



A
PRACTITIONER'S
GUIDE TO
IMMIGRATION
DETENTION IN
SOUTH AFRICA

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# ACKNOWLEDGEMENTS

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# ACRONYMS AND LEGISLATION SHORTHAND

ACHPR African Charter on Human and People's Rights, 1981

ACMS African Centre for Migration & Society

CAT Convention against Torture and Other Cruel,

Inhuman and Degrading Treatment or Punishment, 1984

Children's Act Children's Act 38 of 2005

Citizenship Act Citizenship Act 88 of 1995

Criminal Law Amendment Act 105 of 1977

Amendment Act

CPA Criminal Procedure Act 51 of 1977

**DHA** Department of Home Affairs

**Extradition Act** Extradition Act 67 of 1962

First Refugees Refugees Amendment Act 33 of 2008

Amendment Act

Immigration Act Immigration Act 13 of 2002

**Immigration** Immigration Regulations in GNR.413 GG 37679 of 22 May 2014

Regulations, 2014

IOM International Organisation for Migration

LHR Lawyers for Human Rights

PAJA Promotion of Administrative Justice Act 3 of 2000

OPCAT Optional Protocol to the Convention against Torture and other

Cruel, Inhuman or Degrading Treatment or Punishment, 2003

RAA Refugee Appeals Authority

RAB Refugee Appeal Board

Refugees Act Refugees Act 130 of 1998

**Refugees** Refugees Amendment Act 11 of 2017

Amendment Act

**Refugees** Refugees Regulations in GN 1707 GG 42932

Regulations, 2018 of 27 December 2019

RRO Refugee Reception Office

**RSDO** Refugee Status Determination Officer

SAHRC South African Human Rights Commission

SADC Extradition SADC Protocol on Extradition, Luanda, 3 October 2002

Protocol

SCA Supreme Court of Appeal

SCRA Standing Committee for Refugee Affairs

UNCRC United Nations Convention on the Rights of the

Child, 1989

UNHCR United Nations High Commissioner for Refugees

1951 UN Convention Convention Relating to the Status of Refugees, 1951

1954 UN Stateless Convention relating to the Status of Stateless Persons,

Convention 1954

1967 Protocol Protocol Relating to the Status of Refugees, 1967

1969 OAU Organisation of African Unity Convention Governing the

**Convention** Specific Aspects of Refugee Problems in Africa, 1974

# FOREWORD

'No one shall be subjected to arbitrary detention, arrest or exile' – Article 9 of the Universal Declaration of Human Rights

Management of the movement of people globally has been used as a political football by various leaders and states over time. The danger of this opportunism is that it frequently takes the form of "othering" and scapegoating of migrants, refugees and asylum seekers in society. This makes space for law enforcement agents to espouse sentiments of hatred and discrimination in what has become known as the phenomenon of institutionalised xenophobia.

The purpose of this handbook is to provide a detailed guide to the law of immigration detention in South Africa today. It is a living document. It is intended to map out application of these laws and policies to demonstrate how laws and policies are impacting the management of migration. It is an invaluable contribution as a source of information that aims to debunk myths by pointing out our failings as a democracy with respect to the unlawfulness of arrests, detention and deportation of foreign nationals in South Africa almost as a matter of routine. Just the term 'illegal immigrant' or 'illegal foreigner' is problematic for a variety of reasons, including the manner in which it dehumanises migrants and assumes that any person could be 'illegal.' It is unjust that the majority of foreign nationals who bear the brunt of the failure of immigration officials, SAPS and the military to respect the rule of law are Black African migrants from the continent.

#### **FOREWORD**

This handbook is intended to help address what appears to be an increasingly dehumanising approach to managing the movement of people by the state, in South Africa and elsewhere. It is intended to provide a concise understanding of the operative legal framework and policies, and what these mean in the context of human rights and respect for human dignity – cornerstones of the South African Constitution. Indeed, in speaking to the ethos and vision of the Constitution, this handbook renders clear the need for judicial oversight of the immigration detention process and the procedural safeguards in this context that must be followed.



The relevant executive arm of the state, in the form of the Department of Home Affairs, has been forced to court repeatedly over the last 20 years, and significant victories have been won for refugee and migrant rights especially through public interest litigation. But in many respects, the Department continues to act with impunity and court rulings are routinely ignored.

This handbook is but one contribution towards strengthening the capacity of those with a material say in the lives of South Africa's refugees, asylum seekers and migrants: the legal fraternity, in its roles as adjudicators and advocates, Parliament, in executing its oversight role, and civil society, in its admirable efforts to ensure accountability.

Sharon Ekambaram, Head of Lawyers for Human Rights' Refugee and Migrant Rights Programme

# TABLE OF CASES

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| FNM v The Refugee Appeal Board and Others (71738/2016) [2018] ZAGPPHC 532; [2018] 4 A      |
| SA 228 (GP); 2019 (1) SA 468 (GP)  |
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| Gavrić v Refugee Status Determination Officer, Cape Town and Others CCT217/16) [2018] ZACC |
| 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC)  |
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| Ersumo v Minister of Home Affairs and Others [2012] SASCA 31; 2012 (4) SA 581              |
| (SCA)  |

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| Saunda and Others v President of the Republic of South Africa and Others                 |
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| 996 (4) SA 187 (CC); 1996 (6) BCLR 788 (15 May 1996)                                     |
| Coyabe and Others v Minister for Home Affairs  |
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| awyers for Human Rights v Minister of Home Affairs and Others (CCT38/16) [2017] ZACC 2   |
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| Minister of Home Affairs and Others v Rahim and Others (CCT124/15) [2016] ZACC 3; 2016 ( |
| A 218 (CC); 2016 (6) BCLR 780 (CC)   |
| Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and          |
| Constitutional Development and Another v Tsebe and Others (CCT 110/11, CCT 126/1         |
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## TABLE OF CONVENTIONS

African Charter on Human and Peoples' Rights (Banjul Charter), 21 ILM 59, adopted on 27 June 1981 and entered into force on 21 October 1986.

African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49, adopted 1 July 1990 and entered into force 29 November 1999.

African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 49 ILM 86, adopted on 27 October 2009.

American Convention of Human Rights, 1144 UNTS 123, adopted in 1969 and entered into force on 18 July 1978.

Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities, and Privileges of the UNHCR and Its Personnel in the Republic of South Africa, concluded on 6 September 1993.

Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, adopted on 22 November 1984.

Charter of the Fundamental Rights of the European Union (2000/C 364/01), 18 December 2000.

Charter of the Organisation of African Unity, 2 ILM 766, adopted 25 May 1963 and entered into force 13 September 1963.

Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 1465 UNTS 85, adopted on 10 December 1984 and entered into force on 26 June 1987.

Convention on the Elimination of All Forms of Discrimination against Women, 1249 UNTS 13, adopted 18 December 1979 and entered into force 3 September 1981.

Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted 9 December 1948 and entered into force 12 January 1951.

Convention on the Reduction of Statelessness, 989 UNTS 175, adopted on 30 August 1961 and entered into force on 13 December 1975.

Convention on the Rights of the Child, 1577 UNTS 3, adopted on 20 November 1989 and entered into force on 2 September 1990.

Convention Relating to the Status of Refugees, UN General Assembly, 606 UNTS 267, adopted 28 July 1951 and entered into force 4 October 1967.

Convention Relating to the Status of Stateless Persons, 360 UNTS 117, adopted on 28 September 1954 and entered into force on 6 June 1960.

European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 213 UNTS 221, 1950, adopted on 3 September 1953.

International Covenant on Civil and Political Rights, 999 UNTS 171, adopted 16 December 1966 and entered into force 23 March 1976.

International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 195, adopted 7 March 1966 and entered into force 4 January 1969.

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 2220 UNTS 3, adopted 18 December 1990 and entered into force 1 July 2003.

Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, UN General Assembly, 2375 UNTS 237, adopted 18 December 2002 and entered into force 22 June 2006.

Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, adopted on 10 September 1969 and entered into force on 20 January 1974.

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, CAB/LEG66.6, adopted 1 July 2003 and entered into force 25 November 2005.

SADC Protocol of Extradition, adopted 3 October 2002 and entered into force 1 September 2006.

Vienna Convention on Diplomatic Relations, 500 UNTS 95, adopted 18 April 1961 and entered into force 24 April 1964.

Vienna Convention on the Law of Treaties, 1155 UNTS 331, adopted 23 May 1969 and entered into force 27 January 1980.

Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, A/CONF.129/15, adopted 21 March 1986.

# BIBLIOGRAPHY

Allain, J 'The jus cogens nature of non-refoulement' (2001) 13(4) Int'l J. Refugee L. 533.

Amit, R'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *Int'l J. Refugee L.* 458.

Amit, R. 'No way in: Barriers to access, service and administrative justice at South Africa's refugee reception offices' (2012).

Belvedere, F, Pigou, P & Handmaker, J 'Realising rights: The development of health and welfare policies for asylum-seekers and refugees in South Africa' in J Handmaker, LA de la Hunt & J Klaaren (eds) *Advancing Refugee Protection in South Africa* (Berghahn Books, 2008) 242.

Bennett, TW Customary Law in South Africa (Juta, 2004).

Chetail, V & Bauloz, C "Research Handbook on International Law and Migration' (2015) 27(2) Int'l J. Refugee L. 392-394.

Crush, J & Williams, V 'Making up the Numbers: Measuring "Illegal Immigration" to South Africa', Migration Policy Brief No. 3 (Cape Town: Southern Africa Migration Project) (2001).

Dugard, J'International law – a South African perspective' (1994) 862 JS Afr. L 214.

Gibney, MJ & Hansen, R Deportation and the liberal state: the Forcible Return of Asylum Seekers and Unlawful Migrants in Canada, Germany and the United Kingdom (2003).

Lester, E Monitoring immigration detention: practical manual (2014) 28.

Gojer, J & Ellis, A Post-Traumatic Stress Disorder and the Refugee Determination Process in Canada: Starting the discourse (2014).

Goodwin-Gill, GS The Refugee in International Law (1996) 117.

Hathaway, JC "The Global Cop-Out on Refugees." *Int'l J. Refugee L.* 30, no. 4 (2018): 591-604.

Hathaway, JC The Rights of Refugees under International Law (2005) 279.

Hathaway, JC & Storey, H "What is the Meaning of State Protection in Refugee Law?: A Debate." H. Int'l J. Refugee L. 28, no. 3 (2016): 480-92.

Hiropoulos, A. (2017) Migration and detention: A Review of the application of the legal framework on arrest and detention and its impact on non-nationals in South Africa. African Policing Civilian Oversight Forum, October, 2017.

Hiropoulos, A. & Landau, L. (2015). Categories and criminality: How police claims about immigrants and crime are misleading. African Centre for Migration and Society Brief, September, 2015.

International Detention Coalition Legal framework and standards relating to the detention of refugees, asylum seekers and migrants (2011).

Kriger, N. (2007). "Keep Your Head Down": Unprotected Migrants in South Africa. United Kingdom: Human Rights Watch.

Nethery, A & Silverman, S'Immigration Detention: The Migration of a Policy and Its Human Impact' (2016) 28(3) Int'l J. Refugee L. 541-543.

United Nations High Commissioner for Refugees 'Asylum and Migration' available at https://www.unhcr.org/asylum-and-migration.html, accessed on 9 April 2020.

University of Cape Town Refugee Rights Detention Manual 3 ed (2016) 8.

United Nations High Commissioner for Refugees, Guidelines on Statelessness (2012).



Despite legal protections afforded to asylum seekers, refugees and other vulnerable migrant groups in South Africa, the detention and deportation of individuals via the Immigration Act continues to occur without the requisite supervision to ensure these rights are safeguarded. In the absence of independent oversight mechanisms for immigration detention, judicial proceedings and legal intervention are crucial to ensure the adherence of safeguards in our law.



It is challenging on a number of levels for legal practitioners to assist persons detained for immigration purposes. The legal principles governing this area of law have changed markedly over the last few years, as many of the key principles contained in a body of jurisprudence has since been overtaken by amendments to the applicable statutes. In addition, there frequently appears to be a lack of understanding of the rights of such persons amongst government officials, and even members of the legal fraternity, due to the highly specialised nature of this area of the law. The practices surrounding immigration detention likewise vary and are not applied consistently in different parts of the country.

This handbook therefore seeks to provide legal practitioners, magistrates and judges with a guide to navigating the legal principles concerning immigration detention in South Africa. For the purposes of this handbook, 'immigration detention' is any official detention arising as a result of a person's immigration status, such as detention pending verification of identity, detention on criminal charges related to the Immigration Act, or detention pending deportation. This handbook is intended to be one that can continuously be updated as and where relevant, in acknowledgement that the law is neither static nor fixed.

II.
KEY TERMS
AND CONCEPTS

#### (A) Asylum seeker

An asylum seeker is a person who seeks recognition as a refugee in the Republic. Refugee status determination is conducted through a procedure which is determined by and set out in the Refugees Act. The term 'refugee' is defined in section 3 of the Refugees Act. An asylum seeker is a person who is still in the process of having their refugee status determined.

#### (B) Deportation

Deportation is defined in the Immigration Act as the 'action or procedure aimed at causing an illegal foreigner to leave the Republic...' More comprehensively, deportation refers to 'the return of foreign nationals to their country of origin against their will.' The demographic of non-nationals who may be subject to deportation are those who are 'prohibited persons,' 'undesirable persons' or who otherwise do not have 'authorisation to remain in the Republic.' Similarly, migrants who are present in South Africa but to whom admission into the country has been refused or where permission to remain on the territory had never been granted are subject to deportation.

It is worth noting here the implications of overstaying in relation to a declaration of a non-national as an undesirable person. The Director-General may declare 'any person who has overstayed the prescribed number of times' as an undesirable person in terms of the Immigration Act.<sup>7</sup> In this regard, 'overstay is calculated from the date of expiry of the last valid visa.'<sup>8</sup> The effect of overstaying, in terms of the Immigration Regulations, 2014, is summarised as follows:

(c) is a dependent of a person contemplated in paragraph (a) or (b).

<sup>&</sup>lt;sup>1</sup> The Refugees Act 130 of 1998 at s 3.

<sup>&#</sup>x27;Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-

<sup>(</sup>a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or 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

<sup>(</sup>b) owing to external aggression, occupation, foreign domination or 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: or

<sup>&</sup>lt;sup>2</sup> The Immigration Act 13 of 2002 at s 1.

<sup>&</sup>lt;sup>3</sup> Matthew J Gibney and Randall Hansen Deportation and the liberal state: the forcible return of asylum seekers and unlawful migrants in Canada, Germany and the United Kingdom (2003).

<sup>&</sup>lt;sup>4</sup> Immigration Act supra note 2 at s 1 and s 29.

 $<sup>^{5}</sup>$  Ibid s 1 and s 30.

<sup>&</sup>lt;sup>6</sup> Immigration Regulations in GNR.413 GG 37679 of 22 May 2014 at reg 30(2) (Immigration Regulations, 2014).

<sup>&</sup>lt;sup>7</sup> Immigration Act supra note 2 at s 30(1)(h).

| Period/Frequency of Overstay   | Consequent duration of Declaration as an<br>Undesirable Person |
|--|--|
| 'A person who overstays for a period not exceeding 30 days'9                 | 12 months  |
| 'A person who overstays for the second time within a period of 24 months' 10 | 2 years  |
| 'A person who overstays for more than 30 days' <sup>11</sup>                 | 5 years  |

The table above depicts how deportation has the additional effect of restricting the ability of the deportee to return to the Republic in the future. The deportee may also find it difficult to obtain admission to a third state. Given the serious consequences of these decisions, the Immigration Act includes mechanisms aimed at protecting the right to just administrative action. It is also aimed at protecting substantive rights, such as the right to dignity, prior to and during the deportation process.

It is imperative that deportation be carried out in a procedurally fair manner, lawfully and in line with the aforementioned rights when considering the principle of *non-refoulement*. As discussed below, the Refugees Act prohibits the return of a person to a country where they may be subject to (i) persecution on account of their race, tribe, religion, nationality, political opinion or membership of a particular social group, or (ii) their life, physical safety or freedom would be threatened on account of external aggression, occupation or foreign domination.<sup>13</sup> The practice of not forcing a person to return under these circumstances is referred to as *non-refoulement*.

<sup>&</sup>lt;sup>8</sup> Immigration Regulations, 2014 supra note 6 at reg 27(1).

<sup>&</sup>lt;sup>9</sup> Ibid reg 27(3)(a).

<sup>&</sup>lt;sup>10</sup> Ibid reg 27(3)(b).

<sup>&</sup>lt;sup>11</sup> Ibid reg 27(3)(c).

<sup>&</sup>lt;sup>12</sup> Immigration Act supra note 2 at s 29(1)(c). In terms of section 29(1)(c) of the Immigration Act, anyone previously deported and rehabilitated by the Director-General is a prohibited person and does not qualify for a port of entry visa, admission into the Republic, a visa or a permanent residence permit. Under regulation 26(4) a prohibited person may only apply for rehabilitation after such person has been absent from the Republic for a minimum period of 4 years.

<sup>&</sup>lt;sup>13</sup> Refugees Act supra note 1 at s 2.

#### (C) Detention

Detention generally refers to the deprivation of liberty of any person. A 'deprivation of liberty' is defined in the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("**OPCAT**") as 'any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.' In the context of immigration, detention is imposed as a result of irregular entry and/or stay in the country.

Notably, detention of this kind does not serve the same purpose or adhere to the rules of criminal procedure. Instead, immigration detention is characterised by its administrative (as opposed to criminal) nature. Moreover, it is not intended to be punitive in its purpose or its effect; conversely, the undesirable conduct that is sought to be mitigated is 'undeserved or undesirable migration.' <sup>15</sup> Deportation is different to voluntary repatriation or return, which involves a decision of the migrant concerned to depart the country voluntarily. There is also the procedure of 'self-deportation' whereby the individual has been found to be in the country irregularly but has yet to face the deportation proceedings. They agree to fund their own deportation or they agree to the deportation immediately without proceedings, which is funded by another entity.

#### (D) Extradition

Extradition is defined as the physical surrender by one state (the requested state), at the request of another state (the requesting state), of a person who is either accused or convicted of a crime by the requesting state for the purpose of a trial or serving of a sentence. Since extradition involves the forcible removal of an individual from one country to another, the principles that govern extradition often interact with the principles that govern deportation.

#### (E) Illegal foreigner

An 'illegal foreigner' or irregular migrant is defined as a person who is in the Republic of South Africa in contravention of the Immigration Act. This definition applies to migrants who do not fulfil, or who have ceased to fulfil the conditions of entry, stay or residence within the country. It is this group of migrants to whom deportation may generally apply. The term 'illegal immigrant' or 'illegal foreigner' is problematic for

<sup>&</sup>lt;sup>14</sup> Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 2003 United Nations General Assembly Resolution A/RES/57/199 (2003) at art 4(2).

<sup>&</sup>lt;sup>15</sup> Eve Lester Monitoring immigration detention: practical manual (2014) 28.

a variety of reasons, including the manner in which it dehumanises migrants and assumes that any person could be 'illegal.' It is also highly inflammatory in the context of a country that has experienced repeated violent xenophobic attacks. Where the term is employed in this handbook it is only in order to accurately quote the term used in the Immigration Act. An 'illegal foreigner' should not be confused with an undocumented person who does not have government issued proof of their identification. Being undocumented does not automatically imply that an individual is an 'illegal foreigner' who can be detained and deported from the country; however, these categories often do overlap simply because documentation is insisted upon by law enforcement.

