ACCESS

The Role of Courts in Shaping Access to Asylum

SOUTH AFRICA NATIONAL REPORT

2026

Data collection: June 2024 – December 2025

DOI 10.6092/unibo/amsacta/8977

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ACCESS is funded by the European Research Council 2022 Starting Grant Gatekeepers to International Refugee Law—The Role of Courts in Shaping Access to Asylum [101078683].

European Research Council
Established by the European Commission

CONTENTS

INTRODUCTION: OBJECTIVES OF ACCESS

The research project "Gatekeepers to International Refugee Law? – The Role of Courts in Shaping Access to Asylum" ACCESS investigates the role of courts in shaping access to asylum. It seeks to understand how courts globally interpret State-developed barriers in light of the Refugee Convention (RC) and other international norms, what socio-legal factors influence asylum access adjudication, and how the emerging jurisprudence shapes international refugee law (IRL) and migration governance.

ACCESS adopts a comparative approach as it relies on data collected from 19 countries, theoretically selected to cover all geographical regions, various legal systems and adjudication models, and different forms of participation in the international refugee law regime.[1]

Given the comparative and socio-legal approach of the project, our goal is to collect data through multiple methods that guarantee comparability, comprehensiveness, and reliability of the data.

The data collection template, along with the explanatory guidance used for the preparation of this National Report, can be found at: Lacchei, Alice; Lambertini, Sara Mariella; McDonough, Paul; Moraru, Madalina; Reyhani, Adel-Naim; Scissa, Chiara (2026) National Report ACCESS Project Template. DOI: 10.6092/unibo/amsacta/8984

In addition, the summaries of the judicial decisions analysed in Part II of this National Report and cited throughout this document can be found at: Lacchei, Alice; Lambertini Martinez, Sara Mariella; McDonough, Paul; Moraru, Madalina; Reyhani, Adel-Naim; Scissa, Chiara; Jesudoss, Lorett Mary (2026) ACCESS Mid-Term Dataset: The Role of Courts in Shaping Access to Asylum. University of Bologna. DOI 10.6092/unibo/amsacta/8962. [Dataset]

DEFINING TERMS

'**Asylum**' denotes the protection a state grants on its territory to non-citizens who seek it. It includes a legal status that protects against refoulement and provides a right to stay. In several jurisdictions, e.g. those that do not have domestic asylum legislation, this status might not be labelled 'asylum'. The research nevertheless includes such equivalent protection under the term 'asylum'. Similarly, if a national system that includes an asylum status provides additional protection statuses that include a set of rights closely similar to those the 1951 Convention provides for refugees lawfully staying, the research includes those statuses under 'asylum'.

'**Accessing asylum**' describes using legal and practical avenues to move towards the territory of potential host states, or to enter procedures and other arrangements for obtaining such status (labelled as asylum or not) implemented by a state or on its behalf. Territorial asylum processing (sometimes referred to as refugee status determination or RSD) itself or equivalent practices, however, are not studied here.

'**Barriers to accessing asylum**' refers to measures, arrangements, approaches, implementation practices, or structures that impede access to asylum. They can be implemented by state actors and others (if tolerated by the state); be of a practical or legal character; incorporate socioeconomic and cultural elements;

[1] Australia; Kenya, South Africa, Tunisia (Africa); Austria, Greece, Italy, Poland, Spain (Europe); India, Malaysia, Pakistan, Turkey (Asia); Argentina, Brazil, Chile, Ecuador, Mexico (Latin America), USA.

and pertain to administrative or judicial spheres. Barriers implemented after the formal start of territorial asylum processing can be considered, if the processing is conducted as a sham or pretence rather than allowing effective access to asylum.

'**Pushbacks**' denote the removal or non-admittance of individuals trying to access asylum, without a substantive assessment of risks or potential rights violations. They can occur both on land and sea, including on international waters.

'**Pullbacks**' are the dragging back of individuals approaching a destination state to the territory of a state from which they had departed without a substantive assessment of risks or potential rights violations. Such practices are often implemented in cooperation between two or more countries. While typically practiced at sea, such as in the territorial waters of the state of departure, pullbacks can also occur on land.

'**Walls and fences**' include physical barriers that prevent access to territory at or near borders, irrespective of the specificities of the construction or the materials used.

'**Detention**' is the imprisonment or other limitations of the right to liberty and security of person of individuals, territorially or extraterritorially, in connection with their asylum accessing.

'**Externalization of asylum processing**' denotes outsourcing procedures and transferring individuals to other jurisdictions to assess protection claims. Under such a practice, for example, potential destination states disallow asylum procedures on their territory, dismiss the corresponding applications, and deport individuals to cooperating countries. Externalized asylum processes can be based on formal and informal agreements between states.

'**Procedural barriers**' refers to any administrative practice or arrangement which, after individuals (attempt to) claim asylum, impedes the formalization of the application or the commencing of a procedure for obtaining asylum. This barrier can, for example, take the form of sham processes or (fast-track) processes based on the safe third country or safe country of origin concept, or a lack of mechanisms for ensuring appointments at registration offices.

'**Judicial or quasi-judicial body**' is the body that reviews/assesses the legality of the decisions, actions, or omissions of state authorities. This term encompasses the wide range of institutions adjudicating asylum barriers, including government/executive bodies, UNHCR, etc.

'**First instance judicial or quasi-judicial body**' is a court, tribunal, or other quasi-judicial body that hears appeals against administrative or executive decisions. 'Second instance judicial or quasi-judicial body' is a court or tribunal or other body that hears appeals against decisions made by a first instance judicial or quasi-judicial body. 'Third instance judicial or quasi-judicial body' is a court or tribunal (possibly a constitutional court) or another body that hears onward appeals, i.e., appeals against decisions already made by a judicial or quasi-judicial body of at least a second instance. In some jurisdictions there might be further levels of appeal.

'**Legal system**' refers to deeply rooted, historically conditioned attitudes about law's nature and role, the legal system's organization and functioning, and how the law is developed, applied, and interpreted (Merryman, 1985). The most common legal systems are the common law, civil law, Islamic, indigenous and socialist legal traditions (idem).

'**Asylum access adjudication**' refers to judicial examination and review by courts or quasi-judicial bodies of administrative decisions made by executive or immigration authorities regarding asylum.

'**Socio-legal factors**' refer to macro, meso, and micro factors influencing asylum access adjudication in the selected jurisdictions. They can originate at the macro level (state), at the meso level (judicial or quasi-judicial body), and at the micro level (individual). For example, adjudication may be influenced by the level of independence of the judiciary (macro factor) or the specialization of the asylum adjudication system (e.g., specialized courts); or availability of judicial or quasi-judicial bodies resources such as time, funds, human resources (meso factors); or individual characteristics of the actors involved, such as background or gender of adjudicators (micro factors).

'**Judicialization of politics**' refers to the increasing reliance on courts and judicial means for addressing core moral, political, and public policy questions (Hirschl 2013). For an overview of the meanings of judicialization, please refer to Hamlin and Sala (2018), who trace various forms in which judicialization of politics can occur (e.g., expanding the jurisdiction of courts, judicial activism, or due to the large number of cases decided by courts).

'**Forced migration**' refers to 'a migratory movement which, although the drivers can be diverse, involves force, compulsion, or coercion' (IOM, 2019:77). Although it is not an international legal concept and the use of the term is debated because of the controversial dichotomy of voluntary/forced movements, in this report we refer to forced migration including the movement of refugees and asylum seekers, as well as other displaced persons (including those displaced by disasters or victims of human trafficking) who will not attempt to lodge an asylum application. When referring to 'other displaced persons', we mean those forced migrants who are not registered as asylum seekers or refugees, etc., despite being present in the country.

The questions below aim to better understand the barriers in this jurisdiction and their relevance for investigating how courts shape access to asylum. Each question will be addressed in relation to each of the relevant barriers.

1. **Functioning:** What is the barrier's specific functioning? How does it prevent individuals from accessing asylum?

2. **Time:** What is the implementation period of the barrier? Is it still in use? Is there a time frame for its planned termination?

3. **Place:** Where is the barrier implemented?

4. **Actors:** Who are the key institutional and other actors implementing the barrier? Are there relevant actors from other jurisdictions or international actors?

5. **Interaction:** How does the barrier interact with other barriers and the country's asylum system?

6. **Development:** What has been the historical and political context for introducing the barrier, and how have its implementation and its character developed over time? (Please consider e.g. corruption, economic or human resources available to implement the barrier, resistance or support by local actors - officials or local community)

7. **Rationale:** What are the stated purposes (e.g., in legislative preambles, government/executive, or judicial statements) the barrier is designed to serve?

8. **Legal Status:** What legal status does the national legal framework provide to individuals prevented by this barrier from accessing asylum? For example, do they fall under a specific (protected or unprotected) category within national law, such as asylum seekers or refugees before formal recognition, or are they treated under the general framework for non-citizens?

9. **Specific Impact**: What is the impact of the barrier on specific groups, such as children, women, LGBTQ+ individuals, or people with disabilities? How does it differ from the barrier's general impact?

10. **Reach:** How many individuals have been affected by this barrier since 2010, both in absolute numbers and relative to the number of procedures for determining protection status in the same period? Has the barrier contributed to less movement of displaced persons towards the country? Please provide an informed estimate if reliable statistics or studies are unavailable.

11. **Source:** What is the legal basis or source of the barrier? Is it grounded in or approved by domestic, international, or supranational law (even if its legality might be contested)?

12. **Justification:** What justifications have the government/executive branch provided for the barrier? Are there official statements or documents that outline these justifications?

13. **Domestic and International Reactions:** What have been the reactions or interventions from domestic actors, international bodies, or other countries?

14. **Externalization:** How does the barrier outsource migration control functions to actors outside the jurisdiction?

15. **Technology:** How does the barrier draw on technological infrastructure or tools to fulfil its functioning?

16. **Other:** Any further information considered crucial for understanding this barrier to accessing asylum and its relevance.

PART 1: BARRIERS TO ACCESSING ASYLUM

I. IDENTIFYING BARRIERS

A. Barriers of general relevance

Which of these barriers are implemented in this jurisdiction?

Pushbacks: ☒

Detention: ☒

Procedural barriers: ☒

II. UNDERSTANDING BARRIERS

A. Barriers of general relevance

Pushbacks at land borders.

Summary: The Border Management Authority (BMA) has been created in 2020 with the purpose of addressing the glaring challenges of managing migration at border posts, among others. Although there is still little data and evidence on the operations carried out by BMA, it is evident that it is involved in pushbacks at the land border. BMA itself proudly declares of having intercepted undocumented migrants at the land border and to have pushed them back in blatant violation of the right to access to asylum.

1. Functioning: According to the 2020 legal provision, the BMA was intended to address the glaring challenges of managing migration at border posts, including officials' corruption, poor training of staff and insufficient deployment, lack of infrastructure and technology, and lack of coordination between departments. 672 Border Law Enforcement Officers of the BMA are patrolling the South African land border and are intercepting migrants trying to cross the border. Those with no proper documentation are pushed back with no possibility to claim asylum. Officers are equipped with 22 quad bikes, 26 motorbikes, 44 patrol vehicles, and 127 firearms, with 400 additional pistols recently delivered. In addition, BMA is already using technology to patrol the land border. In collaboration with ARMSCOR, BMA is using funds from the Crime Asset Recovery Account to procure specialized equipment such as drones, body cameras, and maritime patrol vessels to enhance surveillance and enforcement. BMA aims to enhance its technological capacity so to extend digital surveillance at the border (please see Item 6).

2. Time: The 2017 White Paper advanced a proposal to establish BMA to provide a single authority to oversee all aspects of border control. This authority has been officially created through the adoption of the Border Management Authority Act in 2020, and it has been officially operational since April 2023.

3. Place: South Africa's land borders

4. Actors: Border officials of the BMA

5. Interaction: Pushbacks at the land border interact with several other barriers present in the country. In particular, pushbacks interact with detention, as people apprehended at the border are either automatically pushed back in case they don't have proper documentation or are first arrested and then deported with

no possibility to claim asylum. In addition, pushbacks interact with procedural barriers, in particular the total lack of procedural and substantial guarantees in granting access to asylum as well as with systemic corruption of border officials.

6. Development: There are no reliable information or data concerning pushbacks at land borders before 2020. The BMA has been created in 2020 and has been operational since April 2023. Given that its operations have been deployed only recently, there are currently no relevant data nor reports on the development of pushbacks implemented by this authority. Yet, it is evident that the new government, elected in May 2023, has boosted BMA's operationalization in order to achieve the government's aim to speed up deportations particularly of migrants from Ethiopia, the Democratic Republic of Congo, and Bangladesh. In 2023, the BMA launched a comprehensive border control plan aimed at addressing illegal immigration, one of the BMA's biggest challenges.[2] The BMA has been praised for having prevented illegal border crossing by undocumented migrants, reaching an increase of 215% of interception rate that in the past. In BMA's own words, "[…] only those people who have the requisite documents are allowed into the port environment for them to be processed. *Those who do not have the correct documentation are then intercepted and then from there, we actually returned them back to the Zimbabwean side*".

In addition, further concerns on the potential pushback operations carried out by the BMA arise in the context of the White Paper on Citizenship, Immigration and Refugee Protection: Towards A Complete Overhaul of the Migration System in South Africa, published in November 2023. The DHA encourages the BMA to "enter into public-private partnership with other relevant organisations to deal with border management", although clarifications on what is meant by "relevant organizations" are missing. In addition, the document foresees the revision of the Border Management Authority Act to align it with the new policy framework that DHA envisages for citizenship, migration, and asylum.

7. Rationale: The rationale of pushbacks is to protect land borders from undocumented or "undesirable" migrants as well as to ease the migratory pressure on the country.

8. Legal Status: People subjected to pushbacks are considered as undocumented migrants illegally trying to cross the border. As they lack proper documentation, they are refused entry and are treated as illegal foreigners.

9. Specific Impact: The practice of non-admitting/ rejecting migrants potentially seeking asylum at the border without a substantive assessment of risks or potential rights violations may impinge the right to asylum and violate the principle of non-refoulement. This has severe impacts on all migrants subjected to pushbacks and further exacerbate pre-existing vulnerabilities. In addition, often people come back and instead of using the trusted routes they tend to go underground which could be far more dangerous for vulnerable people and minors.

10. Reach: There are few data concerning the number of people affected by this barrier in light of its novelty. Some statistics, yet to be confirmed by independent sources, are provided by BMA itself. From April to November 2023, BMA declared to have apprehended "over 36.000 undocumented, undesirable and inadmissible persons" at the border. Between 2023 and 2024, 15.924 undocumented migrants were intercepted. According to BMA, this number increased to 50.312 in 2025. In addition, almost 2.000 people were refused entry due to fraudulent documentation or non-compliance with entry requirements. Other

[2] Border Management Authority Act, 2020 (No. 2 of 2020) G 43536, https://www.saflii.org/za/legis/num_act/bmaa20202020g43536340.pdf

sources provide for conflicting data. In fact, whereas Al Jazeera estimates that BMA has arrested and deported over 410.000 people from April 2023 to May 2024, News24 rather says that 410.000 people have been arrested and deported over a wider period, from July 2022 to September 2024.

11. Source: National law, Border Management Authority Act, 2020 (No. 2 of 2020) G 43536.

12. Legitimization: The government created the BMA to address the glaring challenges of managing migration at border posts, including officials' corruption, poor training of staff and insufficient deployment, lack of infrastructure and technology, and lack of coordination between departments.

13. Technology: BMA is already using technology to patrol the land border. In collaboration with ARMSCOR, BMA is using funds from the Crime Asset Recovery Account to procure specialized equipment such as drones, body cameras, and maritime patrol vessels to enhance surveillance and enforcement. BMA aims to enhance its technological capacity so to extend digital surveillance at the border. For the future, the BMA aims to build more partnerships with technology firms in order to integrate digital solutions into border processing. Advanced analytics, biometric verification, and real-time data sharing with private sector stakeholders will enable BMA "to respond to threats more efficiently and enhance the accuracy of our documentation and immigration processes". Single modern drone used by the BMA for surveillance of the border line will be mainstreamed to effectively detect illegal crossings in a context where the Authority lacks the manpower it needs for surveillance. BMA announced it will also use specific technology to monitor border crossing at ports by using critical infrastructure (water tankers, generators etc). BMA has also extended operating hours at certain ports in collaboration with neighbouring countries (Lesotho, Zimbabwe, Mozambique, Botswana, Namibia).

14. International Reactions: In its observations on the 2023 White Paper, UNHCR does not actually question the BMA's practices. It dedicates a very small paragraph to it, simply saying that "UNHCR has cooperated with the BMA in its efforts to regulate the entry of foreigners into the country while ensuring the right to seek asylum and upholding the principle of non-refoulement and looks forward to continuing to work with the BMA on these issues" (para 6.1). South African scholars have criticized the BMA Act because while it purports to address other national security concerns, its anti-migrant overtones are clear. In addition, Home Affairs' poor track record on managing xenophobia, concerns about its added powers are valid.

15. Other: Corruption is a relevant barrier for asylum seekers attempting to cross 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 available reports 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, yet there is evidence of the occurrence of this crime. A first survey study, published in 2015 by Lawyers for Human Rights (LHR) and The African Centre for Migration & Society (ACMS), found that many asylum seekers were asked to pay bribes to enter South Africa. Approximately 13% of those surveyed reported being asked for money by the border officials. Of those, almost 1 in 4 paid more than R700 (around 32 euros). The highest amount reported was R2500 (around 117 euros). Asylum seekers who were unable to pay bribes faced the risk that border officials would turn them away. According to the Project Lokisa Report by Corruption Watch, complainants reported that they had been turned away at border posts by immigration officials. A second survey has been published by LHR in 2019, which corroborates the findings of the 2015 Survey: corruption still occurs at every point in the asylum process. The study

surveyed 263 individuals. Accordingly, 10% of respondents reported being asked for money by border officials upon entry into the country.

Detention

Summary: Detention has become an all-too-common experience for migrants, regardless of their documentation status. Arbitrary detention, prolonged or indefinite detention, unlawful detention are all common practices in South Africa to the detriment of asylum seekers who are kept in detention pending deportation while their asylum claim is still pending or even before they have the possibility to apply for asylum. Practices of summary returns through detention may also be detected. In particular, the recent amendments to the Refugees Act and Immigration Act occurred in 2020 have reinforced the possibility for migrants and asylum seekers to be detained.

1. Functioning: In South Africa, arrest and detention are frequently used in several ways. Migrants entering the country irregularly/without authorization are considered to be "illegal foreigners" under the Immigration Act, for which detention is foreseen pending deportation. Section 23 of the Immigration Act stipulates that immigration officials should grant asylum transit visas to allow individuals to transit through the country in order to apply for an asylum permit at a Refugee Reception Office. Yet, Section 23(2) asserts that upon expiry of such transit visa, individuals who have not presented at a RRO are to be considered as "illegal foreigners" under the Immigration Act.

The Immigration Act allows for arrest and deportation of persons found to be an "illegal foreigner…who is in the Republic in contravention of this Act." There are two types of detention that can occur when someone is found to be undocumented: a) administrative immigration detention for the purpose of deportation; and b) criminal detention for the crime of entering and remaining in the country illegally.

Specifically, section 34(1) provides for the administrative detention and subsequent deportation of "illegal foreigners". Under Section 34, detention can last up to 30 days and may be extended for a maximum of 90 days if warranted. While the police have the authority to detain individuals for up to 48 hours for documentation verification, this period is frequently exceeded. In *Ex Parte Minister of Home Affairs*[3], the Court sets out that when arrested for the purpose of deportation under Section 34, individuals must be brought before a court within 48 hours. Their detention can continue for up to 30 days, during which it must be confirmed by a court. Immigration officers can seek a further 90-day extension of the detention at Magistrate's Court. Even with court confirmation, detainees are not to be held beyond 120 days, although this continues to occur regularly in practice.

Section 49 of the Immigration Act provides for criminal sanctions of a fine or imprisonment for individuals who commit offences such as unauthorised entry, overstaying, and failing to comply with deportation orders, with penalties ranging from fines to prison terms of up to four years. In recent years, there has been a notable increase in persons arrested under both Section 49 and Section 34, leading to sequential detention: first a criminal sentence and then an administrative detention pending deportation.

However, if migrants claim asylum then the relevant disposition to be applied is no longer the Immigration Act but rather the Refugee Act, according to which asylum seekers and refugees may not be detained for the purposes of deportation, as this could amount to non-refoulement. This includes people that have an

[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

intention to apply for asylum. Section 21 of the Refugee Act states that individuals, from the moment they apply for asylum until they receive a final decision of their claim are immune to arrest and detention for entering and being in the country illegally, except having committed criminal offences. This has been confirmed by Constitutional Court judgment in *Ruta v Minister of Home Affairs* which found that a delay in applying for asylum does not exclude a person from applying for asylum. The Refugee Act generally prohibits the detention of asylum seekers and provides for specific norms to regulate it (i.e., Art. 23 - Detention of asylum seeker; Art. 29 – Restriction of Detention). Under the Refugees Act, following the initial review by a High Court Judge, an asylum-seeker's detention must be further reviewed every 30 days.32 No other provision appears to exist for challenging the decision to detain. Yet, detention of asylum seekers is often protracted without legal assessment despite the change in the legal status of the migrant. In addition, asylum seekers who have been rejected and who have not challenged the final rejection are at risk of detention and deportation.

In addition, in some cases, asylum seekers whose claim was rejected have been requested to present themselves at an RRO under the impression that they are being called upon to only receive a decision on their applications. Instead, they are arrested and detained in terms of Section 34 of the Immigration Act. This practice has resulted in asylum seekers being detained and immediately deported without warning or opportunity to wrap up their affairs in South Africa, arrange for the repatriation of their families or be afforded the opportunity to review the decisions in a court.

The recent amendments to the Refugees Act and Immigration Act entered into force in 2020 have allowed for broader powers relating to immigration detention. The Amendments allow for an asylum seeker or refugee who is a "threat to national security" or "national interest" to be detained and deported. In addition, they have reinforced the need for 'good cause' when an asylum seeker has entered illegally or delayed their application. According to the 2020 Refugees Amendment Act, asylum seekers are required to obtain an asylum transit visa by declaring their intention to apply for asylum at the border and must report to a Refugee Reception Office no later than five days after arriving in South Africa and fill an official asylum claim there. This visa is only valid for five days, during which individuals are expected to report to an RRO to apply for asylum. If they fail to report to an RRO within 5 days of entering the Republic without compelling reasons, asylum seekers risk exclusion from refugee status.

Furthermore, those who do not have an 'asylum transit visa' will be interviewed by an immigration officer to determine whether they have 'valid reasons' for not holding this transit visa. Accordingly, asylum seekers who fail to enter the country through a designated port of entry, fail to obtain an asylum transit visa at the border and do not show good cause for having done so. In these cases, they are barred from applying for asylum, arrested, detained and then deported. In *Lembore and Others v Minister of Home Affairs and Others* [2024] 2 All SA 113 (GJ), the court clarified that detention under the Immigration Act remains lawful until an applicant demonstrates valid reasons for their illegal entry or delayed asylum claim. If an applicant fails to show good cause, they may still be detained and potentially deported, though the decision can be appealed.

In terms of section 28 of the Bill of Rights, a child may not be held in detention with adults. In addition, the detention of children is allowed only if it is a 'measure of last resort' and it must be proportionate. Similarly, Art. 29(2) of the Refugee Act states that the detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time.

2. Time: According to the scholarship, unlawful detention and deportation practices have been commonplace at the facility since the late 1990s.[4] In 2002, the Immigration Act was first adopted. In opposition to the Refugee Act, which protects asylum seekers from detention, the Immigration Act promotes "a highly restrictionist immigration policy"[5], in which detention is used as the primary means of immigration enforcement.[6] Detention has been exploited as a way to curb asylum seekers since then. Please look at Item 6 (Development) for more information.

3. Place: Throughout South Africa and at the land borders. Illegal foreigners are held at the Lindela Repatriation Centre pending deportation.

4. Actors: Police officers, immigration officers.

5. Interaction: Detention interacts with procedural barriers especially those referring to systemic administrative deficiencies. Rejected asylum claims because of rooted dysfunctionality of the system make the claimant be kept in detention despite their eligibility for protection. In addition, detention also interacts with the closure of refugee offices as asylum seekers and refugees were unable to apply for, and/or renew their documentation, thus being at risk of arrest and detention.

6. Development: Over time, immigration detention has become an all-too-common experience for migrants, regardless of their documentation status. Bribery of migration officials remains a viable option for avoiding detention. The South African Human Rights Commission first investigated the Lindela Repatriation Facility in 1999 and found significant obstacles in accessing detainees and poor conditions.[7] In 2005, the UN Working Group on Arbitrary Detentions found similar circumstances with arbitrary detention, unlawful detention of asylum seekers and refugees, inadequate legal procedures to challenge detention, and conditions that do not meet international standards. Between 2009 and 2010, the NGO Lawyers for Human Rights brought more than 100 cases on behalf of individuals being detained illegally. In 2014, NGOs and the media reported police continued to arrest migrants and asylum seekers arbitrarily, even those with documentation, often because police were unfamiliar with asylum documentation. In some cases, police threatened documented migrants and asylum seekers with indefinite detention and bureaucratic hurdles unless they paid bribes to ensure quick adjudication of their cases. Practices of detention are still in place. For instance, since November 2023, new applicants for asylum have been subject to arrest, detention, and deportation without the opportunity to undergo a refugee status determination interview in open violation of the principle of non-refoulement. Arrests stem from preliminary interviews conducted by immigration officials, who assess whether applicants have good cause for failing to enter the country through a designated port of entry and obtain an asylum transit visa at the border. The majority of applicants are found lacking good cause, resulting in their arrest for deportation. This practice has been challenged in front of Courts by NGOs.

7. Rationale: Detention is designed to punish migrants for entering/staying illegally in South Africa and as a measure to contain flows of asylum seekers. Both political and judicial authorities frequently point out that South Africa is facing harsh migration pressure that current facilities cannot handle. Yet tones are

[4] Corey Johnson, Failed asylum seekers in South Africa: policy and practice, AHMR, Vol.1 No2, May- August, 2015 https://scielo.org.za/pdf/ahmr/v1n2/04.pdf

[5] Khan, F. 2007. Patterns and policies of migration in South Africa: Changing patterns and the need for a comprehensive approach. Paper presented for conference on Patterns on Policies of Migration in Loreto, Italy.

[6] Lawyers for Human Rights. 2008. Monitoring Immigration Detention in South Africa

[7] Algotsson, E. 2000. At the crossroads for detention and repatriation: An assessment of the conditions of detention. Johannesburg: South African Human Rights Commission.

very different. A few emblematic examples are hereby provided: In 2018, the leader of the Congress of the People, Mosiuoa Lekota, stated "Government, at national [level], is allowing people to flood South Africa". In July 2017, the ANC government's Deputy Minister of Police, Bongani Mkongi, lamented: "How can a city in South Africa be 80% foreign nationals? That is dangerous. South Africans have surrendered their own city to the foreign nationals. The nation should be debating that issue. If we do not debate that, that necessarily means the whole of South Africa could be 80% dominated by foreign nationals and the future president of South Africa could be a foreign national. We are surrendering our land, and it is not xenophobia to talk truth".[8] References to judges are provided in Item. 13.

8. Legal Status: Migrants in detention are considered as illegal foreigners under the Immigration Act and do not deserve protection. According to the 2020 Refugee Amendment Act, if the Director-General has withdrawn an asylum seeker visa, they may be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity (Art. 23). In addition, a refugee, asylum seeker or categories of refugee or asylum seeker may be removed from the Republic on grounds of national security, national interest or public order (Art. 28.1)

9. Specific Impact: Detention and deportation may be inapplicable to particular vulnerable groups, such as children.[9] Detention has detrimental effects on children. Without asylum visas, children also face the risk of arrest, detention and deportation. As the Constitutional Court said in Centre for Child Law, "it is unjust to penalise children for matters over which they have no power or influence".[10] In 2004, the Centre for Child Law instituted a case in response to the detention of over 100 children at Lindela Repatriation Centre including some who were held with adults. The Pretoria High Court held that detention of such minors was unlawful and shameful transgression against children's rights and interests. In spite of this, approximately 50 children have been discovered at Lindela since 2016. Again in 2023/2024, reports denounced that children are being arrested and kept at police stations to be charged with ordinary immigration detention charges.

10. Reach: Since 1994, the primary response of South Africa to the increase in immigration flows has been to arrest and deport irregular migrants. Data on the number of asylum seekers detained by South Africa is not available. The Global Detention Centre has denounced the lack of information on the topic.

11. Source: Whereas the Refugee Act protects asylum seekers from detention, the Immigration Act facilitates it. The tension between the two has resulted in refugee protection being subsumed by immigration concerns. Indeed, Section 32(2) of the Immigration Act requires that any person declared an illegal foreigner must be deported; however section 34(1) confers discretion on the part of the officer as to whether the individual must be detained. Section 34(1) also includes a range of safeguards including the need for the authorities to provide reasons in writing for the negative decision, the right to appeal the decision to deport them, the right to have a court confirm the detention, and temporal limitations on detention. Section 49 of the Immigration Act further criminalises violations of immigration laws, adding to the use of detention as an enforcement mechanism of the Immigration Act. Detention under the

[8] MACHINYA, Johannes. Migration and Politics in South Africa: Mainstreaming Anti-Immigrant Populist Discourse. *AHMR* [online]. 2022, vol.8, n.1, http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2410-79722022000100005&lng=en&nrm=iso

[9] As written above section 28 of the Bill of Rights maintains that a child may not be held in detention with adults. In addition, the detention of children is allowed only if it is a 'measure of last resort' and it must be proportionate. Similarly, Art. 29(2) of the Refugee Act states that the detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time.

[10] See, Centre for Child Law v Media 24 Ltd [2019] ZACC 46; 2020 (1) SACR 469 (CC); 2020 (3) BCLR 245 (CC).

Refugee Act is instead allowed only in absence of good cause, as provided by Sections 4(1)(f), 4(1)(h), 4(1)(i) and Section 21(1B) of the Refugee Act read together with regulation 8(1)(c) (1), 8(2) and 8(4) of the Refugees Act.

12. Legitimization: The executive has justified several times the use of detention. The Department of Home Affairs once argued that it continuing to detain illegal foreigners indefinitely, beyond the 120-day limit provided by law, is in the best interest of justice and that releasing them would mean to perpetuate illegality by sending the wrong message to illegal migrants in the country. The fact that the detainee in question was an asylum seeker who had wrongly been sent to Lindela after being acquitted of non-related criminal charges was irrelevant to the government's detention decision, which it automatically framed as a security issue. Yet, according to the Department of Statistics itself, South Africa lacks comprehensive data on irregular migration due to the unavailability of administrative records which would allow for indirect estimation of this group.

13: Technology: Technological issues also involve DHA. In some instances, problems with DHA's computer system and record-keeping procedures prevented the verification of individuals with valid status. For example, an individual with a valid permit was sent to Lindela because DHA could not find him in the system. In another case, the Department detained a recognized refugee whose file it could not locate. DHA determined that his file must have been moved to the 'new system,' and he was instructed to file a new claim. Irregularities and bureaucratic problems at the reception offices also led to accusations of fraud. Some of these issues stemmed from DHA's decision to begin processing all renewals electronically so that permits would be printed with the new expiration date. After this change, some offices continued to manually stamp the existing permits with new dates, as had been the previous practice. This led to accusations of fraud—levelled not against the reception office staff but against the asylum seeker. In two cases, asylum seekers whose permits had been manually renewed were accused of having fraudulent stamps, despite having renewed their permits at a reception office.

14. Domestic and International Reactions: In 2014, the South African Human Rights Commission detailed human rights abuses at the Lindela Repatriation Centre, including procedural violations, inhumane and unsafe conditions, violence, and the unlawful detention of high numbers of people. After the release of that report, the Government blamed the Department of Home Affairs for turning Lindela into "a place of human rights abuses". To solve the conflict on detention of asylum seekers between the Immigration Act and the Refugee Act, the Supreme Court of Appeal established a number of key principles in landmark cases (*Abdi, Arse, Bula,* and *Ersumo*), whereby, in essence, detention of asylum seekers is unlawful until a final status determination is pending, or if an intention to apply for asylum is evinced. These principles have been commented by the Supreme Court of Appeal in *Ulde v Minister of Home Affairs*, where it confirmed that foreigners cannot be detained 'arbitrarily or without just cause', and that Section 34 does not require officials to detain every illegal foreigner they encounter, but instead obligates officials to exercise their discretion, which must be construed in favour of liberty. Most importantly, these principles have been crystallized by the Constitutional Court in *Bula*, where judges ruled that the protection provided by the Refugees Act trumped any punitive measures of the Immigration Act, provided an intention to apply for asylum had been evinced, and regardless of delay or any other reason. An aspirant asylum seeker could only be categorised as an 'illegal foreigner' under the Immigration Act if a final determination on their status as a refugee had been made and denied. Yet, the 2020 Refugees Amendment Act, although it makes no specific mention of detention, had the general effect of preventing individuals from applying for asylum and to label them as 'illegal foreigners'. According to Section 4(1)(h) of the amended Refugees

Act, individuals cannot qualify for refugee status if a Refugee Status Determination Officer (RSDO) has reason to believe that they entered the Republic illegally without 'compelling reasons' for such entry. Section 4(1)(i) exempts any individual who does not already hold an asylum visa from qualifying for refugee status if they fail to report to a Refugee Reception Office within five days of entering the Republic, unless they can provide 'compelling reasons'. Section 21(1B) requires that an asylum seeker without an asylum seeker transit visa must be interviewed by an immigration officer to determine if there are 'valid reasons' for not possessing such visa. The new regulation 8(3) of the Refugee Act asserts that "any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees." Regulation 8(3) appears to set procedural thresholds which could bar individuals from even initiating the application process. When asked to adjudicate on this Regulation in *Abraham*, the High Court was particularly concerned, noting that it empowers immigration officials to make decisions on 'good cause' that could preclude individuals from applying for asylum. In the Court's view "this would have the result that the Refugees Act never becomes applicable". The Court held that regulation 8(3) is ultra vires, stating that it does "not speak to any provision in the Refugees Act which confers a power on a state official or on a judicial officer or court, to block an application for asylum from being lodged." (para 28). In the Court's view, it implies that regulation 8 oversteps its statutory authority by creating barriers to refugee protection that are not envisioned by the Refugees Act, which instead focuses on the substantive assessment of claims. Yet, this judgement had no impact on the legislation as when it was being drafted, the Constitutional Court handed down *Ashebo*, where the judge Maya DCJ argued that the new provisions are not in contrast with article 31 of the Refugee Convention, as the article itself "does not provide an asylum seeker with unrestricted indemnity from penalties." Furthermore, the Court held that a mere intention to apply for asylum is no longer sufficient to grant release from detention given the 2020 amendments. On the issue of continued detention, Maya DCJ held that the obligation on the part of immigration officials when faced with an illegal foreigner who evinces an intention to apply for asylum is to "assist him with the process of applying". Yet, a failure to do this does not always result in the detention becoming unlawful, arguing that "to the extent that the applicant's detention was authorised pursuant to section 49(1) of the Immigration Act read with the Criminal Procedure Act, the immigration officials' failure to facilitate his asylum application would not render his detention unlawful.

