CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 02/18

In the matter between:

ALEX RUTA	Applicant
and	
MINISTER OF HOME AFFAIRS	Respondent

Neutral citation: *Ruta v Minister of Home Affairs* [2018] ZACC 52

Coram: Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Cameron J (unanimous)

Heard on: 1 November 2018

Decided on: 20 December 2018

Summary: asylum seeker applications — effect of delay — relevance of criminal record in South Africa — overriding principle of *non-refoulement*

delay does not impede right to asylum — only the Refugee Status Determination Officer is authorised to consider application merits — Immigration Act must be read in harmony with the Refugees Act and international law

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria). The following order is made:

1. Leave to appeal is granted and the appeal succeeds with costs, including the costs of two counsel.
2. The order of the Supreme Court of Appeal is set aside and in its place is substituted:

   "The appeal is dismissed with costs."

JUDGMENT

CAMERON J (Basson AJ, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] The applicant, Mr Alex Niwubona Ruta, is a national of Rwanda. In December 2014, he crossed the border from Zimbabwe into South Africa. He did not enter through an official port of entry. In addition, he did not have a visa. Under the Immigration Act,[1] that made him an "illegal foreigner"[2] liable to criminal penalties[3]

[1] 13 of 2002.

[2] Section 1 of the Immigration Act defines a "foreigner" as an "individual who is not a citizen"; and an "illegal foreigner" as "a foreigner who is in the Republic in contravention of this Act". Section 9, headed "Admission and departure", provides:

> "(1) Subject to this Act, no person shall enter or depart from the Republic at a place other than a port of entry.
>
> (2) Subject to this Act, a citizen shall be admitted, provided that he or she identifies himself or herself as such and the immigration officer records his or her entrance.

and to deportation.[4] Some 15 months later, in March 2016, after travails that do not require recounting here,[5] he was arrested in Pretoria for road traffic violations. It was then discovered that he was in the country illegally. He was tried and imprisoned for the road traffic offences. While he was in prison, the Department of Home Affairs (Department) moved to deport him to Rwanda. He countered by seeking to apply for asylum under the Refugees Act.[6] In Rwanda, he said, he faced certain death. The respondent, the Minister of Home Affairs (Minister), opposed. The Department, whose officials deposed on behalf of the Minister, said it was too late for him to apply. Its attitude was that his deportation "should continue unabated".

> (3) No person shall enter or depart from the Republic—
>
> > (a) unless he or she is in possession of a valid passport, and in the case of a minor, has his or her own valid passport;
> >
> > (b) except at a port of entry, unless exempted in the prescribed manner by the Minister, which exemption may be withdrawn by the Minister;
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> > (c) unless the entry or departure is recorded by an immigration officer in the prescribed manner; and
> >
> > (d) unless his or her relevant admission documents have been examined in the prescribed manner and he or she has been interviewed in the prescribed manner by an immigration officer: Provided that, in the case of a child, such examination and interview shall be conducted in the presence of the parent or relative or, if the minor is not accompanied by the parent or relative, any person of the same gender as the minor.
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> (4) A foreigner who is not the holder of a permanent residence permit contemplated in section 25 may only enter the Republic as contemplated in this section if—
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> > (a) his or her passport is valid for a prescribed period; and
> >
> > (b) issued with a valid visa, as set out in this Act."

[3] Section 49(1)(a) provides that anyone who enters or remains or departs from the Republic, in contravention of the statute is guilty of an offence and liable on conviction to a fine or to imprisonment of up to two years.

Section 49(1)(b) provides that any illegal foreigner who fails to depart when so ordered is guilty of an offence and liable on conviction to a fine or imprisonment of up to four years.

[4] Section 32 of the Act, headed "Illegal foreigners", provides:

> "(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.
>
> (2) Any illegal foreigner shall be deported."

[5] Mr Ruta's eventful first months in this country are recounted in the judgment of the High Court, *Ruta v Minister of Home Affairs* 2016 JDR 2271 (GP) (High Court judgment); and in that of the Supreme Court of Appeal, *Minister of Home Affairs v Ruta* [2018] ZASCA 186; 2018 (2) SA 450 (SCA) (Supreme Court of Appeal judgment).

[6] 130 of 1998.

[2] What followed was a saga. Mr Ruta tried through the courts to avoid deportation. His efforts were rewarded in the High Court,[7] but were rejected in the Supreme Court of Appeal, which by a majority reversed the High Court decision in his favour.[8] He now seeks to contest the adverse outcome in the Supreme Court of Appeal. The Minister opposes his application for leave to appeal.

[3] At issue are the reach of the Refugees Act and of the Immigration Act as well as the interplay between these two statutes; the effect of delay on entitlement to apply for refugee status; the operation of the exclusionary provisions of the Refugees Act,[9] particularly section 4(1)(b); and whether this section applies only to crimes committed outside South Africa. Also at issue is the fidelity of the Supreme Court of Appeal to its own judgments and whether in this case commitment to precedent (*stare decisis*) was breached.

Litigation history

High Court

[4] Mr Ruta applied urgently to the High Court of South Africa, Gauteng Division, Pretoria (High Court) to stop his deportation. That Court granted him an interdict

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[7] High Court judgment above n 5.

[8] Supreme Court of Appeal judgment above n 5.

