional defect within the challenge provisions was stated (at paragraph 7) as being:

> *"That they permit de facto refugees with meritorious claims to asylum in South Africa to be returned to their countries of origin in violation of the right to non-refoulement enshrined in section 2 of the Refugees Act and international customary law. Put differently, they allow persons who fear (for example) death, torture, or sexual abuse in their home countries to be returned thereto solely because such persons were late in applying for asylum."*

158. The letter called on the Respondents to confirm their willingness to suspend the challenged provisions by 12 April 2024. The letter further warned the Respondents (at paragraph 12):

> *"Kindly take notice that if we do not receive such confirmation, we are instructed to bring an urgent application for an interim interdict suspending the Provisions pendente lite, for the reasons given above. Such application will be set down to be heard approximately one month from the abovementioned deadline of Friday 12 April 2024. Should the Department intend to oppose such an application, we call on you to brief the necessary legal representatives as urgently as possible so that all parties are in a position to argue this matter in mid-May 2024"*

159. On Friday 12 April 2024, the Director-General replied and indicated a desire for a meeting to discuss these issues (see the letter attached as **"JC10"**).

160. On 15 April 2024, Scalabrini replied with proposed meeting dates/times (attached as **"JC11"**). Paragraph 5 of that letter stated, however:

> *"As a precautionary measure, the necessary court papers are still being prepared. We recommend the Department of Home Affairs do the same. While our clients are amenable to discussing the amicable resolution of this matter, such discussions cannot unduly delay the urgent litigation needed to protect the de facto refugees whose rights and very lives are still being prejudiced".*

161. On 19 April 2024, Scalabrini and LHR met with various representatives of the Respondents, including the DG. Prior to the meeting, LHR sent the Respondents a draft copy of the notice of motion in these proceedings. A copy of the email to this effect (excluding attachments thereto) is attached as **"JC12"**.

162. Unfortunately, no consensus could be reached.

163. It became apparent at that meeting that this dispute could only be resolved via litigation.

164. This application was launched as soon as reasonably possible after the abovementioned meeting. Scalabrini contends that this matter is urgent, that any order in due course would be of no assistance, and that it has acted with appropriate swiftness in bringing this litigation.

165. The urgency of this matter arises from the incontestable facts set out above:

    165.1. The challenged provisions disbar *de facto* refugees from accessing the asylum application system for no other reason than that they have an adverse immigration status.

165.2. In doing so, they permit *de facto* refugees with meritorious claims to asylum in South Africa to be returned to their countries of origin in violation of the right to *non-refoulement.* In other words, persons who justifiably fear being executed, or tortured, or subjected to sexual abuse are being exposed to those horrors solely because of non-compliance with bureaucratic procedures.

165.3. This is unlawful, unfair, irrational and unconstitutional for the reasons set out elsewhere in this affidavit.

165.4. These unconstitutional provisions are even now being implemented across the country (possibly excepting Pretoria). RROs that were once overflowing with new applicants are now largely empty. Asylum seekers with valid claims are too afraid to approach the RROs for fear of being arrested. A legal system that once offered protection and succour to a desperate and vulnerable portion of society has essentially been closed.

166. The *de facto* asylum seekers who are disbarred from asylum under the challenged provisions cannot be assisted by an order in due course. By the time any final order is granted by the Constitutional Court, years will have passed. Many thousands of refugees will have been wrongly deported to face potentially horrific consequences.

167. This is why this Court must make its judgment on Part A <u>urgently</u>.

168. The Court is further referred to the averments below (under Part A of this application) concerning the irreparable harm that will result if an interim interdict is not granted *pendente lite*.

169. First, it is apposite to deal with Part B of this application: The grounds on which final relief is sought.

VIII. THE INFRINGEMENT OF CONSTITUTIONAL RIGHTS

170. Scalabrini contends that the very concept underpinning the challenged provisions – that is, that asylum seekers can be disbarred from the refugee system solely due to their adverse immigration status, without any consideration of the merits of the asylum seeker's claim – is an unacceptable and unjustifiable violation of the right to *non-refoulement,* the Constitution, and international law.

171. Scalabrini further contends that the concept of disbarment is irrational, inasmuch as it serves no legitimate government purpose.

172. If an asylum seeker has a well-founded fear of persecution in his/her country of origin, he/she cannot be returned to face such persecution merely because he was, for example, late in filing an asylum application. If an asylum seeker does not have a well-founded claim, then it is irrelevant whether he/she can explain his/her delays, because he/she is undeserving of the protection of the asylum system at all.

173. The new system introduced by the challenged provisions thus adds nothing of value or purpose; it merely serves to disqualify many *de facto* refugees from the protection that they deserve.

174. This is particularly so since harsh consequences – detention and the even more crippling consequences of being undocumented – already apply to any asylum seeker who does not apply for asylum timeously. As explained below, it is not

from lack of motivation that the overwhelming majority of asylum seekers may be late in filing their applications. Rather, it is because of the many obstacles placed in their path, including by the DHA itself.

175. If Scalabrini succeeds either on the above two grounds, then all of the challenged provisions must fall, because they are all inextricably linked to the concept of disbarment.

176. Scalabrini places on record that it holds the view that the challenged provisions may be unconstitutional and/or unlawful for other reasons. For example, the grounds on which an RSDO may condone delay by an applicant under section 4(1)(i) of the Refugees Act may be inadequately or unreasonably narrow.

177. But these concerns are not disputes for this Court to decide at this time.

178. I am further advised that it is not necessary to set out full legal argument in a litigant's affidavits. Fuller and further submissions will be made on the below contentions at the hearing of this matter.

179. I turn to the first contention of Scalabrini: That the challenged provisions infringe unjustifiably upon the right of *non-refoulement* and thus upon constitutional rights.

Non-refoulement and constitutional rights

180. It is well-established that asylum seekers, like all persons in South Africa, are protected by the Constitution and therefore possess the rights to, *inter alia*, life, dignity, equality, and freedom and security of the person.

181. It furthermore cannot be gainsaid that if an asylum seeker is returned to the country from which he/she fled, he/she may suffer serious prejudice to these rights, and generally be subject to inhumane treatment. As set out above, this is the *raison d'etre* of refugee law, both domestically and internationally. Were this not so, there would be no reason for refugee law to exist at all.

182. For example:

182.1. An asylum seeker fleeing persecution based on her political opinion (in terms of section 3(a) of the Refugees Act) may, if returned, face imprisonment without trial, torture, an unfair trial and/or sentence, or death via extrajudicial means. In many cases, this would be at the hands of the asylum seeker's own government.

182.2. An asylum seeker fleeing from persecution on the basis of her religious views or sexual orientation may, if returned, face violations of her rights to equality, to freedom of expression and religion, and to dignity. This could be at the hands of her government, but also at the hands of private parties.

182.3. An asylum seeker fleeing from widespread public disruption in their country of origin (in terms of section 3(b) of the Refugees Act) may, if returned, face death, sexual violence, violations of his/her right to freedom and security of the person, and violations of the right to property. This would be particularly common or likely in cases where the state is failing: for example due to civil war, armed rebellions, natural disasters, or outbreaks of infectious diseases.

183. These are only examples, and do not constitute a closed list. There are many different ways in which persons can be persecuted in terms of section 3(a) of the Refugees Act, and/or can be compelled to leave their country of origin in terms of section 3(b) of the Refugees Act.

184. A violation of the right of *non-refoulement* is therefore also a violation of constitutional rights.

The limitation created by the challenged provisions

185. The challenged provisions undeniably constitute a violation of the right to *non-refoulement*, as they create a system whereby an asylum seeker can be barred from recognition as a refugee not due to a lack of a meritorious refugee claim, but instead because he/she has some form of adverse immigration status: Most prominently, perceived delay in applying for asylum.

186. In other words, the challenged provisions establish a system which allows a person to be returned to their country of origin to be (for example) tortured, extrajudicially executed, or subjected to sexual discrimination and slavery solely due to procedural missteps made when trying to obtain asylum in South Africa.

187. The consequences of this system in South Africa has already been devastating, and will grow yet more devastating still.

188. Many thousands of persons from across the world have sought asylum in South Africa, fleeing from horrors ranging from civil wars and persecutions based on religious identity, to genocide. Most of these persons spend half a decade or more in South Africa before they receive recognition as refugees.

189. It would be a gross injustice for these persons to be barred from asylum, and compelled to return to their countries of origin to face potentially horrific consequences, for no reason other than that, *inter alia*, they took more than five days to access an RRO.

190. Such a system is, Scalabrini contends, unconstitutional and unlawful in principle, and should be declared to be such.

191. A similar set of provisions in the Refugees Act was struck down (without opposition) in *Scalabrini 3*. In this matter, Scalabrini challenged part of section 22 of the Refugees Act which provided that asylum seekers who did not renew their asylum seeker visas timeously were deemed to have abandoned their asylum applications. Such asylum seekers were then disallowed from pursuing refugee status in South Africa.

192. The core of Scalabrini's challenge in *Scalabrini 3* was similar to that raised herein: that it is unconstitutional and in violation of the right of *non-refoulement* for an asylum seeker to be disbarred from obtaining refugee status due to procedural missteps, no matter how severe.

193. The Constitutional Court agreed. At paragraphs 34-35, it stated:

> *"The impugned subsections however disregard the protection of asylum seekers from refoulement: those who do not renew their visas timeously are deemed to have abandoned their asylum applications, and they may be expelled or returned to the countries from which they fled. As stated in the applicants' submissions in this Court, in those countries they may face torture, imprisonment, sexual violence and other forms of persecution, even death. And this, without any consideration of the merits of their claim for asylum.*

As this Court stated in Ruta, 'all asylum seekers are protected by the principle of non-refoulement, and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure'. This procedure necessarily requires a determination of the merits of the asylum claim."

(Emphasis added.)

194. The Constitutional Court went on (at paragraphs 36-39) to explain how constitutional rights had been violated, and concluded at paragraph 40:

"The deemed abandonment of the asylum application under the impugned subsections also cuts across other fundamental rights. The right to just administrative action is directly infringed, since the asylum application is not considered, let alone determined. Worse, the asylum seeker must then be treated as an illegal foreigner, subject to arrest, detention and deportation. The rights to personal liberty, and indeed life itself, are then threatened. All this, simply because a visa has not been renewed."

195. Similar logic applies here.

196. Here, too, asylum seekers are being effectively compelled to return to countries in which their rights will be violated simply because they do not hold the correct visa.

197. As the challenged provisions violate constitutional rights, the onus for justifying them rests on the Respondents in terms of section 36 of the Constitution. This is addressed below.

198. First, however, it is apposite to deal with the second constitutional contention raised by Scalabrini: That the challenged provisions are irrational, arbitrary and

lacking in any legitimate government purpose, and are unconstitutional for this reason as well.

IX. THE IRRATIONALITY OF THE CHALLENGED PROVISIONS

199. The underlying purpose of the challenged provisions as a whole is to ensure that any person with an adverse immigration status – be it due to not having a visa, entering illegally into South Africa, delaying in applying, or for any other reason – is denied the right to apply for asylum.

200. There is no other conceivable purpose to the challenged provisions. The Respondents are invited to suggest any.

201. But this purpose is unlawful and unconstitutional. It is a direct violation of *non-refoulement*, and thus not only of section 2 of the Refugees Act but of customary international law. It is not a legitimate public purpose, such that any steps taken in furtherance thereof can be held to be rational.

202. The very goal of *non-refoulement*, and of refugee law both domestically and internationally, is to provide shelter to foreign persons not because they qualify under the usual immigration procedures, but because they have a well-founded fear of persecution so inhumane that they cannot justifiably be returned to their countries of origin.

203. Put simply, if a person has a good asylum claim, he/she should be allowed to remain in South Africa regardless of any delay or immigration-related errors.

204. If such person does not have a good claim, then he/she should not be allowed to remain in South Africa regardless of whether they can show good cause or compelling reasons for any of their missteps.

205. The addition of disbarment to the above approach thus adds nothing of value. No legitimate or lawful public aims are furthered.

206. Scalabrini contends that on this basis alone, the challenged provisions fall to be struck down as irrational.

207. *Ex abundante cautela*, Scalabrini addresses certain common (and false) stereotypes and tropes about asylum seekers that the Respondents may seek to rely upon in justifying the challenged provisions.

208. It may yet be suggested by the Respondents that many foreign nationals are abusing the asylum system by applying for asylum only when arrested, as a means to avoid detention and deportation.

209. But there is no credible evidence of such a phenomenon.

210. First, there is no evidence of an overwhelming number of foreigners seeking to apply for asylum in South Africa. The number of asylum applications in South Africa has been dropping markedly year-on-year for a decade, since the highs generated by the political violence in Zimbabwe in and around 2008.

211. Per the Parliamentary question and answer attached above, in 2018, only 18 104 persons sought asylum in South Africa. This is a decrease of almost 90% from 2009, when 157 204 asylum cases were processed.

212. COVID-19 interrupted normal migration flows and asylum processes, but initial evidence from after the pandemic is that similar or even fewer persons sought asylum in South Africa. Parliamentary question and answer NW826 of 10 March 2023 (attached as **"JC13"** and available at https://pmg.org.za/committee-question/21969/) indicates that in 2022, approximately 9833 persons sought asylum.

213. The problem is hence not that enormous numbers of people are seeking to enter the asylum system. Rather, it is that the DHA has failed to adjudicate and finalise applications within reasonable timeframes. Thus, many asylum seekers spend years in South Africa without receiving a final decision on their asylum applications.

214. The process of being recognised as a refugee in South Africa takes, on average, more than five years. This has been confirmed by the Respondents in the answer to the Parliamentary question NW1586 of 22 November 2019, which stated that "*60% of Section 22 permits have been active for more than 5 years based on the 2019-midyear statistics*". I attach a copy of this question-and-answer, which is available at https://pmg.org.za/committee-question/12936/, as **"JC14"**.

215. The same document confirms that asylum seeker visas are typically renewed for periods of three or six months. This means that most asylum seekers will have to renew their visas a minimum of ten times – and usually more.

216. There may be many thousands of illegal foreigners in South Africa who do <u>not</u> seek to enter the asylum system. But by the mere fact that they do not seek to

enter the asylum system, their presence in South Africa cannot serve to justify the closure of or restriction of access to such system.

217. There are, in any event, fewer foreigners (both legal and illegal) in South Africa than is often perceived.

218. On 26 March 2024, Stats SA published its Migration Profile Report for South Africa. It states that in 2022, there were 2 418 197 international migrants in South Africa: Approximately only 3% of South Africa's population. A copy of the executive report (including the final table in which the abovementioned figure appears) is attached as **"JC15"**. The full report would overburden these papers, and is in any event available to the Respondents (and at https://www.statssa.gov.za/publications/03-09-17/03-09-172023.pdf).

219. Even higher estimates, for example that of the Institute for Security Studies ("*ISS*") in 2021 that there are approximately 3.95% foreign migrants in South Africa, equate to about 6.5% of the total population. This is entirely in line with the usual immigration figures in comparable countries. The ISS report in question is titled "Scapegoating in South Africa: Busting the myths about immigrants" and a copy is attached as **"JC16"**.

220. Nor is South Africa a recipient of unusually high numbers of refugees or asylum seekers. In fact, we are not even among the top receiving nations worldwide, and have not been for some time.

221. In its 2024 White Paper (at paragraph 51 thereof), the DHA stated that as of December 2023, there were 113 007 persons in South Africa who had been recognised as refugees, 81 086 active asylum seekers in South Africa, and 828

404 inactive asylum seekers. The DHA therefore concluded that there were 1 334 174 asylum seekers and refugees in South Africa.

222. But, firstly, the total of the above figures (113 007 and 81 086 and 828 404) is 1 022 497, not 1 334 174.

223. Secondly, "inactive" asylum seekers is a broad and undefined term for those who applied for asylum at some point, but have since ceased renewing their visas, attending RROs, or otherwise pursuing their asylum claims. Very little is known about such persons, since they are characterised solely by their lack of contact with the DHA. They may have left South Africa, obtained other statuses, or died, but for whatever reason they are no longer functionally within the asylum system. They place no burdens of any kind on the DHA. It is accordingly not correct to include them when assessing the demands on the asylum system.

224. This means (on the DHA's own version), South Africa hosts 194 093 refugees and asylum seekers, which is significantly less than Uganda (1 463 523 refugees), Sudan (1 097 128), Ethiopia (879 598) or Chad (592 764) (according to figures provided by the International Commission of Jurists and cited by the DHA in paragraph 49 of the White Paper). I attach a copy of the relevant pages from the White Paper as **"JC17"**.

225. Overall, as evident from the above, South Africa is not suffering from any form of "migration crisis".

226. Can it nonetheless be said that illegal foreigners are, in general, lacking in motivation to attend on RROs to apply for asylum? No. Such a suggestion is untenable in light of the realities of life for undocumented persons in South Africa.

227. Any undocumented person in South Africa suffers from many hardships, which are the consequence of, *inter alia*, sections 32 and 38-42 of the Immigration Act. These provisions regulate the rights of any foreign person in South Africa not protected by the Refugees Act or the Immigration Act. These provisions stipulate, *inter alia*, that:

227.1. Undocumented persons are vulnerable to arrest, detention and deportation, in violation of their constitutional rights to equality, dignity, freedom and security of the person, and freedom of movement;

227.2. It is illegal for anyone to employ undocumented persons, and they will therefore be unable to earn an income to support themselves or their families;

227.3. It is illegal for anyone to provide undocumented persons with accommodation or shelter;

227.4. Without identification, undocumented persons struggle to access public health care or education, or other social services such as banking, schooling, insurance or cellular phone contracts; and

227.5. If arrested, detained and deported, asylum seekers will be unable to bring judicial review applications or similar litigation (like this one) in order to protect their rights in South Africa. This renders both the right to a just and fair administrative process, and the right of access to courts, nugatory.

228. Section 32(2) of the Immigration Act in particular states that "*Any illegal foreigner shall be deported*".

229. The courts have stressed the importance of ensuring that asylum seekers always possess the necessary permits/visas, and by corollary, the extreme prejudice that comes from living undocumented in South Africa. In *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) ("*Saidi*"), the Constitutional Court held at paragraph 13 that:

"Temporary [visas] issued in terms of this section are critical for asylum seekers. They do not only afford asylum seekers the right to sojourn in the Republic lawfully and protect them from deportation but also entitle them to seek employment and access educational and health care facilities lawfully."

230. And at paragraph 16, the Constitutional Court continued:

"This interpretation [granting asylum seekers visas] better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application. She or he is not exposed to the possibility of undue disruption of a life of human dignity. That is, a life of: enjoyment of employment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference."

231. At paragraph 30, the Constitutional Court then stated:

"The respondents' interpretation exposes asylum seekers to the real risk of refoulement in the interim whilst the outcome of judicial review is pending. Without a temporary [visa], there is no protection. This runs counter the very principle of non-refoulement and the provisions of section 2 of the Refugees Act. It is cold comfort to say – between the exhaustion of internal remedies and the outcome of judicial review – an asylum seeker may seek and obtain interim protection by means of an urgent application to court. Litigation being what it is, there is no guarantee that the approach to court will succeed; the urgent application may be dismissed on a technicality or any other legally

cognisable basis. That would then expose the asylum seeker to the risk of return. What then of the notion of non-refoulement against one's will "in any manner whatsoever"? South Africa may be saying it is not opposed to its administrative refusal of an asylum seeker's application being challenged by way of judicial review. But it will be making it possible for refoulement to take place in the interim. That is a breach of the principle of non-refoulement."

(Emphasis added.)

232. Visas are thus critical to all asylum seekers, if they are to lead secure and dignified lives in South Africa. It is thus illogical to suggest that *mala fide* illegal foreigners would wait until arrested to seek asylum.

233. Why, then, is it not unusual for persons seeking asylum only to file their asylum applications after some period of delay?

234. The answer is: Because there are many barriers between any new asylum applicant and access to an RRO. These barriers may include, but are not limited to:

 234.1. Asylum seekers are, as a general rule, indigent and vulnerable persons with no familiarity with South African law or immigration processes, and often without proficiency in a South African language.

 234.2. Asylum seekers thus often act in simple ignorance of what they are meant to do – and such ignorance is obviously greatly amplified in the cases of newcomers, who may have never encountered any DHA official or office before, and who may have spent less than a week in South Africa as a whole. Even asylum seekers who obtain asylum transit visas

are not told that they must attend on an RRO, where the RROs are, that they must do so in five days, or other important information.

234.3. But even when asylum seekers do act correctly, they often face obstacles or opposition. For example, a newcomer who attends on a port of entry and indicates that he/she wants to be given an asylum transit visa may be unlawfully refused such visa by DHA officials (as occurred in *Faqirzada*).

234.4. Assuming that an asylum seeker is granted an asylum transit visa and learns that he/she must attend on an RRO, he/she has only five days to do so. This is often simply not enough time.

234.5. There are substantial periods during which the DHA system is offline, compounded by loadshedding, resulting in days and weeks during which asylum applications and asylum processes are not accessible.

234.6. One difficulty at RROs has existed for years is that of excessive queues. Many asylum seekers queue from the early hours of the morning – but even then, after waiting all day, may not be admitted into the RRO to be assisted. The problem is worse for unaccompanied women, for whom attending on queues in the very early morning can be particularly dangerous. Any asylum seekers who approached an RRO before 2024 would have encountered this problem.

234.7. Furthermore, many RROs only deal with applicants from certain countries on certain days: Zimbabweans on Mondays, Congolese on Tuesdays, and so on. This is usually intended as a way to manage the

availability of translators. But the consequence is that if an asylum seeker misses the allocated day for his/her nationality, he cannot return the following day. He/she must return the following week – by which time his/her asylum transit visa would have expired.

234.8. In any event, as described above, most RROs implement an appointment system, whereby only a limited number of asylum applicants are assisted each day, and the others are given informal "appointment slips" (often merely handwritten pieces of paper) telling them to return weeks or months in the future.

234.9. Asylum seekers who return on their appointment date are still found not to have good cause for their delays, despite doing no more than obeying the instructions given to them by the DHA.

234.10. And RROs often not even open to newcomers, or have been closed by the DHA for extensive periods of time. The RROs previously located at Crown Mines, Braamfontein and Rosettenville were closed. A court order directing the DHA to re-open the Crown Mines (Johannesburg) RRO was ignored and the office remains closed.

234.11. The DHA sought to close the CTRRO twice, in 2012 (which decision was set aside in *Minister of Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) SA 421 (SCA) ("*Scalabrini 1*")) and then again in 2014 (which decision was set aside in *Scalabrini Centre, Cape Town & others v Minister of Home Affairs & others* 2018 (4) SA 125 ("*Scalabrini 2*")).

234.12. Although *Scalabrini 2* directed that the CTRRO be re-opened by 31 March 2018, this had not in fact occurred by the commencement of the national lockdown in March 2020 (two years later). It was only re-opened in May 2023.

234.13. The GRRO was also closed, and this closure was also found to be unlawful by the SCA in *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA). The SCA ordered the re-opening of the GRRO by 1 July 2015. Instead, that RRO was only re-opened on 18 October 2018 – over three years after the SCA's deadline.

234.14. Yet even then, the resources allocated to the GRRO by the Respondents were inadequate for it to carry out its functions. In litigation that arose from the failure of the GRRO to issue section 22 asylum seekers visas to applicants, the DHA admitted that there simply were not sufficient resources at the RRO to service the demand by asylum seekers. For example, there were only four Refugee Reception Officers who had to carry out many administrative tasks in addition to issuing visas to asylum seekers. The DHA also admitted that although the RRO was visited by about 150 applicants on a daily basis, it could only interview about 7 per day.

234.15. The above facts are evident from the judgment of the Port Elizabeth High Court in *Huda; Willard; Issan; Chiputa v The Minister of Home Affairs and Others*, dated 17 December 2019 ("*Huda*"), which is unreported and

which I therefore attach as **"JC18"** for the convenience of the Court. I refer the Court in particular to paragraphs 16-17 thereof.

234.16. The effective result of the abovementioned conduct by the DHA was that, by March 2020 (when the country went into the lockdown), there were only three fully functioning RROs in South Africa: Musina, Durban, and Tshwane/Pretoria, and a partially functioning RRO at Gqerberha.

234.17. Bear in mind that all of this happened <u>despite</u> a 90% decrease in asylum seeker numbers over the preceding decade, as explained above.

234.18. During the lockdown, it was impossible for new asylum applications to be filed. The DHA only began accepting new asylum applications in mid-2022.

234.19. Lastly, one of the gravest and most persistent problems at RROs is that of corruption. Due to the desperation of asylum seekers, officials ranging from the security guards at the entrances to RROs, to interpreters, to the RSDOs themselves, ask for or expect bribes before they will assist asylum seekers. I attach studies confirming the widespread nature of this problem, namely:

234.19.1. "Queue Here for Corruption" conducted by LHR and the African Centre for Migration and Society in July 2015 (attached as **"JC19"**); and

234.19.2. "Status of Immigration Detention in South Africa) by LHR, dated December 2023 (the executive summary and the section on corruption are attached as **"JC20"**).

234.20. Due to corruption, even the most diligent and law-abiding of asylum seekers may be unable to file asylum applications timeously.

235. Scalabrini contends that the challenged provisions would be unconstitutional even if these problems did not exist – but they do, and they dramatically aggravate the unfair and unlawful burdens that the challenged provisions place upon asylum seekers.

236. This factual context emphasises and amplifies the irrationality of the challenged provisions. It is primarily because of the above factors that asylum seekers are "late" in filing their asylum claims, not because they are negligent or dilatory in some way. It is accordingly senseless to penalise them for delays that are not their fault.

X. THE UNJUSTIFIABILITY OF THE CHALLENGED PROVISIONS UNDER SECTION 36 OF THE CONSTITUTION

237. Section 36 of the Constitution provides:

> "*(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—*
>
> *(a) the nature of the right;*
>
> *(b) the importance of the purpose of the limitation;*
>
> *(c) the nature and extent of the limitation;*
>
> *(d) the relation between the limitation and its purpose; and*
>
> *(e) less restrictive means to achieve the purpose.*"

238. Scalabrini contends that under none of the abovementioned factors can the challenged provisions be justified.

239. Concerning the nature of the right:

239.1. As explained above, the right to *non-refoulement* is central to the protection of a range of other constitutional rights, depending on the facts and circumstances of each individual asylum seeker.

239.2. The nature and importance of these rights to asylum seekers have been recognised internationally, domestically, and by the courts. It is because of the unusual and egregious prejudices which asylum seekers may face in their countries of origin that the refugee system, as a whole, exists.

240. Concerning the importance of the purpose of the limitation:

240.1. Per Scalabrini's contentions on the irrationality of the challenged provisions, there is no purpose (let alone an important one) behind the limitation in issue.

240.2. If a migrant has no meritorious claim to asylum, then they can be deported on that basis alone. If they <u>do</u> have a valid claim to asylum, then they cannot be returned to face such inhumane hardships no matter what procedural missteps they have committed in South Africa.

241. Concerning the nature and extent of the limitation:

241.1. The limitation is total in effect, in that if an asylum seeker is disbarred from the asylum system, he/she is permanently and completely barred

from the protections of refugee status notwithstanding the merits of their refugee claim.

241.2. The Respondents may contend that the limitation created by the challenged provisions is ameliorated by the fact that immigration officers, RSDOs and/or the courts may condone delays/adverse immigration statuses if the asylum seeker demonstrates "*good cause*" or "*compelling reasons*" for their misstep.

241.3. But this misses the point. *Non-refoulement* applies to all asylum seekers – indeed, to all persons. There is no subset of asylum seekers who deserve to be subjected to the challenged provisions, whether they can show good cause or not.

241.4. No matter how generously or properly the Respondents or the courts exercises their various discretions under the challenged provisions, such discretions are limited to considering questions of condonation: Why did the asylum seeker delay, or why does he/she lack an asylum transit visa? These questions are fundamentally distinct from the question that *non-refoulement* asks, which is: What harms will the asylum seeker face in their country of origin? The Respondents and the courts, in other words, cannot protect the right to *non-refoulement* because they are not empowered under the challenged provisions to consider that right in the first place. It is only the RSDOs who can and do assess the merits of an asylum seeker's claim.

241.5. Accordingly, even if the Respondents and the courts exercise their discretionary powers perfectly, the challenged provisions still permit

absurd and unacceptable outcomes. For example, what of a female asylum seeker from the eastern Democratic Republic of Congo who was targeted for her political affiliations, whose family was attacked and killed by government officials, and who herself was gang-raped, but who failed to apply for asylum in South Africa timeously? Can it ever be said that it would be fair, reasonable or proportional to return such a person to the DRC, to face death or worse, merely because of her bureaucratic oversight?

241.6. It is contended that the answer must be no. It must be no for every person found to have a meritorious refugee claim.

241.7. The Respondents may further contend that not every asylum seeker who is compelled to return to their country of origin because of the challenged provisions will, in fact, suffer persecution there. In other words, not all asylum seekers have valid refugee claims. This may be correct, but again it is no answer. It has always been the case that not all asylum seekers have valid refugee claims. That is no basis to disbar asylum seekers *en masse* for reasons that are arbitrarily and irrationally unrelated to the merits of their refugee claims.

242. Concerning the relation between the limitation and its purpose:

242.1. Once again, Scalabrini contends that there is no genuine public purpose or defensible constitutional interest behind the challenged provisions. There can hence be no relation between the challenged provisions and any such purpose or interest.

242.2. The challenged provisions will, at best, mean that those persons who would have sought asylum in South Africa will now remain here as undocumented foreigners. That is a worse position for South Africa as a whole.

243. Concerning whether there are less restrictive means to achieve the purpose:

243.1. As there is no legitimate purpose, there can be no means – restrictive or otherwise – to achieve it.

243.2. I reiterate, however, the points made above, namely that if the underlying problem which the challenged provisions are intended to remedy is that asylum seekers are not applying timeously, then less restrictive means do exist. The DHA can, in any one of a wide range of ways, make RROs more accessible. For example:

243.2.1. The DHA could re-open closed RROs (notably in Johannesburg);

243.2.2. Existing RROs could be capacitated to accept more asylum seekers timeously, whether by adding more RSDOs, more support staff, or more equipment (notably better computers and/or IT resources);

243.2.3. The duration of transit visas could be extended, so that asylum seekers have more than 5 days within which to approach an RRO; or

243.2.4. The DHA could re-start its online application process, which was piloted during the COVID-19 pandemic but has largely been abandoned for asylum newcomers.

244. It is not necessary to prescribe which of its many options the DHA should adopt to improve the asylum system. Overall, the point is that if the asylum system was capacitated to finalise asylum applications swiftly instead of over years, many of the problems about which the DHA complains would disappear. Failed asylum seekers would not remain in South Africa for lengthy periods, but could be lawfully deported. Applying for asylum would be less attractive to abusive individuals, as it would not offer them protection for extended periods.

245. This in turn would reduce the demands on the DHA and on RROs, such as the queues of asylum seekers seeking renewals of their visas and the backlogs at appeal bodies like the RAA. Public perceptions of the asylum system as being abused or overrun would be remedied. Systems that the DHA has developed to compensate for the delays in the asylum system (such as its "appointment slip" system) could be abandoned.

246. Overall, the numbers of persons being processed within the asylum system would be reduced, <u>but</u> without any violation of the right of *non-refoulement* or the Constitution.

247. There are thus a range of alternative, equally-effective but less restrictive means to achieve the DHA's aims.

248. For all of the above reasons, the challenged provisions cannot be justified in terms of section 36 of the Constitution. They fall to be declared to be inconsistent with the Constitution and invalid.

XI. THE JUDICIAL REVIEW OF THE RELEVANT REGULATIONS

249. Scalabrini contends that even if the constitutional challenges to the impugned statutory provisions is unsuccessful, the challenges to the impugned regulatory provisions fall to be granted under PAJA.

250. Regulations, after all, are a form of administrative action. If a regulation fails to meet the standards set by PAJA, it can and should be declared to be unlawful.

251. Scalabrini contends that Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) (which I shall refer to as "*the challenged Regulations*") fall to be set aside on much the same grounds as the challenges set out above, namely that:

    251.1. They violate the right to *non-refoulement*. This right is set out in peremptory terms in section 2 of the Refugees Act, and subordinate legislation must comply therewith. The challenged Regulations are thus *ultra vires* the Act itself;

    251.2. They are irrational and unfair, for the reasons set out above; and

    251.3. They are furthermore unreasonable, also for the reasons set out above, and therefore violate section 6(2)(h) of PAJA.

252. For these reasons, the challenged Regulations fall to be reviewed and set aside, independently of whether Scalabrini's challenges based upon the Constitution

succeed. This relief is sought in the alternative, as it would not be necessary if the overall constitutional attack on the challenged provisions succeeds.

253. I now deal with the relief sought in Part A of this application.

XII. PART A: THE INTERIM INTERDICT SOUGHT

254. Because Part B of this litigation includes a challenge to the constitutionality of a statute, the orders sought by Scalabrini must be confirmed by the Constitutional Court before they can have effect.

255. It is reasonable to expect, therefore, that it will be years before Part B of this litigation is finally resolved.

256. But asylum seekers cannot wait years. The challenged provisions are in effect now, and already asylum seekers are being disbarred from seeking asylum and rendered subject to arrest, detention and deportation. By the time that Part B of this application is finalised, thousands of asylum seekers may have been returned to their countries of origin, in violation of their constitutional rights and the right to *non-refoulement*.

257. Scalabrini accordingly seeks, in Part A of this application, an urgent interim interdict that would effectively suspend the operation of the challenged provisions, pending the final determination of Part B of this application.

258. The elements for an interim interdict are that:

258.1. There is a *prima facie* right, though open to some doubt, to the relief sought;

258.2. There is a well-founded apprehension of irreparable harm;

258.3. The balance of convenience favours the grant of the interim interdict; and

258.4. There is no adequate alternative remedy.

259. All of these elements are fulfilled in this case. I deal with each in turn.

A *prima facie* right

260. Scalabrini contends it has at least a *prima facie* right to the relief sought (namely the declarations of invalidity of the challenged provisions) on the grounds set out above pertaining to Part B of this application.

261. Indeed, Scalabrini contends it has strong prospects of success in Part B, and a clear right to the relief it seeks (though it is not necessary to prove such for the grant of an interim interdict).

262. The *prima facie* right arises from the right of *non-refoulement*, and the set of affected constitutional rights, which every asylum seeker possesses. This has been described above in detail and need not be repeated.

263. In *Scalabrini 3*, a constitutional challenge similar to this matter was brought by Scalabrini concerning, *inter alia*, sections 22(12) and (13) of the Refugees Act. Those sections created a system whereby asylum seekers who failed to timeously renew their asylum seeker visas for a period of one month or more were deemed to have abandoned their application for asylum and were disbarred from re-applying, unless they could satisfy the SCRA that there are compelling reasons for their delays.

264. Scalabrini sought an interim interdict in that matter as well, which was granted by this Court (per Baartman J) on 30 November 2020.

265. By the time Part B of that matter reached the Constitutional Court, the Respondents had abandoned their opposition. The impugned sections were hence struck down, with the Constitutional Court upholding arguments similar to those made herein. For example, at paragraph 46 of *Scalabrini 3*, the Constitutional Court stated:

"The short answer to these assertions is that they cannot justify the automatic abandonment of an asylum application, simply because of a failure to renew a visa. As stated, the consequence of the impugned subsections is that the merits of a claim for asylum are never considered, and the principle of non-refoulement is violated. In any event, the respondents wrongly assume that most asylum seekers have no valid claims to asylum and no interest in pursuing those claims. This assumption violates the core principle of refugee law that asylum seekers must be treated as presumptive refugees until the merits of their claim have been finally determined through a proper process. Moreover, the visa protects asylum seekers against arrest and deportation, and allows them to access employment, education and health services. Therefore, they have sufficient motivation to seek renewal. Apart from this, the evidence shows that the non-renewal of visas – often the consequence of long queues, the financial burden of getting to reception offices and taking time off from work to do so – has not caused the backlog of asylum applications, nor imposed a significant burden on the Department."

266. On similar grounds, it is submitted that Scalabrini has at least *prima facie* prospects of success in its application under Part B.

A reasonable apprehension of irreparable harm

267. There is a well-founded apprehension of irreparable harm to asylum seekers if the challenged provisions are not suspended pending the final determination of Part B of this application.

268. The primary way in which this irreparable harm will occur is that many asylum seekers – probably thousands, perhaps tens of thousands – will be disbarred from applying from asylum and will be compelled to return to their countries of origin. This risk is literally life-threatening, as has been set out above.

269. Not only would this be a clear violation of their rights to *non-refoulement* and their related constitutional rights, but such violations will be irreparable. After an asylum seeker is deported, it is of no meaning or value to them if the statute is subsequently held to be unconstitutional or otherwise unlawful. They will have left South Africa; the damage will have been done. Their lives, homes and jobs in South Africa will all have been lost, beyond repair.

270. It is not expected that the Respondents will (or can) contest this. The challenged provisions were manifestly brought into operation to achieve this outcome.

271. A further form of irreparable harm is that some asylum seekers will, out of fear of being arrested, detained and deported if they attend on an RRO, never apply for asylum at all. They will instead remain in South Africa as illegal foreigners. Such persons will have to endure all the hardships of being undocumented in South Africa, which harms are both serious and irreparable.

272. Jobs, income or homes lost because an asylum seeker did not have a valid visa cannot be restored by an order in due course. If medical care is needed, it will be needed immediately – not after Part B of this application is finalised. If asylum

seekers struggle to access schooling, the negative impact on their education will affect them for the rest of their lives.

273. It will be cold comfort to such persons to find out, years later, that they should never have had to endure these harms at all. This is why interim protection is needed now.

Balance of convenience

274. The balance of convenience favours the grant of the interim interdict.

275. If the challenged provisions are declared unconstitutional but the interim interdict not granted, the catastrophic implementation of the Impugned Provisions will be impossible to undo. As set out above, thousands of people will have had their rights violated, and may as a result of the challenged provisions become subject to persecution, torture, rape or death. This should, Scalabrini contends, weigh heavily with the Court.

276. Even those who remain would remain here illegally, undocumented, and vulnerable, left in desperate circumstances and susceptible to exploitation. It aids no person, and certainly not the Respondents, for an underclass of undocumented migrants to swell with numbers of *de facto* refugees.

277. If, on the other hand, the interim interdict is granted but the challenged provisions are later held to pass constitutional muster, no significant prejudice will have befallen the Respondents. It will still be able, at that stage, to implement the challenged provisions, and if asylum seekers who should have been deported remain in South Africa, they can be deported then.

278. The suspension of the challenged provisions would, in effect, return the accessibility of the asylum system to the openness that existed from 1998 until 2020. This is in no way problematic: It was the prevailing statutory approach for so many years for good reason, and the desirability and appropriateness of such an open system was repeated reiterated by judgments such as *Ruta*.

279. Insofar as any additional burdens are placed on the Respondents at all, the "burden" is no more than the duty to assess asylum seekers' claims on their merits – which is no burden at all. It is the task assigned to them under South African law and the Constitution.

280. In these circumstances, the balance of convenience strongly favours the grant of the interim interdict.

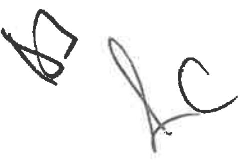
No adequate alternative remedy

281. There is no other adequate remedy to assist asylum seekers in the interim, pending the final determination of Part B of this application.

282. The challenged provisions are now in operation. They must *de jure*, and are *de facto*, being implemented by the Respondents.

283. And, as described above, efforts by Scalabrini to obtain an undertaking from the DHA not to put the challenged provisions into effect have been unsuccessful.

284. No other statutory or other legal mechanism exists which can protect affected asylum seekers in the interim, or afford them the documented security which they need to exercise their rights in South Africa and live lives of dignity.



285. All of the requirements for the grant of an interim interdict are accordingly fulfilled.

XIII. CONCLUSION AND RELIEF SOUGHT

286. For all of the above reasons, Scalabrini prays for the orders as set out in the notice of motion to which this affidavit is annexed.