#### (F) National security

The securitisation of migration is increasingly becoming the norm, both in South Africa and internationally. This represents a shift from focusing on regular and orderly migration, as well as a country's protection obligations towards refugees, and a re-positioning of the migrant or refugee as a 'security threat that needs to be controlled.' The Refugees Amendment Act of 2017 introduces the concept of national security into South Africa's refugee law lexicon by providing grounds by which South Africa may remove an individual. Subject to the principle of *non-refoulement* enshrined in section 2 of the Refugees Act, the Refugees Amendment Act provides that refugees may be removed from the Republic based on national security purposes or public order. "National security" is not defined in the Act.

New regulations made under this provision are likely to be contrary to the Constitution and the principle of *non-refoulement*. The regulations provide for the procedure to be followed when a refugee has been deemed a threat to national security or public order. Regulation 21(4) provides that applications to judicially review orders to remove refugees under the Refugees Act must be made before a High Court within 48 hours of the migrant person's arrest. These orders must be confirmed by the Constitutional Court within two calendar weeks from the date the deportation order was issued. Application to a High Court within 48 hours would require access to legal representation and an urgent application to the High Court. This appears to be an example of regulations prescribing procedures to a High Court, which is irregular. In addition, the confirmation by the Constitutional Court is a further example of this phenomenon, which makes it unlikely that any litigant or Court would be able to adhere to these timeframes. Thus, the timeline is sufficiently short that removals are likely to become impossible to challenge. The timelines are also subject to a constitutionally dubious requirement that if the removal order is not confirmed by the Constitutional Court within two weeks, the Director-General must, notwithstanding the legal status of the removal order, proceed with the person's removal.<sup>17</sup>

<sup>&</sup>lt;sup>16</sup> Refugees Act supra note 1 at s 28(1).

<sup>&</sup>lt;sup>17</sup> Refugees Regulations in GN 1707 GG 42932 of 27 December 2019 at reg 21(5).

#### (G) Newcomer asylum seeker

A newcomer asylum seeker is an asylum seeker who has recently entered the country with the express purpose of applying for asylum. Newcomers to South Africa are entitled to approach a Refugee Reception Office ("RRO"), apply for asylum and have their asylum claim adjudicated. Newcomers are regulated by the Refugees Act. As soon as they express their intention to apply for asylum, they cannot be detained for immigration purposes and must be allowed to so apply. However, the Refugees Amendment Act of 2017, and Refugee Regulations of 2018 provide strict timeframes in which a newcomer asylum seeker is permitted to apply for asylum after entering the country. Under the Amendment Act and 2018 Regulations, newcomer asylum seekers must present themselves at an RRO in order to apply for asylum within 5 days of entry into the Republic. In addition, upon application, the newcomer asylum seeker must be in possession of an Asylum Transit Visa issued at a port of entry. If the newcomer asylum seeker is not in possession of such, or if they are outside the 5-day time limit, they are expected to show compelling reasons for their non-compliance. These reasons would be provided to an Immigration Officer prior to the asylum seeker presenting grounds for asylum to a Refugee Status Determination Officer ("RSDO"). It is possible that this procedure, and the strict timeframes, limit the rights of asylum seekers and may be found unconstitutional if challenged.

#### (H) Non-refoulement

Non-refoulement<sup>18</sup> is a principle of international law that forbids countries from returning individuals to a country in which they would be in likely danger of persecution. It equally forbids the return of asylum seekers into war zones and other disasters. Non-refoulement also extends to forced removal from a country for the purposes of extradition and rendition. The principle applies not only to persons being returned once they are on the territory of the country potentially returning them, but also to the non-return or non-refouler from the frontiers or borders of a country. That is, South Africa cannot refuse entry at a border if that refusal would amount to refoulement.

The principle of *non-refoulement* is important in the scope of immigration detention as it ensures the protection and non-return of multiple vulnerable groups, including refugees and asylum seekers. Thus, the Immigration Act regulates migration into and out of South Africa. However, the Refugees Act, which codifies the international law principle of *non-refoulement* in section 2, provides exceptions to the Immigration Act's framework. As mentioned, these exceptions guarantee every person's right to *non-refoulement*. These exceptions also take primacy over the Immigration Act.

<sup>&</sup>lt;sup>18</sup> Guy S Goodwin-Gill *The Refugee in International Law* (1996) 117: The term *non-refoulement* derives from the French *refouler*, which means to drive back or to repel.

#### (I) Stateless/statelessness

The internationally accepted definition of "stateless" is codified in article 1(1) of the Convention Relating to the Status of Stateless Persons ("1954 UN Stateless Convention"):

"for the purpose of this Convention, the term 'stateless person' means a person who is not considered as a national by any State under the operation of its law." 19

Although South Africa is not yet a signatory to the 1954 Convention, it is nonetheless bound by this definition, as the International Law Commission has concluded that the definition in article 1(1) is part of customary international law.

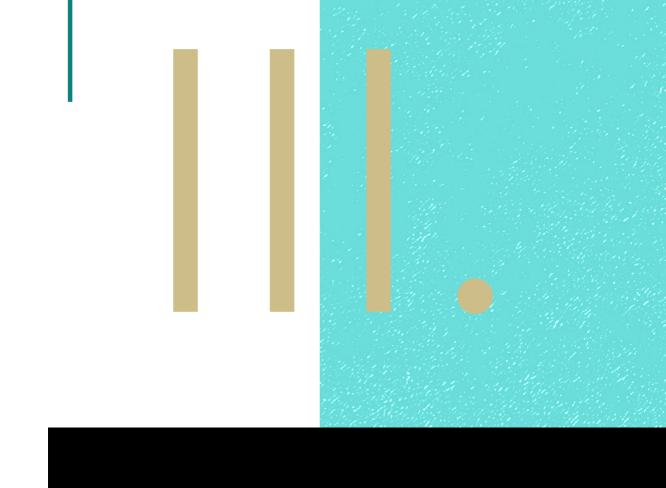
To determine whether a person is stateless, one must ask: (1) whether the person qualifies for citizenship under the law of any country, and (2) whether a given state views the person as its citizen. If a person does not qualify for citizenship anywhere, then they are stateless. But if the person qualifies for citizenship, the inquiry does not end there: one must then ask whether that country views them as a citizen. If the state does not view them as a citizen of the country, then the person is stateless

#### (J) Unaccompanied foreign minor

An unaccompanied foreign minor is a non-national person below the age of 18, who arrived in the Republic of South Africa unaccompanied by an adult responsible for their care. They may or not be stateless. They are considered to be an unaccompanied foreign minor for as long as they are not taken into the care of an adult who will be responsible for them. There is also the category of a separated foreign minor, which includes children who have arrived in the country with an adult who is responsible for their care but is not their parent or legal guardian. For both categories, the rights of the child are paramount and the Children's Act<sup>20</sup> must be applied where appropriate. However, there are also further requirements regarding each category in terms of ensuring parental or guardianship rights where necessary and appropriate. South Africa does not have a comprehensive legal regime applicable to foreign minors, whether unaccompanied or separated. This complicates how the Immigration Act is applied, particularly where there is a threat of deportation and/or detention of that child or of their primary caregiver.

<sup>&</sup>lt;sup>19</sup> Convention relating to the Status of Stateless Persons, 1954, United Assembly General Assembly Resolution 526 A(XVII), (1954).

<sup>&</sup>lt;sup>20</sup> Children's Act 38 of 2005.



# III. THE PRINCIPLE OF NON-REFOULEMENT

#### (A) Introduction

The principle of *non-refoulement* is considered a *jus cogens* norm.<sup>21</sup> It is a fundamental principle of international law accepted by the international community as a norm from which no derogation is permitted.<sup>22</sup> The principle can be found in several international conventions.

Article 33 (1) of the Convention Relating to the Status of Refugees ("1951 UN Convention")<sup>23</sup> provides:

"No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."

Article 1(1) of the Protocol relating to the Status of Refugees ("1967 Protocol")<sup>24</sup> provides that states party to the protocol undertake to apply articles 2 to 34 of the 1951 UN Convention, which includes the principle of *non-refoulement* in article 33. Article 3 (1) of the CAT<sup>25</sup> states that:

"[N]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

There are several ways in which *refoulement* can take place. Deportation is likely the most common expulsion practice in South Africa and is the main concern of this handbook. Extradition, extraordinary rendition and repulsion at the border are three other instances where *refoulement* might occur and they will also be addressed in this handbook.

#### B) Extradition

Extradition essentially involves three elements: acts of sovereignty on the part of two states; a request by one state to another for the delivery of an alleged criminal; and the delivery of the person requested for the purposes of trial or sentence in the territory of the requesting state.<sup>26</sup> A fourth aspect involved in extradition

<sup>&</sup>lt;sup>21</sup> Jean Allain 'The jus cogens nature of non-refoulement' (2001) International Journal of Refugee Law at 533.

<sup>&</sup>lt;sup>22</sup> Vienna Convention on the Law of Treaties Between States and International Organisations or Between International Organisations, 1968 (1968 Vienna Convention) at art. 71.

<sup>&</sup>lt;sup>23</sup> Convention Relating to the Status of Refugees, 1951 United Nations General Assembly Resolution 429 (V) (1951).

<sup>&</sup>lt;sup>24</sup> Protocol Relating to the Status of Refugees, 1967 United Nations General Assembly Resolution 526 A(XVII) (1967).

<sup>&</sup>lt;sup>25</sup> Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, 1984 United Nations General Assembly resolution 39/46 (1984).

<sup>&</sup>lt;sup>26</sup> Mohamed and Another v President of the Republic of South Africa and Others (CCT 17/01) [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 28.

is the presence of an agreement or treaty between states regarding extradition.<sup>27</sup> This could be bilateral, or multilateral such as in the case of a union of states like the EU or a collection of states such as SADC. There is no general duty on states to surrender alleged criminals under customary international law.<sup>28</sup> For purposes of extradition, two states are involved; on the one hand there is the **requesting state**, which asks for the delivery of an individual for purposes of answering criminal allegations or serving a sentence. On the other hand, is the **requested state**, which receives a request from the requesting state to deliver an individual to the requesting state.

Extradition in South Africa is governed by the Extradition Act.<sup>29</sup> When considering a request to extradite someone to a requesting country, the provisions of the Extradition Act must be considered against the Constitution to ensure any action taken is consistent with the Constitution.<sup>30</sup> The procedure laid down in the Extradition Act is as follows:

- An extradition request must be made to the Minister of Justice and Correctional Services through existing diplomatic channels.<sup>31</sup>
- If the Minister accepts the extradition request, they will then issue a notification to a magistrate who may in turn issue a warrant of arrest.<sup>32</sup> It is important to note that the purpose of the arrest or detention is to conduct an extradition inquiry, not to extradite the person.
- A person detained under a warrant of arrest has to, as soon as possible, be brought before the magistrate in whose area of jurisdiction the person is arrested, whereupon the magistrate must hold an inquiry with a view of making a decision as to whether or not to surrender the person to the state concerned.<sup>33</sup>
- If on consideration of evidence adduced at the inquiry, the magistrate finds that the person is liable to be surrendered to the foreign state, he/she shall issue an order committing such person to prison to await the Minister's decision with regard to their surrender. At that time, the person is to be informed that they may, within 15 days, appeal against such order to the High Court.<sup>34</sup> Alternatively, if the magistrate finds that the evidence does not warrant committal or the evidence is not forthcoming within a reasonable time he/she shall discharge the person.<sup>35</sup>
- The magistrate may set bail pending the conclusion of the extradition inquiry. Bail in this inquiry follows the normal rules in the Criminal Procedure Act ("CPA").<sup>36</sup>

<sup>&</sup>lt;sup>27</sup> As of June 2020 South Africa had extradition agreements Algeria, Australia, Botswana, Canada, China, Egypt, India, Israel, Lesotho, Malawi, Nigeria, Swaziland, the United Arab Emirates and the United States. South Africa has also signed extradition treaties with Argentina and Hong Kong but are yet to ratify them.

<sup>&</sup>lt;sup>28</sup> John Dugard 'International law - a South African perspective' (1994) 862 JS Afr. L 214.

<sup>&</sup>lt;sup>29</sup> Extradition Act 67 of 1962.

 $<sup>^{30}</sup>$  The Constitution of the Republic of South Africa, 1996.

<sup>&</sup>lt;sup>31</sup> Extradition Act supra note 29 at s 4(1).

<sup>&</sup>lt;sup>32</sup> Ibid s 5(1)(a).

<sup>&</sup>lt;sup>33</sup> Ibid s 9(1).

<sup>&</sup>lt;sup>34</sup> Ibid s 10(1).

<sup>35</sup> Ibid s 10(3).

<sup>&</sup>lt;sup>36</sup> Criminal Procedure Act 51 of 1977.

- The magistrate must issue the committal order together with the copy of the record of proceedings to the Minister. The Minister may order or refuse surrender to the requesting foreign state.<sup>37</sup>
- Any person against whom an order listed above has been issued has the right to appeal to the High Court within fifteen days of that order<sup>38</sup> and no order for the surrender of such person shall be executed before the right of appeal has been exercised to completion or waived.<sup>39</sup>

The Magistrate in an extradition inquiry performs a judicial screening function. His or her duties are confined to making preparatory findings of whether there is sufficient or *prima facie* evidence to warrant a prosecution. Once sufficient evidence is established, the Magistrate has no discretion but to make an order committing the person to prison whilst awaiting the Minister's decision on their surrender.<sup>40</sup> The Magistrate may only consider whether there is enough evidence to warrant a prosecution (in turn meaning they must make an order of committal), or whether the required evidence has not arrived within a reasonable time.

The final decision on extradition is made by the Minister of Justice and Correctional Services, which is an executive decision. The Minister makes both substantive and political decisions regarding the extradition. A Magistrate conducting an inquiry in terms of s10(1) of the Extradition Act has no authority to consider whether the constitutional rights of a person sought to be extradited may be infringed upon extradition. That aspect must be considered by the Minister when deciding whether to surrender the person concerned. The appropriate forum to raise constitutional issues concerning extradition for anyone challenging surrender would be through submissions to the Minister before he/she makes the decision, and/or in a review of the Minister's decision in the High Court.

When considering extradition, several fundamental rights are of particular concern including the right to human dignity,<sup>42</sup> the right to life,<sup>43</sup> the right to freedom and security of the person,<sup>44</sup> and the right of access to courts.<sup>45</sup> If extradition would significantly infringe these rights the Minister must consider the severity of the infringement before making his or her decision. If extradition would violate the constitutional right to life, right to human dignity, or right not to be treated or punished in a cruel, inhuman or degrading way then the decision to surrender a person would be unconstitutional and unlawful.<sup>46</sup>

<sup>&</sup>lt;sup>37</sup> Extradition Act supra note 29 at s 11.

<sup>&</sup>lt;sup>38</sup> Ibid s 13.

<sup>&</sup>lt;sup>39</sup> Ibid s 14.

<sup>&</sup>lt;sup>40</sup> Mochebele v Director of Public Prosecutions, Gauteng & Others (377/2018) [2019] ZASCA at para16.

<sup>&</sup>lt;sup>41</sup> Director of Public Prosecutions: Cape of Good Hope v Robinson [2004] ZACC 22; 2005 (4) SA1 (CC) at para 49.

<sup>&</sup>lt;sup>42</sup> Constitution supra note 30 at s 10.

<sup>&</sup>lt;sup>43</sup> Ibid s 11.

<sup>&</sup>lt;sup>44</sup> Ibid s 12(1).

<sup>&</sup>lt;sup>45</sup> Ibid s 34.

<sup>&</sup>lt;sup>46</sup> Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others (CCT 110/11, CCT 126/11) [2012] ZACC 16 at para 99.

#### (i) When can extradition be refused?

In cases where an extradition treaty exists between South Africa and a requesting state, the Minister must also consider the provisions of that treaty before making their decision. For regional extradition, the SADC Protocol on Extradition, Luanda ("SADC Extradition Protocol")<sup>47</sup> concluded under the auspices of the SADC must be considered. Article 4 of the SADC Extradition Protocol sets out mandatory conditions under which extradition must be refused:

- First, extradition must be refused where the request relates to offences that are of a political nature;<sup>48</sup>
- Second, it is mandatory to refuse extradition where substantial grounds exist that the request is to prosecute or punish a person "on account of race, religion, nationality, ethnic origin, political opinion, sex, status of that the person's position may be prejudiced for any [of the above] reasons;"<sup>49</sup>
- Third, "if the offence for which extradition is requested constitutes an offence under military law, which is not an offence under ordinary criminal law, extradition must be refused;
- Fourth, extradition must be refused "if there has been a final judgment rendered against the person in the requested state [(in our context, South Africa)] or a third state in respect of the offence for which the person's extradition is requested." In essence, a state can refuse extradition if the offence for which extradition is being sought has already been prosecuted in another state;
- Fifth, "if the person whose extradition is requested has been or would be subjected to torture or cruel, inhuman or degrading treatment or punishment or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in article 7 of the ACHPR,"51 then the extradition must be refused; and
- Sixth, "if the judgment of the requesting state has been rendered in absentia and the convicted person has not had sufficient notice of the trial or the opportunity to arrange for their defence and they have not had or will not have the opportunity to have the case retried in their presence." 52

<sup>&</sup>lt;sup>47</sup> SADC Protocol of Extradition (2002).

<sup>&</sup>lt;sup>48</sup> Ibid art 4(a).

<sup>&</sup>lt;sup>49</sup> SADC Protocol supra note 47 at art 4(b).

<sup>&</sup>lt;sup>50</sup> Ibid art 4(d)

<sup>&</sup>lt;sup>51</sup> Art. 4(f); see also Organisation of African Unity (OAU), *African Charter on Human and Peoples' Rights*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>52</sup> SADC Protocol supra note 47 at art. 4(g)

Article 5 of the SADC Extradition Protocol provides optional grounds under which a request for extradition may be refused as follows<sup>53</sup>:

- If the person is a national of the requested state;
- If prosecution in respect of the offence for which extradition is requested is pending in the requested state against the person whose extradition is requested;
- If the offence for which extradition is requested carries a death penalty under the law of the requesting state, unless the requesting state gives assurance that the requested state considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out. Where extradition is refused on this ground the requested state shall, if asked by the requesting state, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence that is the subject of the extradition; and
- If the offence for which extradition is requested has been committed outside the territory of the requested state, and the law of the requested state does not provide for jurisdiction over such an offence committed outside its territory, then the extradition may be refused.

The Minister must also consider relevant statutory provisions of the requesting state in assessing whether there would be real risk of abuse of the accused's human rights if they were extradited.<sup>54</sup> This includes having regard to what sanctions those provisions impose for the crime the person facing extradition might be subject to upon arriving in the requesting state. The state, through the Minister, must act positively to protect all people in its territory against human rights abuses. This consideration applies equally to extradition, deportation and any other form of surrender. If it is found that a person facing extradition had a real risk of facing a rights violation inconsistent with the provisions of the Constitution if he or she were to be extradited, the Minister would have to request that the necessary assurances are provided before extradition can take place.<sup>55</sup> The existence of the real risk is not an absolute bar for the extradition to proceed.<sup>56</sup> An extradition process that would be unlawful and unconstitutional cannot be substituted or circumvented by deportation proceedings, which are governed under a different set of procedures laid out in the Immigration Act.<sup>57</sup>

Extraordinary rendition is the extra-judicial transfer of a person from one country to another with the purpose of circumventing the first country's laws on extradition, deportation, interrogation, detention and torture.

