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ADVOCATES' MIGRATION BRIEF SERIES / 02

ASYLUM SEEKERS ACCESS TO PROTECTION: DEVELOPMENTS IN SOUTH AFRICA

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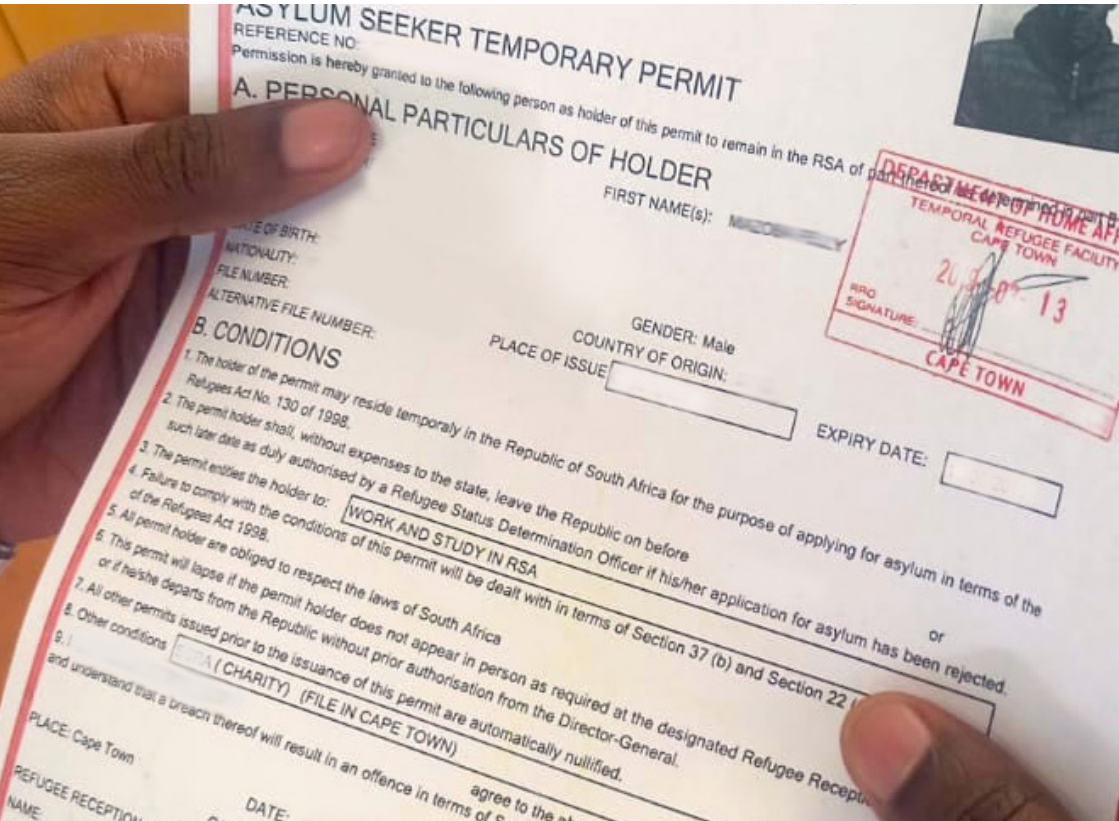

ADVOCATES' MIGRATION BRIEF SERIES

The Advocates' Migration Brief Series addresses recent judicial decisions relating to people on the move.

1. **UNINTENDED CONSEQUENCES FOR EXCLUSIONS**
   (David Simonsz)
2. **ASYLUM SEEKERS ACCESS TO PROTECTION: DEVELOPMENTS IN SOUTH AFRICA**
   (Irene de Vos)

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ABSTRACT

The reality of asylum seekers' journeys is that they are forced to risk their lives to save their lives.[1] Asylum seekers face increasingly sophisticated barriers to access.[2] They undertake risky voyages. Almost by definition, asylum seekers are not in a strong position to access their rights under the refugee regime. This article considers the jurisprudential attempts to increase access to the protections on offer at the end of that journey. At every opportunity, our courts have increased access to those opportunities. Without fail, our courts have shown a commitment to removing blockages and improving access to the refugee system. When Home Affairs contended that asylum seekers ought to be detained pending their asylum claim, the courts rejected that approach as it limits access to the protections afforded under the refugee regime. When Home Affairs refused an asylum seeker an opportunity to apply for asylum because the asylum seeker delayed the application, the courts rejected the premise that a delay in seeking asylum closes the door for an asylum seeker. When Home Affairs sought to limit the physical places where asylum seekers could apply for asylum, the courts mandated they be re-opened. The article sets out how this jurisprudence has built on each previous case, creating the scaffolding necessary to support those in the precarious position of having to apply for asylum. Lastly, despite the persistent and robust message sent by the judiciary, this article considers the potential claw-back effect on these developments by the amendments to the Refugees Act that came into force on 1 January 2020.[3]

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1 James C Hathaway "The Global Cop-Out on Refugees" International Journal of Refugee Law, 2018, Vol 30, No 4, 591–604 p 592

2 Hathaway p 592

3 Refugees Amendment Act 33 of 2008, Act 12 of 2011 and Act 11 of 2017.

1. IMPORTANCE OF ACCESS

Several instruments entrench the right to apply for asylum.[4] However, the entire framework of protections available to a refugee is illusory if a refugee cannot access it. The whole host of protections created for refugees, from international to municipal law, remains outside the grasp of refugees if they cannot seek asylum. The "first and most critical"[5] component of a protection regime is that of access.

Asylum seekers, generally, do not possess the necessary goods to access these legal protections. The nature of seeking refuge is, by definition, precarious. Most refugees do not arrive with lawyers, money or an understanding of the legal system. Language and economic barriers are a reality. Our apex Court[6] has repeatedly reaffirmed that refugees are especially vulnerable persons who are traumatised and in flight from serious human rights abuses. The Constitutional Court has also criticised[7] the Minister of Home Affairs for failing to understand that the "great bulk of vulnerable asylum seekers, do not dispose over opportunities to obtain transit permits or to file asylum applications".

The precarious nature of seeking asylum is made worse by a refugee system that is not easily within reach. The procedure is not common knowledge. The lawyers doing this work is limited.