[9] Section 4 of the Refugees Act, titled "Exclusion from refugee status", provides:

> "(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she—
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> (a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
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> (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or
>
> (c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or
>
> (d) enjoys the protection of any other country in which he or she has taken residence.
>
> (2) For the purposes of subsection (1)(c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity."

enabling him to apply for asylum under the Refugees Act.[10] The Court considered that section 2 of the Refugees Act[11] provided in very wide terms for the right of aspirants for refugee status to apply. It was not for the Court to determine whether an aspirant had prospects of success. The sole power and duty to determine whether an applicant for asylum should be afforded refugee status under the Refugees Act[12] lay

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[10] High Court judgment above n 5 at para 2.

[11] Section 2 of the Refugees Act, headed "General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances", provides:

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

[12] Section 21 of the Refugees Act provides for a procedure in which applications for asylum are processed by Refugee Reception Officers and Refugee Status Determination Officers. The provision reads:

> "(1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.
>
> (2) The Refugee Reception Officer concerned—
>
> (a) must accept the application form from the applicant;
>
> (b) must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard;
>
> (c) may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and
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> (d) must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of section 24.
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> (3) When making an application for asylum, every applicant must have his or her fingerprints or other prints taken in the prescribed manner and every applicant who is 16 years old or older must furnish two recent photographs of himself or herself of such dimensions as may be prescribed.
>
> (4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if—
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> (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or
>
> (b) such person has been granted asylum.

with the Refugee Status Determination Officer.[13] The crux of the Court's ruling was that, once an aspirant communicates an intention to apply for refugee status, the Department is obliged not to obstruct the application. That Mr Ruta had delayed in seeking asylum did not diminish his entitlement to apply. The Court rejected the Department's contention that Mr Ruta was barred from applying for asylum by the statutory exclusions. At issue was section 4(1)(b). This bars from refugee status anyone who has committed a crime not of a political nature which, "if committed in the Republic", would be punishable by imprisonment. The Department contended that the sentence of imprisonment imposed on Mr Ruta for the road traffic offences barred him from attaining refugee status. The High Court rejected this: the exclusion applied only to crimes committed outside the country. Hence the local traffic infractions did not count.

Supreme Court of Appeal

[5] The High Court granted the Department leave to appeal. By a majority, the Supreme Court of Appeal upheld the appeal. The majority[14] considered that asylum

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(5) The confidentiality of asylum applications and the information contained therein must be ensured at all times, except that the Refugee Appeals Authority may, on application and on conditions it deems fit, allow any person or the media to attend or report on its hearing if—

(a) the asylum seeker gives consent; or

(b) the Refugee Appeals Authority concludes that it is in the public interest to allow any person or the media to attend or report on its hearing, after taking into account all relevant factors, including—

(i) the interests of the asylum seeker in retaining confidentiality;

(ii) the need to protect the integrity of the asylum process;

(iii) the need to protect the identity and dignity of the asylum seeker;

(iv) whether the information is already in the public domain;

(v) the likely impact of the disclosure on the fairness of the proceedings and the rights of the asylum seeker; and

(vi) whether allowing any person or the media access to its proceedings or allowing the media to report thereon would pose a credible risk to the life or safety of the asylum seeker or of his or her family, friends or associates."

[13] In terms of section 21(2)(d) of the Refugees Act. Section 34 of the Refugees Act provides: "A refugee must abide by the laws of the Republic."

[14] Seriti JA; Bosielo JA, Willis JA and Schippers AJA concurring.

seekers who enter South Africa are not afforded indefinite time to apply for asylum. They have only a reasonable time. When Mr Ruta entered South Africa illegally he became liable to be dealt with as an illegal foreigner. Since he delayed unreasonably in seeking to apply for asylum, at the time of his arrest he was an illegal foreigner who had to be dealt with in terms of the Immigration Act, not the Refugees Act. In this, the majority[15] embraced the approach in *Kumah*.[16] There the High Court expressed "great concern" that the Refugees Act is being abused,[17] holding that the statute does not permit applicants for asylum to apply "whenever it may take their fancy".[18]

[6] The dissentient in the Supreme Court of Appeal[19] considered that, once a refugee has shown an intention to apply for asylum, he or she is protected under the Refugees Act and its regulations and is entitled to be afforded access to that statute's application process.[20] The issue was whether section 4(1)(b) excluded Mr Ruta – not what was expected of him in order to comply with the Refugees Act to enjoy the protection it offered.[21] The dissentient concluded that section 4(1)(b) pertained only to crimes committed outside the Republic. The appeal should therefore have been dismissed with costs.

Mootness and leave to appeal

[7] During the hearing in this Court, we were informed that when the High Court granted the Minister leave to appeal to the Supreme Court of Appeal, it directed that effect be given to its order to release Mr Ruta. That was done. Mr Ruta then applied for refugee status. This was refused, but we were told that a challenge is "in process". His release and ensuing application mean that the main substance of Mr Ruta's

[15] Supreme Court of Appeal judgment above n 5 at para 27.

[16] *Kumah v Minister of Home Affairs* 2018 (2) SA 510 (GJ).

[17] Id at para 3.

[18] Id at para 33.

[19] Supreme Court of Appeal judgment above n 5 per Mocumie JA.

[20] Id at para 37.

[21] Id at para 38.

application is moot. This Court's ruling will have no direct practical effect on his present situation.