<sup>53</sup> Ibid art 5

<sup>54</sup> Tsebe (case) supra note 46.

<sup>&</sup>lt;sup>55</sup> Tucker v S (A437/17) [2018] ZAWCHC 88; [2018] 2 All SA 566 (WCC) (7 March 2018) at para 29.

<sup>56</sup> Ibid.

<sup>&</sup>lt;sup>57</sup> Ibid para 46.

Minister of Home Affairs and Others v Tsebe and Others, Minister of Justice and Constitutional Development and Another v Tsebe and Others<sup>58</sup>

In this matter, the Constitutional Court was tasked with determining whether the South African government may extradite or deport a person who is charged with a capital offence in the country seeking his extradition. In particular, the extraditing state refused to provide written assurance that the death penalty would not be imposed or, if imposed, would not be carried out.<sup>59</sup>

The applicants in this case both faced murder charges in Botswana, where on conviction, murder is punishable by death. They therefore sought an order preventing the government of South Africa from extraditing or deporting them to Botswana without written assurance from the government of Botswana that if convicted of murder the death penalty would not be imposed or, if imposed, it would not be carried out. Botswana had refused to give assurance on the grounds that there were no provisions for it to do so in its domestic law or in the extradition treaty shared with South Africa. The High Court granted the order preventing the extradition.

The Minister of Justice and the Minister of Home Affairs appealed directly to the Constitutional Court. The Court, in making its determination, examined the following:

- The Constitution of the Republic of South Africa, insofar as South Africa's commitment to upholding the human rights of every person in everything that it did, and could not deport or extradite any person, where doing so would expose him or her to the real risk of the imposition and execution of the death penalty.<sup>60</sup>
- Article 6 of the Extradition Treaty between South Africa and Botswana (1969)
  which allows extradition to be refused if the "offence for which extradition is
  requested is punishable by death and if the death penalty is not provided for
  such offence by the law of the requested Party."

<sup>58</sup> Ibid.

<sup>&</sup>lt;sup>59</sup> Ibid para 14.

<sup>&</sup>lt;sup>60</sup> Extradition Treaty between South Africa and Botswana, (1969), SATS 2 at art. 6.

- The SADC Extradition Protocol and the Constitution of Botswana which give Botswana's Executive the ability to provide assurance that the death penalty, if imposed, will not be carried out.
- The Immigration Act which states that "provisions [...] relating to the obligation to deport an illegal foreigner must be read consistently with the Constitution. It cannot be read to require the deportation of a person in circumstances in which the deportation would be a breach of the Constitution."

On these grounds, the Constitutional Court dismissed the appeal.

#### (C) Deportation

Deportation is governed by the Immigration Act, under which "deport" or "deportation" means "the action or procedure aimed at causing an illegal foreigner to leave the Republic in terms of this Act." <sup>62</sup> It occurs when it is determined that a person does not have status to stay in South Africa, for one or other of the reasons outlined below. The person is then ordered to depart the country, and if they fail to do so they will be deported. <sup>63</sup>

Immigration Officers have the authority to determine if a person is an "illegal foreigner" and therefore subject to deportation under section 32 of the Immigration Act. An "illegal foreigner" is defined as "a foreigner who is in the Republic in contravention of this Act." When this determination is made, the Immigration Officer will issue a Form 29 notification under the Immigration Regulations, <sup>64</sup> which notifies the person of the decision to deport and their right to an internal appeal by way of an application to the Director-General of Home Affairs.

The Immigration Officer has discretion to determine whether or not detention pending deportation is necessary. This discretion is supervised by the courts in that those in detention have the right to be brought before court to have their detention reviewed within 48 hours of arrest, or where the 48 hours expires over a public holiday or weekend, as soon thereafter as the matter may be heard.

<sup>&</sup>lt;sup>61</sup> Tsebe (case) supra note 46 at para 59.

<sup>&</sup>lt;sup>62</sup> Immigration Act supra note 2 at s 2.

<sup>63</sup> Ibid s 32.

<sup>&</sup>lt;sup>64</sup> Immigration Regulations supra note 6 at reg 30(2).

The authority to detain someone pending deportation stems from the Immigration Act.<sup>65</sup> However, deportation is not meant to be of a criminal nature. International law requires that immigration detainees be kept separate from awaiting trial detainees for criminal offences and are not to be treated as those incarcerated for crimes.<sup>66</sup> Due to the need for separation, immigration detention centres exist in various locations in South Africa [as separate from facilities dedicated to sheltering those incarcerated for criminal behaviour]. The largest of these centres is Lindela Repatriation Facility located near Johannesburg. However, in reality this separation does not always occur, as detainees are sometimes held in police stations together with suspected criminal offenders, and indeed certain police stations have been designated for the purpose of immigration detention.

#### (i) Reasons for deportation

A person can be deported for several reasons: if they are found to be a prohibited person; if they are declared an undesirable person; if their claim for asylum or refugee status has been rejected; or if they are found to be an "illegal foreigner."

#### Prohibited persons

The Immigration Act provides that a prohibited person includes:

- Those infected with or carrying infectious, communicable or other diseases or viruses as prescribed;
- Anyone against whom a warrant of arrest is outstanding, or a conviction has been secured
  in the Republic or a foreign country in respect of genocide, terrorism, human smuggling,
  trafficking in persons, murder, torture, drug-related charges, money laundering, or kidnapping;
- Anyone previously deported and not rehabilitated by the Director-General in the prescribed manner;
- A member of or adherent to an association or organisation advocating the practice of racial hatred or social violence;
- Anyone who is or has been a member adherent to an organisation or association utilising crime or terrorism to pursue its ends; and
- Anyone found in possession of a fraudulent visa, passport, permanent residence permit, or identification document.<sup>67</sup>

Prohibited persons are not allowed to enter South Africa or remain in South Africa once they are determined to be a prohibited person. They are therefore subject to deportation. The Director-General has the authority to declare a person referred to above not to be a prohibited person; however, the person must demonstrate good cause.<sup>68</sup> Good cause is not clearly defined under the Act.

<sup>&</sup>lt;sup>65</sup> Immigration Act supra note 2 at s 31(2)(b).

<sup>&</sup>lt;sup>66</sup> International Detention Coalition Legal framework and standards relating to the detention of refugees, asylum seekers and migrants (2011).

<sup>&</sup>lt;sup>67</sup> Immigration Act supra note 2 at s 29(1).

<sup>68</sup> Ibid s 29(2).

#### Undesirable persons

The following non-nationals may be declared undesirable by the Director-General:

- Anyone who is likely to become a public charge;
- Anyone identified as such by the Minister;
- Anyone who has been judicially declared incompetent;
- An unrehabilitated insolvent;
- Anyone who has been ordered to depart in terms of this Act;
- Anyone who is a fugitive from justice;
- Anyone with previous criminal convictions without the option of a fine for conduct which
  would be an offence in the Republic, with the exclusion of certain prescribed offences; and
- Any person who has overstayed their visa the prescribed number of times.<sup>69</sup>

Like prohibited persons, an individual declared to be an undesirable person for immigration purposes is not allowed to enter or remain in South Africa and is subject to deportation. Unlike prohibited persons, in order to be declared "undesirable," the Director General of the Department of Home Affairs ("**DHA**") must use their discretion in making the declaration. They must consider all aspects of the Immigration Act in making this decision. The affected person has the right to apply to the Minister to waive the grounds of undesirability, which the Minister can do for good cause. As with prohibited persons, good cause is not clearly defined under the Act.

#### Rejected claim for asylum or refugee status

When an application for asylum is rejected, the individual whose application failed becomes an "illegal foreigner" and is subject to deportation.<sup>72</sup> The quartet of cases below illustrate the ability to apply for asylum upon or after arrest and the right to be released from detention while the asylum process is being carried out, regardless of stage in that process, and until all rights of appeal are exhausted; but also including prior to application for asylum being made.

<sup>&</sup>lt;sup>69</sup> Ibid s 30(1).

<sup>&</sup>lt;sup>70</sup> It should be noted here that if an individual overstays their visa, then upon exit they will be declared an undesirable and their passport will be endorsed as such. For an overstay of less than 30 days, the period for which a person remains an undesirable is 1 year; whereas for an overstay of over 30 days, the period is 5 years. Once that prescribed period is over, the impacted individual must still make application to have the endorsement removed before they are permitted to travel into South Africa again.

<sup>&</sup>lt;sup>71</sup> Ibid s 30(2).

<sup>&</sup>lt;sup>72</sup> Refugees Act supra note 1 at s 24(5).

Abdi and another v Minister of Home Affairs and others<sup>73</sup>

Mahamad Arwah Abdi and Ysusf Ali Dhiblawe were in the asylum process, one having been granted refugee status and the other still awaiting the outcome of his application for asylum. They were both Somali nationals who had fled to South Africa. Out of fear of xenophobic violence in South Africa they went to Namibia, which then intended to deport them back to Somalia. In the process of being deported from Namibia to Somalia, the appellants were flown by Air Namibia to Johannesburg where they were to be placed on a Kenya Airways flight to Nairobi, Kenya. From this country they were ultimately to be transported to Mogadishu. They sought assistance from UNHRC to prevent their deportation back to Somalia but the DHA official tasked to deal with their request refused to permit their entry into the country on the ground that the appellants were Namibian deportees and that South African authorities had no jurisdiction to interfere with another state's deportation order. An urgent application was launched to stop their deportation and allow them to enter the country and apply for asylum in South Africa and they were held in the Inadmissible Facility at OR Tambo International Airport pending the conclusion of the application.

The matter ended up at the Supreme Court of Appeal ("SCA"), which held that refusing a refugee entry into South Africa, and thereby exposing him or her to the risk of persecution or physical violence in his country of origin would be in conflict with the fundamental values of the Constitution.<sup>74</sup> It further explained that there was no evidence that the applicants had any intention to abandon their status or their applications for asylum in leaving for Namibia. Their immediate release and re-admittance into South Africa was ordered.

<sup>&</sup>lt;sup>73</sup> Abdi v Minister of Home Affairs [2011] SASCA 2; 2011 (3) SA 37 (SCA).

<sup>74</sup> Ibid.

Arse v Minister of Home Affairs and others<sup>75</sup>

The SCA ordered the release of the applicant in this case from detention. The Court held that an individual whose asylum transit permit has expired, whose asylum application has been rejected by the RSDO, but who has an appeal before the Refugee Appeal Board ("RAB") is entitled to be released with a temporary asylum permit while the appeal is pending.

Bula and others v Minister of Home Affairs and others<sup>76</sup>

The SCA confirmed here that a detained person who declares an intention to apply for asylum is entitled to be issued with an asylum transit permit valid for 14 days and freed from detention in order to allow the person the opportunity to approach an RRO in order to apply for asylum. The SCA ordered an interdict preventing the deportation of the applicants pending their application for asylum as well as their lawful and final determination of their application. This included exhaustion of all rights of review and appeal under both the Refugees Act and Promotion of Administrative Justice Act ("PAJA").<sup>77</sup>

 $<sup>^{75}</sup>$  Arse v Minister of Home Affairs [2010] ZASCA 9; 2012 (4) SA 544 (SCA).

<sup>&</sup>lt;sup>76</sup> Bula v Minister of Home Affairs [2011] ZASCA 209; 2012 (4) SA 560 (SCA).

<sup>&</sup>lt;sup>77</sup> Promotion of Administrative Justice Act 3 of 2000.

#### Ersumo v Minister of Home Affairs and others<sup>78</sup>

The SCA upheld the appeal of the applicant who was detained in Lindela Repatriation Centre. It held that once the applicant had declared that he wished to apply for asylum he was entitled to receive an asylum transit permit valid for 14 days, during which time he could file his application for asylum at an RRO. The SCA found that the fact that the applicant was an "illegal foreigner" at the time of his arrest and detention in Lindela to be irrelevant to his right to make an asylum application. It held that delay and adverse immigration status in no way prevents access to the asylum application process. The truth of an applicant's story is to be determined by the RSDO in charge of the application, not an immigration officer.

These decisions were subsequently endorsed by the Constitutional Court in the matter of *Ruta v Minister of Home Affair and Others* as establishing "a body of doctrine that thrummed with consistency, principle and power." The Constitutional Court determined that protection under the Refugees Act extends to illegal foreigners held in detention centres or at ports of entry. It also confirmed the right to liberty pending the final outcome of an asylum application, including all rights of appeal under the Refugees Act and PAJA.80

A refugee whose status has been withdrawn will also be treated as an "illegal foreigner" subject to deportation.<sup>81</sup> The Refugees Amendment Act also makes provisions for the abandonment of asylum claims. That is, an asylum seeker who fails to renew her asylum documentation a month after its expiry will be deemed to have abandoned her asylum application. The matter will then be referred to the Standing Committee for confirmation and thereafter the applicant may be deemed an "illegal foreigner." It is likely that this provision is unlawful, as it provides for the automatic abandonment of a claim prior to the claim having been properly adjudicated by an RSDO. This would fall foul of the precedents articulated in *Ruta*, and if it results in deportation, may amount to violation of the principle of *non-refoulement*.

<sup>&</sup>lt;sup>78</sup> Ersumo v Minister of Home Affairs [2012] SASCA 31; 2012 (4) SA 581 (SCA).

<sup>&</sup>lt;sup>79</sup> Ruta v Minister of Home Affairs (CCT02/18) [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) at para 16.

<sup>&</sup>lt;sup>80</sup> PAJA supra note 77.

<sup>&</sup>lt;sup>81</sup> Refugees Act supra note 1 at s 36(4).

<sup>82</sup> Refugees Amendment Act 11 of 2017.

#### (ii) When can deportation be refused?

"Illegal foreigners" are generally deported to their country of origin. 83 However, there are situations where such deportation would be unlawful. The first is when deportation would violate the principle of non-refoulement. As indicated above, non-refoulement is a principle of international and domestic law which forbids returning a person to a country where they would face persecution based on one of the prohibited grounds, or threat to their life as a result of grave disturbances to the public order. 84

The second scenario is where such deportation would violate the Constitution. An example is in the case of *Tsebe*, discussed in the extradition portion of this handbook. Like the Immigration Act, the Refugees Act must be read in line with the Constitution.

<sup>83</sup> Immigration Regulations supra note 6 at reg 33(2) Form 29 (1724).

<sup>&</sup>quot;Notification of Deportation", section 34(1)(a) read with regulation 33(2) of the 2014 Immigration Regulations (RGN413 GG 37679, 22 May 2014), record 221 and 222. This form notifies the deportee that they will be deported to their country of origin, and provides a space for the country. In Mohamed v President of South Africa 2001 (3) SA 893 (CC) paras 32-33, Mohamed was deported to a country other than his country of origin, or of which he held a passport as was provided for in the regulations to the Alien's Control Act, No. 96 of 1991. The 2014 Regulations do not, however, have a similar regulation. The reference to 'country of origin' is on Form 29.

<sup>&</sup>lt;sup>84</sup> Refugees Act supra note 1 at s 2.

# IV. THE ASYLUM SEEKER PROCESS

#### (A) Introduction

The cornerstone of refugee law is the principle of *non-refoulement*.<sup>85</sup> The rationale behind refugee protection is to stop *refoulement*, which is the forcible return of persons to a place where they are liable to face persecution or harm. Migration into South Africa is primarily regulated by the Refugees Act, the Immigration Act and regulations made pursuant to those statutes. Whereas the Immigration Act establishes the general framework for migration to and from South Africa, the Refugees Act codifies exceptions to the Immigration Act's general framework in accordance with South Africa's commitment to the principle of *non-refoulement* and the duty of international protection. The movement of all people to and from South Africa, including extradition and reunification, must be in line with the principle of *non-refoulement*.

The Refugees Act was enacted to domesticate South Africa's commitments under international law. Many of the provisions in the Refugees Act flow directly from these commitments, as well as other principles which are contained in international law.<sup>86</sup>

The Refugees Act regulates the rights of refugees and asylum-seekers in South Africa and establishes the "asylum system," through which the residency of refugees and asylum seekers is processed. This procedure is handled in more detail below. It is important to understand, as at certain points in the process, it is unlawful to detain a refugee or asylum seeker for the purposes of immigration detention.

#### (B) Specific provisions of the Refugees Act

#### (i) Qualifying for refugee status

The grounds under which one may qualify for refugee status are laid out in section 3 of the Refugees Act.<sup>87</sup> The three principal grounds are:

- 1. Where the asylum seeker has a "well-founded fear of persecution" in their country of origin on account of their race, gender, tribe, religion, nationality, political opinion, or membership of a particular social group;
- 2. Where there is a serious disruption of public order in a part or the whole of the asylum seeker's country of origin that compels them to seek refuge in another place outside of their country; or
- 3. The person is a dependent of someone contemplated in the grounds mentioned above.

<sup>85</sup> James C Hathaway The Rights of Refugees under International Law (2005) 279.

<sup>&</sup>lt;sup>86</sup> Refugees Act supra note 1.

Preamble: "WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law..."

If someone qualifies for refugee status, they are entitled to formal legal recognition of their refugee status under section 27 of the Refugees Act (hereafter referred to as a "refugee permit"). They are also required to apply for a refugee identity book by virtue of the same section. However, in reality, many refugees do not receive their refugee permit or refugee identity book. This could be because they have not yet applied for and been granted refugee status.<sup>88</sup> But for the most part, it is due to the documented backlogs and inefficiency in the asylum system. Despite the fact that they do not have a refugee permit or identity book, they are *de facto* refugees.

A refugee, whether formally recognised as such or not, is protected from deportation. This is because section 2 of the Refugees Act prohibits the return of persons to places where they face persecution, or threats to their life, physical safety, or freedom.<sup>89</sup> This is the principle of *non-refoulement*, which as mentioned, states that no one should be returned to a country where they would be subjected to persecution or where they would face torture, cruel, inhuman or degrading treatment, punishment or other irreparable harm. The commitment to *non-refoulement* flows directly from South Africa's commitments under international law, which are discussed in later sections of this handbook. Refugees may only be removed from South Africa when that removal is consistent with the principle of *non-refoulement*.<sup>90</sup>

#### (ii) Exclusion from refugee status

Exclusion from refugee status is set out in international law and instruments, as well as in the Refugees Amendment Act. Article 1F of the 1951 UN Convention sets out the grounds for exclusion. The concept of exclusion is aimed at preserving the integrity of the asylum system by ensuring that a person who is not in need of international protection cannot use the asylum system in order to evade serious transgressions committed prior to seeking asylum. The 1951 UN Convention provides a closed list of exclusion clauses which should be interpreted narrowly and in a manner that does not undermine the integrity of international protection.

<sup>&</sup>lt;sup>87</sup> Refugees Act supra note 1 at s 3.

<sup>&</sup>lt;sup>88</sup> The way that persons who have not yet applied for refugee status, but who have expressed an intention to do so should be treated is discussed in Section II.

<sup>&</sup>lt;sup>89</sup> Refugees Act supra note 1 at s 2. See also *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC) at para 27 for the rule that all other provisions of the Refugees Act are subordinate to those in section 2, and a the close analysis of the provision's relation to the rest of the Act in *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) at para 24.

<sup>90</sup> Refugees Act supra note 1 at s 28(1).