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4 The African (Banjul) Charter on Human and Peoples' Rights 1986, provides in article 12(3) that "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries under laws of those countries and international conventions." Article 14(1) of the Universal Declaration of Human Rights provides "Everyone has the right to seek and to enjoy in other countries asylum from persecution."

5 Hathaway p 597

6 Union of Refugee Women v Director: Private Security Industry Regulator 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) paras 28 - 29 and recently reaffirmed in Ahmed v Minister of Home Affairs 2018 (12) BCLR 1451 (CC) at paras 20-2

7 Ruta v Minister of Home Affairs 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) para 48

There are multiple grey areas between the Refugees Act and the Immigration Act. The line between a person susceptible to arrest for being in the country without documents and a person wishing to apply for asylum is not always respected. Refugees are arrested and detained before being able to apply for asylum. The threat of arrest and detention is constant.

The physical places where a person can apply for asylum is limited, and the subject of ongoing litigation. If stopped on the street by a refugee asking where to apply for asylum, only a couple of South African lawyers would be able to point the refugee to the nearest refugee reception office. When they get there, the queues are long, and the officials overwhelmed. It will also not be the only visit to these places, as an asylum seeker has to regularly renew their permits - generally for a couple of years on end.

These factors combined often fail to translate the protections in the Refugees Act into tangible benefits. The Refugees Act, however, contains several safeguards that aim to increase access to the protections afforded under the refugee regime.

- THE WHOLE HOST OF PROTECTIONS CREATED FOR REFUGEES, FROM INTERNATIONAL TO MUNICIPAL LAW, REMAINS OUTSIDE THE GRASP OF REFUGEES IF THEY CANNOT SEEK ASYLUM.

2. SAFEGUARDS HARDWIRED INTO THE REFUGEES ACT

The Refugees Act protects against detention, prosecution and deportation.[8] Home Affairs cannot arrest an asylum seeker about any breaches of law related to how they entered the country.[9] An asylum seeker cannot be detained, save in exceptional circumstances.[10] Once there is an indication by an individual that he or she intends to apply for asylum,[11] provide that individual is entitled to be issued with an appropriate permit valid for 14 days within which there must be an approach to a Refugee Reception Office (RRO) to complete an application for asylum. It is clear that once such an intention is asserted, the individual is entitled to be freed subject to the further provisions of the Refugees Act.[12]

Also, an asylum seeker finds statutory assistance in the application procedure. The Refugees Act[13] obliges a Refugee

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[8] These protections have been limited after the introduction of the amendments to the Refugees Act, which will be discussed in the last section of this article. Section 2 of the Refugees Act provides -

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

[9] Section 21 of the Refugees Act

[10] Whilst the refugee convention does not prohibit detention Refugee Convention, art 31(2). South Africa's legal system does, save in exceptional circumstances.

[11] Regulation 2(2) of the Refugee Regulations

[12] Read with s 22 of the Refugees Act

[13] Section 21(2) of the Refugees Act

Reception Officer (or Determination Officer) to accept an application for asylum and, if required, must assist an applicant in completing the necessary application forms. A Refugee Reception Officer is required to submit any application received together with relevant information to a Refugee Status Determination Officer to be considered.[14]

In addition to these statutory provisions, there is another layer of protection afforded by the case law.

[14] Section 24 of the Refugees Act

3. CASE LAW

3.1. SAFE FROM DETENTION AND DEPORTATION WHILST THE ASYLUM CLAIM IS PENDING

3.1.1. AMAN[15]

Mr Mustafa Aman Arse arrived in South Africa from Ethiopia. He did not speak English and could not convey his wish to seek asylum to the officials who arrested and detained him. After his arrest, he spent some time in a police cell. Home Affairs transferred Mr Aman to the Lindela Repatriation Centre. The purpose of his detention was for him to be deported back to Ethiopia. The Determination officer dismissed his asylum application. Eventually, Mr Aman gained access to pro bono lawyers. At this stage, his appeal had been heard but not decided. The Refugee Appeal Board heard Mr Aman's appeal whilst he was in immigration detention in the absence of his lawyers. Mr Aman launched urgent proceedings to the High Court to challenge the lawfulness of his detention and review his appeal.

The High Court accepted that Mr Aman's detention was unlawful, but would only grant a conditional release. The conditions included an undertaking by a resident of South Africa to provide Mr Aman with shelter; that Mr Aman should pay R 2000 as security to the nearest inspection or Refugee Reception Office and that he should report to the nearest Refugee Reception Office every Tuesday and Friday pending the outcome of his appeal to the Refugee Appeal Board.[16] Mr Aman did not have

[15] Arse v Minister of Home Affairs 2012 (4) SA 544 (SCA)

[16] Arse para 4 -
"Willis J was concerned that '[w]hile the court obviously has to have regard to the importance of a person having freedom, the court must also have regard to the practicalities that would arise in ordering the release of a person such

R 2 000. Nor did he know any resident who could provide that undertaking. He also did not have money for transport to report twice a week. The conditions could not be agreed to. In any event, his legal advisor advised him not to - as he was being unlawfully detained and should be unconditionally released. However, because he did not accede to the proposed conditions the Court -despite concluding is detention was unlawful - refused to release Mr Aman. Also, even though the Refugees Act entitled Mr Aman to "sojourn" in the Republic, the High Court interpreted "sojourn" to include being detained against his will.[17]

The appellate Court overturned all these findings on appeal. The appellate Court held that the detaining authority must justify detention. If it cannot, then unconditional release must follow.[18] The principle informing this is the long-standing principle that a "person has an absolute right not to be deprived of his freedom

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as this [applicant], who cannot even comply with eminently reasonable conditions put forward by the respondents."

[17] Arse para 4 -
"He considered whether there was any "absolute" statutory unlawfulness in the continuing detention of the appellant. Referring to s 22 of the Refugees Act he found that the right to 'sojourn' does not necessarily entail a right to go about freely in South Africa with[out] any restrictions. The applicant is sojourning in South Africa; he is not going to be deported or sent out of South Africa pending the outcome of his appeal relating to asylum status. He is indeed sojourning in South Africa, albeit under restriction."