287. Scalabrini further contends that the costs of both Part A and Part B of this application are to be paid by any Respondent who opposes the relief sought herein, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel on scale C as contemplated in Uniform Rule 69(7).

288. A higher tariff for costs in terms of Uniform Rule 69(7) is warranted given the complexity and importance of this matter. This is a constitutional challenge to statutory provisions. It is novel, likely to be finalised only in the Constitutional Court, and will affect the lives and fates of many thousands of vulnerable people. It requires significant expenses, experienced counsel, lengthy litigation, and calls for costs on the highest scale.

289. In the event that this application is unsuccessful, Scalabrini prays that no costs order be made against it in accordance with the well-known *Biowatch* rule. This matter is brought in the public interest, by a civil society entity, without any intention to profit therefrom, on behalf of those who cannot litigate in their own name, against the State. It falls fully within the *Biowatch* parameters and should be decided accordingly.

JAMES CHAPMAN

Signed and sworn before me on this 25th day of April 2024 at Cape Town the Deponent having acknowledged that she knows and understands the contents of this affidavit, has no objection to taking the prescribed oath and considers the oath to be binding on her conscience and uttered the words: "I swear that the contents of this declaration are true so help me God".

COMMISSIONER OF OATHS

Full names:

Designation and area:

Street address:

DARRYL GEORGE RUDOLPH SCOTSMAN
Commissioner of Oaths
Practising Attorney, R.S.A.
22 Bree Street, Cape Town
Republic of South Africa

"JC1"

RESOLUTION OF THE TRUSTEES
OF
THE SCALABRINI CENTRE OF CAPE TOWN ("SCALABRINI")
No: IT2746/2006

This resolution, signed by the Trustees of Scalabrini on 15.02.2024, is to confirm that Scalabrini has resolved to take legal action by launching an application in the Western Cape High Court challenging the Department of Home Affair's policy, practice and law regarding the arrest, detention for deportation and exclusion from refugee protection of undocumented asylum seekers who are attempting to lodge asylum applications. Such legal action shall include addressing issues of:

(i) The rights of asylum seekers to be released from detention upon confirmation of an intention to lodge an asylum application;
(ii) requesting an interdict to halt this practice of arresting new asylum applicants and a declaration that Sections 4 (f) - (i) and S21((1B) and Regulation 8(3) and (4) of the Refugees Act 130 of 1998, as amended, are in whole or in part unconstitutional;
(iii) setting out the appropriate legal framework and procedures to apply to individuals in such situations; and
(iv) having any of the abovementioned relief confirmed by higher courts in South Africa to the extent necessary.

The resolution resolved that the Head of Advocacy for Scalabrini, James Chapman and/or the Director of Scalabrini, Giulia Treves, be authorised to depose to affidavits on behalf of Scalabrini to support an application to the High Court and if applicable to higher subsequent courts in regard to one or more of the abovementioned challenges.

It was further resolved that Lawyers for Human Rights should act as attorneys of record for Scalabrini.

THUS, DONE AND SIGNED AT CAPE TOWN BY:

NAME	SIGNATURE
1. FILIPPO FERRARO	[signature]
2. RICO TALISIC	[signature]
3. PETER-JOHN PEARSON	[signature]
4. Jacqueline Smith	[signature]
5. Safari Jamala	[signature]
6. Lindi Dlamini	[signature]

85 JC

"JC2"

IMS - Done - To Report back on 11/12/2023 To ARO @ 07:00

11/12/2023
15 APRIL 2024

Emi Katendg

W COMERS

ype	Date of appointment	Tick or Comment
-t	29 | 08 | 2023	
:7		

RRO ON 28/11/2023
IMS 16/01/2024
Interpreter 06 Feb 2024

home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

IMMIGRATION INTERROGATION AND DECLARATION QUESTIONAIRE IN-TERMS OF IMMIGRATION ACT 13/2002

1 Surname [redacted]

2 Full Names [redacted]

3 Date of Birth 12 October 2004

4 Home Language: Swahili

5 Other Language English

6 Nationality & Place of Birth Congolese, Sud-Kivu

7 National Passport / Identity number: [redacted]

8 Date of arriving in Republic of South Africa (RSA) 12 April 2023

9 Is it the first time to come to R.S A? Yes

If "No" when None What was the purpose of your visit?
For work and Study

10 Have you reported at Immigration at the port of Entry? No
If "No" why? No Visa

11. What type of permit have you used when entering R S A? None

12 Have you applied for Asylum before? YES/NO (NO circled) Give Details

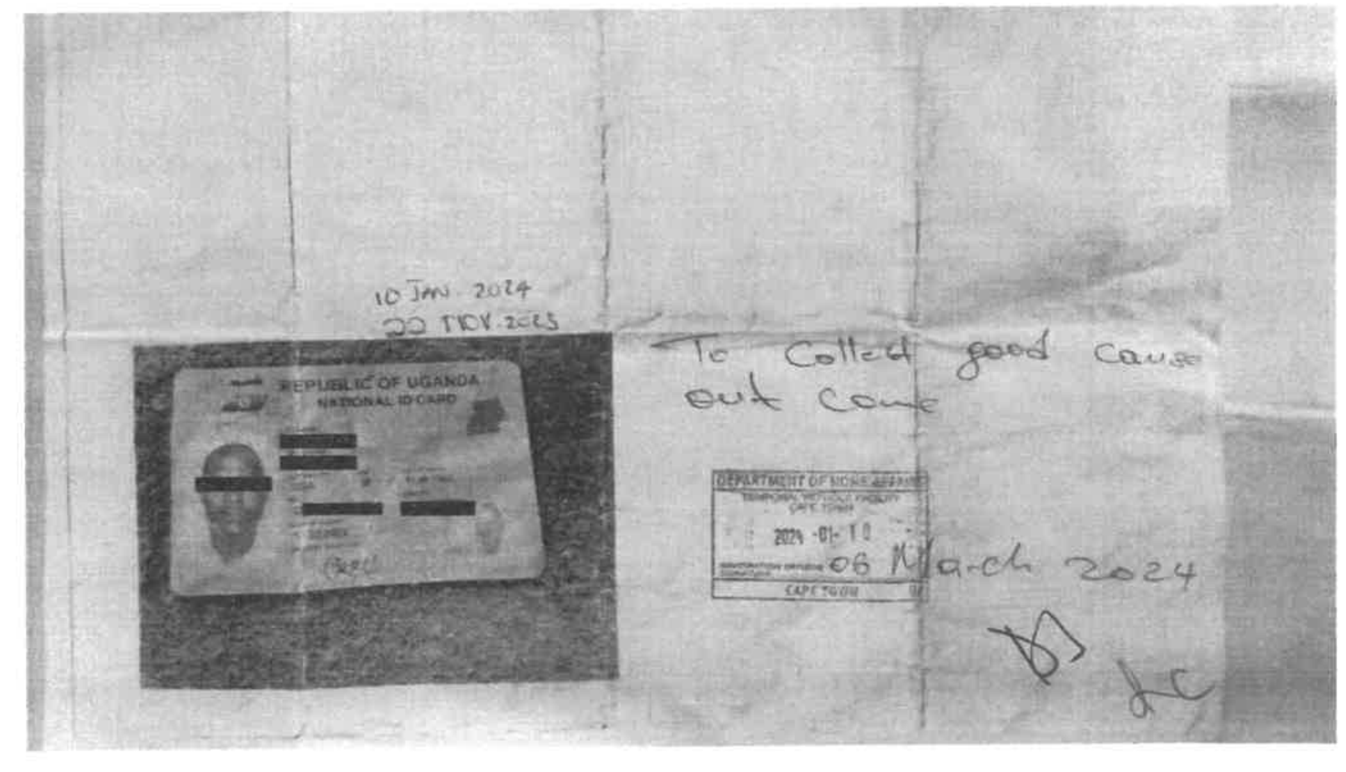
DEPARTMENT OF HOME AFFAIRS
[stamp, partly illegible]

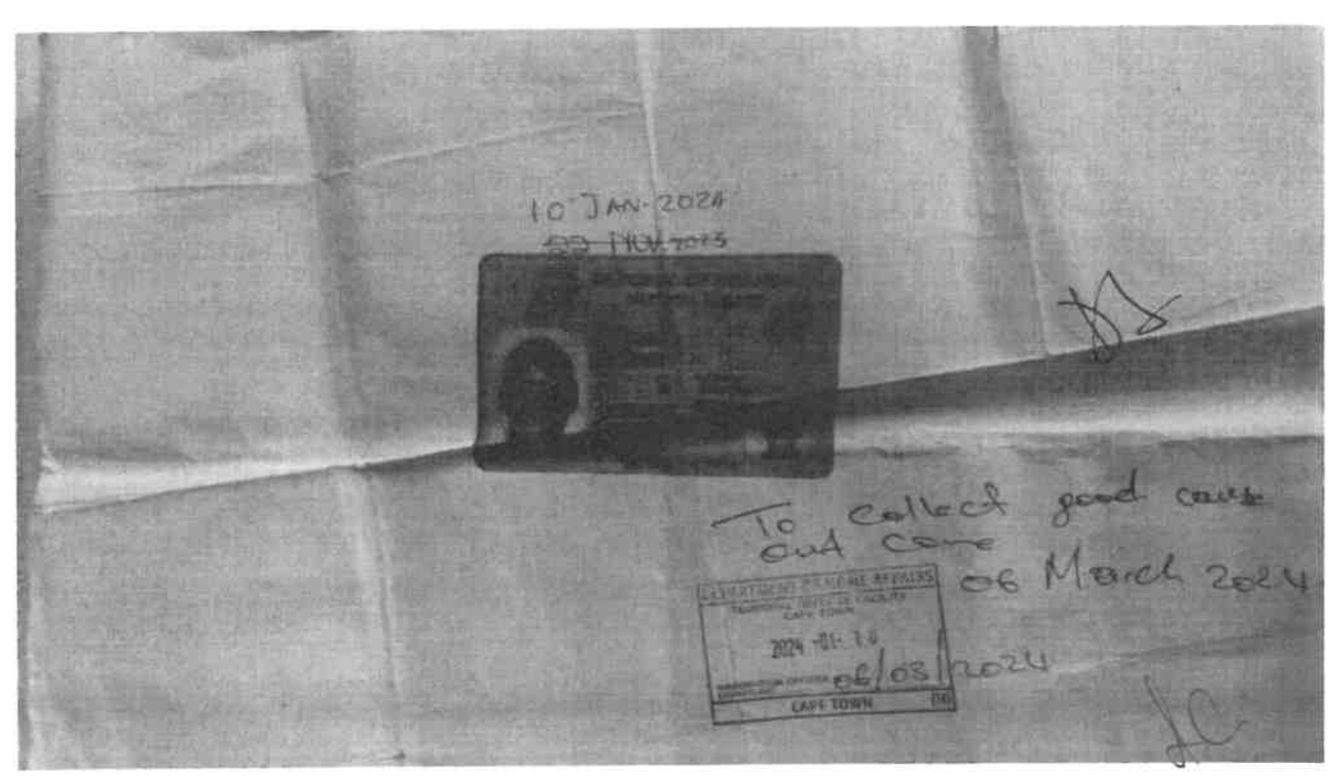
DEPARTMENT OF HOME AFFAIRS
TEMPORAL REFUGEE FACILITY
CAPE TOWN
2024 -02- 06
IMMIGRATION OFFICER
SIGNATURE: ...
CAPE TOWN (74)

REPORT TO IMMIGRATION SERVICES:

GOOD CAUSE

DATE	2024/03/19	OUTCOME / RESULTS 05-03-2025.
TIME	07:00	07:00.
REASON:	Rescheduled for Swahili	Interpreter


10 JAN 2024
REPUBLIC OF UGANDA
NATIONAL ID CARD
To Collect good cause
out come
DEPARTMENT OF HOME AFFAIRS
2024 -01- 10
06 March 2024
CAPE TOWN


10 JAN 2024
To collect good cause
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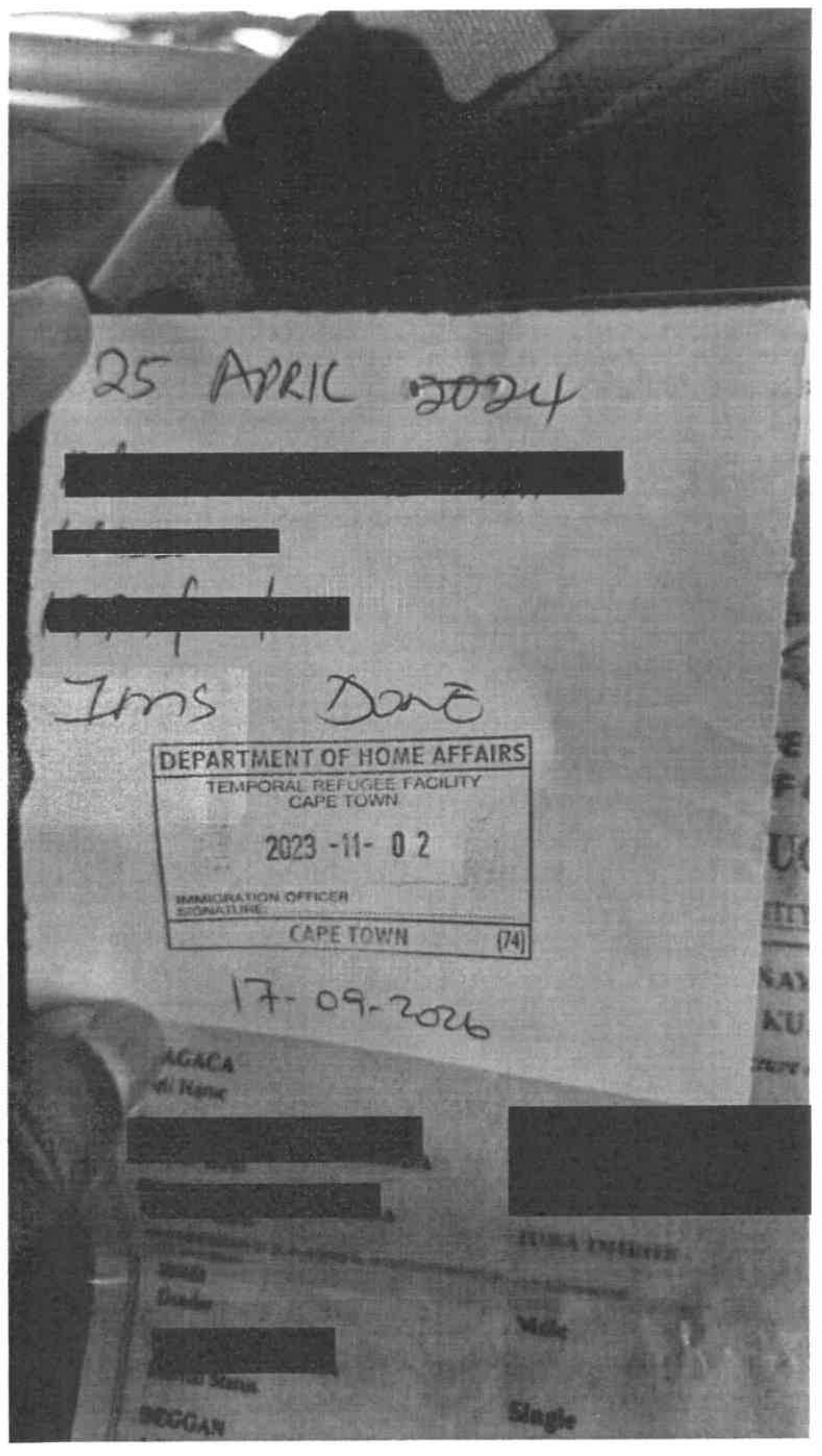
06 March 2024
2024 -01- 10
06/03/2024
CAPE TOWN

"JC3"



"JC4"

FORM 29A
CONDITIONAL RELEASE
FROM DETENTION FOR PURPOSES OF DEPORTATION

(DHA-1724) **Form 29A**

DEPARTMENT OF HOME AFFAIRS
REPUBLIC OF SOUTH AFRICA
CONDITIONAL RELEASE FROM DETENTION FOR PURPOSES OF DEPORTATION
[Section 7(1)*(g)* read with section 34(1)]

To: .... *(indicate full names and surname of illegal foreigner)*
Date of Birth ..../ ..../ .... (dd/mm/yyyy)
Travel Document Type: .... Travel Document No. ....
Date of issue ..../ ..../ .... Expiry date ..../ ..../ ....
Issuing Authority ....

You are hereby **conditionally** released from detention for purposes of deportation, following an *interview held on ....../ ..../ .... or the attached Court Order issued by the .... Magistrates Court and dated ..../ ..../ .... in which it was concluded that there exists reasons justifying your release in the interests of justice, subject to the following conditions:

1. ....
2. ....
3. ....
4. ....
5. ....

Reporting date: ..../ ..../ .... at the .... Office

The reasons justifying your conditional release are as follows:
....
....
....
....
....
....

NOTE: You are hereby warned—

(a) that should you breach any of the conditions for your release, you shall be detained pending your deportation;
(b) to report to an immigration officer named below on the abovementioned specified date(s);
(c) ....; and
(d) ....

ACKNOWLEDGEMENT OF RECEIPT OF CONDITIONAL RELEASE FROM DETENTION FOR PURPOSES

OF DEPORTATION

I hereby acknowledge receipt of the original notification of my conditional release from detention for purposes of deportation and that the contents hereof were explained to me.

....
Signature of detainee **Date**
Place:..

....
Signature of immigration officer **Date**

IMMIGRATION OFFICER'S PARTICULARS

Name and surname:..
Appointment number:...
Rank/position...
Office:... Province:...

SUPERVISOR'S PARTICULARS

Name and surname:..
Rank/position...
Contact No.: Tel: ....

CERTIFICATE BY INTERPRETER

I,... *(name(s) and surname)* of .... *(*business/residential address)* and telephone number.. and cell phone number .... hereby confirm that I have mastered....................................... *(state language)* and that I have explained to.. *(name(s) and surname of detainee)* the contents of this notice in the said language and that I am satisfied that the said foreigner fully understands it.

....
Signature of interpreter Place **Date**
***Delete which is not applicable**

home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

"JC5"

NATIONAL ASSEMBLY

QUESTION FOR WRITTEN REPLY

QUESTION NO. 453

DATE OF PUBLICATION: FRIDAY, 1 MARCH 2024

INTERNAL QUESTION PAPER 6 – 2024

453. Ms T A Khanyile (DA) to ask the Minister of Home Affairs

What total number of asylum transit visas has his department issued in terms of Section 23 of the Immigration Act, Act 13 of 2002, to asylum seekers in the (a) 2022-23 and (b) 2023-24 financial years? NW526E

REPLY:

(a) During the 2022/23 financial year, the Department of Home Affairs issued 30 asylum transit visas in terms of Section 23 of the Immigration Act, Act 13 of 2002.

(b) In the 2023/24 financial year to date, the Border Management Authority issued 61 asylum transit visas in terms of Section 23 of the Immigration Act, Act 13 of 2002.

END.

"JC6"

NATIONAL ASSEMBLY

QUESTION FOR WRITTEN REPLY

QUESTION NO. 72

DATE OF PUBLICATION: THURSDAY, 20 JUNE 2019

INTERNAL QUESTION PAPER 1 OF 2019

72. Mr V Pambo (EFF) to ask the Minister of Home Affairs:

(a) What number of requests for asylum have been processed by his department in each of the past 10 financial years, (b) from which countries were the individuals whose asylum requests were granted and (c) what number of such requests is still outstanding?

NW1029E

REPLY:

(a) The total number of cases processed per year for the past 10 years (First instance adjudication):

Year	Total
2009	157 204
2010	77 071
2011	43 953
2012	63 228
2013	68 241
2014	75 733
2015	60 640
2016	41 241
2017	27 980
2018	18 104

(b) The cases granted for the past 10 years per country according to the Departmental system is as below:

Country	Total
Somalia	36512
DRC	25953
Ethiopia	18022
Congo	4859
Zimbabwe	3432
Burundi	2774
Angola	2365
Eritrea	2096
Rwanda	1416
Bangladesh	563
Uganda	443
Cameroon	368
Kenya	143
Sudan	134
Zambia	69
Liberia	51
Syria	47
Palestine	41
Ivory Coast	37
Tanzania	32
Pakistan	28
Sierra Leone	19
Sri Lanka	15
Iraq	15
Russia	13
Togo	12
Nigeria	11
Ghana	11
Solomon Islands	10
Malawi	9
Swaziland	7
Central African Republic	7
Ukraine	7
Turkey	6
Egypt	6
Mali	6
India	6
Afghanistan	5
Other	5
Morocco	4
Estonia	4
Namibia	4
Yemen	3

Mozambique		3
Bulgaria		3
Myanmar (Burma)		3
Lebanon		3
Niger		3
Iran		3
Seychelles		3
China		2
Macau		2
Bahamas		2
Jordan		2
Gabon		2
Saint Kitts and Nevis		2
Comoros		2
Benin		2
Lesotho		2
Kyrgyzstan		1
Guinea Bissau		1
East Timor		1
Poland		1
Colombia		1
Brazil		1
Senegal		1
Chad		1
Oman		1
Algeria		1
Djibouti		1
Sweden		1
Cambodia		1
Libya		1
Principality of Andorra		1
Grand Total		**99624**

(c) As at 31 December 2018 there were **3 534** cases still to be processed by the Refugee Status Determination Officers.

END

LAWYERS FOR
HUMAN RIGHTS

"JC7"

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14 December 2023

ATT: **Dr Aaron Motsoaledi**
Minister of Home Affairs
By Email: sihle.mthiyane@dha.gov.za, mogambrey.nadassen@dha.gov.za, and mamokolo.sethosa@dha.gov.za

ATT: **Mr Modiri Matthews**
Acting Deputy Director-General: Immigration Services
Email: modiri.matthews@dha.gov.za

Dear Sirs

RE: ARRESTING ASYLUM SEEKERS AND INTERPRETATION AND APPLICATION OF THE *ASHEBO v MINISTER OF HOME AFFAIRS* 2023 (5) SA 382 (CC) JUDGMENT

1. Lawyers for Human Rights (LHR) is an independent, non-profit organisation with a track record of human rights activism and public interest litigation in South Africa since it was established in 1979. In particular, LHR's Refugee and Migrant Rights Programme engages in promoting and protecting the human rights of refugees, asylum seekers, and migrants in a way that promotes the well-being of all in South Africa and the Penal Reform Programme assists in the fulfilment of the rights of migrants who are detained for immigration related reasons.

2. LHR confirms that we act on behalf of our client, the Scalabrini Centre for Cape Town (SCCT) and a number of new asylum applicants seeking to access the asylum process. SCCT is a registered non-profit organization in terms of section 1 of the Non-Profit Organisation Act 71 of 1997 with the registration number 021-079. The SCCT works with asylum seekers, refugees, and other migrants daily, addressing the obstacles many face with rights realisation and documentation pathways so they can meaningfully contribute to society.

3. We address this correspondence in light of the recent increase and practice in persons being detained for purposes of deportation upon presenting themselves at the various Refugee Reception Offices (RROs) across the country. We have been informed that immigration officials have stated that they are relying on the decision of *Ashebo v Minister of Home Affairs*[1] (*Ashebo*) to implement this practice.

[1] *Ashebo v Minister of Home Affairs* [2023] ZACC 16; 2023 (5) SA 382 (CC).

4. We note from the outset that *Ashebo* pertains to individuals stopped for identification by immigration or police authorities and found to be illegally present and detained but it does not provide authority to detain people presenting themselves at RROs to apply for asylum.

5. Accordingly, we write to request a copy of the directive or policy on the application of the implementation of *Ashebo*, specifically in respect of the exercise of discretion to detain asylum-seekers and assist with access to the asylum system.

6. We further hereby demand that immigration officials at RROs cease and desist from arresting and detaining new asylum applicants who are seeking to apply for asylum when situated at RROs, based on the absence of section 23 asylum transit visas and/or passports with visas.

7. We set out in fuller detail the extent of our demands below.

LEGAL BACKGROUND

8. *Ashebo* dealt with an Ethiopian migrant, Mr Ashebo, who was charged with contravening section 49(1) of the Immigration Act 13 of 2002 (Immigration Act). Mr Ashebo entered South Africa in June 2021 and struggled to lodge his asylum application until he was arrested on 07 July 2022. Two issues were before the Constitutional Court. The first concerned the time granted to 'illegal foreigners' to apply for asylum after entering the country and the second was when an illegal foreigner is entitled to be released from detention after expressing an intention to apply for asylum while awaiting deportation until the final adjudication of the asylum application.

9. On the first issue, the Court affirmed its earlier rulings and confirmed that once an 'illegal foreigner' has indicated their intention to seek asylum, they must be allowed to apply for asylum and that a delay is not a bar to seeking asylum. On the second issue, the Court ruled that merely expressing an intention to seek asylum does not on its own entitle an 'illegal foreigner' to be released from detention, but that the Department of Home Affairs is obliged to assist 'illegal foreigners' in filing asylum applications and that once such application is lodged, the 'illegal foreigner' may not be detained.

INTERPRETATION OF THE JUDGMENT

10. We are advised that the Department of Home Affairs is currently relying on *Ashebo* to detain newcomer asylum seekers who are not in possession of a transit visa/section 23 visa pending the application and determination process without establishing whether there is good cause for the delay in applying for asylum in accordance with Regulation 8(3) of the Regulations to the Refugee Act which states that:

"Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees."

11. *Ashebo* is clear in that a person has the right to apply for asylum either when their intention to do so has been declared through providing the adjudicator with their transit visa or once good cause has been shown in respect of their perceived illegal entry and stay in the country.

12. The Constitutional Court reaffirmed the principles of *Ruta*,[2] yet also noted that the current legislative framework and amendments after *Ruta* imposed a stricter application of the applicant's responsibility to declare their intention to apply in that the applicants are required to present a transit visa or show good cause for the illegal entry and stay within a 5-day period.

13. It is noted by the court in paragraph 59 that:

"The applicant is entitled to an opportunity to be interviewed by an immigration officer to ascertain whether there are valid reasons why he is not in possession of an asylum transit visa. And he must, prior to being permitted to apply for asylum, show good cause for his illegal entry and stay in the country, as contemplated in the above provisions. Once he passes that hurdle and an application for asylum is lodged, the entitlements and protections provided in sections 22 and 21(4) of the Refugees Act – being issued with an asylum seeker permit that will allow him to remain in the country, without delay, and being shielded from proceedings in respect of his unlawful entry into and presence in the country until his application is finally determined – will be available to him."

14. This dictum does not automatically give the immigration officers the right to arrest and possibly deport applicants after they have presented themselves to immigration at the RROs or otherwise.

15. The Court did not grant the Department of Home Affairs the entitlement to arrest and detain as a blanket policy. Indeed, the judgment should not be interpreted in a vacuum, but must be read in line with existing laws and principles that govern the arrest and detention of illegal foreigners. Importantly, *Ashebo* must not be read to obliterate established jurisprudence which calls for the exercise of proper discretion in favor of the liberty of people.

16. An inquiry into detention for the purposes of deportation is different from the inquiry that the Court is calling for in this judgment. In essence, the court gives the immigration officer a preliminary duty to ascertain the reasons for delay and lack of transit visa by the applicant.

17. Should those reasons be provided by the applicant the inquiry ends there and the asylum seeker should be directed to proceed with their asylum application. Should the reasons be insufficient, the immigration officer can and must exercise their discretion on whether to charge the person concerned under the operation of section 34(1) and/or Section 49(1)(a) of the Immigration Act read with the Criminal Procedure Act 51 of 1977. In the instance of section 34 proceedings, a further assessment must be made as to whether it would be in

[2] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC).

the interests of justice to detain the person or whether he/she may instead be released with or without conditions.[3]

PRACTICAL APPLICATION BY THE DEPARTMENT OF HOME AFFAIRS

a. Asylum Seeker arrested at Durban RRO

18. On 23 November 2023, a new asylum seeker applicant was arrested at the Durban RRO after making an online application for an appointment which was granted. Upon presenting himself to the reception office with his appointment letter, he was arrested for want of a passport which he could not provide as he was only in possession of his identity document.

19. The applicant was released and informed that he should revert to court for further inquiry. The nature of the inquiry is unknown to the applicant as the nature of his immediate apprehension and detention was not explained to him upon his arrest.

b. Newcomer asylum seekers detained at Beaufort West Police Station

20. On 31 August 2023, Lawyers for Human Rights addressed correspondence to the Department of Home Affairs Legal Department and the Immigration office in Beaufort West in Cape Town, on behalf of 3 newcomer asylum seekers who were arrested and detained at the Beaufort Police Station for more than 40 days. After being arrested on 28 July 2023 on their way to the Refugee Reception Centre in Cape Town, our clients declared their intention of applying for asylum seeker both at the Police Station and in court, however they continued to be detained at the police station for a longer period. The SCCT engaged with immigration in Beaufort West and George for release to enable application for asylum to proceed but were advised of detention based on *Ashebo*. Thereafter our office engaged telephonically and through correspondence, and we were advised that the department is implementing *Ashebo*, hence why our clients should continue to remain in detention.

21. The Immigration Officer who was appointed to attend to the matter advised that he approached the Refugee Reception Centre in Cape Town three times and in each attempt, he was advised that the system is down. As a result, our clients continued to remain in detention at the Beaufort West Police Station. Please see attached a copy of the emails and letter sent to the Department of Home Affairs Legal Department and Immigration Office in Beaufort West marked as **Annexure "1"**.

c. Arrests in Cape Town at the Cape Town RRO

22. In the week of the 27 November 2023 asylum seekers with appointments to apply for asylum issued by the Cape Town RRO were received and taken to the immigration section. Immigration officials required these asylum seekers to produce section 23 asylum transit visas and in the absence of the same these individuals

[3] *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2023] ZACC 34.

were denied access to applying for asylum and were instead arrested in terms of section 34 of the Immigration Act for the purpose of deportation. It was and is patently clear that these individuals seek to apply for asylum and had appointments to apply. Eight asylum seekers who were arrested and detained under these circumstances appeared at Goodwood Magistrates Court in Cape Town on 30 November 2023 and their cases were postponed for 7 days until Thursday 7 December 2023 for them to apply for asylum.

23. These individuals were taken from detention in police holding cells back to the Cape Town RRO where they were interviewed, and their applications were rejected at first instance. They consequently have the right to make submissions to the Standing Committee for Refugee Affairs who have a duty to review all cases rejected as manifestly unfounded or fraudulent. All these individuals, once processed, are entitled to asylum seeker permits. Yet instead of releasing them they remain in custody by order of the Magistrate in Goodwood on 7 December 2023 for a further 30 days pending review by the Standing Committee.

24. Immigration's insistence that these asylum seekers remain in custody and request of the same from the magistrate is in direct conflict with paragraph 59 of *Ashebo* quoted above in that, "[o]nce.. an application for asylum is lodged, the entitlements and protections provided in sections 22 and 21(4) of the Refugees Act – being issued with an asylum seeker permit that will allow him to remain in the country, without delay, and being shielded from proceedings in respect of his unlawful entry into and presence in the country until his application is finally determined – will be available to him." In other words, at the latest they must be released immediately and proceedings regarding their detention suspended upon applying for asylum. Furthermore further detention for deportation compromises these asylum seekers access to legal representation to make submissions on their asylum application to the Standing Committee for Refugee Affairs.

d. Arrests in Musina at the Musina Refugee Reception Office

25. We were advised by partners on 21 November 2023 that new asylum applicants were being arrested (40 arrests in the week before the 21st) at the Musina Refugee Reception Office because they did not have s23 transit visas or passports. Home Affairs management at the Refugee Reception Office confirmed that the *Ashebo* was the basis for the arrests. The series of arrests of new asylum applicants has since caused many who would want to apply for asylum to avoid approaching the RRO for fear of arrest and detention.

CHALLENGES WITH CURRENT APPLICATIONS BY THE DEPARTMENT OF HOME AFFAIRS

26. The Constitutional Court in *Ashebo* deals with the entitlement of a migrant stopped by authorities to be released from detention once the intention to apply for asylum has been declared. It does not talk to the facts of placing someone seeking asylum at an RRO in detention, nor does it give immigration officials at RROs or otherwise an unfettered right to detain asylum applicants without exercising their discretion (which ought to be in favor of the applicant's liberty).

27. The Department has taken the interpretation of this judgment to mean that applicants who present themselves to RROs, even with express appointments issued by the Department, may be immediately

arrested, detained and then brought before the court to undergo a judicial inquiry. This is done despite the RROs being fully aware of the fact that applicants may reasonably delay in making their applications due to:

27.1. Closure of the RROs across the country throughout the years 2020 to 2022.

27.2. Even before then, some RROs were fully booked and others were only partially operational to the exclusion of all new asylum applications (Cape Town RRO).

27.3. Refusal to accept or acknowledge the applicants when they present themselves to the RRO within the 5-day period.

27.4. The online application system was only introduced in May 2022 and there are applicants who have not received appointments from that system at all. The online system was suspended in June 2023 and replaced by an in person attendance and appointment system.

27.5. When applying online via email, and thereafter when attending in person to apply, applicants' initial efforts to apply were not acknowledged at the time they initially approached the offices or thereafter.

27.6. RROs have introduced an appointment system based on the nationality of the applicants and only assist a small fraction of newcomers of the said nationalities per day, making the 5-day period even less attainable.

27.7. Some RROs are fully booked for 2023 and even 2024, however appointments for future dates are neither digitally recorded nor are the full particulars of the person captured.

27.8. Increased security barriers at entry points of RROs.

28. Among others, these challenges hinder the applicant's ability to present themselves to the Refugee Reception Offices timeously. Despite these administrative challenges, the Department continues to rely on the stringent and overbroad interpretation of the methods outlined in *Ashebo* without exercising the required discretion.

29. In the premises, we request the policy document or directive outlining the Department's application of *Ashebo* within fourteen (14) days of receipt of this letter.

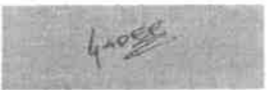
30. We further require and hereby demand that immediately upon receipt of this letter that new asylum seeker applicants seeking to apply for asylum **cease to continue to be arrested or detained**, and/or barred them from the asylum process, as this is in contravention of *Ashebo* as well as domestic and international law.

Kindly contact the writer should you have any queries or response in respect of this letter.

Yours faithfully,

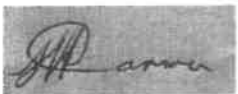
LAWYERS FOR HUMAN RIGHTS
Per: Nabeelah Mia
nabeelah@lhr.org.za

ENDORSED BY:



UNIVERSITY OF CAPE TOWN
REFUGEE RIGHTS UNIT

Per: Shazia Sader
shazia.sader@uct.ac.za



NELSON MANDELA UNIVERSITY REFUGEE RIGHTS CENTRE

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31 August 2023

ATTN: DEPARTMENT OF HOME AFFAIRS
Legal Advisor, Mr Ndivhaleni Mudimeli
By email: <ndivhaleni.mudimeli@dha.gov.za>

ATTN: DEPARTMENT OF HOME AFFAIRS IMMIGRATION WESTERN CAPE
Provincial Manager, Mr Yusuf Simons
By email: <yusuf.simons@dha.gov.za>
Provincial Coordinator, Ms Almien van der Berg
By email: <almien.vanderberg@dha.gov.za>

ATTN: DEPARTMENT OF HOME AFFAIRS IMMIGRATION GARDEN ROUTE & CENTRAL KAROO
District Manager Operations Director, Dr Mosiuoa Ngaka
By email: <mosiuoa.ngaka@dha.gov.za>
Immigration Officer, Mr Mmeli Coko
By email: <mmeli.coko@dha.gov.za>

ATTN: DEPARTMENT OF HOME AFFAIRS IMMIGRATION BEAUFORT WEST
3 De Vries Street
Thusong Centre
Beaufort West, 6970
By email: <thobile.godwana@dha.gov.za>

ATTN: DEPARTMENT OF HOME AFFAIRS GEORGE
Office Manager, Ms Sharon Davids
By email: <sharon.davids@dha.gov.za>

URGENT

Dear all,

RE: URGENT RELEASE OF THREE ASYLUM SEEKERS FROM UNLAWFUL DETENTION AT BEAUFORT WEST POLICE STATION

1. We refer to the above and write on behalf of Mrs Barenga Sinarinzi Ntanirasa Francine and Mrs Queen Diane Ingabire ("our clients"), who are the relatives of three newcomer asylum seekers who have been unlawfully detained for the past 34 days at Beaufort West Police Station, namely:

    1.1. Ms Francoise Uwiragiye (B/West SAPS Case No: 59/2023);

    1.2. Mr Nepomuscene Habarurema (B/West SAPS Case No: 59/2023); and

    1.3. Mr Jean Claude Irambona (B/West SAPS Case No: 65/2023)

    ("the detainees").

2. We write to set out the detainees' backgrounds and the circumstances of their arrest and unlawful detention and **demand that the detainees be released no later than 17h00 on Friday, 01 September 2023**.

Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayan Leung LLB (UNISA); Nabeelah Mia BSocSci (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Wayne Ncube LLB (NMMU) LLM (Wits); Mametlwe Sebei BA Law (UP) LLB (UNISA) and MA (Wits); Chamé Tracey LLB (Wits)

RELEVENT FACTUAL BACKGROUND

3. All of the detainees arrived in South Africa in or around July 2023 with the intention to apply for asylum as they fled their countries of origin due to persecution. We briefly outline each of their backgrounds below, as advised by our clients.

Francoise Uwiragiye & Nepomuscene Habarurema

4. Ms Uwiragiye and Mr Habarurema grew up in Uvira, South Kivu province of the Democratic Republic of Congo ("DRC"). They are first cousins who are both Banyamulenge, an ethnic group from the High Plateau of South Kivu. A copy of their Congolese electoral ID cards are attached hereto as **Annexures "A"** and **"B,"** respectively.

5. In or around 2014, Ms Uwiragiye's parents were killed in an attack where her house was burnt down while she was at school. From that point onward, she lived with her father's sister's family, who is Mr Habarurema's mother. In or around 2015, their family was attacked and fled to Rwanda. After a few months they returned back to Uvira, but unfortunately around 2016 Mr Habarurema's father and brothers were killed in an attack. Ms Uwiragiye and Mr Habarurema were sent to Rwanda for safety.

6. Ms Uwiragiye and Mr Habarurema spent several years continuing their studies as asylum seekers in Rwanda before they were abducted by unknown soldiers in early 2023 and taken to a camp of the notorious M23 rebel group somewhere in the forest in the DRC. The rebels forcibly recruited Mr Habarurema to train to be a soldier, and Ms Uwiragiye was forced to work in the camp and be a sex slave.

7. After several months in the camp, they managed to escape with the help of a doctor who the rebels had taken them to due to Ms Uwiragiye's serious health issues. They took a series of trucks to enter South Africa in or around mid-July 2023. The truck driver told them that he would help them cross as they did not have documents but advised them to go to Home Affairs to apply for asylum.

8. We are advised that Ms Uwiragiye and Mr Habarurema approached the Refugee Reception Office at Musina on or around where they were asked where in South Africa they were going to stay. As our client Mrs Ingabire (their cousin) who had fled Uvira directly to South Africa years ago lived in Cape Town, they advised that they would stay there. We are advised that officials at the Musina RRO verbally instructed the detainees to travel to Cape Town and apply for asylum there.

9. Using the assistance of our client Mrs Ingabire, they purchased a bus ticket to come to Cape Town and were arrested at a road block in Beaufort West while entering Western Cape from Free State on 28 July 2023.

Jean Claude Irambona

10. Mr Jean Claude Irambona is from Makamba, southern Burundi and is ethnically Tutsi. He lived with his family and his father was a member of the National Council for Freedom, an opposition party in Burundi.

11. On or around 1 February 2023, armed men from the Imbonerakure, the ruling party's violent youth wing, entered Mr Irambona's house and started shooting due to the family's connections to the opposition party. Mr Irambona's father was killed and he himself was injured as he fled the house.