The Refugees Amendment Act provides that individuals are excluded from refugee status for a variety of reasons that are fully set out in section 4 of the Refugees Act. The 1998 Refugees Act provided that a person is excluded from refugee status if:

- 1. There is reason to believe that they committed what would be a serious crime under either South African or international law:<sup>91</sup>
- 2. They are guilty of acts which are contrary to the objects and principles of the United Nations or Organisation of African Unity; or
- 3. They enjoy the protection of any other country in which they have taken residence.92

The Refugees Amendment Act added further exclusion clauses:

- 1. Has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Laws Amendment Act, 1997 (Act No. 105 of 1997), or which is punishable by imprisonment without the option of a fine; or
- 2. Has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or
- 3. Is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary; or
- 4. Having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or
- 5. Has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason, provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, issued in terms of section 23 of the Immigration Act, applies for asylum.<sup>93</sup>

The additional exclusion clauses added by way of the Refugees Amendment Act are concerning, and broaden the scope of the exclusion clauses beyond what is envisaged in the 1951 UN Convention. In addition, the principle of inclusion before exclusion is not clearly articulated in the Amendments. It is important that

<sup>&</sup>lt;sup>91</sup> Ibid ss 4(1)(a) and (b).

<sup>92</sup> Ibid ss 4(1)(c) and (d).

 $<sup>^{93}</sup>$  Ibid ss 4(1)(e) – (i). Also see section 22(6) and Regulations 8 and 9.

grounds for refugee status are considered prior to any potential exclusion from refugee status. This is because the exclusion may result in return of the person to their country of origin, and using the approach of inclusion before exclusion ensures that a state does not unknowingly violate the principle of non-refoulement. Thus, exclusion should not apply prior to the full adjudication of the refugee claim.

#### (iii) Cessation of refugee status

Cessation should only apply to a person once they have obtained refugee status. It is a formal process triggered by one or another specific events. In South African law, a person who has obtained refugee status ceases to qualify for it under certain conditions listed in section 5(1) of the Refugees Act. These criteria include, amongst others:

- 1. If they voluntarily re-avail themselves of protection offered by their country of origin;<sup>94</sup>
- 2. If, having lost their nationality, they by some voluntary and formal act reacquire it;95
- 3. If they become a permanent resident or citizen of the Republic or acquire the nationality of some other country and enjoys the protection of the country of their new nationality;96
- 4. If they voluntarily re-establish themselves in the country which they left or return to visit that country;97
- 5. If they can no longer continue to refuse to avail themselves of protection offered by their country of origin because the circumstances in connection with which they were recognised as a refugee no longer exist;98
- 6. If they commit a crime in the Republic listed in Schedule 2 of the Criminal Law Amendment Act or which is punishable by imprisonment without the option of a fine;<sup>99</sup>
- 7. If they commit an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit;100 or
- 8. The Minister issues an order to cease the recognition of refugee status of any individual refugee or category of refugees, or revoke such status. 101

The grounds for cessation listed in the Refugees Amendment Act expand the list provided for by the UN Convention. This presents additional risks of times when cessation may result in refoulement.

<sup>&</sup>lt;sup>94</sup> Ibid s 5(1)(a).

<sup>95</sup> Ibid s 5(1)(b).

<sup>96</sup> Ibid s 5(1)(c).

<sup>97</sup> Ibid s 5(1)(d).

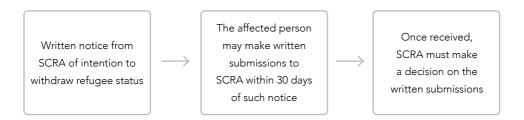
<sup>&</sup>lt;sup>98</sup> Ibid s 5(1)(e).

<sup>&</sup>lt;sup>99</sup> Ibid s 5(1)(f).

<sup>100</sup> Ibid s 5(1)(g).

<sup>101</sup> Ibid s 5(1)(h).

#### (iv) Withdrawal of refugee status



The status of a person who ceases to qualify for refugee status may have their status withdrawn in terms of section 36(1)(c) of the Refugees Act. Before it can be withdrawn, the Standing Committee for Refugee Affairs ("SCRA") must inform the affected person that it intends to withdraw their status, as well as provide written reasons for that decision. The affected person must also be given an opportunity to make a written submission. This process is subject to the PAJA, 102 as well as section 33 of the Constitution.

SCRA is a statutory body responsible for providing independent oversight of the refugee system. The conditions under which SCRA may withdraw refugee status aside from cessation are set out in section 36 of the Refugees Act, subject to the PAJA, and include:

- (a) If a person was recognised as a refugee due to fraud, forgery or false or misleading information of a material or substantive nature in relation to the application; or
- (b) If a person was recognised as a refugee due to an error, omission or oversight.

Note the high procedural standard required by section 36(2) of the Refugees Act: the SCRA must consider *all material facts* in light of the claimant's constitutional rights. This standard is difficult to meet where there are contested facts and a paucity of available evidence.

Once a person's refugee status has been withdrawn, they can be treated as an "illegal foreigner" in terms of the Immigration Act. What this entails will be dealt with in more detail below.

<sup>&</sup>lt;sup>102</sup> PAJA supra note 77.

#### (C) Interpretation of the Refugees Act

It is important to note that the Refugees Act must be interpreted with due regard to the following international conventions concerning the rights of refugees and asylum seekers:<sup>103</sup>

- The 1951 United Nations Refugee Convention<sup>104</sup> and the 1967 Protocol<sup>105</sup>;
- The Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("1969 OAU Refugee Convention"); and
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT")<sup>106</sup>.

#### (D) Applying for asylum

#### (i) An overview of the application process

Entry into South Africa

#### ENTRY INTO SOUTH AFRICA:

The newcomer asylum seeker must enter the country at a port of entry

#### EXPRESSING INTENTION TO APPLY FOR ASYLUM:

The newcomer asylum seeker must express their intention to apply for asylum to the officials at the port of entry

#### ASYLUM TRANSIT VISA:

Once such intention is expressed, the newcomer asylum seeker must be issued with an asylum transit visa

The asylum transit visa is valid for 5 days. In this time, the newcomer asylum seeker must report to an RRO to make their application for asylum

Alternatively, the newcomer asylum seeker must report to the RRO on a date allocated to them upon reporting to the RRO within the prescribed 5-day period

#### **BIOMETRICS:**

Every applicant must submit their biometrics and/or other data to an immigration officer at the port of entry or at the RRO prior to making an application for asylum

<sup>&</sup>lt;sup>103</sup> Refugees Act supra note 1 at s 6.

<sup>104 1951</sup> UN Convention supra note 23.

<sup>105 1967</sup> UN Protocol supra note 24.

<sup>&</sup>lt;sup>106</sup> CAT supra note 25.

#### Making the application for asylum

#### PRIOR TO MAKING AN APPLICATION FOR ASYLUM:

Every applicant must submit their biometrics and other details either at the port of entry or at the RRO prior to making an application for asylum

#### MAKING THE APPLICATION:

The application must be made in person to the RSDO

THE APPLICATION FORM: Applications are made on form DHA-1590

DECLARING A SPOUSE AND/OR DEPENDANTS:

All applicants must declare their spouse and/or dependants in the DHA-1590 form, whether they are in South Africa or elsewhere

FAILURE TO DECLARE:
If an applicant fails to make
the declaration required
by section 21(2A) and
subsequently returns to
the RRO to make a claim in
terms of section 3(c), they
will be required to provide
proof of the relationship

#### SUBMITTING THE APPLICATION:

The DHA-1590 form must be accompanied by (1) a valid asylum transit visa issued at the port of entry; (2) proof of any form of valid identification document; and (3) the applicant's biometrics (including any dependants)

## SUBMISSION OF SOME OTHER VISA:

If the applicant submits a visa other than an asylum transit visa, they must provide proof of change of circumstances

NO ASYLUM TRANSIT VISA:
An applicant who is not in possession of an asylum transit visa must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa

## FAILURE TO PRODUCE VALID VISA:

An applicant who fails to produce a visa must show good cause for their illegal entry or stay South Africa

#### (ii) The process of applying for asylum

#### Entry into South Africa

All cross-border migrants are required to enter South Africa at a valid port of entry. At this stage, the Refugees Act, as recently amended, dictates that all newcomer asylum seekers must express their intention to apply for asylum on entry at a valid port of entry at which point they will be issued with an asylum transit visa which is valid for five days. 107 Accordingly, the newcomer asylum seeker must report to an RRO before the expiry of the asylum transit visa.

It is reasonably anticipated that the Refugees Act, as recently amended, will contribute to the rising numbers of arrested and detained newcomer asylum seekers. This is expected for numerous reasons. First, a large majority of South Africa's newcomer asylum seeker population are prevented from communicating in English their intention to apply for asylum in South Africa. Second, practice has shown that even where a newcomer is capable of doing so, the expression of intention to apply for asylum is often unheard or ignored, especially by police or immigration officers. This frequently results in arrest. Most notably, practice reveals that newcomer asylum seekers very rarely enter South Africa through ports of entry due either to a fear of being immediately deported, lack of official documentation or because of a lack of knowledge of the asylum process. It is imperative that these considerations are viewed against the backdrop of the pre-migratory trauma that has potentially been experienced by a newcomer asylum seeker. The United Nations High Commissioner for Refugees ("UNHCR") has concisely detailed the nature of such trauma:

"...pre-migratory traumatic events...include war, torture, violence, targeted persecution, forced labour, forced migration and family separation. Research suggests that these traumatic experiences may contribute to refugees developing a constellation of mental health issues such as depression/anxiety, adjustment disorders and trauma-based illnesses including Post Traumatic Stress Disorder (PTSD)." 108

<sup>&</sup>lt;sup>107</sup> Immigration Act supra note 2 at s 23.

<sup>&</sup>lt;sup>108</sup> Julian Gojer and Adam Ellis Post-Traumatic Stress Disorder and the Refugee Determination Process in Canada: Starting the discourse (2014).

#### Making the application for asylum

As previously stated, any person who seeks international protection in South Africa must apply for asylum within five days of entry into the country. <sup>109</sup> Put differently, an application for asylum must be made prior to the expiry of the asylum transit visa, which as mentioned, is only valid for five days. The application must be made on Form DHA-1590 to an RSDO at an RRO. <sup>110</sup> The application must then be submitted together with the valid asylum transit visa that would have been issued at the port of entry, proof of any form of a valid identification document, and the biometrics of the applicant. <sup>111</sup> Where an applicant is not in possession of the transit visa, she must be interviewed by an immigration officer who will determine whether valid reasons exist as to why that is. <sup>112</sup> In this regard, the considerations mentioned under the previous heading bear great relevance. However, the Refugees Amendment Act is silent on what follows in the event that an immigration officer does not find that the given reasons are "valid." This is concerning and could result in many *de facto* refugees experiencing barriers to accessing South Africa's asylum system.

Upon application, the asylum seeker is entitled to be issued with an asylum seeker visa. <sup>113</sup> In terms of section 22(4) of the Refugees Act, the asylum seeker visa can be extended pending a final decision on the asylum seeker's application. <sup>114</sup> Because they are issued for a period of one, three or six months, it is normal for them to be extended a number of times before a final decision is made. Lawyers for Human Rights' ("LHR") practical experience shows it is common for asylum claims to not have been determined within the previous statutory limit of 180 days. This has been due to backlogs, systemic delays and inefficiency. The Refugees Amendment Act has removed the statutory limit. LHR has clients who have been waiting for status determination for more than 15 years.

The Director-General can withdraw an asylum seeker visa if 115:

- 1. The asylum seeker contravenes conditions granted on the visa;
- 2. If the application for asylum was rejected;
- 3. If it the application was found to be manifestly unfounded, abusive or fraudulent; and
- 4. If the asylum seeker becomes ineligible for refugee status because they are excluded from status or they have ceased to qualify for it.

<sup>&</sup>lt;sup>109</sup> Refugees Act supra note 1 at s 21(1)(a).

<sup>110</sup> Ibid at s 21(1)(b).

<sup>&</sup>lt;sup>111</sup> Refugees Regulations supra note 17 at reg 8(1)(c).

<sup>&</sup>lt;sup>112</sup> Refugees Amendment Act supra note 82 at s 21(1B).

<sup>&</sup>lt;sup>113</sup> Refugees Act supra note 1 at s 22(1).

<sup>&</sup>lt;sup>114</sup> Ibid.

<sup>115</sup> Ibid s 36.

As mentioned previously, if the Minister has withdrawn a person's asylum seeker visa because of abuse of the asylum process, rejection, or eligibility, then the Minister may, subject to the restrictions on detention contained in the Refugees Act, 116 have the visa holder arrested and detained pending finalisation of their application for asylum. 117 However, such arrest may only be executed to the extent that the "failed" asylum seeker has exhausted all her rights of appeal and/or review. In other words, the Refugees Act prohibits the arrest, detention or institution of proceedings against such an asylum seeker until her application has been reviewed or where the applicant exercised his or her right to appeal. 118 Throughout this process, the Minister must act with due regard for the applicant's dignity. 119 In practice, this means that in the event that an asylum seeker is arrested and detained while a review or appeal is pending against the rejection of her application, such arrest and detention may be challenged on the grounds of unlawfulness and direct contravention of the Refugees Act.

Notwithstanding any law to the contrary, no proceedings may be commenced or continued against any person in respect of their unlawful entry into or presence within the Republic if they have applied for asylum under the Refugees Act. 120

Refugee status determinations can only be made by RSDOs. These officers must follow the procedure outlined in section 24 of the Refugees Act. Note that the Act is careful to emphasise, in section 24(2), how people applying for asylum are entitled to benefit from the rights set out in section 33 of the Constitution and the right to understand the procedures at issue in deciding their status.<sup>121</sup>

If a person is determined to be a refugee by an RSDO then they qualify as a "refugee" under the Refugees Act.<sup>122</sup> Refugees are entitled to identity and travel documents, as defined in the Act, as well as all the other benefits flowing from refugee status.<sup>123</sup>

LHR has documented many asylum seekers' experiences via client interviews and surveys. The organisation has found that the system for processing claims for asylum and refugee status moves very slowly. In some cases, asylum seekers have waited to be processed for more than a decade before finally receiving or being denied refugee status.

<sup>&</sup>lt;sup>116</sup> Ibid s 29.

<sup>&</sup>lt;sup>117</sup> Ibid s 23.

<sup>&</sup>lt;sup>118</sup> Ibid s 21(4)(a).

<sup>&</sup>lt;sup>119</sup> Ibid s 23.

<sup>120</sup> Ibid s 21(4).

<sup>&</sup>lt;sup>121</sup> Ibid s 24(2).

<sup>&</sup>lt;sup>122</sup> Ibid s 27.

<sup>&</sup>lt;sup>123</sup> Ibid. See section 28 for the rights of refugees in respect of removal from the Republic. See also sections 30 and 31 for the requirements of refugee identity and travel documents under the Act.

#### (E) Hearing before the RSDO

Once the asylum seeker has lodged the application for asylum in the manner detailed above, a decision must be made on such application after an interview before the RSDO.<sup>124</sup> This interview-type hearing allows the RSDO to:

- · Consider further information, evidence or to seek clarification from the asylum seeker; and
- Obtain further information, evidence, clarification or corroboration from any other relevant person, body or source. 125

It is vital that adequate interpretation services are provided at these interviews, but also that the interpreters are correctly trained so that the RSDO interview can be conducted in a fair manner. These proceedings must be recorded and are an imperative prerequisite to the RSDO's ability to decide on an asylum application. Through numerous consultations with and reports from clients, LHR's experience is that availability of interpreters is inconsistent and often applicants have to rely on other applicants to assist, in some cases where they do not speak the same language or specific dialect.

<sup>&</sup>lt;sup>124</sup> Refugees Regulations supra note 17 at reg 14(1).

<sup>&</sup>lt;sup>125</sup> Ibid reg 14(5).

#### FNM v the Refugee Appeal Board and Others<sup>126</sup>

In this case, the court set out some of the factors necessary in order for an interview, or hearing, to be deemed fair. This includes the burden of proof and the responsibility of the RSDO to consider adequate country of origin information. The applicant is an asylum seeker who fled from the conflict-ridden eastern region of the Democratic Republic of Congo and sought refuge in South Africa. He attended an interview with the RSDO but was not provided with a competent interpreter. The interview with the RSDO lasted only three minutes and essentially involved a conversation between the person interpreting for him and the RSDO. None of the words exchanged between them were translated to the applicant. His application was rejected by the RSDO and he appealed that decision to the RAB. During the appeal process, the RAB rejecting his appeal without providing him with a hearing.

The Court acknowledged and considered the following various facts presented to it in coming to its conclusion:

- The RAB applied the burden of proof incorrectly and in failing to carry out a facilitative, inquisitorial exercise, the RAB acted in a procedurally unfair manner;
- The RAB failed to provide the applicant an opportunity to respond to new information it obtained before basing its decision on such information and acted in a procedurally unfair manner by doing so;
- The RAB failed to analyse country of origin information objectively and rationally.
- The RAB's decision was 'internally contradictory, unclear, indicative of a lack of understanding of the governing legislation and lacking in reasoned analysis of the information available to it.'127

As a result, the Court held that the applicant had proven exceptional circumstances and therefore, it would be just and equitable that an order of substitution be granted. The applicant was granted refugee status by the court.

<sup>&</sup>lt;sup>126</sup> FNM v The Refugee Appeal Board and Others (71738/2016) [2018] ZAGPPHC 532; [2018] 4 All SA 228 (GP); 2019 (1) SA 468 (GP).

<sup>&</sup>lt;sup>127</sup> Ibid para 93.

#### (F) Appeals and reviews

#### (i) Synopsis

This section outlines the possible decisions that an RSDO may make on applications for asylum. Thereafter, in cases of unsuccessful applications, this section will detail the processes that follow in terms of the Refugees Act.

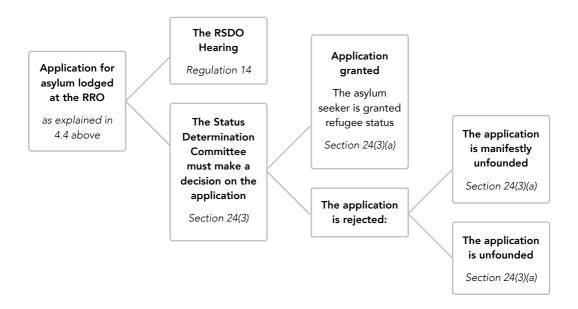
Briefly, an RSDO may grant an applicant asylum or reject the application as manifestly unfounded/fraudulent/ abusive or unfounded. For the purposes of this section, the understanding of these terms and the subsequent procedures associated with each is critical. The following synopsis of the section is provided in this regard: In past cases of a manifestly unfounded application, the Refugees Act entitled the applicant to written

|                                      | Refugee status<br>confirmed<br>Section 24(3)(a)   | Rejected as manifestly<br>unfounded<br>Section 24(3)(b)  | <b>Rejected as unfounded</b><br>Section 24(3)(c)   |
|--------------------------------------|---|--|--|
| Definition of<br>Key Terms           | Refugee: a person who has successfully established the requirements of one of the claims contained in Section 3.128 | Manifestly unfounded:<br>the applicant's claim does<br>not meet the requirements<br>of any Section 3 claim<br>and therefore does not<br>necessitate international<br>protection. | Unfounded: The basis for asylum in the application has been established in terms of Section 3 yet the grounds provided lack substantive evidence or merit. 129 Thus there is no causal nexus between the basis and the grounds provided. |
| Right to<br>Appeal and/<br>or Review | Successful applications may be subject to review by SCRA.   | Manifestly unfounded applications are automatically reviewed by SCRA.  | Unfounded applications may be subject to review by SCRA. Appeals may be lodged to the Refugee Appeals Authority ("RAA")  |

<sup>&</sup>lt;sup>128</sup> United Nations High Commissioner for Refugees 'Asylum and Migration' available at https://www.unhcr.org/asylum-and-migration.html, accessed on 9 April 2020.