[8] Despite this, the parties made it plain that they wished the Court to proceed to determine the issues. There are good reasons for the Court to do so. It has long been settled that this Court may determine issues where the narrow dispute between the parties has become moot. In *Independent Electoral Commission*, the Court afforded a declaration that a dispute between the Electoral Commission and a sphere of government or organ of state is not an intergovernmental dispute, despite the matter being moot.[22]

[9] In *Sebola*, the bank had expressly abandoned the judgment sought to be overturned and tendered the relief the applicants sought.[23] The dispute between the parties was therefore moot. At the insistence of the debtor this Court nevertheless proceeded. It did so, on the "axiomatic" basis that mootness is no absolute bar to determining an issue: the question is whether the interests of justice require that it be decided.[24] Similarly, in *Children's Institute*,[25] the Court granted a declaratory order

[22] *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC); 2001 (9) BCLR 883 (CC). The order provided:

> "It is declared that a dispute between the Electoral Commission and a sphere of government or an organ of state within a sphere of government is not an intergovernmental dispute for the purpose of section 41(3) of the Constitution."

[23] *Sebola v Standard Bank of South Africa Ltd* [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC) at paras 3 and 32-3.

[24] Id at para 32. See also *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29 citing para 22 of *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC), where this Court said:

> "It is by now axiomatic that mootness does not constitute an absolute bar to the justiciability of an issue. The court has a discretion whether or not to hear a matter. The test is one of the interests of justice. A relevant consideration is whether the order that the court may make will have any practical effect either on the parties or on others. In the exercise of its discretion the court may decide to resolve an issue that is moot if to do so will be in the public interest. This will be the case where it will either benefit the larger public or achieve legal certainty."

[25] *Children's Institute v Presiding Officer, Children's Court, Krugersdorp* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC).

regarding appearance of amici curiae in the High Court,[26] even though between the parties the matter was moot.

[10] Here, Mr Ruta has all along claimed that he is acting not only on his own behalf but on behalf of the public, in terms of section 38(b) of the Bill of Rights.[27] The issues his application raises affect many people. South Africa is by international standards very heavily burdened by asylum seekers.[28] The questions are of importance to them, as well as to the departmental officials who are tasked with dealing with them. Hence the wide public importance.

[11] What is more, the practical effect of the majority decision of the Supreme Court of Appeal is to reverse or severely constrict the effect of long-standing and authoritative decisions of that Court construing the Refugees Act and the Immigration Act. These include *Abdi*,[29] *Arse*,[30] *Bula*[31] and *Ersumo*,[32] whose correctness this Court has never been asked to determine.

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[26] The question was whether rule 16A of the Uniform Rules of Court permits High Courts to allow a friend of the court (amicus curiae) to adduce evidence in support of the submissions it seeks to advance. The Court's order provided:

> "It is declared that [r]ule 16A of the Uniform Rules of Court permits an amicus curiae to adduce evidence in support of its submissions, if it is in the interests of justice."

[27] Section 38(b) of the Bill of Rights provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> . . .
>
> (b) anyone acting on behalf of another person who cannot act in their own name"

[28] For instance, the United Nations High Commissioner for Refugees (UNHCR) reported that, with close to 107 000 new asylum claims registered in 2011, South Africa was the top destination for new asylum-seekers for the fourth successive year. South Africa accounted for almost one-tenth of all individual asylum applications worldwide. Although the 2011 figure was 69% lower than in 2010 (180 600 claims), it was twice that of 2006. In that year, a mere 53 400 sought protection. Between 2006 and 2011, South Africa registered more than 816 000 new asylum applications. This made it by far the top destination for asylum-seekers over a six-year period. Zimbabweans accounted for more than half – close to 500 000 asylum applications. In 2011, Zimbabweans again accounted for half of all asylum claims registered in South Africa (51 000 applications). See UNHCR *UNHCR Statistical Yearbook 2011* (undated), available at http://www.unhcr.org/51628b589.html. Most recent figures continue to rank South Africa high as a recipient country dealing with asylum applications: UNHCR *UNHCR Statistical Yearbook 2016* (undated), available at http://www.unhcr.org/afr/statistics/country/5a8ee0387/unhcr-statistical-yearbook-2016-16th-edition.html.

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

[12] This means that a contest of doctrine and practice confronts this Court. Should those decisions – or the majority's reasoning here – prevail? The answer is of importance to many. There is also no doubt that constitutional issues – of personal liberty[33] and human dignity[34] and indeed of life[35] – are at stake.[36] In addition, the interpretation of the two statutes at issue raises arguable points of law of general public importance that it is desirable for this Court to resolve.[37]

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[30] *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA).

[31] *Bula v Minister of Home Affairs* [2011] ZASCA 209; 2012 (4) SA 560 (SCA).

[32] *Ersumo v Minister of Home Affairs* [2012] ZASCA 31; 2012 (4) SA 581 (SCA).

[33] Section 12 of the Bill of Rights, titled "Freedom and security of the person", provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way.
>
> (2) Everyone has the right to bodily and psychological integrity, which includes the right—
>
> (a) to make decisions concerning reproduction;
>
> (b) to security in and control over their body; and
>
> (c) not to be subjected to medical or scientific experiments without their informed consent."

[34] Section 10 of the Bill of Rights provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected".

[35] Section 11 of the Bill of Rights provides that "[e]veryone has the right to life".

[36] *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at paras 9 and 18; *Ahmed v Minister of Home Affairs* [2018] ZACC 39; 2018 JDR 1719 (CC); 2018 (12) BCLR 1451 (CC) at paras 20-2.

[37] Section 167(3) of the Constitution provides:

> "The Constitutional Court—
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> (a) is the highest court of the Republic; and
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> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court; and
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> (c) makes the final decision whether a matter is within its jurisdiction."

[13] It is to be noted that the Refugees Act has been changed. Amendments were adopted that have been signed into law though not yet brought into effect.[38] Even so, the central disputes between the parties remain live and of significance to a large number of people. Leave to appeal must be granted and the issues determined.