15. Other: Corruption plays a relevant role in exacerbating the risk of detention in SA. In particular, corrupted police officers especially at the border threaten migrants to pay high sums if they want to avoid arrest and detention A 2015 Survey showed that 56% of respondents had been stopped by government officials and asked to show their papers, of which 11% reported paying an immigration or police officer to avoid arrest. This trend persists in the 2019 Survey, where 5% of respondents paid a police officer to avoid arrest in Musina, while in Johannesburg and Pretoria, 42% paid a police officer to avoid arrest. Finally, there is evidence that corruption interacts with police violence. In 2010, a Nigerian migrant was shot by a police officer because he refused to pay the bribe. A group of Zimbabweans in Johannesburg suburb described a well-organised system established by the police, whereby officers in their area come to collect money each week. Those who don't pay are either beaten up or arrested and eventually sent to a Johannesburg migrant detention centre, Lindela.

Procedural barriers: Safe country notion.

Summary: Since 2000, South Africa has resorted to the safe country notions multiple times. The aim is twofold: 1) in order to apply expeditated procedures and dismiss asylum claims more quickly without going into the merit. This in order to limit the asylum system only to persons with a legitimate need of protection; 2) in order to automatically exclude people from asylum and be able to deport them as "illegal foreigners" with no right to remain in South Africa for protection purposes.

1. Functioning: The "safe third country", the "safe country of origin", and the "first country of asylum" concepts are often used in practice to legitimize the rejection of asylum applications. According to this approach (not supported by IRL), only neighboring countries have obligations towards refugees. This concept therefore allows for the expeditious removal of asylum seekers arriving at South Africa's borders who are not from neighboring countries without further examination of their claims and runs the risk of violating the principle of *non-refoulement*.

2. Time: Officially from 2000 to 2014, but recent policy developments may anticipate its re-integration into practice.

3. Place: Nationwide

4. Actors: Department of Home Affairs

5. Interaction: These concepts interact with other asylum barriers present in the country, such as detention. Indeed, expedited procedures inherent in the safe third country notion allows for dismissing the claim more quickly. Asylum seekers whose claim has been rejected are subject to detention pending deportation, posing them at risk of refoulement and human rights violations.

6. Development: In 2000, the South African Department of Home Affairs issued a Circular requiring all relevant authorities to verify the good faith of asylum seekers as well as instructing them to refer them back from where they come from in case they were not from South Africa's neighboring countries. If they insisted on entering the Republic, they would be detained. This Circular was challenged by Lawyers for Human Rights (LHR). LHR argued that the Circular made it impossible for any asylum seeker travelling to South Africa by land to make an asylum application and that therefore they run the risk of being removed to their country of origin. LHR claimed that the Circular was unlawful and in direct breach with the Refugees Act and the South African Constitution. In May 2001, a settlement between the parties was reached in front of the South African Court of Appeal. According to the settlement, the government agreed to withdraw Circular 59 but also to consult with LHR on the terms and wording of any Circular that they may seek to issue in place of Circular 59 of 2000. These concepts were also challenged in *Abdi v Minister of Home Affairs* (2011), where the Court held that the principle of non-refoulement entitled the asylum seeker from Namibia (a safe third country) to enter South Africa and deportation would result in cruel and inhumane treatment. Despite this, the Department of Home Affairs has also applied an unpublished whitelist of "safe countries" of origin to exclude certain nationalities from asylum, accelerate the asylum processes or deny entry at the border.[11] For instance, the Cape Town Office did not allow applicants from Fiji or Nepal to apply for asylum as they were deemed safe. In 2011 this practice was again applied against asylum seekers from Zimbabwe who were denied entry and access to Refugee Reception

[11] Handmaker J., L. A. De la Hunt and J. Klaaren (2001), "Perspectives on Refugee Protection in South Africa", Lawyers for Human Rights Report; Van Selm, J. (2001), "Access to Procedures: 'Safe third countries', 'Safe country of origin' and 'Time limits'", Background paper, Global Consultations on International protection, https://www.refworld.org/policy/strategy/unhcr/2001/en/18124

Offices. In 2014, the Regulation 22(1)(b) introduced the "first safe country of asylum" concept, whereby officials may deny issuance of an asylum transit visa to a person with refugee status in another country. Without an asylum transit visa, the person is denied entry into South Africa and therefore denied access to asylum procedures. This measure may therefore bar certain individuals from entering South Africa based on the "first country of asylum concept".

In 2017, South Africa signed the White Paper on International Migration for South Africa, which mentions exclusions from asylum based on "third safe countries". The paper indeed reads as follows "Refugee status may be withdrawn on grounds of serious criminal convictions or breaking of specified conditions. Exclusions includes […] applicants that have failed to apply in safe countries *en route* to South Africa, often termed 'third safe countries'" (p. 62).

7. Rationale: South Africa is exploiting both procedural and legal barriers to asylum in order to contain the number of asylum seekers in the country. The use of this notion is essential to that end as it would automatically declare most asylum claims as inadmissible given that South Africa only borders with 4 countries (Namibia, Botswana, Zimbabwe, Mozambique).

8. Legal Status: asylum seekers coming from safe third countries or countries of first asylum are considered as not eligible for protection. Hence, their status of asylum seekers is more precarious and is easily turned into an irregular position.

9. Specific Impact: The impact would be severe to all asylum seekers coming from safe third countries or first asylum countries, who would have their claim quickly processed with no evaluation in the merits on the fictitious presumption of safety. This would be particularly detrimental for vulnerable groups, such as women, LGBITQ+ communities, ethnic/religious/indigenous minorities, political opponents, people with disabilities, for which their country cannot be considered as safe. These people would face asylum rejection and would be subject to detention pending deportation to countries where they could face persecution, violence, torture, life threats and human rights violations.

10. Reach: There seem to be no data on the number of people affected by the "safe third country" and "country of first asylum" notions.

11. Source: The concepts of "safe third country" and "safe country of origin" are not envisaged into any legal provision, rather they are used in practice. There is no requirement in South African legislation for an asylum seeker to refuge in the first safe country they travel through nor do South Africa currently have any safe third country agreements with any other countries.

12. Legitimization: In 2011, the former South African Home Aff airs Minister said "You must remember, international law refers to the first safe country an asylum seeker enters. […] We must ask if we are the first safe country because international law regulates this matter. […] But if it is clear that South Africa is the first safe country then you cannot ask".

13. Technology: no

14. Domestic and International Reactions: UNHCR noted that the implementation of the concept of safe third country without proper safeguards may result in *refoulement*. It therefore recommended that South Africa remove the "first country of asylum" concept from its immigration regulations, noting that the concept was inconsistent with international and national refugee law. National NGOs have challenged the use of this notion, and judges have found it unlawful.

15. Other: It is relevant to note that there seems to be no clear procedure to be followed for people coming from safe third countries or countries of first asylum. Indeed, the literature shows that sometimes people subject to these notions have been denied access to RROs, while in other cases their asylum application has been considered as invalid. In other words, available information does not clarify if the consequence of the application of these concepts is being subject to accelerated procedure, exclusion from the refugee status, or direct deportation.

Procedural barriers: Administrative failures.

Summary: A systemic barrier to asylum in South Africa concerns the systemic failures of competent authorities to provide for the procedural and substantial guarantees at the core of the right to asylum. In addition, corruption is endemic in migration and asylum affairs and influences the entire asylum procedure. In addition, migrants, asylum seekers and refugee experience corruption across all stages of the asylum process, beginning with entry into the country and continuing once they arrived at an RRO. Corruption takes the form of demand for bribes, at every point of the process: queuing, obtaining and renewing asylum documents, and obtaining and renewing refugee documents. Corruption continues with refugee status renewals and other services also linked to a demand for unofficial payments. Many asylum seekers declared to be unable to access the RRO or renew their documents because of an inability to pay. Many remain undocumented because they cannot not pay, placing them at risk of detention and deportation.

1. Functioning: The proceedings before asylum competent authorities in the Department of Home Affairs are often flawed by procedural unfairness, evident and systemic dysfunctionality in both evaluating asylum claims and in granting judicial review of rejected asylum application. Failures in ensuring the right to information, to legal assistance and representation, to access to documentation, and to the relevant administrative record are further challenges. In addition, the right to information in a language that asylum seekers understand, legal representation and translation is not ensured. There is evidence that the enforcement of asylum provisions has been impaired by corruption, systemic delays, and significant obstacles to obtaining legal documentation. Reports suggest corruption is rampant among officials in the Department of Home Affairs.[12] Evidence shows that migrants experience corruption at multiple stages of the documentation process and that existing laws and norms are fuelling the illicit document market. Corruption is strongly rooted also at RROs. Upon first applying for asylum at an RRO, applicants are provided with an asylum seeker permit document in terms of section 22 of the Refugees Amendment Act. This document allows the holder to legally stay in South Africa to work, study, and protects the holder from deportation, until a final decision is made on their asylum application. Asylum seekers usually must return every 3 to 6 months to renew their permit. According to the 2015 Survey, respondents reported corruption during the queuing process. In particular, "Corruption proved to be a barrier to access, as 13% of the respondents indicated that they had at some point been unable to get inside the office because they did not pay". Marabastad RRO had the worst record with 30% of respondents having not gained access as they had refused to pay a bribe. The 2015 Survey also noted that once inside the RRO, respondents reported having to pay officials to have their issue resolved: "Inside the office it was primarily DHA

[12] See also, Roni Amit, "Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System," Lawyers for Human Rights and The African Centre for Migration & Society Report 2015, (July 30, 2015): https://www.regionalmms.org/images/sector/Measuring%20irregularties%20in%20South%20Africa's%20asylum%20system.pdf; Xinhua, "S. Africa's home affairs minister vows to end corruption," (February 27, 2020): http://www.xinhuanet.com/english/2020-02/27/c_138824956.htm

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". The 2019 survey demonstrates that corruption at RROs is a persistent issue with 32% of the respondent was required to pay to gain access to the RRO. At the RROs, respondents reported various incidents of extortion or other corruption to access services that are officially free of charge. These ranged from being required to pay money just to submit an asylum application, through to payment being required for renewal of documents, for the services of an interpreter, for the issuing of documentation, and for the assistance of a Refugee Status Determination Officer. Some respondents also reported being offered refugee status documentation in exchange for payment. In addition, 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%). Moreover, among respondents who needed to replace a lost or stolen permit, 14% indicated that they were asked to pay to get it replaced. The high number of renewals also creates opportunity for corruption. Respondents had renewed their permits an average of 5.4 times. 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. 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. What is more, 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 Pretoria, the proportion was 11%.

In the 2019 Survey, several respondents referred to "buying" refugee status from people who approached asylum seekers waiting outside of the offices and had links to officials working inside. This suggests that corruption around refugee status is not limited to the status determination interview but is instead taking place at other stages of the process.[13]

2. Time: At least from the beginning of 2000s onwards.

3. Place: Nationwide

4. Actors: various actors implicated in the asylum system, including security guards, interpreters, refugee reception officers, refugee status-determination officers, police officers, and private brokers with links to DHA officials, and the Refugee Appeal Board (RAB).

5. Interaction: Administrative failures can exacerbate other asylum barriers. Not only legitimate asylum claims can be dismissed because of procedural flaws, but accelerated procedures can be applied erroneously. In addition, rejected asylum seekers are at risk of detention and deportation hence it is paramount that competent authorities examine adequately asylum claims and ensure access to judicial review. In particular, Corruption exacerbates administrative failures. Indeed, migration officials exploit the lack of essential services to make asylum seekers pay for them (legal assistance, interpretation etc). Similarly, they exploit administrative failures causing long queues, exhausting waiting periods and backlogs to force asylum seekers to pay to get documents/permit renewal.

[13] Darshan Vigneswaran, A Foot in the Door: Access to Asylum in South Africa, in Refuge: Canada's Journal of on Refugees, Vol. 25, N. 2, 2008

6. Development: Since the 2009 peak of 223.324 asylum applicants, mostly from Zimbabwe, there has been a continuous, systematic limitation of the accessibility of RROs, and as a result, a restriction of the rights of asylum seekers and refugees. Given the restrictive immigration regime for unskilled workers established by the 2002 Immigration Act, unskilled migrants turned to the asylum system as the only means to legalise their stay. The capacity of the Department of Home Affairs (DHA) was stretched and immigration control and refugee protection were conflated. Despite the decline in asylum-seekers in the following years, migration control has increasingly displaced protection as the primary goal of the asylum system. The resulting low proportion of successful refugee claims is frequently cited by government as evidence of abuse of the system, justifying increasingly restrictive and deterrent measures instead of more humane administration, more enlightened legislation, and more resources to get through the backlog of applications.[14]

As the number of asylum claims grew over time and individuals faced long queues and delays in service, corruption started to proliferate. Once these issues became clear, South African NGOs say, "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" (p.20). In addition, the government has focused little attention on the quality of the RSD process or the management of refugee reception offices. Difficulties in accessing asylum have further incentivized individuals to pay, which may be the only way to obtain service. Today, the number of asylum seekers still exceeds by far the capacity of the existing RROs. Lack of financial and human resources together with xenophobic sentiments towards "illegitimate" refugees have paved the way for corruption and the creation of an asylum system that offers protection only to those with the financial means to purchase it. 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.

Administrative failures also concern the lack of information about the modalities to submit the asylum claim. Whereas Section 21(1)(b) of the 2017 Refugees Amendment Act read in conjunction with the 2018 Regulation 8(1)(a) and (b) mandates that the asylum application must be made in person at an RRO within 5 days of entry into South Africa on Form DHA-1590, during the Covid-19 pandemic, RROs were closed.[15] Hence, in-person asylum claims could not be registered. In April 2021, DHA introduced the Online System for extension of section 22 and section 24 visas. The NGO Lawyers for Human Rights declared that their clients experienced difficulties, especially for groups of people who do not speak English or required digital and technological skills. Initially, this system was designed to assist those already holding Temporary Asylum Seeker or Recognised Refugee Visas. However, it quickly became apparent

[14] https://www.migration.org.za/wp-content/uploads/2017/08/All-Roads-Lead-to-Rejection-Persistent-Bias-and-Incapacity-in-South-African-Refugee-Status-Determination.pdf; https://www.migration.org.za/wp-content/uploads/2017/08/Protection-and-Pragmatism-Addressing-Administrative-Failures-in-South-Africa%E2%80%99s-Refugee-Status-Determination-Decisions.pdf

[15] 2018 Regulation 8(1) (c) provides for the following submission process: When submitted, the Form DHA-1590 must be accompanied by 1) a valid asylum transit visa which would have been issued at a port of entry; 2) Proof of any form of valid identification document; 3) The applicant's biometrics (including those of any dependant(s)). If the applicant fails to produce a valid asylum transit visa (requirement no. 1), the following options are available: The applicant may submit some other visa pursuant to Regulation 8(2); or the applicant must be interviewed by an immigration officer and must show good cause as to his illegal entry/stay in the country according to Section 21(1)(b) of the refugee Act read with Regulation 8(3).

that this shift created significant barriers for many in the refugee community. A substantial portion of visa holders lacked access to smartphones or the technological literacy required to navigate the online renewal system.

As a result, many asylum seekers turned to non-governmental organisations (NGOs) for assistance, while some local internet café owners, primarily from immigrant communities, seized the opportunity to charge fees for submitting renewal applications. For those with limited financial resources, technological skills, and facing language barriers, the system became increasingly difficult to navigate. In 2022, the DHA reopened its doors to new asylum seekers, but with a critical caveat: individuals must now present a confirmation of appointment obtained through an online application to enter the RROs. Previously, asylum seekers could simply walk into an office to present their claims. While the Refugee Act mandates that interviews be conducted in a language the asylum seeker understands, the shift to a fully digital system raises questions about who bears the responsibility for providing interpretation services. As it stands, asylum seekers may find themselves shouldering the costs of interpretation and online applications.

As of 2024, asylum seekers are left with a hybrid system that is unclear. It is relevant to note that the online system seems to have been announced by the DHA through an online declaration. No formal law or regulation seems to have been adopted by the government. In addition, it is unclear whether this online system is still in place and whether asylum seekers are still required to use it.

The systemic administrative failures continue nowadays. Despite UNHCR's commitment to provide consistent financial and technical support to the Refugee Appeals Authority of South Africa (RAASA) through the Asylum Appeal Backlog Project, very limited progress has been achieved in enhancing the quality of refugee status determination decisions or reducing the backlog. In 2023, RAASA reported the finalization of 4,985 cases, including 2,215 administrative closures, representing only a small fraction of the 20,000 target.

7. Rationale: Instead of acknowledging deficiencies in the asylum system, the DHA's reaction to the difficulties in the asylum system has fostered opportunities for corruption. The DHA in particular fails in putting in place measures that enable the safe and easy reporting of corruption and is refraining from working with non-governmental stakeholders, including civil society organisations and communities, to educate refugees and asylum seekers about their rights, services available to them and ways in which they can address corruption.

8. Legal Status: no

9. Specific Impact: Without formal status or proper documentation, asylum seekers are unable to work legally, or access healthcare and education. This can leave them destitute and vulnerable to harassment, arrest and detention. This adds to pre-existing vulnerabilities. The legal issue here not only refers to the respect of the right to asylum and related human rights but also of the independence of the competent authorities and the State's rule of law. Administrative failures, long waiting periods and significant backlogs pose an institutional challenge to people seeking asylum or documentation. Under the Refugees Act, a decision on an asylum claim should be resolved within 180 days. Yet, as of 2019, 117.991 active applications out of 812.472 unprocessed applications have been in the system for five years or more and some have gone unresolved for more than a decade.

Often people are left stranded and vulnerable as they wait for a decision on their application for asylum due to the limited rights and protections available to asylum seekers while they are in the midst of the

migrant chain. This is greatly exacerbated by the prolonged frequency in which they have to travel to renew their permits, the inability to apply for jobs and obtain income security and housing, as well as enduring socio-political backlash perpetuated by a largely anti-immigrant government. The high number of pending asylum claims reveals the failure of the DHA to efficiently process asylum claims. Desperate refugees and asylum seekers, whose claims are not being processed and who cannot have access to basic rights and services (housing, work, education, health) are unable to sustain themselves or their families and have no other choice than resorting to bribes for documentation. The money spent on bribes is often borrowed with exploitative loan conditions or taken from savings from informal work or money brought into the country, placing people in a cycle of vicious debt. The breakdown in the application and adjudication system and the rampant corruption which has replaced a free, fair and efficient system has resulted in the non-processing of asylum claims. The pervasiveness of corruption in all aspects of the asylum process revealed a process that was no longer bounded by legal guarantees, predictability, or administrative fairness. While the government devotes significant resources to border security, corruption provides an alternative space for entry that undermines border control efforts.

According to the Migration Policy Institute, systemic corruption and administrative irregularities at RROs "are the product of a deliberate government choice to target demand for asylum in isolation, at the expense of improving services or addressing broader migration issues". The situation, however, has implications not only for asylum seekers, but also for migration policy, a rationally functioning public service, and for governance itself. While South Africa's migration policy remains focused exclusively on the restrictive measures of border control, detention, and deportation, the failure to address corruption has thwarted these efforts by providing an incentive for irregular migration. The result is an asylum practice that is no longer bound by legal guarantees but is instead guided by monetary incentives. Reports indicate that corruption is largely a structural issue.

Studies have also shown the psychological distress related to insecurity and direct violence when applying for asylum at the RRO. According to testimonies: *"I was having a lot of stress. I went to Home Affairs, and then I sit there. It was around 4 there and they called time. I went there and then this guy who was putting people in the line just give me a big slap here and then my head was very sore that time. Every time. And when I remain to go at Home Affairs, I always feel under pressure because I know what is happening. I'm going to that queue again. I'm going to fighting again with the guys there".* Many incidents were reported, such as being subject to violence when sleeping outside, including beatings, the use of pepper spray, fights, rape, and attempted rape and theft. *"We were sleeping outside. They wanted to rape us. [sighing] […] that time at Marabastad Home Affairs it was difficult. Before I went [to Home Affairs] I met some people there on the bridge before Marabastad. […] they took me in to the side and they raped me and they raped me and then they left me there. I was crying and I saw the police come. He was asking me questions but I didn't know English. I cried. They couldn't find the man, that raped me, and I became pregnant because of that rape. The situation was a mess. People were sleeping there at Home Affairs. The whole night, people are there, queuing in the morning. It was hard, you know. I remember they were spraying this pepper spray to try and maintain people".*

10. Reach: Several studies have been conducted by national institutions and NGOs on the specific issue of corruption in accessing asylum. The 2015 survey by LHR and ACMS surveyed 928 individuals, out of which about 33% reported experiencing corruption at multiple stage of the asylum process—more than four times on average. Corruption continues even after individuals obtained refugee status. The Desmond Tutu RRO (previously Marabastad RRO) showed the highest levels of corruption. The Durban office had the lowest levels. The 2016 report published by Corruption Watch highlights how corruption impacts those seeking legal protection in South Africa, and indicated that corruption is rife not only with individual

departmental officials but also Metro Police, administrators, security guards, and interpreters – all officials that asylum seekers and refugees may encounter at some point in their asylum adjudication processes.

11. Source: None.

12. Legitimization: Instead of acknowledging its failures, the government is perpetuating the view that the ongoing high demand by people trying to seek asylum at refugee reception offices stems from the abuse of the system by economic migrants. This has given rise to a toxic anti-asylum seeker narrative that is pushed by those in authority. Asylum seekers spend several years in the asylum system whilst awaiting an outcome on their applications. This is detrimental to both the asylum seeker and the South African state itself. Issues of resources, staff capacity and corruption continue to affect the asylum system negatively.

13: Technology: no

14. Domestic and International Reactions: The DHA's own investigations have confirmed that it is plagued by corruption, including the approval of permits based on false documentation and bribery to bypass legal processes. In 2015, indeed, the DHA reported that 37 officials were dismissed for fraud and corruption under Operation Bvisa Masina. A statement released by the DHA in September 2016 noted that since the operation launched, 83 people have been arrested, with 42 of those being officials and 41 non-officials. Of those arrests, 61 were related to immigration and the other 22 related to civic services. The arrests were made for, among other reasons, the fabrication of counterfeit documents and bribery, aiding and abetting – which were the most prevalent – followed by impersonation, revenue theft and fraudulent violations relating to births, marriages and deaths. Yet, this operation comes in isolation as no other policy or enforcement initiatives have been undertaken by DHA to counteract corruption in asylum matters. According to the Migration Policy Institute, DHA has perpetuated corrupt practices not only by failing to create sustainable change internally and externally, but also by placing the burden of pursuing allegations of corruption onto asylum seekers themselves. According to MPI, the asylum system has largely been led by corrupt, financially driven incentives as opposed to ameliorating barriers for individuals in the hope of a better quality of life.

More generally, recent statements from South African judges who overturned rejections have included strong indictments about the state of the asylum system. These include labelling it as "incompetent" and "deplorable" and accusing DHA officials of "showing blatant disregard for the law, dereliction of duty and bad faith". In *Kiliko* (2006), the Constitutional Court recognizes that South Africa is subject to significant migration flows. Yet, "The Department has failed since 2000 to introduce adequate and effective measures to address a gradually worsening situation […] The delays caused by such lack of facilities have, in my view, undoubtedly resulted in the violation of the fundamental rights of asylum seekers under the Constitution and also under the Refugees Act" (para 28). In *Tafira* (2006), the High Court argues "Our country is in a crisis as a result of the hundreds of thousands of unemployed illegal or potentially illegal foreigners within our borders, a vast number of which are clearly applicants for asylum who have not yet been processed. I cannot imagine how these people can survive without turning to crime. The price to be paid in order to ensure that the high numbers of asylum seekers are processed without delay so that those who do qualify can obtain work legally and those who do not qualify can be returned to their countries of origin, would be a drop in the bucket compared to the price our country is paying in respect of crime and social- and other public services which result from having unprocessed foreigners within our borders which remain unemployable until they have been duly processed or which remain here illegally simply because they choose to do so" (p. 27). In *Tshiyombo* (2015), the Court stated "It is plain that

there is a systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated judicial admonitions, to comply with its legal obligations in matters in which its decisions are taken on judicial review" (para 14). In *Katsshingu* (2011), the Court reiterates that the Department of Home Affairs does not comply with their obligation to produce the record of the asylum application to the applicant and their attorney. Systemic dysfunctionality has been denounced also in more recent cases. In *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* (2021), the Supreme Court pointed once again to the systemic failures within the asylum adjudication system, whereby asylum seekers experience woefully inadequate decision-making, with errors of law, verbatim, down to the same spelling and grammatical mistakes. On the subject, Amnesty International South Africa said "The current asylum management process system is failing everyone. In persisting with a broken system that leaves those trying to claim asylum undocumented and in limbo, the government is causing a divide and inflaming tensions between South African citizens and fellow Africans living in the country". The African Centre for Migration and Society analyzed the conduct of the DHA and found significant flaws (concerning the refugee definition, improper use of the manifestly unfounded standard; failure to provide adequate reasons; Inaccurate assessment of country conditions).

15. Other: Human Rights Watch has interviewed asylum seekers at RROs in Johannesburg and Pretoria and the data they collected is informative of the pervasive nature of corruption. Here below is an extract of their research findings. According to another study, "*Participants also told numerous stories about the queues to access the RRO; the payments to be paid to get into what were known as the "special queues" or to bypass them all; the repeated requests for returns to the RRO in order to be able to submit their claims or do the initial interview. They call you to go in there. Then you pay R50, or sometimes R100. I used to pay that money […]. The problem is inside also, even when you go inside, it's very stressful to get help. "Come back another week". And then I was getting there at 3am. We get inside, but no one attends to us. So they say, "Go back home again". Then we came on the next day. […] The next day I went there, I got a chance to get inside. Once I'm inside, it was a lot of things to do, complications, and I didn't understand anything. My English was not yet perfect. Yeah, so I feel like this is a problem. There's nothing I can do until I can get this document, then I will be fine. And that day, I didn't get any document*".

Procedural barriers: Closure of the Refugee Reception Offices

Summary: Another barrier the DHA enacted to limit the number of asylum claims to be processed is the unlawful closure of half of Refugee Reception Offices available in the country. This compelled asylum seekers to walk long distance to get to one of the only three RROs still open on the entire South African territory. In addition, significant pressure has been put on asylum seekers' shoulders, as they are required by law to be registered at RROs within 5 days from entry.

1. Functioning: The Director-General of Home Affairs unilaterally decided to close to new applicants 3 out of 6 Refugee Reception Offices available in South Africa. The offices in Johannesburg, Port Elizabeth and Cape Town have indeed closed their doors. This implied that new asylum seekers were excluded from the right to access asylum as only 3 out of 6 RROs were available in the entire territory of South Africa, these being Durban, Musina and Pretoria.

2. Time: This barrier began to be implemented in 2011and continued up until 2018. The practice is no longer into force. However, under the 2020 Refugees Amendment Act, the Director-General would be able to establish, and disestablish, as many Refugee Reception Offices as he or she regards as necessary –

'notwithstanding the provisions of any other law'. They would also be able to direct any category of asylum seekers to report to any 'place specially designated' when lodging an application for asylum. Hence, this practice might reappear.

3. Place: Cape Town, Port Elizabeth, and Johannesburg

4. Actors: Director-General - Department of Home Affairs

5. Interaction: This barrier interacts with detention as asylum seekers who are unable to formalize their asylum claim are exposed to the risk of arrest, detention, and deportation.

6. Development: In May 2011, there were six refugee reception offices in the country: in Cape Town, Port Elizabeth, Durban, Johannesburg, Pretoria and Musina. In 2013, the number of refugee reception offices available to asylum seekers was reduced to three (Musina, Pretoria and Durban). The RRO in Cape Town was closed in 2012, reopened and then reclosed in 2014. In 2013, 2015 and 2018, judges declared this practice unlawful as the Department failed to consult with the public in an open and frank manner, and ordered the re-opening of these centres. Despite the Supreme Court of South Africa found the closure of the Port Elizabeth RRO unlawful in 2015 and ordered the Department to re-open it, as of March 2018, this RRO remains closed. Similarly, the one in Cape Town remained closed until April 2023, when it finally reopened. The DHA was being "intentionally slow" in opening the refugee reception office. The applicants who brought the case in front of the Court in 2014 returned to court and asked to appoint a Special Master to oversee the reopening of the office.

7. Rationale: The rationale of relocating all refugee offices to the borders can be seen as an attempt to keep asylum seekers as close to the borders as possible, making it easier to deport them. Official statements and policy convey the view that the government is economically constrained – the deterioration of the refugee protection regime is a product of an overstretched mandate and (regardless of international and Constitutional obligations) the government's need to put vulnerable *South Africans* first. It is implied that building houses, creating employment and providing welfare for poor South Africans both necessitates and justifies the closure of Refugee Reception Offices (RROs).

8. Legal Status: None.

9. Specific Impact: Asylum seekers who cannot formalize their claim do not get any document that allows them to stay in South Africa. Hence, their position is not regularized and cannot have access to basic services, enrol their children in schools, open bank accounts or legalise their presence in the country. They were more exposed to arrest, detention and deportation back to their country of origin – where they can face a risk of persecution or death. The process for applying for asylum in South Africa puts both financial and physical strain on asylum seekers. Compounding these challenges, asylum seekers often do not live near an RRO. According to Amnesty International, asylum seekers in Cape Town and Port Elizabeth who had to travel to an RRO that could service them took a trip 'which ranges between 900km and 1,900km depending on the destination, takes a day or more and the cost of travel, accommodation, and food ranges anywhere from R900 ($62) to over R5,000 ($342) per trip'.[16]

10. Reach: no

11. Source: Section 8 of the Refugees Act, 1998 empowers the DG to establish RROs in the Republic.

[16] See also https://www.lhr.org.za/wp-content/uploads/2020/09/Corruption-Report-V4-Digital.pdf

12. Legitimization: When the RRO in Cape Town was closed, the Department of Home Affairs has stated that its closure was due to the need to relocate offices to border areas because cities were considered too problematic to operate in, the geographic position of Cape Town in relation to the fact that many asylum seekers enter South Africa on the northern borders, and to control the asylum seeker process as the Department contends that many asylum applications are made by economic migrants abusing the asylum system.

13. Technology: no

14. International Reactions: The decision to discretionally close RROs is unlawful by reason of the failure on the part of the Department to consult with the Standing Committee for Refugee Affairs (SCRA) established in terms of Section 9 of the Refugee Act. According to the Scalabrini Centre of Cape Town, "The closures and unlawful practices displayed an intention to restrict access to offices through measures not found in legislation as opposed to exploring other means to address the challenges such as more effective processes and offering more accessible visa options for those coming to South Africa for economic reasons".

15. Other: Corruption interacts with the closure of half RROs available in the entire country from 2011 to 2018 as asylum seekers had even fewer opportunities to file their asylum claim within the 5 days prescribed by law and to obtain documents.

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PART 2: CASE LAW ANALYSIS

I. IDENTIFICATION OF BARRIERS IN THE CASE LAW

A. Description of the barriers in the case law

Detention: Progressively restrictive asylum legislation in South Africa and unlawful practices have made arbitrary detention, prolonged or indefinite detention, unlawful detention a common experience to the detriment of asylum seekers who are kept in detention pending deportation while their asylum claim is still pending or even before they have the possibility to apply for asylum.

Type of body: First instance, second instance and Constitutional instance

Procedural barriers: A wide range of procedural barriers hinder access to asylum in South Africa, including administrative flaws, corruption, and procedural obstacles.

Type of body: First instance, second instance and Constitutional instance

B. Institutional settings

Before answering to this question, it is important to highlight the peculiarity of the South African legal system. Section 165(1) of the Constitution provides that the judicial authority of the Republic is vested in the Courts.

Section 165(2) provides that the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. In terms of Section 165(3) no person or organ of state may interfere with the functioning of the courts. Section 165(4) provides that organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts. Section 165(5) provides that an order or decision issued by a court binds all persons to whom and organs of state to which it applies. Section 165(6) proclaims that the Chief Justice is the Head of the Judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

Section 166 of the Constitution lists the courts as follows:

(a) The Constitutional Court;

(b) The Supreme Court of Appeal;

(c) The High Court of South Africa and any high court of appeal that may be established by an Act of Parliament to hear appeals from any court of a status similar to the High Court of South Africa; and

(d) The Magistrates' Courts, and,

(e) any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Court or the Magistrates' Courts.

According to Section 166, the court of first instance is the High Court, whose decisions are appealable to the Supreme Court of Appeal as a final appellate Court. However, on all constitutional matters, the final court of appeal is the Constitutional Court. The Supreme Court of Appeal is the apex court on all matters *not* related to the Constitution. Yet, if the case has constitutional implications, it can be decided by the

SCA and then appealed to the Constitutional Court. The SCA only deals with cases sent to it from the High Court, which has 14 divisions. The High Courts have jurisdiction to hear cases over their defined provincial areas, and the decisions of the High Courts are binding on Magistrates' Courts within their areas of jurisdiction. The Magistrates' Courts are the lower courts which deal with the less serious criminal and civil cases.

The South African courts exercise judicial review of decisions of administrative bodies in terms of Section 33 of the Constitution on the right to just administrative action. This constitutional provision is elaborated upon in the Promotion of Administrative Justice Act (PAJA). Accordingly, courts review decisions of the RSDO, the DHA as a whole, the SCRA and the RAA. Upon its review of RSD decisions, if it finds a violation of the PAJA, the court may substitute the decisions of administrative officers.

There is no specific Section/Unit/Department responsible for asylum matters in South Africa. Judges and Courts are not specifically trained or specialized in asylum matters.

Detention:

- **First instance judicial body**: Magistrates' Court
- **Second instance judicial body**: High Court
- **Third instance judicial body**: Supreme Court of Appeal
- **Constitutional Court**: South African Constitutional Court

Procedural barriers:

- **First instance judicial body**: High Court
- **Second instance judicial body**: Supreme Court of Appeal
- **Third instance judicial body**: No
- **Constitutional Court**: South African Constitutional Court

Executive bodies involved in asylum access adjudication.

Multiple branches under the Department of Home Affairs are involved in the asylum access adjudication procedure in South Africa. The Refugee Appeals Authority (RAA- formerly the Refugee Appeal Board or RAB) is responsible for examining appeals lodged by asylum applicants where their application is considered to be unfounded by a Refugee Status Determination Officer (RSDO), namely an official of the Department of Home Affairs who, among other duties, interviews asylum seekers and takes the first decision on whether to grant refugee documentation or reject the asylum application. The RAA is an exclusively appellate body whose mandate is to hear and determine any question of law referred to it in terms of the Refugee Act, to hear and determine any appeal lodged after being rejected by the RSDO as unfounded, and to advise the Minister or the Standing Committee for Refugee Affairs on any matter referred to it by either body. In deciding on an appeal, the RAA may confirm, set aside or substitute a decision by the RSDO. Members of the RAA are appointed by the Minister. A member serves for not more than five years and is eligible for reappointment.

The Standing Committee, which used to be known as the Standing Committee for Refugee Affairs (SCRA), is a committee established in terms the Refugees Amendment Act and which has various duties

and functions such as considering certain rejected asylum applications, withdrawing refugee documentation, and other administrative functions. Among others, the Standing Committee assesses whether to grant asylum seekers permission to study or to work while their asylum claim is being adjudicated.