[18] Arse para 5 -
"Once it is established that a person has been detained, the burden justifying the detention rests on the detaining authority. In Principal Immigration Officer and Minister of Interior v Narayansamy Sir John Wessels stated:
'Apart from any legislative enactment, there is an inherent right in every subject, and in every stranger in the Union, to sue out a writ of habeas corpus. This right is given not only by English law but also by the Roman-Dutch law. Prima facie therefore every person arrested by warrant of the Minister, or by any other person, is entitled to ask the Court for his release, and this Court is bound to grant it unless there is some lawful cause for his detention. In English law, the remedy is known as habeas corpus, but in Roman-Dutch law, it is referred to as the interdictum de homine libero exhibendo. Both terms are used in our law."

for one second longer than necessary by an official who cannot justify his detention."[19]

The appeal Court confirmed the right of an asylum seeker to not be detained - even on what the High Court viewed as "imminently reasonable conditions". The reasoning of the Court is one found outside the parameters of the Refugees Act. Rather, the basis of the Court's reasoning was found in our common law[20] and section 35(2)(d) of the Constitution entitles any person who is detained to challenge his or her detention before a court and, if

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[19] Silva v Minister of Safety and Security 1997 (4) SA 657 (W) 661H-I.

[20] As long ago as 1879, De Villiers CJ stated that where detention is unlawful, the only course open was to order the release of the person immediately. In In Re Willem Kok and Nathaniel Balie19 De Villiers CJ said:

> "It is unnecessary to consider the rights which under the Roman-Dutch law free persons had to a release or to the writ de homine libero exhibendo, for, in my opinion, the rights of the personal liberty, which persons within this colony enjoy, are substantially the same, since the abolition of slavery, as those which are possessed in Great Britain. Where those rights are violated, this Court would at least have the same power of restraining such violation as the Supreme Court of Holland had to interdict the infringement without sufficient cause of the rights to personal liberty as understood by the Roman-Dutch law. But in addition to the powers vested in this Court under the Roman-Dutch law, there are certain statutory provisions, which not only add to the powers of the Court, but make it the bounden duty of the Court to protect personal liberty whenever it is illegally infringed upon ... Supposing that the applicants had been detained in one of the ordinary gaols of the colony, and it had been brought to the notice of the Court that they were so kept without a lawful warrant, it surely would have been competent for the Court to call upon the gaoler to produce the prisoners and justify the detention. Can it then make any difference that they are detained in a military fortress instead of an ordinary gaol? I think not. In either case, the person in whose custody they are is bound to produce his warrant or other authority for detaining them, and in case the return to the order of Court be found to be clearly bad it would be the duty of the Court, under ordinary circumstances, to order their discharge. But then it is said the country is in such an unsettled state, and the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not, in my opinion, to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country. The Civil Courts have but one duty to perform, and that is to administer the laws of the country without fear, favour or prejudice, independently of the consequences which ensue."

the detention is unlawful, "to be released."[21] The Court concluded the Constitution prohibits the imposition of conditions on a person such as Mr Aman, for his release.

In *Aman*, the Supreme Court of Appeal confirmed, in the main, the prohibition against the detention of an asylum seeker whilst Home Affairs considers their claims. The Court held that the right of an asylum seeker to "sojourn" meant to move freely within South Africa.

3.1.2. SAIDI[22]

An asylum seeker requires a valid permit to stave off detention. If an asylum seeker is found without such a permit or with an expired permit, they are susceptible to detention and deportation. If detained and deported, it is the end of their asylum claim. These permits, therefore, have to be repeatedly renewed, whilst Home Affairs adjudicates the claim. The adjudication of a claim consists of a hearing, and if unsuccessful an appeal and a review to the High Court.[23]

Home Affairs, as a matter of practice, generally extended the permit during the appeal and the review to the High Court. The permit ensures an asylum seeker would not be arrested, detained and deported before the finalisation of their asylum claim. However, in 2015 a new official within Home Affairs did away with the practice and unilaterally decided to refuse to renew permits pending reviews to the High Court. As a result, many asylum

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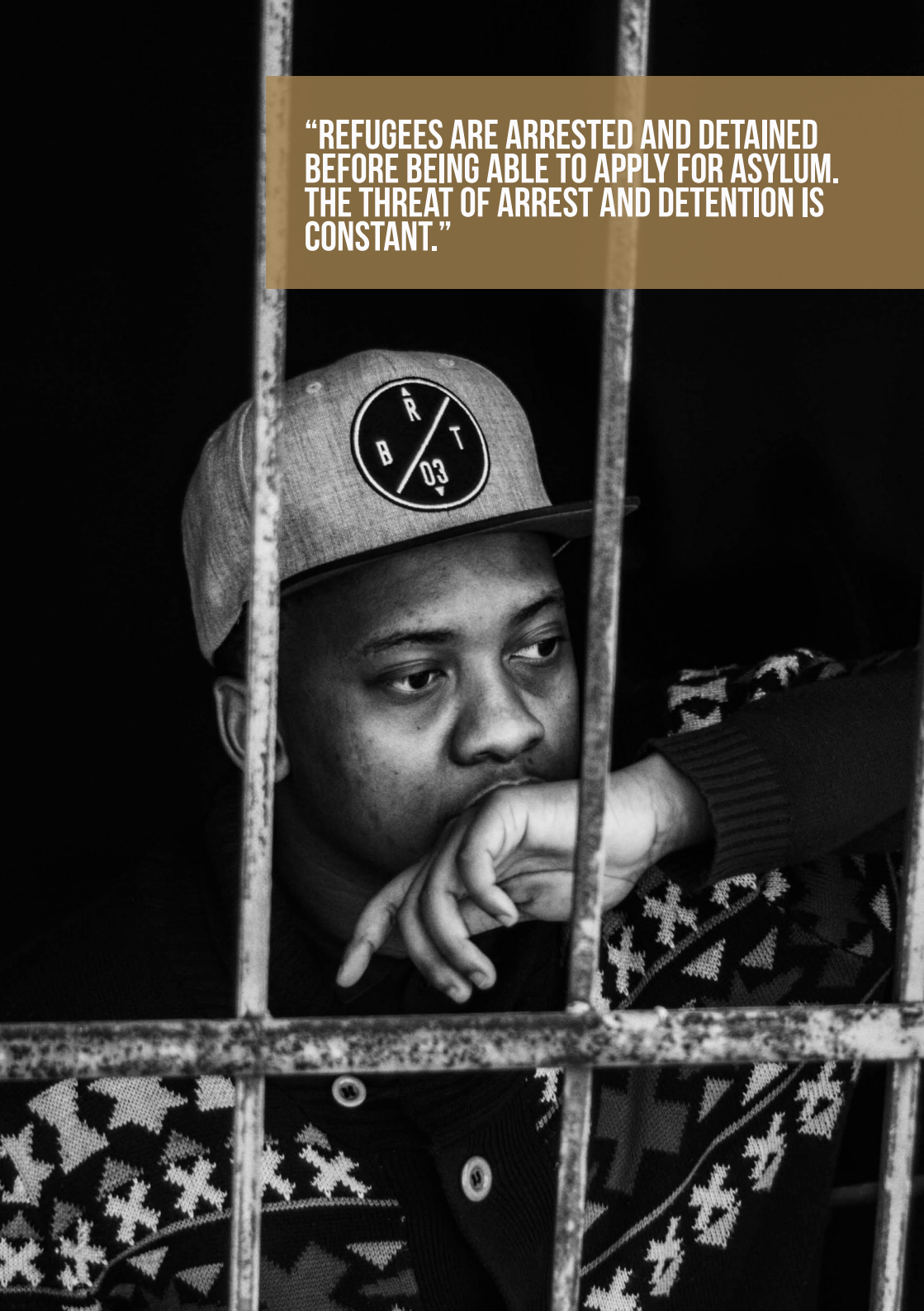
[21] The Court also contrasted this with section 35(1)(f) which allows a person arrested for allegedly committing an offence to be released from detention if justice permits 'subject to reasonable conditions".