Assessment

[14] The question is this: should an "illegal foreigner" who claims to be a refugee and expresses intention to apply for asylum be permitted to apply in accordance with the Refugees Act instead of being dealt with under the Immigration Act? An ancillary question is: does the 15-month delay between Mr Ruta's arrival in South Africa in December 2014 and his arrest in March 2016 bar him from applying for refugee status? More generally, can it be that a foreigner may arrive and tarry illegally for months, without applying for refugee status, and then, when the law catches up,[39] insist on the right to apply? On this contested issue, the High Court and the majority in the Supreme Court of Appeal gave sharply conflicting answers.

[15] But wait! The Supreme Court of Appeal had already answered the ancillary question. It did so more than five years before Mr Ruta's case served before it. The answer was plainly articulated in *Ersumo* and the precedents it affirmed.[40] *Ersumo* was the fourth of a series of decisions that Court gave, settling major questions about the interpretation and application of the Refugees Act and the Immigration Act.

[16] Closely consonant, these four decisions established a body of doctrine that thrummed with consistency, principle and power. The quartet of cases decided that

[38] Refugees Amendment Act 33 of 2008, Refugees Amendment Act 12 of 2011, Refugees Amendment Act 10 of 2015 and Refugees Amendment Act 11 of 2017.

[39] As emerges from the factual account set out in the judgments of the High Court and the Supreme Court of Appeal, Mr Ruta is very insistent that he did not tarry at all, but that he was diverted from applying for refugee status by exigent circumstances related to his departure from Rwanda and his arrival in, and his mission to, South Africa.

[40] *Ersumo* above n 32.

asylum applicants held in an "inadmissible facility" at a port of entry into the Republic enjoy the protection of the Refugees Act and of the courts (*Abdi*);[41] ordered the release from detention of an asylum seeker[42] whose asylum transit permit[43] had expired, and whose application for asylum had been rejected by the Refugee Status Determination Officer[44] but whose appeal before the Refugee Appeal Board[45] was pending (*Arse*);[46]

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[41] *Abdi* above n 29.

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

Section 22(1) of the Act provides that a Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.

[43] Section 23 of the Refugees Act provides if the Minister has withdrawn an asylum seeker permit in terms of section 22(6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.

Section 29 provides:

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

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

Section 24(1) provides that—

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

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

[46] *Arse* above n 30.

affirmed that if a detained person evinces an intention to apply for asylum, he or she is entitled to be freed and to be issued with an asylum seeker permit valid for 14 days[47] (*Bula*);[48] and conclusively determined that false stories, delay and adverse immigration status nowise preclude access to the asylum application process, since it is in that process, and there only,[49] that the truth or falsity of an applicant's story is to be determined (*Ersumo*).[50]

[17] The decisions expressed keen appreciation for the burden refugees impose on the state, and the particular burdens the Department and its officials are obliged to bear.[51] But they were unequivocal in upholding the constitutional principles underlying the Refugees Act and the Immigration Act, and the plain meaning of the language in those statutes.

[18] More precisely, the Supreme Court of Appeal precedents were plain about specifically the points at issue in this case – does delay, even considerable delay, and possible untruths, obstruct access at the outset to the asylum seeker process? On this the previous decisions were unequivocal. The Department's officials have a duty to

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

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

[48] *Bula* above n 31.

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

[50] *Ersumo* above n 32 at paras 13-6, construing, applying and affirming *Bula* above n 31 at para 74.

[51] *Arse* above n 30 at para 23; *Bula* above n 31 at para 81.

ensure that intending applicants not statutorily excluded[52] are given every reasonable opportunity to apply (*Abdi*).[53] A contention by the Department that only those who at "the first available opportunity" indicate their intention to apply for asylum are entitled to do so was roundly rejected.[54] The "every reasonable opportunity", *at any stage*, standard of *Abdi* was reaffirmed.[55] It followed "ineluctably" that, once an intention to apply for asylum was evinced, the protective provisions of the Refugees Act and regulations come into play and "the asylum seeker is entitled as of right to be set free subject to the provisions of the [Refugees] Act" (*Bula*).[56] A later contention by the Department, that undue delay deprived one seeking to apply for asylum of the right[57] to be issued with a 14-day permit within which to approach a Refugee Reception Office,[58] was rejected as having "no warrant" (*Ersumo*).[59]

[19] From this it is apparent that the answer to the issues Mr Ruta presented to the Supreme Court of Appeal were already to be found in that Court's own preceding decisions. The Court's disposition should have been that Mr Ruta was entitled to apply for asylum when he was arrested in March 2016. And his delay, which he in any event strenuously sought to explain,[60] did not preclude him. Nor did the false permits found in his possession, which, equally strenuously, he also sought to explain. More particularly, even the previous unequivocal rulings of the Supreme Court of Appeal were precisely on point. These were that delay in itself does not disqualify an asylum application, that the only grounds on which an application may be refused are those set out in section 24(3) of the Refugees Act, and

[52] By section 4 of the Refugees Act, set out above n 9.

[53] *Abdi* above n 29 at para 22.

[54] *Bula* above n 31 at paras 75-6.

[55] Id at para 76.

[56] Id at para 80.

[57] Set out in regulation 2(2) of the Refugee Regulations. See above n 47.

[58] Section 8(1) of the Refugees Act empowers the Director-General of Home Affairs to establish as many Refugee Reception Offices as he or she, after consultation with the Standing Committee, regards as necessary for the purposes of the statute.

[59] *Ersumo* above n 32 at para 17.