In addition, when the Standing Committee receives a RSDO decision rejecting an asylum claim as 'manifestly unfounded', 'abusive' or 'fraudulent', they will review that decision and alternatively 1) submit a final rejection of the asylum claim, which can be judicially challenged; 2) overturn the RSDO decision and grant the person with the refugee status; or 3) decide to send your asylum application back to a RSDO, who will re-interview the asylum seeker and make a new decision on the asylum application.

The autonomy and independence of these bodies is questionable given the mode of financing and appointments of the DHA staff. There is plenty and authoritative evidence of the misconduct and severe flaws in the RSD procedure under the DHA. External oversight is mainly undertaken by the judiciary in reviewing decisions of the statutory bodies, including departmental policy decisions, as well as by the Parliament to which the DHA is accountable on matters of finances, policy and general functioning.[17]

The Director General of the DHA is also the chief administrative officer or accounting officer of the Department, whose mandate is to establishing and dis-establishing RROs, designation of officers as RSDOs, designation of administrative staff of the SCRA, enforcing and implementing crime prevention and integrity measures, and designation of places where specified categories of asylum seekers should lodge applications.[18] The DG also has powers to withdraw an asylum seeker visa for specified reasons (usually security issues), and also to revoke an asylum seekers right to work in case they fail to provide proof of employment after six months.

Finally, the Minister for Home Affairs is responsible for the administration of the Refugee Act and can issue a cessation order, appoint members of both the SCRA and the RAA, order the removal of a refugee or asylum seeker on grounds of national security, national interest or public order and, most importantly, to make a declaration for group recognition (*prima facie*).[19]

International or regional organizations involved in asylum access adjudication.

International or regional organizations are not directly involved in the asylum access adjudication. Yet, there are some observations to be made on the role played by UNHCR and by the Southern African Development Community (SADC), the Regional Economic Community to which South Africa belongs.

[17] The Parliament has no role in RSD. However, it is the body to which the DHA is accountable, and it has more recently, at the urging and lobbying of CSOs, taken greater interest in the asylum system. Specialised Parliamentary Committees, particularly the Portfolio Committee on Home Affairs, usually require the DHA to provide asylum and refugee-related data and information. Through this accountability process, the DHA has been put to task to report on its implementation of some of the court decisions. Hence, the role of parliament is quite significant insofar as it lends a measure of transparency and accountability to a system that would for all intents and purposes be highly opaque.

[18] Refugees Act, sections 8, 9H, 20A, 21(1C)

[19] Idem, section 35. In the event of mass influx, the Minister of Home Affairs may declare 'any group or category of persons to be refugees either unconditionally, or subject to such conditions as the Minister may impose in conformity with the Constitution and international law.' The declaration and revocation of the same is by Gazette Notice. This provision has not been effectuated since the enactment of the Refugee Act in 2000. The only formal refugee group recognition that has taken place was accorded to Mozambicans under a Tripartite Agreement between South Africa and Mozambique and UNHCR in 1993, which was terminated in 1996.

As for the former, UNHCR has no official role in the implementation of the Refugees Act or in the adjudication procedure. It rather plays an advisory and mediatory role. In addition, UNHCR is currently advising the RAA on clearing its asylum backlog.

Under the Refugees Act, UNHCR's role in RSD is consultative depending on the discretion of the adjudicator. The RSDO may consult with it and invite it to provide some information on specified matters, while both the SCRA and the RAB may invite it to make oral or written representations in any matter before them. Apparently, UNHCR has not been consulted much by the first instance decision makers, partly because it was generally regarded as 'pro- refugee'.[20]

UNHCR funds various projects which provide direct assistance to refugees. For instance, UNHCR funds legal partners who can litigate and set precedents in law to ensure the protection of refugees and asylum seekers. It facilitates repatriations on an individual basis through its legal implementing partners.[21] Thus far, UNHCR has signed only one voluntary repatriation tripartite agreement with South Africa and Angola. The agreement was signed in 2003 and terminated in 2006. It foresaw the repatriation of 13.000 Angolans from South Africa with the assistance of UNHCR after the end of the civil war in the country.[22] Under the programme, any Angolan registered as an asylum seeker by the government of South Africa before 20 June 2003 could approach UNHCR for assistance to return to Angola.[23] UNHCR gave those eligible for repatriation assistance air tickets for all family members with the possibility to bring 30 kg of baggage and Angola agreed that belongings will be exempt from any taxes. All Angolan refugees returning to their homeland, including those who returned without UNHCR assistance, were eligible for UNHCR assistance on arrival. According to the agreement, those returning to Luanda received a grant of $100 per adult and $50 per child under the age of 18; those going to the provinces received food assistance and a package of non-food items, such as plastic sheeting and buckets, to help them resume their lives in Angola. The repatriation process implied for Angolan refugees wishing to repatriate to contact the DHA, UNHCR or UNHCR's partners working with refugees in Johannesburg, Pretoria, Cape Town, Durban or Port Elizabeth. In total, nearly 363.000 Angolans, including 123.542 travelling with UNHCR assistance, have been repatriated from Southern African countires. Of these, 90.000 came on their own but received UNHCR assistance on arrival in Angola, and nearly 150.000 were repatriated without any UNHCR involvement. The programme ended in October 2006 when the rainy season in Angola makes any travel difficult.[24]

Finally, UNHCR conducts mandate RSD purely for purposes of resettlement asylum seekers (including dependants) who have not been recognised as refugees in South Africa. However, some recognised refugees may also be resettled.[25]

As for the latter, namely the SADC, according to some scholars, "the recent 2017 amendments to the Refugees Act are restrictive and appear to be in line with the sentiment of the regional body (ie, the SADC, NdA): to secure borders and contain refugees". Indeed, although the elimination of obstacles to regional

[20] Caroline Nalule, 'Refugee Recognition Regime Country Profile: South Africa' (RefMig Working Paper No. 2/2023)
[21] Handmaker, J. and D. Ndessomin (2011), "Solucão Durável? Implementing a Durable Solution for Angolan Refugees in South Africa", in J. Handmaker, L. A. De la Hunt and J. Klaaren (eds), Advancing Refugee Protection in South Africa, Berghahn Book.
[22] This is the sixth and last tripartite agreement on Angolan returns to be concluded in the region as Botswana, the Democratic Republic of the Congo (DRC), Namibia, the Republic of Congo and Zambia signed similar agreements. https://www.unhcr.org/news/new-agreement-paves-way-angolans-return-south-africa
[23] https://www.refworld.org/legal/agreements/unhcr/2003/en/27479
[24] https://www.unhcr.org/news/stories/unhcr-offers-voluntary-repatriation-angolan-refugees-south-africa
[25] Caroline Nalule, cit.

mobility is set out in the SADC Treaty, freedom of movement is severely limited. This is due to the fact that Member States continue to shape the migration management in the region, preferring to act (nationally) and bilaterally rather than multilaterally on migration issues. Another element hindering the free movement within the region is the difficulty many countries encountered in issuing identification and travel documents.

A draft Protocol on the Free Movement of Persons within SADC was created in 1996, but due to opposition by some member states including SA, it was replaced by a more restrictive Protocol on the "Facilitation of Movement" of Persons, which allows citizens of the community to travel without a visa for up to 90 days. However, only 6 states (Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zambia) have ratified the protocol out of the 10 ratifications needed for it to enter into force and hence it is not yet binding on Member States. The Protocol enshrines relevant provisions, including protection against indiscriminate group or collective expulsion (Art. 24) as well as the reaffirmation of Member States's commitment to their obligations under international agreements on refugees and with relevant UN Agencies, including UNHCR (Art. 28)[26]. The fact that this Protocol is still not into force confirms that regional cooperation on asylum matters is quite limited. Among the few relevant arrangements, it is relevant to recall the 1998 Declaration on Refugee Protection within Southern Africa, where SADC countries expressed concern for the «security, social and economic burdens which the refugee phenomena have brought on the SADC countries that have generously provided and continue to provide asylum»[27]. To face refugee-related challenges, States agreed to recommit to the international and regional refugee conventions and to observe international standards for refugee protection. States also agreed to uphold regional cooperation so to efficaciously address the root causes of refugee movement. Other relevant instruments include the 2019 SADC Common Regional Policy Framework on Refugees and Asylum Seekers, whose text is however not publicly available, SADC Guidelines on Coordinated Border Management (2011), and the SADC-UNHCR Action Plan (2020-2024). SADC Member States are also developing a Regional Migration Policy Framework in order to promote regular, safe and orderly migration, which will also facilitate the development and implementation of National Migration Policies as well as tailored National Action Plans[28]. In addition, a Memorandum of Understanding was signed by member states and UNHCR in 2019, which provides for cooperation in promoting the implementation of the UN General Assembly Resolutions, including the Global Compact on Refugees, promoting the objectives of the Global Action Plan to End Statelessness, and accession to international and African continental instruments related to refugees, stateless persons, and internally displaced persons, and promoting the management of mixed migratory movements within and into the SADC Region.[29] A similar MOU signed in 1996 commits Member States to addressing the social, economic, and political issues in the southern African region that have a bearing on the root causes of forced displacement, provision of humanitarian assistance, and the search for durable solutions. Apart from Art. 28, no specific strategies are in place within SADC concerning international protection. Indeed the SADC Migration Dialogue for Southern Africa (MIDSA) was established in 2000 to facilitate dialogue and cooperation among the SADC

[26] SADC, *SADC and UNHCR commit to strengthen cooperation based on shared priorities, values and strategies*, 9 March 2023, https://www.sadc.int/.
[27] SADC, *Declaration on Refugee Protection within Southern Africa 1998*, signed on 1 January 1998, par. C.
[28] SADC, *SADC Develops Regional Migration Policy Framework*, 22 October 2020 https://www.sadc.int/.
[29] https://www.sadc.int/latest-news/sadc-and-unhcr-commit-strengthen-cooperation-based-shared-priorities-values-and#:~:text=The%20MoU%20provides%20for%20cooperation,instruments%20related%20to%20refugees%2C%20stateless

Member States and contributing to improved regional migration management, but does not refer to asylum.[30]

C. Legal context and legal system

South Africa is a common law country[31] where international and regional obligations in the field of asylum have been incorporated into domestic law. In 1995 and 1996 respectively, South Africa signed the OAU Convention and the 1951 Refugee Convention/NY Protocol. Shortly after, South Africa enacted its Refugees Act 130 of 1998, which became operational in 2000. The Refugees Act incorporates both the 1951 Convention and OAU Convention refugee definitions, thus providing for expanded refugee protection. It is relevant to note that Section 38 of the Constitution introduces a radical departure from the common law tradition in relation to legal standing, including expressly allowing court proceedings by individuals or organisations acting in the public interest.

Reference to decisions from international or supranational tribunals

According to Ziegler, as of 2020, Courts have rarely used the international instruments listed in the Refugee Act as their *primary* interpretive source.[32] Only 3 judgments mention in passing the Constitution's Section 6(1)'s due regard interpretive requirement of international law, and none have proceeded to consider properly its normative significance. In other words, Courts do often mention international refugee law instruments, but only in passing.

When adjudicating detention and administrative failures, Courts sometimes refer to the 1951 Refugee Convention, especially the principle of non-refoulement enshrined in Art. 33, and the principle of non-penalization according to Art. 31 in order to censor unlawful detention practices or when the applicant is hindered from accessing to asylum based on the ground of irregular entry. In *Minister of Home Affairs and Others v Watchenuka and Another*, the South African Supreme Court of Appeal stated that the Refugees Act "was enacted to give effect to South Africa's international obligations to receive refugees in accordance with standards and principles established in international law", and that Section 2 of the Act, which sets out the principle of non-refoulement, exemplifies how the Act gives effect to such international obligations.[33] In addition, in *Kabuika and Another v Minister of Home Affairs and Others*, the Constitutional Court acknowledged the principle of non-refoulement as being at the foundation of refugee protection in South Africa.[34] Although South Africa was at the time yet to ratify the 1951 Convention, the Court acknowledged non-refoulement as a customary international law principle.

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30 https://www.iom.int/sites/g/files/tmzbdl486/files/jahia/webdav/site/myjahiasite/shared/shared/mainsite/activities/tcm/midsa.pdf

31 More into detail, South Africa has a "hybrid" legal system formed by the interweaving of a number of distinct legal traditions: a civil law system inherited from the Dutch (and to an extent the Romans), a common law system taken from the British, and a customary law system from indigenous Africans often called African Customary Law. These traditions have had a complex interrelationship, with the English influence most apparent in procedural law and means of adjudication, and the Roman-Dutch influence most evident in its substantive private law. South Africa generally follows English law in both criminal and civil procedure, company law, constitutional law and the law of evidence. Roman-Dutch common law is followed in the South African contract law, law of delict (tort), law of persons, law of things, family law. See, https://globalaccesstojustice.com/files/national_reports/national-report-south-africa.pdf

32 Ruvi Ziegler, Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' (2020) 10 Constitutional Court Review 65-106.

33 [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) para. 2

34 Kabuika and Another v Minister of Home Affairs and Others 1997 (4) SA 341 (CC)

The 1969 OAU Convention, which broadens the traditional refugee definition, is also frequently mentioned. The right to asylum is often invoked with reference to these two main instruments, as well as in reference to human rights law instruments, both binding and non-binding, such as the African Charter on Human and People's Rights and the Universal Declaration of Human Rights. Occasionally, the non-refoulement clause under Art. 3 of the UN Convention against Torture has been cited (See, Tantoush v Refugee Appeal Board and Others).

In one case *(Abdi and Another v Minister of Home Affairs and Others),* the Supreme Court of Appeal has used the principle of non-refoulement enshrined Chicago Convention on International Civil Aviation to condemn the return of a person seeking asylum in the territory of a Contracting State, to a country where his life or freedom would be threatened.

Membership in regional treaties that include the right to asylum or the principle of non-refoulement.

Membership in regional treaties that include the right to asylum or the principle of non-refoulement significantly influences asylum access adjudication in the country. Most importantly, the 1969 OAU Convention expands the 1951 Convention grounds by adding external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality.

The Refugee Act explicitly transposes international and regional refugee treaties into the domestic legal order. It incorporates the broader refugee definition enshrined in the OAU Convention and even adds further grounds eligible for refugee protection (gender and tribe). South African Courts should therefore consider both instruments when evaluating asylum claims.

What is more, the African Charter, to which South Africa is a party, guarantees for the rights of every individual, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. Although the African Charter is seldomly mentioned in the case law regarding asylum matters, it can be inferred that this instrument plays a key role in South Africa, given that it provides for the regional human rights legal framework.[35] Finally, the Constitutive Treaty of the African Union, which is legally binding for all its member states including South Africa, promotes and protects human and peoples' rights in accordance with the African Charter and other relevant human rights instruments.

Foreign cases or legislation in the field of access to asylum.

Foreign jurisprudence is sometimes referred, especially the jurisprudence of the European Court of Human Rights. In *Abdi v Minister of Home Affairs*, the South African Supreme Court of Appeal used the decisions by the European Court of Human Rights (namely *Amuur v France (1996) 23 EHRR 533* and *Riad and Idiab v Belgium No 29787/03*), which were also referred by counsel for the appellants and whose circumstances were similar to the case at stake, to establish the jurisdiction of South Africa and its Courts on the case concerned and to rule that the Refugee Act provisions should be interpreted in accordance with international law and practice. In *Saidi*, the Constitutional Court cites Pinto de Albuquerque J's

[35] the African Charter on the Rights and Welfare of the Child and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa are also relevant as explained below.

affirmation on the customary and absolute character of the principle of non-refoulement which he made in *Hirsi Jamaa*.[36]

Reference to decisions from international or supranational Courts in asylum barriers adjudication.

Apart from the references to the ECtHR cited above, SA courts do not seem to refer to the jurisprudence of other international/supranational Courts. With specific reference to the African Court on Human and People's Rights, the reason why South African courts have so far not relied on its case law is because the African Court has so far refrained from adjudicating asylum matters and there is no case where the African Court deals with either the 1951 Refugee Convention or the 1969 OAU Convention.

D. Laws and norms at the domestic level

South Africa is bound by both the 1951 Convention and its 1967 Protocol. Both were ratified in 1996, with no reservations (South Africa is among the only 3 Southern African States to have adhered to the 1951 Refugee Convention with no reservations). These Conventions have been domesticated in terms of the Refugees Act 130 of 1998, divided into three parts: it provides for a refugee definition, it governs the processes for asylum application and provides for the rights and obligations of a refugee. Yet, recent amendments to the Refugee Act have, among others, created expansive exclusions which blur the lines between immigration and refugee law while creating obstacles to the legal acquisition of the refugee status.

Principle of non-refoulement.

Section 2 of the Refugee Act "General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances" reads as follows: "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 [or disrupting] public order in [either] any part or the whole of that country".

The principle of non-refoulement is enshrined in Section 2 of the Refugees Act, according to which no person may be refused entry into the Republic of South Africa, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such measure, such person would be compelled to return to or remain in a country where they may face any of the risks or dangers envisaged by the refugee definitions under the 1951 and 1969 OAU conventions. In M*inister of Home Affairs and Others v Watchenuka and Another*, the Supreme Court of Appeal stated that the Refugees Act "was enacted to give effect to South Africa's international obligations to receive refugees in accordance with standards and principles established in international law", and that Section 2 of the Act exemplifies how the Act gives effect to such international obligations.[37]

However, it is relevant to note that even before the adoption of the Refugee Act, South African Courts enacted the principle of non-refoulement in the light of its international and constitutional obligations. As for the former, in *Kabuika and Another v Minister of Home Affairs and Others*, the High Court of Cape Town acknowledged the principle of non-refoulement as lying at the foundation of refugee protection in the

[36] *Saidi v Minister of Home Affairs & Another* [2018] ZACC 9, 2019 (1) SA 1 (CC), paras. 32-34
[37] [2003] ZASCA 142; [2004] 1 All SA 21 (SCA)

country.[38] And although South Africa hadn't ratified the 1951 Convention yet at that time, the Court acknowledged non-refoulement as a customary international law principle applicable in the country.

As for the latter, namely concerning the compliance with the principle of non-refoulement in light of the country's constitutional obligations, the case *Mohamed and Another v President of the Republic of South Africa and Others* is emblematic, although not specifically referring to the field of asylum law, as it establishes the universal application of the principle of non-refoulement.[39] The Constitutional Court was asked whether it was constitutional for South Africa, which had abolished the death penalty, to deport persons to another country where they would face the risk of the death penalty (the US in the present case). The Court referred to art 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment on non-refoulement and stated that expulsion, return and extradition to a country where the person would face an unacceptable form of punishment are all prohibited. In other words, the Constitutional Court rules that non-refoulement applies in all cases where there is a threat that a person would be subjected to torture, cruel, inhuman or other forms of ill-treatment in the country to which such person is sent.

Yet, it was not until 2018 that the centrality of the principle of non-refoulement was most forcefully discussed and applied by the Constitutional Court in two important decisions, namely *Ruta* and *Saidi*. In *Ruta*, the Court held that failure to apply for asylum at the first available opportunity (in the present case 15 months after entry) was not a ground for disqualifying the applicant, although delayed application is relevant in the context of credibility and authenticity of the asylum claim.[40] Judge Cameron J relied on the primacy of non-refoulement which is referred to in Section 2 of the Refugees Act saying that the principle of non-refoulement is a non-derogable principle, which sets aside any contrary provision and is "above anything in any other statute or legal provision".

In *Saidi*, the Constitutional Court determined that *non-refoulement* under the Refugees Act and international law imposes a peremptory duty on competent authorities to automatically extend the temporary permit while the review of the applicants' asylum application is pending. The judgment reiterated that "without a temporary permit, there is no protection. This runs counter to the very principle of non-refoulement and the provisions of section 2". It also emphasised that permits "prevent undue disruption of a life of human dignity and communing in ordinary human intercourse without undue state interference". The Court emphasised that "courts must adopt a purposive reading of statutory provisions", noting that the Refugee Act requires its interpretation to be made with 'due regard' to 1951 Convention, and referencing the Section 233 constitutional requirement.[41] The Court held that advancing this interpretation is comported with Section 39(2) of the Constitution, which requires that courts must interpret legislation in a manner that promotes the spirit, scope and objects of the Bill of Rights. The South African Bill of Rights is enshrined in Chapter 2 of the Constitution, and is a cornerstone of the country's democracy, guaranteeing fundamental human rights to all people in South Africa. It protects both civil and political rights, as well as socio-economic rights, promoting human dignity, equality, and freedom. By leveraging the right to life, security of the person, and human dignity, it reinforces the principle of non-refoulement, ensuring that individuals cannot be returned to situations where their fundamental rights would be violated.

[38] 1997 (4) SA 341 (C).
[39] [2001] ZACC 18, 2001 (3) SA 893 (CC)
[40] [2018] ZACC 52, 2019 (2) SA 329 (CC)
[41] *Saidi v Minister of Home Affairs & Another* [2018] ZACC 9, 2019 (1) SA 1 (CC), paras 20-30.

Right to asylum.

Section 3 of the Refugee Act, titled "Refugee status", reads as follows: "Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person (a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (b) owing to external aggression, occupation, foreign domination or other events seriously disturbing [or disrupting] public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge [elsewhere] in another place outside his or her country of origin or nationality; or (c) is a spouse or dependant of a person contemplated in paragraph (a) or (b).".

The right to asylum is not directly recognized at the Constitutional level, yet it is recognized in legally binding domestic acts, namely the Refugee Act. Besides the principle of non-refoulement which applies to both asylum seekers and refugees, the rights or entitlements of refugees are enumerated both in the Constitution and in the Refugees Act.

Section 9 of the Constitution enshrines the principle of non-discrimination, while Section 9(3) enumerates a list of grounds upon which unlawful discrimination can take place, covering racism and sexism among others. According to section 21(1) of the South African Constitution, everyone has the right to freedom of movement. Section 21(2) provides that everyone has the right to leave the Republic. This forms the constitutional basis for allowing refugees to travel outside of the country. As such, preventing them from doing so would amount to a violation of their constitutional right to freedom of movement. The Bill of Rights Section 15(1) of the Constitution guarantees everyone the right to freedom of conscience, religion, thought, belief and opinion, while section 15(2) covers the circumstances in which religious observances may be conducted in state or state-aided institutions. There is no domestic legislation in this regard which pertains specifically to asylum seekers or refugees. The Constitution also sets out education rights in Chapter 2, section 29(1) which guarantees every person in South Africa, citizens and non-citizens alike, the right to a basic education, which the State, through reasonable measures, must make progressively available and accessible. The right to basic education, including adult basic education, is guaranteed through section 29(1)(a) of the Constitution. This right is immediately realisable, meaning there is an obligation imposed on the state to ensure that everyone has access to the right. In contrast, other aspects of the right to education in terms of section 29, such as the right to further education, require progressive implementation. The Bill of Rights, sections 23(1), 23(2), 23(3), 23(4) and 23(5) of the Constitution, cover labour rights that, except those specifically limited to South African citizens, extend to everyone including refugees. This stance was also reflected in para 46 of the case *Union of Refugee Women and Others v Director, Private Security Industry*, where the court stated: "Under the Constitution, a foreigner who is inside this country is entitled to all the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens".

As for the Refugee Act, rights include full legal protection, the right to remain in SA, seeking employment, entitlement to basic health services and basic primary education on the same standing as nationals, entitlement to formal written recognition, an identity document, and a travel document (key provisions are further deepened here below). Additionally, asylum seekers and refugees are entitled to the rights set out in the Constitution, except those that are expressly limited to South African citizens. Although Section

27 of the Refugee Act on rights entitlement refers both to asylum seekers and refugees, the Executive originally excluded asylum seekers from their enjoyment. When courts extended important substantive rights to asylum-seekers, the basis for their intervention was the effect that restrictions revolved around asylum-seekers' human dignity and the protection of the rights enshrined in the SA Constitution (instead of referring to the 1951 Refugee Convention). In other words, rather than rely on international refugee law principles to compel national authorities to guarantee to refugees the rights to which they are entitled pursuant to the 1951 Refugee Convention, South African courts have opted for the constitutional right to dignity in Section 10 of the Bill of Rights, which provides: "Everyone has inherent dignity and the right to have their dignity respected and protected".[42]

- Documents

Section 27 on the protection and general rights of refugees of the Refugee Act states at subsection (e) that a refugee is entitled to a travel document if he or she applies in the prescribed manner. The travel document entitles the holder to travel outside of South Africa but forbids travelling to the holder's country of origin. It ensures security of residence for refugees or asylum seekers in SA through the issuance of valid documentation. This includes the asylum transit *visa*, which is provided to an asylum seeker at a port of entry once they declare their intention to seek asylum. Initially, the law provided for a 14-day asylum transit *permit*. According to some scholars, the shift in terminology from 'permit' to 'visa' strongly suggests a move to further curtail the rights and status of asylum seekers.[43] Indeed the term visa denotes temporariness or shortness of one's stay relating mainly to the right to enter and travel within or through the host country. Permit on the other hand denotes an assured longer-term residency and attendant rights.

Pursuant to the 2019 Refugee Regulation, an asylum seeker whose application is successful receives a formal recognition of refugee status through the certificate of recognition of refugee status, which is valid for four years and is renewable. In addition, a recognized refugee and their dependants are entitled to an identity document.[44]

Section 27(c) of the Refugees Act maintains that after 10 years, a refugee is entitled to apply for an immigration or residence permit (previously it was 5 years). The 10-year period runs from the time when one was formally recognized as a refugee and not from the time one has been legally resident in the country. Therefore, the years one has spent as an asylum seeker are insignificant.

Finally, South Africa's Refugees Act is beneficial to refugees particularly in relation to family unity, in that it has a more extensive definition of "refugee" than the 1951 Refugee Convention. It includes the dependants of refugees as being refugees themselves, meaning that South Africa affords derivative status to the dependants, which automatically includes immediate members of the family. In this regard, family members in the form of dependants such as parents, children and spouses are covered.

- Right to work and study

The Refugees Act originally provided for the right to seek employment and study in SA. Prior to the Refugees Amendment Act, the most emblematic case law in this area was *Minister of Home Affairs v Watchenuka,* where the Supreme Court of Appeal relied on human dignity enshrined in the Constitution to extend the right to work to asylum seekers, in addition to refugees. Accordingly, "human dignity has no

[42] Emblematically, in *Minister of Home Affairs v Watchenuka*
[43] Caroline Nalule, cit.
[44] Refugees Act, section 30; Refugee Regulations, 2019, reg. 18.

nationality. It is inherent in all people — citizens and non-citizens alike — simply because they are human. And while that person happens to be in this country — for whatever reason — it must be respected, and is protected, by section 10 of the Bill of Rights".[45] The SCA held that the general prohibition on asylum-seekers' access to employment is a material invasion of human dignity that is not justifiable in terms of section 36 of the Constitution] given that asylum-seekers are offered no public support and thus a person who exercises their right to apply for asylum, but who is destitute, will have no alternative but to turn to crime, begging, or to foraging. Applying a similar logic in respect of access to education, the Court held that the freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment.

Yet, the recent Amendment now limits the right to work for asylum seekers and makes it almost impossible for one to get that endorsement if they are new arrivals, unless they are considerably well- off. It provides that an asylum seeker will first be assessed as to whether they can sustain themselves and their dependants for a period of four months. Where they are found to be unable, they may be offered shelter and basic necessities by UNHCR or other charitable organisations. The right to work will not be endorsed on the visa of someone who can sustain themselves, or who is receiving assistance from the UNHCR or other charitable organisations, or for anyone who is seeking to renew their job application fails to provide a letter of employment soon or after making the application. The law imposes an obligation on an employer of an asylum seeker to provide a letter of employment within 14 days from the date on which the asylum seeker took up employment. The obligation it places on employers, especially given the short duration of asylum seeker permits, serves as a disincentive to employ asylum seekers. The threshold has also been raised for long-standing asylum seekers who do not have a stable job or are working in the informal sector, and will in most cases not meet the new criteria for having the right to work endorsed on their permits. Furthermore, the law empowers the DG to revoke any endorsement if the asylum seeker does not have proof of employment six months after receipt of the endorsement. The same can be said on the limitation on the right to study, which is no longer automatic and in the event that an asylum seeker is permitted to study, the educational institution should furnish the department with a letter of enrolment within 14 days of enrolling the asylum seeker. Consequently, the educational institutions given this additional responsibility will be hesitant to enroll asylum seekers.

- Marriage

The Supreme Court of Appeal had also the chance to stipulate the right to marry for asylum seekers. The *Mzalisi* case concerned a Nigerian asylum-seeker wishing to register their customary law marriage to a South African.[46] An institutional circular (Circular s 2.1(b)(iii)(dd)) however proclaimed that asylum seekers whose application is pending cannot contemplate marriage. Given that such a ban was not envisaged in any domestic law, the provision of this circular was declared invalid. Yet, the judgment did not refer to art 23(2) of the ICCPR on the right to marry, rather the Court turned to the constitutional right to dignity.

- Legal aid

The guarantee of legal aid and representation in refugee matters is not a right under the African Charter on Human and Peoples' Rights or under the SA constitution. However, the African Commission on Human and Peoples' Rights has found an obligation of states to provide legal aid or assistance to an accused person or a party to a civil case where the interests of justice so require. This obligation is not

[45] *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142, 2004 (4) SA 326 (SCA), para. 25.
[46] *Mzalisi NO & Others v Ochogwu & Another* [2019] ZASCA 138 (SCA).

contained in any binding instrument but rather in non-binding guiding principles. In South Africa, legal aid is offered by a number of NGOs. These include Lawyers for Human Rights, Legal Resources Centre, Scalabrini Centre, among others. In addition, legal clinics set up in law schools are most prevalent in South Africa. The clinic enables students to get hands-on experience while enabling asylum-seekers and refugees to obtain free legal assistance. Some law clinics may have attorneys and advocates to handle any litigation, while others may refer the matter to NGOs or willing lawyers. Finally, there are a number of cases in South Africa where refugees have used their own resources in litigation.[47]

- Social assistance

Unlike the right to basic health care and education, the Refugees Act does not specifically mention a refugee having the right to social assistance. However, the South African government does provide social assistance to refugees under certain limited circumstances. As of March 2012, when the Minister of Social Development promulgated amendments to the Regulations to the Social Assistance Act 13 of 2004, refugees are able to access a wide range of social-assistance grants in the same manner as citizens and permanent residents do. However, this right does not extend to asylum seekers, given the temporary nature of their status.

- Finance

Access to bank accounts allows some form of security to enable refugees to protect their money. The Agreement established between the FIC, the Department of Home Affairs and the Consortium for Refugees and Asylum Seekers in South Africa (CORMSA), the Department of Home Affairs is supposed to provide banks with the ability to verify the authenticity of valid section 22 and section 24 permits that are issued in terms of the Refugees Act.

Main sources of international refugee law relevant to asylum access adjudication.

Asylum access adjudication is shaped by the 1951 Convention and the 1969 OAU Convention, which are all deeply integrated into the domestic legal order, especially through the means of the Refugees Act and related Regulations.

The Constitution also lays out the position of international law within the domestic legal regime. The South African Constitution has been described as "international law friendly".[48] It pronounces that (all) courts must consider international law in interpretation of the Bill of Rights; that when interpreting legislation, courts must prefer any reasonable interpretation that is consistent with international law over any other interpretation (Section 233); and that customary international law must be treated as law in SA, except where it is in conflict with the Constitution or an Act of Parliament. Therefore, as far as interpretation of refugee law is concerned, the courts should always adopt an interpretation that is consistent with South Africa's obligations and commitments under the refugee conventions. This point is further underscored in the Refugees Act (Section 6) which expressly stipulates that it must be interpreted in accordance with the 1951 Convention, 1967 Protocol, 1969 OAU Convention, 1948 Universal Declaration of Human Rights, and "any other international human rights law instrument to which the

[47] Caroline Nalule, Legal Representation for Asylum-Seekers and Refugees: Much Needed yet Sparse, June 2020, https://www.e-ir.info/2020/06/05/legal-representation-for-asylum-seekers-and-refugees-much-needed-yet-sparse/
[48] E Cameron 'Constitutionalism, Rights, and International Law: The Glenister Decision' (2013) 23(2) Duke Journal and Comparative & International Law 389; Ruvi Ziegler, 2020, cit.

Republic is party".[49] Yet, some scholars argue that South African Courts tend to ground their asylum decisions in constitutional provisions rather than directly relying on the provisions of the 1951 or 1969 Conventions.[50]

Additional human rights obligations applicable to refugees in South Africa.

Human rights obligations play a pivotal role in promoting and safeguarding refugees' rights and their right to access asylum. Emblematically, the African Charter on Human and Peoples' Rights is the most important and binding regional human rights treaty, which drew inspiration from the Universal Declaration of Human Rights, the ICCPR and the ICESCR, as well as the European and American Conventions on Human Rights. South Africa ratified the African Charter on July 9, 1996. Article 12.3 of the African Charter guarantees for the rights of every individual, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions. This article stipulates that non-nationals legally admitted to the territory of a state party may only be expelled by virtue of a decision taken in accordance with the law, and additionally prohibits the mass expulsion of non-nationals.

In addition to the African Charter, two further treaties were adopted, which enrich the African human rights system and which have implications for refugee protection. These are: the African Charter on the Rights and Welfare of the Child (African Children's Charter), and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Women's Protocol). The former was adopted in 1990 in order to supplement the provisions of the African Charter in respect of children and as a complementary mechanism to the UN Committee on the Rights of the Child. Its provisions applied to citizens as well as non-citizens. In particular, Art. 23 details that 'all appropriate measures' are to be taken in order to ensure that children seeking refugee status or who have been granted refugee status, regardless of whether they are accompanied or not, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in the Children's Charter and other international human rights and humanitarian instruments to which the states are parties.

The African Women's Protocol mirrors a number of UN instruments, including the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the General Recommendations emanating from the CEDAW Committee, as well as the UN Declaration on the Elimination of Violence Against Women. It also augmented the provisions of the African Charter in respect of women and, in similar fashion to the African Charter as well as the Children's Protocol, its provisions are applicable to both nationals and non-nationals. Most importantly, the African Women's Protocol provided for special measures of protection for asylum-seeking and refugee women. According to Art. 4(k), State Parties ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents. Pursuant to Art. 10, women, including female refugees, have the right to a peaceful existence and the right to participate in the promotion and maintenance of peace. Finally, Art. 11 protects asylum seeking women,

[49] The Refugee Amendment Act has amended Section 6, which now reads: the Refugee Act has to be interpreted and applied in a manner that is consistent with the 1951 Convention, the 1967 Protocol, the 1969 OAU Convention, the Universal Declaration of Human Rights, and any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party.
[50] Ziegler, 2020, cit.

refugees, returnees and internally displaced persons against all forms of violence, rape and other forms of sexual exploitation.

Other obligations - stemming from general public law, criminal law, humanitarian law, civil law, administrative law - applicable to asylum seekers .

Administrative and criminal law play a role in refugee protection.[51]

The right to administrative justice enshrined in Chapter V of the 1951 Refugee Convention provides for administrative measures to be undertaken by the Contracting State, including administrative assistance and access to Courts. In addition to the Refugees Act, the refugee status determination process also is bounded by the PAJA (Promotion of Administrative Justice Act 3 of 2000). Administrative justice is a necessary component of a fair status determination process and PAJA gives effect to it. It entitles individuals to reasons and establishes clear grounds for review of administrative decisions. It thereby reflects a system that favours government accountability and places individual rights at the heart of administrative decisions. According to Section 33 of the Constitution, just administrative action is characterized by procedural fairness, lawfulness and reasonableness. In addition, Section 34 of the Constitution establishes the right to access Courts. Section 35 refers to fair trial in criminal cases, and Section 38 deals with constitutional remedies and enforcement of rights. PAJA lays out the elements of just administrative action in greater detail (Section 3.2), and also describes the grounds for challenging an administrative decision before Courts (Section 6).