12. Mr Irambona remained hiding and in fear that the Imbonerakure would find him and kill him due to his father's political affiliations. He contacted our Barenga Sinarinzi Ntanirasa Francine (his father's sister) who is an asylum seeker living in Cape Town. She advised him that as his family was killed, he is in danger and should travel to South Africa to apply for asylum and stay with her. Mr Irambona took his passport and left

Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayan Leung LLB (UNISA); Nabeelah Mia BSocSci (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Wayne Ncube LLB (NMMU) LLM (Wits); Mametlwe Sebei BA Law (UP) LLB (UNISA) and MA (Wits); Chamé Tracey LLB (Wits)

Burundi on 06 July 2023 and transited into Tanzania. A copy of the stamps on his passport indicating the same is attached herein as **Annexure "C."**

13. From Tanzania, Mr Irambona boarded a truck which took him to South Africa where he wished to apply for asylum. He reported to the Musina Refugee Reception Office and tried to get inside to apply but could not because of the long queues. As our client Mrs Francine (his aunt) was living in Cape Town, she advised him that there was a Refugee Reception Office now open in Cape Town and that he could travel there to apply since he was unable to get into the office to make an application at Musina. She further attempted to apply online requesting an appointment to apply for asylum on his behalf; however since July 2023 all newcomer applications must be made in person.

14. Ms Francine assisted Mr Irambona to get money for a ticket to come to Cape Town. He was arrested at a road block in Beaufort West on 28 July 2023.

CIRCUMSTANCES OF ARREST & DETENTION

15. The detainees were arrested in Beaufort West as they travelled to Cape Town as they could not produce proof of documentation in South Africa. Their relatives contacted Mr James Chapman at the Scalabrini Centre of Cape Town, who sent an urgent email to Mr Thobile Godwana at Beaufort West Immigration requesting their urgent release. He explained that there was confirmation from the manager at the Cape Town Refugee Reception Office ("CTRRO") that newcomer asylum seekers must approach the CTRRO in person to make an application for asylum. A copy of this email is attached hereto as **Annexure "D."**

16. On Monday, 31 July 2023, the detainees appeared at Beaufort West Magistrates Court. We are advised that they were not offered an interpreter and instead the Magistrate simply instructed them all to pay R 100 for the charge under Section 49 of the *Immigration Act No. 13 of 2002*. They paid the fine. However, they were still taken back to Beaufort West Police Station.

17. When their relatives approached the immigration officers at the police station to enquire why they were not released, they were advised that they must have an attorney come to the police station to facilitate the newcomers making an affidavit to explain that they wish to apply for asylum in order to be released.

18. On Wednesday 02 August 2023, Mr Chapman sent an email after engaging with Mr Godwana telephonically to enquire why they were still being detained. Mr Godwana had advised that according to recent judgement in *Ashebo v Minister of Home Affairs*[1] by the Constitutional Court, newcomer asylum seekers would continue to be detained. Mr Chapman's email explains the ways in which the situation of the detainees differs from that in *Ashebo.* As Mr Godwana advised that he was in George, Mr Chapman followed up with a request to release to Mr Mmeli Coko and Ms Sharon Davids at the Department of Home Affairs on 07 August 2023.

19. On 04 August 2023, Mr Habarurema and Mr Irambona appeared in Court for the second time and Ms Uwiragiye appeared in Court on 07 August 2023. They continued to be detained and were advised that there was a deportation charge pending.

20. On 16 August 2023, Mr Lungani Mondleki, an attorney from Mondleki Attorneys in Cape Town, approached the Beaufort West Police Station and Magistrates Court in order to facilitate the abovementioned affidavit for the detainees to state their intention to apply for asylum. However, he was told that as there were already deportation court orders, the affidavit would no longer suffice. On 21 August 2023, he sent

[1] [2023] ZACC 16

Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayan Leung LLB (UNISA); Nabeelah Mia BSocSci (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Wayne Ncube LLB (NMMU) LLM (Wits); Mametlwe Sebei BA Law (UP) LLB (UNISA) and MA (Wits); Chamè Tracey LLB (Wits)

correspondence requesting copies of the deportation orders for the detainees. A copy of this correspondence is attached herein as **Annexure "E."** We are advised that he did not receive a reply and has since terminated his mandate.

21. On 24 August 2023, the detainees appeared at the Magistrates Court for a third time and were informed that they would be taken to Lindela Repatriation Centre for deportation once there was transportation available. They have since been detained and continue to be detained at Beaufort West Police Station.

Health Concerns

22. As of today, the detainees have been detained for 34 days. Their relatives advise that as they fled persecution in their countries of origin and have preexisting health conditions, their current health is very poor, especially for Mr Irambona who is a TB patient, and Ms Uwiragiye, who has Type 1 diabetes.

23. Ms Uwiragiye's condition is a chronic condition wherein she needs regular access to insulin. In fact, if she is not receiving regular treatment, type 1 diabetes is life-threatening.[2] Due to the fact that she was deprived of insulin during most of her time at the rebel camp, transit, and upon arrest, her condition has deteriorated immensely.

24. In fact, due to lack of access to medication, Ms Uwiragiye's condition deteriorated to the point that she had to be admitted in the hospital for close to five days in Beaufort West, after which she was returned to the police station. Her relative in Cape Town continues to share the burden of bringing her food to keep her glucose at a safe level.

LEGAL FRAMEWORK & NON-REFOULEMENT

25. Section 2 of the *Refugees Act 130 of 1998* enshrines the international refugee principle of *non-refoulment* that South Africa is bound to. This provision prohibits the refusal of entry, expulsion, extradition or return to other country of asylum seekers in certain circumstances, and provides:

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

26. The Constitutional Court in *Ruta v Minister of Home Affairs*[3] unanimously held that the principle of *non-refoulement* acts as a prohibition against returning persons who flee "persecution or threats to 'his or her life, physical safety or freedom,'" even if they have crossed the border unlawfully and delayed in formally applying for asylum. In it, the Court explains that the principle of *non-refoulement* prevails over the Immigration Act and shields asylum-seekers until they have been afforded the right to seek asylum and "a proper determination procedure [under the Refugees Act] is engaged and completed."[4]

[2] https://www.nhsinform.scot/illnesses-and-conditions/diabetes/type-1-diabetes#:~:text=If%20left%20untreated%2C%20type%2D1,problems%20developing%20later%20in%20life.
[3] [2018] ZACC 52
[4] [2018] ZACC 52, Para 54.

Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayan Leung LLB (UNISA); Nabeelah Mia BSocSci (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Wayne Ncube LLB (NMMU) LLM (Wits); Mametlwe Sebei BA Law (UP) LLB (UNISA) and MA (Wits); Chamé Tracey LLB (Wits)

27. We submit that this judgment applies directly to the detainees' cases as they arrived in South Africa with the intention to apply for asylum and even made attempts to do so at the Musina Refugee Reception Office within days of their entry into the country. Two of the detainees were even advised by officers at the Musina RRO that it would be better to make their application in Cape Town as the CTRRO had newly reopened.

28. We further submit that returning the detainees to their countries of origin would violate the principle of *non-refoulement* based on objective reporting on the human rights situation in their habitual residences of Uvira, DRC, and Makamba, Burundi.

Human Rights Situation in Uvira, DRC

29. Ms Uwiragiye and Mr Habarurema are ethnically Banyamulenge, a minority group in eastern DRC that has been the target of much violence due to their cultural similarities to Rwandan Tutsis. International NGO Genocide Watch wrote in 2021 that:

> *"armed alliances between local Maimai forces, Burundian and Rwandan opposition and the DRC army...[have led to] violence against civilians from 'Tutsi' communities, associated by neighbouring communities with Rwanda. Resultant displacement, starvation and killing of Banyamulenge civilians in this context amount to an on-going, slow-moving genocide"* [emphasis added].[5]

30. In addition to the persecution of Banyamulenge, over the past year there has been an increase in fighting in eastern DRC with grave human rights violations committed by various rebel groups.[6] In February 2023, Human Rights Watch released a report on the major human rights violations by the M23 rebel group in eastern DRC including forcible recruitment, even of Congolese living in Rwanda:

> *"Four men, ages 22 to 26, said that M23 rebels forced them to carry supplies and ammunition, do chores at their military camps, and take part in fighting. They said they found themselves with dozens of other young people who had also been forcibly recruited, including some brought in from Rwanda."*[7]

This exactly mirrors the experiences of the detainees Ms Uwiragiye and Mr Habarurema and is a violation of *"international humanitarian law, notably Common Article 3 to the 1949 Geneva Conventions, which prohibits summary executions, forced labor and recruitment, and other abuses...[which can be] war crimes."*[8]

31. In November 2022, UNHCR called for a ban on forced returns of those fleeing violence in eastern DRC, including South Kivu. The return advisory states that:

> *"As the situation in North Kivu, South Kivu, Ituri and adjacent areas remains volatile and fluid, UNHCR con-siders that persons fleeing conflicts in these three provinces and adjacent areas are likely to be in need of international refugee protection...*
>
> *The security, rule of law and human rights situation in North Kivu, South Kivu, and Ituri challenges the fea-sibility of safe and dignified return for any person originating from these provinces and adjacent areas, whether or not the individual is found to be in need of international protection. UNHCR urges States not to forcibly return to the DRC persons originating from these areas until the security*

[5] https://www.genocidewatch.com/single-post/expressive-violence-and-the-slow-genocide-of-the-banyamulenge-of-south-kivu
[6] https://www.amnesty.org/en/location/africa/east-africa-the-horn-and-great-lakes/democratic-republic-of-the-congo/report-democratic-republic-of-the-congo/#:~:text=Democratic%20Republic%20Of%20The%20Congo%202022,and%20ill%2Dtreatment%20of%20detainees.
[7] https://www.hrw.org/news/2023/02/06/dr-congo-atrocities-rwanda-backed-m23-rebels
[8] Ibid.

and human rights situation has improved sufficiently to permit a safe and dignified return of those determined not to be in need of international protection" [emphasis added].[9]

32. The advisory details the violence caused by rebel groups in North Kivu province and explains why those fleeing violence would be at risk of refoulement if returned to eastern DRC.[10]

Human Rights Situation in Makamba, Burundi

33. In the past few years, there has been an increase in political violence in Burundi, especially against opposition party members and Tutsis. Genocide watch released a report in 2022 explaining that the ruling party's youth wing, *"Imbonerakure, intimidates voters, conducting assault, murder, and sexual violence with impunity."* It also highlights the increase in hate speech against Tutsis and the *"targeting of Tutsis by the army and militias."*[11]

34. An article in The New Humanitarian explains that returning asylum seekers to Burundi face persecution by the Imbonerakure. One particular refugee who returned was arrested in October 2022: *"They arrested me, tied my hands behind my back, and told me: 'You said you fled Burundi because of the Imbonerakure, but we are still here.'"*[12]

35. A Human Rights Watch report in 2023 explained how:

> *"Imbonerakure members have continued to arrest, beat, and kill suspected opponents, sometimes in collaboration with or with the support of local administrative officials, police, or intelligence agents. Révérien Ndikuriyo, Secretary General of the CNDD-FDD and a hardliner within the party, made several incendiary speeches during gatherings of CNDD-FDD members and Imbonerakure. In August 2022, he called on the Imbonerakure to continue night patrols and to kill any 'troublemakers.'"*[13]

36. These independent reports validate Mr Irambona's fear of persecution and desire to apply for asylum. They also demonstrate the violence that he would face if returned to his country.

Application of Recent Judgments at the Constitutional Court

37. In relation to the application of the 2021 judgment of *Abore v Minister of Home Affairs and Others*[14] in which the detention of a person who wished to apply for asylum was found to be lawful we note that the following:

    37.1. In that case there was a High Court order extending Mr Abore's detention for 90 days pending his deportation. The Constitutional Court held that his detention was lawful because of this order. In the case of the detainees, they have already been in detention for more than 30 days and they have not been made aware of any High Court order to extend their detention, even after their previous attorney requested their deportation orders. Section 29 of the *Refugees Act 130 of 1998* provides that applicants for asylum cannot be detained for more than 30 days without the sanction of the High Court.

---

[9] https://www.refworld.org/docid/6368eec64.html
[10] Ibid.
[11] https://www.genocidewatch.com/_files/ugd/09ea84_de839bc27dc6476fbed3ab2da58af294.pdf
[12] https://www.thenewhumanitarian.org/news-feature/2023/06/14/burundi-returning-refugees-face-mixed-fortunes
[13] https://www.hrw.org/news/2022/10/14/human-rights-watch-submission-universal-periodic-review-burundi
[14] [2021] ZACC 50

Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayan Leung LLB (UNISA); Nabeelah Mia BSocSci (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Wayne Ncube LLB (NMMU) LLM (Wits); Mametlwe Sebei BA Law (UP) LLB (UNISA) and MA (Wits); Chamé Tracey LLB (Wits)

37.2. The Constitutional Court noted that the asylum seeker *"should not have been kept in custody after [the fine for the Section 49 charge was paid]."*[15] The detainees paid the fine of R 100 on 31 July 2023 and were not released.

37.3. Mr Abore had been in the country for several years without ever approaching the Department of Home Affairs to make an application for asylum. The detainees have all approached the RRO in Musina and were advised to apply in Cape Town and were en route to Cape Town for this purpose when they were arrested.

37.4. The Constitutional Court noted that the *Ruta* judgment still applied and that a detainee who makes clear the intention to apply for asylum should be given an opportunity to apply for asylum. At the time the judgment was released, the application for asylum was online, however it has since shifted to be in-person. In the case of the detainees, they have made their intention to apply for asylum clear ever since they entered the country and have yet to be afforded to opportunity to do so.

38. In relation to the application of the 2023 judgment of *Ashebo v Minister of Home Affairs and Others*[16] in which the detention of a person who wished to apply for asylum was found to be lawful we note that the following:

38.1. Mr Ashebo was charged under Section 49 of the *Immigration Act* and detained for the same at Kgosi Mampuru Correctional Facility. The detainees have paid the fine for their Section 49 charge and are being held at a police station and told that they will be transferred to Lindela for deportation.

38.2. The Constitutional Court notes that if there is no effort by the Department of Home Affairs to bring someone charged under Section 34 of the *Immigration Act* who has expressed their desire to apply for asylum in front of a Refugee Status Determination Officer within *"a reasonable period,"* then that detention becomes unlawful.[17] The detainees have been detained for more than 30 days insisting on their desire to apply for asylum, yet no such effort has been made by the Department of Home Affairs. We therefore submit that a *"reasonable period"* has elapsed and <u>their detention is unlawful</u>.

38.3. The Court further stated that persons charged under Section 34 who express the desire to apply for asylum but do not have an asylum transit visa are *"entitled to an opportunity to be interviewed by an immigration officer to ascertain whether there are valid reasons why he is not in possession of an asylum transit visa."*[18] Despite their detention for over one month in the presence of police and immigration officers, we have been advised that no such interview has been conducted with an interpreter.

[15] Ibid, para 49.
[16] [2023] ZACC 16
[17] Ibid, para 58.
[18] Ibid, para 59.

Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayan Leung LLB (UNISA); Nabeelah Mia BSocSci (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Wayne Ncube LLB (NMMU) LLM (Wits); Mametlwe Sebei BA Law (UP) LLB (UNISA) and MA (Wits); Charné Tracey LLB (Wits)

39. In light of the above, we are instructed to **demand**, as we hereby do, that:

    39.1. All deportation proceedings against the detainees be halted pending the adjudication of their asylum claims in terms of the *Refugees Act 130 of 1998*, as amended;

    39.2. The detainees be immediately released and permitted to travel to Cape Town to make their applications for asylum;

considering:

    39.3. The detainees are fleeing violence in eastern DRC and Burundi;

    39.4. The detainees made attempts to apply for asylum in Musina and wish to make their application for asylum at the Cape Town Refugee Reception Office;

    39.5. Under the *Ruta* judgement, the detainees are not in contravention of the *Immigration Act* and should be afforded the opportunity to apply for asylum; and

    39.6. Returning the detainees to their countries of origin would violate the principle of *non-refoulement*.

40. Should the detainees not be released as outlined above by no later than **17h00 on Friday, 01 September 2023,** we will take further steps as may be advised, including approaching an appropriate court for urgent relief.

41. We trust that this will not be necessary and anticipate your cooperation.

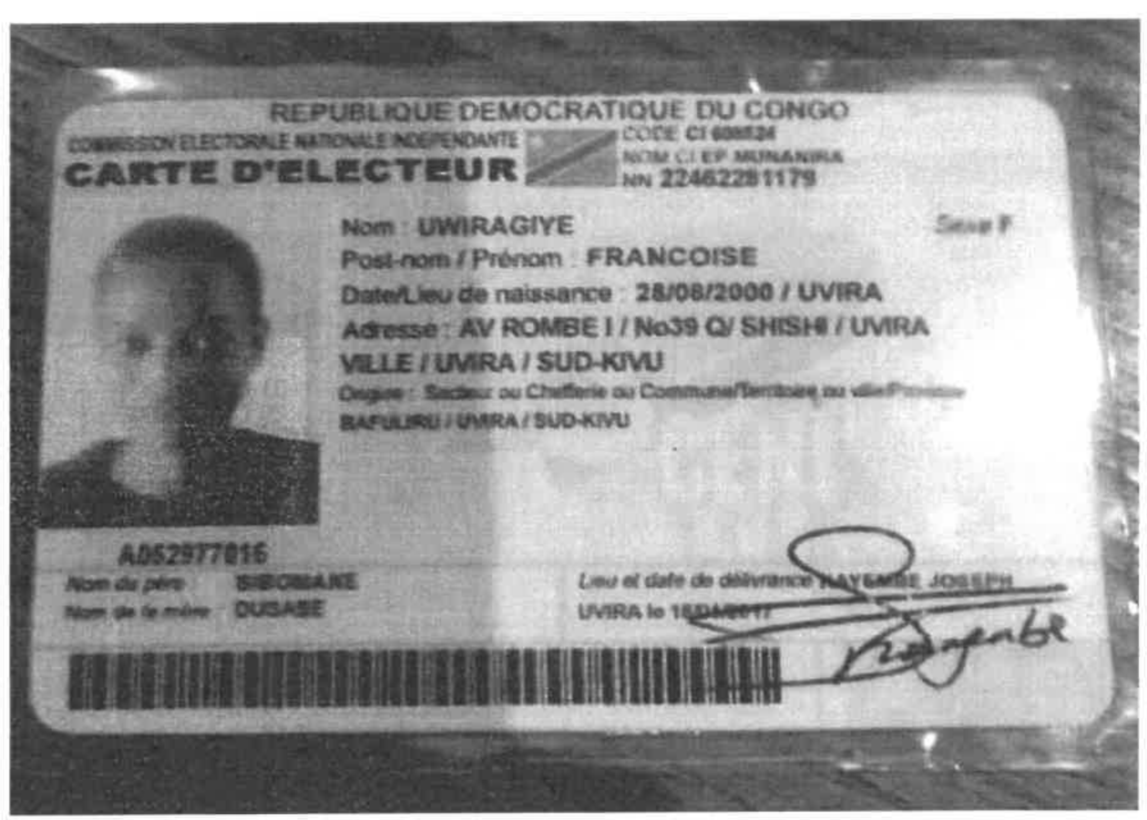
42. All of the detainees' rights are reserved.

Yours faithfully,

LAWYERS FOR HUMAN RIGHTS
Per:
Nabeelah Mia / Madhavi Narayanan
Nabeelah@LHR.org.za / LHRjintern12@LHR.org.za

Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayan Leung LLB (UNISA); Nabeelah Mia BSocSci (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Wayne Ncube LLB (NMMU) LLM (Wits); Mametlwe Sebei BA Law (UP) LLB (UNISA) and MA (Wits); Chamé Tracey LLB (Wits)

120 "A"



REPUBLIQUE DEMOCRATIQUE DU CONGO
COMMISSION ELECTORALE NATIONALE INDEPENDANTE
CARTE D'ELECTEUR
CODE CI [illegible]
NOM CI EP MUNANIRA
NN 22462281179

Nom : UWIRAGIYE
Sexe F
Post-nom / Prénom : FRANCOISE
Date/Lieu de naissance : 28/08/2000 / UVIRA
Adresse : AV ROMBE I / No39 Q/ SHISHI / UVIRA
VILLE / UVIRA / SUD-KIVU
Origine : Secteur ou Chefferie ou Commune/Territoire ou ville/Province
BAFULIRU / UVIRA / SUD-KIVU

A052977016
Nom du père : [illegible]
Nom de la mère : DUSABE

Lieu et date de délivrance NAYEMBE JOSEPH
UVIRA le [illegible]

"B"

REPUBLIQUE DEMOCRATIQUE DU CONGO
COMMISSION ELECTORALE NATIONALE INDEPENDANTE
CARTE D'ELECTEUR
NN 22436251890

Nom : HABARUREMA
Sexe M
Post-nom / Prénom : NEPOMUSCENE
Date/Lieu de naissance : 01/01/1996 / UVIRA
Adresse : AV DU LAC / No207 Q/ KIMANGA / UVIRA VILLE / UVIRA / SUD-KIVU
Origine : Secteur ou Chefferie ou Commune/Territoire ou ville/Province [illegible]
BAFULIRU / UVIRA / SUD-KIVU

A060944125
Nom du père MUSABYIMANA
Nom de la mère KABEGA
Lieu et date de délivrance
UVIRA le 25/01/2017

"G"

123 "D"

Request for Release of 3 Asylum Seekers arrested in Beaufort West 28 July 2023

Scalabrini Advocacy | James Chapman <advocacy@scalabrini.org.za>
To:Thobile.godwana@dha.gov.za <Thobile.godwana@dha.gov.za>

1 attachments (702 KB)
Map response.pdf;

Dear Mr Godwana,

Please see attached attachment received via email from the Centre Manager of Cape Town Refugee Reception Office (Ms Ndodana) yesterday confirming the process to approach the Refugee Reception Offices including the Cape Town Refugee Reception Office to Apply in Person on the nationality allocated day. Mr Jean Claude Irambona (age 23), Ms Uwiragiye Francoise (age 23) and Mr Habarurema Nepomuscene (age 27) should and must be afforded the same opportunity to apply for asylum under the Refugees Act. This is in line with the Constitutional Court judgement in the Ruta case referred to below . We formally request that they are released and that any application for warrant confirmation in terms of section 34 is set aside and not confirmed.

Kind regards,

James

James Chapman
Head of Advocacy & Legal Advisor

Scalabrini Centre of Cape Town
43 - 47 Commercial Street, Cape Town, 8001
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C: +27 74 318 5854

www.scalabrini.org.za | Facebook | Twitter | LinkedIn

From: Scalabrini Advocacy | James Chapman
Sent: Friday, July 28, 2023 6:43 PM
To: Thobile.godwana@dha.gov.za
Cc: Ellen Boriwondo <ellen@scalabrini.org.za>
Subject: Request for Release of 3 Asylum Seekers arrested in Beaufort West 28 July 2023

Dear Mr Godwana,

Thank you for receiving the call from my colleague Ms Ellen Boriwondo earlier today concerning a Burundian National Arrested in Beaufort West on his way to Cape Town. Our client's name is Mr **Irankundo Colode** and he is 20 years old and is seeking asylum in South Africa. Additionally, two further clients from the DRC, a Ms **Uwiragiye Francoise** (age 23) and Mr **Habarurema Nepomuscene** (age 27) were also arrested. All three clients are new to South Africa, have been in the country for less than a month, have been trying to apply for asylum since they arrived, and were travelling to Cape Town to apply for asylum in Cape Town and to join family who reside in Cape

Town. We request that they are released and allowed to apply for asylum at the recently opened Cape Town Refugee Reception Office.

The Scalabrini Centre of Cape Town is a registered non-profit whose mission is to welcome, to protect, to promote and to integrate, people on the move into local communities. The Advocacy Programme provides paralegal advice and seeks to promote and strengthen the rights and integration of migrants and refugees in South Africa, through providing individual advice, publishing research, raising awareness, and advocating for legislative and policy reform and its proper implementation.

Our three clients mentioned above have not yet lodged a claim for asylum but that does not render her as unlawfully present. In the Constitutional Court case of *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52, the honourable court held that

> [T]hough an asylum seeker who is in the country unlawfully is an 'illegal foreigner' under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act. (para 43)

The Court also held that a delay in lodging a claim for asylum in no way functions as an absolute disqualification for an application for asylum being made, following the jurisprudence of *Abdi*, *Arse*, *Bula* and *Ersumo* which emphasises the principle of *non-refoulement* and the right to asylum (paras 55-56).

Additionally, the Refugees Act is clear in section 21(4) preventing action commencing or continuing against someone who is seeking asylum like our clients.

> S21(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 application has been reviewed in terms of section 24A or where the applicant exercised heror her right to appeal in terms of section 24B; or
> (b) such person has been granted asylum.

Thus, we submit that our clients are legally present in the country and protected by section 21(4) and the principle of non-refoulement and should be released and that no case should be commenced or continued against her as she is seeking asylum.

We hope this email clarifies our clients' situations and explains where they stands in regard to their application for asylum. We hope it helps to finalise their case and secures their release promptly.

Kind regards

James Chapman
Head of Advocacy & Legal Advisor

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Dr Callixte Kavuro <callixtekav@gmail.com>

Fwd: Deportation court orders

Mondleki Attorneys <lungani@mondlekiattorneys.com> Mon, Aug 21, 2023 at 12:55 PM
To: Dr Callixte Kavuro <callixtekav@gmail.com>

This is the email that I sent.

---------- Forwarded message ---------
From: **Mondleki Attorneys** <lungani@mondlekiattorneys.com>
Date: Mon, Aug 21, 2023 at 12:35 PM
Subject: Re: Deportation court orders
To: <styulu@justice.gov.za>

Good day
Please be advised that I am Lungani Mondleki the Attorney that was there at Beaufort West Magistrates court on 16 August 2023 from Cape Town.
I request the following deportation court orders:
1. Habarurema Nepomuscene, dated 4 August 2023, case no 65/23
2. Uwiragiye Franchoise, dated 7 August 2023, case no: 59/23
3. Irambona Jean Claude, dated 7 August 2023, case no: 64/23.

Thank you.
Lungani Mondleki
Director
Mondleki Attorneys

"JC8"

LAWYERS FOR HUMAN RIGHTS

Johannesburg Law Clinic
4th Floor Southpoint Corner Building
87 De Korte Street (corner Melle)
Braamfontein, 2001

Tel (011) 339 1960
Fax (011) 339 2665
Web www.lhr.org.za

25 January 2024

ATT: Dr Aaron Motsoaledi
Minister of Home Affairs
By Email: sihle.mthiyane@dha.gov.za; mogambrey.nadassen@dha.gov.za; mamokolo.sethosa@dha.gov.za

ATT: Mr L.T. Makhode
Director General: Home Affairs
By Email: tommy.makhode@dha.gov.za

ATT: Mr Modiri Matthews
Acting Deputy Director-General: Immigration Services
By Email: modiri.matthews@dha.gov.za

ATT: Mr Mandla Madumisa
Director: Asylum Seeker Management
By Email: mandla.madumisa@dha.gov.za

ATT: Department of Home Affairs Legal Department
By email: Zanecebo.Menze@dha.gov.za; Adina.Mutshaeni@dha.gov.za; Banyamme.Seboga@dha.gov.za; Mongezi.Mahlangu@dha.gov.za

Dear Sirs

RE: FOLLOW UP: ARRESTING ASYLUM SEEKERS AND INTERPRETATION AND APPLICATION OF THE *ASHEBO v MINISTER OF HOME AFFAIRS* 2023 (5) SA 382 (CC) JUDGMENT

1. We refer to our correspondence dated 14 December 2023 and the follow-up email sent on 11 January 2024. We wish to place on record that there has been no response to any of our correspondence.

2. We note that notwithstanding our abovementioned correspondence, new asylum seekers continue to be arrested and/or detained in the manner detailed in the abovementioned correspondence and are barred from accessing the asylum system.

3. Specifically, we are advised that Refugee Reception Offices across South Africa continue to bar asylum seekers from making applications for asylum because they fail to show good cause for their delay in applying for asylum as required in terms of Regulation 8(3) of the Regulations to the Refugees Act 130 of 1998 (the "Act").

It would appear that this conduct is geared towards disqualifying them from refugee status in terms of exclusions under section 4 of the Act or otherwise.

4. In many cases new asylum seekers are given express appointments to attend at the Refugee Reception Offices, and their attendance for their appointment gives rise to their arrest and barring from the asylum refugee status determination process.

5. The effect of this is that *de facto* refugees are at risk of refoulement and being returned to countries where they might be subjected to persecution or their lives, physical safety or freedom might be threatened. In this regard, we draw your attention to section 2 of the Act and the principles outlined in *Ruta*.[1] Accordingly, the actions by the Refugee Reception Offices outlined in the abovementioned correspondence and paragraph 3, constitute a violation of domestic legislation and the international principle of *non-refoulement*.

6. To this end, we persist with our demands that:

   6.1. The policy documents or directives outlining the Department's application of *Ashebo* be provided to us; and

   6.2. Immediately upon receipt of this letter that an undertaking be provided that new asylum seeker applicants seeking to apply for asylum **cease to continue to be arrested or detained**, and/or barred from the asylum process, as this is in contravention of *Ashebo* as well as domestic and international law.

7. Should you fail to provide such undertaking by 31 January 2024 at the latest, we are instructed to institute urgent court proceedings during the week of 5 February 2024, with a view to having the matter heard on or before the 8th of March 2024.

Kindly contact the writer should you have any queries or response in respect of this letter.

Yours faithfully,

LAWYERS FOR HUMAN RIGHTS
Per: Nabeelah Mia
nabeelah@lhr.org.za

[1] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC).

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28 March 2024

ATT: Dr Aaron Motsoaledi
Minister of Home Affairs
By Email: sihle.mthiyane@dha.gov.za; mogambrey.nadassen@dha.gov.za; mamokolo.sethosa@dha.gov.za

ATT: Mr L.T. Makhode
Director General: Home Affairs
By Email: tommy.makhode@dha.gov.za

ATT: Mr Modiri Matthews
Acting Deputy Director-General: Immigration Services
By Email: modiri.matthews@dha.gov.za

ATT: Mr Mandla Madumisa
Director: Asylum Seeker Management
By Email: mandla.madumisa@dha.gov.za

ATT: Department of Home Affairs Legal Department
By email: Zanecebo.Menze@dha.gov.za; Adina.Mutshaeni@dha.gov.za; Banyamme.Seboga@dha.gov.za; Mongezi.Mahlangu@dha.gov.za; LOD@dha.gov.za

Dear Sirs

RE: THE UNCONSTITUTIONALITY OF SECTIONS 4(1)(F), 4(1)(H), 4(1)(I), AND 21(1B) OF THE REFUGEES ACT 130 OF 1998 AND REGULATIONS 8(1)(C)(I), 8(2), 8(3) AND 8(4) OF THE REFUGEE REGULATIONS

1. We refer to our correspondence dated 14 December 2023, the follow-up email sent on 11 January 2024 and our correspondence dated 25 January 2024. We further refer to the meeting held on 20 March 2024 between Mr James Chapman of the Scalabrini Centre ("Scalabrini" or "our client") and Department of Home Affairs ("Department") officials.

2. Notwithstanding our abovementioned correspondence, new asylum seekers continue to be arrested, detained, and/or barred from accessing the asylum system, specifically because they fail to show "good cause" or "compelling reasons" to explain their adverse immigration status. In fact, it appears that the overall disbarment and deportation of persons seeking asylum in South Africa has accelerated over the past 2-3 months.

Jessica Lawrence LLB (UJ) LLM (UJ); Carol Lemekwana LLB (UL); Kayan Leung LLB (UNISA); Nabeelah Mia BSocSci (Law and Psychology) (UCT) LLB (UCT) LLM (UCLA); Wayne Ncube LLB (NMMU) LLM (Wits); Mametlwe Sebei BA Law (UP) LLB (UNISA) and MA (Wits); Charné Tracey LLB (Wits)

3. In early engagements with Department officials, the justification for these practices has turned on the Department's interpretation of the Constitutional Court's judgment in *Ashebo v Minister of Home Affairs & Others* 2023 (5) SA 382 (CC) ("*Ashebo*"). We respectfully disagree with material aspects of such interpretation.

4. However, subsequent discussions, including the meeting of 24 March 2024, have demonstrated that the fundamental basis of the Department's practices is its implementation of sections 4(1)(f), 4(1)(h), 4(1)(i), and 21(1B) of the Refugees Act 130 of 1998 ("the Refugees Act") and Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Refugee Regulations. We refer to these provisions as "the Provisions" below.

5. In sum, the Provisions disqualify or disbar *de facto* refugees from accessing the asylum application system for no other reason than that they have an adverse immigration status: For example, if they do not hold asylum transit visas in terms of section 23 of the Immigration Act 13 of 2002 ("the Immigration Act"), or if they held such visas but they have since expired.

6. We are alive to the fact that the Provisions generally contain provisos which would protect asylum seekers who can demonstrate "good cause" or "compelling reasons" for their adverse immigration status.

7. However, such provisos do not alter or ameliorate the central – and in our view unconstitutional – difficulty with the Provisions: That they permit *de facto* refugees with meritorious claims to asylum in South Africa to be returned to their countries of origin in violation of the right to *non-refoulement* enshrined in section 2 of the Refugees Act and international customary law. Put differently, they allow persons who fear (for example) death, torture, or sexual abuse in their home countries to be returned thereto solely because such persons were late in applying for asylum.

8. This is unlawful and unconstitutional. We do not, in this letter, intend to set out all the legal authorities and arguments on which the Provisions must be held to be unconstitutional, but we draw to your attention the fact that similar provisions have already been struck down by the Constitutional Court in *Scalabrini Centre of Cape Town & Another v Minister of Home Affairs & Others* 2023 (4) SA 249 (CC).

9. We have accordingly been instructed by our client to bring a challenge to the constitutionality of the Provisions in the Western Cape High Court, Cape Town. The constitutional challenge will be settled and launched within the next few weeks.

10. Such a challenge will necessarily take years to be finalized by the Constitutional Court. Pending such finality, the Provisions cannot remain operative. This would self-evidently result in the deportation of hundreds, perhaps thousands, of *de facto* refugees. If our client's challenge is upheld, this would be a gross and irreparable violation of these refugees' human rights.

11. We accordingly call upon you to confirm, **by no later than Friday 12 April 2024**, that the Department will suspend the operation of the Provisions pending a final determination of our client's constitutional challenge.

12. Kindly take notice that if we do not receive such confirmation, we are instructed to bring an urgent application for an interim interdict suspending the Provisions *pendente lite*, for the reasons given above. Such application will be set down to be heard approximately one month from the abovementioned deadline of Friday 12 April 2024. Should the Department intend to oppose such an application, we call on you to brief the necessary legal representatives as urgently as possible so that all parties are in a position to argue this matter in mid-May 2024.

13. We look forward to your swift response.

Kindly contact the writer should you have any queries or response in respect of this letter.

Yours faithfully,

LAWYERS FOR HUMAN RIGHTS
Per: Nabeelah Mia
nabeelah@lhr.org.za

home affairs

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

"JC10"

Enquiries: Ms Nolwandle Qaba; Cell: 072 292 7978; Tel: (012) 406 4524
E-mail: Nolwandle.Qaba@dha.gov.za

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4th Southpoint Corner Building
87 De Korte Street (Corner Melle)
Braamfontein, 2001

12 April 2024

Attention: Nabeelah Mia

Per E-mail: nabeelah@lhr.org.za

Ms Nabeelah Mia
LAWYERS FOR HUMAN RIGHTS
Johannesburg Law Clinic
4th Floor Southpoint Corner Building
87 De Korte Street (corner Melle)
Braamfontein, 2001

Per email: nabeelah@lhr.org.za

Dear Madam

RE: THE UNCONSTITUTIONALITY OF SECTIONS 4(1)(F), 4(1)(H), 4(1)(I), AND 21(1B) OF THE REFUGEES ACT 130 OF 1998 AND REGULATIONS 8(1)(C)(I), 8(2), 8(3) AND 8(4) OF THE REFUGEE REGULATIONS

1. The above matter as well as your letter dated 14 December 2023, your email sent on 11 January 2024 and your letters dated 25 January 2024 and 28 April 2024 refer.

2. Please take note that this correspondence is not intented to fully address all the issues raised in your correspondence and should not be construed as an admission of the issues not addressed.

3. From your correspondence I noted that it appears that main issue relates to "... *new asylum seekers continue to be arrested and/or detained in the manner detailed in the abovementioned correspondence and are barred from accessing the asylum system.*".

4. As the Accounting Officer, I value stakeholder engagement as a way finding resolutions to matters of mutual interest. To this end I appreciate that Lawyers for Human Rights ("LHR") has had meetings/engagements/disscussions with officials of the Department in an attempt to address these serious and important matters.

5. In view thereof, I am of a considered view that the issues raised in your correspondence require a formal meeting at my level, as an Accounting Officer, assisted by the Acting Deputy Director-General, Mr Modiri Mathews. If you are amenable to this suggestion, kindly indicate as such. In my view, this meeting/engagement will, afford ourselves an opportunity of fully appreciating the challenges and coming up with an amicable resolution of the matters without the need for the issues to be ventilated before the Court.

Regards

LT MAKHODE
DIRECTOR-GENERAL
DATE 12 April 2024.

LAWYERS FOR
HUMAN RIGHTS

"JC11"

Johannesburg Law Clinic
4th Floor Southpoint Corner Building
87 De Korte Street (corner Melle)
Braamfontein, 2001

Tel (011) 339 1960
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Web www.lhr.org.za

15 April 2024

ATT: Mr L.T. Makhode
Director General: Home Affairs
By Email: tommy.makhode@dha.gov.za

ATT: Dr Aaron Motsoaledi
Minister of Home Affairs
By Email: sihle.mthiyane@dha.gov.za; mogambrey.nadassen@dha.gov.za; mamokolo.sethosa@dha.gov.za

ATT: Mr Modiri Matthews
Acting Deputy Director-General: Immigration Services
By Email: modiri.matthews@dha.gov.za

ATT: Mr Mandla Madumisa
Director: Asylum Seeker Management
By Email: mandla.madumisa@dha.gov.za

ATT: Department of Home Affairs Legal Department
By email: Zanecebo.Menze@dha.gov.za; Adina.Mutshaeni@dha.gov.za; Banyamme.Seboga@dha.gov.za; Mongezi.Mahlangu@dha.gov.za

Dear Sirs

RE: THE UNCONSTITUTIONALITY OF SECTIONS 4(1)(F), 4(1)(H), 4(1)(I), AND 21(1B) OF THE REFUGEES ACT 130 OF 1998 AND REGULATIONS 8(1)(C)(I), 8(2), 8(3) AND 8(4) OF THE REFUGEE REGULATIONS

1. We refer to your letter of 12 April 2024.

2. We appreciate your willingness to meet with ourselves and the Scalabrini Centre ("Scalabrini" or "our client"). We propose that such meeting be held virtually at any convenient time on any of the following dates:

   2.1. Between 12h00 and 17h00 on Wednesday 17 April 2024;
   2.2. Between 12h00 and 17h00 on Thursday 18 April 2024; or
   2.3. Between 08h00 and 15h00 on Friday 19 April 2024.

3. Kindly inform us when you would like to meet, and we will send through the virtual meeting request via email or meet via a link of your choosing.

4. We stress the importance of meeting this week. This matter is inherently urgent: Every day that passes, more and more *de facto* refugees are denied their rights to apply for asylum, arrested, detained, and/or deported, in gross violation of their constitutional rights and their right to *non-refoulement* under customary international law and the Refugees Act 130 of 1998 ("the Act").

5. This is why our client has instructed us (subject to any agreement reached at the proposed meeting) to apply for an urgent interim interdict suspending the operation of the impugned provisions (sections 4(1)(f), 4(1)(h), 4(1)(i), and 21(1B) of the Act and Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Refugee Regulations) *pendente lite*. As a precautionary measure, the necessary court papers are still being prepared. We recommend the Department of Home Affairs do the same. While our clients are amenable to discussing the amicable resolution of this matter, such discussions cannot unduly delay the urgent litigation needed to protect the *de facto* refugees whose rights and very lives are still being prejudiced.