[60] See the facts set out in the High Court judgment and the Supreme Court of Appeal judgment above n 5.

that the Refugee Status Determination Officer alone is entitled to adjudge bogus or undeserving applications.[61] These decisions could not be ignored.

[20] The question before the Court was thus not, as the majority purported to find,[62] whether Mr Ruta had delayed unreasonably, since the significance of delay had already been eviscerated by that Court's previous decisions.[63] The only questions were whether he sought to apply for asylum and whether immigration officers should have allowed him to do so. Though, as the majority thought,[64] the facts in *Bula*[65] might have been different, the principle *Bula* established, applied and affirmed was not. This was that failure to apply for asylum at "the first available opportunity" was no disqualification.[66] That was squarely on point.

[21] It was of course open to the Supreme Court of Appeal to reject its own previous decisions, provided it concluded they were clearly wrong.[67] But the majority made no effort to explain why *Abdi*, *Arse*, *Bula* and *Ersumo* were wrong or how. The Supreme Court of Appeal has itself emphasised that respect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice.[68] This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution.[69] Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. The courts would

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[61] *Bula* above n 31 at para 74; *Ersumo* above n 32 at paras 13-6.

[62] Supreme Court of Appeal judgment above n 5 at para 27.

[63] *Abdi* above n 29; *Arse* above n 30; *Bula* above n 31; *Ersumo* above n 32.

[64] Supreme Court of Appeal judgment above n 5 at para 31.

[65] See general facts set out in *Bula* above n 31.

[66] Id at para 75.

[67] *Turnbull-Jackson v Hibiscus Coast Municipality* [2014] ZACC 24; 2014 (6) SA 592 (CC); 2014 (11) BCLR 1310 (CC) at para 57.

[68] *True Motives 84 (Pty) Ltd v Mahdi* [2009] ZASCA 4; 2009 (4) SA 153 (SCA) at para 100, quoted and endorsed by this Court in *Turnbull-Jackson* id at para 55.

[69] Section 1(c) of the Constitution states that the Republic of South Africa is founded on values including—

> "Supremacy of the Constitution and the rule of law".

operate without map or navigation, vulnerable to whim and fancy. Law would not rule.[70]

[22] The majority therefore erred in not rejecting the Minister's appeal on the premises it advanced. The majority was bound to do so because governing precedents of the Supreme Court of Appeal were binding upon it. But those decisions are not binding on this Court. Though this Court has given significant rulings on refugee law,[71] it has not squarely considered the four Supreme Court of Appeal decisions at issue here. Were they correct?

[23] To find the answer we must start with section 2 of the Refugees Act:

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

[24] This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in

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[70] See *Camps Bay Ratepayers and Residents Association v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) at para 28.

[71] *Saidi* above n 36; *Ahmed* above n 36; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC); *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC); *Gavric v Refugee Status Determination Officer Cape Town (People Against Suppression Suffering Oppression and Poverty as Amicus Curiae)* [2018] ZACC 38.

any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of *non-refoulement*, the concept that one fleeing persecution or threats to "his or her life, physical safety or freedom" should not be made to return to the country inflicting it.[72]

[25] It is a noble principle – one our country, for deep-going reasons springing from persecution of its own people, has emphatically embraced. The provenance of section 2 of the Refugees Act lies in the Universal Declaration of Human Rights (Universal Declaration), which guarantees "the right to seek and to enjoy in other countries asylum from persecution".[73] The year in which the Universal Declaration was adopted is of anguished significance to our country, for in 1948 the apartheid government came to power. Its mission was to formalise and systematise, with often vindictive cruelty, existing racial subordination, humiliation and exclusion. From then, as apartheid became more vicious and obdurate, our country began to produce a rich flood of its own refugees from persecution, impelled to take shelter in all parts of the world, but especially in other parts of Africa. That history looms tellingly over any understanding we seek to reach of the Refugees Act.

[26] The principle of protecting refugees from persecution was elaborated three years after the Universal Declaration, in article 33 of the Convention Relating to the Status of Refugees of 1951 (1951 Convention).[74] This gave substance to article 14 of

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[72] Article 33 of the *United Nations Convention Relating to the Status of Refugees*, 28 July 1951, UNTS, Volume 189 at 137.

[73] UN General Assembly, *Universal Declaration of Human Rights*, GA Res. 217A (III), UNGAOR, 3rd Session Supp. No. 13, UN Doc. A/810, 10 December 1948, article 14, which reads:

> "1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
>
> 2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."

[74] Above n 73. Article 33, headed "Prohibition of expulsion or return ('*refoulement*')" provides:

> "1. 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.

the Universal Declaration. The 1951 Convention defined "refugees", while codifying *non-refoulement*. South Africa as a constitutional democracy became a State Party to the 1951 Convention and its 1967 Protocol when it acceded to both of them on 12 January 1996 – which it did without reservation.[75] In doing so, South Africa embraced the principle of *non-refoulement* as it has developed since 1951. The principle has been a cornerstone of the international law regime on refugees. It has also become a deeply-lodged part of customary international law[76] and is considered part of international human rights law.[77] As refugees put agonising pressure on

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> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

[75] See United Nations Treaty Series Depository Records with respect to the Convention Relating to the Status of Refugees of 1951, available at https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en. See also See United Nations Treaty Series Depository Records with respect to the 1967 Protocol to the Convention Relating to the Status of Refugees, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=V-5&chapter=5&lang=en.