Furthermore, Criminal Law regulates offenses related to irregular entry or stay as well as crimes that can lead to the cessation/exclusion from the refugee status. While the Refugee Act endorses the principle of non-criminalization of irregular migration for asylum seekers as enshrined in Art. 31 of the Refugee Convention, this often happens in practice.

Membership to regional or international organizations that provide legally binding acts and human rights obligations relevant to asylum.

In addition to the OAU Convention and the regional human rights treaty system already examined, South Africa, as already mentioned, is a State Party to the SADC, the Regional Economic Community of Southern Africa.

Role that soft law in asylum access adjudication.

As mentioned, UNHCR has no official role in the implementation of the Refugees Act or in the adjudication procedure as it rather plays an advisory and mediatory role, although its capacity depends on the discretion of the adjudicator. The RSDO may consult with it and invite it to provide some information on specified matters, while both the SCRA and the RAB may invite it to make oral or written representations in any matter before them.

As for the relevance of UNHCR's soft-law instruments at the judicial level, Courts frequently refer to UNHCR's Guidelines or Handbooks. Judges often mention UNHCR when recalling the tasks of executive bodies, including the RSDO, the SCRA and the RAB, in the RSD procedure.[52] Sometimes, they cite its statistical analysis on the number of asylum seekers and refugees in South Africa, such as its Statistical

[51] https://www.migration.org.za/wp-content/uploads/2017/08/Protection-and-Pragmatism-Addressing-Administrative-Failures-in-South-Africa%E2%80%99s-Refugee-Status-Determination-Decisions.pdf
[52] Among others, Tshiyombo v Members of the Refugee Appeal Board and Others; Ruta, cit.;

Yearbooks.[53] UNHCR is also cited when supporting the view that the principle of non-refoulement has customary character.[54] Finally, in some judgements there is reference to the burden of proof or other procedural aspects inherent in the evaluation of the asylum claim.[55]

As for institutional Circulars, these are usually adopted by the DHA. Yet, they are often challenged in Courts as illegitimate, unlawful or unconstitutional. This is the case of Circular 50/2000, which ordered to intercept all applicants coming from first safe countries of asylum and which was challenged by Lawyers for Human Rights and later censored.

E. Legal standing

Legal procedures and/or remedies which allow litigants to bring cases before judicial or quasi-judicial bodies when challenging barriers to asylum access.

The South African Constitution contains a number of provisions bearing on access to justice. The most directly applicable are found in s. 33 (administrative justice), s. 34 (access to court), s. 35 (fair trial in criminal cases), and s. 38 (constitutional remedies and enforcement of rights). Section 34 guarantees a fair public hearing, which ensures a public nature of hearings, independence and impartiality of the court or forum, the beneficiaries of the right. In *De Beer NO v North-Central Local Council and South-Central Local Council and Others*, the Constitutional Court observed that a key element of a "fair hearing" is the requirement according to which the other party to a proceeding must have notice of the matter against him.[56] In pursuit of the objective of fairness, the court noted, there is a prerequisite that a person gets a court hearing before an order is made against him or her.

Another relevant requirement concerns the language in which communications and hearings are held. In order to have access to a fair trial, remedy and defence, asylum seekers need to take part in legal proceedings in a language they understand. Although the Constitution does not contain an equivalent provision with respect to civil proceedings, Section 35(3)(k) (on criminal matters) of the Constitution confers upon every accused person, the right to be tried in a language he or she understands, or where this is not practicable, to have the proceedings interpreted in that language.[57] The Constitution further provides that arrested, detained or accused persons have the right to receive required information in a language they understand. This holds true also in the context of asylum seekers in trial. In addition, the jurisprudence has determined that they have the right to receive required information in a language they understand. Yet, this does not imply that Section 35(3)(k) confers the right to be tried or to have proceedings held in a language of *their choice*.[58]

Whereas access to the Courts is secured to everyone, including asylum seekers, through section 34 of the Constitution, legal assistance is not mentioned in the Constitution and remains limited to the same extent that it is for most South Africans, as a result of the significant cost usually entailed in securing legal services. Free legal assistance is only to be provided where substantial injustice would result if legal representation were not available to the accused or detained person in criminal matters pursuant to Section 35(2) and (3)

[53] This is the case of Ruta, where the Constitutional Courts cites UNHCR's Statistical Yearbooks of 2011 and 2016. https://collections.concourt.org.za/bitstream/handle/20.500.12144/34618/Full%20judgment%20Official%20version%2020%20December%202018.pdf?sequence=34&isAllowed=y
[54] See Ruta, cit, p. 17, 18,
[55] This is the case of Tantoush v Refugee Appeal Board and Others.
[56] De Beer No v North-Central Local Council and South-Central Local Council and Other 2002 (1) SA 429 (CC).
[57] S v Ngubane (1995) 1 BCLR 121 (T).
[58] Mthethwa v De Bruin NO and Another (1998) 3 BCLR 336 (N).

of the Constitution. The High Court has elucidated the position of foreigners in respect of their right to legal assistance in criminal matters. In *S v Manuel*, an Angolan refugee was refused legal assistance by the Legal Aid Board because he was not lawful in the country.[59] The High Court found that the magistrate had failed to explain to him his constitutional right to legal representation at State expense. The Court held that in criminal matters refugees have a right to legal assistance at State expense to the same extent that citizens do.

Final observations are due with reference to the right of asylum seekers to access justice.

- The right of asylum seekers to access South African courts

This was specifically addressed in *Baramoto v Minister of Home Affairs,* where the Minister of Home Affairs declared that the three asylum seekers' decision to approach the court was an abuse of the judicial process. The court stated that South Africa's courts are there to protect all persons regardless of their nationality and are open to all persons who find themselves in South Africa.[60] More generally, the Constitutional Court also recognized that all persons must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access.[61]

Asylum seekers who have been detained before expressing their intent to seek asylum have the right to access Courts through *habeas corpus*. It is an urgent court order (a writ) issued by a court that orders government officials, usually the DHA, to bring the detained person before the court to determine the lawfulness of that person's detention. In South Africa, this right is enshrined in the Bill of Rights, whose Section 12(1)(a) guarantees the right of everyone not to be deprived of freedom arbitrarily or without just cause. In addition, Section 35(2)(d) specifically guarantees the right of every detained person to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released. In *Habeas Corpus* cases, the burden of proof is on the detaining authority, which must justify the detention and prove that it is lawful.[62] According to Sir John Wessels, *Principal Immigration Officer and Minister of Interior v Naravansamy* 1916 TPD 274 (para 276), every person arrested by the authority of a Minister or by any other person is, prima facie, entitled to approach the court for his or her release and the court is bound to grant the writ unless some lawful authority can be shown for the detention. Habeas Corpus is especially used in the context of the unlawful detention of asylum seekers as this remedy forces the authorities to bring the person to court to explain *why* they are being detained without having processed their asylum claim. Where a constitutional challenge to detention is successful, it appears that the usual remedy is an order for immediate release. For example, in the cases of *Aruforse v Minister of Home Affairs* and *Hassani v Minister of Home Affairs*, the High Court ordered the immediate release of individuals who had been detained for more than 120 days in breach of Immigration Act safeguards.[63] Similarly, in *A v Minister of Home Affairs*[64] the High Court found that the applicant's detention had been rendered unlawful by the failure of the immigration officer to obtain a warrant to extend detention beyond 30 days; a warrant obtained later than this was inadequate, and immediate release was ordered.

[59] S v Manuel 2001 (4) SA 1351 (W).
[60] Baramoto and others v. Minister of Home Affairs and Others, Witwatersrand Local Division, (unreported), 1998.
[61] Van der Walt v Metcash Trading Ltd 2002 (4) SA 317 (CC) 325.
[62] J.A. Malan, Arse v Minister for Home Affairs 2012 (4) SA 544 (SCA) par 5; Minister van Wet en Orde v Matshoba 1990 (1) SA 280 (A) at 284 per J.A. Grosskopf.
[63] 2010 (6) SA 579 (GSJ); (01187/10) SGHC (5 February 2010). South Guateng High Court
[64] (101/10) SGHC (17 March 2010).

If, instead, the asylum seeker has lodged an application but has received a negative decision, they have the right to appeal against it. First, asylum seekers can appeal to executive authorities, namely the Refugee Appeals Authority (RAA- formerly the Refugee Appeal Board or RAB), which is responsible for examining appeals lodged by asylum applicants where their application is considered to be unfounded, and the Standing Committee, which used to be known as the Standing Committee for Refugee Affairs (SCRA), that also considers asylum claims rejected as 'manifestly unfounded', 'abusive' or 'fraudulent'. If the outcome of this revision is negative, then asylum seekers can appeal to judicial authorities of first instance (high court), second instance (supreme court of appeal), and to the Constitutional Court for constitutional matters under specific circumstances.

In terms of section 7(2)(a) and (b) of PAJA an applicant for judicial review must exhaust internal remedies provided for by any other law before instituting judicial review proceedings. Section 7(2)(c) however also provides that a court or tribunal may in exceptional circumstances exempt a person from the obligation to exhaust any internal remedy if it deems it in the interests of justice to do so. It is up to an applicant to satisfy the court that (a) exceptional circumstances exist which would require the immediate intervention of the Court and (b) that it would be in the interests of justice for the Court to intervene notwithstanding that the internal remedy has not been exhausted. In determining whether or not exceptional circumstances exist the Court will be required to consider the facts and circumstances of the case as well as the nature of the administrative action in issue, and the availability, effectiveness and adequacy of the existing internal remedies. An example of such an exceptional circumstance would be that the internal remedy is likely to be ineffective or incapable of granting effective redress to the applicant/complainant.

Accordingly, asylum seekers may ask for "direct access" to the Constitutional Court, hence bypassing other lower courts, if this is in the interests of justice, such as sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good government.[65] The threshold for the grant of applications for direct leave to appeal and direct access requires the exercise of discretion by the Constitutional Court in consideration of the same factors. These include the importance of the constitutional issue and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute may arise in the matter, the possibility of obtaining relief in another court, the time and costs that may be saved by coming directly to this Court and the overarching interests of justice.

Finally, asylum seekers can ask judicial authorities to substitute the rejection of their asylum claim by executive bodies into the recognition of the refugee status in exceptional circumstances, which have to do with the urgency of the matter (for instance when the claimant is detained pending deportation) or when the impact of the rejection decision on their fundamental rights is severe. This has been the case in *Tshiyombo v Members of the Refugee Appeal Board and Other*, examined later.

F. The influence of international Courts

Influence of supranational courts' rulings on the decision-making of national judicial or quasi-judicial bodies on asylum access barriers.

The African Commission and Court on Human and People's Rights have so far refrained from going into the substance of the right to asylum and connected rights as enshrined in the African Charter and in the OAU Convention. There are indeed multiple obstacles of legal and procedural nature that have so far hindered their interpretation in this field. Whereas the African Court has never dealt with refugee matters,

[65] Mazibuko v Sisulu [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at paras 34-5.

the Commission did. Yet, the few relevant Communications issued by the African Commission are often perceived as non-legally binding, are extremely brief and lack legal reasoning.[66]

As for foreign supranational courts' rulings do not seem to play a relevant role in national decision-making. National Courts sometimes refer to rulings delivered by foreign supranational Courts to support their arguments, as in the case of *Abdi v Minister of Home Affairs*, where the South African Supreme Court of Appeal used the decisions by the European Court of Human Rights (namely *Amuur v France (1996) 23 EHRR 533* and *Riad and Idiab v Belgium No 29787/03*), to establish the jurisdiction of South Africa and its Courts on the case concerned and to rule that the Refugee Act provisions should be interpreted in accordance with international law and practice. In *Saidi*, the Constitutional Court cites Pinto de Albuquerque J's affirmation on the customary and absolute character of the principle of non-refoulement which he made in *Hirsi Jamaa*.[67]

The jurisprudence of supranational courts seems not to have shaped procedural protections or the interpretation of access to asylum in this jurisdiction. With specific reference to the African Court on Human and People's Rights, the reason why South African courts have so far not relied on its case law is because the African Court has so far refrained from adjudicating asylum matters and there is so far no case where the African Court deals with either the 1951 Refugee Convention or the 1969 OAU Convention.

G. Comparative insights

Divergences among judicial or quasi-judicial bodies regarding the legality of specific asylum barriers.

Divergence can be traced in the jurisprudential trend within the High Court, Supreme Court of Appeal and Constitutional Court as well as among them. The most emblematic example of divergence is *Ruta.*

In *Ruta*, the applicant irregularly crossed the border from Zimbabwe into South Africa. 15 months later, he was arrested in Pretoria for road traffic violations. He was tried and imprisoned for road traffic offences. While he was in prison, the DHA moved to deport him to Rwanda. He then expressed his intention to apply for asylum. The DHA opposed. Mr Ruta applied urgently to the High Court of South Africa, Gauteng Division, to stop his deportation. The Court considered that Mr Ruta's delayed application did not diminish his entitlement to apply. The DHA appealed the High Court's decision to the Supreme Court of Appeal, which overturned the decision of the lower court. The Supreme Court of Appeal argued that asylum seekers are not afforded indefinite time to apply for asylum. Since Mr Ruta delayed unreasonably in seeking to apply for asylum, at the time of his arrest he was an illegal foreigner who had to be dealt with in terms of the Immigration Act, not the Refugees Act.

The stance of the Supreme Court widely diverges from a series of decisions it delivered a few years before Ruta, where it ruled in favour of the rights of asylum seekers and refugees. Respectively, the Supreme Court of Appeal ruled that asylum applicants held in an "inadmissible facility" at a port of entry into the Republic enjoy the protection of the Refugees Act and of the courts (*Abdi*); ordered the release from detention of an asylum seeker whose asylum transit permit had expired, and whose application for asylum had been rejected by the Refugee Status Determination Officer but whose appeal before the Refugee

[66] Marina Sharpe, Regional Refugee Regimes: Africa, in Cathrine Costello, Michelle Foster, Jane McAdam (eds) The Oxford Handbook of International Refugee Law, 2021.
[67] *Saidi v Minister of Home Affairs & Another* [2018] ZACC 9, 2019 (1) SA 1 (CC), paras. 32-34

Appeal Board was pending (*Arse*); affirmed that if a detained person evinces an intention to apply for asylum, they are entitled to be freed and to be issued with an asylum seeker permit valid for 14 days (*Bula*); and finally determined that false stories, delay and adverse immigration status do not preclude access to the asylum application process, since it is in that process, and there only, that the truth or falsity of an applicant's story is to be determined (*Ersumo*).

The case of *Ruta* was then brought in front of the Constitutional Court, which ruled that non-refoulement is a non-derogable principle that triumphs over immigration laws. Specifically, an asylum application cannot be dismissed simply because the claimant hasn't applied for asylum at the first available opportunity. Accordingly, once an asylum seeker expresses an intention to apply for asylum, they must be allowed to apply – even if they have delayed in doing so or do not have the asylum transit visa. The Constitutional Court therefore consolidated what was already found by the High Court, and dismissed the argument of the Supreme Court of Appeal.

However, a restrictive trend in judicial interpretation of the right to access asylum is visible within the same Courts in recent judgements on detention and non-penalization of asylum seekers irregularly entered in SA. Recently the matter of 'good cause' and what effects it may have in terms of allowing (or barring) a potential asylum seeker have been raised following the case of Ashebo v Minister of Home Affairs and Others . In opposition to a consolidated jurisprudence where the right to access to asylum and the principle of non-refoulement triumphed against any other immigration provision, in *Ashebo* the Constitutional Court ruled against such expansive trend and emphasized that expressing an intent to apply for asylum does not automatically entitle an illegal foreigner to be released from detention. Its conclusions in *Ashebo* run counter what the Constitutional Court said in *Ruta* with reference to the contrasting judgement gave by the Supreme Court of Appeal in that case, whereby it was "apparent that the answer to the issues Mr Ruta presented to the Supreme Court of Appeal were already to be found in that Court's own preceding decisions". Yet, "It was of course open to the Supreme Court of Appeal to reject its own previous decisions, provided it concluded they were clearly wrong. But the majority made no effort to explain why Abdi, Arse, Bula and Ersumo were wrong or how. The Supreme Court of Appeal has itself emphasised that respect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate" (para 19). Yet, despite the reference to these principles, the Constitutional Court itself run counter its previous decision in Ruta, undermining a strong judicial trend.

Similarly, in *Lembore and Others v Minister of Home Affairs and Others* [2024] 2 All SA 113 (GJ), the Gauteng High Court, which few years before had argued in favor of Mr Ruta, clarified that detention under the Immigration Act remains lawful until an applicant demonstrates valid reasons for their illegal entry or delayed asylum claim. If an applicant fails to show good cause, they may still be detained and potentially deported, though the decision can be appealed. In this case, Judge Mlambo JP interpreted the 'good cause' requirement as creating a condition precedent for asylum applications, stating that "the requirement to show good cause, in section 21(1B) of the Refugees Act read with regulation 8(3), precedes and is disjunctive to the main application for asylum".[68] In Mlambo JP's view, *Ruta* had incorrectly understood the purpose of section 2 of the Refugees Act, conflating detention with deportation.[69] In other words, the

[68] Lembore and Others v Minister of Home Affairs and Others (2023-097427, 2023-097292, 2023-097111, 2023-097076,2023-100081, 2023-100526) [2024] ZAGPJHC 102, [76]
[69] Ibid, [82]

detention of asylum seekers who are classified as illegal foreigners "doesn't violate the nonrefoulement principle as it doesn't amount to countenancing the deportation of asylum seekers fleeing persecution". [70] And "it must be in the interest of any country desiring to protect its borders, to expect anyone entering its territory to do so lawfully".[71]

Two main reasons for such a restrictive trend may be detected. First, the change in the legislation. The Refugees Act has been amended and the new provisions severely limit asylum seekers' rights and protection standards. Courts have therefore to deal with restrictive changes in the national asylum legislation. Second, some judges also share the view that South Africa is facing a huge migratory pressure and burden[72] and that the asylum system is exposed to abuses.

Divergences between national courts and supranational rulings regarding asylum access.

The African Commission and Court on Human and People's Rights have so far refrained from going into the substance of the right to asylum and connected rights as enshrined in the African Charter and in the OAU Convention. There are indeed multiple obstacles of legal and procedural nature that have so far hindered their interpretation in this field. From the few relevant Communications issued by the African Commission, it can be inferred that, when the case is admissible, the African Commission tends to recognize the violation of key refugee rights enshrined in the African Charter and there is no perceivable divergence with the rulings set out by national courts.

National decisions aligning or diverging from the broader principles established by international bodies (e.g. UNHCR, CAT) concerning the right to asylum.

Divergence of interpretation can be spotted on the non-penalization item as enshrined in Art. 31 of the 1951 Refugee Convention. Recent judicial interpretation of this provision moves away from that of UNHCR.

Art. 31.1 of the Refugee Convention states that "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".

Already back in the 2000s, Goodwin-Gill observed that "Refugees are not required to have come directly from their country of origin. Article 31 was intended to apply, and has been interpreted to apply, to persons who have briefly transited other countries, who are unable to find protection from persecution in the first country or countries to which they flee, or who have 'good cause' for not applying in such country or countries. The drafters only intended that immunity from penalty should not apply to refugees who had settled, temporarily or permanently, in another country".[73] According to Goodwin-Gill, therefore, art. 31 wouldn't protect those who have settled, and not simply transited, to another countries before reaching the host country of asylum. As per *Asfaw*, the purpose of Art. 31 is "to protect refugees

[70] Ibid, [82]
[71] Ibid, [68]
[72] In *Kiliko* (2006), the Constitutional Court recognizes that South Africa is subject to significant migration flows. In *Tafira* (2006), the High Court argues "Our country is in a crisis as a result of the hundreds of thousands of unemployed illegal or potentially illegal foreigners within our borders".
[73] G. Goodwin-Gill, Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalization, Detention and Protection. UNHCR, 2000, para. 105.

from the imposition of criminal penalties for breaches of the law reasonably or necessarily committed in the course of flight from persecution or threatened persecution'.[74]

In 2024, UNHCR issued its new Guidelines on non-penalization, where it argued that the concept of "good cause" relates more to the irregularity of the movement (entry or stay) in the host country rather than to the temporal dimension of their stay in transit countries. In UNHCR's words: "In practice, refugees will generally have good cause, given that many face significant factual and legal barriers to regular entry or stay in a host country, which consequently compel them to resort to irregular means. Even where genuine and effective access to means of legal entry are available, a refugee may still show good cause for irregular entry within the meaning of Article 31(1). Good cause may be satisfied by a number of factors, such as a fear of being rejected or pushed back at the border; being unable to physically enter at an established port of entry; lacking information or knowledge about relevant procedures for claiming asylum upon entry; acting under instruction of a third party, such as a smuggler; or being traumatized or otherwise lacking capacity to identify or use lawful means to enter".[75]

Recent domestic law in South Africa inextricably links the good cause to the possession of a specific document to be issued at the border, namely the temporary asylum visa. Regulation 8 of the Refugees Amendment Act stipulates 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".

Therefore, according to Regulation 8, good cause must be shown for not being in possession of the visa. Justification must be provided by the foreigner before they can even be admitted applying to asylum. Good cause therefore turns from being an exemption from penalization to an essential requirement of asylum access adjudication, which determines whether the person can be admitted or excluded from exercising their fundamental right to asylum. Despite this shaky application of Art. 31 of the Refugee Convention, national judges have so far interpreted the good cause item as amended by the recent legislation accordingly, and have not questioned its legality and compliance with international refugee law. Recent case law, emblematically *Ashebo*, are thus divergent from the interpretation of Art. 31 given by UNHCR as well as with previous jurisprudence (*Ruta*, emblematically).

In addition, the Refugee Act's new section 4(1)(h) provides for the exclusion from access to asylum to the person who, having entered the Republic other than through a designated Ports Of Entry, fails to satisfy an RSDO that there are compelling reasons for doing so. Such reasons are neither listed in the Amendment Act nor in the new Regulations, leaving it to the RSDO's discretion. Hence, this exclusion ground appears to use the penalisation clause as a way to automatically/discretionally exclude asylum seekers from asylum.

Best practices or lessons learned from the adjudication of asylum barriers.

The proactive role of CSOs in asylum litigation is commendable, especially in light of limited opportunities for asylum seekers to be provided with legal aid and representation. CSOs' role in denouncing human rights violations, bringing public attention to these cases, and demand judicial intervention on such

[74] *R v Asfaw (UNHCR Intervening)* [2008] 1 AC 1061 (Bingham LJ) at para 9.
[75] UNHCR, GUIDELINES ON INTERNATIONAL PROTECTION NO. 14: Non-penalization of refugees on account of their irregular entry or presence and restrictions on their movements in accordance with Article 31 of the 1951 Convention relating to the Status of Refugees, September 2024, para. 27.

practices reflects a litigious society and surely represents a best practice, which is absent in many other countries of the African continent and beyond.

Another key element relates to the impressive work done by national Courts in safeguarding the key tenets of refugee law. In their asylum adjudication over the past 20 years, SA courts have been forced to square the protective premises of the Refugee Act with executive policies designed to limit access to asylum procedures and to deny asylum-seekers substantive rights. In so doing, SA courts have extended constitutional protection to all those physically in the Republic, irrespective of their legal status, and have enacted the principle of non-refoulement to bridge a protection gap between the status of asylum seekers according to the Refugee Act and that of an illegal foreigner as per the Immigration Act, in turn enabling access to the asylum process through insistence on issuance or renewal of asylum permits.[76] Courts have also construed the constitutional right to dignity to facilitate asylum-seekers' (partial) access to employment, basic health care, education, and to marry South Africans, which the Executive sought to deny through directives, regulations, and other policies.[77]

H. Role of expert testimony

Role of expert testimony in decisions regarding asylum barriers.

So far there are no cases where experts, beyond UNHCR, are consulted in asylum adjudication.

I. Future Directions

Emerging trends or evolving issues in asylum law in South Africa that are likely to affect how judicial or quasi-judicial bodies address barriers in the near future.

There are evolving political issues that may affect the way judicial authorities address asylum barriers in South Africa. These pertain to 1) the possible and unprecedented withdrawal of South Africa from the 1951 Refugee Convention; and 2) the reforms to asylum and migration law anticipated by the 2023 White Paper.

The DHA can develop non-binding White Papers with proposals for legislative amendments or adoption of new norms in the field of migration and asylum. In 2023, the DHA unprecedently suggested the government to withdraw from the 1951 Refugee Convention and to eventually re-adhere to it with reservations as to the recognition of socio-economic rights to refugees and asylum seekers. In addition, it blames the unconditional adherence to the Refugee Convention, as this has allowed Courts to extensively interpret and expand refugees' rights and protection.

What is more, the White Paper recommends changing the RSD process, which in the future would entail quick and virtual hearings at official ports of entry and appeals managed by a special tribunal with serving or retired judges. RROs are suggested to be located at ports of entry to facilitate immediate assessment of asylum claims allowing to swiftly separate economic migrants from refugees. This would not only change the authority responsible for the adjudication of the asylum claim, but in putting retired judges in charge of the RSD process, key procedural safeguards would risk being undermined, in turn putting asylum seekers' rights at risk. Finally, although South Africa has refrained so far from establishing an encampment

[76] Emblematically, Abdi & Another v Minister of Home Affairs & Others [2011] ZASCA 2, 2011 (3) SA 37 (SCA).
[77] R Amit '(Dis)placing the Law: Lessons from South Africa on Advancing U.S. Asylum Rights' (2018) 20 Loyola Journal of Public Interest Law 1

policy, the proposal to move RROs at the border may have the effect of containing people in demarcated and precarious areas.

II. IDENTIFICATION OF LEADING DECISIONS

Detention: 1) *South African Constitutional Court, Ashebo v Minister of Home Affairs and Others (CCT 250/22) [2023] ZACC 16*; and 2) *Supreme Court of Appeal, Bula v Minister of Home Affairs [2011] ZASCA 209, 2012 (4) SA 560 (SCA).*

Procedural barriers: 1) *Constitutional Court of South Africa, Ruta v Minister of Home Affairs 2019 (2) SA 329 (CC);* and 2) *Tshiyombo v Members of the Refugee Appeal Board and Others (13131/2015) [2015] ZAWCHC 170; [2016] 2 All SA 278 (WCC); 2016 (4) SA 469 (WCC).*

A. Description of the barriers in the selected decisions

Formality/informality of the barrier.

Detention:

In *Bula*, 19 Ethiopian nationals, arrested and detained pending deportation with no possibility to ask for asylum, appealed against a judgment of the South Gauteng High Court, Johannesburg (Cassim AJ), in terms of which it dismissed an application by the appellants, for an order: (a) reviewing and setting aside an order of the Magistrates' Court to extend warrants of detention and (b) interdicting the Minister of Home Affairs and the Director-General of the Department of Home Affairs (the DG) from deporting them until their refugee claim was pending. They were granted none of the relief sought. The ruling has been appealed, and the Supreme Court of Appeal censored the interpretation of the lower Courts. It argued that 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.

In *Ashebo*, the Constitutional Court was asked to deal with two crucial issues. The first concerned the time afforded to an illegal foreigner to apply for an asylum seeker permit in terms of the Refugees Act after entering the country. The second was whether an illegal foreigner is entitled to be released from detention after expressing an intention to seek asylum while awaiting deportation until such time that his or her application has been finalised. The case concerned a foreign national from Ethiopia, who was arrested in Pretoria for unlawfully entering and residing in South Africa and was charged with a deportation order. Upon his arrest, Mr Ashebo explained he had long been seeking asylum, with no success because of RROs closure as a result of Covid-19 restrictions, and that he entered South Africa illegally from Zimbabwe owing to a fear of persecution in his country. The Court held that, once good cause is shown and an application for asylum is lodged, the asylum seeker must be issued with a permit that will allow him or her to remain in the country, without delay, and must be shielded from proceedings in respect of his or her unlawful entry into and presence in the country until the application is finally determined. The Constitutional Court further held that Ashebo's continued detention, it held that merely expressing an intention to seek asylum does not entitle an illegal foreigner to release from detention. The Court held that a just and equitable remedy would be to compel the respondents to facilitate Mr Ashebo's application for

asylum, failing which, to release him from detention unless he may lawfully be detained under the Criminal Procedure Act.

Procedural barriers:

In *Ruta*, the DHA rejected the applicant's asylum claim because it was not made at the first available opportunity. The Constitutional Court's judgment confirmed the reasoning of the Supreme Court of Appeal in the decisions of *Abdi, Arse, Bula* and *Ersumo*, which established the principle that delay and adverse immigration status do not bar access to the asylum application process. Failure to immediately apply for asylum cannot lead to disqualification from seeking and qualifying for asylum. The Court's judgment emphasises that delay may still be relevant in evaluating the authenticity of a claim to be a refugee. But it cannot bar an applicant from applying for asylum at the outset.

In *Tshiyombo*, the barrier was informally established. The judge acknowledges that there is systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated judicial admonitions, to comply with its legal obligations in matters in which its decisions are taken on judicial review. The consequences prejudice not only the proper administration of justice, but also the effective administration of the Refugees Act. The respondents' failure to comply with rule 53(1)(b) of the Act prejudices the administration of justice because it tends to impinge adversely on the applicants' constitutional right to a determination of their suits by the application of law in a fair hearing. The actors involved are, in particular, RRO officers, DHA officers, RSDOs, RAB officers who gravely disregard the respect of the administrative and judicial norms in the context of asylum.

Administrative obstacles faced by the applicant(s) in the cases reviewed and their impact on the applicant(s)'s ability to access asylum.

Detention:

In *Bula*, the applicants faced severe administrative and judicial obstacles to the exercise of their right to asylum. They declared to have been detained for 10 days at the Johannesburg police station upon arrival in South Africa, then transferred to the Lindela repatriation centre controlled by the DHA. The officers gave them no possibility to apply for asylum. Following on a meeting with their attorneys, Lawyers for Human Rights sent a letter on their behalf to the DHA asking for their release and for their opportunity to apply for asylum. The DHA never responded. In the meantime, the Department applied for the extension of the appellants' detention and the Magistrates' Court granted an order extending the detention of the appellants for 90 days. The DHA refused to release the applicants because, among others, there was no legal obligation on the part of the Department's officials at Lindela to transport any person detained, pending deportation, to a refugee reception office, to enable an application for asylum to be made, if that person had failed to do so themselves. In evaluating the case at stake, the Supreme Court of Appeal observe that "The appellants explained how they came to be arrested. They described their difficulty in communicating with the authorities. They sought assistance from attorneys. The context is that they were in a foreign country without proper documentation and at the mercy of law enforcement authorities. Be that as it may, as demonstrated above, the legal-technical approach adopted by the court below and counsel for the Minister and the DG before us is fundamentally flawed" (para. 82).

In addition to administrative obstacles, the applicants faced also judicial hardness. Fearing imminent deportation, the appellants approached the South Gauteng High Court to seek release from detention and being afforded the opportunity to apply for asylum. However, the High Court took what the Supreme Court of Appeal described as "unacceptable" (para 53) behaviors, where the judge "indulged in pontification" (para 54) and blinkered towards the applicants (para 55). The High Court indeed considered their intention to apply for asylum as an afterthought, designed to defeat the decision to deport them. In the High Court's own words: "I cannot accept that 19 applicants, without any connecting factor in this country, can be set free to roam the streets of our country as would be the effect of this court releasing the applicants. That will be tantamount to irresponsible and reckless conduct on the part of the authorities and this court. Assuming one or more of them were then to commit a crime, the victim will then seek to hold the State liable for releasing a detainee without any connecting factor and who subsequently engages in wrongful conduct" (para 62; para 47 of the SCA's decision). According to the Supreme Court of Appeal, "it is a matter of grave concern when fundamental rules of litigation are so flagrantly flouted. The court below misconceived its function and misidentified the issues that called for decision" (para 52). In so doing, the High Court denied release from detention as well as the possibility for the applicant to exercise their right to asylum.

In *Ashebo*, the applicant faced several obstacles that hindered his possibility to access to asylum. He submitted that he entered the country with no knowledge of the laws and regulations of the country and was therefore unaware of the five-day requirement. He further argued that he could not meet this requirement because the RRO was closed due to the COVID-19 pandemic. Upon his arrest, he tried to explain to the arresting officers that shortly after his arrival in the country he had launched an application to compel the respondents to accept his application for an asylum seeker permit but abandoned it because of a lack of funds. The closure of the RRO due to Covid-19, and the subsequent impossibility for Mr. Ashebo to register for asylum, as well as his application have been confirmed by the evidence. Yet, they were not considered as relevant by the High Court. In addition, his right to access asylum was impinged by the fact that he was unlawfully detained.

Procedural barriers:

In *Ruta*, no administrative obstacles are detected. Mr Ruta had access to the High Court and succeeded in bringing the case to the Constitutional Court, which considered the case admissible in light of the general public interest in the case.

In *Tshiyombo*, the obstacles the applicant faced were plenty and can be divided into 3 categories according to the stage where he encountered them.

1) At the RRO in Cape Town. After a few days in Johannesburg, he went to Cape Town to make application for asylum. He described the conditions there here as 'chaotic and dangerous'. He waited for some months to obtain *attention* (not an appointment) at the RRO. After several months, he together with other applicants were loaded onto busses and taken to the offices of the DHA in Barrack Street, where, with the help of another Congolese national whom he encountered there, he completed an application form and was issued with an asylum seeker permit in terms of s 22 of the Act. He did not receive any official assistance, any linguistic support (he doesn't speak English) and he was not given a copy of the application form (para 22).
2) Appeal in front of the Refugee Appeal Board (RAB). His asylum claim was rejected. He received a rejection letter from the Refugee Affairs section of the Department of Home Affairs' Cape Town

office. The letter was in English, which the applicant did not speak. He therefore sought appeal in front of the RAB. A hearing followed in October 2014 in terms of s 26 of the Act in front of them. The RAB dismissed his appeal on multiple grounds that the High Court found as illegitimate and speculative. The first ground was that "refugee law is essentially a means of preventing the sending back of an individual to a state in which a risk of persecution on political grounds or opinion exists". The Court dismissed this ground by saying that it gives a misleadingly narrow scope to the refugee definition and scope. The second ground of rejection was that the story of the claimant was not credible. To establish so, the RAB cited only one source, which was not even a legal source, rather a quote from the "Principles of International Refugee Law" written by Guy S. Goodwin-Gill, where he states the following: "one of the hardest tasks in refugee determination, and one that is central to the process, is assessing the credibility of the applicant….The decision maker must assess not only the credibility of the applicant, but also the credibility of the story in itself". The RAB interpreted this source as entailing that the Board must be convinced that the appellant is telling the truth before it can consider the principal issues. Finally, the Board dismissed the case as it believed that the applicant had been a willing member of a rebel group and had probably participated in gross human rights violations in his country of origin. The Court objected this ground by saying that the aforementioned inferences were based on unfounded assumptions and opinions that were not put to the applicant or his legal representative during the appeal hearing.