<sup>&</sup>lt;sup>129</sup> Refugees Amendment Act 33 of 2008.

#### (ii) Decisions on applications for asylum



Once an application for asylum has been lodged, and the RSDO has duly conducted a hearing with the applicant, a decision must be made on such application. In this regard, the RSDO may either grant the application, in which case the applicant is awarded refugee status, or the RSDO may reject the application on the basis of such application being manifestly unfounded or unfounded. An asylum seeker must report to the RRO at which their application was submitted in order to receive the outcome of the application in writing.<sup>130</sup>

<sup>&</sup>lt;sup>130</sup> Refugees Regulations supra note 17 at reg 14(8).

The RSSDO rejects the application for asylum as manifestly unfounded or fraudulent or abusive

Section 24(3)(b)

The decision is confirmed, set aside, or substituted by SCRA

Section 24A(3)

SCRA informs the relevant RRO of its decision within 5 days of making such decision

Section 24A(4)

The applicant is dealt with as an :illegal foreigner"

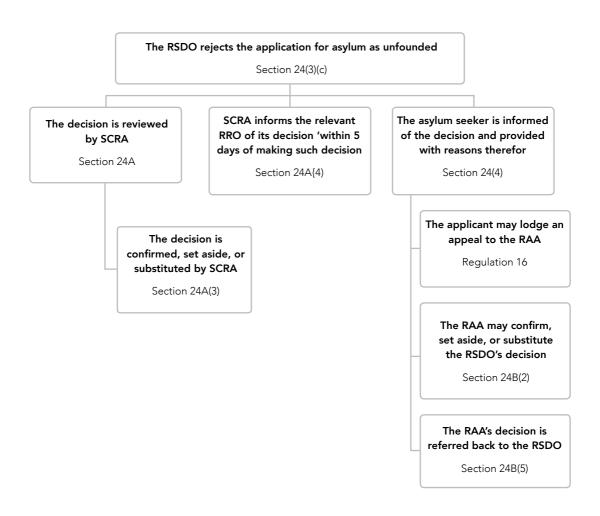
Section 24(5)

reasons for such rejection. Later, the First Refugees Amendment entitled such applicant to within 14 days lodge written representations for consideration by SCRA against the decision. However, with the introduction of the recent amendments, the right to appeal has seemingly dissolved. Once an application is rejected by the RSDO as manifestly unfounded, it is subject to automatic review by SCRA. SCRA is mandated to confirm, set aside, or substitute the RSDO's decision. Once an RSDO's decision has been reviewed and confirmed by SCRA in this way, and the applicant has been duly notified in writing, such applicant must subsequently be dealt with as an "illegal foreigner."

<sup>&</sup>lt;sup>131</sup> Refugee Amendment Act supra note 82 at s 24A(1).

<sup>132</sup> Ibid s 24A(3).

<sup>&</sup>lt;sup>133</sup> Immigration Act supra note 2 at s 32.



The RAB, previously established by the Refugees Act as the appeals authority for unfounded applications, has now been replaced by the RAA.<sup>134</sup> Once the RSDO decides to reject an application as unfounded, it may be reviewed similarly as above by SCRA. Upon receipt of the written rejection from the RSDO, the applicant is entitled to lodge an appeal to the RAA within 10 days of receipt.<sup>135</sup> In this regard, the applicant must comprehensively detail the grounds of his appeal on Form 9 (RAA-01).

<sup>&</sup>lt;sup>134</sup> Refugees Amendment Act supra note 82 at ch 2.

<sup>&</sup>lt;sup>135</sup> Refugees Regulations supra note 17 at reg 16(1).

Regulation 16 further makes provision for the late submission of appeals in exceptional circumstances or where compelling reasons exist.<sup>136</sup> The exceptional circumstances listed in the Regulations as being compelling are:

- Institutionalisation:
- Entry into a Witness Protection Programme;
- Quarantine:
- Arrest without bail; or
- Any other similar compelling reasons.

Moreover, applications for condonation must be accompanied by documentary evidence in order to prove the existence of such compelling grounds.

After lodging an appeal, the failed asylum seeker is called by the RAA to appear at an appeal determination. <sup>137</sup> Should the asylum seeker fail to appear before the RAA, his appeal will be determined on the basis of documents already before the RAA at the discretion of the presiding member of the RAA.

If an asylum seeker fails to lodge an application, is not granted condonation or if their appeal has been rejected, they must be dealt with as an "illegal foreigner" in terms of the provisions of the Immigration Act.<sup>138</sup>

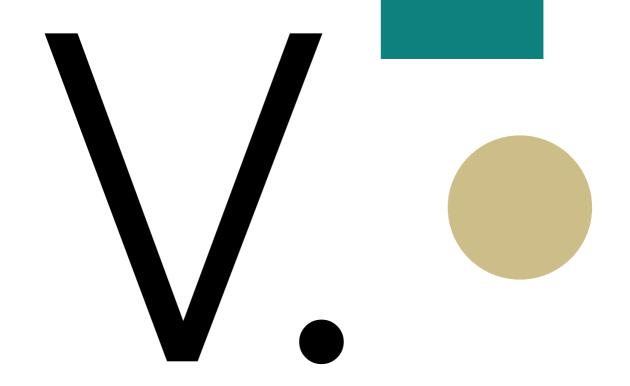
The changes to the Refugees Act indicate a shift towards securitisation of migration and a conception of an asylum system not aimed at providing protection, but rather as a system to be used for immigration control. This is evident in the procedural changes outlined above. It is also evident that these procedural and substantive changes are likely to result in more asylum seekers falling foul of the Refugees Act and thus being placed in precarious positions at risk of being deemed "illegal foreigners" and at risk of detention and deportation.

<sup>&</sup>lt;sup>136</sup> Ibid reg 16(3).

<sup>&</sup>lt;sup>137</sup> Ibid reg 16(5).

<sup>138</sup> Ibid reg 16(4).

## V. IMMIGRATION DETENTION



#### (A) Introduction

Under South African law, detention for the purposes of identification and deportation is known as **Immigration Detention**. Immigration Detention is not dealt with through ordinary criminal justice processes and as a result, a detained person's legal status in South Africa must be determined on a balance of probabilities. Immigration detainees should only be held at centres specifically designated for immigration detention by the Director-General of Home Affairs. <sup>139</sup> In practice, however, immigration detainees are often held at detention centres that have not been designated by the Director-General.

The Immigration Act defines "foreigners" as individuals who are not citizens of South Africa. "Illegal foreigners" are defined as "foreigners" who are in the Republic in contravention of the Immigration Act. 140 Non-nationals in the Republic are required to obtain documentation that authorises their stay in South Africa, such as asylum seeker visas, refugee status permits or refugee identification documents, or a valid visa in terms of the Immigration Act. 141

#### (B) Detention for the purposes of identification

An immigration or police officer may interview and/or detain a person if they believe – on reasonable grounds – that the person is not legally in South Africa.<sup>142</sup>

Under these circumstances the person can be detained without a warrant. However, the officer may **not** hold a person **for more than 48 hours for the purpose of verifying their identity or status.** <sup>143</sup> During this time, the officer must take "reasonable steps" to investigate and:

Access relevant documents that may be readily available **OR** contact relatives or other persons who could prove their identity and status **AND** access departmental records to this effect.<sup>144</sup>

In practice, verification is very rarely performed by the police or immigration officers and yet, non-nationals are not released within the stipulated time-frame. As a result, there is danger that the lawfulness of the detention could be confirmed by a court without verification having taken place, resulting in the *actual unlawful* detention of newcomer asylum seekers, existing asylum seekers and recognised refugees. In fact, detainees consistently report that verification is not conducted at any stage of the arrest and detention process by the police, immigration officers, or upon arrival at Lindela Repatriation Facility.

<sup>&</sup>lt;sup>139</sup> Immigration Act supra note 2 at s 34(1).

<sup>&</sup>lt;sup>140</sup> "Prohibited persons" are any persons referred to in section 29 of the Immigration Act, 2002 (xxx).

<sup>&</sup>lt;sup>141</sup> See respectively the Refugees Act, 1998 section 22, Immigration Act section 30, and Immigration Act (xlii). Section 23 of the Refugees Act authorises detention of asylum seekers where the Minister has revoked their asylum seeker permit in terms of section 22(6).

<sup>&</sup>lt;sup>142</sup> Immigration Act supra note 2 at s 41.

<sup>143</sup> Ibid s 34(1)(b).

<sup>&</sup>lt;sup>144</sup> University of Cape Town Refugee Rights Detention Manual 3 ed (2016) 8.

#### (C) Detention for the purposes of deportation

Detention for the purposes of deportation should only occur if a person cannot provide officers with a valid identification document. Valid documents, which an officer should have taken reasonable steps to obtain, must demonstrate that the prospective detainee is either a citizen, permanent resident, visitor with a visa, refugee or asylum seeker or that the detained person came to South Africa to seek asylum. As mentioned above, asylum seekers cannot be returned to their country of origin if the reason they sought asylum still exists 145

In reality, the line between detention for the purpose of verification and detention for the purpose of deportation is often blurred. This is mostly due to the absence of verification by officials at the arrest stage. This essentially means that all immigration detention tends to be regarded as being for the purpose of deportation.

#### (D) Detention permissible under the Refugees Act

Under the Refugees Act, asylum seekers and refugees may be detained in some circumstances. An asylum seeker may be lawfully detained if the Minister has withdrawn their visa, 146 whereas a refugee may be detained pending their deportation if they pose a risk to national security or public order. 147

All detentions under the Refugees Act are limited by section 29's general restrictions on detention which states under sub-section 1 that:

"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 court in whose area of jurisdiction the person is detained, and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days of detention."

<sup>&</sup>lt;sup>145</sup> In accordance with the principle of *non-refoulement*. See Section III of this guide for a discussion of *non-refoulement*.

<sup>&</sup>lt;sup>146</sup> Refugees Act supra note 1 at s 23: "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."

<sup>&</sup>lt;sup>147</sup> Ibid s 28(1) and (4): "(1) Subject to section 2, a refugee may be removed from the Republic on grounds of national security or public order. ... (4) Any refugee ordered to be removed under this section may be detained pending his or her removal from the Republic."

#### Subsection 2 states

"The detention of a child must be used only as a measure of last resort and for the shortest possible period of time, taking into consideration the principle of family unity and the best interest of the child."

Asylum seekers may be detained under section 23. It states that "[i]f the Director-General has withdrawn an asylum seeker visa in terms of section 22(5), he or she **may**, subject to section 29, cause the holder to be arrested and detained". An asylum seeker visa may be withdrawn where the applicant:

"(a) contravenes any condition endorsed on that visa; (b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent; (c) the application for asylum has been rejected; or (d) the applicant is or becomes ineligible for asylum." 148

Asylum seekers may also be detained under section 36, which provides for the withdrawal of refugee status under certain conditions which, as stated above, are where:

"(a) such person has been recognised as a refugee due to fraud, forgery or false or misleading information of a material or substantive nature in relation to the application; (b) such person has been recognised as a refugee due to an error, omission or oversight; or (c) such person ceases to qualify for refugee status in terms of section 5." 149

Section 36(4) states that "[a] person whose refugee status is withdrawn in terms of [section 36] must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act."

<sup>&</sup>lt;sup>148</sup> Refugees Amendment Act supra note 82 at s 22(5)

<sup>&</sup>lt;sup>149</sup> Ibid s 36(1).

Minister of Home Affairs and others v Rahim and others<sup>150</sup>

In 2016, respondents in this case, various non-nationals, were arrested after having been informed that their respective applications for asylum had been rejected and the internal appeal process had been exhausted unsuccessfully. They were detained for various periods and at various places around the country, either in police stations or prisons.

In terms of section 34 of the Immigration Act, "illegal foreigners" can be detained pending deportation, but it specifies that they must be detained at a place determined by the Director-General of the DHA. The respondents alleged that the places they were detained were not designated by the Director-General, meaning their detention was unlawful. They therefore sued for damages.

The Constitutional Court agreed with the SCA that "it is an international norm that refugees and others caught up in migratory regulation have a peculiar status that differentiates them from those who are imprisoned by the criminal justice system." They went on to find that the legality of the place of detention and the legality of the detention itself cannot be separated, stating, "[f]or so long as a person is confined in a place not permitted by law his or her confinement is unlawful." 152

The appeal was dismissed with costs and the damages awarded to the respondents were upheld.

<sup>150</sup> Minister of Home Affairs v Rahim and Others (CCT124/15) [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC).

<sup>151</sup> Ibid para 9.

<sup>&</sup>lt;sup>152</sup> Ibid para 26.

#### (E) Detention for other purposes

The Criminal Procedure Act regulates detention for matters not arising out of a person's immigration or refugee status. For instance, section 50(1)(a) requires that arrested persons shall be brought to a police station or other place specified on the warrant for arrest. People detained under this section are entitled to general rights upon detention, including the right to be informed of their right to institute bail proceedings and the right to be brought before a lower court "as soon as reasonably possible, but not later than 48 hours after the arrest" – provided that they have not been charged and bail is not granted to them under sections 59 or 59A. 153

The 48-hour timeline is critical to the processes of arrest and detention. In terms of the Constitution, "[e]veryone who is arrested for allegedly committing an offence has the right... to be brought before a court as soon as reasonably possible, but not later than...48 hours after the arrest; or the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day." 154

#### (F) Common abuses in the detention process

Practical experiences of LHR staff has indicated a number of common abuses of authority which occur in the detention process. One example is the confiscation or destruction of valid visas or identity documents. Further common abuses reported to LHR by clients include:

- a) Counting the length of a detention only from the first day that the client was taken to a prison or detention centre. Section 35(1)(d)(i) and (ii) of the Constitution requires that the length of a person's detention includes the time they are detained at a police station. <sup>155</sup> This is a major issue in practice. Detainees are often held in police custody for extended periods of time, and yet the time spent in detention is often only calculated from the day of arrival at Lindela. This results in detainees being held for unlawful periods of detention which exceed the prescribed 120 days.
- b) Repeated detention with short periods of release between periods. In other words, authorities releasing migrants from detention centers and thereafter requesting that they present identity documents. When the migrant cannot present identity documents they are then detained again, thereby restarting the clock on their detention.<sup>156</sup>

These abuses are unlawful.

<sup>&</sup>lt;sup>153</sup> CPA supra note 36 at s 50(1)(c)(i) and (ii).

 $<sup>^{154}</sup>$  The Constitution supra note 30 at s 35(1)(d)(i) and (ii). Section 35 details the core constitutional rights pertaining to 'Arrested, detained and accused persons'. We therefore recommend every practitioner consult this section when faced with any situation involving arrest or detention, including the arrest or immigration detention of migrant persons.

<sup>155</sup> South African Human Rights Commission and Others v Minister of Home Affairs: Naledi Pandor and Others (41571/12) [2014] at paras 27-28, interpreting section 34(2) of the Immigration Act and section 35(1)(d) of the Constitution.

<sup>&</sup>lt;sup>156</sup> Immigration Regulations supra note 6 at reg 53.

#### (G) Conditions for deportation

If a person's lawful identity and status cannot be established, and they have not expressed an intention to apply for asylum, then they will be deported. The procedure for deporting "illegal foreigners" is contained in the Immigration Act and its regulations.<sup>157</sup>

If it is decided that a person will be deported, the Director-General may order that the person deposit a sufficient sum of money to cover, in whole or in part, the expenses relating to deportation. <sup>158</sup> If one fails to comply with this order then they will be guilty of an offence and may be fined up to R20 000 and imprisoned for not more than 12 months. <sup>159</sup> The current designated detention centres are listed in Section XII below.

<sup>&</sup>lt;sup>157</sup> See Immigration Act supra note 2 at s 34 and Immigration Regulations Ibid reg 39 of the Regulations. Refer to both sections for an overview of the primary guidelines governing deportation under the Immigration Act.

<sup>158</sup> Immigration Act supra note 2 at s 34(3).

<sup>159</sup> Ibid s 34(4).

The Constitution is the primary instrument for interpreting the Immigration Act, Refugees Act, Citizenship Act, <sup>160</sup> and Children's Act. <sup>161</sup> This part of the handbook outlines key provisions of the Constitution and international legal instruments and how they are relevant to the detention process.

South Africa is a democratic nation founded on the values of human dignity, equality, advancement of human rights and freedoms, and the rule of law. 162 All laws that are inconsistent with the Constitution are invalid. 163 The provisions of the Constitution apply to all laws in South Africa, and binds all organs of state, including the DHA. 164 The Constitution requires South Africa's government to respect, protect, promote and fulfil the rights it contains. These rights may only be limited by the Constitution's own limiting provisions. 165

Everyone in South Africa is equal before the law and has the right to equal protection and benefit of the law. Discrimination on the basis of social origin, birth or analogous grounds are forbidden with the exception of positive discrimination designed to benefit a marginalised group. All people are entitled to respect and recognition of their inherent dignity.

Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Every person whose rights have been adversely affected by administrative action has the right to be given written reasons. 168 Furthermore, everyone has 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. 169

<sup>&</sup>lt;sup>160</sup> Citizenship Act 88 of 1995.

<sup>&</sup>lt;sup>161</sup> Children's Act supra note 20.

 $<sup>^{162}</sup>$  The Constitution supra note 30 at ss 1(a) and (c). See also s 7.

<sup>&</sup>lt;sup>163</sup> Ibid s 2.

<sup>&</sup>lt;sup>164</sup> Ibid s 8.

<sup>&</sup>lt;sup>165</sup> See Ibid s 36(1). Section 36(2) provides that other limitations of the rights in the Bill of Rights that may be effected otherwise than under subsection (1) must still be located within the Constitution itself. Examples of such other limitations are the provisions in the Bill of Rights that accord certain rights only to citizens such as in sections 19 (political rights) 20 (Citizenship), and 22 (Freedom of trade). See also section 174(1) (appointment of judicial officers).

<sup>&</sup>lt;sup>166</sup> Ibid s 9.

<sup>&</sup>lt;sup>167</sup> Ibid s 9, 10, and 11.

<sup>&</sup>lt;sup>168</sup> Ibid s 33.

<sup>&</sup>lt;sup>169</sup> Ibid s 34.

#### (A) The rights of arrested, detained, and accused persons generally

Section 35 of the Constitution outlines the general rights available to any person who has been arrested, detained or accused of an offence (including an immigration-related offence) for which they could be detained. These include the right to be promptly informed of one's right to remain silent, the reasons for one's detention, the right to information provided in a language that the arrested/detained/accused person can understand and the right to a fair trial.