[76] Pertinent to the customary international law status of the principle, on 13 December 2001, States Parties to the 1951 Convention and its 1967 Protocol (South Africa included) adopted a declaration that reaffirmed the significance of the two instruments. The declaration called for universal adherence to the rules set out in the instruments, noting that "the continuing relevance and resilience of this international regime of rights and principles, including its core, the principle of *non-refoulement*, whose applicability is embedded in customary international law". UNHCR, *Declaration of States Parties to the 1951 Convention and / or its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/MMSP/2001/09 (16 January 2002) at para 4.

As of 2018, only 16 out of the 193 UN Member States are not bound by any universal treaty obligation to respect *non-refoulement* (meaning countries that have not yet ratified any international or regional treaty embodying the principle of *non-refoulement* – including the 1951 Convention, International Covenant on Civil and Political Rights, Convention Against Torture, Convention on the Rights of the Child, Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, European Convention on Human Rights, and Inter-American Convention on Human Rights, among others. As of 2003, over 125 countries had incorporated the principle into domestic law. See Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, Cambridge University Press, 2003 at paras 217-53.

Other authorities indicating that *non-refoulement* has obtained status as customary international law include: UNHCR, *The Principle of Non-Refoulement as a Norm of Customary International Law: Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany*, 31 January 1994 at para 5; Lauterpacht and Bethlehem, *The Scope and Content of the Principle of Non-refoulement: Opinion*, Cambridge University Press, 2003 at para 253; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2005] 2 AC 1 (House of Lords); Zimmermann et al., *Commentary on the 1951 Convention Relating to the Status of Refugees Status and its 1967 Protocol*, Oxford University Press, 2001 at 1343-6.

[77] See UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 UNTS, 85, 10 December 1984. Article 3 of the Convention Against Torture (CAT) provides:

> "1. No 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.

national authorities and on national ideologies in Europe, North America, and elsewhere, the response to these principles of African countries, including our own, is of profound importance.

[27] Of relevance to Mr Ruta's position when arrested is that the 1951 Convention protects both what it calls "*de facto* refugees" (those who have not yet had their refugee status confirmed under domestic law), or asylum seekers, and "*de jure* refugees" (those whose status has been determined as refugees).[78] The latter the Refugees Act defines as "refugees".[79] This unavoidably entails an indeterminate area within which fall those who seek refugee status, but have not yet achieved it. Domestic courts have also recognised that *non-refoulement* should apply without distinction between *de jure* and *de facto* refugees.[80]

> 2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

South Africa became a State Party to the CAT on 10 December 1998, see UN Treaty Series Depository Records with respect to the Convention Against Torture, available at https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-9&chapter=4&clang=_en.

See also UN General Assembly, *International Covenant on Civil and Political Rights*, 999 UNTS, 171, 16 December 1966. Article 7 of the International Covenant on Civil and Political Rights (ICCPR) provides:

> "No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

This article has been interpreted implicitly to include prohibition of *refoulement*. Read together with article 2(1) of the ICCPR, it is considered to provide broader scope than CAT. (UN Human Rights Committee, *General Comment No. 31* (2004), UN Doc. HRI/GEN/Rev.8 at para 12.) South Africa became a State Party to the ICCPR on 10 December 1998, see UN Treaty Series Depository Records, available at https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

[78] The UNHCR has emphasised "the fundamental importance of the principle of *non-refoulemen*t . . . irrespective of whether or not individuals have been formally recognised as refugees". This has also been reaffirmed by the UN General Assembly. See UNHCR, Executive Committee Conclusion No. 6 (1977); see also Executive Committee Conclusions No. 79 (1996), No. 81 (1997) and No. 82 (1997). See also UN General Assembly, *On the Office of the UN High Commissioner for Refugees*, UN Doc. A/RES/52/103, 12 December 1998 at para 5.

[79] Section 1 of the Refugees Act defines "refugee" as "any person who has been granted asylum in terms of this Act".

[80] See *Saidi* above n 36; *R v Secretary of State for the Home Department, ex parte Sivakumaran* [1988] AC 958; [1988] 1 All ER 193; [1988] 2 WLR 92; *R v Uxbridge Magistrates Court, ex parte Adimi* [1999] EWHC Admin 765; [2001] QB 667.

[28] The right to seek and enjoy asylum means more than merely a procedural right to lodge an application for asylum – although this is a necessary component of it. While States are not obliged to grant asylum, international human rights law and international refugee law in essence require States to consider asylum claims and to provide protection until appropriate proceedings for refugee status determination have been completed.

[29] In sum, all asylum seekers are protected by the principle of *non-refoulement*, and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure.

[30] Section 2 of the Refugees Act embodies all these principles. Yet it goes further than the 1951 Convention. Its more generous wording[81] is derived from our own continent – the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Status in Africa.[82]

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[81] See Organisation of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45. Three particular features of the protection afforded by section 2 indicate its broader, Organisation of African Unity-inspired, ambit.

First, section 2 and the 1969 Organisation of African Unity Convention expanded the definition of "refugee" to include those whose life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country (read articles 1(2) and 2 of the 1969 Organisation of African Unity Convention together). These are not covered in the 1951 Convention.

Second, section 2 and the 1969 Convention, regarding only the expanded definition of "refugees" (namely section 2(b) of the Refugees Act and article 1(2) and 2(3) of the 1969 Convention), do not require proof of "persecution", but merely threats to "life, physical safety or freedom".

Third, on the measures of *refouler*, section 2 and the 1969 Convention include refusal of entry, expulsion, extradition, return, or other similar measures, while the 1951 Convention lists solely "expel or return".