3) Appeal in front of the High Court. The respondents had refused to supply the applicant's legal representatives with copies of his B1-1590 asylum form, the RSDO had refused to supply his legal representatives with his interview notes, and the DHA officers unfairly had regard to documents which had been requested by his legal representative, but which were withheld by them. This runs counter rule 53(1)(b) of the Uniform Rules by 31 August 2015.[78] The High Court observes that "It all too frequently happens in these matters that the respondents in the relevant section of the Department of Home Affairs do not comply with their aforementioned obligation in terms rule 53(1)(b) to produce the record. It is plain that there is a *systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated judicial admonitions, to comply with its legal obligations* in matters in which its decisions are taken on judicial review. The consequences prejudice not only the proper administration of justice, but also the effective administration of the Refugees Act. Courts are frequently called upon to make substitutive decisions determining the refugee status of applicants in judicial review matters" (para 15, emphasis added). The Courts adds that "[…] the Department's systemic failure to comply with its procedural obligations in judicial review applications of this nature is liable to subvert the proper administration of the [Refugee] Act. And it is a matter for serious concern that the subversion is being perpetrated by the very functionaries who are employed to administer it" (para 17). It went on to say that "The respondents' failure to comply with rule 53(1)(b) prejudices the administration of justice because it tends to impinge adversely on

[78] Rule 53 aims to assess whether a decision was made lawfully, reasonably, and within the powers granted to the administrative body, helping to prevent arbitrary decision-making. For the applicant to seek appropriate relief where his rights or interests have been prejudiced by wrongful administrative action, Rule 53 mandates the administrative body or a public authority to furnish a comprehensive record of its decision-making process to the court, which affords the applicant an opportunity to interrogate the decision, whereafter such applicant can elect to amend and supplement its grounds for review in the form of a supplementary founding affidavit.

the applicants' constitutional right to a determination of their suits by the application of law in a fair hearing. More prosaically, it tends also to increase the cost of litigation – in many cases at the expense of the taxpayer and thus, society as a whole" (para 18).

Challenges related to the appellants' legal standing or capacity to bring the case.

Detention:

In *Bula*, the applicants do not seem to have faced challenges related to their legal standing.

In *Ashebo*, the applicant does not seem to have faced challenges related to their legal standing. He applied for the leave of direct appeal to the Constitutional Court, which was granted in light of the exceptional urgency of the case.

Procedural barriers:

In *Ruta*, the applicant does not seem to have faced challenges related to their legal standing.

In *Tshiyombo*, the applicant does not seem to have faced challenges related to their legal standing. He also obtained interim relief and substitutive relief pursuant to s 8(1)(c)(ii)(aa) of PAJA was recognized.

Hearing.

Detention:

In *Bula*, the applicants were heard by the Coram. No information is provided concerning the modality of the hearing.

In *Ashebo*, the applicant was heard by the Coram and also submitted written considerations. No information is provided concerning the modality of the hearing.

Procedural barriers:

In *Ruta*, the applicant was heard by the Coram. No information is provided concerning the modality of the hearing.

In *Tshiyombo*, the applicant was heard for urgent relief before Judge Dlodlo J on 5 August 2015. After the hearing certain interim relief was granted to the applicant. The interim relief included a direction to the RSDO to issue a temporary asylum seeker permit to the applicant that would permit him to remain lawfully in this country pending the determination of his claim.

Provision of legal aid to the applicants.

Detention: In *Ashebo*, the applicant was supported by a counsel. No further information is provided.

In *Bula*, the applicants were supported by the legal NGO Lawyers for Human Rights.

Procedural barriers:

In *Ruta*, the applicant was supported by the legal NGO Lawyers for Human Rights.

In *Tshiyombo*, the applicant was supported by an attorney attached to the Refugee Rights Clinic at the University of Cape Town.

Applicants' vulnerability.

Detention:

In *Bula*, there is no reference to the potential vulnerability of the applicants nor an evaluation in that regard.

In *Ashebo*, there is no reference to the potential vulnerability of the applicant, despite his well-founded fear of being persecuted and the fact that he was kept in continued detention.

Procedural barriers:

In *Ruta*, the applicant was not directly and expressly considered as belonging to a specific vulnerable group. Yet, the Court considered certain asylum seekers as vulnerable, namely those "who do not dispose over opportunities to obtain transit permits or to file asylum applications in a timely manner as the Immigration Act demands. […] refugees are especially vulnerable persons who are traumatised and in flight from serious human rights abuses" (para 48).

In *Tshiyombo*, the Court does not directly refer to the applicant as being vulnerable. Yet, it can be inferred that the Court is aware of his vulnerability and this may have influenced the Court's decision to subvert the RAB's rejection decision. The Court is called indeed to evaluate the applicant's request for substitutive relief by way of an order declaring him to be a refugee. Such an order can be made pursuant to s 8(1)(c)(ii)(aa) of the PAJA if exceptional circumstances apply.[79] The relevant principles in determining whether the exceptional remedy of a judicially made substitutive determination should be granted respond to the criteria of justness and equitability. The High Court decided to grant substitutive relief to the applicant because of several reasons, including 1) the inordinate length of time (7 and a half years) for his asylum determination process, which runs counter the constitutional principles of administrative efficiency; 2) The adverse effect of this delay on the applicant's family's security and right to live in South Africa; 3) the impact of this delay on his status. As a holder of an asylum seeker permit, he is excluded from accessing basic rights, travel documentation, health and education benefits and eventual qualification for permanent residence (para 44).

B. Impact of the judicial or quasi-judicial body's decision

Influence of the case on subsequent case law or legal practice.

Detention:

Bula has proven influential in shaping the procedural and substantial safeguards surrounding the right to access asylum and established clear boundaries to the use of detention. It is frequently cited along with other landmark case law (together with *Adbi, Ersumo, Arse* etc) on the legality of detention as a barrier to asylum as well as on the right to asylum.

The *Ashebo* judgement influenced subsequent case law in South Africa and inaugurated a restrictive judicial trend, where the findings in *Ruta* were put aside. Subsequent judgments delivered by lower courts as well as by the Constitutional Court relied on *Ashebo* when assessing the legality of continued detention.[80]

[79] This norm recognises the exceptional case where the court may substitute or vary the administrative action or decision for that of the decision-maker/administrator.

[80] These include: Judgment handed down on 8 February 2024, Gauteng Division (2023-097427, 2023-097292; 2023-097111; 2023-097076; 2023-100081; 2023-100526); South Gauteng High Court (Johannesburg), *Lembore and Others v Minister of Home Affairs and Others* (2023/097427) [2024] ZAGPJHC 502 (21 May 2024); South Gauteng High Court (Johannesburg), *Boamah v*

Procedural barriers:

Ruta has influenced subsequent case law decided prior to the enactment of the Refugees Amendment Act and related Regulations. In particular, in the *Abore* case of 2021, the Constitutional Court re-affirmed that once an illegal foreigner has indicated their intention to apply for asylum, they must be afforded an opportunity to do so and further, that a delay in expressing that intention does not bar the individual from applying.[81] It held that even though a delay in applying for asylum is significant in determining an individual's credibility and authenticity, it does not "function as an absolute disqualification from initiating the asylum application process". Thus, until an applicant's application has been finally adjudicated, the principle of non-refoulement protects the applicant from deportation. Ruta was instead overturn by *Ashebo* and subsequent jurisprudence.

Tshiyombo fits in a rooted trend where judicial authorities condemn the systemic dysfunctionality of the administration in refugee matters and is cited in subsequent jurisprudence on the matter.

C. Consistency with previous jurisprudence

Consistency or divergence of specific decision(s) with the previous jurisprudence

Detention:

Bula is in line with previous jurisprudence on detention, where Courts at different levels (SCA and Constitutional Court in particular) have provided for a principled interpretation of the right to asylum and limited the application of the Immigration Act to cases concerning (would-be) asylum seekers.

The *Ashebo* ruling is not totally consistent with other national cases on the same barrier and departs from the guarantees set out in *Ruta* and *Abore*. The Court reaffirms that delayed applications should not be automatically dismissed, however it admits that the non-penalization clause of Article 31 RC does not give an illegal foreigner unrestricted indemnity from penalties. The mere intention to apply to asylum is not enough to be released from detention. In *Ashebo*, the divergences were mainly related to the enactment of new and restrictive provisions under the Refugee Act, which resulted in additional obstacles to asylum access. Yet, the interpretation according to which the mere intention to apply for asylum does not entitle the applicant to be released from detention is a key divergence from the consolidated jurisprudence on the refugee's declaratory status, the right to asylum and the duty not to penalize asylum seekers in case of irregular entry as established in R*uta, Abore, Ersumo, Adbi, Arse* etc.

Procedural barriers:

Ruta is in line with the Constitutional Court's previous jurisprudence and is consistent with other national cases on the same barrier (see *Bula, Abdi,* and *Ersumo*)

As anticipated, *Tshiyombo* well fits in a rooted trend where judicial authorities condemn the systemic dysfunctionality of the administration in refugee matters. Courts have often labelled DHA officials as "incompetent" and "deplorable" and accused DHA officials of "showing blatant disregard for the law, dereliction of duty and bad faith". Administrative failures have been identified and censored by lower

Minister of Home Affairs and Others (2024/068962) [2024] ZAGPJHC 694 (22 July 2024); Constitutional Court of South Africa, *D. A. v Minister of Home Affairs and Another*.

[81] *Abore v Minister of Home Affairs and Another* (CCT 115/21) [2021] ZACC 50; 2022 (4) BCLR 387 (CC); 2022 (2) SA 321 (CC) (30 December 2021).

Courts as well as by the Constitutional Courts (in *Kiliko* (2006) for example). Other examples are *Tafira* (2006) decided by the High Court, *Katsshingu* (2011) delivered by the High Court of Cape Town, and *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* (2021) pronounced by the Supreme Court of Appeal.

Divergence as establishing a binding precedent.

Detention:

Bula was decided by the Supreme Court of Appeal, whose judgements are binding on other courts. Subsequent jurisprudence by lower courts followed this stance, while the Constitutional Court upheld its findings in subsequent jurisprudence.

Ashebo was decided by the Constitutional Court, whose judgements are binding for all Courts in South Africa. Subsequent jurisprudence by lower courts followed this stance.

Procedural barriers:

Ruta was decided by the Constitutional Court, whose judgements are binding for all Courts in South Africa. Subsequent and divergent jurisprudence by lower courts was motivated by a stark change in the legislation.

Tshiyombo was decided by the High Court of Cape Town, and it is binding on other courts.

Elements of divergence.

Detention:

No divergences are visible in *Bula*.

As stated before, in *Ashebo*, the divergences were mainly related to the enactment of new and restrictive provisions under the Refugee Act, which resulted in additional obstacles to asylum access. Yet, the interpretation according to which the mere intention to apply for asylum does not entitle the applicant to be released from detention is a key divergence from the consolidated jurisprudence on the refugee's declaratory status, the right to asylum and the duty not to penalize asylum seekers in case of irregular entry as established in Ruta, Abore, Ersumo, Adbi, Arse etc.

More into detail, in *Ashebo*, the Court says that regulation 7 of the new Regulations, which deals with asylum transit visas, imposes conditions more stringent than the old Regulations and requires an individual to declare his or her intention to apply for asylum while at a port of entry before entering the country and not when he or she is encountered in violation of the Immigration Act. And once he or she has expressed such an intention, he or she must provide his or her biometrics and other relevant data as required and only then would he or she be eligible to be issued with an asylum transit visa for five days. Similarly, Regulation 8, which governs the asylum application process, is also strict. It requires a person who does not possess an asylum transit visa when seeking asylum at a RRO to show good cause for his illegal entry into or stay in the Republic as contemplated in article 31(1) of the Convention. This must be done before the person is permitted to apply for asylum. In the Court's view, these provisions do not offend the principle of non-refoulement embodied in section 2 of the Refugees Act. Rather, they are in line with Art. 31 of the Refugee Convention because it too does not provide an asylum seeker with unrestricted indemnity from penalties. Finally, the Constitutional Court found that Mr Ashebo's continued detention would become unlawful only after he successfully shows to have good cause for his illegal entry and stay in the country. In this case, he would no longer be an "illegal foreigner" for purposes of the Immigration Act. Merely expressing an intention to seek asylum does not entitle the applicant to release from detention.

Procedural barriers:

Ruta confirms what lower Courts, such as the Supreme Court of Appeal, had already found in several previous judgements on similar topics revolving around refugee rights and access to asylum.

Tshiyombo confirms what other High Courts as well as higher Courts in South Africa had already found in several previous judgements on systemic dysfunctionality and administrative failures in asylum matters.

Alignment of the decisions with the current (evolutive/restrictive) approach to asylum barriers endorsed by the judicial or quasi-judicial body.

Detention:

Bula well fits within the evolutive approach that Courts used towards detention until the Refugees Amendment Act came into force in 2020, where Courts at different levels had promoted a dynamic and principled interpretation of the norms set out in the Refugees Act, including the principle of non-refoulement and the right to access asylum. After 2020, when the amendments entered into force, Ruta has been overturn by subsequent and more restrictive jurisprudence reflecting those changes in the legislation.

Ashebo falls within the restrictive trend inaugurated at the political and legislative level concerning migration and asylum.

Procedural barriers:

Ruta fits well in the trend of jurisprudence prior to the enactment of the Refugees Amendment Act. After 2020, Ruta has been overturn by subsequent and more restrictive jurisprudence reflecting those changes in the legislation.

Tshiyombo denounces a rooted lack of respect for the rule of law in South Africa by the executive's asylum officials. The judgement, akin to the many others that have been delivered, has not prompted improvements at the administrative level.

PART 3: SOCIO-LEGAL FACTORS

I. PROCEDURES IN ASYLUM ACCESS ADJUDICATION

A. Access to judicial or quasi-judicial bodies

Pushbacks: for the time being, there is no evidence of pushbacks in domestic case law. This can be partially attributed to the fact that the Border Management Authority, which praises itself for intercepting irregular migrants attempting to cross the border with South Africa, has become operational only in May 2023 and hence cases of pushbacks may take a while before arriving to Courts. Another obstacle can be that pushbacks happen before a person can access territory or file a petition and this limits the number of case law on the matter.

Pullbacks: there is no evidence of this barrier in South Africa

Walls and fences: there is no evidence of this barrier in South Africa

Detention: Yes, this is very much the case for detention in the way in which it is implemented by competent authorities. The rights to asylum, fair trial and due process are frequently denied to refugees and asylum seekers in South Africa when they are subjected to prolonged detention, often without the opportunity of a fair hearing. Asylum seekers, particularly, are at risk of being detained indefinitely for administrative purposes, with some held in detention centres for extended periods without proper adjudication of their cases. Access to legal rights is highly circumscribed in detention and individuals may be illegally deported without any review or appeal procedures and at great risk to their safety. Studies have revealed a systemic practice implemented by the DHA of detaining asylum seekers and refugees and denying individuals access to the legal protections of the asylum framework. Despite the Department's duty to ensure the right of everyone to access to asylum, including those in detention, it continued to argue that it was under no legal obligation to take individuals from Lindela to a refugee reception office to apply for asylum. As a result, several individuals detained at Lindela were not allowed to apply for asylum until legal interventions were made on their behalf. This is the case of a Sri Lankan man was not allowed to apply until Lawyers for Human Rights (LHR) obtained a court order demanding his release in addition to a Ugandan and two Congolese detainees who told officials at Lindela that they wished to apply for asylum were only taken to apply after LHR sent letters of demand. The same goes for a man from Sierra Leone who was not taken to apply for asylum until LHR intervened. In some cases, the asylum seekers were not taken to apply at all. In other cases, Lindela officials told detainees that they were not eligible to apply for asylum despite they lack the authority to make this determination. Among other examples, Immigration officials at Lindela told a Zimbabwean and a Nigerian man who wished to apply for asylum that they could not apply from Lindela and should simply wait for deportation. In addition, Section 34 of the Immigration Act requires individuals to be notified of their rights of review and appeal. DHA did not adhere to any of these requirements involving notifications, authorisations, and detention periods.

Externalization of asylum processing: no evidence of such a barrier in SA.

Procedural barriers: Misconduct by DHA officials reportedly hinder asylum seekers' possibility to access to justice. Indeed, systemic administrative failures deliberately caused by the DHA aim to deny applicants

the right to register their intention to apply for asylum and leave them without any documentation that can prove their efforts. First, this means that many of those who have entered South Africa never reached an RRO because not adequately informed of the procedure to be followed or because they have been arrested in the attempt to do so. In addition to individual officials pro-actively creating barriers to entry, DHA officials do little to ensure that potential applicants are notified of their rights to register their claims. One in ten (10% n = 230) applicants interviewed in a study understood that they needed to make their claim for asylum at an RRO only because they were so told by friends or family (72% n = 230). There is also evidence that back in 2009, when the inflows from Zimbabwe notably increased, border officials and the police patrolling the border in the Limpopo border region have a limited working knowledge of South African asylum laws and regularly deported Zimbabweans before they can ask for asylum. All these asylum seekers are therefore left in invisibility and excluded from accessing asylum and Courts.

Time as a challenge.

Pushbacks: asylum seekers can be pushed back immediately after interception, often before they can express their intention to seek asylum. Pushbacks are often informal as no formal procedure of rejection at the border seems to be implemented by the Border Management Authority. This makes judicial extremely hard if not at all impossible because there is no window of time for filing petitions.

Detention: Time surely represents a challenge in the case of detention. In several occasions, LHR was informed of the imminent deportation of their clients or asylum seekers in detention just a few hours before the execution of the order and in a few cases it succeeded to halt deportation. Among others, two individuals were almost deported, an outcome that was only avoided through urgent interventions by LHR. In one of these cases, LHR sent a letter of demand indicating the detainee's intention to apply for asylum, which he had attempted to do prior to his arrest. Two days later, the detainee told LHR by phone that his deportation was scheduled for the following morning. LHR phoned at least six people asking that the deportation be halted on the basis that he was an asylum seeker. Without regard for the legal obligation against refoulement, DHA responded that deportation arrangements had already been made and halting the deportation would have serious financial implications.

In addition, DHA caused several unnecessary postponements, increasing the deprivation of liberty and the time spent in detention. Already in 1997, the Supreme Court of Appeal ruled that "A detained person has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention" (SCA, *Silva v Minister of Safety and Security* 1997 (4) SA 657 (W), at p. 661-H). Many of these postponements were the result of DHA's failure to make timely legal submission. Among others, DHA sought several postponements, each time failing to file papers by the court specified deadline. It justified these delays on the grounds that it needed time to establish why it was detaining the applicant, notwithstanding the fact that the reasons for detaining an individual must be established prior to the detention, or, at the very least, within 48 hours if for the purposes of verifying immigration status. In many cases, DHA failed to adhere to the terms of court orders, whether obtained by agreement or by court decree. These actions left individuals in detention for additional periods as well as undocumented and subject to re-arrest following their release. In one case, DHA agreed to release the detainee and provide him with an asylum seeker permit. He was subsequently turned away from the RRO on numerous occasions, and LHR was forced to send an additional letter of demand. It took 27 days before he received his permit. In another case, the order required that the detainee be released on 12 August 2009 with an

asylum seeker permit. On 13 August, Lindela officials informed LHR that there was no transport to take the detainee to Marabastad and he would be taken on the following day. The centre manager at Marabastad had refused to issue the permit despite the court order. After LHR threatened contempt proceedings, the client was released on 14 August. He did not receive an asylum seeker permit until 11 September.

In addition, asylum seekers caught in detention before they could express their intention to apply for asylum have the right to appear before a judge within 48 hours to assess the lawfulness of their detention (habeas corpus). Indeed, a detainee may at any time request that their detention be confirmed as lawful by a court warrant – if a warrant is not issued with 48 hours of the request, they must be released (Immigration Act s 34). Yet, detention can continue up to 30 days without a warrant of the court and the court may extend the period for a maximum of 90 days 'on good and reasonable grounds'. In addition, Rule 6(12) of the Uniform Rules of Court allows for the normal forms and service to be dispensed with if a matter is of an urgent nature. The time in which the opposition has to respond may also be shortened. The litigant will have to show damage, prejudice or harm of some sort that requires urgent attention in order to qualify for this departure from the normal rules and procedures. The party pursuing relief on an urgent basis will also have to explain to the court why the same relief could not be obtained were the ordinary course of litigation to be pursued.

Procedural barriers: asylum seekers who have succeeded in claiming asylum have the right to appeal against a negative decision of their asylum claims. In order to have access to Courts, asylum seekers must first exhaust all executive internal remedies. First, asylum seekers must appeal to executive authorities and, if the outcome of this revision is negative, to judicial authorities of first instance (high court), second instance (supreme court of appeal), and to the Constitutional Court for constitutional matters under specific circumstances. Deadlines to submit appeals in front of executive authorities are stringent (10 or 14 days from receiving the letter of rejection), while the appeal procedure can take years if not decades. Time, therefore, represents a challenge for asylum seekers both in terms of rigid deadlines to be respected and for the prolonged waiting that leaves them in precarious conditions. In addition, after having exhausted internal executive remedies, the unsuccessful asylum seeker has the right to have their final rejections reviewed by judicial authorities in terms of the Promotion of Administrative Justice Act (PAJA). A court may review and set aside the decision to reject the application if it can be proved that the decision was made unlawfully, unreasonably or without fairness in procedure. The review application must be launched at the High Court no later than *6 months* from the date the asylum seeker became aware of the final rejection notice.

Rule 53 of the Uniform Rules of the High Court sets out the procedure to be followed in reviewing decisions taken by inferior courts, tribunals, boards or officers performing judicial, quasi-judicial and administrative action. Reviews of decisions made by an RSDO, the RAB and/ or the SCRA should be brought in terms of this Rule. Rule 53 review proceedings must be brought by way of a notice of motion which should be directed and delivered to the RAB / SCRA or RSDO in question as well as any other affected party. The notice of motion must set out the decision or proceedings sought to be reviewed and must call upon the relevant presiding officer / chairperson or officer: to show cause why such decision or proceedings should not be reviewed and corrected or set aside; and to despatch, within 15 days after receipt of the notice of motion, to the Registrar of the relevant court, the record of the proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make,

and to notify the applicant that she or he has done so. The notice of motion must be supported by an affidavit setting out the grounds and the facts and circumstances upon which the applicant relies to have the decision or proceedings set aside or corrected. Should any of the cited respondents wish to oppose the application, they will be required to file a notice of intention to oppose within 15 days of receiving the notice of motion and founding affidavit. Once the applicant receives a copy of the record from the Registrar, the applicant must furnish the Registrar and the other parties with copies of those portions of the record necessary for the purposes of the review. Within 10 days of receiving the record, the applicant may amend, add to or vary its notice of motion or founding affidavit by way of notice and an accompanying affidavit.29 Should any of the respondents have elected to oppose the application, they will be required to produce an answering affidavit within 30 days of the expiry of this period. The applicant will then be entitled to file a replying affidavit in terms of Rule 6 within 10 days of receiving the answering affidavit. It is relevant to note that extended timeframes apply to legal proceedings against the State. In terms of Rule 6(13) of the Uniform Rules of Court, the minimum period allowed for a respondent to deliver its notice of intention to defend is extended from the usual 5 to 15 days should proceedings be conducted against the State. The application of this timeframe is extended by Rule 53(5)(a) to all judicial review proceedings which typically involve the State, including asylum matters.

As seen, an asylum matter can reach the Constitutional Court if it concerns an issue of constitutional relevance. Where access to the Constitutional Court is provided, relevant deadlines apply. Deadlines are imposed by the Court Rules. They vary depending on the nature and stage of the proceedings involved.

Applications for direct access to the Constitutional Court

Under Court Rule 18, direct access will only be considered by the Court if exceptional circumstances exist. Once such an application has been made, the following deadlines apply:

- Any party opposing the application must file notice of intention to oppose within 10 court days (court days running from Monday to Friday).
- After notice of intention to oppose it has been received or the 10 days has expired, the Chief Justice shall issue directions concerning the matter - including setting deadlines for the filing of affidavits and written submissions, if necessary.

Applications for leave to appeal – Constitutional Court

Applications for leave to appeal against the decision of any court are dealt with under rule 19. The applicable deadlines are:

- The application must be brought within 15 court days of the date of the decision against which leave to appeal is sought.
- Within 10 court days of such application, the respondent(s) must indicate in writing whether they oppose the application and, if so, on what grounds.
- A respondent wishing to cross-appeal to the Court must file such application for leave to cross-appeal within 10 days of the filing of the application for leave to appeal.
- The Court will then decide how to deal with the matter, and directions imposing further deadlines may be issued.

Amici curiae – Constitutional Court

Unless the Chief Justice has issued directions imposing deadlines for applications to be admitted as an amicus, rule 10(5) says that such applications must be made not later than five court days after the lodging of the respondent's written submissions. If consent to your admission as an amicus has been received from the parties in the matter, such written consent must be lodged with the registrar within five court days of it having been obtained.

Directions of the Constitutional Court

Once an application has been filed, the Chief Justice may issue directions in which further deadlines are imposed - for example, for the filing of written submissions and applications to be admitted as an amicus, and for the setting of dates for hearings.

Condonation of non-compliance with deadlines

The Constitutional Court has the power to condone non-compliance with the rules, including deadlines, in appropriate cases. Parties who fail to comply with deadlines must file an application for condonation, or include a prayer for condonation in their main application, in which the reason for failure to comply with the rules must be provided.

Costs for legal representation.

Detention: Yes, costs have a relevant bearing. Indeed, whereas access to justice is secured to everyone, including asylum seekers, through section 34 of the Constitution, legal assistance is not mentioned in the Constitution and remains limited to the same extent that it is for most South Africans, as a result of the significant cost usually entailed in securing legal services. Free legal assistance is only to be provided where substantial injustice would result if legal representation were not available to the accused or detained person in criminal matters pursuant to Section 35(2) and (3) of the Constitution. In *S v Manuel*, the High Court held that in criminal matters refugees have a right to legal assistance at State expense to the same extent that citizens do.

Procedural barriers: Idem as above. In addition, more generally, corruption plays a key role in undermining asylum seekers' access to fundamental rights, including legal representation. Corruption takes the form of demand for bribes, at every point of the process: queuing, obtaining and renewing asylum documents, and obtaining and renewing refugee documents. Free-of-charge services, such as for translating documents in a language the applicant understands, are instead linked to a demand for unofficial payments. Many asylum seekers declared to be unable to access the RRO or renew their documents because of an inability to pay. Many remain undocumented because they cannot not pay, placing them at risk of detention and deportation. Corruption therefore impedes asylum seekers to access the first phase of the RSD process and hinders their possibility to access to Courts.

Practices adopted by actors involved in asylum access adjudication to overcome challenges to accessing justice.

Detention: NGOs supporting asylum seekers and refugees, such as LHR, resorted to letters of demand before initiating a litigation in front of the court, where LHR informed DHA of an individual's status as an asylum seeker or of other irregularities in the detention process. When these letters remained unanswered, the LHR has systemically resorted to bring the case in front of the Court. What has been

perceived by the DHA as a "continued onslaught by way of this incessant litigation" has actually allowed asylum seekers to avoid unlawful deportation and indefinite detention.

Procedural barriers: In order to reduce the massive backlog of asylum applications at least in part caused by high rates of rejections at first-instance refugee status determination and the appeal stage, UNHCR launched the "asylum appeal backlog project" in South Africa by providing financial and technical support to the RAASA to address the appeal backlog and prevent future accumulation. However, the backlog project did not achieve the desired outcomes in 2024, as no effective adjudicative strategy was implemented, and case processing output remained below targets. RAASA finalized only 2,174 cases - 43% of the 5,000 target - due to staffing shortages and unreliable data analysis (with a yearly average of 217 decisions per Member in 2024, compared to 190 decisions per Member in 2023). Case processing outputs remain below the agreed targets set by DHA and UNHCR, and there is still no effective adjudicative strategy. In addition, the absence of reliable data and trend analysis in the South African asylum system prevents the pursuit of an efficient and effective case processing strategy. Recognizing these challenges, UNHCR has proposed a Surge Project for 2025 to enhance case processing, strengthen adjudication strategies, and prevent future backlogs at the appeal stage. This initiative aims to introduce additional processing capacity and improve the national asylum system's overall efficiency.

In addition, several NGOs such as LHR, Corruption Watch, and ACMS have conducted and disseminated extensive research while increasing awareness on systemic corruption practices and scandals among DHA officials that have also led the Department to carry out investigations to punish corrupted officials. Yet, only a few officials have been arrested, and no counterstrategy has been developed or implemented (please see part

Implications of the above-mentioned challenges in accessing justice in asylum access adjudication.

Difficulties in accessing justice can lead to a denial of asylum access and unlawful deportation. Courts are a key benchmark against DHA's circumvention of asylum law. As seen, DHA officials reportedly engage in misconduct and create deliberate systemic administrative failures to deny applicants the right to register their intention to apply for asylum, which include failing to inform potential applicants of their rights and the correct asylum procedure, telling detainees that they are ineligible for asylum, engage in illegal deportation as well as indefinite and unlawful detention. In addition, rigid and short deadlines (e.g., 10 or 14 days for executive appeals) are further obstacles that make access to Courts even more difficult as usually internal remedies must be exhausted for asylum seekers to be admitted to Courts. Such short deadlines contrast sharply with the prolonged waiting periods for the resolution of appeal procedures, leaving applicants in precarious conditions. Further difficulties, which will be examined later on, in accessing justice concern the availability and cost of legal assistance and representation, which is not constitutionally guaranteed outside of criminal matters for most South Africans and asylum seekers. The significant cost of securing legal services severely limits access to justice, as free legal aid is only for criminal cases where "substantial injustice" would result otherwise. In addition, although free legal aid is provided by pro-bono organizations, their financial capacity is usually limited and cannot therefore guarantee access to representation to all asylum seekers in need.

B. Legal aid

Procedural aspects in law and in practice for obtaining legal representation in asylum access adjudication.

General note: The Constitution recognises as fundamental the right of the individual to legal advice and legal representation only in criminal matters. The state funds Legal Aid South Africa (LASA) which provides legal services to indigent people mainly in criminal matters plus in certain categories of civil matters subject to availability of resources. Legal Aid in South Africa is extremely important in delivering access to justice, equal access to courts and fair trial rights and goals when it comes to indigent persons. LASA is the national legal aid system that is funded by the national government with offices in each province and satellite offices in more remote areas. It is the main institution responsible for providing legal aid services to those who are unable to afford private attorneys. It is an independent statutory body established by the Legal Aid South Africa Act 39, 2014. Legal Aid South Africa also covers asylum seekers involved in criminal matters, and limitedly in civil matters. There are also cooperation agreements with public interest law firms and university law clinics to assist with the delivery of free legal services. Where justice centres are unable to assist clients, these clients are referred to judicare attorneys.

The involvement of LASA in criminal matters envisages a purely administrative process involving completion of a requisite form (including to substantiate that the person needs free legal aid on the basis of their income) followed by a follow-up interview; these being done to ensure qualification for assistance. Although the law is silent on this, on the basis of the constitutional right to a fair trial including legal representation de facto the case will be postponed until a legal aid lawyer is available and present. If legal aid is denied, there is a possibility of 'appealing' the decision by LASA in terms of its own internal rules for appealing such a decision; for example a committee convenes to decide in this regard. The total number of criminal cases filed in court where State funded legal aid was provided in 2017/2018 was 371.202.

LASA can (but does not have to) be involved in civil matters due to the indirect right to civil legal aid in certain matters which can be derived from Section 34 of the Constitution, which provides for the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Only certain services are included as part of civil legal aid in South Africa. The 'right to civil legal aid' is specified in LASA rules. LASA has its own rules as to the limited parameter of civil legal aid matters accepted. For instance, LASA can represent asylum seekers in tribunals (i.e. whether they should be classed as refugees). The limitation on the ambit of civil legal aid matters relates to the limited funding available for such work. Civil legal aid covers legal advice and information in turn recognising that no legal right can be realised unless the right-holder is aware of it and knows how to exercise it. In 2017, LASA launched a telephonic legal advice line facility, including a "Please call me" free sms/text service for call-backs so as not to limit the service to those who are able to afford the call.[82] In 2016/2017 alone, LASA's Annual Report reflected 41 777 items of advice or legal information were given via their telephonic legal advice line.44 Almost all of this advice was given for civil as opposed to criminal matters. However, LASA does take on a relevant number of litigious civil matters before courts and tribunals as do other legal NGOs/Law Clinics. Indeed, LASA also only takes on civil legal aid matters which it views as having

[82] LASA 2017 http://www.legal-aid.co.za/wp-content/uploads/2017/09/ANR-LegalAidSA_2017.pdf.

relatively good prospects of success. In comparison to 371.202 criminal files in 2017/2028, for instance, LASA accepted 55.415 civil matters. The financial means test is exactly the same as that mentioned in criminal legal aid – hence R7400 (+- $510 p.m.) for individuals and R8000 (+- $551 p.m.) for couples. LASA stresses the need to assist vulnerable groups: women, children and people with disabilities. Despite this espoused focus, the financial means test for such applicants remains the same.

Detention: The right to Legal Aid is specified in the Constitution. Section 35(2)(c) thereof provides for every detained person, including sentenced prisoner has the right to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. Section 35(3)(g) thereof provides that every accused person has the right to a fair trial which includes the right to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly.[83] Section 22 of the Legal Aid Act 39 of 2014 provides that: A court in criminal proceedings may only direct that a person be provided with legal representation at state expense, if the court has— "(1)(a) taken into account— (i) the personal circumstances of the person concerned; (ii) the nature and gravity of the charge on which the person is to be tried or of which he or she has been convicted, as the case may be; (iii) whether any other legal representation at state expense is available or has been provided; and (iv) any other factor which in the opinion of the court should be taken into account".

Yet, as seen, legal representation remains limited to the same extent that it is for most South Africans, as a result of the significant cost usually entailed in securing legal services. As for asylum seekers, UNHCR partners with several NGOs to provide legal assistance to detained asylum seekers and refugees. in addition to NGOs, universities also offer legal assistance to asylum seekers. Relevant entities:

- NGOs like Lawyers for Human Rights and ProBono.org. The latter is an NGO which makes use of private legal practitioners to assist poor people with their legal matters via a 'clearing house system'.
- The Legal Resources Centre. This organisation is an independent non-profit organisation which provides legal services to poor, homeless and landless individuals and communities.
- University Law Clinics – 5 active Law Clinics in the country, including the University of Cape Town Refugee Rights Unit, Scalabrini Centre, and Nelson Mandela University Refugee Rights Centre.
- Another source of assistance is private lawyers acting pro bono - something which is theoretically possible but has been said to have yielded little or at least limited assistance in practice.[84]

Yet, the legal assistance and representation provided by these organizations is limited as they lack sufficient financial and human capacity. In addition, language barriers, lack of knowledge about legal rights and procedures, socio-economic constraints, and limited awareness of pro bono or Legal Aid South Africa services further limit asylum seekers' access to legal representation. It has been reported that in practice many detainees are unaware of the procedural safeguards under the Immigration Act or of the availability

[83] Brickhill, J., 2018. The Right to Civil Legal Aid in South Africa: Legal Aid South Africa v Magidiwana. Constitution Court Review, [Online]. 8/1, 256-281 http://www.saflii.org/za/journals/CCR/2018/22.pdf
[84] Holness, D. 2013. Recent developments in the provision of pro bono legal services by attorneys in south africa. Potchefstroom Electronic Law Journal, [Online]. 16/1,129-164 https://www.ajol.info/index.php/pelj/article/viewFile/88747/78335

of judicial review, while procedural protections under the Immigration Act are widespread disregarded.[85] One report concludes that it is possible that the availability of remedial procedures in principle does not match their availability in practice. For additional information, please see Part 2 on Legal Standing.