[22] Saidi v Minister of Home Affairs 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC)

[23] In certain numbered instances the appeal lies to the Standing Committee on Refugee Affairs. In the event of a refugee status determination officer rejecting an application as manifestly unfounded, abusive or fraudulent, the decision is to be reviewed by the standing committee, which may receive new evidence to confirm or set aside the decision.

“REFUGEES ARE ARRESTED AND DETAINED BEFORE BEING ABLE TO APPLY FOR ASYLUM. THE THREAT OF ARREST AND DETENTION IS CONSTANT.”



seekers awaiting a High Court ruling on their asylum claims did not have asylum seeker permits renewed. They were at risk of being arrested, detained and deported. They feared losing their employment and access to their bank accounts. Their children were in danger of being removed from school, and they and their families would struggle to gain access to medical care. They also faced the real risk of being deported before being granted refugee status. In this context, Mr Saidi and others, approached the High Court to compel Home Affairs to renew the permits until the High Court had considered their reviews.

The Court, again, favoured an approach that would strengthen an asylum seeker's ability to access the refugee framework. The Court expressly supported the interpretation that "better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application".[24] The constitutional protections are to prevent exposure "to the possibility of undue disruption of a life of human dignity" and includes a "life of enjoyment of employment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference."[25]

The reasoning of the Court was that to not provide permits pending a High Court Review "exposes asylum seekers to the real risk of refoulement in the interim whilst the outcome of judicial review is pending. Without a temporary permit, there is no protection".[26] The principle the Court pinned this reasoning onto is non-refoulement. The Court held that litigation with no guarantee, "being what it is" provides "cold comfort" as it might

[24] Saidi para 18
[25] Saidi para 18
[26] Saidi para 30

"expose the asylum seeker to the risk of return."[27] The Court concluded that an act that makes refoulement possible, whilst an asylum claim is still being finalised is "a breach of the principle of non-refoulement."[28]

The Constitutional Court's approach in Saidi meant, in practice, that asylum seekers were immune from arrest, detention and deportation until they had exhausted the last remedy available to them - a High Court review.

After Mr Aman and Mr Saidi's cases, asylum seekers were free from detention and protected from arrest pending the finalisation of their refugee claims.

[27] Saidi para 30
[28] Saidi para 30

3.2. PERMITTED TO APPLY FOR ASYLUM AT ANY STAGE

3.2.1. BULA[29]

Mr Bula was one of 40 asylum seekers who were arrested and detained before they could apply for asylum. From within Lindela, their lawyers wrote letters to the Department of Home Affairs to apply for asylum. Home Affairs denied this request stating they ought to have applied earlier. It was unclear, at least to us, how 40 Amharic speaking Ethiopians averaging 20 years of age - who were on South African soil after walking here over four years- ought to have done so. Home Affairs did not share this curiosity, and flatly denied Mr Bula and his co-applicants access to the asylum process.

Mr Bula and his co-applicants obtained legal representation who brought an urgent application to permit them to apply for asylum and be released from immigration detention. The High Court refused the relief, and Mr Bula and his co-applicants had to await their appeal in immigration detention. The appellate Court heard their case on an urgent basis. The appellate Court, again, overturned the High Court's finding and held that the regulations to the Refugees Act do not require an individual to indicate an intention to apply for asylum immediately. A person is also or precluded from applying for asylum after coming into contact with Home Affairs.[30] The Court held that the purpose of the section was to "ensure that where a foreign national indicates an intention to apply for asylum, the regulatory framework of the

[29] Bula v Minister of Home Affairs 2012 (4) SA 560 (SCA)

[30] Regulation 2(2) ought to have been the starting point as the appellants clearly fell within its ambit. They had not lodged an application within the terms set out in Regulation 2(1)(a). The word 'encountered' in Regulation 2(2) must be given its ordinary meaning which is to meet or come across unexpectedly.

Refugees Act kicks in, ultimately to ensure that genuine asylum seekers are not turned away." The reasoning of the Supreme Court of Appeal, has at its heart, the aim to protect asylum seekers' access to the refugee framework. The Court stated 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."[31]

This position was strengthened in *Abdi*.[32] Mr Abdi was also prevented from applying for asylum. The Supreme Court of Appeal restated the asylum seeker's right to apply at a later stage but also cemented Home Affairs' duties to assist such an asylum seeker. The Court stated categorically that "the Department's officials have a duty to ensure that intending applicant for refugee status are given every reasonable opportunity to file an application with the relevant refugee reception office - unless the intending applicant is excluded in terms of section 4 of the Act.'[33] Again, the courts increased access to protections.