#### (B) Rights of every person who is arrested

The CPA allows for the arrest of persons with a warrant of arrest, or without a warrant of arrest in certain circumstances.<sup>172</sup> It further requires that the arrested person must "at the time of being arrested or immediately after being arrested, be informed of the cause of the arrest."<sup>173</sup> Further, if the arrest is authorised by a warrant, the arrested person must be furnished with a copy of the warrant upon request. The CPA outlines the procedure required following an arrest:<sup>174</sup>

#### 50 Procedure after arrest

- (1) (a) Any person who is arrested with or without warrant for allegedly committing an offence, or for any other reason, shall as soon as possible be brought to a police station or, in the case of an arrest by warrant, to any other place which is expressly mentioned in the warrant.
  - (b) A person who is in detention as contemplated in paragraph (a) shall, as soon as reasonably possible, be informed of his or her right to institute bail proceedings.
  - (c) Subject to paragraph (d), if such an arrested person is not released by reason that-
    - (i) No charge is to be brought against him or her; or
    - (ii) Bail is not granted to him or her in terms of section 59 or 59A, he or she shall be brought before a lower court as soon as reasonably possible, but not later than 48 hours after the arrest.
  - (d) If the period of 48 hours expires-
    - (i) Outside ordinary court hours or on a day which is not an ordinary court day, the accused shall be brought before a lower court not later than the end of the first court day;

<sup>&</sup>lt;sup>170</sup> For the purposes of this handbook, accused persons mean accused migrants, including asylum seekers and refugees whose criminal prosecution is connected to their immigration status or who having completed sentence related to their criminal convictions connected or unconnected to their immigration status are in law not, by virtue of their position as asylum seekers (or express aspirant asylum seekers) or refugees, eligible for deportation. An example can be found in Ruta (case) supra note 79.

<sup>&</sup>lt;sup>171</sup> The Constitution supra note 30 at s 35(1)(b), 35(2)(a), 35(4), and 35(3) respectively.

<sup>&</sup>lt;sup>172</sup> CPA supra note 36 at s 39.

<sup>&</sup>lt;sup>173</sup> Ibid s 39(2).

<sup>174</sup> Ibid ss 50(1) and (6).

- (6) (a) At his or her first appearance in court a person contemplated in subsection (1) who-
  - (i) Was arrested for allegedly committing an offence shall, subject to this subsection and section 60-
  - (a) Be informed by the court of the reason for his or her further detention; or
  - (b) Be charged and be entitled to apply to be released".

#### Mashilo v Prinsloo<sup>175</sup>

In this matter, the Court clarified how the above provisions relate to section 35(1)(d) of the Constitution. Section 35(1)(d) requires that:

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

The court in Mashilo made the following findings:

[11] Section 50 was designed, even before the advent of the new constitutional dispensation, to encroach in the least restrictive manner on a potential accused's right to freedom. Subsection 50(1)(a) is the beginning of steps to be taken to expedite the workings of the criminal justice system. First, an arrested person has to be brought to a police station as soon as possible after his or her arrest. Second, that person is required, in terms of s 50(1) (b) to be informed of his or her right to institute bail proceedings 'as soon as reasonably possible.' Section 50(1)(c)(ii) requires that an arrested person be brought before a lower court 'as soon as reasonably possible,' but no later than 48 hours after the arrest. This is to ensure court oversight and to enable a bail application to be brought.

[12] Section 35(1) of the Constitution gives new impetus to the expedition that has to be brought to bear in dealing with an arrested person . . .

<sup>&</sup>lt;sup>175</sup> Mashilo and Another v Prinsloo (576/11) [2012] ZASCA 146; 2013 (2) SACR 648 (SCA).

[13] Section 50(d)(i) was clearly intended to extend the 48-hour outer limit during which an arrested person could be detained. That is made plain from the language of the subsection and has, during the last 35 years since the introduction of the Act, always been understood to be so... The legislative purpose in extending the 48 hours, if it is interrupted by a weekend, appears to me to be fairly obvious. It is because the logistics of ensuring an appearance before court over a weekend are difficult. Put differently, it is difficult to co-ordinate police, prosecutorial and court administration and activities over a weekend. This was especially true at the time that the legislation was introduced. It continues to be true today.'

The police may release persons on police bail if the persons are arrested for minor offences. This may be done before the person appears in lower court.<sup>176</sup> This is only possible when done by a "police official of or above the rank of non-commissioned officer" who must first consult with the police official charged with investigating the offence.<sup>177</sup>

If the alleged offence is not of a serious nature, then the arrested person may be released earlier if police grant bail without the need to wait for 48 hours and an appearance before a court. An undocumented migrant, however, may have difficulties securing bail. This is possibly due to the ill-conceived notion that non-nationals automatically constitute a "flight risk" – especially those who hold no valid documentation. However, the fact that an accused person is an undocumented non-national does not justify the refusal of bail.

<sup>&</sup>lt;sup>176</sup> CPA supra note 36 at s 59.

<sup>&</sup>lt;sup>177</sup> Ibid s 59(1)(a).

The Constitution requires that the person who is arrested, with or without a warrant, has the right to remain silent and to be promptly informed of this right, as well as of the consequences of not remaining silent.<sup>178</sup> The arrested person further has **the right not to be compelled to make any confession or admission that could be used in evidence against the person.** A distinction must therefore be drawn between compelled and voluntary confessions. The former is generally not admissible while the latter automatically is. For a confession to be admissible, the CPA sets out that:<sup>179</sup>

- "(1) Evidence of any confession made by any accused person in relation to the commission of any offence shall, if such confession is proved to have been freely and voluntarily made by such person in his sound and sober senses and without having been unduly influenced thereto, be admissible in evidence against such person at criminal proceedings relating to such offence: Provided—
  - "(a) That a confession made to a peace officer, other than a magistrate or justice or, in the case of a peace officer referred to in section 334, a confession made to such peace officer which relates to an offence with reference to which such peace officer is authorised to exercise any power conferred upon him under that section, shall not be admissible in evidence unless confirmed and reduced to writing in the presence of a magistrate or a justice; and
  - (b) That where the confession is made to a magistrate and reduced to writing by him, or is confirmed and reduced to writing in the presence of a magistrate, the confession shall, upon the mere production thereof at the proceedings in question
    - (i) Be admissible in the evidence against such person if it appears from the document in which the confession is contained that the confession was made by a person whose name corresponds to that of such person and, in the case of a confession made to a magistrate or confirmed in the presence of a magistrate through an interpreter, if a certificate by the interpreter appears on such documents to the effect that he interpreted truly and correctly and to the best of his ability with regard to the contents of the confession and any question put to such person by the magistrate."

Section 35(5) of the Constitution forewarns that "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded **if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.**" While this provision is fundamentally context-sensitive, the following two cases offer some guidance as to how it applies to situations where the accused has either incriminated themselves or been coerced into supplying incriminating evidence.

 $<sup>^{\</sup>rm 178}$  The Constitution supra note 30 at s 35(1).

<sup>&</sup>lt;sup>179</sup> CPA supra note 36 at s 217.

In Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others, <sup>180</sup> which was adjudicated under the Interim Constitution, Ackermann J found:

"A compulsion to give self-incriminating evidence, coupled with only a direct use immunity along the lines indicated above, and subject to a judicial discretion to exclude derivative evidence at the criminal trial, would not negate the essential content of the section 11(1) right to freedom or the section 25(3) right to a fair trial. Only a discrete and narrowly defined part of the broad right to freedom is involved which could not conceivably be described as a "negation" of its essential content. As far as section 25(3) is concerned, the trial judge is obliged to ensure a "fair trial", if necessary by his or her discretion to exclude, in the appropriate case, derivative evidence. Ultimately this is a question of fairness to the accused and is an issue which has to be decided on the facts of each case. The trial judge is the person best placed to take that decision."

The section 25(3) rights referred to in the case are contained in the interim Constitution and are now located within section 35(3) of the Constitution.<sup>181</sup>

In Key v Attorney-General, Cape Provincial Division and Another<sup>182</sup> the Constitutional Court found that:

"In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by state agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in Ferreira v Levin, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."

<sup>&</sup>lt;sup>180</sup> Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others (CCT5/95) [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1.

<sup>&</sup>lt;sup>181</sup> The section 25(3) rights described here are currently enshrined in section 35(3) of the Constitution.

Key v Attorney-General, Cape Provincial Division and Another (CCT 21/94) [1996] ZACC 25; 1996 (4) SA 187 (CC); 1996 (6) BCLR 788 (15 May 1996). This decision was followed in S v Ngwenya (CC73/15) [2015] ZAGPPHC 654 (30 July 2015).

It follows from the above judgments that it will be upon an accused person to inform the trial court of any confession(s) that may have been compelled or improperly induced by any arresting officer(s) during and while under arrest. In turn, the trial court is duty-bound to investigate the accused's complaint and use its discretion to assess and weigh the admissibility of the evidence obtained through such induced confession, and must in doing so ensure that the evidence so obtained is not admitted "if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice." 183

LHR's experience is that many clients complain about being coerced into signing documents, such as admission of guilt forms or forms consenting to their deportation, without being instructed about the contents or purpose of these documents that are later used against them when they try contest their detention. Practitioners must be ready to interrogate the manner evidence used against their clients was obtained.

#### (C) Rights of every person who is detained (including a sentenced prisoner)

A person who is arrested must, upon being brought to court to be charged, either be released on bail or warning, in the interests of justice, or if they are not released be informed of the reason for their continued detention. Section 35(2) of the Constitution grants the detained person the right to be promptly informed of:

- The reason for their detention;<sup>184</sup>
- The right to choose and consult with a legal practitioner;<sup>185</sup>
- Failing the above (i.e. if the detainee cannot afford their own private legal services), the right to be assigned a legal practitioner by the state at its own expense.<sup>186</sup>

In addition, a detained person is entitled to challenge the lawfulness of their detention before a court and to be released if the detention is ruled by the court to be unlawful. For instance, if a person has not been brought to court and charged within the prescribed period, then the court will likely find their detention unconstitutional.<sup>187</sup>

Conditions of the detention facility in which a detainee is confined must be consistent with the detained person's human dignity. Detained persons must be afforded, for example, space and time to exercise; provision of adequate accommodation provisions, nutrition, reading material and medical treatment.<sup>188</sup>

<sup>&</sup>lt;sup>183</sup> CPA supra note 36 at s 135(5).

<sup>&</sup>lt;sup>184</sup> The Constitution supra note 30 at s 35(2)(a)

<sup>185</sup> Ibid s 35(2)(b)

<sup>186</sup> Ibid s 35(2)(c)

<sup>187</sup> Ibid s 35(2)(d)

<sup>188</sup> Ibid s 35(2)(e).

The Constitution also affords the detainee the right to communicate with and be visited by their spouse or partner, next of kin, chosen religious counsellor, and chosen medical practitioner. All of these rights and entitlements apply equally to a detainee who is a citizen and a detainee who is a foreign national.

#### (D) Children's specific right against detention

The Constitution provides that every child has the right to not be detained except as a measure of last resort, in which case, in addition to the other rights children enjoy under the Constitution, the child may be detained only for the shortest appropriate period of time. Moreover, a child's best interests are of paramount importance in every matter concerning a child.<sup>190</sup>

#### (E) Every accused person has a right to a fair trial

Every person in South Africa has a right to a fair trial. Section 35(3) of the Constitution guarantees a battery of rights meant to secure the right to a fair trial. A person who was not advised upon arrest of the right to remain silent, the corresponding consequences of not remaining silent and who was compelled to make a confession or admission the police intended to use in evidence against them, is at risk of an unfair trial.

As part of the right to a fair trial, the Constitution requires that an accused person in a criminal trial has a right: 191

- To be informed of the charge with sufficient detail to answer it;
- To have adequate time and facilities to prepare a defence;
- To a public trial before an ordinary court;
- To have their trial begin and conclude without unreasonable delay;
- To be present when being tried;
- To be promptly informed of:
  - the rights to choose and be represented by a legal practitioner of their choice; and failing to choose a legal representative of their choice,
  - the right to have a legal practitioner assigned to them by the state at its own expense if substantial injustice would occur if the accused were to represent themselves.
- To be presumed innocent, to remain silent, and not to testify during the proceedings;
- To adduce and challenge evidence;

<sup>189</sup> Ibid s 35(2)(f).

<sup>&</sup>lt;sup>190</sup> Ibid ss 28(1)(g) and (2). Sections 12 and 35 prescribe the general rights to security of the person and rights of arrested, detained, and accused persons.

<sup>&</sup>lt;sup>191</sup> Ibid s 35(2)(a) through (o).

- Not to be compelled to give self-incriminating evidence;
- To be tried in a language that they understand or alternatively, to have the proceedings
  interpreted to them if it is not practicable to conduct the trial in the language of their
  understanding. It is also required that whenever the accused has to be provided any trial related
  information under this section, it must be given to them in the language that they understand;
- Not to be convicted of an act or omission that was not an offence either under national or international law at the time it was committed or omitted;
- Not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
- To the benefit of the least severe of the prescribed punishment, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of the sentencing; and
- The accused is entitled to the right of appeal to or review by a higher court.

#### (F) Who can seek redress for a violation of constitutional rights?

Anyone who alleges a violation or threatened violation of a right in the Bill of Rights may approach a court for redress.<sup>192</sup> Under this provision "anyone" includes a person:

- Acting in their own interest;<sup>193</sup>
- Acting on behalf of another person who cannot act in their own name; 194
- Acting as a member of, or in the interest of, a group of or a class of persons;<sup>195</sup>
- Acting in the public interest;<sup>196</sup> and
- As an association acting in the interest of its members;<sup>197</sup>

<sup>&</sup>lt;sup>192</sup> Ibid s 38.

<sup>&</sup>lt;sup>193</sup> For example *Gavrić v Refugee Status Determination Officer, Cape Town and Others* (CCT217/16) [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC) (28 September 2018); Ruta (case) supra note 79.

<sup>&</sup>lt;sup>194</sup> See Sonke Gender Justice NPC v President of the Republic of South Africa and Others (24227/16) [2019] ZAWCHC 117 (5 September 2019). In the area of refugee rights law, this happens often when acting on behalf of bedridden patients, and school children.

<sup>195</sup> Sonke Gender Justice Network v Malema (2010 (7) BCLR 729 (EqC)) [2010] ZAEQC 2; 02/2009 (15 March 2010).

<sup>&</sup>lt;sup>196</sup> Lawyers for Human Rights v Minister of Home Affairs and Others (CCT38/16) [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC) (29 June 2017).

<sup>&</sup>lt;sup>197</sup> Zimbabwe Exiles Forum and Others v Minister of Home Affairs and Others (27294/2008) [2011] ZAGPPHC 29 (17 February 2011).

#### (G) The Constitution's principle limiting clause: section 36

The rights protected in the Constitution are subject to section 36, the Constitution's principle limiting provision. <sup>198</sup> Section 36 permits the limitation of the rights in the Bill of Rights only if this is in terms of a law of general application, and only to the extent that the limitation is reasonable and justifiable in an open democratic society based on human dignity, equality and freedom. Such limitation must take account of the following factors:

- The nature of the right that is the subject of the limitation;<sup>199</sup>
- The importance of the purpose of the limitation;<sup>200</sup>
- The nature and extent of the limitation;<sup>201</sup>
- The relation between the limitation and its purpose;<sup>202</sup> and
- (Whether there are no) less restrictive means to achieve the purpose.<sup>203</sup>

#### (H) Interpretive instruments within the Constitution

When interpreting the Bill of Rights, a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law <sup>205</sup> and may consider foreign law.<sup>206</sup> Furthermore, when interpreting any legislation, and when developing the customary law, the courts, tribunals or forums are required to promote the spirit, purport and objects of the Bill of Rights.<sup>207</sup>

The Constitutional Court often invokes international law as well as foreign law. The Constitution specifically states that courts "may consider foreign law." The word "may" is critical and ensures our courts do not readily apply foreign law at the expense of local context and the particular lived experiences of those in South Africa. The minority judgment of Kriegler J in Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others warns:

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<sup>198</sup> The Constitution supra note 30 at s 36.
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<sup>&</sup>lt;sup>199</sup> Ibid s 36(1)(a).

<sup>&</sup>lt;sup>200</sup> Ibid s 36(1)(b).

<sup>&</sup>lt;sup>201</sup> Ibid s 36(1)(c).

<sup>&</sup>lt;sup>202</sup> Ibid s 36(1)(d).

<sup>&</sup>lt;sup>203</sup> Ibid s 36(1)(e).

<sup>&</sup>lt;sup>204</sup> Ibid s 39(1)(a).

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<sup>&</sup>lt;sup>205</sup> Ibid s 39(1)(b).

<sup>&</sup>lt;sup>206</sup> Ibid s 39(1)(c).

<sup>&</sup>lt;sup>207</sup> Ibid s 39(2).

"[I]n particular I would require to be persuaded that the differences between South Africa on the one hand, and the foreign jurisdictions used as lodestars, on the other, are not so great that a local departure is not warranted. That will entail, inter alia, a comparison of the safeguards against corporate fraud in the countries concerned and the relative competence of the supervisory, investigatory and prosecuting authorities in the particular countries compared with what is available in this country."

The Constitution requires a court must, in appropriate cases, "declare that any law or conduct that is in consistent with the constitution is invalid to the extent of its inconsistency;" and further, that a court "may make an order that is just and equitable" in the circumstances of a particular matter.<sup>208</sup> This mandate conveys a broad authority on the courts to find laws invalid, but also urges the courts to limit uses of that authority only to the "extent of [the law's] inconsistency" with the Constitution.

#### (I) Relevant international human rights instruments and provisions

South Africa is a party to many international human rights instruments. This handbook, however, will describe only the key instruments that apply to immigration detention in South Africa. The common denominators amongst all the referenced international human rights instruments are, inter alia: equality before the law and equal protection of the law, human dignity, liberty and security of the person, right of access to courts or an appropriate forum, the right to be presumed innocent until proven guilty by competent court or tribunal/forum, the right to legal representation and the right to receive information.

(i) 1951 UN Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees<sup>209</sup>

**Article 3** of the 1951 UN Convention, which is a non-discrimination clause similar to section 9 of the Constitution, obliges the state party to apply its provisions to refugees **without discrimination** as to race, religion or **country of origin**.

**Article 16** imposes a duty upon a state party to ensure that refugees have free access to the courts of law and enjoy the same treatment as nationals of the host country in matters pertaining to access to the courts, which includes legal assistance and exemption from the obligation to pay security for costs of litigation.

**Article 25**, read with **article 27**, requires that the host state provide refugees with the necessary administrative assistance, including delivery of such documents to refugees as they may require, such as identification documents.

<sup>&</sup>lt;sup>208</sup> Ibid s 172(1).

<sup>&</sup>lt;sup>209</sup> 1951 UN Convention supra note 23.

**Article 31** prohibits the imposition against refugees of penalties based upon their illegal entry into the Republic, if they have without delay presented themselves before authorities to apply for asylum. **Article 32**, read together with **article 33**, prohibits the expulsion of refugees from the host country's territory, unless this is done on the grounds of national security or public order, and provides further that:

- "2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority."
- (ii) 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>210</sup>

Article 5 deals with the voluntary repatriation of refugees and prohibits the forced repatriation of refugees. Sub-article (2) provides that "[t]he country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation." This is important given that many asylum seekers and refugees, including rejected asylum seekers, endure or have endured prolonged periods of detention before they are released via court orders, or before they were finally repatriated. In other instances, also, some have been deported against their will to countries such as the Democratic Republic of Congo, where they faced persecution on arrival. This undeniably constitutes a violation of the principle of non-refoulement.