Procedural barriers: Idem as above. However, it is not clear whether pro-bono organizations offering free legal aid assist also those asylum seekers who are not in detention.

In addition, relevant discrepancies between law and practice can be spotted with reference to legal representation linked to a fair hearing. The case of *AOL v Minister of Home Affairs* decided in 2006 by the Durban and Coast Local Division is particularly telling. In this case, the applicant is a woman who fled from Uganda to South Africa, where she had applied for refugee status. Two years later she received a letter from the DHA notifying that her claim had been unsuccessful. She indicated that she wished to appeal against the Department's decision and was called to appear before a member of the Refugee Appeal Board for a preliminary investigation into her position. A further two years later she was notified that the Appeal Board had refused her appeal on the sole ground of information contained in a document styled the 'United Kingdom Country Information and Policy Unit - April 2003 -3 2006 (2) SA p9 Uganda Assessment'. The applicant then resorted to the Court. The Court *mero motu* raised the issue of whether the application proceedings had complied with the provisions of s 24 of the Act and whether the appeal proceedings had been conducted in accordance with the principles of administrative fairness. The Court held that there was no evidence from the letter from the DHA that the decision to refuse her application had been made by a RSDO who, in terms of s 24 of the Act, was the only person authorized to make such a decision and which was fatal to the jurisdiction of the Appeal Board to hear the applicant's appeal. Judge Swain J then observed that the provisions of s 26(4) of the Act ("If an application is rejected (a) written reasons must be furnished to the applicant within five working days after the date of the rejection or referral; (b) the record of proceedings and a copy of the reasons referred to in paragraph (a) must be submitted to the Standing Committee within 10 working days after the date of the rejection or referral") implied that the applicant was entitled to be present at the hearing of her appeal and that she was entitled to be given notice of the hearing in order to be able to request and arrange legal representation at the hearing. According to the court, therefore, the fact that s26(4) provides that the Appeal Board must allow legal representation on the request of the applicant of necessity implies that (a) the applicant is entitled to be present at the hearing and (b) must be given notice of the hearing to be able to request and arrange legal representation. The Court further observed that no notice had been given to the applicant of the appeal hearing and that was fatal to the proceedings of the Appeal Board. Similarly, the applicant did not receive a copy of the document on which the rejection decision was based or given an opportunity to deal with the contents of the document before the Appeal Board took its decision. It concluded that the applicant's right to a fair hearing had been denied and that the rejection decision had to be put aside and reviewed.

Availability of free legal aid available.

There is no specific difference among selected barriers. Free legal assistance is only to be provided in criminal matters especially where substantial injustice would result if legal representation were not available to the accused or detained person pursuant to Section 35(2) and (3) of the Constitution. The High Court

[85] Gina Snyman, Monitoring Immigration detention in South Africa (Johannesburg: Lawyers for Human Rights, 2010).

has elucidated the position of foreigners in respect of their right to legal assistance in criminal matters in *S v Manuel*, where an Angolan refugee was refused legal assistance by the Legal Aid Board because he was not lawful in the country.[86] In addition, Section 22 of the Legal Aid South Africa Act (Act 39 of 2014) guides the process by which courts may direct that legal representation be provided at state expense. The decision is not automatic and must consider personal circumstances, the severity of the charges, the availability of alternative representation, and any other relevant factors. Regulation 9 of the Legal Aid South Africa Regulations governs the provision of legal aid in civil matters. It is relevant to note from the outset, that Legal Aid South Africa *may* grant legal aid to a litigant in any civil matter, but it's not obliged to as this is not required under the SA Constitution. Assistance to asylum seekers in civil matters is therefore conditional and depends on a variety of factors. For assistance to be granted, the case must show good prospects of success and enforceability. Resources must also be available, which is determined based on a written merit report assessing alignment with Legal Aid South Africa's mandate. It is relevant to note that certain categories of people, such as children under 18, automatically qualify for free legal aid regardless of financial means. This applies to all children in South Africa, regardless of nationality or immigration status.

Main challenges asylum seekers face in obtaining legal representation in asylum access adjudication.

A major challenge to legal aid is economic in nature. The Deputy Minister of the Department of Justice and Constitutional Development once noted that South Africa's legal fees were "astronomically high" compared with those of other parts of the world, an affirmation which supports the need for greater free legal services for those in dire need of such assistance.[87] This adds to the risk of an adverse costs order for any recipient of legal aid. In other words, even if a litigant gets free legal services, on losing a civil matter in court, they are very likely to be liable to pay the other litigants costs. This therefore makes litigation in South Africa an inherently risky affair even for recipients of civil legal aid, making access to justice potentially less attainable as litigants may not be willing to risk the little they have in the event of an adverse court finding.

The economic challenge is a burden not only for the applicants but also for those who provide legal aid. The sources of legal aid funding for LASA is the government. Independent legal NGOs seek their own donor funding. The legal aid budget to LASA is a separate component of the annual justice system budget allocated to the Department of Justice and Constitutional Development (DOJ). This is a decision made by the executive which has the power to allocate resources as it sees fit to the DOJ; the latter then decides on LASA's allocation. The level of the national budget for legal aid is not clear in so far as the amounts for legal aid are conflated with overall justice spending. The South African government's genuine commitment to legal aid-related access to justice could be questioned in terms of a major cut having been made to LASA's budget flowing from a decrease in the Department of Justice and Constitutional Development's allocation from the national fiscus. LASA already had its funding from government reduced by 5% in the 2018-19 financial year alone. In 2018, a further huge budget cut of 503 million Rand

[86] S v Manuel 2001 (4) SA 1351 (W).
[87] Manyathi-Jele N "The Legal Practice Bill and Community Service" 2013 De Rebus 10

has been announced.[88] Such drastic funding cuts for legal aid spending makes service provision by them all the more challenging.

In addition, a very significant proportion of LASA's budget, personnel and case output (approximately 87% in each instance) is focused on criminal as opposed to civil legal aid.[89] A second and connected challenge refers to job careers related to LASA. Commonly, after completion of a minimum four year law degree at university (the LLB), they must then perform a period of one to two years of vocational training which includes passing admission examinations. The procedure to become a staff member of a legal aid institution is by a normal job application. Anecdotally, due to the scarcity of vocational training opportunities in the legal field and even good positions for admitted legal practitioners, there is a high level of interest among lawyers to become State funded legal aid provided. Legal aid providers are paid for their services via salaries when employees of LASA or legal NGOs and the relatively small proportion of work done by private lawyers in terms of judicare are paid as consultants on a case-by-case hours worked basis. There is no empirical evidence available to evaluate the remuneration offered to legal aid providers, but it is evident that LASA salaries are better than those in the legal aid NGO sector and the former as opposed to the latter have employment benefits attached thereto.

Moreover, there is no requirement on legal aid providers (LASA or NGOs, University clinics etc) to engage in continuing education and/or skills training.[90] There is no administrative remedy available if a person receives legal aid services, but the legal aid provider is unprepared or unqualified or if the services are otherwise of poor quality. Seemingly the only route available for such a client would be to lay a complaint against the lawyer with the Legal Practice Council or in litigious matter to appeal if it were to be shown that the legal aid representation grossly denied a client's rights to a fair trial. The chance of the latter occurring is very small. There is a formal accreditation scheme in place for legal aid providers via recognition by the Legal Practice Council. But this does not show quantitative output of work or the quality of assistance provided.

In terms of the financial eligibility criteria for criminal legal aid is the same as for civil legal aid. The LASA threshold (followed by a number of legal NGOs) is R7400 (+- $510 p.m.) for individuals and R8000 (+- $551 p.m.) for couples and in almost all cases the recipient of criminal legal aid services does not contribute to the cost of providing those services.[91]

Another challenge is spotted by the Annual Judiciary Report 2021/22, which notes that legal aid is considered by Regional Courts (Magistrates Courts are the lowest courts and are divided into Regional Courts and District Courts) to be a main factor of Case Flow Blockages. Indeed, 4.873 cases (or 12.1%) have been allegedly blocked by stakeholders providing legal aid. No other information is provided to contextualize this data.

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[88] Mabuza E "Legal Aid SA budget cuts bad news for poor and vulnerable seeking justice". Times Live 17 October 2018 https://www.timeslive.co.za/news/south-africa/2018-10-17-legal-aid-sa-budget-cuts-bad-news-for-poor-and-vulnerable-seeking-justice/

[89] Holness D "Improving Access to Justice through Law Graduate PostStudy Community Service in South Africa" PER / PELJ 2020(23)

[90] Holness, D., 2015. Doctor of Laws (LLD), Nelson Mandela (Metropolitan) University. Thesis title: 'Coordinating free legal services in civil matters for indigent people in Ethekwini: a model for improved access to justice."

[91] Holness, D "The constitutional justification for free legal services in civil matters in South Africa" [2013] 27(2) Speculum Juris 1-21

The geographic disaggregation of blockages linked to legal aid is available in the Annual Judiciary Report for South Africa for the years 2021/2022 and reads as follows:

Electoral Court – 804 cases

Free State Divisions - 287

Gauteng Division – 952

Kwazulu-Natal Division – 711

Limpopo Division – 538

Mpumalanga Division – 387

Northwest Division – 508

Northern Cape Division - 273

Western Cape Division - 413

In sum, the main challenges to legal representation highlighted above are:

- Limited availability of legal representation because of the high costs related to private legal representation and the scarcity of free legal aid by pro-bono organizations
- Restricted provision of free legal representation provided by the State

Implications of the availability, quality, and accessibility of legal aid on asylum access adjudication.

As seen, legal aid is not ensured in South Africa. Free legal aid by competent and authoritative NGOs is available yet limited due to financial constrains and limited human resources. DHA officials often do not inform asylum seekers of their rights, including legal assistance. Legal barriers continue to exist in South Africa for asylum seekers – in particular for those who cannot afford legal representation to pursue the matter on judicial review. Some asylum seekers are fortunate to be able to approach the courts with the support of NGOs after they have exhausted all the review procedures available under the Refugees Act. Therefore, asylum seekers often do not look for legal support because they are unaware of their rights. This has led to unlawful rejections of asylum claims, such as in the emblematic case of *AOL*. Frequently, NGOs intervene when asylum seekers have been already arrested and are about to be deported to halt imminent deportation and admit the person to the asylum procedure. Also in this case, unlawful practices and procedural irregularities by DHA officials risk undermining the right to legal assistance of asylum seekers and expose them to a severe risk of deportation and refoulement. For instance, many of those seeking asylum do not fully understand the asylum process. In a survey, 68 percent of interviewed asylum seekers reported that the asylum process had not been properly explained to them. The survey also pointed to a lack of adequate interpretation services. Under PAJA, an administrative procedure must be fully explained to the individual in order to be fair, and the individual must be given an opportunity to make representations. Many individuals failed to properly adhere to the requirements of the asylum system because they did not understand these requirements, which had not been adequately explained to them. As a result, they found themselves in Lindela without having had a status determination officer consider their asylum claim or whether or not they faced a risk of refoulement. A Congolese man who did not

speak English was never properly informed that his claim had been rejected as manifestly unfounded and that he had fourteen days to make written submissions to the SCRA. He was arrested when he went to renew his permit. A Burundian man who was illiterate did not know he had an appeal hearing scheduled. He was arrested when he went to renew his permit after being rejected by the Appeal Board. The lack of legal representation have therefore exacerbated their vulnerability to arrest and detention and has hampered their right to appeal.

C. Lodging the appeal

Pushbacks: Because pushbacks occur at the border, asylum seekers may be returned before any procedural filing can occur, meaning that appeals cannot be lodged and access to judicial review is effectively impossible.

The procedure to be followed does not differ according to the barrier at stake, yet it depends whether the issue at stake is one involving a criminal or a civil procedure. For the civil procedure, there are two ways instituting proceedings in a civil court, by way of an Action or by way of Application procedure. The determining factor when deciding on which manner to proceed is whether a material dispute of fact is foreseen. If a material dispute of fact is foreseen, it is best to proceed by way of an Action. If there is no material dispute of fact, then an Application is a better option. In an Application proceeding, the matter is usually decided upon on the papers before the court. Parties to these proceedings will depose to affidavits containing their submissions. Usually, oral evidence is not given during Application proceedings. If the presiding officer is unable to decide the matters on the papers before them, they may call for oral evidence and/or oral argument. Application proceedings are usually quicker than Action proceedings. Asylum cases usually involve an application proceedings, where the parties are the Applicant (party instituting the application) and Respondent. A Notice of Motion coupled with a Founding Affidavit is issued by the Clerk or Registrar of the Court and then served by the Sheriff of the Court on the Respondent. The Notice of Motion indicates the relief sough, while the Founding Affidavit provides the basis for the relief sought. If the Respondent wishes to oppose the Application, they are required to file a Notice of Intention to Oppose and an Answering Affidavit setting out the reasons why they are opposing the Application. Should the Applicant wish to respond to any points raised by the Respondent, the Applicant may file a Replying Affidavit. Any facts pertinent to the matter should be included in the affidavits as usually only oral arguments by the parties' legal representatives are heard in application proceedings. No further evidence is put forward once the affidavits are filed and the matter is set down for hearing. Thereafter, the presiding officer will give a judgment.14 If a party is dissatisfied with a judgment based on the law, facts of the matter or both, the dissatisfied party may lodge an appeal. The court of appeal will make a decision based on the merits of the matter and may set aside the judgment of the lower court and hand down what is in its opinion the correct judgement.

If the asylum seeker is detained before having the possibility to ask for asylum, then they can access Courts through *habeas corpus*. In addition, Rule 6(12) of the Uniform Rules of Court allows for the normal forms and service to be dispensed with if a matter is of an urgent nature.

In addition, pursuant to section 24(B) of the Refugees Act 130 of 1998, asylum seekers have the right to appeal against a negative decision of their asylum claims. First, asylum seekers can appeal to executive

authorities (RAB – Refugee Appeal Board or SCRA - Standing Committee for Refugee Affairs) and, if the outcome of this revision is negative, to judicial authorities of first instance (high court), second instance (supreme court of appeal), and to the Constitutional Court for constitutional matters under specific circumstances. The main difference between the RAB (or RAA) and the SCRA is that the former is responsible for examining appeals lodged by asylum applicants where their application is considered to be unfounded and may confirm, set aside or substitute a decision by the Refugee Status Determination Officer (RSDO). The latter, instead, is competent to examine appeals against claims rejected as 'manifestly unfounded', 'abusive' or 'fraudulent'. The SCRA will review that decision and alternatively 1) submit a final rejection of the asylum claim, which can be judicially challenged; 2) overturn the RSDO decision and grant the person with the refugee status; or 3) decide to send your asylum application back to a RSDO, who will re-interview the asylum seeker and make a new decision on the asylum application.

The law provides for two different procedures, and timing, according to the executive appeal body at stake.

If an application is rejected in terms of section 24(3) of the Refugees Act, the RSDO must furnish the applicant with written reasons within 5 working days after the date of the rejection, and inform the applicant of their right to appeal in terms of section 24B of the Act. Section 26(1) provides that any asylum seeker may lodge an appeal. The 2019 Refugee Regulation 14(1)(a) provides that "an appeal in terms of section 26 of the Act must be lodged in person within 30 days of receipt by the asylum applicant of the letter of rejection from the Refugee Status Determination Officer" and s14(1)(b) provides that an appeal "must be lodged in person directly at a designated Refugee Reception Office". Rule 4.1 of the Refugee Appeal Board Rules, 2013 geographically restricts the right to appeal of the claimant as it specifies that the appeal against the negative decision by the RSDO shall be lodged at the Refugee Reception Office where the letter of rejection was handed to the asylum seeker. In addition, it notes that "The reasons for the decision are in writing and are only provided in English", which undermines the right of the applicant to be informed in a language they understand. Rule 4.1. further observes that the designated Appeal Clerk shall submit the notice of appeal together with copies of relevant documentation to the Appeal Board within 10 days after the notice of appeal is lodged.

For a manifestly unfounded rejection by the Refugee Status Determination Officer (RSDO), or an application rejected as abusive or fraudulent, the applicant is referred to the SCRA for review. The appeal to the SCRA must be submitted within 10 days of receiving the letter of rejection from the RSDO. However, an application for condonation may be made if there is a cause for delayed submission of an appeal. The asylum seeker may write a letter to the SCRA within 14 days of the rejection, giving reasons for leaving their home country and why they believe it is unsafe to return to their home country at that time.

The asylum seeker has the right to have their final rejections reviewed in terms of the Promotion of Administrative Justice Act (PAJA). A court may review and set aside the decision to reject the application if it can be proved that the decision was made unlawfully, unreasonably or without fairness in procedure. The review application must be launched at the High Court no later than 6 months from the date the asylum seeker became aware of the final rejection notice.

As for the Supreme Court of Appeal, there is no automatic right to appeal, but leave to appeal is required from the court of first instance, or failing that from the SCA. In addition, whenever there are conflicting

decisions on civil matters in different Divisions of the High Court, the Minister for Justice and Constitutional Development may submit the question to the Chief Justice, who must cause the matter to be argued before the Constitutional Court or the SCA to settle the matter. Moreover, if the Minister for Justice and Constitutional Development has any doubt as to the correctness of a decision by the High Court in a criminal case on a question of law, the Minister may submit the decision or the conflicting decisions to the SCA and cause the matter to be argued before that court in order that it may settle the matter.

Implications of the procedure in law and practice regarding the procedural aspects for lodging the appeal in asylum access adjudication.

As seen, several procedural aspects (sometimes barriers) for appealing asylum decisions can prevent cases from even being heard, leading to divergence in practice from what is prescribed by law. Starting with appeal in front of executive authorities, rejected asylum seekers have to face extremely tight timeframe to appeal a rejection to the RAA. Asylum seekers must file a "Notice of Appeal" within 10 working days (previously 30 days) of receiving the RSDO's written decision. This short window is often impractical for asylum seekers, who may lack legal knowledge, face language barriers, and struggle to secure legal assistance from overburdened pro bono legal clinics in such a limited time. Lodging an appeal requires asylum seekers to submit an affidavit, which is often a difficult task for somebody who does not speak English and without the counsel of a lawyer. This procedural requirement effectively makes legal assistance a necessity, creating a significant barrier for those who cannot afford it or access free legal aid. Finally, the RAA has historically suffered from a massive backlog of cases, which leads to years of waiting for a decision, leaving asylum seekers in legal precarity. The misapplication of the law by RAA officials, who do not ensure the rights to legal assistance and to be heard, among others. The administrative burden combined with lack of respect for asylum norms and capacity issues risk becoming procedural barriers to the timely and effective adjudication of appeals.

If an appeal to the RAA and SCRA is unsuccessful, asylum seekers can seek judicial review in front of the High Court. The Promotion of Administrative Justice Act (PAJA) mandates the exhaustion of all internal remedies before seeking judicial review. Yet, judicial review can be costly and while legal aid organizations like Lawyers for Human Rights take on such cases, their capacity is limited. This economic barrier heavily influences which cases are brought before the judiciary, most likely only those with the strongest legal grounds or those that can serve as test cases to challenge systemic issues. In addition, procedural barriers may impair asylum seekers' right to judicial remedy as systemic deficiencies and misconduct by DHA officials at various stages (RRO, RAA, SCRA) impede asylum seekers from obtaining proofs and relevant documentation to support their appeal.

D. Hearing

Pushbacks: As pushbacks are not documented and there is no formal procedure involved, people subject to pushbacks are not entitled to hearings

There seem to be no differences between the selected barriers and are therefore generally examined. As the law mandates that the RSD procedure is to be carried out only in person at RROs, people in detention cannot access to asylum and cannot therefore access hearing unless they are freed from detention. This is

why Courts usually order the immediate release of the asylum seeker unlawfully detained together with an order to the DHA to facilitate their access to RROs.

Regulation 10(1) to the Refugees Act set out how a refugee status determination hearing should be conducted at the executive level. Firstly, the hearing is aimed at eliciting information relevant to the applicant's eligibility for refugee status, and also ensure that the applicant fully understands the procedures, rights, and responsibilities involved. At the hearing, the RSDO may, among other things, verify the identity of any interpreter present and receive any evidence (Regulation 10(2)(a)–(d)). To ensure an applicant is afforded a fair opportunity to be heard, Section 24(2) of the Refugees Act requires the RSDO to ensure that the applicant fully understands the proceedings, their responsibilities and rights. As regards language, the use of an interpreter is of paramount importance in ensuring a fair hearing and RSD procedure. Regulation 5(1) to the Refugees Act makes it clear that the DHA must provide competent interpretation for all applicants where it is practicable and necessary. An interpreter need not be a representative or employee of the Department of Home Affairs (Regulation 5(2)).

The issue of whether the applicant is entitled to be present at and make representations to the Appeal Board was considered in the matter of *AOL v Minister of Home Affairs*. Despite this judgement, it is evident from *The Somali Association of South Africa and others v the Chairperson of the Standing Committee for Refugee Affairs (unreported case no 18655/14) case* that the SCRA similarly disregarded the right to be heard as it used COI reports without giving the applicants an opportunity to respond. However, under both administrative and refugee law in South Africa, information must be shared with an applicant for refugee status, who must be given an opportunity to respond to such information or adduce their own information to contradict it. Only the launching of the *Somali Association case* to challenge this practice led to the SCRA backtracking on conditions in Somalia and inviting applicants to resubmit their certification applications.

As for the applicant's hearing in Courts, The Supreme Court of Appeal decides cases upon the record of the proceedings before the court appealed from and after considering the written and oral arguments presented. Witnesses do not appear before the court, and the parties need not be present during the hearing of an appeal. A written judgment is usually handed down shortly after the argument. The Court hears appeals on fact and since there are no jury trials, it has a relatively wide discretion to make its own factual findings. Because of this jurisdiction, judges have to read the record of the full proceedings in the lower courts. Typically, each judge is allocated cases with about 30 000 pages of evidence and exhibits per year.

The Constitutional Court does not hear evidence or question witnesses. As a court that functions largely as a court of appeal, it considers the record of the evidence heard in the original court that heard the matter. A result, the Constitutional Court works largely with written arguments presented to it. The hearings are intended to tackle difficult issues raised by these arguments.

Implications of the procedure in law and practice regarding the hearing on asylum access adjudication.

Despite hearing is well prescribed in national asylum law, and relevant safeguards are explicitly mentioned to guarantee its exercise, in practice the right to be heard is frequently hindered by procedural obstacles, which undermine the legitimate need of protection of the claimant and unduly protract the trial. Often asylum seekers are not informed by DHA about their rights, including of the right be heard during appeal and to provide evidence contravening the grounds on which a rejection decision has been made at first

instance. Moreover, and in violation of national provisions, executive appellate bodies often carry out the appeal without giving the possibility of the appellant to be heard just putting their right to access asylum in jeopardy. These breaches have been censored by the scholarship as well as by Courts, as previously seen.

E. Deliberation

Information is available only for some Courts and do not differ according to the barrier at stake. Generally, there are no specific divisions or sections on asylum and judges adjudicating asylum matters do not have specific knowledge on the topic. In addition, deliberation does not vary according to the asylum barrier at stake.

In the High Court, a Judge normally sits alone but will sometimes sit with one or two others. The Supreme Court of Appeal sits in panels of three or five but two Judges deal with applications for leave to appeal. In *Bula*, 5 judges sat in the adjudicating panel.

The Constitution requires that a matter in the Constitutional Court be heard by at least 8 Judges. In practice all 11 Justices sit in every case set down unless there is a good reason for one or more of the Justices not to be part of the panel hearing a particular case (for instance, in *Ruta*, 9 judges were part of the Constitutional panel, while in *Scalabrini Centre of Cape Town & Another v The Minister of Home Affairs and Two Others,* 10 judges were part of the Constitutional panel. Yet, the decision is made by one judge). Each judge sitting in a case must indicate their decision; the ruling is then determined by majority vote. The reasons are published in a written judgment. Once a case has been set down, the chief justice will ask a particular judge to do special preparation and possibly write the judgment. Usually, cases will be spread out so that each judge writes from time to time. Once all parties have been heard, the judges meet to discuss the possible outcome of the case. This is one of the central features of the Court: the judges act collegially and meet often to discuss important and controversial aspects of a case. A few days later, the writing judge will submit a memo to all the others, indicating their opinion. If there are disagreements about the decision or the route taken in reaching it, the judge who disagrees with the main writer will a concurrence or dissent. Writing a judgment is a long process. The judge prepares a first draft and circulates it. The judges then meet and submit comments or changes. If a dissenting judgment has been written, the justices will begin to indicate which judgment they will follow and why. Sometimes lengthy discussions take place. Once consensus is reached, the judgments are thoroughly checked. The judgment is then handed down - released at a public sitting of the Court.

Implications of the procedures in law and practice regarding the deliberation on asylum access adjudication.

The Judiciary of South Africa's report for 2021-2022 notes that it is easier for a Judge who sat alone in a matter to hand down their judgment within the term mandated by law (three months from the last hearing) than it is for a Judge who sat with other Judges in a matter. This because they must discuss and debate their judgment with the other Judges to persuade them to agree with their judgment. It also notes the relevant burden upon the Constitutional Court as it now is the Apex Court and the Court of final appeal on all matters. Indeed, previously the SCA and the Constitutional Court were both 'apex courts' with different areas of jurisdiction. However, since August 2013 the Constitutional Court has been the highest

court in all matters. Despite this, the Judicial establishment remained unchanged, thereby placing increased pressure on the Justices to ensure that access to justice is upheld.

Implications of the functioning of judicial (or quasi-judicial) review mechanisms on asylum access adjudication.

the jurisprudence of upper Courts is usually followed by lower Courts, not only because their decisions are legally binding on the latter but also because there has been strong convergence among judges on the need to adopt a principled interpretation of South Africa's obligations in refugee law, at least until the enactment of the 2020 Amendments. Yet, it is relevant to note that whereas lower Courts usually stick to the judgements set out by upper Courts, it has also emerged clearly that the DHA frequently ignores or disobeys orders granted by the courts. For example, in the case of *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others*, the DHA ignored the two court orders granted in favor of the applicants requiring the DHA to reopen its RRO in Cape Town.

F. Influence of procedures in practice and the role of courts

The role of the jurisprudence of judicial and quasi-judicial bodies in shaping procedural protections or the interpretation of asylum rights

In *De Beer NO v North-Central Local Council and South-Central Local Council and Others*, the Constitutional Court observed that a key element of a "fair hearing" is the requirement according to which the other party to a proceeding must have notice of the matter against him.[92] In pursuit of the objective of fairness, the court noted, there is a prerequisite that a person gets a court hearing before an order is made against him or her. Another relevant requirement on which judicial authorities have pronounced concerns the language in which communications and hearings are held. In order to have access to a fair trial, remedy and defence, asylum seekers need to take part in legal proceedings in a language they understand. Although the Constitution does not contain an equivalent provision with respect to civil proceedings, Section 35(3)(k) (on criminal matters) of the Constitution confers upon every accused person, the right to be tried in a language he or she understands, or where this is not practicable, to have the proceedings interpreted in that language.[93] The Constitution further provides that arrested, detained or accused persons have the right to receive required information in a language they understand. This holds true also in the context of asylum seekers in trial. In addition, the jurisprudence has determined that they have the right to receive required information in a language they understand. Yet, this does not imply that Section 35(3)(k) confers the right to be tried or to have proceedings held in a language of *their choice*.[94]

The High Court has elucidated the position of foreigners in respect of their right to legal assistance in criminal matters. In *S v Manuel*, an Angolan refugee was refused legal assistance by the Legal Aid Board because he was not lawful in the country.[95] The High Court found that the magistrate had failed to explain

[92] De Beer No v North-Central Local Council and South-Central Local Council and Other 2002 (1) SA 429 (CC).
[93] S v Ngubane (1995) 1 BCLR 121 (T).
[94] Mthethwa v De Bruin NO and Another (1998) 3 BCLR 336 (N).
[95] S v Manuel 2001 (4) SA 1351 (W).

to him his constitutional right to legal representation at State expense. The Court held that in criminal matters refugees have a right to legal assistance at State expense to the same extent that citizens do.

The right of asylum seekers to access South African courts was specifically addressed in *Baramoto v Minister of Home Affairs,* where the Minister of Home Affairs declared that the three asylum seekers' decision to approach the court was an abuse of the judicial process. The court stated that South Africa's courts are there to protect all persons regardless of their nationality and are open to all persons who find themselves in South Africa.[96] More generally, the Constitutional Court also recognized that all persons must be afforded the same right to access the courts and to the same fair and just procedures with regard to such access.[97]

Finally, asylum seekers can ask judicial authorities to substitute the rejection of their asylum claim by executive bodies into the recognition of the refugee status in exceptional circumstances, which have to do with the urgency of the matter (for instance when the claimant is detained pending deportation) or when the impact of the rejection decision on their fundamental rights is severe. This has been the case in *Tshiyombo v Members of the Refugee Appeal Board and Other*.

The role of the jurisprudence of supranational courts in shaping procedural protections or the interpretation of asylum rights in this jurisdiction

The African Commission on Human and Peoples' Rights has held that procedural guarantees must be applied in the framework of procedures relating to asylum seekers, in accordance with the 'right to a fair trial', established in article 7(1) of the African Charter on Human and Peoples' Rights.[98] The African Commission has also established the right to be defended in administrative cases, implying that free legal assistance must also be guaranteed in migration procedures.[99] Yet, these considerations have not been cited in the national jurisprudence examined.

As for supranational guidelines, Principle 9 of the African Guiding Principles on the Human Rights of All Migrants published by the African Commission in 2023 includes a reference to the right of "Every detained migrant shall be treated with humanity and respect for the inherent dignity of the human person and have the right to appeal the conditions, legality and length of detention". This principle takes inspiration from Articles 6 and 12 of the African Charter on freedom from detention and the Right to Freedom of Movement and Residence as well as Article 9 ICCPR. Principle 11 on due process reads as follows: "Every migrant shall have the right to have their cause heard and to due process of law before the courts, tribunals and all other organs and authorities administering justice, including those specifically charged with making determinations regarding their legal status as a migrant. This includes: a. the right to an appeal to competent national organs against acts violating fundamental rights as recognized and guaranteed by laws, regulations and customs in force; b. the right to be presumed innocent until proved guilty by a competent court or tribunal; c. the right to defense, including the right to be defended by counsel of their choice; d. the right to legal assistance in all proceedings related to their legal status as a migrant; e. the right to interpretation

[96] Baramoto and others v. Minister of Home Affairs and Others, Witwatersrand Local Division, (unreported), 1998.
[97] Van der Walt v Metcash Trading Ltd 2002 (4) SA 317 (CC) 325.
[98] Good v Republic of Botswana, African Commission on Human and Peoples' Rights, Comm No 313/05 (26 May 2010) paras 160–80; Organisation mondiale contre la torture v Rwanda, African Commission on Human and Peoples' Rights, Comm Nos 27/89; 46/91; 49/91; 99/93 (1996) para 34.
[99] *Media Rights Agenda v Nigeria*, African Commission on Human and Peoples' Rights, Comm No 224/98 (2000)

in a language the migrant can understand in criminal proceedings and in all proceedings related to their legal status as a migrant f. the right to be tried within a reasonable time by an impartial court or tribunal". This principle takes inspiration from the right to due process recognized under Article 7 of the African Charter, which includes the right of every individual to have his cause heard and that in turn comprises: (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (b) the right to be presumed innocent until proven guilty by a competent court or tribunal; (c) the right to defense, including the right to be defended by counsel of his choice; (d) the right to be tried within a reasonable time by an impartial court or tribunal. Principle G of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa notes, "(a) [s]tates shall ensure that efficient procedures and mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, gender, language, religion, political, or other opinion, national or social origin, property, disability, birth, economic or other status. (b) States shall ensure that an accused person or a party to a civil case is permitted representation by a lawyer of his or her choice, including a foreign lawyer duly accredited to the national bar. (c) States and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental rights and freedoms." Such right shall include due process protections in refugee status determinations and those related the nationality of stateless migrants.

The Guiding Principles were developed on the basis of Article 45(1)(b) of the African Charter, which empowers the African Commission to formulate standards, principles, and rules on which African governments can base their legislation. They are based on African regional treaty law; case law, standards and resolutions of this Commission; and international human rights treaty law and also draw from the experience of other world regions, including the 2019 Inter-American Principles on the Human Rights of All Migrants, Refugees, Stateless Persons, and Victims of Human Trafficking (IACHR Res. 04/19). The Guiding Principles also consider other international and regional human rights decisions and special procedures and the views of a broad range of stakeholders who engaged with the Commission while drafting and revising the present document.

Despite their relevance, there is no evidence that these principles have been used by the case law so far. There is currently no case law by the African Court on procedural protections or on the interpretation of asylum rights.

II. JUDICIAL BODIES IN ACCESS TO ASYLUM

A. Institutional configuration

According to Section 166 of the South African Constitution:

The court of first instance is the High Court, whose decisions are appealable to the Supreme Court of Appeal as a final appellate Court. However, on all constitutional matters, the final court of appeal is the Constitutional Court. In terms of section 166(c) of the Constitution there is one High Court of South Africa. Yet, in terms of the Superior Courts Act 2013 there are nine provincial Divisions of the High Court of South Africa. They are:

(a) The Eastern Cape Division, with its main seat in Makhanda and three Local Divisions located in Gqeberha, Mthatha and Bhisho;

(b) The Free State Division with its main seat in Bloemfontein;

(c) The Gauteng Division with its main seat in Pretoria and the Local Division in Johannesburg.

(d) The KwaZulu-Natal Division with its main seat in Pietermaritzburg and its Local Division in Durban;

(e) The Limpopo Division with its main seat in Polokwane with its local Division in Thohoyandou.

(f) The Mpumalanga Division with its main seat in Mbombela, with its local Division in Middelburg;

(g) The Northern Cape Division with its main seat in Kimberley;

(h) The North West Division with its main seat in Mahikeng; and

(i) The Western Cape Division with its main seat in Cape Town.

The High Court has jurisdiction to adjudicate any matter that has not been assigned to another court either by the Constitution or an Act of Parliament. The High Courts have jurisdiction to hear cases over their defined provincial areas, and the decisions of the High Courts are binding on Magistrates' Courts within their areas of jurisdiction.

The Supreme Court of Appeal is the apex court on all matters *not* related to the Constitution. Yet, if the case has constitutional implications, it can be decided by the SCA and then appealed to the Constitutional Court. The SCA only deals with cases sent to it from the High Court. The SCA used to be known as the Appellate Division of the Supreme Court, a court that was established in 1910 as the highest court in the land at the time. Its name changed to the Supreme Court of Appeal when the final Constitution was passed in 1996. The Supreme Court of Appeal comes immediately below the Constitutional Court in the hierarchy of courts in South Africa. In terms of the Constitution, it may decide any matter, except certain labour and competition matters. It may decide only appeals and issues connected with appeals. It may make any order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity it makes has no force unless it is confirmed by the Constitutional Court. Generally, the Supreme Court of Appeal sits in panels of three or five but two Judges deal with applications for leave to appeal. The SCA is made of 24 judges.