The impact of *Bula* and *Abdi* is that an asylum seeker can apply - even at a late stage and that Home Affairs' officials must ensure that asylum seekers are given every reasonable opportunity to apply.

3.2.2. RUTA[34]

Mr Ruta entered South Africa in December 2014. The Rwandan government dispatched him to South Africa as an intelligence agent on a mission that he would only know after arrival. The mission, he learnt on arrival, was to assassinate a leader of an

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31 Bula para 80

32 Abdi v Minister of Home Affairs [2011] ZASCA 2; 2011 (3) SA 37 (SCA)

33 Abdi para 22

34 Ruta v Minister of Home Affairs 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC)

exiled opposition party. He immediately decided against it. Having dissociated himself from this assassination mission, Mr Ruta approached the office of the Directorate for Priority Crimes Investigation and alerted them of his position, offering his cooperation in their investigation. Soon after this, Mr Ruta's home was attacked by unknown gunmen. The home was organised by a Rwandan government agent who had received him in South Africa. The Hawks placed Mr Ruta in a safe house under the Witness Protection Programme of the National Directorate of Public Prosecutions. It was while under the Witness Protection Programme that Mr Ruta repeatedly made known to the Hawks his desire to apply for asylum, as he had felt that his dissociation from the disclosed assassination mission meant that he could no longer return to Rwanda without risking his safety and, possibly, his life. This request was never met and was instead frustrated by the Hawks. Mr Ruta sought assistance from the Court for him to apply for asylum. The High Court agreed with Mr Ruta and ordered that he must be allowed to apply for asylum. However, on appeal, the majority of the Supreme Court of Appeal did an about-turn on the previous judgments of Bula and Abdi and dismissed Mr Ruta's request to be provided with an opportunity to apply for asylum.

Mr Ruta appealed to the Constitutional Court. It was the first case, dealing with access to the refugee framework, that made its way to the apex Court. The Court considered the Supreme Court of Appeal's decision in Ruta to be a departure from the established jurisprudence. The Court held that there was an established body of doctrine that "thrummed with consistency, principle and power".[35] The established jurisprudence decided that asylum applicants held in an "inadmissible facility" at a port of entry into the Republic enjoy the protection of the Refugees

[35] Ruta SCA para 16

Act and of the courts (*Abdi*);[36] ordered the release from detention of an asylum seeker[37] whose asylum transit permit[38] had expired, and whose application for asylum had been rejected by the Refugee Status Determination Officer[39] but whose appeal before the Refugee Appeal Board[40] was pending (*Arse*);[41] affirmed that if

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[36] Abdi v Minister of Home Affairs [2011] ZASCA 2; 2011 (3) SA 37 (SCA)

[37] Section 21(1) of the Refugees Act provides that an application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.

[38] Section 23 of the Refugees Act provides if the Minister has withdrawn an asylum seeker permit in terms of section 22(6), he or she may, subject to section 29, cause the holder to 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.
Section 29 provides:

> "(1) No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a judge of the High Court of the provincial division in whose area of jurisdiction the person is detained, designated by the Judge President of that division for that purpose and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days.
> (2) The detention of a child must be used only as a measure of last resort and for the shortest appropriate period of time."

[39] Section 22(2) of the Refugees Act provides that the Refugee Reception Officer concerned (a) must accept the application form from the applicant; (b) must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard; (c) may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and (d) must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of section 24.
Section 24(1) provides that—

> "Upon receipt of an application for asylum the Refugee Status Determination Officer—
> (a) in order to make a decision, may request any information or clarification he or she deems necessary from an applicant or Refugee Reception Officer;
> (b) where necessary, may consult with and invite a UNHCR representative to furnish information on specified matters; and
> (c) may, with the permission of the asylum seeker, provide the UNHCR representative with such information as may be requested.

[40] Section 14(1) of the Refugees Act provides that the Refugees Appeal Board, which the Act established in section 12, must (a) hear and determine any question of law referred to it in terms of this Act; (b) hear and determine any appeal lodged in terms of this Act; (c) advise the Minister or Standing Committee regarding any matter which the Minister or Standing Committee refers to the Appeal Board.

[41] Arse v Minister of Home Affairs 2012 (4) SA 544 (SCA)

a detained person evinces an intention to apply for asylum, he or she is entitled to be freed and to be issued with an asylum seeker permit valid for 14 days[42] (*Bula*);[43] and conclusively determined that false stories, delay and adverse immigration status nowise preclude access to the asylum application process, since it is in that process, and there only,[44] That the truth or falsity of an applicant's story is to be determined.[45]

The Constitutional Court was quick to point out that the precedents were plain that even "considerable delay, and possible untruths" do not obstruct access at the outset to the asylum seeker process. The Court held that the courts had been unequivocal. In turning its gaze to the Department, the Court held that its approach to asylum applications was "suffocatingly occlusive".[46]

The Court acknowledged the hurdles standing in the way of applying for asylum -

> "What this appears to envisage is a kind of desktop-management of self-identifying refugees who have the

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[42] The 14-day period is found in regulation 2(2) of the Refugee Regulations issued in terms of section 38 of the Refugees Act. Regulation 2 provides:

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

[43] Bula v Minister of Home Affairs 2012 (4) SA 560 (SCA)

[44] Section 24(3) of the Refugees Act mandates a Refugee Status Determination Officer to (a) grant asylum; or (b) reject the application as manifestly unfounded, abusive or fraudulent; or (c) reject the application as unfounded, or (d) refer any question of law to the Standing Committee for Refugee Affairs established by sections 9 to 20 of the Refugees Act.

[45] Ersumo v Minister of Home Affairs [2012 (4) SA 581 (SCA)

[46] Ruta para 49

opportunity and the agency to self-describe as asylum seekers and claim the consequent statutory entitlements.