In terms of sub-article (5), South Africa must, in partnership, with other countries and role players such as the UNHCR or International Organisation for Migration ("IOM") provide assistance to voluntary returnees who have been assured safe return by their home countries. In practice, most detained asylum seekers and refugees languish in detention, despite pleas to be returned home.

The 1969 OAU Convention has been domesticated into South African law through the promulgation of the Refugees Act.<sup>211</sup>

<sup>&</sup>lt;sup>210</sup> Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1974 1001 U.N.T.S. 45 (1974)

<sup>&</sup>lt;sup>211</sup> Some sections of the Refugees Act were amended and substituted when the Refugees Amendment Acts 33 of 2008, 12 of 2011 and 11 of 2017.

#### (iii) ACHPR

**Article 2** contains a prohibition against discrimination based on, amongst others, nationality. **Article 3** guarantees equality before, and equal protection of the law. It must be read together with **article 7** (which guarantees rights of access to courts and a fair trial), which states that:

- "(1). Every individual shall have the right to have his cause heard. This comprises:
  - (a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, 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 defence, 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."

Meanwhile, article 5 guarantees the right of "every individual" to the respect of their inherent human dignity. Article 6 warns against the deprivation of liberty otherwise than is permitted by the law—that is, "no one may be arbitrarily arrested or detained."

#### (iv) CAT<sup>213</sup> and OPCAT<sup>214</sup>

Article 1(1) of CAT defines "torture" as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions."<sup>215</sup>

**Article 2** of CAT requires South Africa takes effective, legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Consistent with article 2, **article 11** requires South Africa keep "under systematic review interrogation rules, instructions, methods and practices as well as arrangements **for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment** in any territory under its jurisdiction, with a view to preventing any cases of torture."

<sup>&</sup>lt;sup>212</sup> African Charter supra note 51.

<sup>&</sup>lt;sup>213</sup> CAT supra note 25.

<sup>&</sup>lt;sup>214</sup> OPCAT supra note 14.

<sup>&</sup>lt;sup>215</sup> Arbitrary detentions constitute which affect the physical and emotional well-being of a detained person may amount to torture.

Under **article 13**, the state is required to ensure that individuals who complain about the acts of torture in any territory under its jurisdiction have their cases addressed promptly and that the complaints are impartially examined by competent authorities, such as to ensure the protection of the complainants and or their supporting witnesses against acts of ill-treatment or intimidation.<sup>216</sup> Meanwhile, article 15 necessitates that "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made."

Resonance with section 12(1) of the Constitution (i.e. freedom and security of the person) is found in **article 16(1)** of CAT, which requires South Africa to "prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The CAT and OPCAT have been domesticated under the Prevention Against Torture Act.<sup>217</sup> The objects of this Act are set out in **section 2(1)**, and they are, amongst others, to give effect to CAT and OPCAT, namely to recognise that the "equal and inalienable rights of all persons are the foundation of freedom, dignity, justice and peace in the world, and to promote the universal respect for human rights and the protection of human dignity." Further, the Prevention Against Torture Act aims to ensure that no one shall be subjected to acts of torture. Subsection (2) provides that when interpreting the Prevention Against Torture Act the court must promote the values of Chapter 2 of the Constitution (i.e. the Bill of Rights) and the achievements of the objects referred to in subsection (1).

Section 8, which is the equivalent of section 2 of the Refugees Act, endorses the international law principle of non-refoulement as follows:

"(1) No person shall be expelled, returned or extradited to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

(2) For the purposes of determining whether there are such grounds, all relevant considerations must be taken into account, including where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

<sup>&</sup>lt;sup>216</sup> See also CAT supra note 24 at art 14, which advocates for legal redress and compensation for the victims of torture.

 $<sup>^{217}</sup>$  Prevention of Combating and Torture of Persons Act 13 of 2013.

#### (v) United Nations Convention on the Rights of the Child ("UNCRC")<sup>218</sup>

Article 1 of the UNCRC defines a "child" as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier."<sup>219</sup>

**Article 2** prohibits any discrimination against children irrespective of, amongst others, their parents or guardian's nationality, birth or other status. **Article 3** states that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**" Article 12(1) states that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."

Article 37 requires that a State Party to the Convention, must ensure that:

- No child is subjected to torture or other cruel, inhuman or degrading treatment or punishment.
- No child is deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child is in conformity with the law and is used only as a measure of last resort and for the shortest appropriate period of time;
- Every child deprived of liberty is treated with humanity and respect for the inherent dignity
  of the human person, in a manner that takes into account the needs of persons of his or her
  age, including in particular that such a child is separated from adults unless it is considered
  in the child's best interest not to do so and the child shall have the right to maintain
  contact with his or her family through correspondence and visits, save in exceptional
  circumstances; and
- Every child deprived of his or her liberty is afforded the right to prompt access to legal
  and other appropriate assistance, as well as the right to challenge the legality of the
  deprivation of his or her liberty before a court or other competent, independent and
  impartial authority, and to a prompt decision on any such action.

Meanwhile, article 22(1) affords refugee children protections by stating:

"States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties."

<sup>&</sup>lt;sup>218</sup> United Nations Convention on the Rights of the Child, 1989 United Nations General Assembly resolution 44/25 (1989). <sup>219</sup> Ibid.

The Children's Act<sup>220</sup> has domesticated the provisions of the Convention. Section 9 of the Children's Act provides that "in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance, must be applied.

**Section 14**, which deals with access to courts, read with section 15, provides that "every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court." **Section 15** emulates the provisions of section 38 of the Constitution by empowering a person, in addition to or apart from the affected children, to bring a matter before courts for redress in the public interest.

In Centre for Child Law and Another v Minister of Home Affairs and Others,<sup>221</sup> the Centre for Child Law brought an urgent application on behalf of a number of unaccompanied foreign children who were detained at Lindela Repatriation Facility. At the time, the detained children were not given separate accommodation from adults who were also being detained at Lindela Repatriation Centre. The children faced imminent (and unlawful) deportation. Notwithstanding the recommendations of their curator ad litem that they be placed at a place of safety, the children continued to be detained, and were never brought before the children's court. The judgment of the high court, before which the urgent application was brought, stated:

"[14] It is clear from the curator's report that insufficient resources, inadequate administrative systems and procedural oversights in the handling of children, as well as the inaccessibility of legal representation in the adjudication process, have further exacerbated the crisis now existing in the treatment of unaccompanied foreign children.

. . .

[22] It seems to me that there can be no doubt that the respondents' behaviour as set out above is a serious infringement of the children's fundamental rights protected in terms of ss 28(2), 28(1)(c), 28(1)(g), 33, 34, 12 and 35 of the Constitution, whilst it also infringes their statutory rights contained in ss 12 and 14 of the Child Care Act.

[23] The bringing of more children to the Lindela Repatriation Centre, subsequent to the curator's report having been filed, is also, to my mind, a breach not only of the aforementioned statutory rights, but also in direct conflict with the provisions of ss 28(2), 28(1)(c), 28(1)(g), 33, 34, 12 and 35 of the Constitution. I am of the view that the detention of these children at Lindela is unlawful and invalid and should cease immediately. Furthermore, the way in which these children are being deported is not only unlawful, it is shameful."

<sup>&</sup>lt;sup>220</sup> Children's Act supra note 20.

<sup>&</sup>lt;sup>221</sup> Centre for Child Law and Others v Minister of Basic Education and Others (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG)

Among the orders that the Court made to redress the situation of the children were orders:

- Directing the relevant departments to conclude investigations in respect of the personal circumstances of each of the 13 detained children, within a prescribed period and to file their reports with the Court confirming their compliance with the order;
- Directing immediate:
  - o Compilation by the relevant department of a list containing the names, ages, gender and countries of origin of all foreign children then in detention at Lindela Repatriation Facility;
  - o Removal of the detained children and their placement in an appropriate place of care or place of safety as required by the law;
- Directing that within 14 days of removing the children from Lindela Repatriation Centre to an
  appropriate place of care or place of safety, the relevant department was to cause them to be
  brought to the children's court in order for inquiries to be held as required by the law.
- Directing the relevant department to refrain from causing an unaccompanied foreign child to be admitted at Lindela Repatriation Centre without such a child first having been dealt with by the children's court as required by the law; and
- Ordering the relevant department to appoint a legal practitioner for each of the 13 children, in terms of s 28(1)(h) of the Constitution, if it appears that a substantial injustice would otherwise result.

The rights of unaccompanied and/or separated foreign children are paramount as illustrated by the Constitution as well as domestic and international law. The detention of a child is *prima facie* unlawful, unless done as a matter of last resort and the best interest of children be considered in the manner such detention takes place.

This portion of the handbook outlines common situations involving detention that bear on the rights of refugees, asylum seekers, and other non-nationals. For such situations, an overview is included below of possible steps to take in determining the legal rights of refugees, asylum seekers and other non-nationals, as well as DHA's consequent obligations.

#### (A) Non-nationals who have completed a sentence for a crime

Non-nationals who have completed a sentence for a crime are entitled to remain in South Africa in some circumstances but are barred from remaining in others.

Step One: Does the non-national have a visa or permit to stay in South Africa?

Visas or permits to stay in South Africa include visas issued in terms of the Immigration Act, asylum seeker visas, refugee permits, permanent residency permits, etc. If the person has a visa or permit then they are, at this stage of the inquiry, entitled to remain in the Republic.

**Step Two:** If the non-national has a visa or permit, has the visa or permit expired?

All visas or permits to remain in South Africa are **time limited**. If the non-national's visa expired while in detention, then they will be held until the DHA verifies their status. If their visa is expired, then they should then be given an opportunity to renew it.

**Step Three:** If the non-national does not have any visa at all—either valid or expired—then are they an asylum seeker who was on their way to an RRO?

Non-nationals in South Africa without a visa to reside in South Africa are liable to deportation. The exception to this general rule is asylum seekers, who are permitted to remain undocumented in South Africa whilst on their way to visit an RRO. All non-nationals without documentation are "undocumented." Non-nationals in South Africa with an intention to apply for asylum must be permitted to travel to an RRO to apply. Undocumented non-nationals who do not have an intention to apply for asylum are liable to deportation.

<sup>&</sup>lt;sup>222</sup> The process governing detention and deportation of "illegal foreigners" is codified in section 34 of the Immigration Act supra note 2.

Step Four: Was the non-national declared "undesirable" under the Immigration Act?

"Undesirable persons," as defined in the Immigration Act,<sup>223</sup> are forbidden from receiving temporary residence visas.<sup>224</sup> If someone is an "undesirable person" under the Immigration Act then they are liable to deportation – unless they make a successful application to Home Affairs to waive any grounds of undesirability.<sup>225</sup>

If a documented non-national is not "undesirable" under the Immigration Act, then they must be released from detention. A documented non-national cannot be detained by reason of having completed a sentence for a crime that they have committed in the Republic.

#### (B) Asylum seeker or refugees' special liability for detention

Asylum seekers and refugees in South Africa are liable to increased scrutiny from police officers and other officials which generally results in increased arrests, detention and/or imprisonment. It is therefore important to understand the law concerning the consequences for refugees and asylum seekers' surrounding detention. A series of common scenarios follows below.

Scenario #1: The non-national has been detained for a crime separate from his/her immigration status.

If a refugee or asylum seeker is detained for a crime, then they cannot—upon their release—be detained for additional immigration matters given that the intention to apply for asylum has been expressed.<sup>226</sup> To do so would breach their right of *non-refoulement* under section 2 of the Refugees Act, or the rule protecting them from proceedings in respect of their immigration status in section 21(4) of the Refugees Act. Such non-nationals must be given the opportunity to renew their refugee or asylum visas, or if they are a newcomer to apply for asylum in order for these rights to be upheld.

<sup>&</sup>lt;sup>223</sup> Ibid s 1(1)(xli) and 30 define an "undesirable persons". In general, "undesirable persons" are 'foreigners' whom the Republic has determined cannot remain within the Republic's borders, whether because they are a fugitive, insolvent, or for some other stipulated reason. Exceptions to this provision are outlined in section 31.

<sup>&</sup>lt;sup>224</sup> Ibid s 10(4).

<sup>&</sup>lt;sup>225</sup> Ibid s 30(2).

<sup>&</sup>lt;sup>226</sup> Refugees Act supra note 1 at s 2 and 21(4)(a).

Ruta is the guiding case on this circumstance and is discussed immediately below.<sup>227</sup>

Ruta v Minister of Home Affair and others<sup>228</sup>

The applicant, Ruta, entered South Africa in December 2014. He resided in South Africa as an "illegal foreigner" until March 2016, when he was arrested for a traffic violation. The DHA moved to deport him to his country of origin, Rwanda, at which stage he requested to apply for asylum. The Minister of Home Affairs opposed his application, stating that it was too late for him to apply as he had already been in the country for 15 months

The Constitutional Court addressed the following issues:

- Should an "illegal foreigner" who claims to be a refugee and expresses intention to apply for asylum be permitted to apply in accordance with the Refugees Act instead of being dealt with under the Immigration Act?
- How do the Refugees Act and the Immigration Act interact?
- Can it be that a foreigner may arrive and live in South Africa without applying for refugee status for months, and then, when the law "catches up", insist on the right to apply for asylum?<sup>229</sup>

The Constitutional Court found that the principle of *non-refoulement* is not only embraced by international conventions to which South Africa is a signatory, but it is also a deeply entrenched part of customary international law and international human rights law. Further, the Constitutional Court held that the 1951 UN Convention<sup>230</sup> protects those who have not yet had their refugee status confirmed (*de facto* refugees) and those who have been determined to be refugees (*de jure* refugees). This, along with international human rights law, requires a country to provide protection to an individual seeking asylum until a final determination of their claim has been made.

<sup>&</sup>lt;sup>227</sup> Ruta (case) supra note 79.

<sup>&</sup>lt;sup>228</sup> Ibid.

<sup>&</sup>lt;sup>229</sup> Ibid para 14.

<sup>&</sup>lt;sup>230</sup> 1951 UN Convention supra note 23.

<sup>&</sup>lt;sup>231</sup> Ibid para 43.

With regard to the harmonisation of the Refugees Act and the Immigration Act, the Court found that the Refugees Act alone governs who may apply for asylum. The Constitutional Court stated that "[t]hough an asylum seeker who is in the country unlawfully is an "illegal foreigner" under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act."<sup>231</sup>

Specifically addressing the issue of detention, the Court stated: "[T]he Immigration Act affords an immigration officer a discretion whether to arrest and detain an illegal foreigner. That discretion must, in the case of one seeking to claim asylum, be exercised in deference to the express provisions of the Refugees Act that permit an application for refugee status to be determined." <sup>232</sup>

Finally, the Court found that while a delay is a crucial factor in determining a claim for refugee status, it is to be considered by the RSDO and in no way disqualifies an application for asylum from being made.

#### In summary:

- The right to apply for asylum is governed solely by the Refugees Act and is not influenced or circumvented by the Immigration Act in any way.
- The right to apply for asylum remains despite any delay in application, however the delay will be considered by the RSDO, for instance, with regard to the credibility and the legitimacy of the claim itself.

Scenario #2: How does a criminal conviction bear on a person's claim to asylum or existing refugee status?

If the detained person is an asylum seeker who committed a crime prior to their application for asylum, then their application may be rejected based on the Refugees Act's listed exclusions from refugee status. One such exclusion includes the commission of a Schedule 2 crime in the Republic.<sup>233</sup> The exclusion from refugee status can only be made by a RSDO.<sup>234</sup>

<sup>&</sup>lt;sup>232</sup> Ibid para 46.

<sup>&</sup>lt;sup>233</sup> Refugees Act supra note 1 at s 4(1)(e).

<sup>&</sup>lt;sup>234</sup> Ibid s 24.

<sup>&</sup>lt;sup>235</sup> Ibid s 5 and 36

Formally recognised refugees who commit crimes may lose their status. As mentioned in the section on the withdrawal of refugee status, refugees may lose their status under section 5 of the Refugees Act or may have it withdrawn. Withdrawal can only be effected by the SCRA.

The crimes, which have the potential to render a person ineligible for refugee status, either through exclusion or withdrawal, are contained in schedule 2 of the Criminal Law Amendment Act and are generally of a serious nature. However, the exclusion of an individual based on crimes which took place after gaining refugee status in a country is ill-advised and contrary to recommendations made by the UNHCR in respect of cessation and exclusion. The 1951 UN Convention only makes provision for exclusion based on past crimes, not ones taking place within the country of refuge after entering the asylum process. The correct application would be that the individual is treated in the same way that a citizen is treated with respect to the serving of a sentence. To include withdrawal or exclusion from refugee status could result in *refoulement*, and serves as a further punishment in addition to time served.

#### Scenario #3: Are non-nationals eligible for parole?

There is no right to parole in South Africa. There is, on the other hand, no statutory bar to refugees and asylum seekers obtaining parole. In order to be released on parole, applicants are often asked to provide a fixed residential address. Since many refugees and asylum seekers do not have fixed addresses, special consideration should be given to how their legal representative might argue for their refugee and asylum-seeking clients' release on parole. In practice, when a sentenced offender comes up for parole and their documentation has expired, this impacts their parole possibilities and they might not be granted parole.

This handbook has touched on the constitutional provisions governing the arrest and detention of a non-national. Failure to comply with those provisions would render the impugned conduct unconstitutional and unlawful, regardless of the status of that person, or whether their detention is handled in terms of the Refugees Act, the Immigration Act and or the CPA.

#### (A) The process of detention and deportation under section 34 of the Immigration Act

Detention and deportation of non-national persons in South Africa is primarily organised by section 34 of the Immigration Act.<sup>236</sup>

Under section 34, minors may only be detained as a measure of last resort. Where their detention is unavoidable, they must be detained separated from adults. Minors may not be detained at length in police custody. If the detained person is 18 years or older then they may be detained and deported. If a non-national is documented (i.e. if they have a valid visa to remain in South Africa under the Immigration Act or Refugees Act), then they cannot be detained for immigration purposes, because section 34 only empowers government officials to detain people for the purpose of deportation. If the detained person does not have documents, then one should assess whether they fall into the scope of the Immigration Act or Refugees Act (or neither, as the case may be). The following scenarios are helpful:

Expired visa under the Immigration Act

If the non-national has a visa in terms of the Immigration Act, but it has expired and they have applied for the renewal of the visa (but are awaiting an outcome on that renewal), then their detention would be unlawful and the court must order their release.

Expired/no visa in terms of the Refugees Act

If the non-national is a newcomer seeking asylum, then they cannot be detained and the court must order their release.<sup>237</sup> If the non-national is already in the asylum system but has been rejected and referred to the SCRA or the RAB, and they are awaiting the outcome of that review/appeal, then the detention is unlawful. Again, the court must order the person's release.<sup>238</sup> In addition, if the asylum seeker has received a final rejection and has taken the decision on judicial review in terms of PAJA before a high court, then the detention of such an individual is unlawful, and a court must order the person's release.

<sup>&</sup>lt;sup>236</sup> Immigration Act supra note 2.

<sup>&</sup>lt;sup>237</sup> Bula (case) supra note 76.

<sup>&</sup>lt;sup>238</sup> Refugees Act supra note 1 at s 21(4)(a).

#### Stateless persons

If the non-national is a stateless person, if they have applied for an exemption permit in terms of section 31(2)(b) of the Immigration Act, and are awaiting the outcome of that application, then their detention is unlawful. Again, the court must order their release. A stateless person can not be detained for the person of deportation since no nation would have accepted them.