Finally, the Constitutional Court is the highest court in SA. In terms of section 167(4) of the Constitution only the Constitutional Court may: (a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state; (b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121; (c) decide applications envisaged in section 80 or 122; (d) decide on the constitutionality of any amendment to the Constitution; (e) decide that Parliament or the President has failed to fulfil a constitutional obligation; or (f) certify a provincial constitution in terms of section 144.

The Constitution requires that a matter in the Constitutional Court be heard by at least eight Judges. In practice all 11 Justices sit in every case set down unless there is a good reason for one or more of the Justices not to be part of the panel hearing a particular case.

The South African courts exercise judicial review of decisions of administrative bodies in terms of Section 33 of the Constitution on the right to just administrative action. This constitutional provision is elaborated

upon in the Promotion of Administrative Justice Act (PAJA). Accordingly, courts review decisions of the RSDO, the DHA as a whole, the SCRA and the RAA. Upon its review of RSD decisions, if it finds a violation of the PAJA, the court may substitute the decisions of administrative officers. There is no specific Section/Unit/Department responsible for asylum matters in South Africa. Judges and Courts are not specifically trained or specialized in asylum matters.

Although there is an issue of concurrent jurisdiction in South Africa – whereby more than one Court, usually the High Court and lower Courts like Magistrates' Court/Land Courts etc - can have jurisdiction to handle the same type of cases, this is not the case for asylum matters. Indeed, the lowest Court having jurisdiction on asylum matters is the high court, which can address the legality of asylum policies as well as barriers to asylum.

Implications of the institutional configurations of bodies responsible for assessing the legality of the barriers to access asylum in asylum access adjudication.

The institutional configuration for assessing the legality of barriers to asylum access in South Africa involves a system of executive appeals followed by independent judicial review. The first line of appeal involves executive bodies *within* the DHA. As seen in Part 2 and 3 above, these are: Refugee Appeals Authority (RAA) (formerly the Refugee Appeal Board or RAB), which hears appeals on "unfounded" claims, and the Standing Committee for Refugee Affairs (SCRA), which reviews decisions rejected as "manifestly unfounded", "abusive" or "fraudulent". Their institutional configuration, especially the fact that they are under the DHA, creates an inherent tension between political interests and administrative independence. The fact that there is plenty of evidence of systemic corruption and failures by DHA officials involved in the RSD procedure and appeals demonstrates the lack of independence of these organs.

The judiciary acts as the ultimate guarantor of legality and constitutional rights. As seen, courts are independent from the executive and their judicial integrity has been demonstrated in multiple occasions where judges have censored misconduct and failures by DHA officials.

Power/competences of the judicial or quasi-judicial bodies responsible for asylum access adjudication.

- *First instance judicial or quasi-judicial body/bodies:* High courts exercise judicial review of decisions of administrative bodies in terms of Section 33 of the Constitution on the right to just administrative action. This constitutional provision is elaborated upon in the PAJA. Accordingly, High Courts review decisions of the RSDO, the SCRA and the RAA. Upon its review of RSD decisions, if it finds a violation of the PAJA, the court may substitute the decisions of administrative officers. In addition, High Courts' decisions are binding on Magistrates' Courts within their areas. A decision of a High Court in one division is not binding on another, but in practice has strong persuasive force. Appeal in front of the High Court focuses on the lawfulness, reasonableness, and procedural fairness of the administrative action, not the merits of the asylum claim itself.
- *Second instance judicial or quasi-judicial body/bodies:* Decisions of the Supreme Court of Appeal are binding on all lesser courts. It can only decide on appeals.

- *Third instance judicial or quasi-judicial body/bodies:* The Constitutional Court can overturn decisions by lower courts and declare the constitutional invalidity of a provision.

B. Independence

As for LASA, its autonomy is guaranteed by statute. Nonetheless, as LASA is state owned/funded there may be a perception that this is not the case even if there is no basis to back this up. Overall it would be concluded that legal aid provision in South Africa is independent of undue pressure from government arms.

Section 165(1) of the Constitution provides that the judicial authority of the Republic of South Africa is vested in the courts. Section 165(2) provides: "The courts are independent and subject only to the Constitution and the law which they must apply impartially and without fear, favour or prejudice." Section 165(3) provides that no person or organ of state may interfere with the functioning of the courts. Section 165(4) reads: "Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts." Section 165(6) provides that the Chief Justice is the head of the Judiciary and exercises responsibility over the establishment and monitoring of norms and standards for the exercise of the judicial functions of all courts.

Section 8(2) of the Superior Courts Act 2013 reaffirms the same point. Item 16(6)(a) of Schedule 6 to the Constitution provides that as soon as is practical after the new Constitution took effect all courts, including their structure, composition, functioning and jurisdiction, and all relevant legislation, must be rationalised with a view to establishing a judicial system suited to the requirements of the new Constitution. Section 92(2) of the Constitution provides that members of the Cabinet are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions. In terms of section 55 of the Constitution, the National Assembly must provide for mechanisms to maintain oversight of the exercise of national executive authority, including the implementation of legislation, and any organ of the State. According to section 239, the meaning of "organ of state" expressly excludes a court or a Judicial Officer.

Section 8(3) of the Superior Courts Act stipulates that the Chief Justice may issue written protocols or directives, or give guidance or advice to Judicial Officers in respect of Norms and Standards for the performance of judicial functions and regarding any matter affecting the dignity, accessibility, effectiveness, efficiency or functioning of the courts. Section 8(4) provides that any function or power in terms of section 8 vesting in the Chief Justice or any other Head of Court, may be delegated to any other Judicial Officer of the Court in question. Section 9 provides that Superior Courts may have recess periods as may be determined by the Chief Justice in consultation with the Heads of Court and the Minister in order to enable Judges to do research and to attend to outstanding or prospective judicial functions that may be assigned to them. During each recess period, the Head of each Court must ensure that an adequate number of Judges is available in that Court to deal with any judicial functions that may be required, in the interests of justice, to be dealt with during that recess period. In terms of the Regulations on the Criteria for the Determination of the Judicial Establishment of the Supreme Court of Appeal and Divisions of the High Court of South Africa, 2015, made in terms Section 49(1)(b) of the Superior Courts Act, 2013, any

determination of the number of Judges at such Courts, must be considered with due regard to court performance statistics and information relating to the performance of judicial functions.

According to the Rule of Law Index, South Africa ranked 42/142 countries in 2024 with reference to balance of power. This indicator measures the extent to which those who govern are bound by law. It comprises the means, both constitutional and institutional, by which the powers of the government and its officials and agents are limited and held accountable under the law. With reference to fundamental rights, including due process of the law and rights of the accused, South Africa ranked 48/142 countries.

As for regulatory enforcement, the Rule of Law Index ranked South Africa 63/142 countries in 2024. Regulatory enforcement measures the extent to which regulations are fairly and effectively implemented and enforced. Regulations, both legal and administrative, structure behaviors within and outside of the government. This factor does not assess which activities a government chooses to regulate, nor does it consider how much regulation of a particular activity is appropriate. Rather, it examines how regulations are implemented and enforced.

With reference to civil justice, South Africa ranked 50 out of 142 countries. Civil justice measures whether ordinary people can resolve their grievances peacefully and effectively through the civil justice system. It measures whether civil justice systems are accessible and affordable as well as free of discrimination, corruption, and improper influence by public officials. It examines whether court proceedings are conducted without unreasonable delays and whether decisions are enforced effectively. It also measures the accessibility, impartiality, and effectiveness of alternative dispute resolution mechanisms. Finally, with reference to criminal justice, south Africa ranked 55 out of 142 countries. Criminal justice evaluates a country's criminal justice system. An effective criminal justice system is a key aspect of the rule of law, as it constitutes the conventional mechanism to redress grievances and bring action against individuals for offenses against society. An assessment of the delivery of criminal justice should take into consideration the entire system, including the police, lawyers, prosecutors, judges, and prison officers. Finally, it is relevant to underscore the level of corruption within the judiciary.

Financial independence of the judicial or quasi-judicial bodies in the field of access to asylum.

The Judges' Remuneration and Conditions of Employment Act, 2001 (Act 47 of 2001), together with regulations promulgated under it, governs the employment benefits of Judges. The Independent Commission for the Remuneration of Public Office Bearers makes recommendations to the President of the Republic on the salaries, allowances and benefits of Judicial Officers. In addition, judges are legislatively required to disclose particulars of all their registrable interests and those of his or her immediate family members to the Registrar of Judges' Registrable Interests to enhance transparency, accountability of and public confidence in the Judiciary. The Registrar is the custodian of the Register of Judges' Registrable Interests. Section 6(2)(c) of the Judicial Service Commission Act, 1994, requires the JSC annually to submit a written report to Parliament for tabling. The report must include a section dealing with compliance with the requirements of the registration of Judges' Registrable interests.

Regulation 5(5) of the Regulations on Judges' Registrable Interests, made in terms of Section 13(8) of the Judicial Service Commission Act, 1994, stipulates that the Registrar of Judges Registrable Interests must, for the purpose of indicating the degree of compliance with the Register in the annual report of the JSC,

also furnish the JSC with the names of those Judges in active service who have disclosed interests of their family members.

Regulation 3(2) requires that a Judge must lodge the first disclosure with the Registrar within 30 days of their appointment as a Judge. In March of every year, Judges in active service must inform the Registrar in writing whether the entries in the Register are an accurate reflection of that Judges' registrable interests and, if applicable, make such further disclosures or amendments, as may be required. In the financial year 2023/24, there were 252 Judges in active service and they all disclosed their registrable interest by 31 March 2024, as prescribed by the Regulations.

In the 2020/2021 financial year, a total of 12 Judges were appointed and they all disclosed their registrable interests within the time prescribed by the Regulations. In the financial year 2021/2022, there were 253 Judges in active service and all the Judges disclosed their registrable interests in March 2022 as prescribed by the Regulations. In 2023/2024, 24 judges were appointed while 11 vacancies remained unfilled. 16 new Judges disclosed their registrable interests within 30 days of appointment as prescribed by the regulations.

Independence concerning human resource decisions about adjudicators and managers in judicial or quasi-judicial bodies in asylum access adjudication.

In terms of section 174(6) of the Constitution, the President appoints Judges of all Superior Courts, on the advice of the Judicial Service Commission (JSC). In the case of Justices of the Constitutional Court, the JSC is required to submit to the President a list of candidates with three names more than the number of appointments to be made, where after the President appoints the Justices from the list as Head of the National Executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly.

According to the 2022 Annual Judiciary Report (p. 56), in 2021-2022, there were 59 vacancies in the Superior Courts in respect of which the JSC had to interview candidates and advise the President on candidates to be appointed as Judges. Of these 59 vacancies, the JSC was only able to advise the President to appoint 57 candidates out of which the President appointed 53 as Judges. In this period, a total of 52 Judges were appointed, of which 40% (21 of 52) were black females, 37% (19 of 52) were black males, 17% (9 of 52) were white males and 6% (3 of 52) were white females, as later detailed.

In 2023-2024, 35 vacancies were recorded in the Superior Courts in respect of which the Commission had to interview candidates and advise the President on candidates to appoint as Judges. Of these vacancies, the Commission advised the President to appoint 24 candidates. Following the Commission's recommendations, the President, acting in terms of section 174 appointed all 24 recommended candidates as Judges. Furthermore, the Commission was unable to recommend candidates to fill the other 11 vacancies.

Implications of various aspects of independence of judicial or quasi-judicial bodies responsible for asylum access adjudication.

In light of the questionable independence of executive appellate bodies (which are placed under the DHA and suffer from reported corruption and misconducts), Courts in South Africa play a vital role in protecting and upholding asylum seekers' rights, including access to justice. Courts can overturn DHA decisions that are found to be procedurally unfair, irrational, or in violation of the Constitution. Courts

have a strong track record of upholding the rights of asylum seekers, including the right to dignity, equality, and the principle of non-refoulement (especially before the enactment of the 2020 amendments). The Constitutional Court has also consistently affirmed that the executive must adhere to its international and domestic legal obligations in the field of refugee and human rights law. As seen from the data provided by the Rule of Law Index, access to justice in South Africa suffers from relevant shortcomings especially because it is often a lengthy and expensive process, which many asylum seekers cannot afford. This means that while a legal remedy exists in theory, it is not always accessible in practice.

Independence of the whole judicial system

As seen, South Africa's Constitution guarantees a high level of judicial independence for its court system and, through its Section 165, judicial independence is made a cornerstone of the country's constitutional democracy. This guarantee is robust and applies to all levels of the court system, from the Constitutional Court down to the Magistrates' Courts. No signs of deviation or limited independence can be spotted in the specific field of asylum, where Courts have consistently and successfully intervened to overturn flawed or unlawful executive decisions. They have ruled against a wide range of barriers hampering the right to access to asylum and to justice, including the closure of RROs, arbitrary detention, and procedural safeguards.

C. Centralization/decentralization

- *First instance judicial body:* The High Court has 9 Divisions and 14 Provinces.
- *Second instance judicial body:* The seat of the SCA is at Bloemfontein. However, provision exists for a session of the Court to be held at another place when it is expedient or in the interests of justice.
- *Third instance judicial body:* The Constitutional Court is situated at Constitutional Hill Precinct in Braamfontein, Johannesburg

D. Specialization

- *First instance judicial or quasi-judicial body/bodies:* Judges in High Court are not specialized in asylum or migration matters and there are no specific divisions or sections on the topic. Among the few judges who seem to have some connection with the aforementioned topics is Judge D. Mlambo, Judge President of the Gauteng Division of the High Court, who is a member of the International Association of Refugee and Migration Judges (IARMJ Africa Chapter).
- *Second instance judicial or quasi-judicial body/bodies:* Judges in the SCA are not specialized in asylum or migration matters and there are no specific divisions or sections on the topic.
- *Third instance judicial or quasi-judicial body/bodies:* Judges in the Constitutional Court are not specialized in asylum or migration matters and there are no specific divisions or sections on the topic.

It is relevant to note that when the Immigration Act was originally enacted, provision was made for the establishment of Immigration Courts. However, the Immigration Act was amended in 2004 to remove the establishment of such courts. Their re-establishment is foreseen in the 2023 DHA's White Paper. So far, no concrete legislative proposal has been put forward on the matter.

Access to specialized training in asylum.

Judges regularly attend trainings organized by the South African Judicial Institute (SAJEI), established in terms of the South African Judicial Education Institute Act, 2008 (Act 14 of 2008). From 2020 to 2022, it conducted 168 courses. There is no evidence of whether immigration and asylum were part of these trainings. The 2020-2022 Annual Judicial Report mentions that the course content was expanded to include Judicial wellness, Gender Based Violence and Femicide, Equality Court skills and Illegal Wildlife Trade. Immigration and asylum trainings are available for judges who are members of the IARMJ. However, there is no information about how many SA judges are part of it.

Specialization of adjudicators and other professionals involved in asylum access adjudication

By looking at the reports and materials published by pro-bono organizations that provide legal aid to asylum seekers, it can be inferred that lawyers working or collaborating with these entities have experience and expertise in refugee and migration matters. Given the high number of cases (although unspecified) where asylum seekers' appeals supported by NGOs have turned successful, it can be concluded that lawyers operating in those organizations have a good legal knowledge. However, detailed information about their background is not available.

Implications of the (lack of) specialization for asylum access adjudication.

As seen, South Africa lacks specialized courts dedicated to asylum cases. This means that the judiciary is not composed of judges who are experts in the nuanced and complex field of refugee law, and there is no formal requirement for specialized training on this matter. In principle, therefore, this can affect the quality of decisions, as judges may not be fully equipped to handle intricate matters in this field. In addition, in principle, the lack of specific knowledge may lead to inconsistent rulings across different Courts, whereby similar cases may be adjudicated differently according to the Court or judge at stake. If this were the case, the lack of specialization would create legal uncertainty. Yet, this does not seem to be the case for South Africa. Rather, Courts have proven their ability and sensitivity to manage difficult asylum cases and to promote a principled and correct interpretation of the main refugee instruments at the international and regional levels.

Nevertheless, what can be noticed is that historically there has been a backlog in asylum cases and the massive appeals caused by deficiencies at first instance have further exacerbated this issue. Without specialized courts handling them efficiently, the backlog can hardly be solved, leading to significant delays in final decisions. The 2023 White Paper includes a proposal which would create specialized migration Courts. However, so far, no concrete legislative proposal has been advanced.

E. Human resources

In 2022, the race and gender composition of the Judges in Superior Courts – which include High Courts, Supreme Court of Appeal, and Constitutional Court among others and exclude Magistrates' Courts- was made up of 39% black males (98 of 253), 32% black females (81 of 253), 17% (42 of 253) white males and 13% white females (33 of 253). As for the number of judges per Court, these were the rates in 2022:

Constitutional Court: 8 Judges

Supreme Court of Appeal: 23 Judges

High Courts: 211 Judges

According to the 2024 Annual Judicial Report (the latest available), in 2023-2024 the Judiciary was made up of a total of 252 Judges in all Superior Courts of which 25% (64) were African male, 24% (60) were African female, 6% (14) were Coloured male, 5% (13) were Coloured female, 5% (12) were Indian male, 4% (10) were Indian female, 18% (44) were White male and 14% (35) were White female.

A racial breakdown indicated that from the total of 252, 49% (124) of Judges were African, 11% (27) Coloured, 9% (22) Indian and 31% (79) White. A gender breakdown of the Judiciary indicated that it comprised 53% (134) males and 47% (118) females. Noteworthy is the transformation in the following Divisions with female representation in the Judiciary of 50% or more:

• Supreme Court of Appeal 52%,

• Eastern Cape Local Division, Bhisho (50%),

• Eastern Cape Local Division, Makhanda (50%),

• Eastern Cape Local Division, Mthatha (50%),

• Free State Division, Bloemfontein (53%),

• Gauteng Division, Pretoria (52%);

• KwaZulu-Natal Local Division, Durban (50%),

• Mpumalanga Local Division, Middelburg (100%),

• Northern Cape Division, Kimberley (57%),

• North West Division, Mahikeng (60%), and

• Labour Court (57%).

As of March 2024, the Judiciary was made up of a total of 252 Judges.

Selection and appointment of adjudicators in judicial or quasi-judicial bodies responsible for asylum access adjudication?

Section 174(3) and (4)(a) to (c) of the Constitution provides as follows: "(3) The President as head of the national executive, after consulting the Judicial Service Commission and the leaders of parties represented in the National Assembly, appoints the Chief Justice and the Deputy Chief Justice and, after consulting the Judicial Service Commission, appoints the President and Deputy President of the Supreme Court of Appeal. (4) The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the Chief Justice and the leaders of parties represented in the National Assembly, in accordance with the following procedure: (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President. (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made. (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list." The JSC must interview candidates and advise the President on candidates to be appointed as Judges.

Judges in SA are appointed to office for an undetermined period/ life (until the retirement age of 70). An exception to this are judges of the Constitution Court which have a 12 year tenure (non-renewable) or until they turn 70. The salaries, allowances and benefits of judges may not be reduced. A judge cannot be transferred to another court without their consent as they are appointed to a particular court. A judge may also not be removed from office unless a particular procedure is followed which can only occur if a judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct.

Availability of clerks.

- *First instance judicial or quasi-judicial body/bodies:* A Master of the High Court is appointed for every provincial division of the High Court of South Africa. Master's offices are situated in Bloemfontein, Cape Town, Grahamstown, Kimberley, Mafikeng, Pietermaritzburg, Pretoria, Mthatha, Bisho, Thohoyandou, Johannesburg, Polokwane, Durban, Port Elizabeth and Nelspruit. Functions performed by the Masters' Offices include: 1) The administration of estates of deceased and insolvent persons in accordance with the applicable statutory prescriptions, 2) The protection of the interests of minors and people with disability, 3) The protection and administration of the funds of minors, contractually incapacitated and undetermined and absent heirs, which have been paid into the Guardian's Fund, 4) The supervision of trusts in terms of the Trust Property Control Act, 1988, 5) The safeguarding of all documentary material received by the Master in respect of estates, insolvencies, liquidations, trusts, etc, 6) The processing of enquiries by executors, attorneys, beneficiaries and other interested parties, 7) The appointment of impartial and capable persons as executors, trustees, curators and liquidators.

  To be appointed as a Master of the High Court, a person should at least have an appropriate three-year legal qualification, such as an LLB degree. He/she should also go through the following stages: The person starts as an Estate Controller, Assistant Master, Deputy Master, Master and then Chief Master.

- *Second instance judicial or quasi-judicial body/bodies:* No information is available for the SCA.

- *Third instance judicial or quasi-judicial body/bodies:* The Constitutional Court in 1995 became the first court in South Africa to assign law clerks to assist each of its judges. Law clerks are appointed to work for a specific judge. The law clerk's primary responsibility is to assist the judge in fulfilling his or her duties, including accompanying the judge in all sittings of the court sessions, managing the judge's diary on sittings and postponement of cases, conducting research for the judge/s on law related matters. Each judge has two South African law clerks, paid for by the State, and may in addition have a foreign law clerk, who is self-funded. Although South African and foreign clerks' responsibilities are basically identical, different conditions apply to their appointment. There is no specific information regarding clerks supporting the judges in asylum matters. However, it may be reasonable to infer that clerks also support judges when dealing with asylum issues of constitutional relevance.

Interpretation service in quasi-judicial bodies responsible for asylum access.

Already in 2022, the Department of Justice and Constitutional Development of South Africa has acknowledged the shortage of court interpreters. Similarly, the South Africa Registered Court Translators & Interpreters (SARCTI) highlighted the significant shortage of interpreters — both in sign language and

spoken languages — and sworn translators within the South African judiciary. The lack of court interpreters has also made headlines when cases were repeatedly delayed due to not having interpreters. In one reported case, for instance, the trial of Chinese nationals accused of human trafficking was postponed for the third time due to the lack of interpreters.

For a certification to be considered valid, it must originate from either the South African High Court or the Department of Justice and Constitutional Development. Pursuant to subsection (2) of Section 61 of the Uniform Rules of the High Court, prior to the employment of an interpreter, the court is empowered to assess the individual's competence and integrity. This evaluation can be conducted at the court's discretion or at the request of any party who provides reasonable grounds for such a desire. The court may gather evidence or utilize other methods to ensure that the interpreter meets the necessary standards. The following criteria are taken into consideration:

Language Proficiency: Proficiency in at least two languages is mandatory, with English being one of them. A robust command of legal terminology in both languages is imperative.

Educational Background: While formal qualifications are not a strict requirement, possessing a diploma or degree in languages, interpreting, translation, or a related discipline would be advantageous. Specialized training in legal interpretation can further strengthen the applicant's credentials.

Interpreting Skills: Proficient interpreting skills are essential.

Knowledge of the Legal System: A comprehensive understanding of South Africa's legal framework, court procedures, and the roles of different judicial participants is crucial.

Professional Conduct: Adherence to stringent ethical standards, including confidentiality and impartiality, is non-negotiable.

The duties of a court interpreter mainly relates to: Interpreting in the various courts, at quasi-judicial proceedings and during consultations. They also translate legal documents and exhibits and provide any administrative support such as recording cases in criminal record book and drawing case records. The minimum academic qualification is Matric (Grade 12) and a formal language proficiency.

Interpreters are key in ensuring a fair RSD procedure. When the asylum seeker lodges their application in person at the RRO, an admissibility hearing is held. At this stage, an interpreter needs to be secured. In addition, the presence of an interpreter is often key also when the RSDO conducts the RSD interview with the asylum seeker. If there is no interpreter available for the language the asylum seeker speaks, the asylum seeker is required to source an interpreter. Khan argues that when an applicant is required to source his or her own interpreter, the individual is placed in a vulnerable position and may be open to exploitation. One of the directors of the Durban Refugee Social Service stated in an interview that: "RRO only accept applicants from certain countries on certain days to allow for the correct interpreters to be available. But that system has changed as well. That the Refugee Reception Centre used to have interpreters at the refugee reception offices, probably like two or three years ago. But currently, they now have this call centre where the interpretation comes via the telephone. And if that doesn't work, it doesn't work".

In *Deo Gracias Katsshingu v The Standing Committee for Refugee Affairs unreported 19726/2010,* the issue of interpretation was raised in front of the Western Cape High Court. The applicant completed his application form partly in French and partly in poor English. He was then interviewed without the

assistance of an interpreter. The application was rejected by the standing committee. The High Court overturned the negative decision as the failure to provide a competent interpreter for an applicant makes the decision unfair. Similarly, in *Mayemba v Chairperson of Standing Committee for Refugee Affairs and Others (2015)*[100], the interpreter did not adequately translate the applicant's predicament to the RSDO, omitting facts surrounding the persecution his family was subjected to and why he had fled the Democratic Republic of Congo. The applicant could not say whether the interpreter correctly wrote down what he said because the interpreter's dialect differed from his making it difficult to communicate effectively. Because of this, his claim has been rejected.

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

The lack of interpreters has relevant repercussions on asylum seekers. Not only do DHA officials not provide interpreters when they are needed but they often do not inform applicants of rights that will potentially improve their capacity to accurately tell their story, such as the right of female applicants to request an interviewer of the same sex. There is also Evidence of former and present DHA interpreters asking for bribes outside RROs. In light of persisting issues, according to Khan, some asylum seekers no longer demand an interpreter as this could lead to a delay in the processing of their applications until an interpreter is available.

F. Tools supporting adjudication

There is evidence of bar associations available in South Africa. However, there is no information of them facilitating information exchange with Courts. It seems that the main functions of these associations are to train aspiring advocates, collaborating (in general terms) with pro-bono judges, and providing pro bono legal services to attorneys in need. In addition, no reference has been found with regards to asylum matters specifically.

In addition to bar association, there is evidence of a relevant role played by paralegals in SA. Although representation by paralegals is not permitted in court in South Africa, they play a significant role in promoting access to justice. In particular, community-based paralegals (CBPs) are persons who do not have a law degree but have skills and knowledge of the law that allow them to provide some form of legal aid and assistance to those in need, in particular members of a community they are part of or know well, and typically under the supervision of a legal practitioner and work for the indigent. Hence, they endorse a quasi-legal, humanist approach to helping a diversity of people with a range of issues from everyday practicalities to more challenging obstacles. As seen, however, they cannot represent clients in court, and they may not give specialised legal advice or practice law in any way that is reserved for qualified lawyers. Although post-Apartheid constitutional reforms guaranteed a broad range of rights and benefits to all South Africans, including the right to legal assistance in criminal matters, accessing many of these benefits remains a challenge for those who live in remote areas and those who cannot afford legal representation. CBPs fill this gap to an extent by providing dispute resolution and legal support that is both geographically and financially accessible. Despite the prevalence and importance of CBPs in the South African justice

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

sector, their role remains largely under-formalised. For example, there is no reliable source indicating the number of CBPs in South Africa.

IT tools supporting asylum access adjudication.

No specific information on the use of ICT tools in asylum adjudication by Courts in SA. In general, the Judiciary supported by the Office of the Chief Justice (OCJ) prioritize Information and Communication Technology as a strategic enabler. The court online system aims to provide a platform for filing documents to the courts electronically and helps to minimize the physical movement of people and paper-based court processes in regard to litigation The Court Online system consists of two separated, yet interlinked, components: A case management solution and an evidence management solution. This is beneficial for storage, retrieval and management of electronic documents on the filing system. In 2021-2022, the OCJ had planned to roll out the Court Online system in two service centres. The Court Online system was, however, partially implemented in the Gauteng Division of the High Court. The pilot phase will proceed until all defects have been dealt with to ensure a fully effective and operational system when it is rolled out to all other Superior Courts. The Annual Judiciary Report provides an overview of the performance of all courts. Unfortunately, the information concerning the performance of the District courts will again be excluded as the systems crash at the Department of Justice and Constitutional Development affected the integrity of the data on the Integrated Case Management System. As a result of this, it is not possible to have proper and accurate information. The 2022 Annual Judicial Report regrets that, once again, the performance of the District courts has to be excluded for a second year as the majority of members from the public are served by these Courts.

Measurement of professional performance

The performance of Courts in South Africa is measured by specific indicators developed in the context of the Annual Judiciary Performance Plan (AJPP) with specific reference to monitoring delivery against set quarterly performance targets. The AJPP defines and identifies performance indicators and targets for the various Courts. The performance indicators and targets are measures that allow for the monitoring of performance on one or more aspects of the overall functions and mandate of the Judiciary. Relevant indicators include: the percentage of matters finalised (judgment granted or dismissed) by the relevant Court; the percentage of reserved judgments finalised by all Superior Courts within three months after the last hearing; the proportion of civil applications, (opposed / unopposed motions, urgent applications, appeals, default judgments) matters finalised (granted, dismissed, refused, settled rule nisi discharged, rule nisi confirmed, withdrawn draft order) by the Regional Court; the proportion of civil trials finalised (granted, dismissed, refused, withdrawn; draft order made an order of court) by the Regional Court; The average civil trial court hours per day.

G. Caseload and delays

- *First instance judicial or quasi-judicial body/bodies:* In 2022-2023, High Courts have finalised 75% of criminal matters, 64% of civil matters and reduced by 30% the criminal case backlogs. During that period, the various Divisions of the High Court managed to finalise 9.715 criminal matters out of a total of 11.765 criminal matters, which represents a performance of 83%. The annual target of 75% was exceeded by 8%. Compared to the previous reporting period, a marginal increase of 6% is noted in the total number of criminal matters (11.765 compared to the 11.098 reported during

previous year), whilst a decrease of 1% is noted in the total number criminal matters finalised (9.715 criminal matters were finalised compared to 9.855 reported during the previous year). In 2022-2023, a total of 94 347 civil matters were finalised out of a total of 110 387. This represents an 85% performance against the set annual target of 64%. This reflects an over achievement of 21%. During the period under review, all the Divisions of the High Court achieved or exceeded the set annual target of 64% for civil matters finalised.

38% (6 of 16) of the Divisions of the High Court have managed to achieve the set annual target of 75%. The 10 Divisions that did not meet the set annual target of 75% were Eastern Cape Local Division, Mthatha (63%); Eastern Cape Local Division, Gqeberha (63%), Gauteng Division, Pretoria (64%), Gauteng Local Division, Johannesburg (51%); KwaZulu-Natal Local Division, Durban (52%); Limpopo Local Division, Thohoyandou (67%), Mpumalanga Division, Mbombela (62%), Mpumalanga Division, Middelburg (60%), North West Division, Mahikeng (74%) and Northern Cape Division, Kimberley (61%). The reason for this under performance is also ascribed to logistical challenges due to the continuous load shedding. This under achievement can mainly be ascribed to the complex nature of the cases that the Courts have to deal with, coupled with having multiple accused persons per case.

The performance of the Regional Court divisions can be summarised as follows: Average Court Hours = 02h01 This is below the set norm and standard of 04h30. It should be noted that many Regional Courts are doing both criminal and civil cases on a daily or weekly basis, with only a few Regional Courts doing civil cases only. Finalised civil applications per day = 1.09. Finalised civil trials per day = 3.6. Court days increased by 14%, enrolled cases increased by 13%, finalised cases increased by 12% and the court hours increased by 13%. A number of factors contribute towards case flow blockages. These include the unavailability of stakeholders, the unavailability of court rooms, defective court recording equipment and intermediary systems, load shedding, natural disasters, and bad/adverse weather conditions, among others. Below is an indication of the blockages/ challenges experienced per key stakeholder. In particular, the Regional Court blockages/challenges experienced are to be mainly ascribed to Department of Justice (19.0%), Prosecution (13.8%), Private Practitioner (12.3%), Legal Aid (12.1%) and Accused person (11.8%).

- *Second instance judicial or quasi-judicial body/bodies:* In 2022-2023, the SCA achieved 85% performance on the indicator "Percentage of Appeals finalised" by finalising 204 appeals out of a total caseload of 239 appeals. This was above the set annual target of 80%. The SCA achieved 91% performance on the indicator "Percentage of Applications/Petitions finalised" by finalising 1 266 applications/petitions out of a total caseload of 1 387 applications/petitions. This represents an over achievement of 11% performance measured against the set annual target of 80%. The total number of appeals enrolled by the SCA decreased by 1% from 242 matters during 2021/2022 to 239 matters during 2022/2023. On the other hand, the total number of appeal matters finalised by the Supreme Court of Appeal increased by 5% from 194 matters during 2021/2022 to 204 matters during 2022/2023. The total number of applications/petitions enrolled by the Supreme Court of Appeal increased by 25% from 1 113 applications/petitions during 2021/2022 to 1 387 applications/petitions during 2022/2023. Similarly, the total number of applications/petitions

finalised by the Supreme Court of Appeal increased by 18% from 1 075 applications/petitions during 2021/2022 to 1 266 applications/petitions during 2022/2023.

- *Third instance judicial or quasi-judicial body/bodies:* In 2022-2023, A total of 263 matters out of a total of 481 were finalised by the Constitutional Court. The performance for the reporting period is below the set annual target of 70%. The total number of matters dealt with by the Constitutional Court decreased by 13% from 554 matters during 2021/2022 to 481 matters during 2022/2023. Similarly, the total number of matters finalised by the Constitutional Court decreased by 32% from 389 matters during 2021/2022 to 263 matters during 2022/2023

It is relevant to note that these numbers do not specifically point to asylum matters, rather they refer to all civil and criminal matters.

The 2017 White Paper points to the need to prioritise investigations and case-flow management in the field of migration. In particular, the DHA noted that "In order to better provide for the efficient judicial system as well as to minimise the delays in finalising cases on the court rolls, the Office of the Chief Justice (OCJ) has initiated case flow management and a process to set uniform norms and standards for the judiciary. Despite the introduction of this initiative, immigration related litigations do not receive appropriate attention from officials or courts. There is a lack of uniform application of departmental legislation and appreciation of the importance of urgently dealing with immigration matters in courts. Therefore, the White Paper recommends that prioritised investigations and case flow management should be introduced by the Department of Justice and Constitutional Development (DoJ&CD) in order to promote speedy justice for migrants and to improve case finalisation rate for immigration related litigations. Initially, specialised immigration courts and prosecutors were recommended; however, the DoJ&CD has advised against the proposal given its financial implications". Yet, no statistics or data are available at least partially because there are no specific units/departments/divisions within Courts specialized in asylum matters.

In addition, it seems reasonable to conclude that the well-known backlog of the RSD process in South Africa cannot be largely attributed to Courts, rather to the executive branches that deal with asylum claims in first instance (Please see Part 1 and 2 on administrative failures). Emblematically, the 2019 Auditor General's Report raised concerns about the projection that the asylum appeal backlog would take the DHA 68 years to clear. In 2024, the Refugee Appeals Authority has 113 689 appeals of asylum decisions in a deadlock. On this point, fresh new data have been just released by the DHA: In May 2025, the DHA disclosed a five-year snapshot (2019-2024) of South Africa's asylum system, revealing persistently high application volumes, sluggish processing times, and a strikingly low acceptance rate of asylum seekers. Data provides a detailed breakdown of asylum applications by year, country of origin, processing durations, and outcomes.

Application Trends and Origin Countries

Between 2019 and 2024, the DHA received a total of over 71,000 asylum applications. Numbers spiked dramatically in 2019 (26,453) and again in 2023 (20,456), before dropping to 7,086 in 2024, a decline that could reflect either improved border control, deterrent policies, or barriers in access to the asylum process.

Top countries of origin remain consistent: Ethiopia, the Democratic Republic of Congo, Somalia, Bangladesh, and Zimbabwe dominate the asylum seeker pool. Ethiopia alone accounted for nearly 10,000 applications over five years.