6. We look forward to receiving your answer to the proposed meeting date and time. Our clients' rights remain reserved.

Kindly contact the writer should you have any queries or response in respect of this letter.

Yours faithfully,

LAWYERS FOR HUMAN RIGHTS
Per: Nabeelah Mia
nabeelah@lhr.org.za

Subject: Re: LETTER OF REPLY TO LHR
Date: Thursday, 18 April 2024 at 13:06:33 South Africa Standard Time
From: Nabeelah Mia
To: Modiri Matthews, Qaba, Nolwandle, Mandla Madumisa, Phelelani Khumalo, Tommy Makhode, Sihle Mthiyane, mogambrey.nadassen@dha.gov.za, Mamokolo Sethosa, Zanecebo Menze, Adina Mutshaeni, Banyamme Seboga, Mongezi Mahlangu, Marubini Malaka, Estelle Bok
CC: Felix Happy. Quibe, Tumelo Mogale, Melissa Muyambo, Nyiko Manyusa, Hlengiwe Mtshatsha, Scalabrini Advocacy | James Chapman, Sharon Ekambaram
BCC: David Simonsz
Attachments: image001.png, image002.png, AGENDA FOR DHA LHR SCCT MEETING (19 APRIL 2024).docx, Scalabrini (asylum access) - Notice of motion (draft for distribution).pdf

Good day

In anticipation of our meeting tomorrow, please see attached a draft agenda with the link to the Teams meeting (a separate calendar invitation was circulated yesterday).

In addition and in the interests of transparency and to ensure a productive meeting, we attach our draft notice of motion in the proposed litigation alluded to in our various correspondence.

Kind regards

Nabeelah Mia (she/her)
Head: Penal Reform Programme

Johannesburg Office
87 De Kort St (Corner Melle)
Braamfontein
www.lhr.org.za

Tel: (011) 339 1960
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Celebrating 45 Years of Lawyers for Human Rights

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From: Nabeelah Mia <nabeelah@lhr.org.za>
Date: Wednesday, 17 April 2024 at 09:42
To: Modiri Matthews <Modiri.Matthews@dha.gov.za>, Qaba, Nolwandle <Nolwandle.Qaba@dha.gov.za>, Mandla Madumisa <Mandla.Madumisa@dha.gov.za>, Phelelani Khumalo <Phelelani.Khumalo@dha.gov.za>, Tommy Makhode <Tommy.Makhode@dha.gov.za>, Sihle Mthiyane <Sihle.Mthiyane@dha.gov.za>,

mogambrey.nadassen@dha.gov.za <mogambrey.nadassen@dha.gov.za>, Mamokolo Sethosa <Mamokolo.Sethosa@dha.gov.za>, Zanecebo Menze <Zanecebo.Menze@dha.gov.za>, Adina Mutshaeni <Adina.Mutshaeni@dha.gov.za>, Banyamme Seboga <Banyamme.Seboga@dha.gov.za>, Mongezi Mahlangu <Mongezi.Mahlangu@dha.gov.za>, Marubini Malaka <Marubini.Malaka@dha.gov.za>, Estelle Bok <Estelle.Bok@dha.gov.za>
Cc: Felix Happy. Quibe <Felix@lhr.org.za>, Tumelo Mogale <Tumelo@lhr.org.za>, Melissa Muyambo <melissa@lhr.org.za>
Subject: Re: LETTER OF REPLY TO LHR

Dear Mr Matthews

Thank you for your correspondence. We appreciate the Department's willingness and accommodation to meet at such short notice.

I will share the virtual meeting request shortly and a circulate a proposed agenda during the course of tomorrow.

Kind regards

Nabeelah Mia (she/her)
Head: Penal Reform Programme

Johannesburg Office
87 De Kort St (Corner Melle)
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LAWYERS FOR
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From: Modiri Matthews <Modiri.Matthews@dha.gov.za>
Date: Tuesday, 16 April 2024 at 11:58
To: Nabeelah Mia <nabeelah@lhr.org.za>, Qaba, Nolwandle <Nolwandle.Qaba@dha.gov.za>, Mandla Madumisa <Mandla.Madumisa@dha.gov.za>, Phelelani Khumalo <Phelelani.Khumalo@dha.gov.za>, Tommy Makhode <Tommy.Makhode@dha.gov.za>, Sihle Mthiyane <Sihle.Mthiyane@dha.gov.za>, mogambrey.nadassen@dha.gov.za <mogambrey.nadassen@dha.gov.za>, Mamokolo Sethosa <Mamokolo.Sethosa@dha.gov.za>, Zanecebo Menze <Zanecebo.Menze@dha.gov.za>, Adina Mutshaeni <Adina.Mutshaeni@dha.gov.za>,

Banyamme Seboga <Banyamme.Seboga@dha.gov.za>, Mongezi Mahlangu <Mongezi.Mahlangu@dha.gov.za>, Marubini Malaka <Marubini.Malaka@dha.gov.za>, Estelle Bok <Estelle.Bok@dha.gov.za>
Cc: Felix Happy. Quibe <Felix@lhr.org.za>, Tumelo Mogale <Tumelo@lhr.org.za>, Melissa Muyambo <melissa@lhr.org.za>
Subject: Re: LETTER OF REPLY TO LHR

Dear Ms Mia

Receipt is acknowledged.

Please find attached the response to your correspondence dated 15 April 2024.

I thank you

Regards

Mr Modiri Matthews

Acting Deputy Director-General

Immigration Services

Department of Home Affairs

From: Nabeelah Mia <nabeelah@lhr.org.za>
Sent: Monday, April 15, 2024 3:36 PM
To: Modiri Matthews; Qaba, Nolwandle; Mandla Madumisa; Phelelani Khumalo; Tommy Makhode; Sihle Mthiyane; mogambrey.nadassen@dha.gov.za; Mamokolo Sethosa; Zanecebo Menze; Adina Mutshaeni; Banyamme Seboga; Mongezi Mahlangu
Cc: Felix Happy. Quibe; Tumelo Mogale; Melissa Muyambo
Subject: Re: LETTER OF REPLY TO LHR

> **Caution:** This is an EXTERNAL sent email from outside DHA! DO NOT open any attachments or links from a SUSPICIOUS sender or UNEXPECTED email.

Good day

Please see attached urgent correspondence in response to the below.

Kindly acknowledge receipt.

Regards

Nabeelah Mia (she/her)

Head: Penal Reform Programme

Johannesburg Office **Tel: (011) 339 1960**

87 De Kort St (Corner Melle) Fax: (011) 339 2665

Braamfontein

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From: Modiri Matthews <Modiri.Matthews@dha.gov.za>

Date: Saturday, 13 April 2024 at 08:13
To: Qaba, Nolwandle <Nolwandle.Qaba@dha.gov.za>, Nabeelah Mia <nabeelah@lhr.org.za>
Cc: Mandla Madumisa <Mandla.Madumisa@dha.gov.za>, Phelelani Khumalo <Phelelani.Khumalo@dha.gov.za>, Tommy Makhode <Tommy.Makhode@dha.gov.za>
Subject: Re: LETTER OF REPLY TO LHR

Thanks Nolwandle

Mr Modiri Matthews

Acting Deputy Director-General

Immigration Services

Department of Home Affairs

From: Qaba, Nolwandle
Sent: Friday, April 12, 2024 4:59 PM
To: nabeelah@lhr.org.za
Cc: Tommy Makhode; Modiri Matthews; Phelelani Khumalo; Mandla Madumisa
Subject: LETTER OF REPLY TO LHR

Good afternoon

As per direction of the Director-General, please find attached the letter in reply to correspondence from yourselves on behalf of your client, Scalabrini Centre.

We trust that you will find everything to be in order.

Kind regards

Nolwandle Qaba (Ms)

Immigration Services

home affairs

"JC13"

Department:
Home Affairs
REPUBLIC OF SOUTH AFRICA

NATIONAL ASSEMBLY

QUESTION FOR WRITTEN REPLY

QUESTION NO.826

DATE OF PUBLICATION: FRIDAY, 10 MARCH 2023

INTERNAL QUESTION PAPER 8 – 2023

826. Ms L L van der Merwe (IFP) to ask the Minister of Home Affairs:

(1) With regard to the 22 Afghan nationals who have allegedly been granted permission to enter the Republic to seek asylum, (a) how long will it take his department to adjudicate their claim for asylum and (b) what are the time frames;

(2) how long does it take on average from when a person enters the Republic to when they are informed that their claim for asylum has been successful or not;

(3) what (a) total number of refugees are currently residing within the borders of the Republic and (b) are the details of the countries that the refugees come from;

(4) (a) what is the current backlog in terms of finalising applications for asylum, (b) what total number of asylum applications are turned down annually, (c) how does his department ensure that those who have had their asylum applications rejected, leave the Republic and (d) what total number of deportations have taken place in each of the past 10 years;

(5) whether his department has found that the asylum seekers simply stay on illegally because his department does not have the capacity to identify, apprehend and/or deport illegal migrants; if not, what is the position in this regard; if so, what are the further relevant details? NW926E

REPLY:

(1)(a) The department strives to conclude all asylum applications with immediate effect. However, each case is informed by its complexities, the need to conduct research, consult other institutions or further investigations do affect finalization.

(1(b) Same as above.

(2) Same as question 1(a) response.

(3)(a) According to the NIIS which is the system used by the department to record refugees, there are 129 325 refugees ever registered in the system, whilst there are 66 601 of them who are active and 9 363 refugee statuses withdrawn.

(3)(b) The majority of the refugees come from the following countries; Somalia, DRC, Ethiopia, Burundi, Rwanda, Eritrea, Uganda and Zimbabweans.

(4)(a) There are no backlogs in finalising asylum cases at the level of refugee status determination, which is the first instance by adjudication officers. The backlogs usually spoken about are cases already rejected at the first instance and are at the level of appeals which the department is working with UNHCR to address.

(4)(b) The total number of asylum applications turned down annually are in the table below:

Year:	**Rejection Numbers**	**Rejection % per cases finalised**
2022	8 948	91%
2021	No new comers	0% (numbers affected by Covid)
2020	1 916	86% (numbers affected by Covid)
2019	22 083	92%
2018	16 510	91%
2017	25 713	92%

(4)(c) The failed asylum seekers are handed over to the Immigration Officers stationed within the Inspectorate at the Refugee Reception Office (RRO) for processing in terms of the Immigration Act 13 of 2002, for deportation purposes. Upon arrest they are detained at the police station with jurisdiction of the RRO.

(4)(d) The total number of deportations that have taken place in each of the past 10 years is as follows:

Year	**Total**
2012/13	105 392
2013/14	131 907
2014/15	54 169
2015/16	33 399
2016/17	23 004

2017/18	15 033
2018/19	24 266
2019/20	29 376
2020/21	14 859
2021/22	20 093

(5) Additional human resources will improve law enforcement in immigration, and serve to detect and deport not only failed asylum seekers, but illegal immigrants who entered the country unlawfully with no record as well.

When failed asylum seekers are arrested due to the final rejection of their asylum applications, or abandoning the process by not ensuring they receive the outcome and/or their appeals to the Refugee Appeal Board not succeeding, they must be given the opportunity to apply to the High Court for a Judicial Review of the negative decision. The backlog in the caseload leads to further abuse of the asylum seeker regime, as upon arrest and failed asylum seekers disclosing their intention to take the administrative decision to court, they have to be released and the turnaround time for their court hearing cannot be estimated.

END

"JC14"

NATIONAL ASSEMBLY

QUESTION FOR WRITTEN REPLY

QUESTION NO. 1586

DATE OF PUBLICATION: 22 NOVEMBER 2019

INTERNAL QUESTION PAPER 29 OF 2019

1586. MS L L Van Der Merwe (IFP)) to ask the Minister of Home Affairs:

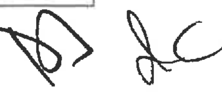
(a) What number of foreign nationals and/or asylum seekers are currently in possession of temporary asylum seeker permits, (b) from which countries are the specified persons, (c) what is the breakdown of numbers in each province, (d) how many times on average do applicants renew these permits and (e) what percentage of the specified permits have been active for longer than five years?

REPLY:

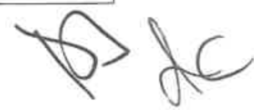
a. The total number of active Section 22 permit holders (temporary asylum seeker permits) is 186 210 as at 30 June 2019.

b. The countries are as follows:

Country	Total
Afghanistan	16
Algeria	212
Angola	19
Australia	1
Bahamas	18
Bahrain	7
Bangladesh	27768
Barbados	2
Belarus	1
Benin	46
Botswana	4
Burkina Faso	44
Burundi	6874
Cambodia	1
Cameroon	1926
Central African Republic	7



Country	Total
Chad	5
China	95
Colombia	2
Comoros	21
Congo	8485
Denmark	2
Djibouti	1
DRC	35716
East Timor	7
Ecuadorian	1
Egypt	231
Eritrea	1026
Estonia	8
Ethiopia	50436
Gabon	15
Gambia	8
Germany	1
Ghana	1963
Guinea	54
Guinea Bissau	10
Haiti	1
Hungary	3
Ice Land	1
India	4348
Iran	3
Iraq	6
Ireland	1
Ivory Coast	180
Jamaica	2
Jordan	6
Kenya	1052
Kyrgyzstan	1
Lebanon	3
Lesotho	44
Liberia	74
Libya	3
Malawi	2060
Malaysia	2
Mali	128
Mauritania	3
Mauritius	2
Morocco	5
Mozambique	535
Myanmar (Burma)	1
Namibia	3
Nepal	93
Netherlands	1



Country	Total
Niger	772
Nigeria	6475
Niue	1
Pakistan	9409
Palestine	14
Russia	1
Rwanda	1047
Senegal	882
Serbia	1
Sierra Leone	18
Slovenia	1
Solomon Islands	2
Somalia	4339
Sri Lanka	16
Sudan	63
Suriname	1
Swaziland	20
Syria	19
Tanzania	598
Thailand	24
Togo	30
Tunisia	1
Turkey	56
Tuvalu	1
Uganda	4429
Ukraine	3
Uruguay	1
USA	1
USA (Commonwealth)	1
Venezuela	2
Wallis and Futuna	1
Yemen	17
Zambia	250
Zimbabwe	14120
Total	**186210**

c. Below is the breakdown per province based on the office where clients extend their permits:

Refuge Reception Office	Province	Total
Desmond Tutu	Gauteng	109069
Cape Town	Western Cape	30219
Durban	Kwa-Zulu Natal	30504
Musina	Limpopo	11830
Port Elizabeth	Eastern Cape	4588
Total		**186210**

d. Clients for the Standing Committee for Refugee Affairs (SCRA) renew their permits on average every 3 months and clients for the Refugees Appeal Board (RAB) renew their permits on average every 6 months.

e. 60% of Section 22 permits have been active for more than 5 years based on the 2019-midyear statistics.

END

"JC15"

MIGRATION PROFILE REPORT FOR SOUTH AFRICA
A COUNTRY PROFILE 2023

Embargoed until:
26 March 2024
10:00

Statistics South Africa

Risenga Maluleke
Statistician-General

Report No. 03-09-17

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EXECUTIVE SUMMARY

INTRODUCTION

The Migration Profile Report for South Africa offers a comprehensive view of migration within a country experiencing mixed migration flows, hampered by fragmented data management systems. Aligned with the Global Compact for Migration and the Sustainable Development Goals, the report prioritises migrants' rights and underscores the critical need for precise, disaggregated data to inform policy decisions effectively.

The Migration Profile was prepared by members of the inter-ministerial Technical Working Group, in close collaboration with a broad range of stakeholders and with technical support from the International Organization for Migration (IOM). This Migration Profile – a first for South Africa – is designed to enhance policy coherence, evidence-based policymaking, and the mainstreaming of migration into South Africa's development plans.

Its development was guided and supported with inputs by the Technical Working Group of government ministries and institutions. The report provides an overview of migrant characteristics, trends and impacts of migration in South Africa up to the end of 2022/23. The data used in the analysis were collected from various sources, ranging from South Africa's national population and housing censuses and national surveys to administrative records, academic research and relevant national and international sources. As a result, this landmark profile delivers one of the most comprehensive overviews of migration trends and their impacts on South Africa to date.

The Migration Profile is comprised of three parts:

- Part A: Migration trends and characteristics provides data and analysis of migration trends in South Africa.
- Part B: Impacts of migration describes the impact of migration on key socioeconomic and development indicators based on several literature reviews.
- Part C: Recommendations presents key steps and initiatives for consideration by policymakers.

PART A: MIGRATION TRENDS AND MIGRANT CHARACTERISTICS

GENERAL CROSS-BORDER MOBILITY: Between 2011 and 2015, there were fluctuations in the issuance of both Permanent Residence and Temporary Residence permits, notably peaking for Temporary Residence permits in 2012 and gradually declining thereafter. The turnover mobility trends from 2010 to 2022 showed a consistent increase until 2016, reaching a peak of 30 789 422. However, this sharply declined in 2020–2021 due to COVID-19 pandemic-related restrictions, with a slight rebound observed in 2022. Transit migration experienced substantial growth from 2016 to 2019, reaching a peak of 821 440, but faced significant drops in 2020 and 2021 due to the pandemic, followed by notable recovery in 2023. Short-term visits displayed consistent growth until 2019, reaching a peak of 10 228 593, but witnessed substantial declines in 2020 and 2021, with a partial recovery in 2023, hinting at a possible resurgence in short-term visits.

IMMIGRATION (IMMIGRANT STOCKS): The data on immigration in South Africa encapsulate several noteworthy trends: a shifting landscape of median ages; a steadily growing migrant population; and a notable trend toward young adults as primary movers. Dominated by the black African population group, the migration landscape revolves around Gauteng as a central hub while Zimbabwe emerges as a significant source country. Most migrants originate from the Southern African Development Community (SADC) region.

Employment among immigrant individuals based on quarter three of the Quarterly Labour Force Survey (QLFS) has steadily increased from 6,0% in 2012 to 8,9% in 2022. Industry preferences, especially in the wholesale and retail trade, exhibit variations in migrant employment. Zimbabwe consistently leads in sending students to South Africa for higher education and training. On the other hand, Ethopia, Democratic Republic of Congo and Somalia are leading countries in sending refugees to South Africa.

The distribution of immigrant learner in basic education has been presented across the years from 2018 to 2023. In 2018, there were a total of 26 992 learners; over subsequent years, the number of immigrant learners increased steadily for both sexes. Finally, in 2023 the number of immigrant learners further increased to 37 856 males and 38 949 females, with a total of 76 805 learners.

Housing trends demonstrate a move toward formal housing, a surge in property ownership among immigrants, and enhanced utility access. Yet, despite strides in housing and utilities, waste management remains a challenge, reflecting persisting issues despite advancements.

EMIGRATION: Across various years, the number of South African citizens residing abroad showed fluctuations in sex ratios, with consistent growth overall. The United Kingdom (UK), Australia, and the United States of America (USA) were favoured destinations for South African citizens residing abroad, demonstrating significant increases in their populations. Emigration for study purposes witnessed a steady rise in the number of South African students studying abroad. However, involuntary emigration, particularly the refugee population, exhibited significant changes over time, with fluctuating numbers indicating the sensitivity of such migration. The destinations for South African asylum seekers shifted across countries from 2021 to 2022, reflecting changes in asylum-seeking patterns.

IRREGULAR MIGRATION: South Africa lacks comprehensive data on irregular migration due to the unavailability of administrative records which would allow for indirect estimation of this invisible group. On the other hand, the population census has a limitation as it does not ask respondents about their legal status in the country during census enumeration due to the fact that NSO's are not mandated to monitor the legal status of immigrants. Administrative sources from the Department of Home Affairs related to permits may give some insight in terms to number of permits given over a specified period.

SAFETY AND SECURITY: In the prison system, immigrants made up 1,7% to 2,6% of inmates from 2017 to 2021, averaging 2,3% over five years. Deportation events fluctuated widely overtime between 2002 and 2022. A high number of deportations were observed in 2007 (312 284). Reported cases of immigrants accused of crimes varied across provinces, with Gauteng consistently reporting higher numbers due to most people residing there. Cases involving nationals from Zimbabwe, Mozambique, Lesotho, Malawi, and Nigeria showed fluctuations over the years.

RETURN MIGRATION: The voluntary return of South African citizens between 2011 and 2022 saw fluctuations by age and sex distribution. In 2011, 45 866 citizens returned, with 46,2% being male and 53,8% female. However, by 2022 the return numbers dropped to 27 983, showcasing an equal split of 50,0% male and female returnees. Age-wise distribution revealed a varied landscape across different population groups in 2011, showcasing diverse representation across age brackets. This trend underwent noticeable changes by 2022, indicating shifts in demographic patterns. In 2011, white South Africans comprised 56,6% of returnees, contrasting with black Africans at 32%. By 2022 this had evolved, with whites accounting for 52,9% and black Africans for 37,1% of the returnee demographic. Sex and age dynamics further revealed that in both 2011 and 2022, a higher percentage of male returnees existed across age brackets. Provincial distribution displayed a similar trend, with Gauteng and the Western Cape being prominent in 2011. By 2022, shifts in returnee percentages across provinces hinted at changing preferences or circumstances influencing voluntary return decisions.

INTERNAL MIGRATION: The analysis on the period in migration between the 2011 and 2022 censuses reveals intriguing trends. Gauteng and the Western Cape are the two main provinces that attracted a high number of in-migrants between the two censuses; the Northern Cape is the province with the lowest share of period migrants (2,6%). Eastern Cape on the other hand experienced an increase of 5,3% from Census 2011 and 10,3% in Census 2022. Period out-migration indicates that Gauteng, Eastern Cape, Limpopo, and KwaZulu-Natal experience a high share of out-migration. Caution needs to be taken when interpreting the data on period migration from Census 2022 due to the impact of the COVID-19 pandemic, which resulted in less movement of people. Lastly, the results on the main reasons for moving from the previous place of residence in 2022 indicate that the main reason for migrating is to look for paid work, followed by moving to be closer to spouses.

PART B: IMPACTS OF MIGRATION

Migration intertwines with human development, shaping opportunities through knowledge exchange and remittances while posing challenges like brain drain and irregular migration. Economically, migration fuels growth, driving occupational expansion and entrepreneurship, yet management incurs costs. It is associated with employment, skills development, and competition for scares resources which, necessitates a balanced approach. Migration's role in social development influences urbanisation and societal identity, requiring inclusive policies to foster cohesion. Health-wise, migration impacts the demand and delivery of healthcare in several ways. Migrant workers play an important role in the healthcare industry while South Africa sees steady emigration of healthcare professionals, demanding a comprehensive policy response. Environmentally, migration contributes positively through knowledge transfer but strains ecosystems, especially amid climate change. Overall, addressing the complexities of migration in South Africa demands nuanced strategies that harness benefits while mitigating challenges for comprehensive and inclusive development.

PART C: KEY RECOMMENDATIONS ON DATA COLLECTION

Recommendations on improving migration statistics.

Regular population surveys: Conduct regular population surveys that specifically focus on migration patterns, reasons for migration, and socio-economic characteristics of migrants. These surveys should encompass both documented and undocumented migrants.

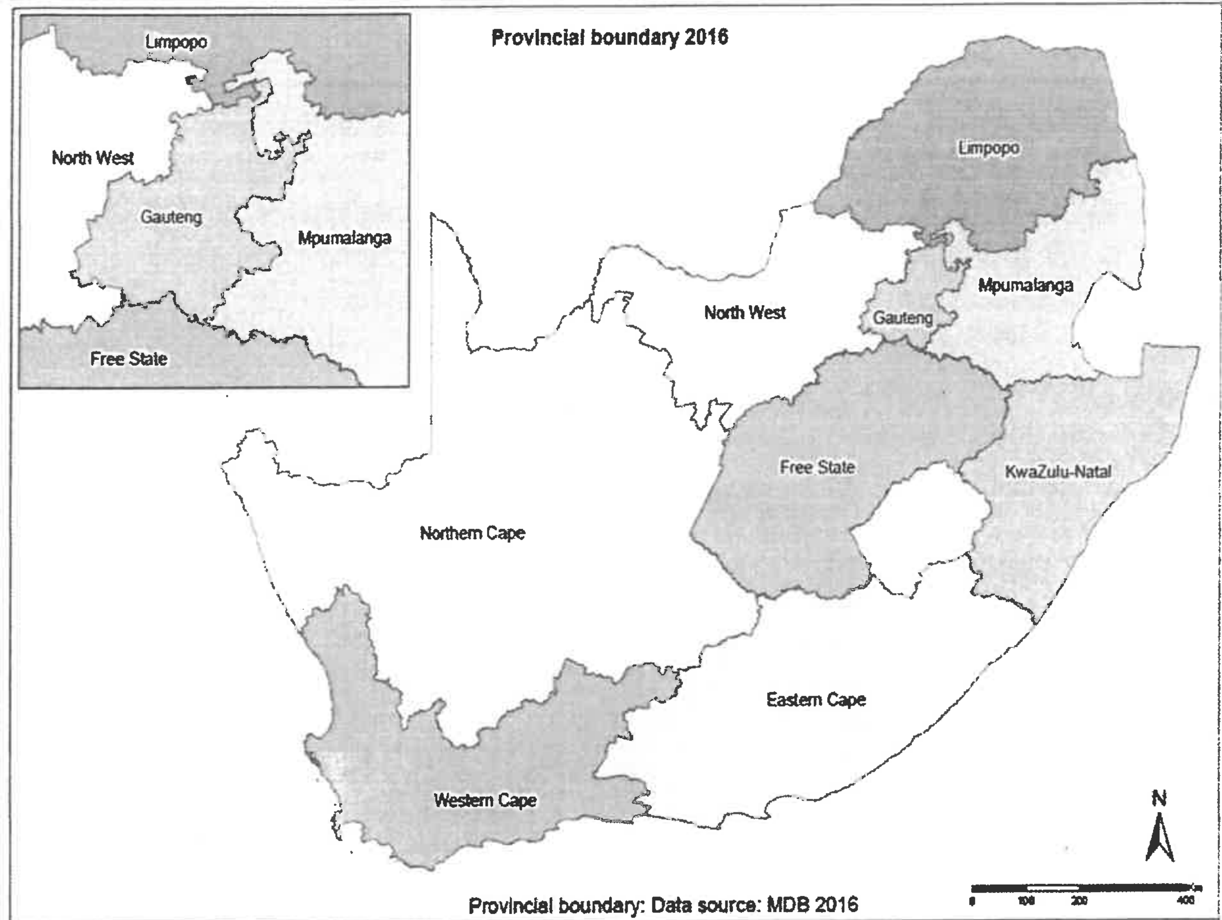
Capacity building: Invest in training and capacity building for officials involved in data collection and analysis. This ensures a better understanding of migration dynamics and improves the quality of data collected.

Utilise administrative data: Integrate data from various administrative sources, such as border control agencies, health services, and education departments, to create a more comprehensive picture of migration patterns.

Use of Big Data and Artificial Intelligence (AI): Consideration of Big Data and AI should certainly be brought on board to gain an understanding of migration from a different perspective. Research and partnerships are required in this regard.

The full set of recommendations can be found in Part C of the report.

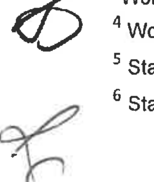
MAP OF SOUTH AFRICA AND KEY COUNTRY STATISTICS



Source: Stats SA

South Africa Key Statistics

Geography total area	1 220 813 square kilometres						
Human and social development[2]	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
Life expectancy at birth, years, annual averages (males)	61,1	61,7	61,7	62,0	62,3	59,2	60,0
Life expectancy at birth, years, annual averages (females)	66,7	67,1	67,4	67,8	68,4	64,2	65,6
Total life expectancy	64,0	64,5	64,6	64,9	65,4	61,7	62,8
Education[3]	**2010**	**2011**	**2012**	**2014**	**2015**	**2017**	**2019**
Adult literacy rate, percentage aged 15 and older	92,9	93,1	93,7	94,1	94,4	87,0	95,0
Combined gross enrolment ratio in education (%)	18,4	19,6	19,1	19,8	22,3	22,4	23,9
Economic[4]	**2016**	**2017**	**2018**	**2019**	**2020**	**2021**	**2022**
GDP per capita, PPP in thousands of US$	13 696,16	13 950,45	14 326,65	14 439,69	13 533,78	14 689,15	15 904,85
Human Development Index (HDI)	0,719	0,72	0,726	0,736	0,727	0,713	-
Remittance inflows (US$ million)	755	874	929	890	811	927	873
Remittance outflow (US$ million)	897	1,033	1,098	1,052	921	1,066	1,012
FDI Inward Flow (US$ million)	-	-	-	-	3,062	40,948	9,051
FDI Stock (US$ million)	-	-	-	-	133,127	174,783	173,584
Annual inflation rate on a monthly basis					3,3	4,5	6,9
Net Official Development Assistance (ODA) (in US$ million)	1 180,30	1 014,80	921	964,9	1 203,10	1 039,60	-
Population[5]	**1996**	**2001**	**2011**	**2022**			
Total	40 583 573	44 819 778	51 770 560	62 027 503			
Male	19 520 887	21 434 040	25 188 791	30 078 757			
Female	21 062 685	23 385 737	26 581 769	31 948 745			
Black African	31 127 631	35 416 166	41 000 938	50 486 856			
Coloured	3 600 446	3 994 505	4 615 401	5 052 349			
Indian or Asian	1 045 596	1 115 467	1 286 930	1 697 506			
White	4 434 697	4 293 640	4 586 838	4 504 252			
Other	375 204	-	280 454	247 353			
International migrants' stock	835 216	1 025 076	2 184 408	2 418 197			
International migrants as percentage of the total population	2,06	2,29	4,22	3,9			
Females among international migrants (%)	38,0	40,46	39,82	42,2			
Projected Net international migration[6]		**1985-2000**	**2001-2006**	**2006-2011**	**2011-2016**	**2016-2021**	**2021-2026**
		466,673	491,652	752,215	916,346	852,992	592,520



[2] World Development Indicators; Human Development Reports (undp.org)
[3]World Bank: https://data.worldbank.org/indicator/DT.ODA.ALLD.CD?locations=ZA
[4] World Bank: https://data.worldbank.org/indicator/DT.ODA.ALLD.CD?locations=ZA;
[5] Statistics South Africa, Census 1996, 2001, 2011 & 2022: https://census.statssa.gov.za/
[6] Statistical release P0301.4; Stats SA, *Mid-year population estimates 2022,*

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Scapegoating in South Africa

Busting the myths about immigrants

Anthony Kaziboni, Lizette Lancaster, Thato Machabaphala and Godfrey Mulaudzi

Public officials and politicians routinely blame immigrants for a range of social and economic problems in South Africa. This reinforces negative, xenophobic sentiments among many people. The research and analysis presented in this report tests the validity of these widely held beliefs. It shows that they are largely false and can only have detrimental consequences for South Africa's economy and people.

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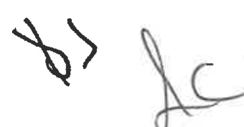
Key findings

- South African socio-economic problems are not caused by immigrants but by poor governance and corruption.
- Many politicians, public officials and other high-profile people regularly make anti-immigrant statements that fuel xenophobia.
- The number of migrants in South Africa is grossly exaggerated. There are about 3.95 million migrants in the country, comprising about 6.5% of the population. This is in line with international norms.
- Immigrants contribute positively to the country. They contribute about 9% of GDP and boost employment because every working immigrant creates two local jobs.
- Criminal justice data show that immigrants are less likely to commit crime than South Africans. Only about 2.3% of inmates incarcerated per year are undocumented foreigners.
- Immigrants are less likely than South Africans to be convicted of serious crimes such as murder and rape. However, they are disproportionately targeted in police operations and caught for minor crimes such as drug possession or use.
- While the 2019 National Action Plan to Combat Racism, Racial Discrimination, Xenophobia and Related Intolerance (NAP) is welcome, inadequate attention is being given to implementing proactive programmes that address xenophobia.

Recommendations

- Statistics South Africa needs to make population data easily accessible and understandable to government departments and ministries, political parties and the general public.
- The Department of Justice and Constitutional Development (DoJ&CD), which is responsible for implementing the NAP, needs to work with other government departments and civil society to gather accurate information that dispels myths and misinformation about immigrants in South Africa.
- The Government Communication and Information System (GCIS) should ensure that credible, accurate and reliable information about immigrants is disseminated in all official languages, reaching communities in urban, peri-urban and rural areas.
- The DoJ&CD and GCIS should coordinate with other government departments and ministries in anti-xenophobia training, particularly those that deal with migrants like the Departments of Home Affairs, Health, Employment and Labour, Social Development and the South African Police Services (SAPS).
- The SAPS could improve public safety if it targeted individuals, groups and networks involved in specific priority crimes such as murder, armed robbery and extortion. Targeting broad categories of people, like immigrants, fails to reduce crime, wastes police time and state resources, and undermines police–community relationships.
- Organisations across all sectors should commit to tackling xenophobia as they would racism or sexism. Their representatives should use credible, accurate and reliable population data when addressing their respective constituencies about immigrants and immigration.
- Media outlets should fact check statements about immigrants and correct claims that are patently untrue.



Introduction

The issue of cross-border immigration is often the subject of contentious and emotive debate in the host country.[1] A disturbing trend emerging globally is that governments and right-wing conservative groups tend to blame and scapegoat immigrants for socio-economic problems like crime, disease, unemployment and poverty. The blaming and scapegoating of immigrants as a cause of socio-economic ills is not unique to South Africa.[2] This was the case in the United States of America with former president Donald Trump and especially Mexican immigrants,[3] in Turkey with the Recep Tayyip Erdoğan-led Turkish government and Syrian refugees,[4] as well as in England and France.[5] This 'attitudinal orientation of hostility against non-nationals in a given population' is defined as xenophobia.[6]

Since democracy in 1994, anti-foreigner sentiment has been growing in South Africa, with more than 936 violent xenophobic incidents recorded. These have resulted in more than 630 deaths, the displacement of 123 700 people and the looting of about 4 850 shops.[7] The most widespread xenophobic attacks, negatively affecting thousands of people and making international headlines, occurred in 2008[8] and 2015.[9] Unfortunately, the country seems unable to learn important lessons from this violence to prevent it from reoccurring.

The scapegoating of immigrants as a cause of socio-economic ills is not unique to South Africa, and is part of a disturbing global trend

While xenophobic sentiment is not new in South Africa, there are some worrying recent developments that deserve attention. During 2019, statements that fuelled xenophobic sentiment were made by a number of politicians from mainstream political parties while campaigning for the national and provincial elections held that year. The country also experienced violent attacks on foreign-born truck drivers. Many vehicles were torched and some drivers killed for being non-South Africans.

In 2020 various community-based groups started to mobilise around an anti-immigrant agenda. These include Operation Dudula, which started in Soweto and has since opened branches across the country, and the unrelated Dudula Movement, based in the Johannesburg township of Alexandra. The isiZulu word *Dudula* means 'to push', seemingly denoting pushing foreigners out of the country.

Both groups blame immigrants for a range of socio-economic challenges, including high levels of crime and unemployment. Immigrants have also been accused of being the cause of poor service delivery with regards to public housing, health and schooling, as they use these services which some people believe should be reserved for citizens. These groups espouse the

>630

NUMBER OF DEATHS RESULTING FROM XENOPHOBIC INCIDENTS IN SA SINCE 1994

idea that if immigrants were removed from the country, citizens would have more jobs, less crime and better service delivery.

However, the assumptions that immigrants are the cause of these problems or contribute to worsening conditions for locals are rarely interrogated. Furthermore, some public officials and politicians have used migration to direct citizens' anger toward immigrants and away from state failure relating to poor governance, corruption and non-responsiveness to community needs.[10]

United Nations experts tracking the growing xenophobia in South Africa issued the following public statement in 2022:

> Anti-migrant discourse from senior government officials has fanned the flames of violence, and government actors have failed to prevent further violence or hold perpetrators accountable. Without urgent action from the government of South Africa to curb the scapegoating of migrants and refugees, and the widespread violence and intimidation against these groups, we are deeply concerned that the country is on the precipice of explosive violence.[11]

This report examines what the evidence says about some of the most common accusations against immigrants, including that:

- There are many millions of immigrants in the country, and in the Johannesburg CBD, for example, more than 80% of the population consists of immigrants.
- The large numbers of immigrants are the cause of, or contribute to, high levels of unemployment in South Africa.
- Foreign nationals are the cause of, or contribute to, the country's high levels of crime.
- Foreign nationals place an undue burden on public services, which contributes to poor service delivery for citizens.
- Immigrants do not want to be documented and choose to be in the country illegally.

While the above statements reflect the commonly held beliefs of many people in South Africa, this paper will show that it is not possible to sustain them on the available evidence. Consequently, in order to prevent xenophobic sentiment from spreading and contributing to violence, it is necessary to challenge these sentiments. Moreover, political parties and other organisations need to familiarise themselves with immigration facts so that they can counter such narratives and hold their officials or members accountable for spreading false information that fuels xenophobia in South Africa.[12]

In this report, the term 'immigrants' denotes non-South Africans residing in the country as asylum seekers, refugees, economic migrants, students, permanent residents and undocumented foreign-born nationals or their children.

Linking poverty, inequality, unemployment and xenophobia

For more than a decade, South Africa has exhibited increasing levels of poverty, inequality and unemployment – what some commentators have termed the 'triple challenge'.[13] More than half of the country's population lives in poverty, and with a Gini coefficient of 0.65, South Africa is one of the most unequal countries in the world.[14] This is partly due to the country's exceptionally high unemployment rate. Almost two-thirds (63.9%) of people aged 15 to 24 and 42.1% of people aged 25 to 34 are out of work. At the time of writing, the official national rate stood at 34.5%.[15]

> Around 6.5% of South Africa's population is foreign born, which is in line with international norms

In his 2021 Medium-Term Budget Policy Statement, Finance Minister Enoch Godongwana warned about the impact of corruption on public finances. Annually, South Africa is estimated to lose about R27 billion to corruption. This figure is more than one-third of the 2021/22 national health budget.[16] Corruption and other illicit activities deplete funds available for critical areas such as housing, social grants and public healthcare.[17] Godongwana has warned that local government's continued decline in basic service provision is a 'breeding ground for economic strife and future instability in South Africa.'[18]

Despite these challenges, South Africa is a destination of choice for many African immigrant groups such as

economic migrants, refugees and asylum seekers. This is because of the country's comparatively better economy compared to other African countries, along with a strong judicial system anchored in the rule of law and respect for human rights.[19]

Moreover, South Africa is party to a range of conventions that compel the government to support refugees. For example, the country is party to the 1951 Refugee Convention, its 1967 Protocol and the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa.[20] In line with this, Pretoria ratified the Refugees Act 1998 (Act 130 of 1998). Through the Act, refugees have the right to work and travel, and to access social welfare, healthcare and education.

South Africa is often internationally praised for its refugee programme. For example, in 2019, the United Nations High Commissioner for Refugees (UNHCR), Filippo Grandi, noted that it was one of the best systems globally, at least on paper. However, due to a combination of inefficiencies and corruption, it has also been alleged that in practice the system contributes to xenophobia.[21]

Unfortunately, due to government policy and implementation failures, along with events such as the COVID-19 lockdown regulations, the socio-economic conditions have worsened notably in recent years. Unwilling to acknowledge their own failures, many politicians and public officials attempt to use their positions of authority and power to redirect the citizenry's anger away from themselves. They do this through scapegoating foreign nationals as the source of many of these challenges. Blaming immigrants also provides an increasingly frustrated population with an easy explanation for their difficult situation. Narratives that blame social ills on immigrants, if repeated often, are likely to drive xenophobia. As Crush and Ramachandran note:

> Scapegoating tendencies and public rhetoric of fear and loathing collectively shape and define the contours of the symbolic threat posed by immigrants. That is, they transform diverse immigrant groups in the public imagination as an undifferentiated mass, representing a menace and threat to the well-being and security of host populations.[22]

In South Africa, black African and Asian immigrants have been negatively stereotyped as 'illegal' and 'job stealers' who are 'criminal' as well as 'diseased'.[23] While immigrants from African countries with shared ethnic characteristics to South Africans, like Botswana, Lesotho and eSwatini, are generally more tolerated, immigrants from other African countries like Zimbabwe and Mozambique are disliked and referred to as *kwerekwere*.[24] The term denotes that locals consider other black Africans strange, with peculiar-sounding dialects,[25] thus condoning violence against them.