The realities of our continent, of Europe, of North America and of South Asia, and perhaps elsewhere, seem more complex. Asylum seekers do not arrive only where they should, nor do they always have the opportunities and agency to claim what they should. This, both international refugee law and international human rights law recognise. An appreciable number of asylum seekers are informal cross-border migrants who do not arrive at recognised ports of entry and are not able to claim desktop-afforded privileges."[47]

The protections granted in *Aman*, *Saidi, Bula* and *Abdi* were confirmed expressly and with conviction by our apex Court. An asylum seeker could now apply anytime, and officials from Home Affairs were mandated to assist without the fear of arrest or detention. However, Parliament enacted an amendment to the Refugees Act.

[47] Ruta paras 49 - 40

- WITHOUT FAIL, OUR COURTS HAVE SHOWN A COMMITMENT TO REMOVING BLOCKAGES AND IMPROVING ACCESS TO THE REFUGEE SYSTEM.
- THE COURTS REJECTED THE PREMISE THAT A DELAY IN SEEKING ASYLUM CLOSES THE DOOR FOR AN ASYLUM SEEKER.
- JURISPRUDENCE HAS BUILT. THE SCAFFOLDING NECESSARY TO SUPPORT THOSE IN THE PRECARIOUS POSITION OF HAVING TO APPLY FOR ASYLUM.

- THE NATURE OF SEEKING REFUGE IS, BY DEFINITION, PRECARIOUS. THE PRECARIOUS NATURE OF SEEKING ASYLUM IS MADE WORSE BY A REFUGEE SYSTEM THAT IS NOT EASILY WITHIN REACH.
- THE REFUGEES ACT CONTAINS SEVERAL SAFEGUARDS THAT AIM TO INCREASE ACCESS TO THE PROTECTIONS AFFORDED UNDER THE REFUGEE REGIME. THE REFUGEES ACT PROTECTS AGAINST DETENTION, PROSECUTION AND DEPORTATION.
- THE REASONING OF THE SUPREME COURT OF APPEAL [IN BULA], HAS AT ITS HEART, THE AIM TO PROTECT ASYLUM SEEKERS' ACCESS TO THE REFUGEE FRAMEWORK.

- THE PROTECTIONS GRANTED IN AMAN, SAIDI, BULA AND ABDI WERE CONFIRMED EXPRESSLY AND WITH CONVICTION BY OUR APEX COURT [IN RUTA]. AN ASYLUM SEEKER COULD NOW APPLY ANYTIME, AND OFFICIALS FROM HOME AFFAIRS WERE MANDATED TO ASSIST WITHOUT THE FEAR OF ARREST OR DETENTION. HOWEVER, PARLIAMENT ENACTED AN AMENDMENT TO THE REFUGEES ACT [WHICH MAY ALTER THE PROTECTIONS GRANTED].
- THE REFUGEES ACT AMENDMENT CAME INTO FORCE ON 1 JANUARY 2020. ONE OF THE BIG CHANGES IS THE INTRODUCTION OF AN AMENDED SECTION 21... THE IMPACT OF THE SECTION IS FELT BY THE THREE WORDS "WITHIN FIVE DAYS" OF ENTRY. IMPLICIT IN THE SECTION IS THAT IF AN ASYLUM SEEKER DOES NOT APPLY FOR REFUGEE STATUS SHORTLY AFTER ARRIVAL - THEY CAN BE DENIED AN OPPORTUNITY TO APPLY FOR ASYLUM. THE SECTION STANDS IN STARK CONTRAST TO THE FINDINGS IN ABDI, BULA AND RUTA.
- THE COURTS HAVE CONSISTENTLY EXPANDED ACCESS TO REFUGEE PROTECTION. THE COURTS HAVE HINGED THAT EXPANSION AS BEING FEATURES OF THE PRINCIPLE OF NON-REFOULEMENT.
- CHANGING THE TEXT OF THE REFUGEES ACT WILL NOT BE THE END OF THE INQUIRY BY A COURT [ON]... AN ASYLUM SEEKER['S]... ABILITY TO GAIN ACCESS TO THE REFUGEE FRAMEWORK. ULTIMATELY, OUR COURTS HAVE, MUST AND WILL CONTINUE TO DECIDE THE ISSUE THROUGH THE LENS OF THE PRINCIPLE OF NON-REFOULEMENT.

3.3 KEEPING THE ASYLUM APPLICATION CENTRES OPEN

The Refugees Act prescribes that an asylum seeker can only apply for asylum at a Refugee Reception Office. Practically, an asylum seeker has to apply for asylum at the Office and return, usually every three months, to renew their asylum claim, whilst the application is pending. If the permit is not renewed, Home Affairs treats the person as being in the country illegally and they are subject to arrest, detention and deportation. Asylum seekers therefore have to take off work repeatedly to attend at the office every three months. It is a costly exercise for many asylum seekers as they have to lose a work day and pay for transport to the closest office. Many asylum seeker permits lapse because it is arduous to repeatedly renew the permit.

Home Affairs has over the years, repeatedly closed these offices. The effect of closing the offices is to make an already hard process of applying for asylum and keeping that claim alive to a near impossible one. Home Affairs closed the offices in Johannesburg, Cape Town, Port Elizabeth as well as the TIRRO (Tshwane Interim Refugee Reception Office). In fact, the Cape Town offices were closed on two separate occasions.

Over the course of a couple of years, Home Affairs essentially halved the number of offices that were open. These closures were repeatedly and successfully challenged.

The Scalabrini Centre of Cape Town challenged Home Affairs decision to close down the office in Cape Town. The Supreme Court of Appeal held that the closure was unlawful.[48] The Court held that there must be as many offices as "needed

[48] Minister of Home Affairs and Others v Scalabrini Centre, Cape Town and 2013 (6) SA 421 (SCA) ("Scalabrini I")

for the purposes of the Act."[49] The Court set the decision aside, on the basis that Department failed to consult with the public in an acceptable manner regarding the closure of the offices. The decision was one that focused on the process used by Home Affairs to close the office and Home Affairs was mandated to consult prior to making a decision. Despite this order, Home Affairs again in 2014, after a consultation meeting, again decided to close down the office in Cape Town.