On average, the time the DHA takes to finalize asylum decisions remains alarming:

- 2019: 2,379 days
- 2020: 1,876 days
- 2021: 2,666 days
- 2022: 3,079 days (around 8.4 years)
- 2023: 2,274 days
- 2024: 2,572 days (around 7 years)

Acceptance rate and appeals

From 2020 to 2024, only 933 asylum applications were successful, namely 17% of the 5,516 rejections issued in the same period. Meanwhile, 8,884 appeals were lodged over the same timeframe, and the Refugee Appeals Authority managed to finalize 14,400 appeals. However, the department failed to disclose the breakdown between appeals upheld and dismissed. In 2024, only 19 approvals were granted versus 1,704 rejections in appeal.

Implications of backlog and delays in asylum access adjudication.

As mentioned, there is no information/data concerning the backlog on asylum access adjudication faced by Courts as no separate statistics is available. However, given that most of asylum applications fail in first instance due to procedural irregularities and manifest errors of law, it is plausible that several rejections are appealed. This is confirmed by the DHA in the 2023 White Paper, where it acknowledged that (para. 62.3) "The difficulty with the current legislative provisions is that once the RSDOs take wrong decisions, there is nothing that an appeal body can do to salvage the situation. The majority of the decisions of the RSDOs, SCRA and RAA are set aside in court at a huge cost to the DHA. The reason being that the bar has been set far too low for the appointment of persons serving on these bodies. The same applies to qualifications for appointment as RSDOs".

Yet, this depends on the awareness of the claimants, who are rarely informed of their rights, of their financial availability to hire a lawyer or of the availability of free legal aid by NGOs. In addition, as seen, the DHA often resort to strategies aimed at delaying the process. Hence, not only asylum seekers can wait years for their asylum application to be finalized in first instance, but also to see their rights respected during appeal.

H. Influence of judicial or quasi-judicial bodies on access to asylum

Impact of case law in the field of asylum access adjudication on legislation.

Until the implementation of the 2020 Amendments, South African Courts have consistently upheld South African obligations in the field of asylum and human rights law, expanding protection and safeguards to asylum seekers and refugees in a number of respects (regular status, deportation, non-penalization, access to basic rights and services etc). The DHA and the government have repeatedly blamed Courts for

endorsing such an expansive approach to protection that, according to their view, has restricted the sovereignty of the country and has allowed illegitimate asylum seekers to remain in South Africa. This resentment may have contributed to the radical political and legislative shifts enacted through the 2020 Amendments to the Refugee Act, which have considerably restricted protection and guarantees.

The two latest White Papers (2017, 2023) submitted by the DHA on Migration and Asylum are particularly telling and also concur in justifying the assumptions made in the question above. Indeed, in the 2017 White Paper the DHA notes that "Because there is little national consensus around the importance and goals of international migration, government and civil society often decide on matters in court in South Africa and those decisions often drive policy. This can be disruptive, with unintended consequences, such as the 2004 Watchenuka judgement which entitles asylum seekers to work and study – a major pull factor that overwhelmed the asylum system. The White Paper proposes that South Africa should adopt an approach to immigration that is strategically managed and which involves the whole of the government and society approach led by the elected government" (p. 6). In addition, the DHA considers that two major factors contributing to irregular migration in South Africa are "Human rights organisations and legal practitioners abuse the loopholes in the system to secure the release of the illegal immigrants, at the expense of the government; and the lack of uniform application of the Immigration Act in court" (p. 67).

Moreover, in the 2023 White Paper, the DHA observes that South African Courts have developed an expansive jurisprudence regarding asylum and refugee protection in the absence of exceptions and reservations to the 1951 Refugee Convention. Hence, the suggested withdrawal from the Refugee Convention may be seen as also motivated by the need to limit the "activism" of Courts in this field.

Courts have successfully censored a number of unlawful practices developed by the DHA and related executive asylum bodies that also undermined a fair RSD procedure. These include: quota system, pre-screening, closure of RROs, systematic administrative failures, unlawful detention etc. As a result, the DHA has often halted those practices. In some cases, such as in the case of the safe third country notion and the closure of RROs, the DHA has attempted to either revive those practices or to delay their cessation as much as possible.

I. Judicialization of politics

Conflicts do exist. In several judgements, South African judges deplore the unrespectful and reckless behavior of the DHA. These include labelling it as "incompetent" and "deplorable" and accusing DHA officials of "showing blatant disregard for the law, dereliction of duty and bad faith". In *Kiliko* (2006), the Constitutional Court recognizes that South Africa is subject to significant migration flows. Yet, "The Department has failed since 2000 to introduce adequate and effective measures to address a gradually worsening situation […] The delays caused by such lack of facilities have, in my view, undoubtedly resulted in the violation of the fundamental rights of asylum seekers under the Constitution and also under the Refugees Act" (para 28). In *Tshiyombo* (2015), the Court stated "It is plain that there is a systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated judicial admonitions, to comply with its legal obligations in matters in which its decisions are taken on judicial review" (para 14). In *Katsshingu* (2011), the Court reiterates that the Department of Home Affairs does not comply with their obligation to produce the record of the asylum application to the applicant and their

attorney. Systemic dysfunctionality has been denounced also in more recent cases. In *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* (2021), the Supreme Court pointed once again to the systemic failures within the asylum adjudication system, whereby asylum seekers experience woefully inadequate decision-making, with errors of law, verbatim, down to the same spelling and grammatical mistakes. In addition, the RROs closure "saga" is particularly telling of the low consideration that the DHA has for Courts' judgements. Indeed, despite judges found this practice unlawful and ordered the DHA to reopen these centres, RROs remained closed for years. Emblematically, the closure of the RRO in Cape Town was found in 2013 but it remained closed until April 2023, when it finally reopened. The DHA was being "intentionally slow" in opening the refugee reception office. Applicants were forced to go back to Court and asked to appoint a Special Master to oversee the reopening of the office.

At the same time, as evident in the 2017 and 2023 White Papers, the DHA blames Courts for their expansive approach that has put further economic and administrative burden on South Africa and has limited the sovereign power of the government.

The 2023 White Paper suggests establishing specialized Immigration Courts to deal with migration and asylum issues in order to make case flows faster. Yet, this proposal has not yet landed on an actual legislative proposal for review.

Role of judicial and quasi-judicial bodies responsible for asylum access in influecing policy outcomes in practice, particularly given the volume of cases they decide and review?

Courts in South Africa have a significant influence on "correcting" asylum policies. This influence often manifests as the judiciary serving as the *de facto* custodian of refugee rights against an increasingly restrictive policy. Indeed, Courts have repeatedly ordered the DHA to respect the rule of law and the country's constitutional and international obligations in the field of refugee and human rights law. Examples include ordering the DHA to re-open Refugee Reception Offices (RROs) or to issue/renew temporary asylum seeker permits and to end arbitrary detention. These judicial "rectifications" directly counteract the DHA's restrictive policies designed to shrink the asylum space. In addition, through numerous judgments, Courts have given authoritative interpretations to vague or restrictive provisions in the Refugees Act and the Immigration Act. Judicial interpretation helps provide for an expansive and safeguarding application of asylum law in SA in turn respecting the constitutional right to dignity and the principle of non-refoulement.

As for divergences in judicial practices (asylum vs. general law), no specific information has been found.

The analyzed literature seems to agree that Courts are playing a positive and effective role in limiting the government's restrictive turn towards migration and asylum and are successfully upholding a principled interpretation of refugee and human rights law. I have not found support in the literature for the alleged "judicial activism" that the government is imputing to national Courts. Several authors have however underlined the relevant judicial shift occurred since the 2020 Amendments have entered into force.

III. OTHER ACTORS IN ASYLUM ACCESS ADJUDICATION

A. Bodies of the executive branch in asylum access adjudication

Multiple branches under the Department of Home Affairs are involved in the asylum access adjudication procedure in South Africa. In particular, they are the first authorities mandated to evaluate asylum claims as well as eventual appeals in case of rejection. The Refugee Appeals Authority (RAA- formerly the Refugee Appeal Board or RAB) is responsible for examining appeals lodged by asylum applicants where their application is considered to be unfounded by a RSDO. It is an exclusively appellate body whose mandate is to hear and determine any question of law referred to it in terms of the Refugee Act, to hear and determine any appeal lodged after being rejected by the RSDO as unfounded, and to advise the Minister or the Standing Committee for Refugee Affairs on any matter referred to it by either body. In deciding on an appeal, the RAA may confirm, set aside or substitute a decision by the RSDO. Members of the RAA are appointed by the Minister. A member serves for not more than five years and is eligible for reappointment.

The Standing Committee for Refugee Affairs (SCRA) is a committee established in terms the Refugees Amendment Act. Among others, the Standing Committee receives a RSDO decision rejecting an asylum claim as 'manifestly unfounded', 'abusive' or 'fraudulent', they will review that decision and alternatively 1) submit a final rejection of the asylum claim, which can be judicially challenged; 2) overturn the RSDO decision and grant the person with the refugee status; or 3) decide to send your asylum application back to a RSDO, who will re-interview the asylum seeker and make a new decision on the asylum application.

The autonomy and independence of these bodies is questionable given the mode of financing and appointments of the DHA staff. There is plenty and authoritative evidence of the misconduct and severe flaws in the RSD procedure under the DHA. Although these bodies specifically engage in the RSD procedure and asylum matters, there is strong evidence that executive officials working in these bodies do not have specific knowledge/expertise on refugee/migration/human rights matters. More often than not, officials have never practiced law and do not even have a legal background. The DHA itself acknowledged that (para. 62.3) "The difficulty with the current legislative provisions is that once the RSDOs take wrong decisions, there is nothing that an appeal body can do to salvage the situation. The majority of the decisions of the RSDOs, SCRA and RAA are set aside in court at a huge cost to the DHA. The reason being that the bar has been set far too low for the appointment of persons serving on these bodies. The same applies to qualifications for appointment as RSDOs. The recent amendment to the Refugees Act makes provision for the RSDOs to have legal qualifications. Given the complexity of the international refugee law, that is grossly inadequate. Many of the appointees have *never practiced law*".

The lack of adequate knowledge of DHA officials has been repeatedly underlined by judges in their case law. Among others, in *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* (2021), the Supreme Court of Appeal pinpointed to the systemic failures within the asylum adjudication system, whereby asylum seekers experience woefully inadequate decision-making, with errors of law, verbatim, down to the same spelling and grammatical mistakes. In *Tshiyombo*, the judges acknowledge that there is systematic dysfunctionality among RRO officers, DHA officers, RSDOs, RAB officers, who gravely disregard the respect of the administrative and judicial norms in the context of asylum. Dysfunctionality has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated

judicial admonitions, to comply with its legal obligations in matters in which its decisions are taken on judicial review. The consequences prejudice not only the proper administration of justice, but also the effective administration of the Refugees Act. The DHA officials' misbehaviour prejudices the administration of justice because it tends to impinge adversely on the applicants' constitutional right to a determination of their suits by the application of law.

Extent of involvement, efforts, and interests that executive bodies display in asylum access adjudication when they are one of the parties involved in the trial.

A study reports that in several cases, DHA ignored LHR's letters of demand until the start of court proceedings, after which the DHA proposed a settlement between the parties. These cases were then removed from the roll—some of them after DHA had initially indicated an intention to oppose the proceedings—which contributed to the legal costs of both sides prior to removal. In other cases, DHA either opposed the case in court, indicated an intention to oppose without then filing opposing papers, or initially opposed but ultimately settled the case. In many of these cases, DHA opted to oppose despite a previous negative court ruling on the same issue. In the only two instances concerning the detention of asylum seekers in which DHA obtained a favourable judgment in the High Court, the Supreme Court of Appeal subsequently overturned the judgments, creating an even stronger precedent establishing the illegality of DHA's actions.

Role of executive bodies and their implications (if any) in asylum access adjudication.

According to analyzed sources and case law, the DHA's involvement is asylum trials has been "negative" in the sense that it has reportedly caused delays, postponement, and interference in trial. Among others, the lack of respect for administrative rules concerning the RSD procedure and the systematic failures to adhere to the rules of the Court have slowed down the judicial process whereby judges had to postpone judgements to allow the DHA to find/produce the required documentation.

For instance, the right to appeal of several asylum seekers has been reportedly undermined due to procedural irregularities that contravened the requirements of just administrative action. A Congolese man went to Marabastad to renew his permit. He was arrested and taken to Lindela. DHA said that his claim had been rejected as manifestly unfounded and had been reviewed by the Standing Committee for Refugee Affairs (SCRA). The claimant had never received a copy of his initial decision.

A number of the procedural irregularities involved problems with the appeals process: A reception officer refused to accept a Congolese man's appeal request because it had not yet been 30 days since he had received his rejection decision. The man then emailed the request to the centre manager, but it was not processed; the man was subsequently arrested. A Congolese man handed in his appeal request and received a six-month extension on his permit. When he returned to renew his permit, the reception office said it did not have his appeal request; he was immediately arrested. He remained in detention even after his brother arrived with a copy of the original appeal request letter.

A Pakistani man arrived at the reception office for his appeal hearing. A reception officer took his documents, and another officer gave him a new three-month permit. When he returned after three months, he received a three-day extension and was told to return. When he returned a second time, he was informed that his appeal was rejected even though he had never had a hearing. He was immediately arrested. A Congolese woman arrived at Crown Mines for her appeal hearing. The reception officer extended her

permit for six months, but she did not have a hearing. When she arrived to extend her permit again, she received a rejection from the appeal board and was immediately arrested. A Congolese man arrived at Crown Mines for his appeal hearing. He showed a security guard his notice of appeal, but the security guard refused to let him in and told him to return when his permit expired. He returned on the day of his permit expiration and was told to return three days later. When he returned, he was arrested as an illegal foreigner. A Burundian man was not allowed into Crown Mines on the day of his appeal hearing and was told to return when his permit expired. He was arrested when he returned. A Burundian man lodged an appeal request and continued to renew his permit. On one of these occasions, he went to Crown Mines to renew a few days after the expiration date and was arrested. At the time of his arrest, he received a letter stating that he had failed to appeal, despite the fact that his asylum permit indicated that he was to be scheduled for appeal hearing. Four detainees were arrested while waiting for their appeal hearings. Another four were arrested while waiting for the decision on their appeal. One of them had been granted refugee status but had never been informed of the decision.

B. International or regional organizations

UNHCR does not play a crucial role in the RSD procedure in South Africa or in accessing asylum. For an overview of its role in SA please see Part 2. SADC does not have a specific mandate on migration or asylum issues, nor on human rights.

C. NGOs and bar associations

Pro-bono NGOs include Lawyers for Human Rights, the University of Cape Town Refugee Rights Unit, Scalabrini Centre, and Nelson Mandela University Refugee Rights Centre. By looking at the reports and materials published by pro-bono organizations that provide legal aid to asylum seekers, it can be inferred that lawyers working or collaborating with these entities have experience and expertise in refugee and migration matters. However, detailed information about their background is not available.

Extent of involvement, efforts, and interests that NGOs and bar associations display in asylum access adjudication.

Whereas no relevant information has been found concerning bar associations, important insights have been collected for NGOs. They are indeed highly involved in asylum access adjudication in South Africa through a variety of activities and services, from direct legal services to strategic litigation and advocacy. Organizations like Lawyers for Human Rights (LHR), the Legal Resources Centre, and university-based law clinics (e.g., at the University of Cape Town and Nelson Mandela University) are the primary providers of free legal aid to asylum seekers. They offer free legal advice and representation, helping clients with initial applications, appeals, and documentation issues, such as lost or expired permits. This direct service is critical, as many asylum seekers cannot afford private legal assistance. Beyond individual cases, these organizations engage in strategic litigation to challenge systemic barriers. They take on public interest cases that have the potential to set legal precedents and compel the government to uphold constitutional and administrative obligations, as seen in Part 2. Finally, by denouncing systemic flaws, such as corruption, among DHA officials, NGOs aim to raise awareness on these issues calling for greater transparency and compliance.

As for the explanations for involvement, this can be inferred by looking at the mission and values underscoring their actions. Among others, a central reason for NGO involvement may lie in the (deliberate

or unvoluntary) inability of the State to manage the asylum system efficiently and justly. The DHA is plagued by chronic inefficiencies, extensive backlogs, and allegations of corruption, leading to significant administrative and practical barriers for asylum seekers. NGOs do their best to fill this gap, providing essential services that the State often fails to adequately deliver.

The role of NGOs and bar associations and their implications (if any) in asylum access adjudication.

As seen, NGOs and bar associations play a vital role in ensuring asylum seekers have access to justice and legal protection. While their involvement doesn't directly constitute an official part of the government's adjudication process, they act as crucial intermediaries and advocates. They help to bridge the gap between complex legal frameworks and asylum seekers who are often vulnerable and lack resources. NGOs secure free legal aid and representation to asylum seekers in detention, although availability is conditioned to financial and human resources. In addition, NGOs engage in strategic litigation to challenge systemic failures in the asylum system. Similarly, bar associations also play an "indirect" role in asylum adjudication by contributing to upholding the rule of law and the principles enshrined in the Constitution, supporting pro bono free cases, and by offering training for legal professionals to improve their understanding of refugee law. In sum, NGOs and bar associations' relevance in the adjudication process is twofold: on the one hand, they ensure a fair RSD procedure and make sure that the rights of asylum seekers are respected, on the other hand they act as a critical check and balance on the DHA officials by improving access to justice and bringing reported inconsistent practices to Courts.

Although there are other forms of organized or formal involvement of civil society, their involvement is primarily through advocacy and litigation rather than direct, formal participation in the RSD process. These include: 1) Community-Based and Refugee-Led Organizations, such as People Against Suffering, Oppression and Poverty (PASSOP) that is a grassroots organization founded by and for refugees and migrants in Cape Town that also provide basic paralegal advice and help asylum seekers understand how to navigate the asylum process; 2) Pro-bono Organizations, such as The Scalabrini Centre of Cape Town, which offers legal aid, welfare program, and English classes, while engaging in strategic litigations to uphold asylum seekers' rights; 3) Universities, such as the Refugee Rights Unit at the University of Cape Town that runs a legal clinic on refugee rights and submits *Amicus Curiae* Briefs in major court cases, and the Legal Resources Centre.

IV. THE SOCIO-POLITICAL CONTEXT

A. Migratory routes and entry points

The country is a hub of different migration patterns. On the one hand, it is a land of emigration of highly skilled workers, especially towards Australia. On the other hand, given that it is one of the most economically flourished countries in Southern Africa, it is an established and attractive destination for immigrants. In 2022, it was estimated that more than 2 million migrants were settled in the country.[101] Data on the actual number of refugees and asylum seekers present in South Africa are uncertain and

[101] UNDP, *South Africa*, available at https://www.undp.org/south-africa [last accessed 18 August 2025].

inconsistent. According to UNHCR, South Africa currently hosts around 250.250 refugees and asylum-seekers mainly coming from Burundi, the DRC, Rwanda, South Sudan, Somalia, and Zimbabwe.[102] In contrast, the DHA argued that more than 1.3 million refugees and asylum seekers were present in South Africa as well as inactive asylum seekers, namely those who were issued with asylum permits and later disappeared.[103]

The main routes for asylum seekers entering South Africa are generally land routes from neighboring Southern African countries. Asylum seekers often cross countries like Zimbabwe, Zambia, and Botswana to enter South Africa (so called Southern Route). Other routes include crossing Zimbabwe and Mozambique which directly border with SA.

Main entry points (e.g., air, sea, or land) in the country since 2010.

Migrants and refugees enter South Africa primarily through its 72 ports of entry, which include 52 land borders, 10 international airports, and 9 seaports. The six earmarked ports of entry are Beitbridge (Zimbabwe), Lebombo (Mozambique), Maseru Bridge (Lesotho), Ficksburg (Lesotho), Kopfontein (Botswana), and Oshoek (Eswatini). The government employs the BMA to enhance border control, aided by technologies like high-tech drones, to manage these entry points and combat illegal crossings. Unauthorized entries often occur through unofficial points along the country's long and porous borders, particularly in the South Africa-Zimbabwe corridor.

Implications that migratory routes towards the country have on how judicial and quasi-judicial institutions assess the legality of barriers to access asylum in the jurisdiction.

For many years, a significant number of migrants from Zimbabwe have fled in South Africa. The government has attempted to manage this flow in different ways over time. On the one hand, the government enacted the Zimbabwean Exemption Permit (ZEP) program, which provided the beneficiaries with the right to stay, access to the labour market and education. Yet, it was not an asylum permit as South Africa believed that their flight was economic in nature. On the other hand, Zimbabweans have been subjected to pushbacks and deportations without the possibility to claim asylum as they were automatically excluded from the refugee status on an number of grounds, including the fact that they came from a safe third country or that they crossed the border with South Africa irregularly and had no permission to enter. The vacillating relationship between South Africa and Zimbabwe had not prevented Courts to uphold key principles of refugee law and to protect asylum seekers from a violation of their rights.

B. Composition and spatial distribution of forced migration population

As mentioned, statistics on foreigners are not precise nor reliable. The DHA does not in fact keep track of the number of asylum seekers and refugees in SA and usually refers to excessive numbers to inflame anti-migration propaganda. UNHCR provides some data but may not be totally accurate. As mentioned, according to UNHCR, South Africa currently hosts around 250.250 refugees and asylum-seekers mainly coming from Burundi, the DRC, Rwanda, South Sudan, Somalia, and Zimbabwe. There are no reliable

[102] UNHCR, *South Africa*, available at https://www.unhcr.org/countries/south-africa [last accessed 18 August 2025].
[103] Department of Home Affairs, *White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa*, 17 April 2024, at 51, available at https://www.gov.za/sites/default/files/gcis_document/202404/50530gon4745.pdf [last accessed 18 August 2025].

statistics differentiating between refugees and asylum seekers and no data are available on their composition.

Latest data are hereby reported. However, DHA's data may be biased and need to be checked and confronted with other sources:

Between 2019 and 2024, the DHA received a total of over 71,000 asylum applications. Numbers spiked dramatically in 2019 (26,453) and again in 2023 (20,456), before dropping to 7,086 in 2024, a decline that could reflect either improved border control, deterrent policies, or barriers in access to the asylum process.

Top countries of origin are Ethiopia, the Democratic Republic of Congo, Somalia, Bangladesh, and Zimbabwe dominate the asylum seeker pool. Ethiopia alone accounted for nearly 10,000 applications over five years.

From 2020 to 2024, only 933 asylum applications were successful, namely 17% of the 5,516 rejections issued in the same period. Meanwhile, 8,884 appeals were lodged over the same timeframe, and the Refugee Appeals Authority managed to finalize 14,400 appeals. However, the department failed to disclose the breakdown between appeals upheld and dismissed. In 2024, only 19 approvals were granted versus 1,704 rejections in appeal.

Implications that the number of asylum seekers and refugees has on what occurs in judicial and non-judicial institutions responsible for assessing the lawfulness of barriers to access asylum in the jurisdiction.

Given that South Africa's asylum system is characterized by systemic deficiencies, these are even more exacerbated in case of mass influxes of asylum seekers. The case of Zimbabweans arriving in the country in 2009 emblematically demonstrated the incapacity of the DHA to deal with great numbers of asylum seekers/migrants, which generated even greater backlogs and forced courts to intervene to ensure the government's compliance with its legal obligations. Indeed, since the 2009 peak of 223.324 asylum applicants, mostly from Zimbabwe, there has been a continuous, systematic limitation of the accessibility of RROs, and as a result, a restriction of the rights of asylum seekers and refugees. Given the restrictive immigration regime for unskilled workers established by the 2002 Immigration Act, unskilled migrants turned to the asylum system as the only means to legalize their stay. The capacity of the DHA was stretched and immigration control and refugee protection were conflated. Despite the decline in asylum-seekers in the following years, migration control has increasingly displaced protection as the primary goal of the asylum system. The resulting low proportion of successful refugee claims is frequently cited by government as evidence of abuse of the system, justifying increasingly restrictive and deterrent measures instead of more humane administration, more enlightened legislation, and more resources to get through the backlog of applications.[104] Currently, 147.794 cases are in a deadlock at the RAA as revealed by a 2019 Auditor General Report. Over time, the DHA introduced a number of illegal practices (prescreening, quota system, technological barriers, closure of RROs etc – please see Part 1) under the motivation that they were needed to ease the backlog of cases. Among others, in an attempt to manage the high number of applications, the

[104] https://www.migration.org.za/wp-content/uploads/2017/08/All-Roads-Lead-to-Rejection-Persistent-Bias-and-Incapacity-in-South-African-Refugee-Status-Determination.pdf; https://www.migration.org.za/wp-content/uploads/2017/08/Protection-and-Pragmatism-Addressing-Administrative-Failures-in-South-Africa%E2%80%99s-Refugee-Status-Determination-Decisions.pdf

DHA has tried to implement online application systems. However, this created a new barrier for many asylum seekers who lack access to technology or the digital literacy required to use the system.

These practices resulted in an additional backlog of cases in Courts. Indeed, to seek relief, asylum seekers are forced to turn to the courts, resulting in an increased number of litigation cases related to asylum, and placing a significant burden on the already strained judicial system.

Displaced persons.

UNHCR registered 171,841 people who were displaced or stateless (or returning from forced displacement) within the country at the end of 2024. According to UNDESA (2020), an estimated 2.9 million migrants resided in South Africa at mid-year 2020. No further information is provided.

The distribution of displaced persons is heavily concentrated in big cities, such as Cape Town, Johannesburg and Pretoria, primarily due to the availability of potential employment opportunities and access to essential services. South Africa does not have an encampment policy, therefore displaced persons are generally integrated into host communities in major urban centers.

C. Political and public debate in the country

The DHA has made the restriction of asylum laws a central part of its political agenda. This is driven by a belief that the asylum system is being abused by "economic migrants" and that 90% of asylum claims have been rejected because unfounded. The DHA has introduced legislative changes to make the asylum process more restrictive, as emblematically seen in the context of the 2020 Amendments, while making the procedural and physical access to asylum more difficult (closure of RROs, introduction of stringent requirements and time limits).

Migration and asylum have been frequently instrumentalized by policymakers and used as scapegoat for the rooted problems that South Africa is facing (including unemployment, criminality rate and corruption). Some sources argue that asylum seekers are used "as a weapon" during election campaign to gain votes. In addition, South Africa has seen the rise of political parties and xenophobic organizations, such as the Patriotic Alliance and the Operation Dudula movement, which call for "clean-up" operations and massive deportations of foreigners from the country. Hate speech and xenophobic discourses against migrants and asylum seekers have also fueled violence and abuses against them.

Relevance of the topic of access to asylum in public debate.

A central issue is the media's tendency to conflate different groups of foreign nationals. Asylum seekers, refugees, and undocumented migrants are often lumped together under the catch-all term "foreigners" or, more negatively, "illegal immigrants". This blurs the legal distinctions and undermines the specific protections afforded to asylum seekers under South African and international law. In addition, media coverage often focuses on the perceived threats posed by foreign nationals, a framing that reinforces a narrative that asylum seekers are a burden for the state. In this context, border control is seen as an efficient solution to the "problem" of migration. The narrative is that South Africa's borders are "porous" and that more needs to be done to control the influx of people.

Research studies show a direct link between media narratives and public attitudes towards migration in South Africa, whereby the perception that immigrants pose a danger to jobs, safety, or cultural identity is seen as a powerful driver of negative attitudes towards asylum seekers.

Implications that political debate and public opinion have on what occurs in judicial and quasi-judicial bodies responsible for deciding on the legality of the barriers to access asylum

Despite significant political pressure and negative public opinion, South Africa's judiciary has largely maintained its independence. Yet, things may have changed since the enactment of the 2020 Amendments, which have brought Courts to embrace a more restrictive approach to asylum. Apparently, many judges in South Africa are in favour of the DHA's proposal to withdraw from the 1951 Refugee Convention. In their opinion, South Africa is left alone in dealing with mass inflows coming from other countries, while responsibility should be placed on the international community as a whole. In addition, no financial support is provided to South Africa, whose resources are insufficient even for its own citizens.

D. Corruption

https://www.lhr.org.za/wp-content/uploads/2020/09/Corruption-Report-V4-Digital.pdf

https://academic.oup.com/rsq/article/39/1/26/5741662

https://www.hrw.org/legacy/reports98/sareport/Adv4a.htm#N_6_

https://www.iol.co.za/news/south-africa/gauteng/high-court-berates-refugee-adjudication-process-16052875

https://mg.co.za/article/2015-02-26-refugee-wins-asylum-after-10-years-in-legal-limbo.

https://www.migrationpolicy.org/article/paying-protection-corruption-south-africa%E2%80%99s-asylum-system

https://www.lhr.org.za/archive/news/2015/home-affairs-responds-corruption-report.html

https://www.amnesty.org/en/latest/press-release/2019/10/south-africa-failing-asylum-system-is-exacerbating-xenophobia/

https://www.corruptionwatch.org.za/wp-content/uploads/2016/11/Project-Lokisa..pdf

https://www.lhr.org.za/archive/sites/lhr.org.za/files/272268061-queue-here-for-corruption.pdf

https://www.lhr.org.za/wp-content/uploads/2020/09/Corruption-Report-V4-Digital.pdf

https://pmg.org.za/committee-question/13069/

And case law: *Tshiyombo* (2015), *Katsshingu* (2011), *Kiliko* (2006), *Somali Association of South Africa and Others v The Refugee Appeal Board and Others* (2021), *Tafira* (2006).

E. Other socio-political factors

one cannot avoid mentioning the relevance of apartheid in contemporary asylum policy and political propaganda. South Africa has been often under the spotlight for xenophobic and racist speeches and lethal attacks against African and Asian non-nationals, including refugees and asylum seekers.[105] According to Xenowatch, since 1994, xenophobic violence in South Africa resulted in 686 deaths and around 128.000

[105] Dratwa, 'Xenophobia: A Pervasive Crisis in Post-Apartheid South Africa' (2024) Georgetown Journal of International Affairs.

displacements.[106] Violence between natives and refugees has been inflamed by the perception that the letter have caused increasing rate in crime and unemployment in South Africa. Politicians in South Africa are using migrants as a scapegoat by pushing a narrative according to which 15 million irregular migrants live in the country posing an unbearable burden on national economy and security.[107] Human Rights Watch has collected a number of xenophobic declarations made by political leaders, whereby migrants would be responsible for drug trafficking and unemployment and have called for the mass deportation of illegal immigrants from South African cities.[108]

Xenophobia and intolerance against asylum seekers and refugees are not only rooted in pervasive political narratives and economic challenges that the country is facing, but also trace back to the ideology of apartheid, a system based on racial superiority into force from 1948 to 1994 whose ground elements pre-existed in the policy of segregation established before the Afrikaner Nationalist Party came to power. During apartheid, asylum seekers and refugees were not recognised in South Africa as the country was not bound by any international and regional conventions relating to the status of refugees and asylum seekers and administered its refugee policy on an *ad hoc* basis. For instance, South Africa welcomed white people fleeing from Rhodesia and Mozambique but refused to do so for black Mozambicans fleeing civil war.

Under apartheid, the 1991 Aliens Control Act institutionalized discrimination in migration policy with high control and deterrence over non-white migration.[109] According to this legislation, all applications for immigration and work permits had to be made from outside South Africa to prevent people from using visitors visas to irregularly entry the country. People wishing to enter South Africa had to bear heavy costs for their applications, meet restrictive administrative and financial requirements, and discrimination based on nationality. Indeed, immigration from some African countries, such as Zimbabwe, was particularly discouraged.[110] In addition, foreign black Africans were victims of racist discrimination and targeted for detention and repatriation with no possibility of judicial review. Undocumented migrants were banned from exercising basic human rights, such as access to healthcare and education. In addition, from 1986 to 1993, land borders with Zimbabwe, Botswana and Mozambique have been militarized and protected with lethal electric fences.

After the end of the apartheid regime, South Africa ratified the 1951 Refugee Convention and its 1967 New York Protocol as well as the 1969 OAU Convention. The Draft Refugee Bill, prepared in 1996 by the DHA in partnership with UNHCR and the National Consortium on Refugee Affairs, aimed to reform the 1991 national immigration asylum policy. Yet, the apartheid rhetoric was still in place with a curtailed refugee definition and massive deportations of irregular migrants from Mozambique occurring between 1994 and 1995.[111] Thanks to the intervention of third parties, the Refugee Act adopted in 1998 not only

[106] Xenowatch, available at https://www.xenowatch.ac.za/

[107] Daily Maverick, *No action no evidence that 15 million undocumented immigrants live in South Africa*, available at https://www.dailymaverick.co.za/article/2023-07-07-no-actionsa-no-evidence-that-15-million-undocumented-immigrants-live-in-south-africa/

[108] Human Rights Watch, *South Africa: Toxic Rhetoric Endangers Migrants*, 6 May 2024, available at https://www.hrw.org/news/2024/05/06/south-africa-toxic-rhetoric-endangers-migrants

[109] Peberdy and Rogerson, 'Rooted in racism: The Origins of the Aliens Control Act', in Crush (ed) *Beyond Control: Immigration and Human Rights in a Democratic South Africa*, 1998.

[110] Peberdy, 'Imagining Immigration: Inclusive Identities and Exclusive Policies in Post-1994 South Africa' (2001) 48 AfricaToday 3.

[111] Crush and McDonald, 'Introduction to special issue: Evaluating South African immigration policy after apartheid' (2001) 48 Africa Today 1.

reflected South African international and regional commitments relating to refugees and ensured the principle of non-refoulement, access to asylum and to integration, but it also expanded protection by extending the refugee status to additional grounds of persecution beyond those provided by the 1951 Refugee Convention and the 1969 OAU Convention, namely tribe and gender.[112]

The responsibility for asylum seekers' status determination and protection was conferred to the DHA. Since the very beginning, however, DHA has reportedly and systematically lacked the knowledge and administrative capacity to adequately process asylum claims with asylum seekers waiting years, if not a decade, to receive the outcome of their application.

Several authors have pointed out that during the apartheid era, officials had a considerable degree of discretion to decide how individual requests for immigration permits ought to be evaluated. As suggested by the former special advisor to the Minister, the purpose of this highly discretionary environment was to validate racially prejudicial outcomes in the language of non-racial administrative law: "If you read the Aliens Control Act and you're applying for a permit, you do not know under what criteria you will get or you will not get the permit. You will not know what procedures you would need to follow. The Aliens Control Act gives no information in terms of which most of the permit categories would qualify for either permanent or temporary residency. In terms of permanent residence, there was a mechanism in place where … an application would come in under some general criteria of being a good citizen and somehow in the application of those criteria whatever came out were white, Anglo-Saxon, protestant people".[113] This point has been echoed by the former Home Affairs Minister, Nosiviwe Mapisa-Nqakula, who said that "it is sometimes very difficult to get officials to change their mindsets. It seems that many officials are still stuck in the era of the Aliens Control Act. Some seem to think that the law means what they think it should mean".[114]

[112] Section 3(a) of the Refugee Act.https://www.saflii.org/za/legis/consol_act/ra199899.pdf
[113] Klaaren and Sprigman, "Refugee Status Determination Procedures in South African Law."
[114] Department of Home Affairs, Briefing by the Minister of Home Affairs, Mrs N. Mapisa-Nqakula to the Chambers of Commerce and Stakeholders from Business Community (Department of Home Affairs, 2006),