Is South Africa swamped with immigrants?

Since the 1990s, a dominant discourse has been the existence of 'uncontrollable' in-migration. All immigrants, irrespective of residency status or gender, are typically grouped into arbitrary categories such as 'aliens,' 'illegals' and 'foreigners'.[26] Over the years, various politicians have remarked on the number of immigrants in the country. For example, the first post-apartheid Home Affairs minister, Mangosuthu Buthelezi, made the following unsubstantiated claim to the National Parliament in 1997:

> With an illegal population estimated at between 2.5 million and 5 million, it is obvious that the socio-economic resources of the country, which are under severe strain as it is, are further being burdened by the presence of illegal aliens.[27]

Twenty years later, in 2017, then Deputy Police Minister Bongani Mkongi alleged that 80% of inner-city Johannesburg was under migrants' control. He added that failure to address this would result in the country being about '80% dominated by foreign nationals and the future president of South Africa could be a foreign national.'[28] More recently, in 2021, Gayton McKenzie, the leader of the Patriotic Alliance (PA), tweeted that there were 10 million undocumented immigrants in the country.[29]

These unfounded statements have contributed substantially to many South Africans' perceptions that the country is overrun with immigrants. The South African Social Attitudes Survey (SASAS) for 2021 found that almost half (48%) of the population believed there were between 17 and 40 million immigrants in the country.[30] However, this is totally false.

According to South Africa's statistician-general, Risenga Maluleke, there is 'erroneous reporting of undocumented

migrants in SA.'[31] Based on the best available 2021 mid-year population estimates, there are about 3.95 million immigrants in South Africa. Therefore, around 6.5% of the country's population of over 60 million is foreign born, with many having moved to South Africa with their parents when they were children.[32] This figure includes all immigrants, irrespective of legal status, where they come from or their socio-economic situation.[33]

Moreover, this percentage is in line with international norms and does not indicate that South Africa has a higher proportion of immigrants than most other countries.[34] Regarding refugees, in 2019 there were 280 004 refugees in the country of whom 189 491 were asylum seekers and 90 513 had official refugee status.[35] Most refugees and asylum seekers are from Burundi, the Democratic Republic of the Congo (DRC), Rwanda, South Sudan, Somalia and Zimbabwe, countries plagued by conflict, poverty and food insecurity.[36]

Do immigrants steal jobs?

A common belief, not only in South Africa, is that immigrants steal citizens' jobs.[37] This persistent myth has been propagated by senior politicians and public officials.[38] For example, former energy minister Jeff Radebe claimed foreign nationals were 'dominating trade in certain sectors such as consumable goods in informal settlements which has had a negative impact on unemployed and low skilled South Africans.'[39] The PA's McKenzie blamed immigrants for 'job stealing': 'South Africans don't have jobs. White businesses (in South Africa) have found new slaves in foreigners.'[40] These remarks were part of his party's election campaign manifesto in 2021 and were broadcast on national television.[41] Such remarks are clearly aimed at stirring up discontent towards immigrants.

Rather than undermining South Africa's economy, immigrants contribute around 9% of GDP and have a positive net impact on the government's fiscus

Although the South African job market is shrinking, as evidenced by quarterly labour force surveys, with each quarter showing a great expansion of the unemployment rate, it is not accurate to blame immigrant labourers.[42] There is no evidence to suggest that immigrants take employment opportunities away from South African workers.[43] Rather, there is evidence that the opposite is true – that immigrants often create employment for South Africans.[44] According to a 2018 World Bank study drawing from data collected between 1996 and 2011 in South Africa, 'one immigrant worker generates approximately two jobs for locals.'[45]

3.95 MILLION

NUMBER OF IMMIGRANTS IN SA ACCORDING TO 2021 POPULATION ESTIMATES

Immigrants are generally more likely to be self-employed and to employ South Africans. Moreover, a little-known fact is that rather than undermining the economy, immigrants contribute an estimated 9% of the country's

Gross Domestic Product (GDP).[46] They also have a positive net impact on the government's fiscus, which is attributed to the fact that they generally pay income and value-added taxes.[47]

A 2019 Statistics South Africa (Stats SA) report found that immigrants made up only 5.3% of the labour market.[48] Unfortunately, between 2012 and 2017, the height of the state capture years, the percentage of the labour employed decreased markedly for all groups, irrespective of migration status (Chart 1).[49] Migration status in this context refers to citizens and residents that did not move during this five-year period ('non-movers'), persons that did move internally in the country (internal migrants) and foreign 'immigrants'.[50] Interestingly, immigrants are about 7% more likely to be employed than internal migrants and about 11% more likely than local non-movers.[51] This can arguably be attributed to immigrants having limited access to social protection networks and support, which is a compelling factor for them to seek employment.

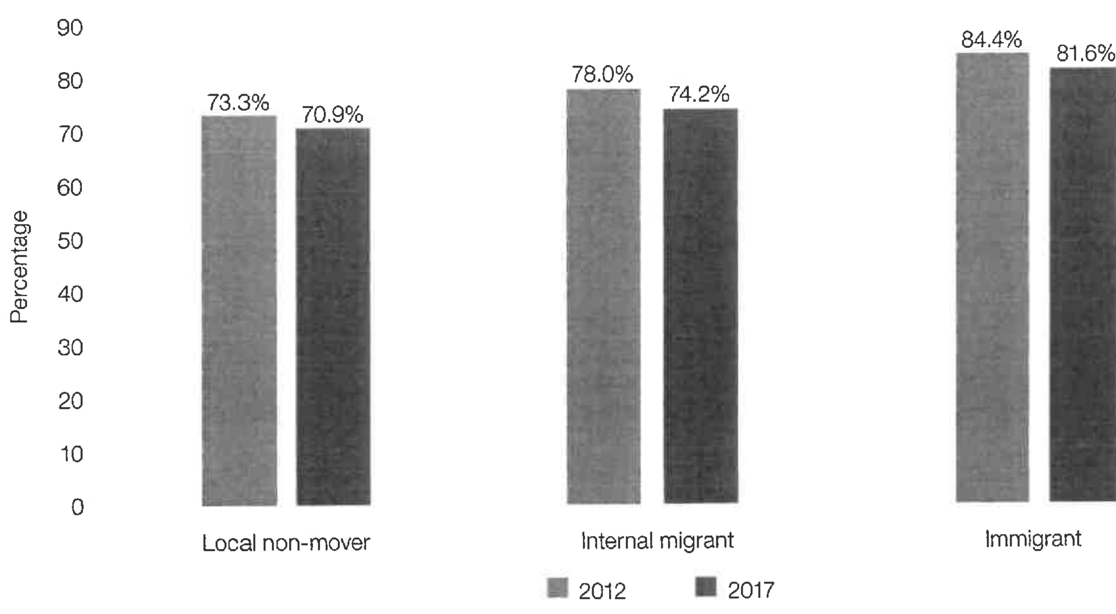
Chart 1 indicates that while the employment rate is consistently higher for immigrants, the decrease in employment opportunities is similar across the three groups, irrespective of migration status.

Stats SA's analysis found that most immigrants work in the informal sector where they are not protected by labour laws and are afforded minimal worker rights.[52] Using the International Labour Organisation's (ILO) decent job framework, Stats SA's analysis shows that immigrants are more likely to be employed in the informal sector when compared to South African non-movers or internal migrants.[53]

In comparison to locals, immigrants are more likely to work excessive hours, are less likely to be entitled to benefits or protections such as maternity or paternity leave, have an employment contract, hold a permanent employment position, have an employer contributing to pension or the Unemployment Insurance Fund (UIF) or be affiliated to a labour union. The data show that in 2017, 29.3% of the immigrants who were employed were in the informal sector.[54]

Most immigrants and internal migrants are drawn to Gauteng because of the province's relatively high level of economic development, which provides the greatest work opportunities. The second most desirable province is the Western Cape.[55] Immigrants are also more likely to be concentrated in metropolitan areas such as Johannesburg, Tshwane, Ekurhuleni, Cape

Chart 1: Proportion employed by migration status



Source: Stats SA, 2019

Town and eThekwini. These areas are already characterised by rapid urbanisation caused by high internal in-migration from the rural areas, where there are few employment options.

Do immigrants cause high crime levels?

One of the country's most dangerous criminals, currently serving a 35-year prison sentence for a range of crimes and facing trial on numerous other charges, is Radovan Krejcir, an immigrant from Czechoslovakia.[56] While some immigrants do commit crimes in South Africa, there is a widely held public perception that they contribute an inordinate amount to the overall crime levels. This perception is partly fuelled by populist statements made by politicians.

During his first 100-days-in-office address in 2016, the former Democratic Alliance (DA) mayor for Johannesburg, Herman Mashaba, expressed his determination to deal with 'illegal' immigration. He indicated that '[irregular foreigners] are holding our country to ransom and I am going to be the last South African to allow it.'[57] In a follow-up interview, he stated that foreign nationals who are in Johannesburg without documentation are linked to criminal activity in the city.[58] The mayor could not provide evidence or data that supported this claim.[59]

There is no evidence that most immigrants commit crime or are responsible for most crime in SA

At an African National Congress (ANC) rally in 2019, South Africa's president, Cyril Ramaphosa, undertook to deal decisively with immigrants who were being blamed for setting up unlicensed establishments: 'Everyone just arrives in our townships and rural areas and sets up businesses without licenses and permits. We are going to bring this to an end. And those who are operating illegally, wherever they come from, must now know.'[60] These too were unfounded remarks. Some of the president's critics indicated that these remarks ignited subsequent attacks on immigrants in Durban.[61] More recently, anti-immigrant vigilante groups, such as Operation Dudula, have also indicated that immigrants are responsible for most crimes in South Africa.[62]

According to the Human Sciences Research Council's (HSRC) SASAS data, most South Africans believe that immigrants are responsible for crime in the country.[63] The 2008 survey found that 62% of South Africans believed that immigrants increased crime. By 2016, 66% agreed with this statement.[64] However, when asked who commits crime in their areas, most people say it is locally based citizens. For example, between 2011 and 2017, the national Victims of Crime surveys showed that only a small minority of households (5.7%–6.7%) stated that crime in their areas was caused by 'people from outside South Africa.'[65] This shows how dangerous populist statements can be in influencing people's general perceptions.

There is no statistical relationship between international migration in South Africa and crime.[66] There is also no evidence that most immigrants commit crimes or are responsible for most crimes in the country.[67]

The SAPS also responds to and perpetuates notions about immigrants being engaged in crime. This is partly due to the high level of political interference in their operations. For example, in 2015, Operation Fiela was initiated in response to attacks on immigrants in KwaZulu-Natal and Gauteng. However, it morphed into a targeted campaign against immigrants when citizens complained to politicians that the police were responding to xenophobic violence when they had largely ignored or been ineffectual in tackling local criminal activity.[68]

As a result, 15 396 persons were apprehended and deported between April and July 2015. The large number of deportations had no positive impact on the crime situation. For example, the crime statistics for that year show that violent crime continued to increase, with a 4.9% increase in murder and 2.7% increase in armed robberies.[69]

More recently, the SAPS used similar tactics in response to the vigilante Operation Dudula's illegal search and seizures.[70] These actions are criminal and leave victims vulnerable to further criminal acts such as intimidation, trespassing, malicious damage to property, arson, robbery, assault and death.[71] Yet, arrests of vigilantes are

the exception. Instead of acting against the criminal actions of Dudula members, the police again targeted immigrants.

Targeting immigrants has had little impact on crime levels and, paradoxically, has contributed to higher violence levels. Annual crime statistics show that crime levels, especially violent crime levels, remain high and continue to increase while trust in the police is declining.[72] Low levels of trust in policing result in a service delivery gap filled by vigilantism.[73]

Although a vigilante group may start with the intention of protecting its community, it often descends into punitive criminal behaviour as the group operates outside the rule of law. If left to act with impunity, vigilante groups can rule areas with fear and violence, further driving insecurity and instability.[74] Furthermore, crime statistics and the SAPS annual reports show that law enforcement has not been able to prevent the proliferation of organised crime (including robbery, kidnapping and extortion), and intergroup and public violence.[75]

While the SAPS do collect data on the demographics (sex, race, age, nationality, etc.) of suspects arrested for various crimes, these data are not shared publicly and appear to be a closely guarded secret. Nevertheless, given that the police target immigrants as a group, it can be expected that immigrants will be overrepresented in the data of people arrested and charged for various crimes.

In the absence of SAPS data, the next best option is to look at the available data on the nationality of people who are in South African prisons. In a parliamentary response on 7 January 2022, the Minister of Justice and Correctional Services, Ronald Lamola, provided the following figures for the number of 'foreign nationals' convicted of crimes in South Africa: 2019 – 13 897; 2020 – 9 892; 2021 (as of 21 September) – 4 887.

The minister also provided the number of immigrants convicted of murder, rape or drug-related offences. In the two-year period from January 2019 to December 2020, 30 foreign nationals were convicted for murder and 42 for rape. Of the 942 drug-related cases resulting in convictions, 39% were for dealing in drugs, with most (61%) convicted for the minor charge of drug possession or use.[76]

When the figures for convictions are compared to the total number of sentenced and unsentenced inmates incarcerated per year, immigrants made up 8.5% of convicted cases in 2019 and 7.1% in 2020.[77] Chart 2 shows that between 2017 and 15 November 2021, an annual average of about 3 599 undocumented foreigners were incarcerated out of a total of 158 329 inmates. This

Chart 2: Number of 'illegal foreigners' incarcerated per year and their proportion of total inmates, 2017–2021

Years of recording	Number of 'illegal foreigners' incarcerated			Total number of inmates incarcerated			Proportion of illegal to total inmates
Period	**Unsentenced**	**Sentenced**	**Total**	**Unsentenced**	**Sentenced**	**Total**	**Percentage of total**
2017	1 325	1 670	2 995	31 604	145 995	177 599	1.7
2018	1 609	2 137	3 746	44 020	133 692	177 712	2.1
2019	2 254	2 219	4 473	46 308	116 017	162 325	2.8
2020	1 707	1 550	3 257	47 842	90 871	138 533	2.4
2021 (up to 15 Nov.)	1 780	1 743	3 523	51 727	83 749	135 476	2.6
Average over five years	**1 735**	**1 864**	**3 599**	**44 300**	**114 065**	**158 329**	**2.3**

Source: Department of Justice and Correctional Services; calculations by ISS

represents an average of 2.3% of the total inmate population, a far smaller percentage than is popularly believed.[78]

Procedurally, once the Department of Correctional Services (DCS) releases an inmate on parole, the Department of Home Affairs (DHA) is tasked with checking their nationality and immigration status. It is then the 'responsibility of the DCS to hand over such offenders to the relevant authorities either for release or deportation based on status confirmed by DHA.'[79] If they are undocumented, they are typically deported to their country of origin.

Are most foreign migrants illegally in the country?

The notion that immigrants are generally in South Africa illegally is distorted and derogatory. Using the term 'illegal' is prejudicial and criminalises persons who may not have a status that qualifies them as regular. This sentiment encourages the false perception that immigrants deserve to be mistreated. When an immigrant has a suspended or expired permit or visa, they assume an 'irregular' status but are not 'illegal'.

The backlog in the Department of Home Affairs, along with corruption, impact the finalisation of permit outcomes, which compromises immigrants' status

Often, immigrants enter the country with a regular status but fall into irregular status due to poor immigration policy management. The DHA struggles with a backlog, partly as a result of departmental dysfunction,[80] and is plagued by corruption. This has impacted the finalisation of permit outcomes, which further compromises the status of immigrants.[81] The existing backlogs were exacerbated by a hold placed on the processing of visas and waivers that occurred during the 2020 state of disaster regulations under the COVID-19 lockdown. Recently, the DHA instituted a 'blanket extension' until 30 September 2022 for immigrants with pending waiver and visa applications.[82]

In addition to the DHA backlogs, it is increasingly difficult to obtain the relevant documentation in an affordable and speedy manner. The cost of applying for permits is exorbitant, which makes it difficult for individuals to achieve compliance in their migration status.[83] Achieving compliance is also affected by allegations (and investigations) of corruption in various DHA facilities, resulting in further barriers to accessing the correct status.[84]

4%

PERCENTAGE OF SA UNIVERSITY POPULATION IN 2018 MADE UP BY IMMIGRANT STUDENTS

Do immigrants burden public services and social welfare?

Immigrants are believed to put pressure on schools, the healthcare system, social grants and service delivery.[85] For example, the former minister of health, Dr Aaron Motsoaledi, stated, 'The weight that foreign nationals are bringing to the country has got nothing to do with xenophobia … it's a reality. Our hospitals are full, we can't control them.'[86]

As noted, immigrants account for about 6.5% of the population.[87] It is thus statistically impossible for immigrants to be responsible for the healthcare system's failings.[88] Continued claims of 'hordes' of immigrants flooding South Africa's public healthcare facilities dominate the national discourse and promote 'medical xenophobia'.[89]

However, in the short run, immigrants tend to be healthier than locals. This phenomenon, called the 'healthy immigrant effect', found immigrants to have healthier diets and lifestyles, making them less likely to develop chronic diseases.[90] Furthermore, many foreign nationals come to private medical facilities for operations that they either cannot get in their countries or that are cheaper in South Africa. This results in foreign nationals spending money that benefits South Africans more broadly as they book hotels, and buy food and other goods.

Due to the birth and death registration laws in South Africa, children of immigrants often have difficulty accessing healthcare as well as education services such as schools.[91] However, many South African children face a similar struggle, especially in rural areas. The regulations around registering births and deaths[92] make it difficult for parents to receive a birth certificate for their child without a valid identity document, passport or asylum-seeker documentation.[93] The cost of obtaining these documents within the 30 days required to register a birth is often beyond the reach of low-income and rural communities given that DHA facilities are located in metropolitan areas and towns. Children of immigrants are often the victims of the challenges faced by their parents at the DHA.

At 6.5% of the population, it's impossible for immigrants to be responsible for SA's failing healthcare

With respect to education, the South African High Court in Makhanda handed down a ground-breaking judgment ruling that all children, whether documented or not, have the right to access education.[94] This balances the interests of the children of immigrants, stateless children and South African children.[95]

The rights of a child are of paramount importance according to Section 28 of the Children's Act 38 of 2005. The Department of Basic Education (DBE) has since released a circular related to the admission of undocumented children.[96] The DBE acknowledges that the Learner Unit Record Information and Tracking System (LURITS) recorded 11 905 509 children of South African origin in schools in 2021. Of those learners, 10 873 891 had verified identification documents.[97] In total, 465 826 South African learners were without identity documents in 2021. The DBE and the DHA have established teams to focus on all undocumented learners, led by the directors-general of both departments.[98]

The blame for overpopulated and overwhelmed schools is incorrectly placed on immigrant children when it should instead be placed on the poorly managed education department. Similar to public healthcare facilities, schools are poorly maintained, under resourced and the construction of new schools has not kept pace with population growth.[99]

Similar myths apply to higher education. Claims that immigrants are overpopulating South African universities are not true. Although South Africa is a popular education destination for neighbouring African countries, immigrant students made up only 4% of the total university population in 2018.[100] This is down from the previous year's 4.1%.[101] These are generally fee-paying students who also add wealth to the overall economy due to the money they spend while studying in the country.

State-subsidised Reconstruction and Development Programme (RDP) housing is another service immigrants are assumed to have 'stolen'. Housing allocated under the RDP is targeted at formerly disadvantaged people. However, the provision of RDP housing has been plagued by mismanagement and corruption.[102] Forced illegal evictions have occurred in communities such as Alexandra, where immigrants occupying RDP houses were ejected.[103]

However, RDP houses can only be applied for by South African citizens or immigrants with permanent residency permits. Refugees, asylum seekers and temporary residents are not eligible. If a non-citizen without permanent residency in South Africa stays in an RDP house, it has been sub-let or sold to them by the registered South African owner.[104] The lessor and lessee, or buyer and seller, are thus both acting illegally regardless of their nationality.

Conclusion

While politicians often publicly denounce and condemn violence against immigrants and prefer to link it to criminality, not xenophobia, there are no effective mechanisms in place to address it. This lack of political will to address the scourge is most likely because it is easier to blame others for governance failures.

The adoption of the long-awaited and much anticipated 2019 NAP,[105] for example, fulfilled a longstanding commitment made by South Africa to develop and implement the Declaration and Programme of Action adopted by the 2001 United Nations World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance in Durban, which took almost 20 years to develop.[106]

However, earlier drafts of the NAP did not even refer to 'xenophobia'. The NAP treats xenophobia in a 'perfunctory manner', providing no information about the nature and extent of the phenomenon, and contains no proactive steps to address it.[107] The proposed remedies are largely reactive, such as condemning violence when it occurs, ratifying hate crime laws, strengthening law enforcement and prosecuting offenders. Furthermore, xenophobia is conceptualised as an economic problem within the NAP rather than a social or political one.[108]

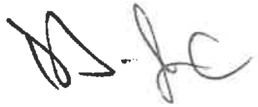
Due to the history of xenophobic incidents that have culminated in widespread violence and the loss of lives, it is crucial to deal with issues around migration using accurate information. Scapegoating immigrants will not result in significantly improved healthcare service provision, reduced crime or address unemployment, as suggested by some politicians and people in government.

Public officials and political leaders should refrain from making unsubstantiated allegations regarding immigrants as these can influence general perceptions. Xenophobic remarks must be condemned in the strongest terms. Political parties and organisations must commit to tackling xenophobia as they would racism and sexism. The more xenophobic-inspired myths are perpetuated and immigrants are scapegoated, the more discrimination, hate and violence will continue breaking down social order and social cohesion.

Promoting xenophobic attitudes along with failing to take steps to prevent it will lead the country to ruin. Migration is not a problem to be solved, but an issue to be managed. Bloomberg has warned that violence against immigrants 'causes investment concerns in South Africa.'[109] Increasingly, because of xenophobic violence, South Africa's goods and ports are being bypassed in favour of other markets.[110] Furthermore, the ripple effects are being felt by South African businesses and migrants operating in Africa.[111]

Political parties and organisations must commit to tackling xenophobia as they would racism and sexism

Fortunately, many South Africans do not hold severely xenophobic sentiments. They simply want politicians to put the country and those who live in it first. They want capable public servants who work to solve the various challenges we face and improve the economy, public safety and government services to all people. It is these South Africans who do not resort to scapegoating, who believe in the importance of facts and truth, who will ultimately determine whether the country achieves the much higher levels of safety, prosperity and development that are possible.



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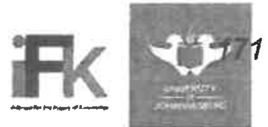

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GOVERNMENT NOTICES • GOEWERMENTSKENNISGEWINGS

DEPARTMENT OF HOME AFFAIRS

NO. 4745 **17 April 2024**

WHITE PAPER ON CITIZENSHIP, IMMIGRATION AND REFUGEE PROTECTION: TOWARDS A COMPLETE OVERHAUL OF THE MIGRATION SYSTEM IN SOUTH AFRICA

POLICY PAPER

APRIL 2024

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44.3 Refugees Amendment Act 11 of 2017 ("2017 Refugees Amendment Act") assented to by the President on 14 December 2017 which came into effect immediately after the commencement of 2008 and 2011 Refugees Amendment Act came into effect.

45. Some of the amendment provisions of the Refugees Act and new Regulations may not pass constitutional muster. In general, there was public outcry and newspapers articles were written about the negative impact of the amendments and Regulations. The Minister sought legal advice which confirmed that some of the criticisms were justified.

New Refugee Regulations

46. The New Regulations were published on 27 December 2019 and repealed the previous Regulations (published in GNR 36, Government Gazette 21075, 6 April 2000. The Regulations came into effect on 1 January 2020.

47. Some of the Regulations will not pass constitutional scrutiny, such as dealing with verification or authentication and termination of marriage at the time the application for asylum is made.

What are the figures for asylum seekers and refugees in South Africa?

48. There is much speculation regarding the actual numbers of asylum seekers and refugees in South Africa as compared to other countries in Africa. The incorrect

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figures supplied (sourced from the UNHCR 2023 Planning Figures) by the International Commission of Jurists ("ICJ") in its comments on the White Paper are; South Africa has 66 596 refugees in 2022 and the total number of refugees and asylum seekers living in South Africa is 250 250.

49. Based on the said incorrect figures, the ICJ concludes that the numbers in South Africa are "*not considerable*"[31] as in 2022, Uganda has 1 463 523 refugees, Sudan 1 097 128, Ethiopia 879 598 and Chad 592 764.

50. The figures provided by the ICJ are not correct. First, the countries such as Uganda has an encampment system whereas South Africa does not. Second, when **Ruta** was heard by the Constitutional Court in November 2018, the figures in South Africa were extremely high. The Court said:

"*At a time when the world is overladen with cross-border migrants, judges cannot be blithe about the administrative and fiscal burdens refugee reception imposes on the receiving country. South Africa is amongst the world's countries most burdened by asylum seekers and refugees. That is part of our African history, and it is part of our African present. It is clear from cases this Court has heard in the last decade that the Department is overladen and overburdened, as indeed is the country itself. As the High Court noted in Kumah, the system is open to abuse, with ever-present risk of adverse public sentiment*"[32].(Underlining supplied)

31 ICJ submission on the White Paper on Citizenship, Immigration and Refugees Protection: Towards a Complete overhaul of the Migration System in South Africa, 31 January 2024.

32 **Ruta,** para 58.

51. As of December 2023, the figures are 113 007 for refugees granted the refugee status and 81 086 active asylum seekers and 828 404 inactive asylum seekers. The inactive asylum seekers refers to those who were issued with asylum permits and later disappeared into thin air. They have not renewed their permits and the DHA has no idea as to their whereabouts. Thus, making a total of 1 334 174 of asylum seekers and refugees in South Africa.

Policy recommendations

52. The Government of the Republic of South Africa must review and/or withdraw from the 1951 Convention and the 1967 Protocol with a view to accede to them with reservations like other countries. The procedure involves depositing the reservations with Secretary-General of the United Nations and complying with other domestic requirements[33]. It must be emphasized that the contemplated withdrawal (with a view to re-acceding with reservations) does not negate South Africa's commitment to human rights.

53. A handful of public interest groups, including the UNHCR, IOM and UNICEF are opposed to the Government withdrawal from the 1951 and its 1967 Protocol. The thrust of the objection is that South Africa will still be bound by other international instruments and its Constitution. It is therefore concluded this would be an exercise in futility. It is even suggested that the withdrawal would be "*unconstitutional*". It is suggested countries such as Zambia and

33 See Helen Suzman Foundation (HSF) submission on the White Paper, January 2024.

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"JC18"

IN THE HIGH COURT OF SOUTH AFRICA — NOT REPORTABLE

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

Case Number: 2434/2019

Date Heard: 28 November 2019

Date Delivered: 17 December 2019

In the matter between :

NAZMUL HUDA	First Applicant
HABIBULAH RIPON	Second Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL : DEPARTMENT OF HOME AFFAIRS	Second Respondent
CENTRE MANAGER : PORT ELIZABETH REFUGEE RECEPTION OFFICE	Third Respondent

Case Number : 2435/2019

In the matter between :

IBRAHIM WILLARD	First Applicant
ALBERT CHIPIKO	Second Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent

DIRECTOR GENERAL : DEPARTMENT OF HOME AFFAIRS	Second Respondent
CENTRE MANAGER : PORT ELIZABETH REFUGEE RECEPTION OFFICE	Third Respondent

Case Number : 1891/2019

In the matter between :

HAJDAH ISSAN	Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL : DEPARTMENT OF HOME AFFAIRS	Second Respondent
CENTRE MANAGER : PORT ELIZABETH REFUGEE RECEPTION OFFICE	Third Respondent

Case Number : 2192/2019

In the matter between :

BRIA CHIPUTA	First Applicant
CHESTER SEMWAYO	Second Applicant
YEASIN ARAFAT RASEL	Third Applicant
SAIDY HOSSAIN	Fourth Applicant
MD FOYEZ AHAMMAD	Fifth Applicant
DENIS LILLIAN HENRY	Sixth Respondent

and

THE MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL : DEPARTMENT OF HOME AFFAIRS	Second Respondent
CENTRE MANAGER : PORT ELIZABETH REFUGEE RECEPTION OFFICE	Third Respondent

---

JUDGMENT

POTGIETER, AJ:

[1] These are four opposed applications involving the same Respondents, that were consolidated by order of this court issued on 28 October 2019. The Respondents are the Minister of Home Affairs, the Director General of Home Affairs and the Centre Manager of the Port Elizabeth Refugee Reception Office. The applications were brought under case numbers 2434/2019 ("*Huda*"); 2435/2019 ("*Willard*"); 1891/2019 ("*Issan*"); and 2192/2019 ("*Chiputa*") by 11 foreign nationals who have all attended at the Port Elizabeth Refugee Reception Office (PERRO) at different times in the recent past to apply for asylum.

[2] The issues in all the applications are identical in that the Applicants are challenging the practice and system of appointments applied at the PERRO in respect of applications for asylum. The practice entails that first time asylum seekers are subjected to an initial screening process capturing their personal details and biometrics. The applicant is then provided with a reference number and an appointment at some future date for the submission and processing of

the application for asylum. The appointments provided to the Applicants were between approximately 4 to 13 months in the future.

[3] At some point in the past applicants were provided with an official appointment slip. This practice appears to have been abandoned in favour of handwritten notes on ordinary pieces of paper being handed to applicants recording the reference number and the appointment date.

[4] Despite minor differences in the respective notices of motion, the effective relief being sought by the Applicants is an order declaring that the failure by the PERRO forthwith to accept their applications for asylum but instead to issue appointment slips, was inconsistent with the provisions of the Refugees Act, 130 of 1998 ("the Refugees Act") and the Constitution. A further order is sought directing the PERRO to accept the applications upon submission thereof and to issue asylum seeker permits to the Applicants and directing the Second and Third Respondents to pay the costs of the application.

[5] There is accordingly in these circumstances no need to differentiate between or deal individually with the respective applications which all rely on the same arguments for the relief being sought.

[6] The Applicants accept (rightly so in my view) that it is unrealistic to expect the applications to be finalised on the turn immediately upon an asylum seeker calling at the PERRO for the first time. Their case rather is that the

system of appointments is unlawful in that it gives rise to considerable delays in accepting and processing the applications which leaves the Applicants "undocumented", unprotected and completely vulnerable in the interim particularly in the absence of having immediately been provided with an asylum seeker permit.

[7] Considerable effort and time were spent by the Applicants in their papers and during argument in an attempt to demonstrate that the PERRO could increase the rate at which it is processing applications thus drastically cutting down on the waiting period for asylum seeker permits. This include increasing the human and other resources at the PERRO and processing asylum applications more efficiently.

[8] The Respondents in turn referred to the prevailing circumstances at the PERRO which necessitated the introduction of the system of appointments to cater for the significant increase in applications and to alleviate the resultant pressure on the office and the inconvenience for applicants who call at the office in their numbers without any prospect of being attended to immediately.

[9] The Respondents indicated that after the PERRO was reopened on 19 October 2018 the volume of applications for asylum increased drastically. The office lacked the human resource or financial capacity to deal with the influx resulting in the introduction of appointments at the office. The system of appointments has been in existence since July 2016 when it was introduced by

the Department of Home Affairs ("the Department") after consultation with various stakeholders.

[10] The Respondents indicated that for the period 22 October 2018 to 17 September 2019, the PERRO processed 1 565 asylum seeker applications. Out of this number 59% were applications by asylum seekers from the Southern African Development Community ("SADC") and the rest were from other African or Asian countries such as the Democratic Republic of Congo, Bangladesh and India.[1] From 1 April 2019 to 17 September 2019, 3 721 asylum seekers from the SADC, North Africa and Asian countries visited the PERRO.[2] 5 797 asylum seekers from countries other than the SADC, North Africa and Asia visited the PERRO and underwent screening tests. 9 518 asylum seekers visited the PERRO and had screening tests conducted during the 123 day period immediately preceding the attestation of the answering affidavit on 27 September 2019.[3] The screening process added an additional burden resulting in an average of only 744 applications being processed per month.[4]

[11] The screening process, also referred to as a *"10P search"*, entails the electronic recording of the applicant's fingerprints which are fed into the Department's National Integrated Information System (NIIS) and the Home Affairs National Identification System (HANIS), in order to establish whether the

[1] *Huda:* Record p. 49 para 5.6
[2] ibid p. 51 para 6.9
[3] ibid p. 51 para 6.10
[4] ibid p. 51 para 6.9

applicant is a *bona fide* first time asylum seeker.[5] According to the Respondents the screening process was introduced for the following reasons[6]:

> *"18.1 A concern was noted that some individuals do not return to their country of origin when their asylum applications were finally rejected, but they re-apply for asylum under a different name (so-called "shoppers");*
>
> *18.2 It was also noted that applicants will apply at other offices because of their individual geographical location needs, whilst the original application was still in the process (e.g. they applied at Musina, but then moved to Cape Town), and they do not indicate that they have already lodged an asylum application;*
>
> *18.3 Duplicate applications are only detected once the applicant's details are entered onto the NIIS and the fingerprints forwarded to the Home Affairs National Identification System (HANIS), for registration of the fingerprints, if not yet so registered;*
>
> *18.4 The concern about "shoppers" was raised in the report by the Auditor-General ("AG"), which indicated that during 2015, 2016 and 2017, a number of approximately 45 157 asylum seekers "shopped around", that is, they applied for asylum more than once, particularly after their permits expired or if they had been denied refugee status."*

---

[5] *Chiputa*: Record p. 83 para 17
[6] Ibid: Record p. 83 para 18

[12] In view of the upsurge in the number of applicants, the Department developed a practical measure or policy of scheduling the interviews of asylum seekers of different nationalities in the following manner[7]:

> "*(a)* *Mondays and Tuesdays are for asylum seekers from the Southern African Development Community countries (SADC), North Africa and Asia;*
>
> *(b)* *Wednesdays are for asylum seekers from Ethiopia, Burundi, Ruwanda, Uganda and Kenya;*
>
> *(c)* *Thursdays are for asylum seekers from Somalia, Nigeria, Ghana, Eritrea, Senegal and Cameroon; and*
>
> *(d)* *Fridays are reserved for asylum seekers that are fluent in the English language and do not require interpretation services.*"

[13] This practice has been in place since the reopening of the PERRO on 19 October 2018.[8]

[14] In order to comply with the obligation to supply interpretation services, the Department has established an off-site interpretation service.[9] There are 20 interpreters servicing the five refugee reception offices in the Republic. The interpreters are based at a call centre in Pretoria and provide interpretation services telephonically. The reason for opting for an off-site interpretation

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[7] *Huda*: Record pp 49-50 paras 6.1-6.2
[8] ibid: p 50 para 6.2
[9] *Chiputa*: Record pp. 82-83 paras 14-16

service was to mitigate against corrupt activities and to avoid the human interaction between interpreters and applicants for asylum. The service also encompasses the recording of the interview. The service is fashioned in such a way that various languages are provided on different days of the week. French, Swahili, Lingala, Tshiluba, Urdu, and Mandarin are provided on Mondays and Tuesdays, while Amharic and Kinyarwanda are provided on Wednesdays, and Wolof and Twi on Thursdays. This is the underlying rationale for scheduling appointments for specific nationalities on specified days of the week when the required interpretation services would be available.

[15] A challenge presented by the off-site interpretation service is that it is not always possible to reach an interpreter on the first attempt and at times it can take an hour or even longer to connect with an interpreter who is able to assist a specific applicant. This in turn impacts negatively on the number of applicants that officials are able to assist on a daily basis.[10]

[16] The PERRO is furthermore confronted by capacity challenges in that it only has four Refugee Reception Officers. In addition to considering asylum applications and conducting interviews as required by the Refugees Act, these officers are required to perform other administrative duties.[11] These include assisting with the processing of applications for refugee identity and travel documents, receiving and processing certification applications to the Standing Committee for Refugee Affairs, receiving notices of appeal and booking

[10] ibid: Record p. 85 para 21
[11] ibid : Record p. 85 para 20

appearances for Refugee Appeal Board hearings, and extension of asylum seeker permits over and above assisting asylum seekers in the completion of the prescribed asylum seeker application form.[12]

[17] While the PERRO is visited by approximately 150 applicants on a daily basis[13], only 7 asylum seekers can be interviewed per day. This is as a result of the language barrier and the need for interpretation which reduces the number even further.[14]

[18] The Applicants counter the above factors raised by the Respondents with the submission that no amount of administrative difficulty can justify unlawful action or a violation of the Applicants' rights. They rely heavily in this regard on the judgment in *Tafira & Others v Ngozwane & Others*[15] for the contention that, despite any administrative difficulties that might be experienced by the PERRO, the system of appointments applied by the PERRO was unlawful. That matter dealt with the appointment system that applied in respect of applications for asylum at the Rosettenville and Marabastad refugee reception offices in Gauteng during 2006. The waiting period for appointments in that case would be between 6 months to almost a year.

[19] The court appears to have accepted the arguments of the Applicants in that case "... *that during such period* [while awaiting the appointment date] *the*

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[12] *Huda*: Record pp. 51-52 para 6.11
[13] *Chiputa*: Record p. 84 para 19
[14] *Huda*: Record p. 51 para 6.8
[15] Transvaal Provincial Division case number 12960/06 (unreported)

asylum seeker remains an illegal foreigner who is liable to be arrested, detained and deported - the reason being that the mere fact of such an appointment, or the possession of an appointment slip, creates no rights for the particular asylum seeker".[16]

[20] The court, moreover, accepted[17] as correct the following statement in *Kiliko & Others v Minister of Home Affairs & Others*[18] concerning the stated effect of failing to issue a section 22 permit to asylum seekers :

> "*Until an asylum seeker obtains an asylum seeker permit in terms of section 22 of the Refugees Act he or she remains an illegal foreigner and as such subject to the restrictions, limitations and inroads enumerated in the preceding paragraph, which self-evidently, impacts deleteriously upon or threatens to so impact upon at least his or her human dignity and the freedom and security of his or her person.*"

[21] The court concluded as follows in this regard :

> "*I consequently agree with the submission on behalf of the applicants that an appointment slip is of no legal force or effect and affords no protection to the applicant for asylum at all. According to the relevant legislation it is only a section 22 permit which affords an asylum seeker with the necessary protection against his arrest, detention and deportation. No amount of information on such an appointment slip can change the legal*

[16] *ibid* p. 5
[17] at p. 13 of the judgment
[18] 2006(4) SA 114 (C) at para [27]

status thereof and the bearer thereof will remain an illegal foreigner."[19]

[22] The court continued as follows:

"Only a section 22 permit would legalise an asylum seeker's presence in the country and afford him the necessary protection.

I consequently agree with the submissions on behalf of the applicants that the issuing of a section 22 permit is of vital importance. Without this permit the asylum seeker has no legal right to remain in South Africa and suffers the dire consequences that have already been referred to above on a daily basis. (See Kiliko & Others v Minister of Home Affairs and Others (supra).)