# (B) Constitutional law and its implications for detentions under section 34 of the Immigration Act

(i) The position in the Immigration Act prior to the LHR judgment<sup>239</sup>

Previously, the Immigration Act failed to provide for the automatic judicial oversight of immigration detainees. Practically, this meant that during detention in police custody, detainees were rarely brought before court to confirm lawfulness of their continued detention. Rather, if they were brought before a court, it was merely on charges of being in the country "illegally" which ordinarily resulted in a criminal conviction. Following such conviction, detainees were then remanded back to police custody and transferred to Lindela to await deportation.

Detention and deportation of non-nationals is provided for in section 34 of Immigration Act, read with regulation 33 of the Immigration Regulations. Under the previous formulation of section 34, immigration officials were authorised to detain an "illegal foreigner" for up to 30 days without a warrant of court; however, the detainee must have been informed of their right to challenge the lawfulness of the detention **and** their right to request that a court confirm the detention within 48 hours.

#### (ii) LHR v the Minister of Home Affairs & Others

The arrest and detention of a non-national whose residence in South Africa is governed by the Refugees Act (whether the desire to apply has already been expressed or is yet to be expressed) is the primary focus of this portion of the handbook.

Generally speaking, non-nationals are arrested and detained because:

- They have lost their document;
- Their documents have expired;
- they have not carried their documents on them;
- They have exhausted the internal appeal or review processes afforded under the Refugees Act; or
- They have exhausted all judicial processes related to final decisions on their status taken in terms of the point above, for instance reviews in terms of PAJA, and any appeals thereon.

<sup>&</sup>lt;sup>239</sup> Lawyers for Human Rights (case) supra note 196.

In 2017, the Constitutional Court had occasion to address detentions effected under section 34, in particular subsections (b) and (d) of the Immigration Act, in the matter of *Lawyers for Human Rights v Minister of Home Affairs and Others*. Section 34 allows the arrest of an "illegal foreigner" by an immigration officer (including arrest by police officer, subject to status verification by an immigration officer) without a warrant of arrest, for the purposes of deportation. Section 34(1) creates a technical distinction between the arrest and detention of a non-national in the following sense:

- A non-national may be arrested for the purposes of being charged for a particular criminal offence under the CPA, and
- A non-national may be taken into immigration custody for the purposes of deportation.

Lawyers for Human Rights v Minister of Home Affairs and Others<sup>241</sup>

At issue in this case was the "validity of legislation that authorises administrative detention without trial for purposes of deportation."242 The Immigration Act allows an immigration officer to arrest and detain an "illegal foreigner." Upon arrest the detainee must be told the purpose of arrest and about their right to appeal. They may then request to have their detention confirmed by a warrant of a court, which must be issued within 48 hours of the request or else the detainee must be released. Additional protections are also included in the Immigration Act that limit the period of detention to a maximum of 120 days i.e. a nonnational may not be detained for more that 30 days without a warrant of Court which may be extended for a further 90 days on reasonable grounds. In reality, however, these safeguards were routinely being ignored. The applicant, who was LHR in this instance, argued that even if implemented properly, these provisions allowed for the detention of an individual to continue for a full 30 days without appearing before a court (and even in that case, the detainee would have to request to appear in court rather than it being an automatic referral to court), thereby violating the rights of detainees in terms of section 35(2)(d) of the Constitution, which allows a detainee to challenge the lawfulness of his detention before a Court.

<sup>&</sup>lt;sup>240</sup> Lawyers for Human Rights (case) supra note 196.

<sup>&</sup>lt;sup>241</sup> Ibid.

<sup>&</sup>lt;sup>242</sup> Ibid para 4.

<sup>&</sup>lt;sup>243</sup> Ibid para 31-32.

In discussing the rights afforded to all individuals in South Africa under section 12 of the Constitution, the Court stated, "...the word "detention" carries a wide meaning so as to afford individuals maximum protection...importantly, the right to freedom and security of the person enshrined in section 12(1) has been taken as incorporating two aspects, the substantive and procedural aspects... the purpose of each must be met". 243 The substantive aspect does not allow for arbitrary detention, and the purpose of detention must be constitutional. The procedural aspect is the right not to be detained without trial, and the Constitutional Court reiterated the importance of this being considered against South Africa's historical background. Judicial oversight and control is what ensures procedural safeguards are followed. The Constitutional Court also pointed out that even in a declared state of emergency, the maximum amount of time a detainee can go without access to the courts under section 37 of the Constitution is 10 days.

The state attempted to justify the limitation on the basis that detention review hearings for every arrested non-national would mean hundreds of court appearances every day and would be astronomically expensive. The Court dismissed this as a cost that should have been budgeted for at the implementation of the Immigration Act.<sup>244</sup> The court indicated that administrative convenience is no justification for the limitation of rights.<sup>245</sup>

The Court declared Sections 34(1)(b) and (d) of the Immigration Act to be inconsistent with sections 12(1) and 35(2)(d) of the Constitution to the extent that they allowed for detention exceeding 30 days without judicial oversight. The impugned provisions were therefore of no force and effect. It ordered that any "illegal foreigner" detained under section 34(1) of the Immigration Act had to be brought before a court in person within 48 hours of arrest, pending Parliament passing corrective legislation which was to be done within 24 months. There are 2 important conclusions to be drawn from this case:

- First, people cannot be detained without proper judicial oversight, regardless of the individual's status in South Africa; and
- Second, costs to the state do not justify limitations on a person's right to appear in court to challenge the lawfulness of their detention.

<sup>&</sup>lt;sup>243</sup> Ibid para 31-32.

<sup>&</sup>lt;sup>244</sup> Ibid para 61.

<sup>&</sup>lt;sup>245</sup> Ibid.

Importantly, at the time of publication, Parliament had not passed the corrective legislation ordered by the Court, despite the 24-month time period having expired. This means that the prescripts of the judgment must be applied prospectively until such time as amendment legislation is passed.

As mentioned, in Lawyers for Human Rights v Minister of Home Affairs and Others, the Constitutional Court declared section 34(1)(b) and (d) to be inconsistent with sections 12(1) and 35(2)(d) of the Constitution. However, the Constitutional Court ordered Parliament to correct the Immigration Act in line with the judgment and order. At the time this handbook was printed, Parliament has not yet done so. As a result, the handbook focuses only on the form the law currently takes—as directed by the Constitutional Court and until Parliament makes the necessary amendments to the offending provisions. Specifically, pending that enactment, "any illegal foreigner detained under **section 34(1)** of the **Immigration Act shall** be brought before a court **in person** within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days."

This decision has resolved the difficulties that faced many detained asylum seekers and refugees, who prior to the judgment had their detention extended before a magistrate **without their attendance** in court.

Thus, as a result of the Lawyers for Human Rights judgment, a non-national's detention may not exceed 30 days unless a court has, after considering submissions of both the DHA and the detained person, authorises the extension. After an initial extension of 30 days, there can only be another extension of 90 days in total, calculated from the first date of detention. If the deportation has not taken place within this period, the detainee must be released.

#### (C) Visiting persons held in detention

Every detention facility will allow some degree of visitation by friends and family. The extent of the visitation will vary depending on the reason for which the person is detained and the facility in which they are held. To find the rules governing a specific person's detention, contact the detention facility directly. The following are the general minimum standards for visitation to a detention facility:

- Upon arrival, visitors are searched by the security guards of the facility and are required to produce a valid identification document;
- Visitors are then made aware of the rules pertaining to the detention facility;
- Personal details of the visitor are recorded in a register;
- Visitors are generally required to hand over any valuable items, firearms, and/or weapons to the security guards prior to entering the facility.

When visiting a person in detention, **always bring valid identification documents** and expect to be searched. You may wait a long time before being granted access to the detainee.

Once informed that your client has been detained, go to the place where they are being detained and attempt to have them released. If their detention is unlawful then they must be released immediately.

#### (D) Detention of stateless persons

As a legal practitioner, you may encounter clients who have been arrested and detained for immigration purposes. In order to assist them, you will need to determine if there are any grounds for their release from detention. A typical case analysis will include questions as to whether the individual has any legal basis to remain in South Africa—through valid immigration status or a pending application for status; a citizen or permanent resident child, parents or spouse; or an asylum claim that can be pursued under the Refugees Act.

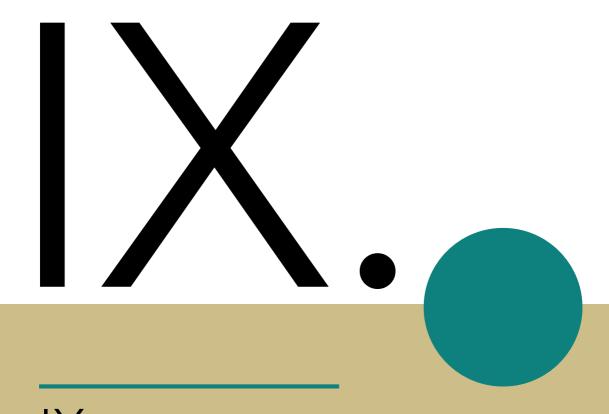
Police and immigration officials are permitted under law to detain an individual for up to 48 hours for the purpose of verifying his or her immigration status.<sup>246</sup>

The immigration detention of stateless people is most often arbitrary, due to the fact that it is not possible to deport them.<sup>247</sup> In cases where immigration detention lasts over 48 hours such detention must be intended for purposes of deportation; therefore, where it is determined that a person is stateless and no country will accept them for deportation, their detention becomes a violation of their rights to freedom, security of person and their human dignity.

Statelessness, by its very nature, severely restricts access to basic identity and travel documents that nationals normally possess. Thus, being undocumented or lacking the necessary immigration permits or visas cannot be used as a general justification for detention of such persons.<sup>248</sup>

<sup>&</sup>lt;sup>246</sup> Immigration Act supra note 2 at s 34 and 41.

<sup>&</sup>lt;sup>247</sup> Most often, stateless persons cannot be deported. Due to their status they struggle to obtain travel documents and immigration status, as well as a right to residence in any country. However, it is possible that you may encounter stateless persons who have some form of identity document or who gained legal residence or immigration status in another country. This could include refugees who are also stateless; they may have been granted refugee status in another country prior to coming to South Africa. It may be possible to deport them to the country where they are recognised as refugees. Further, not all stateless persons have always been stateless - for those who were stripped of their citizenship by law, it may be possible to deport them to the country of their previous residence even though they are no longer recognised as citizens. Often denationalised persons will be afforded permanent residence or some other legal status by law (e.g. Zimbabwe's 2010 Citizenship Amendment Act, which granted denationalised persons 'alien' status). <sup>248</sup> United Nations High Commissioner for Refugees, Guidelines on Statelessness (2012).



IX.
ARGUING AT A
SECTION 34 HEARING

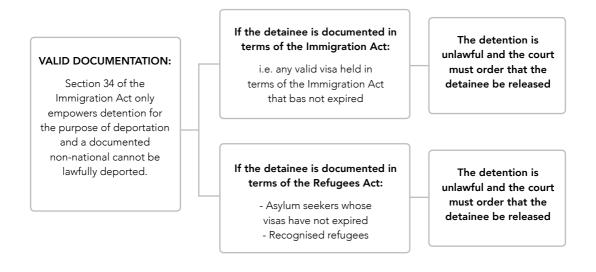
#### (A) Overview

At the first court appearance at the magistrate's court i.e. the first court appearance after the initial arrest in an immigration detention matter, the submissions made in support of the detainee's release must indicate that the detention is unlawful through establishing the existence of one of the following broad grounds:

- (1) The detainee is validly documented;
- (2) Compelling reasons as to why the detainee's documentation is expired; or
- (3) Compelling reasons as to why the detainee is not documented.

These submissions can be justified by the following legislative provisions:

#### (i) Valid documentation



#### (ii) Compelling reasons for expired documentation

## EXPIRED DOCUMENTATION:

Section 34 of the Immigration Act only empowers detention for the purpose of deportation and a documented non-national cannot be lawfully deported

#### If the detainee holds documentation in terms of the Immigration Act:

i.e. any valid visa he)d in terms of the Act where a renewal thereof had been applied for

# If the detainee is documented in terms of the Refugees Act:

Failed asylum seekers whose visas have expired, an appeal on the asylum application bad been lodged and the detainee is awaiting the outcome thereof

The detention is unlawful and the court must order that the detainee be released

The detention is unlawful and the court must order that the detainee be released

#### (iii) Compelling reasons for no documentation

## NO DOCUMENTATION:

Section 31(2)(b) of the Immigration Act provides for exemption applications Section 21(4)(a) of the Refugees Act prohibits the detention and deportation of any person until such time as they have exhausted their rights to appeal and/or review

## If the detainee falls within the scope of the Immigration Act:

i.e. stateless persons who have applied for exemptions and are awaiting the outcome thereof The detention is unlawful and the court must order that the detainee be released

## If the detainee falls within the scope of the Refugees Act:

Newcomer asylum seekers had intended to apply for asylum but were arrested prior to doing so

The detention is unlawful and the court must order that the detainee be released

#### (B) Arguing before the Magistrate

Asylum seekers who are detained because they are suspected of being "illegal foreigners" must appear before a court within 48 hours of their arrest, to establish one of the following:

- 1. That they are a recognised refugee; **OR**
- 2. That they are currently in the asylum application process; **OR**
- 3. That they have previously tried to apply for asylum but have been unable to thus far because of deficiencies in the system.

In the initial consultation with the detainee, the first and most significant determination to be made is the detainee's age. As mentioned previously, this consideration is of utmost importance as minors may only be detained as a measure of last resort and for the shortest appropriate period. In addition to this, there is other crucial information relating to immigration status that must be obtained prior to making submissions before a magistrate in support of the release of a detainee. This entails assessing whether the provisions of the Immigration Act or the Refugees Act are applicable. The objective in obtaining such information is to establish the unlawfulness of the detention in order to build a case for the release of the detainee. Against this objective, the required information can be divided into three principle categories:

- (1) Circumstances of the detainee's entry and stay in the country;
- (2) The execution of the arrest; and
- (3) The conditions of the detention.

With these considerations in mind, the following non-exhaustive checklist may be used as a guide in determining whether there is a case to be made for the detainee's release on the basis of unlawfulness:

## **CHECKLIST**

| Which statute is applicable: The Immigration Act or the Refugees Act?  |
|--|
| Does the detainee hold a valid visa?   |
| Is the detainee awaiting the outcome of a pending visa renewal?  |
| Is the detainee a stateless person?  |
| Does the detainee hold a valid asylum seeker visa?   |
| Is the detainee a recognised refugee?  |
| Is the detainee awaiting the outcome of an appeal to the RAA?  |
| Has the detainee launched judicial review proceedings in terms of PAJA before a high court?  |
| Is the detainee awaiting the outcome of judicial review proceedings in terms of PAJA before a high court?  |
| Is the detainee a failed asylum seeker, but with a prima facie claim that may warrant the institution of judicial review proceedings in terms of PAJA before a high court? |
| Does the detainee intend to apply for asylum?  |
| Were there reasonable grounds to believe that the detainee does not have legal stay in the country?  |
| Did the police/immigration officer take reasonable steps to assist the detainee in verifying their status?   |
| Was the detainee notified in writing of the decision to deport them?   |
| Is the detainee being detained at a designated detention centre?   |
| Do the conditions of detention comply with regulation 33(5) of the Immigration Regulations?  |

# X. HOW TO KEEP ABREAST OF CURRENT REFUGEE LAW AND POLICY

#### X. HOW TO KEEP ABREAST OF CURRENT REFUGEE LAW AND POLICY

The following is a list of sites that may be utilised in keeping up to date with refugee law and policy:



https://www.lhr.org.za/cases-reports/



https://www.refworld.org/country/ZAF.html



https://www.hrw.org/africa/south-africa



https://www.amnesty.org/en/countries/africa/south-africa/



https://www.unhcr.org/south-africa.html



http://www.refugeerights.uct.ac.za/case-law-reader



http://www.scalabrini.org.za/resources



# XI. REFER REFUGEE MATTERS TO SPECIALISTS IF YOU CANNOT TAKE THE CASE

## LAWYERS FOR HUMAN RIGHTS

#### **DURBAN OFFICE**

Address: Room S104 Diakonia Centre, 20 Diakonia Avenue, Albert Park, Durban

Tel: +27 31 301 0531

#### JOHANNESBURG OFFICE

Address: 4th Floor South Point Corner Building, 87 De Korte Street, Braamfontein

Tel: +27 11 339 1960

#### CAPE TOWN OFFICE

Address: 295 Lower Main Road, Observatory, Cape Town

Tel: +27 21 424 8561

#### PRETORIA OFFICE

Address: 357 Visagie Street, Pretoria Central

**Tel:** +27 12 320 2943

#### **UPINGTON OFFICE**

Address: Room 110 & 111, Rivercity Centre, Corner Scott and Hill Streets, Upington

Tel: +27 54 331 2200

#### MUSINA OFFICE

Address: 18 Watson Avenue, Musina

Tel: +27 15 534 2203



#### CENTRE FOR CHILD LAW

Address: 299 Soutpansberg Road, Corner Van Der Merwe St, Rietondale, Pretoria

**Tel:** +27 12 333 5610

# XI. REFER REFUGEE MATTERS TO SPECIALISTS IF YOU CANNOT TAKE THE CASE



#### **DURBAN OFFICE**

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#### JOHANNESBURG OFFICE

Address: 2nd Floor West Wing, Women's Jail, Constitution Hill,

1 Kotze Street, Braamfontein, Johannesburg **Tel:** +27 11 038 9709 | **Fax:** +27 11 838 4876

#### CAPE TOWN OFFICE

Address: Aintree Office Park, Block D, Ground Floor,

cnr Doncaster Road and Loch Road, Kenilworth, Cape Town

**Tel:** +27 21 879 2398 | **Fax:** +27 21 423 0935

#### GRAHAMSTOWN (MAKHANDA) OFFICE

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**Tel:** +27 46 622 9230 | **Fax:** +27 46 622 3933



#### **SCALABRINI CENTRE**

Address: 47 Commercial Street, Cape Town

**Tel:** +27 21 465 6433 | **Email:** info@scalabrini.org.za

#### LAWRENCE HOUSE

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Tel: +27 21 448 1144 | Email: lawrencehouse@scalabrini.org.za

# XI. REFER REFUGEE MATTERS TO SPECIALISTS IF YOU CANNOT TAKE THE CASE



#### **UCT LAW CLINIC**

Address: UCT, 3rd Floor, Kramer Law School Building, 1 Stanley Rd, Rondebosch, Cape Town

**Tel:** +27 21 650 3775

#### **UCT REFUGEE RIGHTS UNIT**

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#### **DURBAN OFFICE**

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Chambers

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**Tel:** +27 11 339 6080 | **Fax:** +27 86 512 2222

#### CAPE TOWN OFFICE

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#### **NELSON MANDELA UNIVERSITY**

**Address:** University Way, Summerstrand, Port Elizabeth **Tel:** +27 (0) 41 504 1111 | **Fax:** +27 (0) 41 504 2574 / 2731



This handbook is intended to help address what appears to be an increasingly dehumanising approach to managing the movement of people by the state, in South Africa and elsewhere. It is intended to provide a concise understanding of the operative legal framework and policies, and what these mean in the context of human rights and respect for human dignity – cornerstones of the South African Constitution. In speaking to the ethos and vision of the Constitution, this handbook renders clear the need for judicial oversight of the immigration detention process and the procedural safeguards in this context that must be followed.