Scalabrini and the Somali Association of South Africa headed back to court. Again, the Supreme Court of Appeal sets aside the decision to close the office.[50] However, on this occasion the court did so on substantive grounds. The Court considered that Home Affairs' own statistics show that in the first four months of 2012, there were 5 946 new applications for asylum at the Cape Town Refugee Reception Office - about 1 500 per month. In the same period, there were 52 666 applications for extensions of asylum seeker permits.[51] The Court concluded that the decision to close the office ignored relevant considerations and was therefore irrational. The Court held that Home Affairs had failed to consider whether the Cape Town Refugee Reception Office was necessary for the purposes of the Refugees Act.[52]

Similarly, the decision to close the Port Elizabeth office was also successfully challenged. It had to be challenged twice. The first time, after a decision in 2011, the High Court set the decision aside. The Court had regard to an earlier decision to close the office. The Court held that decision, taken in 2011, made light of the fact that several communities of refugees and asylum seekers, including some 14 000 Somali refugees (who are represented

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49 Scalabrini I para 71

50 Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others 2018 (4) SA 125 (SCA) ("Scalabrini II")

51 Scalabrini II para 39

52 Scalabrini II para 52

in these proceedings by the first respondent), reside and work in that geographic region. The Court considered that these communities provide vital support to new asylum seekers who have little to no financial resources and means of self-support. The Court noted that the relevant authorities appear to obfuscate the real complaint, which is not that there should be an office wherever asylum seekers or refugees choose to live, but that the offices should be sufficient in number and located so that asylum seekers and refugees are reasonably able to access the services that they require and to which they are entitled under the Act. However, despite the court ruling that the 2011 decision to close the office was unlawful, Home Affairs did not comply with that order. Therefore, in 2014 the decision was challenged a second time. On the second occasion, the High Court[53] not only set the decision aside but also granted a supervisory order in an attempt to ensure court oversight of Home Affair's compliance with the court order.

These closures have been repeatedly litigated. In all of them Home Affairs was mandated to re-open the offices. However, Home Affairs' compliance with these orders have ranged from compliance to malicious compliance. To date, few of the closed offices have been re-opened or sufficiently staffed to serve the asylum seeker applications.

[53] Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another 2015 (3) SA 545 (SCA)

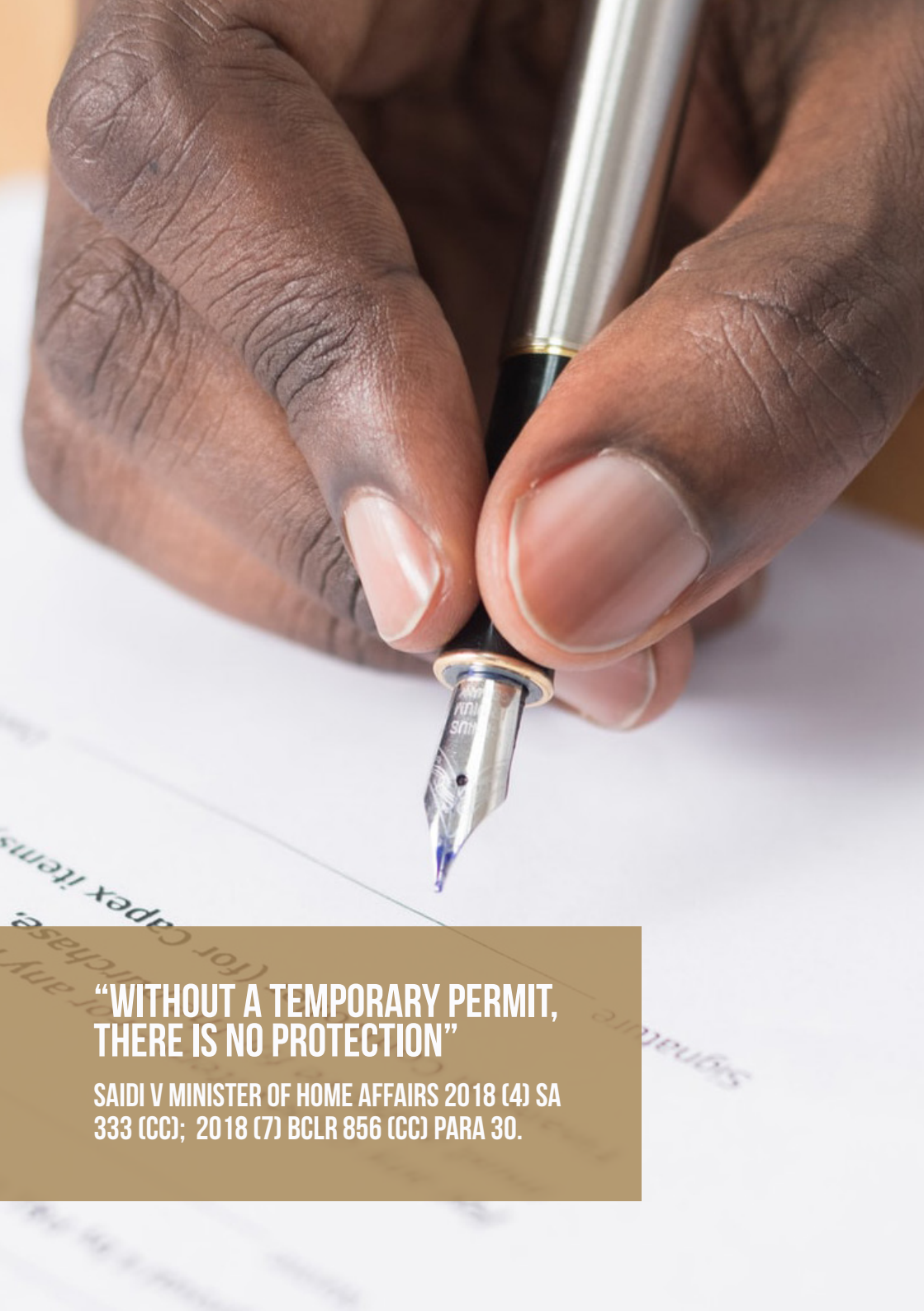
4. CLAW BACK FROM PARLIAMENT

The Refugees Act Amendment came into force on 1 January 2020. One of the big changes is the introduction of an amended section 21. The previous section 21 protected an asylum seeker from any proceedings against her in respect of her unlawful entry into or presence within the Republic if she has applied for asylum. The jurisdictional requirement that kicks the protections of section 21 into gear is an application for asylum. However, the amended section 21 provides -

> 21. Application for asylum.—
> (1) (a) Upon reporting to the Refugee Reception Office within five days of entry into the Republic, an asylum seeker must be assisted by an officer designated to receive asylum seekers.