Consequently the consequences of a delay in obtaining a section 22 permit are extremely severe. The extent of the delay which is inherent in the appointment system currently employed at the Marabastad and Rosettenville offices, and which was not disputed by the respondents, impact extremely negatively on the statutory and constitutional rights of all asylum seekers. It is unacceptable that applicants should face the severe consequences referred to above over such an extraordinary lengthy period of time. The fact that a system of appointments is acceptable on principle does not mean that a system which has such results in practice, can be accepted as being lawful. A system which results in applicants having to face, over a prolonged period of time, a real risk of arrest, detention, deportation and other violations of statutory and constitutional rights, in itself violates the applicants' constitutional rights and is unlawful. These risks and the other violations of

[19] at p. 21of the judgment

statutory and constitutional rights is a direct consequence of the appointment system presently implemented by the Department."[20]

[23] The court came to the following conclusion :

"In conclusion, whatever the legality would be of any future appointments policy to be adopted by the respondents, the appointment system currently in use at the Marabastad and Rosettenville offices is clearly unconstitutional and unlawful."[21]

[24] The Respondents submitted in reply firstly that *Tafira* is distinguishable on the facts in that it dealt with the situation that prevailed at the two Refugee Reception Offices at the time prior to the formal introduction of the appointment system in June 2016 and the implementation thereof at the PERRO in the circumstances that prevailed there after its reopening in October 2018. They further submitted that the effect of the Refugees Act and its interface with the provisions of the Immigration Act, 13 of 2002 ("the Immigration Act") have been clarified by the Constitutional Court in *Ruta v Minister of Home Affairs* (*"Ruta"*).[22] The deleterious consequences for asylum seekers, so the argument continued, referred to by the court in *Tafira* and relied upon for the conclusion that the appointment system in that matter was unlawful, were based on the provisions of the Immigration Act. The Respondents argued that the Constitutional Court held in *Ruta* that once a foreign national indicated an intention to apply for asylum, the protections offered by the Refugees Act

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[20] *ibid* pp. 26 - 27
[21] *ibid* p. 30
[22] 2019(3) BCLR 383 (CC)

immediately accrue to the foreign national to the exclusion of the negative consequences for illegal foreigners set out in the Immigration Act. The Respondents accordingly submitted that the decision in *Tafira* was based upon an incorrect legal premise and that it should not be followed by this court. There appears to be merit in this submission.

[25] The Constitutional Court formulated the issues in *Ruta* as follows:

> *"At issue are the reach of the Refugees Act and of the Immigration Act as well as the interplay between these two statutes.*[23]
>
> *The question is this: should an 'illegal foreigner' who claims to be a refugee and expresses intention to apply for asylum be permitted to apply in accordance with the Refugees Act instead of being dealt with under the Immigration Act?'*[24]

[26] In considering the relevant jurisprudence of the Supreme Court of Appeal in respect of the interpretation of the Refugees Act and the Immigration Act the Constitutional Court referred to a quartet of authoritative decisions of the Supreme Court of Appeal relevant to illegal foreigners. In one of these cases, *Bula v Minister of Home Affairs,*[25] the Supreme Court of Appeal decided that a detained person indicating an intention to apply for asylum, is entitled to be freed and to be issued with an asylum seeker permit for 14 days in terms of Regulation 2(2) of the Refugee Regulations. This Regulation applies to any

[23] at 385 para [3]
[24] at 390 para [14]
[25] 2012(4) SA 560 (SCA)

person who entered the Republic and is encountered in violation of the Immigration Act and who has not applied for asylum in terms of section 21 of the Refugees Act. The court held that it followed *"ineluctably"* that once an intention to apply for asylum was evinced, the protective provisions of the Refugees Act and the Regulations come into play.[26]

[27] In determining whether the said jurisprudence of the Supreme Court of Appeal reflected in the quartet of decisions should be confirmed, the Constitutional Court dealt pertinently with the interface between the Immigration Act and the Refugees Act. The court effectively rejected the argument advanced on behalf of the Minister of Home Affairs that the provisions of the Immigration Act trump those of the Refugees Act and that the former provisions primarily regulate the position of asylum seekers. The court indicated that while the Immigration Act determines who is an *"illegal foreigner"* liable to deportation, the Refugees Act and that statute alone, determines who may seek asylum and who is entitled to refugee status.[27] The court continued as follows:

> *"The Refugees Act makes plain principled provision for the reception and management of asylum seeker applications. The provisions of the Immigration Act must thus be read together with and in harmony with those of the Refugees Act. This can readily be done. Though an asylum seeker who is in the country unlawfully is an 'illegal foreigner' under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status,*

[26] at 393 para [18]
[27] at 404 para [41]

his or her claim to asylum must first be processed under the Refugees Act. That is the meaning of section 2 of that Act, and it is the meaning of the two statutes when read together to harmonise with each other."[28]

"To impose the system of review the Immigration Act creates wholesale upon all illegal foreigners, without singling out those who seek refugee status, would radically undermine the plain meaning of section 2 of the Refugees Act, in particular, and the import of the statute generally."[29]

[28] The court concluded as follows in confirming the decisions of the Supreme Court of Appeal in the said quartet of cases:

"These considerations point away from the conclusion that the Immigration Act covers the field of refugee applications or predominates within it. Until the right to seek asylum is afforded and a proper determination procedure is engaged and completed, the Constitution requires that the principle of non-refoulement as articulated in section 2 of the Refugees Act must prevail. The 'shield of non-refoulement' may be lifted only after a proper determination has been completed. The Immigration Act then applies, subject, of course, to the continuing obligation not to contravene customary international law and human rights and to indigenous constitutional safeguards.

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[28] at 405 para [43]
[29] at 406 para [45]

All this impels the conclusion that the principles affirmed and the practical determinations made in Abda, Arse, Bula and Ersumo were correct.'[30]

[29] It follows from what is set out above that the premise of vulnerability and prejudice seemingly confronting aspirant asylum seekers in the absence of an asylum seeker permit underpinning the court's conclusions in *Tafira*, does not bear scrutiny. The perceived prejudice referred to in *Tafira* is based upon the provisions of the Immigration Act which do no predominate in the case of intending asylum seekers such as the applicants in the present matters. As correctly submitted by the Applicants *Tafira* can at best constitute persuasive authority insofar as this matter is concerned I am not persuaded in the circumstances to follow the conclusion in *Tafira*.

[30] In my view the system of appointments applying at the PERRO cannot *per se* be unlawful. There are compelling reasons why it is not reasonably practicable for the PERRO in the prevailing circumstances to forthwith process asylum applications on the first presentation by an applicant and immediately provide the applicant with an asylum seeker permit. The process as such that has been decided upon and that is being followed by the PERRO does not strike me as irrational or unreasonable. The difficulty to my mind lies in the implementation thereof. I accept as reasonable that the Applicants could not be accommodated immediately but had to be provided with appointments to submit their asylum applications. I do, however, share the discomfort of the Applicants

[30] at 408 paras [54] and [55]

with the significant delays resulting from the long waiting periods for their appointments. On the other hand, I do not regard this aspect as rendering the entire appointment system unlawful. This is particularly so in view of the conclusion in *Ruta* that aspirant asylum seekers such as the Applicants are not exposed to the negative consequences attaching to *"illegal foreigners"* under the Immigration Act, at least while their applications for asylum have not yet been finalised.

[31] I am, however, of the view that the long delays in accepting the asylum applications in issue in these matters, occasioned by the appointments allocated to the present Applicants (save for Habibulah Ripon, the Second Applicant in *Huda* whose appointment was on 25 November 2019) are inconsistent with at least the requirements of the Refugees Act. In my view the latter Act requires Refugee Reception Officers to facilitate the processing and determination of asylum applications (and by the same token the compulsory issuing of asylum seeker permits) within a reasonable period of time. The waiting period for their appointments by those Applicants who had not yet been interviewed strikes me as unreasonable in the circumstances of this case despite them not facing the negative consequences set out in the Immigration Act. There are other benefits such as being able to take up employment opportunities, that the Applicants might very well be deprived of while awaiting receipt of asylum seeker permits. This supports the conclusion that asylum applications must be accepted and processed with due dispatch.

[32] It is naturally not possible or desirable to set a standard period of time within which all asylum applications should be determined and I should not be understood as doing so in this matter. Each case will necessarily depend upon and must be decided in the light of its own peculiar facts and circumstances.

[33] In the heads of argument in *Huda* and *Willard*, Mr Nthai SC who appeared with Ms Masimene for the Respondents in those matters, submitted that in the event of the court deciding to come to the assistance of the Applicants there should not be a substitution order, but that the Respondents should instead be ordered to deal with the asylum applications within a period of 30 days from the date of the order. Ms Pango who appeared for the same Respondents in *Chiputa* and *Issan*, aligned herself with the Respondents' arguments in *Huda* and *Willard*.

[34] Although the appointment system as such is not unlawful, I am of the view that the current appointment dates of the Applicants in question are not reasonable and that it is not just and equitable that those appointment dates should remain undisturbed. Given the time that has already elapsed since their first appearance at the PERRO, I am of the view that it is fair and reasonable (also bearing in mind the time period proposed on behalf of the Respondents) that the Applicants in question be allocated new appointment dates within 30 days for the acceptance and processing of their asylum applications.

[35] The remaining issue that warrants attention is the proof provided to the Applicants of having attended at the PERRO for purposes of their asylum applications and of having been allocated an appointment for the acceptance and processing of the applications. The PERRO had previously issued formal appointment slips to applicants containing the necessary information, bearing the stamp of the Department and the Code of Arms of the Republic. An example is annexed to the founding affidavit of Mr Huda as annexure "NH2" in the *Huda* application.[31] This was the slip provided to Mr Huda for his first appointment. He, like the other Applicants, has been given a handwritten note on a piece of paper as proof of the new appointment allocated to him. This latter practice is open to abuse and undermines the integrity and security of the appointments system. There is no explanation why the PERRO has apparently moved away from issuing formal appointment slips. Notwithstanding the fact that *ex lege*, the Applicants had at all material times enjoyed the protection of the Refugees Act, the official appointment slip clearly would find far more credence among third parties than the informal handwritten notes provided in this instance to the Applicants. Practically the official appointment slip would, to their immense benefit, place the fact that the Applicants have pending asylum applications beyond any question and would facilitate proof that the Applicants enjoy the protection of the Refugees Act.

[36] I have not been provided with any explanation why the PERRO has seemingly moved away from issuing official appointment slips or why this

[31] *Huda*: Record p. 27

practice cannot be reinstated or continued. I am of the view that the Applicants in question are entitled to be provided with official appointment slips reflecting the new appointment dates allocated to them pursuant to the order to be issued herein. The PERRO would, moreover, be well advised to reinstate or continue this practice in respect of all applications for asylum.

[37] Insofar as the issue of costs is concerned, I am of the view that although the Applicants have not been successful in respect of the principal relief that they sought, they have nevertheless been successful in respect of an important aspect of the matter and that it is fair that they should not be deprived of their costs or be ordered to pay the Respondents' costs.

[38] In the result the following order issues:

1. It is declared that the delays occasioned by the appointment dates currently allocated to the Applicants (save for *Habibulah Ripon*) for the acceptance and processing of their applications for asylum in terms of section 21(1) and the issuing of asylum seeker permits in terms of section 22(1) of the Refugees Act, 130 of 1998 ("the Act") are inconsistent with the provisions of the Act.

2. The Third Respondent is directed forthwith to provide the Applicants (save for *Habibulah Ripon*) with:

2.1 new appointment dates, that are no later than 30 days from the date of this order, for the acceptance and processing of their applications for asylum in terms of section 21(1) of the Act and for the immediate issuing of asylum seeker permits to the Applicants in question in terms of section 22(1) of the Act;

2.2 official appointment slips bearing the stamp of the Department of Home Affairs and reflecting at least the personal details of the Applicant, the date, time and place of the new appointment and the reference number allocated to the matter.

3. The Second and Third Respondents are ordered to pay the costs of the application.

D O POTGIETER

ACTING JUDGE OF THE HIGH COURT

Appearances:

Case Number:	2434/2019 & 2435/2019
For Applicants:	Adv D Simonsz instructed by Ntanzi Attorneys, Port Elizabeth
For Respondents:	Adv S Nthai SC and Adv M S Masimene instructed by The State Attorney, Port Elizabeth

Case Number:	1891/2019 & 2192/2019
For Applicants:	Adv M E Menti instructed by Ntanzi Attorneys, Port Elizabeth
For Respondents:	Adv M N Pango instructed by The State Attorney, Port Elizabeth

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"JC19"

QUEUE HERE FOR CORRUPTION

MEASURING IRREGULARITIES IN SOUTH AFRICA'S ASYLUM SYSTEM

Roni Amit, PhD

A REPORT BY **LAWYERS FOR HUMAN RIGHTS** AND **THE AFRICAN CENTRE FOR MIGRATION & SOCIETY**

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JULY 2015

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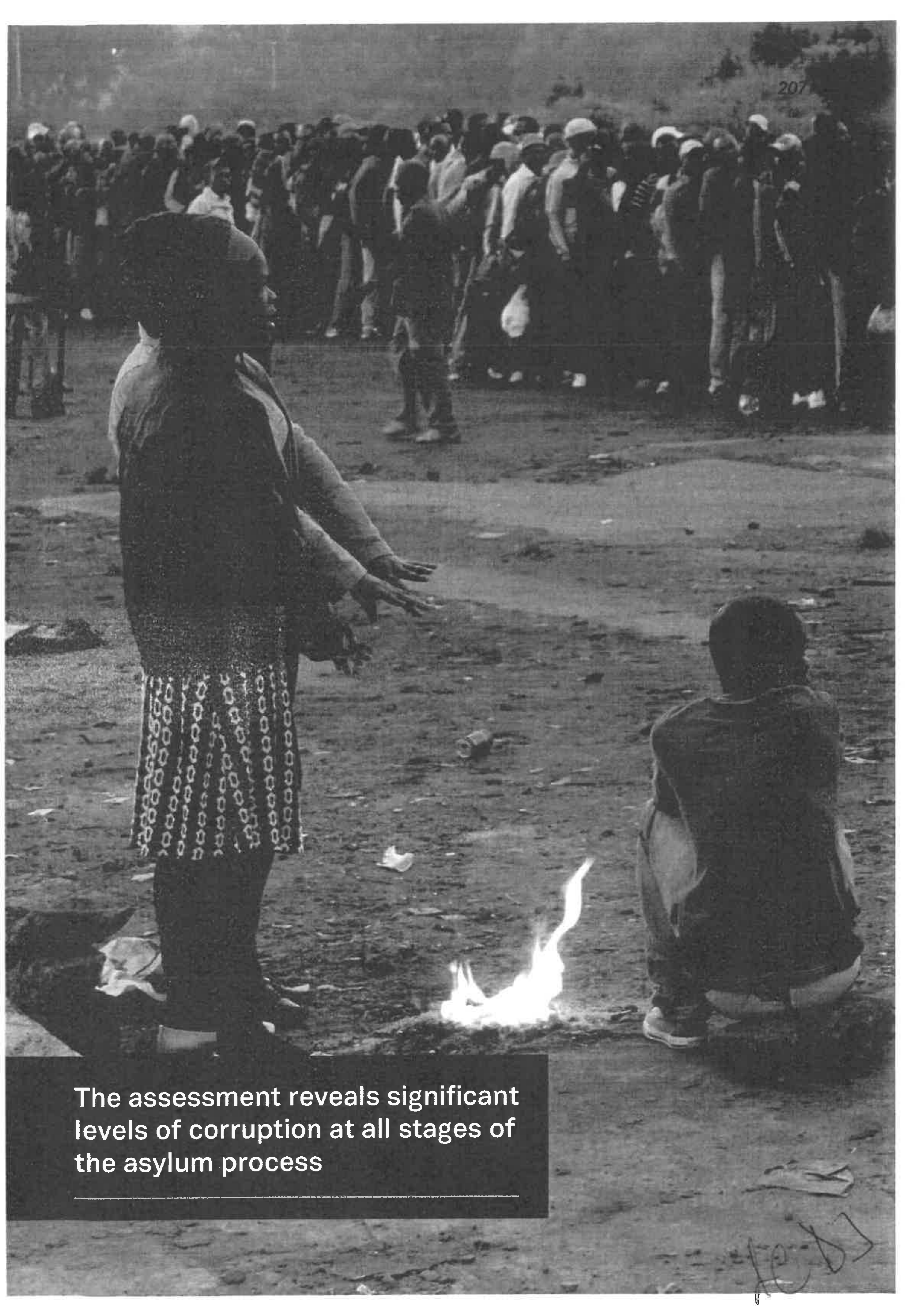


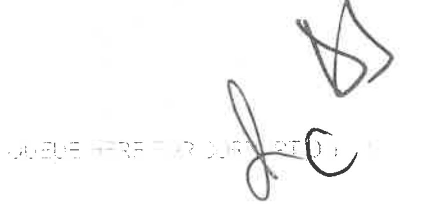
The assessment reveals significant levels of corruption at all stages of the asylum process

EXECUTIVE **SUMMARY**

South Africa's refugee reception offices (RROs) are the gateway through which would-be asylum seekers and refugees access legal protection. Following years of anecdotal evidence regarding corruption at the RROs, Lawyers for Human Rights (LHR) and the African Centre for Migration & Society (ACMS) conducted a quantitative assessment of the scope of corruption at these offices. **The assessment revealed significant levels of corruption involving multiple actors, occurring at all stages of the asylum process, and continuing even after an individual had obtained refugee status.** Results varied by office, but **overall almost one-third of respondents experienced corruption at an RRO**. The Marabastad RRO in Pretoria showed the highest levels of corruption.

The presence of corruption is significant for its effects on the ability of individuals to access protection; on the integrity of a system that is an integral part of South Africa's constitutional and international obligations; and on the incentive structures within and rational functioning of the public service. Continued corruption risks producing a system where the behaviour of public officials is removed from legal guarantees and the principles of equality, fairness, and accountability. Moreover, the delinking of refugee status from protection needs undermines the government's migration management goals and provides a mechanism for economic migrants to enter the country and regularise their status, even as government devotes greater resources to border control and deportation. It is precisely those migrants whose entry the government is seeking to control who can undermine these controls by engaging with corrupt officials. At the same time, individuals with valid protection needs may be denied protection because they are either unwilling or unable to engage with these same officials.

The corruption detailed in this report is based on a survey administered to 928 asylum seekers and refugees while they were exiting or waiting to enter one of the country's five refugee reception offices. The numbers interviewed at each office are listed below.



REFUGEE RECEPTION OFFICE	NUMBER OF RESPONDENTS
Marabastad (Pretoria)	**208**
Tshwane Interim Refugee Reception Office (TIRRO – Pretoria)	**204**
Cape Town	**175**
Musina	**205**
Durban	**136**

The survey included a series of quantitative questions about the border crossing, the various stages of the asylum application process, and respondents' efforts to obtain and maintain documentation, as well as experiences with arrest and detention. The inclusion of a small number of open-ended questions also elicited detailed accounts of migrants' experiences. The proportions of asylum seekers and refugees represented are detailed below.

STATUS OF RESPONDENTS	PERCENTAGE	PERCENTAGE WITH VALID DOCUMENTATION
Asylum seeker	**86%**	**80%**
Refugee	**11%**	**98%**
Undocumented	**3%**	

THE PATH TO CORRUPTION

Several factors have contributed to the prevalence of corruption in the country's refugee reception offices. Foremost among these is the Department of Home Affairs' (DHA's) failure to respond to high levels of demand that quickly exceeded the capacity of a

system designed around individualised decision-making. Rather than addressing the situation by reforming immigration policy or increasing resources in the asylum system, the Department's single-minded focus on decreasing demand without any concomitant attention to service provision exacerbated the situation. Its decision to close three refugee reception offices further contributed to these problems.

Refugee reception offices are consequently characterised by unwieldy queue management, poor quality status determination procedures, and arbitrary discretion in issuing documents and renewals. These conditions create multiple opportunities for corruption. Additional factors provide further incentives: individuals must generally make multiple visits to a refugee reception office to address a single issue; they remain in the system for several years, necessitating even more visits; and they receive legally problematic status determination decisions that require appeals. Rather than address the factors contributing to corruption, the DHA has adopted a reactive approach in which it responds to individual allegations of corruption; it has, thus far, failed to initiate more far-reaching investigations or reforms of the asylum system.

KEY FINDINGS

Asylum seekers and refugees experienced corruption at multiple stages of the asylum application process. Corruption continued even after individuals obtained refugee status. The Marabastad refugee reception office showed the highest levels of corruption. The Durban office had the lowest levels. Overall, 30% of respondents reported experiencing corruption at some stage in the asylum process, pointing to an asylum system in which many official actions are guided by the objective of revenue collection. The pervasiveness of corruption in all aspects of the asylum process reveals a process that is no longer bounded by legal guarantees, predictability, or administrative fairness.

Some of the report's main findings are summarised below.

BORDER CROSSING

- 13% of respondents reported being asked for money by a border official.
- Many respondents reported paying an extra amount to the driver transporting them across the border for the purposes of paying off border officials.

ACCESS TO THE RRO

- 20% of respondents reported experiencing corruption in the queue. At Marabastad, 51% reported experiencing corruption in the queue.
- 13% of respondents reported being unable to access an office because they did not pay. At Marabastad, 30% reported being denied access because they did not pay.

Access to the RRO

20%

Corruption in the queue
MARABASTAD: **51%**

13%

Denied access because respondent did not pay
MARABASTAD: **30%**

INSIDE THE RRO

- 13% of respondents experienced corruption inside the refugee reception office. Inside Marabastad, this number was 31%.
- 12% of respondents had paid at least once to renew their asylum permit. At Marabastad, 24% had paid at least once.

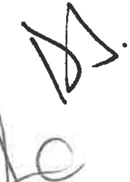
Inside the RRO

13%

Corruption inside the RRO
MARABASTAD: **31%**

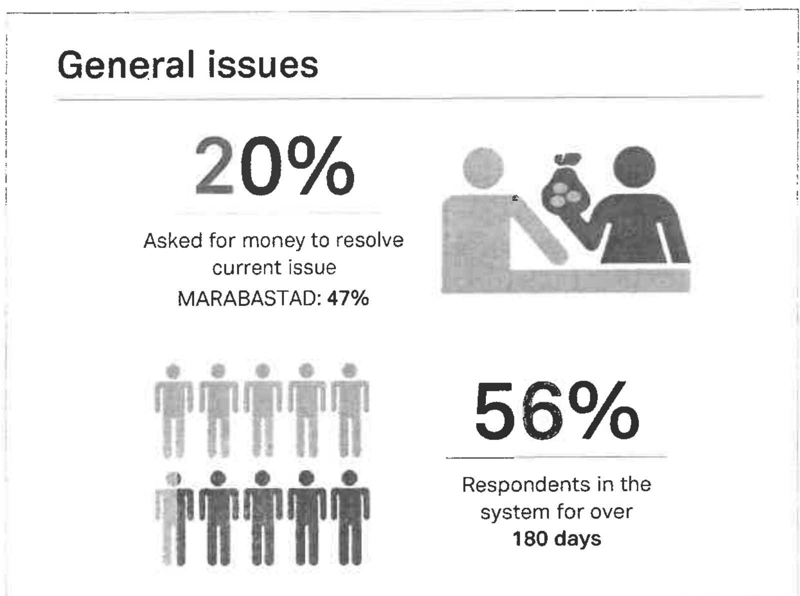
12%

Paid at least once to renew asylum permit
MARABASTAD: **24%**



GENERAL ISSUES

- 20% of respondents had been asked for money to resolve the issue they were at the office on that day to resolve. At Marabastad, this number was 47%.
- 56% of respondents had been in the system for over 180 days, which is the time period stipulated in the Regulations to the Refugee Act (No. 130, 1998) for the asylum process to be completed.



CONCLUSION

An effective response to corruption must address the conditions that allow corruption to continue largely unchecked. This includes the links between migration policy and demand on the asylum system, the adequacy of resources dedicated to asylum, the continued operation of urban refugee reception offices, and the adoption of practices that fulfil the country's constitutional and international obligations, as well as the Batho Pele principles.

RECOMMENDATIONS

TO THE DHA:

Queuing

- Create a waiting area inside the office that is based on an electronic numbering system.
- Establish a more effective queue management system that may, for example, include separate numbering queues based on the type/level of service requested, with a reception desk that directs individuals to the appropriate number queue.
- Post instructions in numerous locations inside and outside the office.

Application Process

- Provide individuals with asylum application forms that they can fill out away from the office to minimise the reliance on officials or private individuals for assistance and to eliminate related opportunities for corruption.
- Include information about the application process, with a clear explanation of the rights and duties of asylum seekers and refugees, on the application form.
- Inform individuals that payment is not required for any stage of the application process.
- Provide information on how to report corruption with the application form.

Renewals

- Establish a set period of validity for renewals that eliminates a refugee reception officer's discretion.
- Ensure that renewals are recorded electronically by the officer.
- Post information so that individuals know that only such electronically recorded renewals are valid and that no payment is required.
- Create a computerised check-in system for individuals who are at the office for renewals. Having a record of individuals who arrived at a refugee reception office for their renewals will flag any potential irregularities in the event that such individuals do not subsequently obtain these renewals.
- Keep an electronic record of which individuals were served by which refugee reception officer so that any irregularities can be traced back to the officer.

Status Determination

- Professionalise the status determination process so that decisions reflect the details of an individual's claim and are not simply generic summaries of country conditions.
- Require refugee status determination officers to provide specific reasons in the case of both rejections and approvals of

asylum claims, which will eliminate the possibility of payment for refugee status.

- Allow asylum seekers to have legal representation during the status determination interview.
- Create a computerised system that does not allow for the issuance of refugee documents without an accompanying written decision containing reasons.
- Post informational signs informing asylum seekers of the process for obtaining refugee documents.

Fines

- Allow individuals to renew/replace status documents even if they have incurred a fine.
- Separate the process for renewing/replacing documents from the process laid out in the Criminal Procedures Act for paying or challenging fines.
- Post informational signs stating that no payment is necessary at the time of renewing or replacing lost documents.
- Eliminate refugee reception officer discretion to determine when documents should be renewed or replaced.
- Renew/replace documents automatically and create a separate process for determining when individuals are no longer eligible for documentation.
- Train police officers on the fines process in accordance with the procedures laid out in the Refugees and Criminal Procedures Acts.

Investigating Corruption

- Establish an anonymous mechanism for reporting corruption.
- Establish a protocol for investigating corruption.
- Explore potential monitoring methods such as installing cameras outside and inside the offices.
- Initiate independent investigations of each stage of the asylum process: queuing, initial application, renewals, status determination, and refugee documents.
- Guarantee to asylum seekers and refugees who have been forced to pay for access or documentation that they will not be punished for reporting corruption.
- Post information about reporting corruption.
- Ensure that investigatory processes are sensitive to the situation of asylum seeker and refugee witnesses, who may be undocumented, may distrust authority, may suffer from post-traumatic stress disorder, or may face additional challenges that require particular sensitivity.

TO PARLIAMENT AND THE PORTFOLIO COMMITTEE FOR HOME AFFAIRS:

- Exercise greater oversight of the DHA in its management of the asylum process.

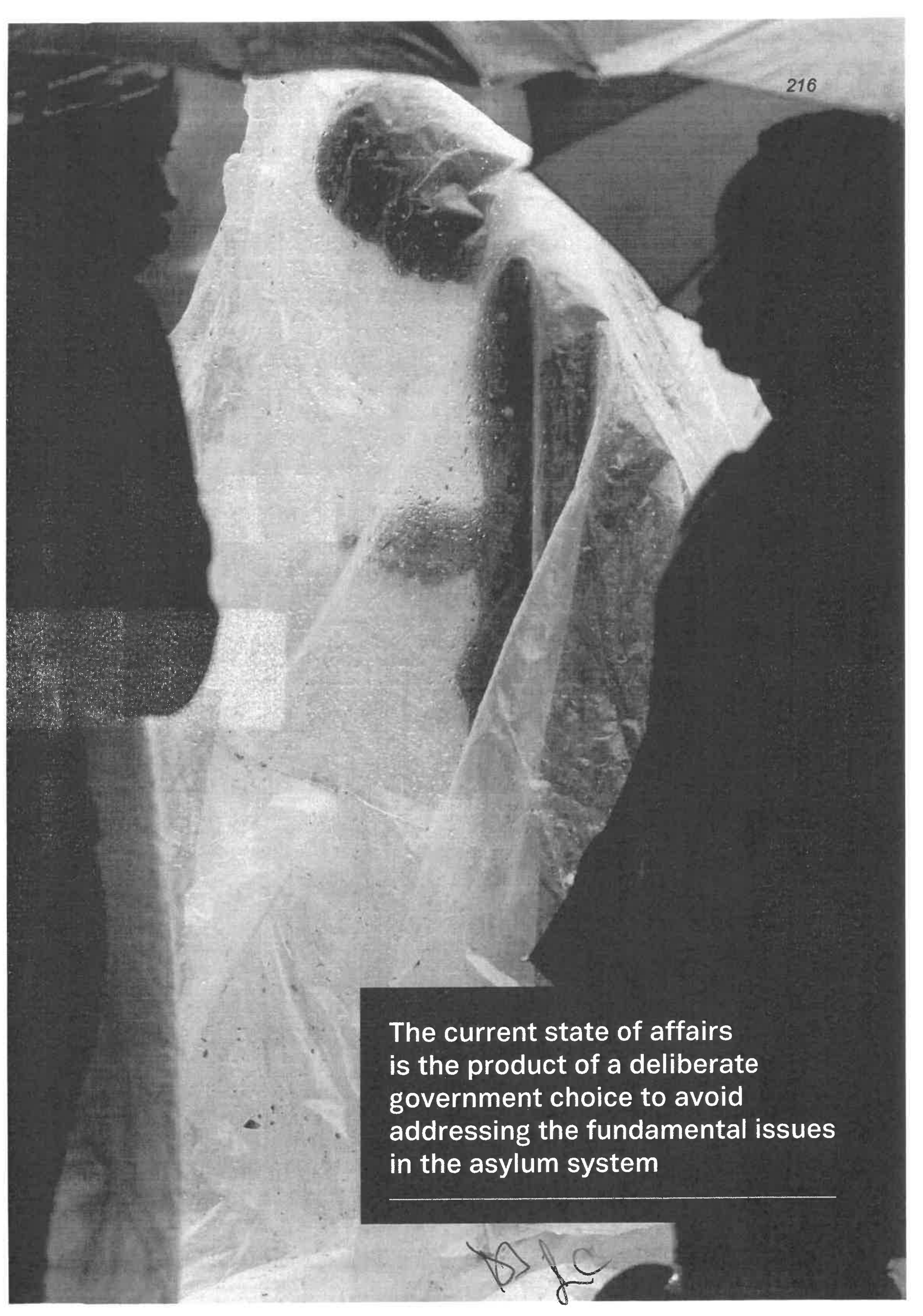
- Consider how reforming the immigration system might affect the operation of the asylum system.
- Demand greater accountability from the DHA in its efforts to combat corruption.
- Increase the resources directed at operating the asylum system to ensure adequate service delivery.

TO THE PUBLIC PROTECTOR AND THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION:

- Investigate and monitor corruption at the refugee reception offices.
- Engage with the DHA about its efforts to combat corruption.

TO THE SOUTH AFRICAN POLICE SERVICE AND THE NATIONAL PROSECUTING AUTHORITY:

- Develop a protocol for responding to corruption allegations, including guidelines for responding to asylum seekers who may be undocumented as a result of corruption.
- Investigate allegations of corruption and prosecute corrupt officials.
- Do not prosecute or otherwise punish asylum seekers and refugees who report corruption, regardless of their documentation status or complicity in the corrupt practices.
- Ensure that investigatory processes are sensitive to the situation of asylum seeker and refugee witnesses, who may be undocumented, may distrust authority, may suffer from post-traumatic stress disorder, or may face additional challenges that require particular sensitivity.


The current state of affairs is the product of a deliberate government choice to avoid addressing the fundamental issues in the asylum system

INTRODUCTION

Established in 1998, South Africa's asylum system was designed to identify those individuals in need of protection in accordance with the country's international obligations and democratic character. Implementation of this system, however, has strayed far from this initial intention. Plagued with problems of inefficiency, poor quality decision-making, and corruption, administrators of the asylum system reject almost all applicants – regardless of their protection needs.[1] Researchers and non-governmental organisations (NGOs) have extensively documented the efficiency and quality problems.[2] But there is little research documenting the extent of corruption in the asylum system.

The evidence presented in this report reveals high levels of corruption throughout the asylum application process and continuing after an individual has acquired refugee status. Rates vary by refugee reception office (RRO), with respondents at the Marabastad office in Pretoria reporting the highest rates of corruption, but overall almost one-third of individuals experienced corruption at some point. **In order to address the prevalence of corruption, the Department of Home Affairs (DHA) and other stakeholders must recognise that it pervades all stages of the asylum process, that it occurs at multiple sites, and that it is a continuing phenomenon that is not confined to isolated individuals or incidents.**

In light of its harmful effects, the government must move beyond hollow statements and adopt proactive measures to combat corruption. Three key issues are at stake. First, corruption affects an individual's ability to access protection. Second, it implicates the integrity of a system that is critical for South Africa to meets its constitutional and international obligations. Third, corruption in one department runs the risk of spreading like a cancer to other departments and, more generally, distorting the incentive structures within the public service. If not checked, the result will be a system of governance lacking in predictability, accountability, equality, and fairness – a system where legal guarantees do not dictate government behaviour.

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1 According to the DHA's 2013 Annual Asylum Statistics for UNHCR (unpublished), 7,286 out of 68, 241 adjudicated asylum claims were approved. This is a rejection rate of approximately 90%.

2 R. Amit, 'No Way in: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices,' ACMS Research Report, 2012. Available at **http://www.migration.org.za/uploads/docs/report-40.pdf**; R. Amit, 'All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination,' ACMS Research Report, 2012. Available at **http://www.migration.org.za/uploads/docs/report-35.pdf**

Although corruption has not previously been measured, it is no secret that individuals purchase asylum and refugee documents, or pay just to gain access to the refugee reception offices. Corruption has permeated every step of the asylum process, from access to documentation to renewals. While many of those who pay are genuine asylum seekers who will face grave danger if deported and have no other way to obtain protection, others are economic migrants without an alternative path to remain in the country legally. **Even as the government continues to point to the scourge of economic migrants abusing the asylum system, it does little to combat the corruption that enables individuals without protection needs to claim asylum while denying protection to the system's intended beneficiaries.**

Journalists and NGOs working with affected populations have periodically reported on the corruption in the asylum system.[3] In 2004, the Public Protector published a report on unlawful conduct at the Braamfontein RRO in Johannesburg.[4] International reports have also noted corruption problems at the RROs.[5] The US State Department has flagged corruption annually in its country reports between 2009 and 2013:

> *Although the DHA had anticorruption programs in place and punished officials or contracted security officers found to be accepting bribes, NGOs and asylum applicants continued to report that immigration authorities sought bribes from those seeking permits to remain in the country, particularly in cases where applicants allowed their documents to expire.*[6]

Yet, with the exception of a few high profile corruption cases,[7] the DHA's response has been limited. It has generally responded only

3 See, e.g., **http://www.irinnews.org/report/97944/south-africa-s-flawed-asylum-system**; **http://www.irinnews.org/report/94692/south-africa-red-tape-ensnares-asylum-seekers**; **http://www.corruptionwatch.org.za/content/corrupt-officials-make-life-tough-refugees**; **http://www.hrw.org/reports/2005/southafrica1105/5.htm**; **http://bit.ly/MG-Refugeesface-corruption**; The Consortium for Refugees and Migrants in South Africa (CoRMSA), 'Protecting Refugees, Asylum Seekers, and Immigrants in South Africa,' Johannesburg, June 2009, available at **http://bit.ly/CORMSAProtectingRefugees** .

4 'Report on an Investigation into allegations of undue delay, unlawful and improper conduct and prejudice in the rendering of services at Braamfontein refugee reception centre,' cited in Human Rights Watch, 'Living on the Margins: Inadequate Protection for refugees and asylum seekers in Johannesburg,' November 2005, available at **http://www.refworld.org/docid/43ba84a54.html**.

5 United Nations High Commissioner for Refugees (UNHCR), 'Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report- Universal Periodic Review: South Africa,' November 2011, available at http://www.refworld.org/docid/4ed724952.html; Human Rights Watch, 'Human Rights Watch World Report, 2007- South Africa, January 2007, available at **http://www.refworld.org/docid/45aca2a51a.html**; Human Rights Watch, 'Living on the Margins: Inadequate Protection for Refugees and Asylum Seekers in Johannesburg,' November 2005.

6 Country Reports on Human Rights Practices, South Africa, 2013, available at **http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper** .

7 In June 2013, for example, the DHA removed a security official from the Cape Town office for allegedly taking bribes. News24, 'Home Affairs official fired over bribe,' 7 June 2013, available at **http://www.news24.com/SouthAfrica/News/Home-affairs-official-fired-over-bribe-20130607** .

to particular allegations of corruption – asking for specific details and evidence and placing the burden on the victims of corruption to substantiate their stories – without conducting more comprehensive or independent investigations.

The tepid DHA response has been facilitated by the lack of systemic evidence highlighting the scope of the corruption problem. A few research efforts, however, have pointed to the prevalence of corruption in the asylum system. In 2003, the Community Agency for Social Enquiry (CASE) published a baseline study of asylum seekers and refugees that included questions about corruption at four refugee reception offices (Johannesburg, Cape Town, Pretoria, and Durban).[8] The survey of 1500 asylum seekers and refugees found that applicants were asked to pay at various stages of the asylum application process, as detailed in the table below.[9]

Asked to pay to submit application	**29%**
Asked to pay to renew asylum documents	**11%**
Asked to pay for refugee documents	**16%**
Asked to pay to renew refugee documents	**6%**

Eight years later, the African Centre for Migration & Society (ACMS) surveyed 1417 asylum seekers and refugees about their experiences at the RROs.[10] The ACMS administered two surveys – one targeting new applicants and one targeting applicants who had undergone status determination interviews. It found that approximately a quarter of respondents were asked for money while queuing, and 7%-8% experienced corruption inside the office. The survey also noted that levels of corruption varied greatly by office and that the highest levels of corruption (40%) occurred in the queues at the Marabastad refugee reception office.

Aside from these limited studies, there is no comprehensive data measuring levels of corruption at the country's refugee reception offices. This study seeks to address that gap by asking individuals at the RROs specifically about their experiences with corruption. This information is vital in order for Home Affairs to craft an effective response to the problem of corruption in its offices along the path to establishing a well-functioning asylum system.

8 Community Agency for Social Inquiry, 'National Refugee Baseline Survey: Final Report,' Researched for Japan International Cooperation Agency & United Nations High Commissioner for Refugees, November 2003.

9 Ibid., at pp. 115-120.

10 R. Amit, 'No Way in: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices,' ACMS Research Report, 2012. Available at **http://www.migration.org.za/uploads/docs/report-40.pdf**

METHODOLOGY

The research defined corruption narrowly as a request for money. While corruption may take other forms, the narrow definition provided the lowest risk of individuals applying their own interpretations of when they experienced corruption, even if it risked under-reporting. Seeking to move from anecdotal reports to a more systemic picture of the prevalence of corruption in the asylum system, the research design involved a survey that could be broadly administered to a representative sample of individuals seeking services at the refugee reception offices. The questions targeted the frequency and circumstances under which individuals were asked for money as they interacted with the asylum system.

The field researchers interviewed a total of 928 respondents queuing outside or exiting one of the country's five refugee reception offices that remain open to either newcomers or existing asylum seekers: Cape Town, Musina, Durban, and the two offices in Pretoria.[11] The table below shows the numbers interviewed at each office.

OFFICE	NUMBER OF RESPONDENTS
Marabastad (Pretoria)	208
Tshwane Interim Refugee Reception Office (TIRRO – Pretoria)	204
Cape Town	175
Musina	205
Durban	136

The research design set a goal of 200 respondents from each office. Although this target was not met at the Durban office, this did not have a significant effect on the results, as the office did not register substantial levels of corruption as detailed below. The Cape Town

11 No interviews were conducted in Port Elizabeth, where the refugee reception office has been closed since October 2011. Existing asylum seekers and refugees are able to access a limited set of services at a satellite DHA office in PE.

office also fell slightly short of the target. Preliminary results there indicate some levels of corruption, but additional research is needed to determine with greater certainty how widespread the problem is.

Language barriers, the sensitivity of the questions, and the willingness of respondents to talk to the researchers all affected the representativeness of the sample, leaving some nationalities under-represented relative to their overall population in the asylum system. Moreover, anecdotal evidence suggests that certain nationalities may be specifically targeted for corruption, raising the need for more in-depth investigation of their particular experiences. Finally, the sample contains more men than women, both because men were more numerous outside the refugee reception offices, and because women were generally less willing to participate.