[82] Id. Article 1 of the Organisation of African Unity Convention provides:

> "1. For the purposes of this Convention, the term 'refugee' shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.
>
> 2. The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled

[31] This is not internationalist blurb. It applies directly to the problem at hand. For our Constitution requires us, when interpreting any legislation, to prefer any reasonable interpretation that is consistent with international law over any alternative interpretation that is inconsistent with it.[83] And it provides that customary international law "is" law in the Republic unless it is inconsistent with the Constitution or a statute.[84] And, of course, section 39(1)(b) requires us to consider international law when interpreting the Bill of Rights.[85]

[32] The practical import of section 2 of the Refugees Act thus springs from our specifically African history, and from an African Convention that, at the time it was adopted, had particular poignancy and pertinence to South Africa and those exiled from it.[86] This Court recently underscored the central importance of the provision.[87]

> to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality."

Article 2(3) provides:

> "No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in [a]rticle I, paragraphs 1 and 2."

[83] Section 233 of the Constitution provides:

> "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

[84] Section 232 of the Constitution provides:

> "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

[85] Section 39(1) of the Bill of Rights provides:

> "When interpreting the Bill of Rights, a court, tribunal or forum—
>
> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
>
> (b) must consider international law; and
>
> (c) may consider foreign law."

[86] Also significant is Article 12(3) of the African Charter of Human and People's Rights. This specifies that:

> "Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions."

[87] *Saidi* above n 36 at paras 27-8.

Other courts have done the same.[88] Its effect is that the principle and the prohibition it embodies prevail not only over the Immigration Act and any other law, but that its provisions determine how to understand the remaining provisions of the Refugees Act itself.

[33] A good instance arises from section 21(4)(a) of the Refugees Act.[89] In explicit terms, the provision affords express protection only to one who already "has applied" for asylum. Nevertheless, section 2 demands that its overriding and prevailing principle be considered. This is that, apart from those officially recognised as refugees and afforded refugee status, *no applicant* for asylum may be expelled, extradited or returned to any other country or be subjected to any similar measures.[90]

[34] This raises a general question. How does the Refugees Act harmonise with the Immigration Act? Counsel for the Minister contended that the Immigration Act was the primary statutory vehicle at issue. It was under this statute that the status of asylum claimants who had not yet applied for asylum and had not elicited the protection afforded under section 21(4)(a) of the Refugees Act was to be determined. He contended that a person who, like Mr Ruta, failed to attain asylum seeker status under the Immigration Act was excluded from applying for it under the Refugees Act. Counsel relied on the provisions of the Immigration Act that manage the asylum process. These include the definition of "visa"[91] and the provision for a visa to

[88] See *Abdi* above n 29 at para 22 fn 3; *Arse* above n 30 at para 14.

[89] Set out above n 13.

[90] The width of the protection section 2 envisages may be noted. It provides that "no person" falling within its terms may be refused entry to the country or be compelled to return to their country, which is wider than providing this protection only to asylum seekers (defined as persons seeking recognition as a refugee in the Republic) or refugees (defined as persons who have been granted asylum in terms of the Refugees Act). Though, in practice, the differentiation will disappear since persons qualifying under section 2 will also be asylum seekers, or attain statutory refugee status, the breadth of the statute's intended embrace is undeniable.

[91] Section 1 of the Immigration Act defines "visa" as—

> "the authority to temporarily sojourn in the Republic for purposes of—
>
> (a) transit through the Republic as contemplated in section 10B;
>
> (b) a visit as contemplated in section 11;
>
> (c) study as contemplated in section 13;

temporarily sojourn in the Republic.[92] In addition, the Immigration Act expressly provides for an asylum transit visa for one "who at a port of entry claims to be an asylum seeker".[93]

[35] The argument was that it is these provisions, primarily, that regulate the position of asylum seekers. A person who fails to qualify under these provisions, or, who qualifies initially, but fails within the five-day validity of an asylum transit visa to apply for asylum, without more becomes an "illegal foreigner" under the

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> (d) conducting activities in the Republic in terms of an international agreement to which the Republic is a party as contemplated in section 14;
>
> (e) establishing or investing in a business as contemplated in section 15;
>
> (f) working as a crew member of a conveyance in the Republic as contemplated in section 16;
>
> (g) obtaining medical treatment as contemplated in section 17;
>
> (h) staying with a relative as contemplated in section 18;
>
> (i) working as contemplated in section 19 or 21;
>
> (j) retirement as contemplated in section 20;
>
> (k) an exchange programme as contemplated in section 22; or
>
> (l) applying for asylum as contemplated in section 23,
>
> whichever is applicable in the circumstances;
>
> 'work' includes—
>
> (a) conducting any activity normally associated with the running of a specific business; or
>
> (b) being employed or conducting activities consistent with being employed or consistent with the profession of the person, with or without remuneration or reward, within the Republic.".

[92] Section 10(l) of the Immigration Act provides: "Upon admission, a foreigner, who is not a holder of a permanent residence permit, may enter and sojourn in the Republic only if in possession of a visa issued by the Director-General for a prescribed period."

[93] Section 23 of the Immigration Act provides:

> "(1) The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.
>
> (2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act No. 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act."

Immigration Act. He or she thereby becomes summarily liable to the consequences of illegal status,[94] in the form of detention and deportation.[95]

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[94] Section 32(1) of the Immigration Act provides:

> "Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status."