The impact of the section is felt by the three words "within five days" of entry. Implicit in the section is that if an asylum seeker does not apply for refugee status shortly after arrival - they can be denied an opportunity to apply for asylum. The section stands in stark contrast to the findings in Abdi, Bula and Ruta. In fact, Mr McKay, in defence of the then proposed amendment said:

> "With regard to the five-day period to report, he said that there were people who had been arrested after staying in the country for 12 months or more and once they had arrived at the Lindela Holding Centre, they had expressed their intention to seek asylum. South Africa was saying that people should express their intention to apply for asylum within five days of their arrival in the country. The Green Paper dealt with international migration and was not restricted to



"WITHOUT A TEMPORARY PERMIT, THERE IS NO PROTECTION"

SAIDI V MINISTER OF HOME AFFAIRS 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) PARA 30.

> refugees. It looked at migration in a comprehensive manner. It would take long to be able to table it, hence it had to accommodate all the views of the public."[54]

It appears that the amendment was introduced to undo the findings of our courts that asylum seekers can apply - even if they only seek to do so from within immigration detention. During the debates, no other explanation for the five-day limit was provided. Despite clarity being sought whether this would be sufficient time or practically possible - no concrete justification for the five-day limit was given.

The Scalabrini Centre submitted that the five-day limit "would marginalise a high number of asylum-seekers and was thus unreasonable". The Centre submitted that the Bill did not "take into consideration vulnerable groups such as pregnant women and people with disabilities". In addition, the Bill was -

> "adding a workload to the existing one, which the DHA had no capacity to deal with. For example, refugees and asylum-seekers were spending a day in queues without being assisted. Some refugees or asylum-seekers were holders of expired documents because it was difficult to access RROs. The Bill was not catering for asylum-seekers who were living inside the country, for example, Cape Town."

It was contended that the Bill failed to take "into consideration that asylum-seekers came into the country with nothing, and the first thing to do in those circumstances was to find basic necessities of life, like food and accommodation?" Practical examples were given of how unreasonable the five day period would be, for

[54] Refugees Amendment Bill [B12-2016]: public hearings 15 November 2016 https://pmg.org.za/committee-meeting/23661/ accessed on 26 November 2020

example, the example of a Burundian asylum-seeker who had come to South Africa through Namibia. He came to Cape Town. Since there was no RRO in Cape Town, he had had to go to report in Durban. This had required him to have a certain amount of finance in order to get to Durban.

Despite these debates, the Bill was promulgated and came into force on 1 January 2020. It remains to be seen whether our Courts views the five-day requirement as unjustifiably detracting from the principle of non-refoulement. It also remains to be seen whether Home Affairs uses the five day period to prevent people from applying for asylum or if Home Affairs will contend that it may detain people pending their applications.

5. CONCLUSION

In the series of cases discussed above, *Arse, Bula, Abdi, Saidi* and *Ruta*, the courts viewed the need to permit asylum seekers to apply and protect them from detention - even after significant delays - as a feature giving effect to the principle of non-refoulement. The right to not be detained whilst an asylum application was being adjudicated, similarly, was a feature of the principle of non-refoulement and not based solely on the text of the Refugees Act. Without fail, all judgments referred to the protections afforded to asylum seekers to gain access to the refugee framework found the basis to be the principle of non-refoulement.

The general march of the courts' jurisprudence in favour of increasing access to protection is seen from the litigation concerning the closing of the refugee reception offices. The reasoning in these judgments all stem from the premise that the purpose of the refugees framework is to protect asylum seekers.

The courts have consistently expanded access to refugee protection. The courts have hinged that expansion as being features of the principle of non-refoulement. Changing the text of the Refugees Act will not be the end of the inquiry by a Court in deciding whether the process an asylum seeker must go through detracts from their ability to gain access to the refugee framework. Ultimately, our courts have, must and will continue to decide the issue through the lens of the principle of non-refoulement.

SIHMA

The Scalabrini Institute for Human Mobility in Africa (SIHMA) was established in Cape Town, South Africa, in 2014.

Our Vision is an Africa where the human rights of people on the move are ensured and their dignity is promoted.

Our Mission is to conduct and disseminate research that contributes to the understanding of human mobility and informs policies that ensure the rights and dignity of migrants, asylum seekers and refugees in Africa.

We disseminate the findings of our research through our Journal AHMR (African Human Mobility Review), social media and our website **www.sihma.org.za**.

SCALABRINI NETWORK

SCALABRINI MIGRATION STUDY CENTERS

SIMN
Scalabrini International Migration Network

SIHMA is part of the **Scalabrini International Migration Network** (SIMN), and joins an existing **Network of Scalabrini Study Centres** around the globe:

CSER (Centro Studi Emigrazione Roma), established in 1964 in Rome (Italy)
Journal: Studi Emigrazione
www.cser.it

CIEMI (Centre d'Information et Études sur les Migrations Internationales), established in 1971 in Paris (France)
Journal: Migrations Société
www.ciemi.org

CMS (Center for Migration Studies of New York,) established in 1969 in New York (USA)
Journal: International Migration Review (IMR)
and Journal on Migration and Human Security (JMHS)
www.cmsny.org

SMC (Scalabrini Migration Center,) established in 1987 in Manila (Philippines)
Journal: Asian and Pacific Migration Journal (APMJ)
www.smc.org.ph

CEM (Centro de Estudios Migratorios), established in 1985 in São Paulo (Brazil)
Journal: Travessia
www.missaonspaz.org

CEMLA (Buenos Centro de Estudios Migratorios Latinoamericanos), established in 1985 in Buenos Aires (Argentina)
Journal: Estudios Migratorios Latinoamericanos (EML)
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PEOPLE BEHIND THE FIGURES