The interviews took place between June 2013 and June 2014. Respondents were randomly selected among individuals standing outside of the refugee reception offices as they either exited or waited to enter the office. The field researchers explained the purpose of the research and participants gave their informed consent to participate. They were also given an information sheet with referral information for legal and counselling services. Despite these protections, there is a possibility that respondents under-reported their experiences with corruption to avoid implicating themselves.

Respondents were asked a series of quantitative questions about the border crossing, the various stages of the asylum application process and their efforts to obtain and maintain documentation, as well as their experiences with arrest and detention. A small number of qualitative questions also provided respondents with the opportunity to provide a more detailed account of their experiences. Some of these comments are included below. Although there were 928 respondents in total, not every respondent answered every question. Percentages recorded below are based on the total number of respondents per individual question. In most instances, percentages have been rounded to whole numbers. In some instances, decimals have been included to increase accuracy.

DEMOGRAPHIC REPRESENTATION

Survey respondents were predominantly male, with 772 males and 147 females. The field researchers failed to record the gender of 9 respondents. The age of the respondents ranged from 18 to 67, with an average age of 31.

Demographic Representation

147 female
772 male

(9 unrecorded)

Average age: **31 years**

Respondents represented 34 countries, almost all of them in Africa. Countries outside of Africa included Pakistan (18 respondents), Bangladesh (10 respondents), India (8 respondents), and Nepal (1 respondent). The table below shows the number of respondents from the most highly represented nationalities and their proportion of overall respondents. The first five were among the 10 most represented asylum applicant countries in the 2011 Annual Report on Asylum Statistics. The sixth country, Burundi, was listed in that report as the top sending country on the rise. Preliminary figures released by the DHA for the 2013 calendar year indicate that

NATIONALITY OF RESPONDENTS	NUMBER OF RESPONDENTS	PROPORTION OF OVERALL RESPONDENTS
Democratic Republic of Congo	**319**	**34.3%**
Zimbabwe	**173**	**18.6%**
Ethiopia	**102**	**10.9%**
Nigeria	**56**	**6%**
Somalia	**54**	**5.8%**
Burundi	**43**	**4.6%**

applicants from Burundi and Somalia have decreased significantly. The highest numbers of asylum applicants in 2013 came from Zimbabwe, Nigeria, the DRC, and Ethiopia.

Other nationalities encountered with some regularity included Ghanaians (25 respondents), Ugandans (23 respondents) and Malawians (17 respondents).

Field researchers administered the surveys in English and French. The most common primary languages spoken by respondents included Shona, Swahili, Lingala, Amharic, French and Somali. Twenty-four (24) respondents stated that they did not understand and speak English fluently. These respondents spoke Amharic (7), French (5), Somali (5), Swahili (5), Lingala (1), and Afrikaans (1).

STATUS OF RESPONDENTS

Most of the survey respondents were asylum seekers, but there were also a number of refugees seeking services at the refugee reception offices, indicating that the potential for corruption continues even after an individual has attained refugee status.

The distribution included 795 asylum seekers (86%), 103 refugees (11%) and 28 undocumented migrants (3%). Two respondents did not report their status. Of those who claimed to be asylum seekers, 80% had valid permits at the time of the interview. Among reported refugees, 2 individuals stated that they did not have a valid refugee permit or ID at the time of the interview.

STATUS OF RESPONDENTS	PERCENTAGE	PERCENT WITH VALID DOCUMENTATION
Asylum seeker	**86%**	**80%**
Refugee	**11%**	**98%**
Undocumented	**3%**	

CONSIDERING CORRUPTION IN THE ASYLUM SYSTEM

WHY CORRUPTION MATTERS

[T]o protect our hard earned democracy, we remain determined to root out corrupt practices within the public service. We are of the opinion that our best defence against corruption is transparency, accountability and the knowledge that any person involved in corrupt activities will be prosecuted. We therefore call on all public servants to prioritize serving our people responsibly and with honour.

Collins Chabane, Late Minister of Public Service and Administration[12]

In recent years, South African citizens have benefitted from improvements in the civic services section of the Department of Home Affairs. This has decreased the focus on the problems inside the Department. Most citizens are not invested in the level of service provided to foreigners, nor are elected officials who are responsive to their domestic constituencies. To the extent that they are interested in migrants, it is largely in the areas of border control and irregular migration. What this disinterest overlooks, however, is that these issues do not exist in isolation. Corruption in one area undermines institutional integrity and will eventually affect broader governance issues that are not confined to foreigners.

The large demand on the asylum system has provided a space for corruption to emerge. Although no longer ranked number one, South Africa remains one of the top global recipients of asylum seekers. In the 2012/13 financial year, the country received 85,058 asylum applications. In the 2013 calendar year, there were 70,010 asylum applicants. While down significantly from the 2009 peak of 223,324 applicants, this number still exceeds the capacity of the existing three offices that the Department has allocated for new applicants. A situation in which demand exceeds capacity creates opportunities for corruption. It also risks creating an asylum system that offers protection only to those with the financial means to purchase it.

The effect on the asylum system is not the only reason to be concerned about corruption. Corrupt practices may easily spread to other areas of government, particularly if little is done to deter such

12 Budget Vote Speech, 17 July 2014, available https://pmg.org.za/briefing/19082/.

behaviour. Allowing corruption to continue unchecked threatens the institution, and the institutions, of democracy. In the words of former UN Secretary General Kofi Annan:

> *It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organized crime, terrorism and other threats to human security to flourish.... Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a government's ability to provide basic services, feeding inequality and injustice, and discouraging foreign investment and aid. Corruption is a key element in economic under-performance, and a major obstacle to poverty alleviation and development.*[13]

In other words, the effects of corruption are not limited to those who are forced to pay but are pervasive.

In South Africa, a member of the Gauteng Provincial Legislature spoke about the economic implications of corruption in the tender process: 'Rational incentives and a corruption-free tender process are the best way to broaden opportunities for those who were previously excluded', while corruption impedes economic growth and job creation.[14] The effects of a skewed incentive structure are not limited to the tender process but affect all areas in which corruption prevails. In addition to the economic repercussions of corruption, the fundamental elements of a well-functioning democracy – government accountability, the rule of law, and administrative fairness – depend on a corruption-free system. For these reasons, it is important to understand the contributing factors and levels of corruption that exist in the asylum system.

CONDITIONS FOSTERING CORRUPTION

The DHA's reaction to the difficulties in the asylum system has fostered opportunities for corruption. Following the active involvement of civil society,[15] the government adopted a progressive refugee law framework based on international and regional standards and operating through a system of individualised assessments of asylum claims. This system was quickly overwhelmed as asylum numbers began to increase. Having little

13 Statement on the adoption by the General Assembly of the United Nations Convention Against Corruption, 31 October 2003, available at **http://bit.ly/UNConventionAgainstCorruption**.

14 Jack Bloom, 'Empowerment vs Tenderpreneurship,' *Politicsweb*, 10 May 2010. Available at **http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=175220&sn=Detail**.

15 J. Handmaker, *Advocating for Accountability: Civic-State Interactions to Protect Refugees in South Africa*, Antwerp: Intersentia, 2009.

experience with immigration under the closed system of apartheid, the government did not anticipate the large numbers of asylum seekers who would arrive in the country, particularly as the political and economic situation in Zimbabwe deteriorated. As demand grew and individuals faced long queues and delays in service, conditions became ripe for corruption. Once these issues became clear, the DHA could have taken remedial action by enacting better immigration policy or devoting greater resources to the asylum system to improve its functioning. Instead, it chose to maintain the status quo and shifted the focus onto the migrants themselves, allowing its inaction to exacerbate the situation. **The current state of affairs is the product of a deliberate government choice to avoid addressing fundamental issues in the asylum system.**

The DHA has also taken purposeful actions that have intensified the problems around service. The highly contested decisions to close the Johannesburg, Cape Town, and Port Elizabeth offices in 2011 and 2012 have ensured that demand continues to outstrip capacity, increasing the incentives for corruption. At the micro level, government has focused little attention on the quality of the status determination process or the management of refugee reception offices. This has given rise to a situation in which there is no link between an individual's asylum claim and the decision that the individual receives. **Individuals who cannot obtain a status determination decision that reflects their protection needs are more susceptible to corruption. Access problems further incentivise individuals to pay, which may be the only way to obtain service.** Individuals remain in the system for several years, adding to the opportunities for corruption.

Rather than address these service issues, the Department has concentrated its efforts on the demand side of the equation. In practice, this has meant an unwavering focus on decreasing the number of individuals entering the asylum system – characterising virtually all of these individuals as economic migrants – while failing to address any of the problems at the offices themselves. At the same time, the office closures have increased demand pressures. As the space for obtaining documentation has narrowed, the incentives and need for payment have increased.[16] **Although the DHA has stated its commitment to root out corruption, it has failed to recognise the link between the quality and management issues described above and the flourishing of corruption**. This failure has left past interventions lacking.

16 In November 2014, the DHA proposed changes to the asylum application form that narrowed this space still further by requiring detailed information about employment history and financial conditions. The status of these changes was still uncertain at the time of publication.

THE DHA'S RESPONSE TO CORRUPTION

The DHA has repeatedly noted the problem of corruption, but it has yet to craft an effective response. **In May 2010, the Department acknowledged in a presentation to Parliament that placing decision-making responsibility in the hands of one individual increased the susceptibility to corruption.**[17] The 2010 amendments to the Refugees Act proposed replacing the individual decision maker with a status determination committee, but the latest round of amendments (2015) retains the individual decision maker. In September 2011, the Minister of Home Affairs said that allegations of physical abuse and corruption at the Marabastad refugee reception office in Pretoria were being investigated together with other corruption allegations, while noting that the counter-corruption unit had not received any formal complaints.[18] In November 2014, the Department implemented several changes at the Marabastad office, including new management and a new security company. Although positive, it is as yet unclear how effective and permanent these changes will be.

In its 2012/13 Annual Report, the DHA stated that it would 'spare no effort to remove' corrupt officials 'from the public service'.[19] The report referenced 68 disciplinary actions for fraud and corruption, but it provided no details on these actions or on the broader efforts to combat corruption. Nor is it clear whether any of these actions targeted the country's refugee reception offices. In a March 2014 response to a parliamentary question, the Department stated that it had identified 387 cases of corruption in the 2012/13 financial year. The breakdown of these cases for that and the previous two years involved only one case from the asylum system.[20]

The DHA's counter-corruption unit is mandated to prevent, combat and investigate corruption. But interactions with the unit suggest that it is largely reactive rather than proactive. One individual's experience with this unit highlights its limitations. In July 2014, an asylum seeker told Lawyers for Human Rights that a refugee status determination officer (RSDO) at the Marabastad refugee reception office had asked her for R2500 in exchange for refugee status. LHR contacted the counter-corruption unit, which agreed to set up a sting operation. As part of the operation, the police would provide R2500 in marked notes and obtain a court order authorising the arrest of the RSDO.

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17 Department of Home Affairs, Briefing to the Portfolio Committee on Home Affairs, 'Challenges in the Processing of Asylum Applications and Issuance of Permits,' 31 May 2010, available at **https://pmg.org.za/committee-meeting/11802/**.

18 Question 2940, 23 September 2011, available at **https://pmg.org.za/question_reply/286/**.

19 Department of Home Affairs Annual Report, 2012/13, 27 September 2013.

20 Question 207, 28 February 2014, available at **https://pmg.org.za/question_reply/491/**.

A week later, the counter-corruption unit asked whether LHR or its client could provide a portion of the R2500. After LHR rejected this possibility, officers from the unit began pressuring the client to contribute money for the operation. When LHR expressed its concerns over the way the operation was being managed, officers from the counter-corruption unit criticised the organisation for forcing its client to withdraw from the operation. The officers again contacted the client directly and threatened to arrest her for not cooperating. In addition, they suggested completing the operation with counterfeit notes, promising to get her released if she was arrested on counterfeiting charges. LHR then spoke to the unit's manager, who agreed to investigate but did not follow up with LHR. In October 2014, the manager of the Marabastad RRO requested contact details for the client in order to discuss the corruption allegations. Fearing that this would subject the client to intimidation at the RRO, LHR declined to provide this information. Subsequently, the new centre manager at Marabastad arranged for the client to undergo another status determination interview and she was granted refugee status.

LHR has continued to work with the DHA on behalf of its clients who have experienced corruption, but these arrangements rest on LHR providing client complaints in affidavit form before the DHA will investigate. While the DHA has begun implementing disciplinary proceedings in response to these affidavits, the evidentiary burden remains on the asylum seeker to provide names and specifics. **Asylum seekers must be willing to come forward, despite fear of reprisals, and must be able to provide these details. The DHA does not target the wider processes outside of these individual complaints.**

In Cape Town, the Scalabrini Centre's attempts to follow up on behalf of clients who experienced corruption have also met with a limited response. Home Affairs' officials have sought to investigate the officials responsible, but their responses have been narrowly focused and, as in the LHR cases, place most of the investigatory burden on the clients or representatives from Scalabrini. In one such case, the Home Affairs officials also indicated that they intended to charge Scalabrini's clients who had unwittingly participated in the corruption and then reported it. The clients continued to assist in the investigation only after Scalabrini received assurances from the NPA that it would not prosecute.

These examples show that although the DHA has at times responded to individual allegations of corruption, it has avoided conducting broader investigations, leaving its efforts largely reactive. **The focus on specific individuals in the absence of broader efforts to target corruption has done little to alleviate the structural problem, allowing corruption to flourish even as certain corrupt individuals are rooted out.** This situation is revealed in the results described below.

RESULTS

The survey results show corruption at every stage of the asylum process, beginning with entry into the country. Nor did corruption stop once individuals acquired refugee status. **In short, corruption permeates every aspect of the asylum system and every category of actor in this system – security guards, interpreters, refugee reception officers, refugee status determination officers, police officers, and private brokers with links to DHA officials.** Close to one-third of respondents experienced corruption at some point. The fact that individuals often had to make repeat visits for a single issue and remained in the system for periods exceeding the 180 days established in the regulations to the Refugees Act[21] served to exacerbate this state of affairs. Corruption rates also varied by office, indicating that differences in management and oversight practices may play a key role.

BORDER CROSSING

The first point of contact with an immigration official for individuals seeking asylum is often at the South African border. If an individual states an intention to apply for asylum to a border official, the law requires that he or she receive a five day transit permit to enable the individual to reach a refugee reception office to apply for asylum.[22] Because this is the first stage on the path to asylum, the survey included a series of questions about the border crossing, the first point at which individuals may experience corruption. The results show corruption on a smaller scale than that recorded at the refugee reception offices. **Thus, while corruption at the border may be a barrier to entry for some, subsequent encounters at RROs are a more potent obstacle.** Respondents' descriptions, however, suggest that more informal corruption not captured by the survey may be taking place. Several respondents reported paying an additional sum to the truck driver transporting them into South Africa so that the driver could pay border officials to facilitate the border crossing.

Most respondents had crossed through the Zimbabwe border, which accounted for almost 71% of border crossings. Mozambique, the second most common point of entry, accounted for 15% of entrants. Respondents at the Durban refugee reception office were

21 Regulation 3.

22 Immigration Act, Section 23.

almost evenly split between the Zimbabwe (59 respondents) and Mozambique (63 respondents) border. Roughly 11% of respondents arrived at an airport – almost all of them via OR Tambo in Johannesburg. A very small number entered at the Durban and Cape Town airports.

BORDER CROSSING	PERCENTAGE OF RESPONDENTS
Zimbabwe	**70.5%**
Mozambique	**15.4%**
Botswana	**0.9%**
Namibia	**0.9%**
Swaziland	**0.6%**
Lesotho	**0.3%**
Sea port	**0.2%**
Airport	**10.7%**

These numbers include official and unofficial border crossings: 44% of respondents attempted to enter South Africa through an official border post, and 40% of them told border officials that they wanted to claim asylum. Seven (7) individuals reported being denied entry at an official border post, with a few reporting that they fled to avoid arrest.

Thirteen percent (13%) of respondents stated that border officials asked them for money, and 12% of respondents said that they paid to pass through the border. The amounts paid are detailed in the table below.

AMOUNT PAID	NUMBER OF RESPONDENTS
R1-R100	**6**
R101-R200	**7**
R201-R300	**4**
R301-R400	**2**
R401-R500	**2**
R501-R600	**5**
R601-R700	**3**
More than R700	**12**

One individual reported paying US $220, the equivalent of almost R2500.

While the government devotes significant resources to border security, corruption provides an alternative space for entry that undermines border control efforts. **Additionally, the linking of protection with payment starts at the border and poses the risk that those entitled to protection under domestic and international law will be illegally turned away because of their inability to pay.** Because the survey only encountered individuals who had entered the country, it is not possible to determine how many would-be asylum seekers were turned away on this basis.

RRO VISITS

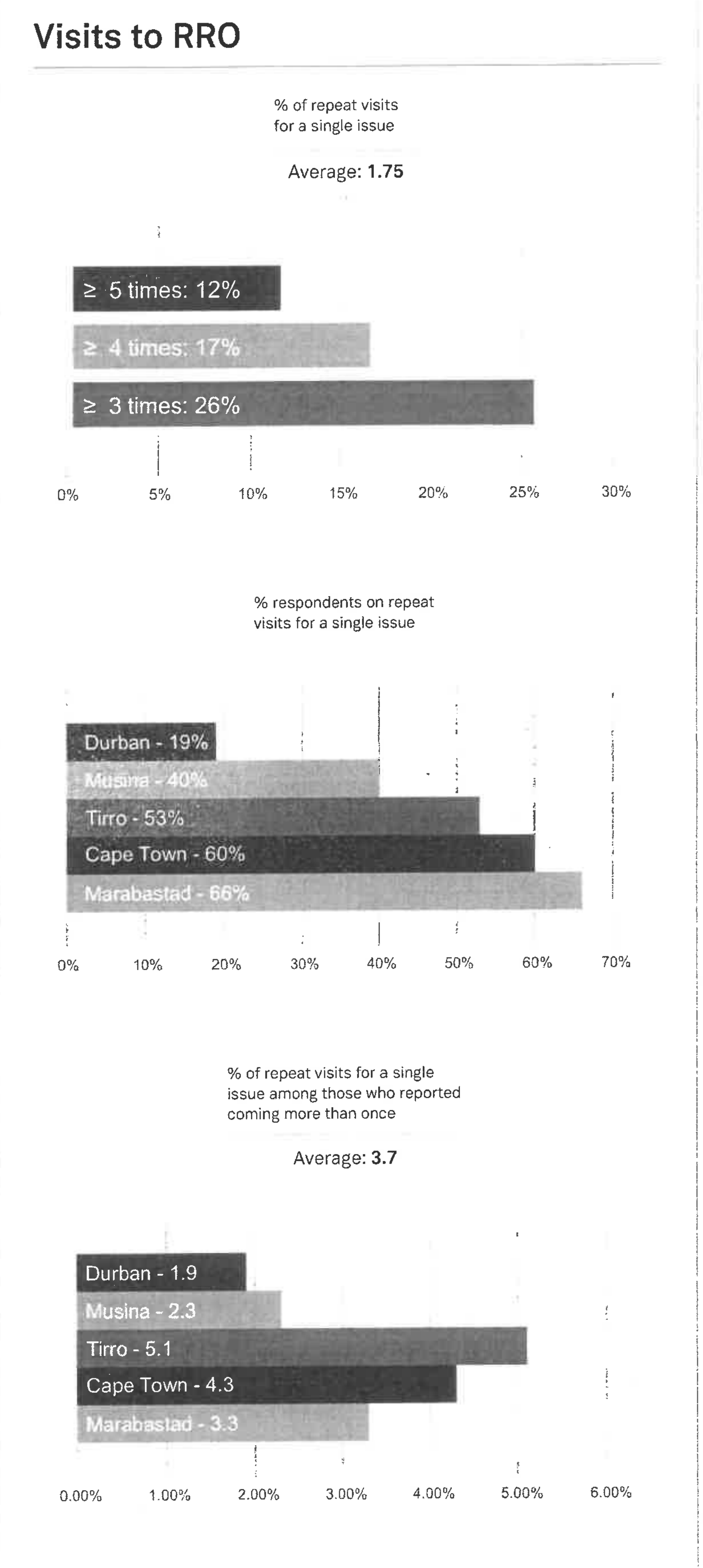
Opportunities for corruption exist at various stages of the asylum application process and close to a third (30%) of respondents reported experiencing corruption at some point, often on multiple occasions. Asylum seekers and refugees come to the RRO for a variety of issues involving their asylum status. The majority of survey respondents were there to renew their asylum permits, but the refugee reception offices perform many services that are vital to asylum seekers and refugees. The reasons for respondent visits are outlined in the table below.

REASON FOR VISIT	PERCENTAGE OF RESPONDENTS
Extend asylum permit	**63%**
Apply for asylum for the first time	**9%**
Extend refugee permit	**5%**
Replace lost/stolen permit	**2%**
Collect an asylum permit	**1.5%**
Request an appeal hearing	**1%**
Have an appeal hearing	**1%**
Obtain a refugee ID	**1%**
Get a passport	**.9%**
Obtain travel documents	**.6%**
Join family member files	**.5%**
Give written submissions to the Standing Committee	**.3%**
Extend permit and request an appeal	**.3%**
Get appeal results	**.3%**
Register children	**.3%**
Get info on fines	**.2%**
Other	**13%**

A number of individuals indicated that they were at the office to get a passport, which can only be provided by the country of origin and is not available at the RRO. These individuals were most likely referring to either a South African or a United Nations Convention Travel Document, which can be obtained through a refugee reception office. In the above table, these results have been reported separately from those individuals who stated that they were at the office to obtain travel documents, although they may be two characterisations of the same issue.

Individuals often must make numerous visits to the office to address a single issue. Such inefficiencies increase both the opportunities for and the susceptibility to corruption as respondents grow increasingly desperate. Half of respondents reported that it was not the first time they had come to the RRO to address the issue they were there for on the day of the interview. Twenty-six percent (26%) of respondents reported coming three times or more; 17% four times or more; and 12% five times or more. On average, respondents had come to the office 1.75 times for a single issue, with the highest proportion of repeat visits occurring at Marabastad, where 66% of respondents reported coming more than once. This was followed by Cape Town (60%) and TIRRO (53%). Durban had the lowest rate of repeat visits (19%), followed by Musina (40%). Among those respondents who reported coming more than once for a single issue, they averaged 3.7 visits. At TIRRO, this average was 5.1 visits, followed by 4.3 at Cape Town, 3.3 at Marabastad, 2.3 at Musina, and 1.9 at Durban.

Thus, although a higher proportion of respondents had to come more than once for a single issue at Marabastad, they generally were able to resolve this issue in fewer visits than respondents from the Cape Town or TIRRO refugee reception offices. **As the results in the next infographic indicate, however, there was also a higher likelihood that respondents at Marabastad paid to get the issue resolved.**


Visits to RRO
% of repeat visits for a single issue
Average: 1.75
≥ 5 times: 12%
≥ 4 times: 17%
≥ 3 times: 26%
0%
5%
10%
15%
20%
25%
30%
% respondents on repeat visits for a single issue
Durban - 19%
Musina - 40%
Tirro - 53%
Cape Town - 60%
Marabastad - 66%
0%
10%
20%
30%
40%
50%
60%
70%
% of repeat visits for a single issue among those who reported coming more than once
Average: 3.7
Durban - 1.9
Musina - 2.3
Tirro - 5.1
Cape Town - 4.3
Marabastad - 3.3
0.00%
1.00%
2.00%
3.00%
4.00%
5.00%
6.00%

One in five respondents reported that they had been asked for money in exchange for getting their issue resolved. The percentages by office are detailed in the table below.

OFFICE	% WHO REPORTED BEING ASKED FOR MONEY TO GET AN ISSUE RESOLVED
Marabastad (Pretoria)	**47%**
TIRRO (Pretoria)	**21%**
Cape Town	**12%**
Musina	**11%**
Durban	**2% (2 respondents)**

The highest proportion of requests for money came from security guards (39%), followed by civilians or brokers who had connections with DHA staff (32%), and DHA officials (13%). A few respondents also implicated DHA interpreters and police officers.

'I complained because some people came later but because they paid they got in. When I informed the official, they handcuffed me.'
Respondent, TIRRO

Respondents reported similar rates of corruption around the queuing process, with 22% stating that they had been asked for money to get to the front of the queue or to get inside. **Again, Marabastad had the highest rate of respondents who experienced corruption in the queue, while respondents at the Durban office did not report any corruption.**

OFFICE	% WHO EXPERIENCED CORRUPTION IN THE QUEUE
Marabastad (Pretoria)	**51%**
TIRRO (Pretoria)	**28%**
Cape Town	**20%**
Musina	**4%**
Durban	**0%**

Security guards were most frequently implicated, accounting for 61% of the corruption in the queue. Twenty-eight percent (28%) also pointed to civilians with links to officials inside.

Corruption proved to be a barrier to access, as 13% of respondents indicated that they had at some point been unable to get inside the office because they did not pay. **Here too, Marabastad had the worst record.**

'I had to pay the security guards R100 to get inside the DHA office to apply for asylum. As I can't pay, I remain undocumented.'
Respondent, Musina

OFFICE	% DID NOT GET ACCESS TO OFFICE FOR FAILURE TO PAY
Marabastad (Pretoria)	**30%**
TIRRO (Pretoria)	**12%**
Cape Town	**15%**
Musina	**3%**
Durban	**.7% (1 respondent)[23]**

Respondents also experienced corruption once inside the office, with 13% reporting that they were asked for money in exchange for assistance.

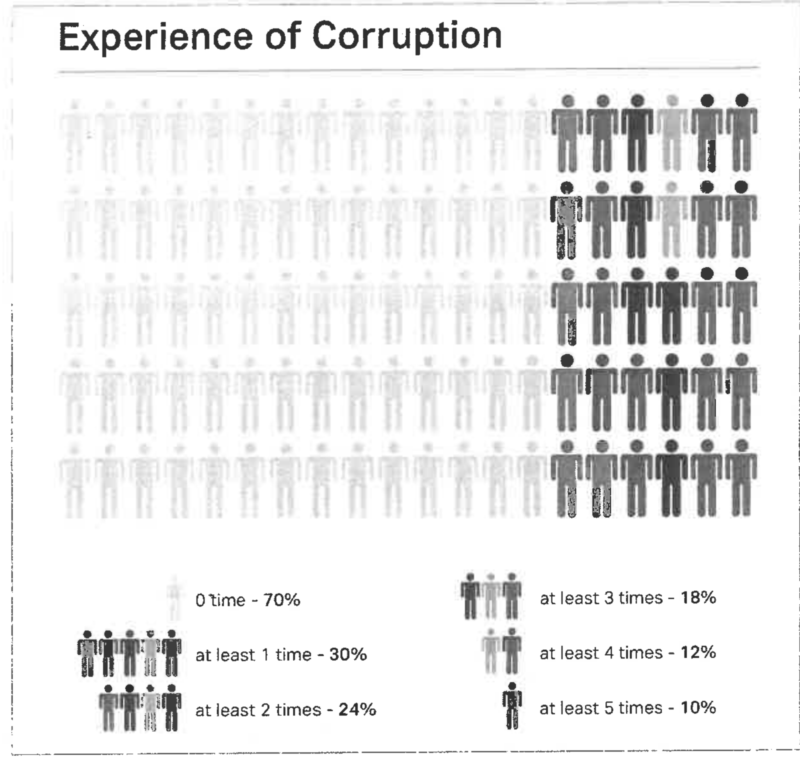
OFFICE	% ASKED FOR MONEY IN EXCHANGE FOR ASSISTANCE INSIDE THE OFFICE
Marabastad (Pretoria)	**31%**
TIRRO (Pretoria)	**18%**
Cape Town	**2%**
Musina	**5%**
Durban	**2%**

23 This result is inconsistent with the results from the previous table, in which none of the respondents reported being asked for money to get to the front of the queue or to get inside the office.

'I applied in 1999. They gave me a Sudanese permit and picture I told them this was wrong. I paid R1500 to apply as Ethiopian. I gave the DHA interpreter R500. They gave me one month and then three months.... They asked R3000 from me and I did not pay. I am undocumented.'
Respondent, Marabastad

Inside the office it was primarily DHA officials who were linked to the corruption (62%), in comparison to security guards (17%). DHA interpreters were implicated by 10% of respondents and civilians by 7%.

In general, 30% of respondents reported experiencing corruption at least once, 24% at least twice, 18% at least three times, 12% at least four times, and 10% at least five times. Overall, respondents experienced corruption an average of 1.3 times.



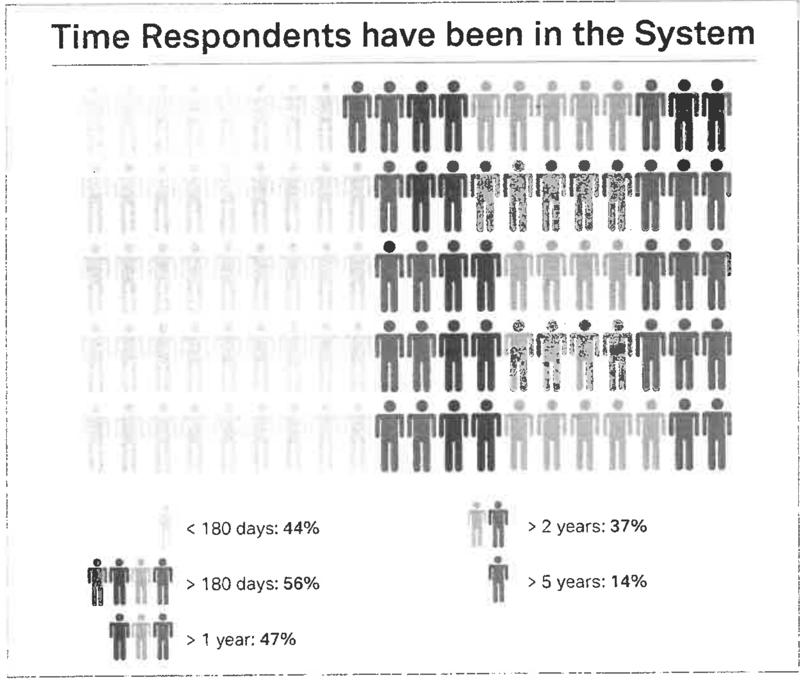
Among those respondents who reported experiencing corruption, the average was 4.44 times, with the highest average reported at Marabastad (4.7). The percentage of individuals who experienced corruption at each individual office and the average number of times they experienced corruption is recorded below.

OFFICE	% WHO EXPERIENCED CORRUPTION	AVERAGE INCIDENTS OF CORRUPTION FOR THOSE RESPONDENTS WHO EXPERIENCED CORRUPTION
Marabastad	**62%**	**4.7**
TIRRO	**37%**	**4.56**
Cape Town	**22%**	**4.28**
Musina	**15%**	**3.58**
Durban	**3% (4 respondents)**	**2**

Inefficiencies in the asylum system increase the interactions that individuals have with the refugee reception offices, escalating both the opportunities and incentives for corruption. Just gaining entry into the office has become a major outlet for exploitation. The struggle to obtain services provides further pressures on those seeking assistance, incentivising them to pay in order to gain needed documents or other assistance.

THE APPLICATION PROCESS

The longer an individual is in the asylum system as either an asylum seeker or refugee, the greater the opportunity for corruption as demand for renewals and other services increases. Under the Refugees Act and accompanying regulations, the application process should generally be completed within 180 days.[24] Among survey respondents, 56% had been in the asylum system for over 180 days, 47% had been in the system for at least one year, 37% had been in the system for at least two years, and 14% had been in the system for at least 5 years.



Respondents had spent an average of 1037.5 days in the system, or 2.8 years. The longest reported time in the system was 18.65 years and five respondents reported entering the system before 2000.

24 Regulations to the Refugees Act, Regulation 3.

'The people don't care who you are, where you come from, what your story is. They just care about money. If you have got money, everything is good for you. Like myself, after I got my refugee status. I bought it. Otherwise, I would still be an asylum seeker. There is a business out there.'
Respondent, Cape Town

As noted above, respondents had to visit the office repeatedly for a single issue. Consistent with this, 38% of respondents reported that they did not receive their asylum permit the first time they came to a refugee reception office. Overall, 12% of respondents indicated that they had at some point been asked for money in exchange for receiving an asylum seeker permit, with the highest proportion of these requests coming from DHA officials (43%) and security guards (19%). Below are the amounts that respondents reported paying in exchange for asylum permits.

AMOUNT PAID	NUMBER OF RESPONDENTS
R0-R100	**7**
R101-R200	**13**
R201-R300	**10**
R301-R400	**2**
R401-R500	**6**
R501-R600	**9**
R601-R700	**1**
R800-R1000	**10**
R1001-R2000	**11**
Over R2000	**2**

Among respondents who needed to replace a lost or stolen permit, 14% indicated that they were asked to pay to get it replaced. These payments were not in the form of a fine.

The high numbers of renewals also create opportunities for corruption. Respondents had renewed their permits an average of 5.4 times. When first time applicants were removed, this average rose to 6.54. Twelve percent (12%) of respondents had paid at least once to renew their permits, 8% at least twice, 6% at least three times, 4% at least four times, and 3% at least five times.

Renewal of Permits

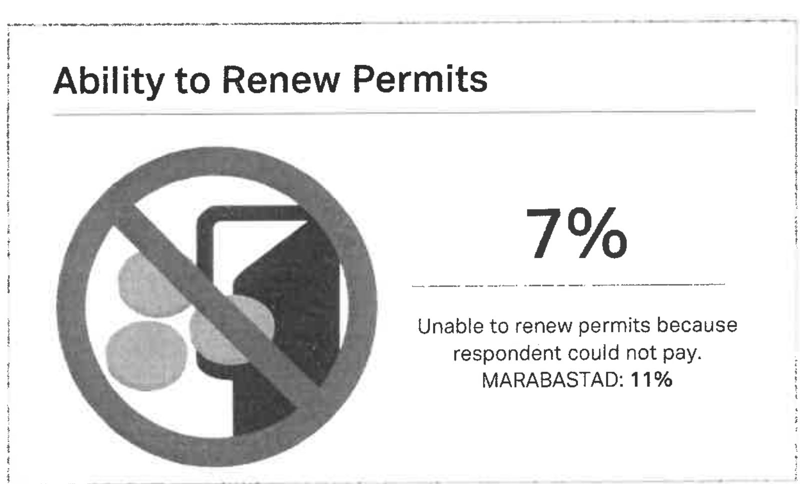
3% paid at least **5** times
4% paid at least **4** times
6% paid at least **3** times
8% paid at least **2** times
12% paid at least **1** time

Average renewals excluding first time applicants: **6.54 times**

Marabastad again registered the highest rates of corruption, while Durban registered none.

OFFICE	% OF RESPONDENTS WHO PAID TO RENEW PERMITS
Marabastad (Pretoria)	**24%**
TIRRO (Pretoria)	**15%**
Cape Town	**7%**
Musina	**9%**
Durban	**0%**

Respondents reported paying DHA officials (27%), security guards (22%), or both (16%). They also paid agents/civilians both inside and outside of the office (15%), including former DHA interpreters. A few indicated paying existing DHA interpreters as well. Corruption affected the ability of some asylum seekers to get documents: 7% of respondents said that they were unable to renew permits because they could not pay. At Marabastad, the proportion was 11%.



'The lady inside the DHA asked me for R2500 for the status. I gave them R1500 and then R1000, but she did not give me the status.' ***Respondent, Durban***

As part of the asylum application process, asylum seekers must undergo an interview with a refugee status determination (RSD) officer who decides on the validity and credibility of their asylum claim. Among respondents, 60% had had an RSD interview. Only 6% reported that an RSDO had asked them for money. At Marabastad and TIRRO, these numbers were 12% and 8%, respectively. Of the 32 respondents who reported being asked for money by an RSDO, 21 reported paying, but only 6 said that this resulted in their application being approved. Below are the amounts they paid.

AMOUNT PAID	NUMBER OF RESPONDENTS
R0-R100	**5**
R101-R200	**2**
R201-R300	**1**
R401-R500	**3**
R1000	**2**
R1500	**1**
R2000	**3**
R3000	**2**
R3500	**1**
R4000	**1**

Although relatively few respondents reported being asked for money by a refugee status determination officer, several respondents referenced the ability to buy refugee status from brokers or interpreters who approach asylum seekers waiting outside of the offices and have links to officials working inside. This suggests that corruption around refugee status is not limited to the status determination interview, but is taking place at other stages of the process. It also highlights the multiple actors that are involved in corruption. Corruption around refugee documents is just one of the mechanisms through which refugee status has become detached from protection needs, distorting the rationality of the system.

FINES

'Fines are the biggest problem. If you don't pay on the spot they arrest you. Some documents expire on the weekend and that is a problem.' ***Respondent, Cape Town***

For the last several years, the DHA has issued fines for lost or expired permits. Individuals can either pay the fine (via an admission of guilt), or go to court to challenge the fine. Under the authorisation in the Criminal Procedures Act (No. 51 of 1977), a properly administered fine can only be paid at a police station or a

court and must be accompanied by a receipt. **While fining under certain circumstances is legal, the survey responses revealed a variety of irregularities that suggest that the fines are not always implemented properly and may in some instances be veiled forms of corruption.**

Eleven percent (11%) of respondents indicated that they had been fined for either a lost (32 respondents) or expired (71 respondents) permit. Ten respondents reported that they had been fined more than once. For those with expired permits, the table below shows how long their permits had been expired.

'This is a business in DHA. For affidavit we pay. For taxi to go to police station we pay. R3000 for fine but it is not a fine.' ***Respondent, Marabastad***

LENGTH OF PERMIT EXPIRATION	NUMBER OF RESPONDENTS
1 - 5 days	**11**
5 days - 3 months	**32**
3 - 6 months	**10**
6 - 9 months	**6**
9 months - 1 year	**2**
More than 1 year	**10**

Seventy-nine percent (79%) of respondents answered negatively when asked if anyone had explained their rights regarding the actions they could take in relation to the fine; roughly the same proportion (80%) indicated that they did not understand these rights. Specifically, 77% did not understand that they had the option to challenge the fine in court.

Fines

The most common fine amounts were R1000, R1500, R2500, and R3000. A number of individuals received fines in differing amounts, suggesting either irregularities or a great deal of discretion in the fining process. The fine amounts are listed in the table below.

FINE AMOUNT	NUMBER OF RESPONDENTS
R200-R800	**10**
R1000	**21**
R1200	**1**
R1500	**14**
R2000	**1**
R2500	**19**
R2700	**1**
R3000	**16**

Although the process requires that fines be paid at the police station or court, 31 out of 59 were paid elsewhere. Thirteen (13) respondents indicated that they paid at a court of law, although only three respondents reported going to court to contest their fine. Twenty-five (25) respondents paid at the RRO, suggesting that the fine may in fact have been a form of corruption. Other respondents made payments in a van, or paid a civilian who allegedly had connections with RRO staff. Of these same 59 respondents, 32 reported receiving a receipt, while 27 did not.

'I was on a bus from Johannesburg to Musina and my asylum seeker permit, wallet, belt and watch were stolen. I went to the DHA to get a replacement but they told me I had to pay a fine of R1000. I do not have the money to pay the fine.' ***Respondent, Musina***

Among the 36 respondents who did not pay the fine, 27 said that it was because they could not afford it. Three individuals were still in the process of paying or challenging the fine. One individual simply stated that he had given up. Another feared being arrested if he returned to the RRO. Three individuals reported successfully challenging the fine in court. Asked if they had ever remained undocumented because they could not pay a fine, 34 respondents replied affirmatively and 7 stated that they were arrested during this period.

The fining process links documentation to an individual's ability to pay. This poses the risk that individuals with valid asylum claims who cannot safely return to their countries of origin may be denied documentation and ultimately deported without any assessment of their protection needs. These risks are increased when corruption prevents individuals from obtaining or renewing documents.

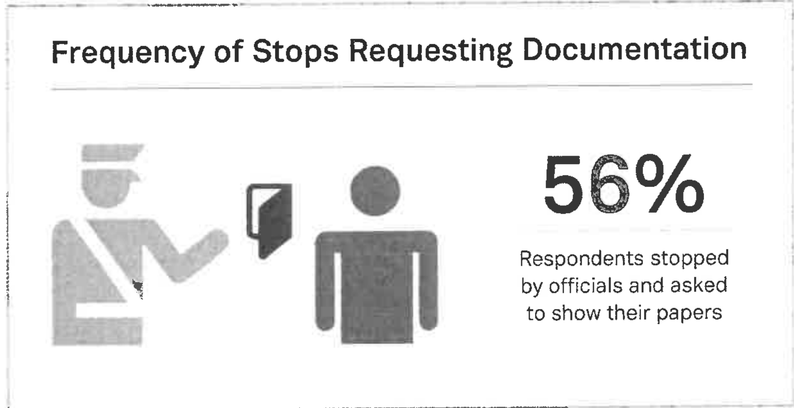
Finally, the fining process itself creates additional opportunities for corruption, as individuals who are unable to pay the official fine are in a more vulnerable position where their lack of documentation can be exploited for unofficial payment.

'If you don't pay you don't get in like me. You are waiting. They did not ask me for money but they did ask others every day inside and outside. They make us wait for weeks in order to fine us later.'
Respondent, Marabastad

ARREST AND DETENTION

The multiple entry points of corruption increase the risk that asylum seekers will remain undocumented and at risk of arrest and detention. Highlighting the fact that corruption may spread beyond one department, migrants have reported that police officers sometimes solicit payment to avoid arrests over documentation. Accordingly, access and documentation problems have resulted in a number of legal challenges from detainees in Lindela – the detention centre where illegal foreigners are held pending deportation.[25]
The arrest and detention processes themselves create multiple opportunities for corruption. In a 2009/10 survey of Lindela detainees, 21% of those interviewed described being asked for money to avoid being detained, deported, or physically harmed.[26]
In Musina, police checkpoints outside of town target asylum seekers coming from urban areas such as Johannesburg to renew expired permits. Respondents from Marabastad also reported that police roamed the area near the office in search of asylum seekers who had been unable to renew their permits.

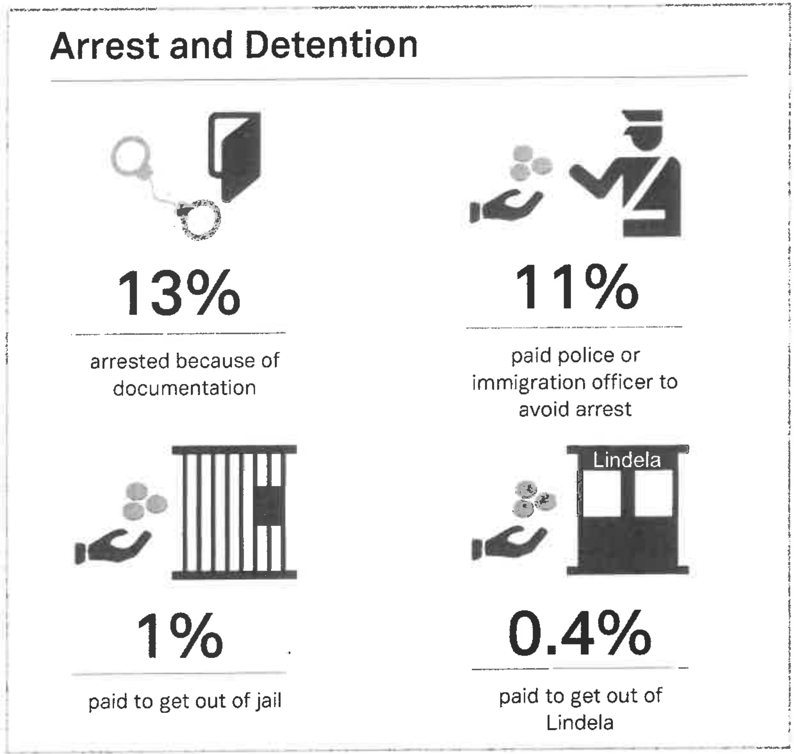
Among the respondent population, 56% reported that they had been stopped by government officials and asked to show their papers.



25 These cases are described in R. Amit, 'Breaking the Law, Breaking the Bank: The Cost of Home Affairs' Illegal Detention Practices,' ACMS Research Report, 2012. Available at **http://www.migration.org.za/uploads/docs/report-37.pdf** .

26 R. Amit, Lost in the Vortex: Irregularities in the Detention and Deportation of Non-Nationals in South Africa," FMSP Research Report, 2010. Available at **http://www.migration.org.za/uploads/docs/report-21.pdf** .

While the overall average number of stops was 2.89, those who answered affirmatively to this question were stopped an average of 5 times. Thirteen percent (13%) reported being arrested because of their documentation, while 11% reported paying an immigration or police officer to avoid arrest, 1% reported paying to get out of jail, and 4 respondents (.4%) reported paying to get out of Lindela.



These numbers reflect those individuals who managed to escape detention, either legally or through payment. An unknown number of individuals may ultimately be deported as a result of corruption despite having a legal basis to remain in the country.

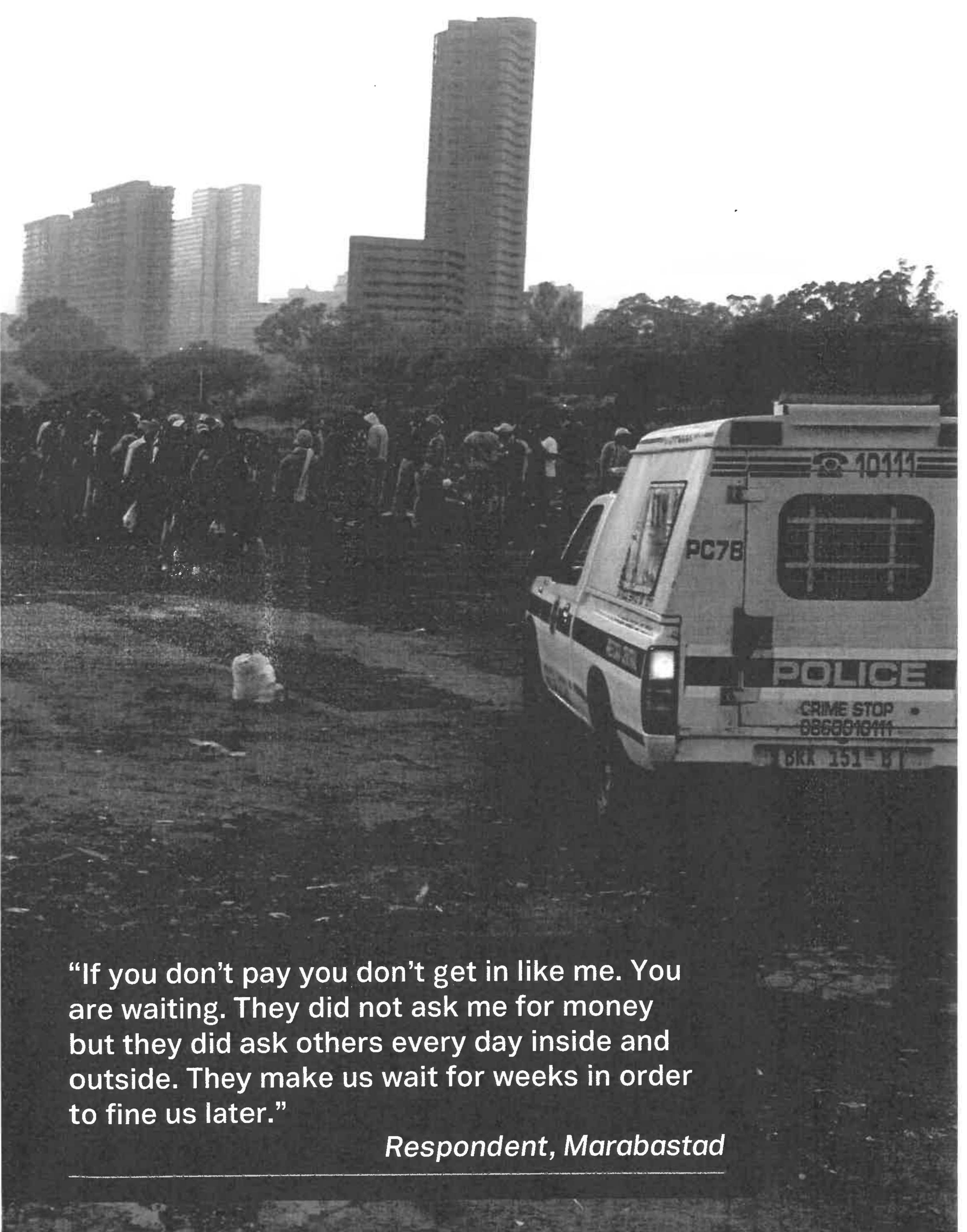
The proliferation of corruption in the asylum, arrest, and detention processes points to the emergence of perverse incentive structures. **In some cases, public officials are no longer guided by legal requirements; instead, their behaviour is driven by a new opportunity structure involving alternative sources of revenue.** The more their behaviour is driven by extracting payments, the more removed it becomes from the law. This increases the risk that South African citizens will also begin to face unaccountable public officials whose actions are neither predictable nor administratively fair.

REPORTING CORRUPTION

Individuals confronting corruption at the refugee reception offices have little recourse. They are often faced with the choice of paying for documentation or remaining undocumented and at risk of arrest, detention, and deportation. Only 3% of respondents attempted to report corruption to the police, the DHA, or an NGO. None saw any results from these efforts. A few described being told to go back to their country when they attempted to report the corruption. As described earlier, the anti-corruption unit has proven largely ineffective in responding to corruption allegations from asylum seekers or NGOs representing them. Recent collaborations between NGOs and DHA have led to investigations and disciplinary proceedings, but they remain limited in scope.

'I am afraid to report corruption because I feel ashamed to report the police while I contributed to paying the bribe to avoid arrest.' ***Respondent, Musina***

'Today when I was paying people giving money to the officials I thought of reporting or calling someone to come and see but it was useless.' ***Respondent, TIRRO***



"If you don't pay you don't get in like me. You are waiting. They did not ask me for money but they did ask others every day inside and outside. They make us wait for weeks in order to fine us later."

Respondent, Marabastad

ADDITIONAL OBSERVATIONS

Respondent comments in the qualitative section of the survey provided more detail about the ways in which corruption takes place. **A number of respondents referenced 'special queues' reserved for those who paid.** Many also referred to networks of civilians, including former DHA interpreters, who had connections with security guards and RRO staff inside. Additionally, respondents mentioned that existing DHA interpreters often asked for money in exchange for assisting with forms or interviews. While private interpreters may charge for these services, DHA interpreters are contracted by the Department and must provide their services free of charge.

Respondents' comments also provided a more detailed accounting of events at the refugee reception offices:

They ask for money outside and they share with the security guard. Inside we are called to a room. They call one of us who must ask for R200 from the others and then when you collect the permit the official has already gotten the money. **(Marabastad)**

You pay for a renewal at Musina on the street. People of the community come to us and tell us to pay. They take your name and permit number and send an SMS to the DHA. It is R500 to R1000. You are served before the others and you don't queue. They call us inside. It is Ethiopians, Somalis, and Pakistanis. They think we have money. They don't propose paying for status. That would be too obvious if Ethiopians got that. **(Musina)**

People ask for money. Officials don't help you or tell you what is happening. They play on their phones. Security guards ask for money but not openly. It is a previously made deal. Then they grab the people and take them to the front of the queue. Never women. People from Zim only get a one month extension and other people from other countries get 3 to 6 months. **(Cape Town)**

It is corruption everywhere. They are camped from outside to inside. They ask for money. You pay, but they don't help you. If you can give R2000 to R5000 you can get status. **(Marabastad)**

The people who ask you for money are the ones who sell the plastic folder for permits. They ask R200 for the plastic and to go in the gate. They share with the guard at the gate. There is [sic] 3 cops who share with them outside. Inside it is R300 if you do not pay you do not get helped. **(Marabastad)**

A number of respondents commented on the fact that particular nationalities were targeted for payment because these nationalities were known to own shops and have money. Respondents from these nationalities felt that they were being unfairly targeted, while respondents from other nationalities felt that these individuals had an advantage: 'they accept them before they accept us because they have money.' As one of the respondents above acknowledged, granting refugee status to particular nationalities would be likely to raise suspicion.

Respondents also expressed great frustration about the amount of time they were forced to take off from work, school, and child care. One respondent had just lost his job: 'I was fired yesterday as my boss is fed up with me to being able to work because I am always here. They tell us to go back to our country at DHA.' Another complained that her children had been unable to attend school for two years because they did not have documentation. These respondents generally attributed their difficulties to their inability to pay. By the same token, other respondents attributed their documentation, specifically refugee status, to their ability to pay.

The survey did not include any explicit questions about renewal of refugee status, but it did query whether respondents had ever been asked for money to resolve the issue they were at the office to address on that particular day. Seven (7) respondents who answered yes were there to renew refugee permits. Additionally, both the qualitative responses and anecdotal reports from service providers linked these renewals to payment, pointing to the need for further investigation. The discretion regarding renewal periods, which range from 6 months to 4 years, increases the opportunities to extract payments in exchange for lengthier renewal periods.

CONCLUSION

The experiences of asylum seekers and refugees recorded above indicate that corruption is a very real problem at the country's refugee reception offices. Access, documentation, status, and renewals all are linked to payment, as are many other services tied to the asylum process. Moreover, as inefficiencies in the system increase, both the opportunities for and the need to acquiesce to corruption, increase. In many cases, individuals are left with the choice of paying or remaining undocumented.

The survey results show that corruption in the asylum system is not limited to a few isolated cases. The failure to prioritise corruption at the RROs contributes to a situation in which even those who are in the system legitimately are forced to turn to illegitimate means to obtain protection. **An effective response to corruption requires the DHA to take a more proactive role in investigating corruption, one that does not place the burden solely on individuals experiencing corruption to substantiate their claims.** At the same time, the Department must address the broader management challenges at the RROs that create an environment where corruption can flourish. **This means better operational systems that eliminate the space for corruption, as well as expanding services to meet demand while creating alternative mechanisms for economic migrants.** The Department must also address the quality problems in the status determination system so that decisions are truly individualised and reflect the content of the claims, further reducing the potential for status to be linked to payment.

The delinking of refugee status from protection needs undermines the Department's migration management goals. The process, however, is the result of a deliberate government choice to avoid instituting measures aimed at improving services at the RROs or to address broader migration issues. **The government has chosen to focus almost exclusively on the restrictive measures of border control, detentions, and deportations. Allowing corruption to flourish undermines the utility of these efforts while contributing to the emergence of a system of public service guided by monetary incentives rather than legal obligations.** While this may prevent significant numbers of individuals from obtaining refugee status – an outcome that ostensibly serves the government's immediate goals – it does little to address broader migration management issues, to deter irregular migration (the monetisation of refugee status may in fact provide an incentive for irregular migration), or to contribute to economic growth and good governance.

RECOMMENDATIONS

An effective response to corruption is one that moves from a reactive, case by case response to one that addresses the systemic issues that allow corruption to flourish. The government and other stakeholders should consider the limits of current migration policy, the inadequacy of resources dedicated to the asylum system, the need for more urban refugee reception offices, and the implications for the country's constitutional and international obligations, as well as the Batho Pele principles.

TO THE DHA:

Queuing

- Create a waiting area inside the office that is based on an electronic numbering system.
- Establish a more effective queue management system that may, for example, include separate numbering queues based on the type/level of service requested, with a reception desk that directs individuals to the appropriate number queue.
- Post instructions in numerous locations inside and outside the office.

Application Process

- Provide individuals with asylum application forms that they can fill out away from the office to minimise the reliance on officials or private individuals for assistance and to eliminate related opportunities for corruption.
- Include information about the application process, with a clear explanation of the rights and duties of asylum seekers and refugees, on the application form.
- Inform individuals that payment is not required for any stage of the application process.
- Provide information on how to report corruption with the application form.

Renewals

- Establish a set period of validity for renewals that eliminates a refugee reception officer's discretion.
- Ensure that renewals are recorded electronically by the officer.
- Post information so that individuals know that only such electronically recorded renewals are valid and that no payment is required.
- Create a computerised check-in system for individuals who are at the office for renewals. Having a record of individuals who arrived at a refugee reception office for their renewals will flag

any potential irregularities in the event that such individuals do not subsequently obtain these renewals.

- Keep an electronic record of which individuals were served by which refugee reception officer so that any irregularities can be traced back to the officer.

Status Determination

- Professionalise the status determination process so that decisions reflect the details of an individual's claim and are not simply generic summaries of country conditions.
- Require refugee status determination officers to provide specific reasons in the case of both rejections and approvals of asylum claims, which will eliminate the possibility of payment for refugee status.
- Allow asylum seekers to have legal representation during the status determination interview.
- Create a computerised system that does not allow for the issuance of refugee documents without an accompanying written decision containing reasons.
- Post informational signs informing asylum seekers of the process for obtaining refugee documents.

Fines

- Allow individuals to renew/replace status documents even if they have incurred a fine.
- Separate the process for renewing/replacing documents from the process laid out in the Criminal Procedures Act for paying or challenging fines.
- Post informational signs stating that no payment is necessary at the time of renewing or replacing lost documents.
- Eliminate refugee reception officer discretion to determine when documents should be renewed or replaced.
- Renew/replace documents automatically and create a separate process for determining when individuals are no longer eligible for documentation.
- Train police officers on the fines process in accordance with the procedures laid out in the Refugees and Criminal Procedures Acts.

Investigating Corruption

- Establish an anonymous mechanism for reporting corruption.
- Establish a protocol for investigating corruption.
- Explore potential monitoring methods such as installing cameras outside and inside the offices.
- Initiate independent investigations of each stage of the asylum process: queuing, initial application, renewals, status determination, and refugee documents.
- Guarantee to asylum seekers and refugees who have been forced to pay for access or documentation that they will not be punished for reporting corruption.

- Post information about reporting corruption.
- Ensure that investigatory processes are sensitive to the situation of asylum seeker and refugee witnesses, who may be undocumented, may distrust authority, may suffer from post-traumatic stress disorder, or may face additional challenges that require particular sensitivity.

TO PARLIAMENT AND THE PORTFOLIO COMMITTEE FOR HOME AFFAIRS:

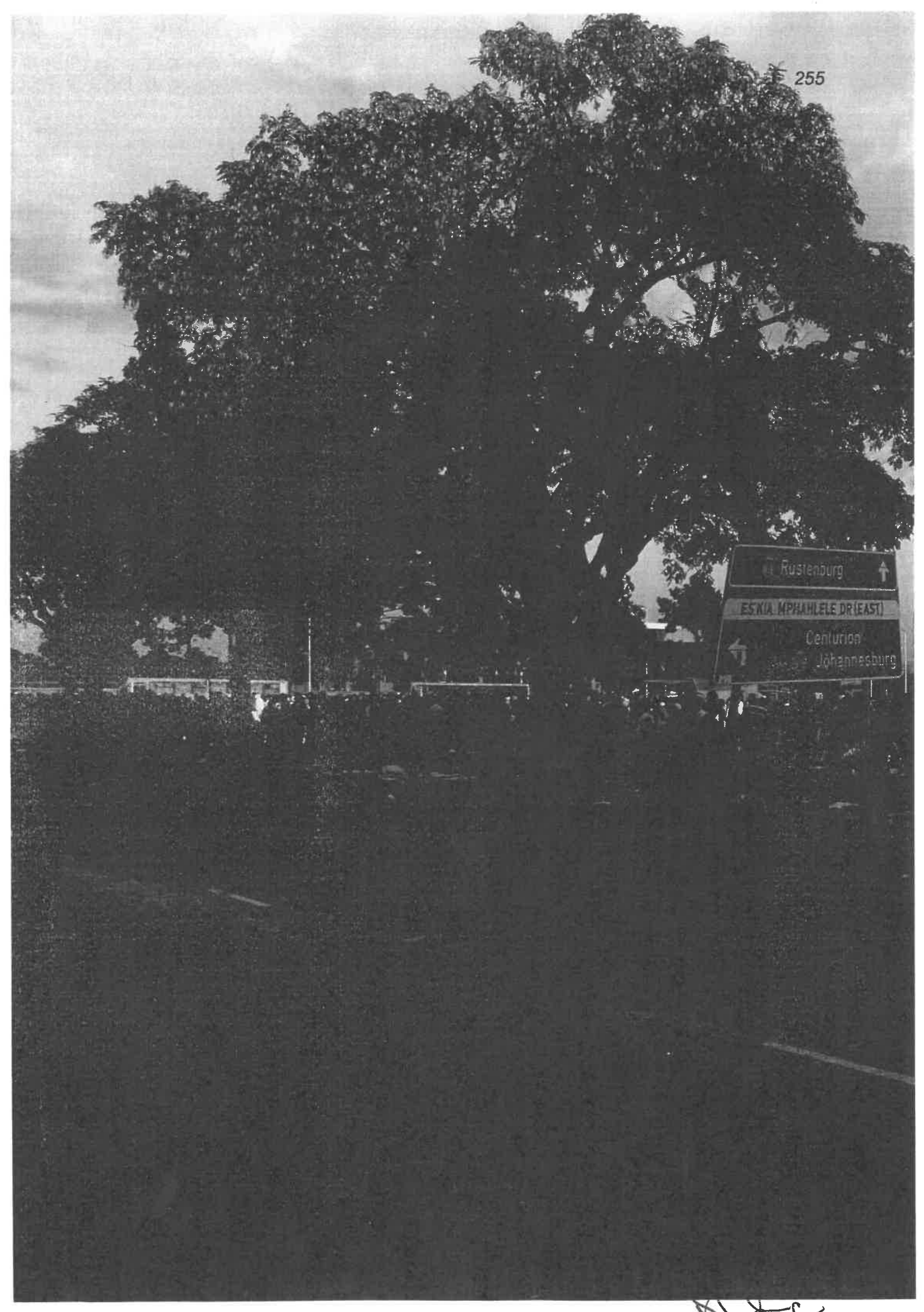
- Exercise greater oversight of the DHA in its management of the asylum process.
- Consider how reforming the immigration system might affect the operation of the asylum system.
- Demand greater accountability from the DHA in its efforts to combat corruption.
- Increase the resources directed at operating the asylum system to ensure adequate service delivery.

TO THE PUBLIC PROTECTOR AND THE SOUTH AFRICAN HUMAN RIGHTS COMMISSION:

- Investigate and monitor corruption at the refugee reception offices.
- Engage with the DHA about its efforts to combat corruption.

TO THE SOUTH AFRICAN POLICE SERVICE AND THE NATIONAL PROSECUTING AUTHORITY:

- Develop a protocol for responding to corruption allegations, including guidelines for responding to asylum seekers who may be undocumented as a result of corruption.
- Investigate allegations of corruption and prosecute corrupt officials.
- Do not prosecute or otherwise punish asylum seekers and refugees who report corruption, regardless of their documentation status or complicity in the corrupt practices.
- Ensure that investigatory processes are sensitive to the situation of asylum seeker and refugee witnesses, who may be undocumented, may distrust authority, may suffer from post-traumatic stress disorder, or may face additional challenges that require particular sensitivity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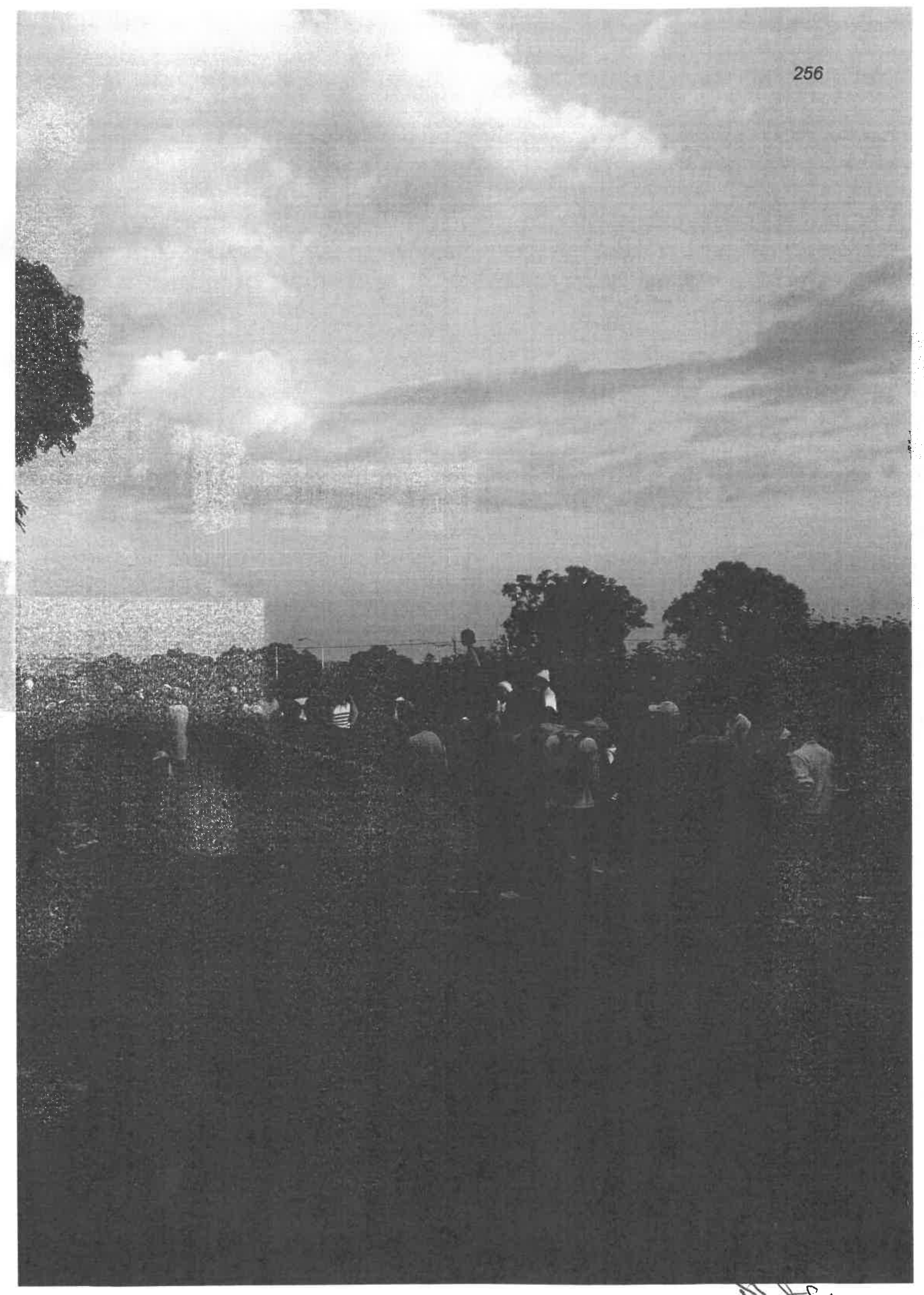

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Status of Immigration Detention in South Africa

December 2023

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Executive Summary

The right to seek asylum is a fundamental human right protected under international law. However, the practice of immigration detention in South Africa has persisted for decades, necessitating a critical examination of its necessity and proportionality. This report delves into recent trends in immigration detention in South Africa, shedding light on its impact on migrants and their interactions with various entities, including the SAPS, the DHA, legal professionals, and government officials.

Drawing on both quantitative and qualitative data from the Immigration Detention Hotline at LHR between March and October 2023, supplemented by interviews with 41 individuals, some directly affected by immigration detention, this report offers a comprehensive analysis. Additionally, insights from legal practitioners nationwide who have represented individuals under the Immigration Act contribute to a well-rounded perspective.

This report focuses on the recent trends in immigration detention in South Africa and its effects on migrants, including in their interactions with SAPS, DHA, immigration officials, lawyers, Magistrates, Judges, and other government officials.

Despite the legal protections theoretically afforded to migrants in South Africa concerning immigration detention, a stark disparity exists between these protections and the harsh reality faced by migrants within the country. Challenges such as lack of access to documentation, corruption, irregular law implementation, homophobia and xenophobia render migrants – predominantly black African migrants - susceptible to arbitrary arrest and detention based on their documentation status.

Numerous arrests, as documented by LHR, are deemed unlawful and indicative of an abuse of power by state officials. Concrete examples underscore the urgent need for reform in the enforcement of immigration laws..

The immigration detention system has cultivated a climate of fear within migrant communities in South Africa. Migrants, already enduring challenging experiences before arriving in the country, find themselves traumatised by a system that fosters a sense of powerlessness and dehumanization. For most migrants, the reality is that the immigration detention system is wielded as a discriminatory and xenophobic tool for officials to exert power over them and extract money from them, regardless of their documentation status.

This report emphasises the urgent need for reform in the South African immigration detention system. The gap between legal protections on paper and the reality experienced by migrants demands immediate attention to rectify systemic issues, safeguard human rights, and ensure a fair and just immigration process.

Realities of Immigration Detention in South Africa

The analysis, personal anecdotes and recommendations that follow stem from the first-hand experiences of persons arrested due to their documentation status and/or detained at Lindela.

The contrast between the legal protections outlined for migrants in South Africa with respect to immigration detention and the reality that migrants face within the country is glaring. Non-nationals often find themselves exposed to arrest and detention due to their documentation status, exacerbated by factors such as:

- limited access to documentation;
- corruption;
- inconsistent law enforcement practices;
- homophobia; and
- xenophobia.

Most...foreigners, they are uncomfortable by the road. They are afraid to get arrested. Most of them, they don't have [correct] papers and most of them, they don't have money to pay to do this, to do this. So they are afraid, they are not free.

- WINNER, 21-YEAR OLD ASYLUM SEEKER FROM THE DEMOCRATIC REPUBLIC OF CONGO ARRESTED FOR NOT HAVING DOCUMENTS

Among the arrests brought to the attention of LHR, a significant number are identified as unlawful and constitute an abuse of power by SAPS, DHA, or court officials.

Further, the climate of fear that the immigration detention system has created among migrant communities in South Africa has traumatised migrants who often go through incredibly difficult experiences even before coming to South Africa. Migrants are made to feel powerless and dehumanized as they navigate through the processes of arrest, detention, and possible deportation, often without a clear understanding of the procedures. For most migrants, the reality is that the immigration detention system is wielded as a discriminatory and xenophobic tool by officials to exert power, assert control, and extract money from them, regardless of their legal status in South Africa.

Access to Documentation

The absence of accessible documentation directly correlates with immigration detention. Increased challenges in obtaining and renewing documentation heighten the risk of unlawful arrest and detention under the Immigration Act. In situations where asylum seekers and refugees lack access to legal representation or community advocates who can clarify the reasons behind expired documents, they may find themselves compelled to pay bribes for release or endure prolonged periods of detention.

> *I was looking for my son like a mad woman [at the court]. And one police said, "Mama, just keep quiet, just organize the money and your son will come out." And I give them the money, it is not even 10 minutes and I see my son out... We don't have job, we are selling [what we can] to survive and they are taking that little money we have to feed our children. It's painful.*
>
> *BETTY, ASYLUM-SEEKER FROM THE DEMOCRATIC OF CONGO WHOSE SON WAS ARRESTED AND DETAINED FOR FOUR DAYS UNTIL SHE PAID A FINE EVEN THOUGH HE HAD A VALID ASYLUM VISA*

rejections, applicants may not even know why they were rejected or that they have the ability to appeal the final rejection at the High Court.

LHR has come across many cases in which applicants are told that they are finally rejected or given a final rejection without written reasons and immediately arrested at the RRO, especially in Musina and Durban. Sometimes their phone is also confiscated, or the battery dies, and they are unable to contact their family or friends who may be able to search for legal representation for them. None of the interviewees who were arrested at the RRO were informed of their right to judicial review. Some spend weeks in prison and are even transported to Lindela before they are able to consult with a lawyer and launch a judicial review application to be released.

Even asylum seekers who find the money and legal representation to launch a judicial review of their final rejection remain at high risk of arrest and deportation due to the fact that they struggle to have their asylum visas renewed. In one case reported to the LHR immigration detention hotline, an applicant who came with copies of his court application for documentation pending the case was refused by RRO officials who instructed him that his lawyer must instead email the documents. When he asked where the lawyer needed to email it, he was told to leave the building.

Corruption

> ***It's the police, it's the government. I can't fight with the government; they seem to do whatever they want. I don't want to fight with those people, so I pay them.***
>
> *- MOHAMMAD, REFUGEE FROM ETHIOPIA*

Money drives the system of arrests due to documentation. Many interviewees expressed how for police, stopping individuals for document checks is not primarily about enforcing the law or ensuring safety but rather a profit-driven enterprise. Sometimes labelled as bail, police and lawyers at Magistrate's Courts collect money from family members of those arrested without documents before they appear in front of the judge and are released without ever formally appearing in Court. They are never given a slip confirming the payment of the fine, thereby rendering them at risk of re-arrest, sometimes as soon as the next day.

A concerning aspect revealed by 100% of interviewees is the pervasive solicitation of bribes. Whether solicited directly or indirectly, such as by prolonging detention while releasing those who pay, individuals are consistently pressured to pay a bribe as a condition for their release. This widespread practice raises serious questions about the integrity of the system and the motivations behind arrests related to documentation issues.

One Malawian interviewee remembered,

> *"I had two people, they ask for 3000 Rands for two people, 1.5 one person, 1.5 one person. So I paid them. Since I paid them, they never asked those guys to appear before court. Those people, they are looking for money ... they just want money. The government just create this program to collect money from foreign nationals, that's all."*[80]

Indeed, one of the interviewees reported how after he was forced to pay a bribe in order to be released in December 2022:

> *The paper that Home Affairs first sent me normally they can't arrest someone when he's waiting for a permit, and they already applied online... I showed them the email that says I sent the paper the previous day and that I'm waiting for my permit. I showed that to the police. The immigration said this paper, yes, I think it's right he can go. But the officer the police commander said, we can't release you to go you're already here by police station you can't go out unless you give us 2000 Rands and I said how can I give you 2000 Rands when the immigration officer said the paper is good. They said you're here already you can't say anything to us just keep quiet and give us 2000 Rands. Just give us 2000 Rands or you will go to court. I said it's fine it's better for me to go to the court. And the next day, of course they refuse to take me by the court they keep me two more days, like 4 to 5 days they keep me. And until then, my brother is outside my friends they contribute for me. I gave them 2000 rounds and then they released me.*[81]

After this, the same police officers came around looking for him a few months later, knowing that he was waiting to be served at his appointment at the RRO. Although he had gone to the RRO with his appointment slip close to a dozen times, every day he was told to leave and come back. In August 2023, he

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Hassan applied for asylum online after the newcomer application launched in May 2022. Around July, he was arrested in KZN for lack of documents, even though he showed the online application.

Once he was arrested, his half-sister in Gauteng tried to assist him. She went to court but it was postponed multiple times. Luckily after a few more weeks, they received an appointment letter for him make his application for asylum.

Upon bringing the appointment letter to the court, she was told by an official inside of the court that in order for the letter to be shown to the judge, she must pay them money, part of which was to be given to the Legal Aid lawyer to represent them. She did so, and the judge ordered that her brother be released. However, when she went to fetch him afterwards, she saw that they were taking him back to the prison. When she asked them why, they told her that the appointment letter is fake and without paying them money he would not be released. Exasperated and desperate to have her brother released, she paid multiple people:

> ***I pay many times there [by the prison and the court]. Too many people they eat my money there. That second time [at least] that one I know they help me even if they eat my money. Another one they was eating my money, they still can't help me. There was too many people. There was different people. And me I don't stay there, I don't know. I was just going and this one person is gonna say, "mama, your brother is never gonna come out, he gonna stay there, I will help you!" You see, just like that.***

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[80] Phone Interview with Donald, 10 September 2023.

[81] Phone Interview with Tsegaye, September 2023.

was again arrested, and he decided that he will not pay and asked to speak to the judge. After spending close to 5 days in detention, he was finally taken to Court where the Magistrate instructed that the immigration officers must take him to the RRO for them to verify his appointment letter, after which he should be released. On the way, the immigration officers informed him that he would be deported unless he paid money and never took him to the RRO. Afraid, exhausted, and thinking of his wife and young children who had been at home alone for five days, he gave the officer the 1500 Rands that his friends had sent him for transport money. He was immediately let out of the van.[82]

When asked why he paid money rather than waiting to go to court to show that he had a valid document, a refugee from Ethiopia explained that he felt that he will not win in Court as the system seemed to be against him,[83]The large majority of interviewees also reported having noticed corruption at the RRO's, particularly at the Desmond Tutu RRO in Pretoria. As interviewees put it, there only money talks. One interviewee recalled,

> *"Last week I go to Home Affairs, I start to cry there. The way they are treating me, I am talking to someone he cannot even listen what I want to tell him. He's just pushing, "mama go there, I don't want to hear you. Do you pay me to listen to what you want to say? Do you pay me?"*[84]

Although the online system was supposed to assist in preventing corruption that had long plagued the RRO's when asylum seekers came to renew their documents in person, several interviewees shared how the system of corruption, too, has moved online:

> *"You have officers, because they have our numbers, telling you, if you send R 1000 today, tomorrow you will have your email [with the new document]...Me myself I have the officer's account number. You have to put money in. Sometimes [after an appointment] you will follow up, they will not reply. Then you will have [another] person coming in your whatsapp who is saying, do you want to get your paper on time? Send to this [account]."*[85]

The main complaints regarding corruption at the RROs are against the security, who often arbitrarily decide who gets to stand where in the queue and who gets to enter inside on a particular day. Interviewees reported having seen multiple people who arrived later than them be allowed to enter inside because they paid money to the security.

"An arresting officer has a clear duty under the Immigration Act- there is a resistance from Police Officials to conduct that training and there is an incentive for the Police Officials to stay ignorant so that they can keep on operating in a manner that creates that vulnerability that creates that opportunity for corruption and that is why you hear so many cases that clients are being coerced into paying bribes but they don arrest people when the procedure is more inquisitorial and should detention should be a last resort." –

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[82] Ibid.
[83] Phone interview with Mohammad, 20 September 2023.
[84] In-person interview with Ayesha, 7 August 2023.
[85] In-person interview with Odia, 1 September 2023.

Irregularities in Application of Law

Immigration officials, SAPS, and court officers regularly fail to correctly apply the law, either due to lack of knowledge of the law and policy changes, or unwillingness to respect the rights of persons arrested due to lack of documentation. In many instances, this unwillingness is directly tied to corruption and the use of the immigration detention system as a business for immigration officials and SAPS.

> ***[Even with] the right document...the police sometimes they tell you, it is fake, it is expired, they want money. They will arrest you.***
>
> - ***MOHAMED, ASYLUM-SEEKER FROM SOMALIA***

Holding for longer than 48 hours

While the police do have the authority to detain a person for up to 48 hours for documentation verification, this 48-hour period is frequently breached. There are instances where persons are held for long periods at police stations without verification taking place. We have also noted cases where people are not brought before the court within the 48-hour period. This usually takes place when police officers want to solicit bribes from the arrestees.

Betty, an asylum-seeker from the Democratic Republic of Congo, went to the police station after her son was arrested on a Friday with a printed copy of his most recent asylum visa after the police accused the electronic version of being fake. Once she brought a printed copy, the police informed her that her son would be held for verification of the document.

> *"They said Home Affairs is not there because it is the weekend, Home Affairs will only come on Monday. My son sleep by [the police station] for three days without any reason. After Monday they charge me, they say I must pay R 1500 otherwise he must go to Lindela because the immigration they are not working, they are on leave, and only they can verify his paper. I was so shocked. My son slept there for four days even though he was having his document. What is happening here in South Africa? I say we are lost, us and our children."*[86]

Conditions of Detention

Regardless of the location of detention, interviewees agreed that the conditions of detention were *"very bad."* Certain detainees also noted how cold the holding cells were during winter, but they

[86] In-person interview with Betty, 1 September 2023.