[95] Section 34 of the Immigration Act, in relevant part, provides:

> "(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned—
>
> (a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
>
> (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;
>
> (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;
>
> (d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days, and
>
> (e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.
>
> (2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to [16h00] of the first following court day.
>
> (3) The Director-General may order a foreigner subject to deportation to deposit a sum sufficient to cover in whole or in part the expenses related to his or her deportation, detention, maintenance and custody and an officer may in the prescribed manner enforce payment of such deposit.
>
> (4) Any person who fails to comply with an order made in terms of subsection (3) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment not exceeding 12 months.
>
> (5) Any person other than a citizen or a permanent resident who having been—
>
> (a) removed from the Republic or while being subject to an order issued under a law to leave the Republic, returns thereto without lawful authority or fails to comply with such order; or
>
> (b) refused admission, whether before or after the commencement of this Act, has entered the Republic, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and, pending his or her

[36] This, however, would not be the end of the matter. To guard against the deportation of people deserving of protection because they are refugees whose status is deserving of recognition, the Immigration Act provides some recourse through ministerial review.[96] One who claims asylum but failed to enter at an official port of

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removal, be detained in the manner and at the place determined by the Director-General.

(6) Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.

(7) On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant."

[96] The Immigration Act makes provision for an immigration officer's determination that someone is an illegal foreigner may be taken on review to the Director-General or the Minister. Section 8 provides:

"(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and—

(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(b) in any other case than the one provided for in paragraph (a), that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry or was found to be an illegal foreigner and who has requested a review of such a decision—

(a) in a case contemplated in subsection (1)(a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

(b) in a case contemplated in subsection (1)(b), shall not be removed from the Republic before the Minister has confirmed the relevant decision.

(3) Any decision in terms of this Act, other than a decision contemplated in subsection (1), that materially and adversely affects the rights of any person, shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.

(4) An applicant aggrieved by a decision contemplated in subsection (3) may, within 10 working days from receipt of the notification contemplated in subsection (3), make an application in the prescribed manner to the Director-General for the review or appeal of that decision.

(5) The Director-General shall consider the application contemplated in subsection (4), whereafter he or she shall either confirm, reverse or modify that decision.

(6) An applicant aggrieved by a decision of the Director-General contemplated in subsection (5) may, within 10 working days of receipt of that decision, make an

entry or who failed timeously to exercise the entitlements of an asylum transit visa could thus always seek ministerial dispensation under the Immigration Act. In addition, that statute separately empowers the Minister on application to make provision for distinguished visitors and to grant a foreigner (or category of foreigners) permanent residence.[97]

[37] The starting point of the Minister's argument is thus correct, even though whether the avenues of review for asylum seekers are adequate seems open to substantial doubt. It is however true that non-South African nationals do not have the right to enter, to remain or to reside anywhere in the Republic. The Bill of Rights affords these rights only to citizens.[98] It is also true that South Africa may regulate the manner in which it allows foreigners, including potential asylum seekers, to gain entry

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> application in the prescribed manner to the Minister for the review or appeal of that decision.
>
> (7) The Minister shall consider the application contemplated in subsection (6), whereafter he or she shall either confirm, reverse or modify that decision.

Seemingly, the right to review a decision of the Director-General, which is conferred on applicants by section 8(4), only applies to decisions other than the decision which finds that a person is an illegal foreigner as contemplated in section 8(1).

[97] Section 31 of the Immigration Act, headed "Exemptions", provides for those who are not illegal foreigners (section 31(1)), ministerial exemptions (section 31(2)) and for statutory exemptions (section 31(3)). Section 31(2) reads:

> "Upon application, the Minister may under terms and conditions determined by him or her—
>
> (a) allow a distinguished visitor and certain members of his or her immediate family and members in his or her employ or of his or her household to be admitted to and sojourn in the Republic, provided that such foreigners do not intend to reside in the Republic permanently;
>
> (b) grant a foreigner or a category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision: Provided that the Minister may—
>
> (i) exclude one or more identified foreigners from such categories; and
>
> (ii) for good cause, withdraw such rights from a foreigner or a category of foreigners;
>
> (c) for good cause, waive any prescribed requirement or form; and
>
> (d) for good cause, withdraw an exemption granted by him or her in terms of this section."

[98] Section 21(3) of the Bill of Rights provides:

> "Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic."

to the country. It does so in the Immigration Act,[99] which, as this Court recognised in *Ahmed*,[100] complements the Refugees Act.

[38] There is, further, avowedly no right under international conventions to enter and reside in South Africa in contravention of its laws. Under the Immigration Act, an illegal foreigner is someone who is in the Republic in contravention of the statute.[101] It is also true that the Immigration Act's fail-safe mechanisms of review, for asylum seekers denied refugee status, do provide some measure of access for an asylum application.

[39] Yet on examination the Minister's contentions falter. Enabling Mr Ruta and asylum seekers in his position to have their status determined under the Refugees Act does not mean that everyone or anyone has the right to enter the Republic anywhere across our borders. The Refugees Act, though its compass is emphatically and deliberately wide, makes provision for authentic asylum seekers and genuine refugees. A fear of persecution must be "well-founded",[102] or, in the case of external disruption, the asylum seeker must have left his or her habitual residence under compulsion.[103] The statute spells out prominent exclusions from refugee status.[104] In

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[99] The Immigration Act regulates entry to South Africa by requiring entry at a designated port of entry, following which a temporary visa in terms of section 10(2)(l) of that statute is issued allowing time to apply for asylum.

[100] *Ahmed* above n 36 at paras 39-40 and 58-61.

[101] See above n 2 for the definition of "illegal foreigner".

[102] Section 3(a) of the Refugees Act.

[103] Section 3(b) of the Refugees Act. Section 3 in its entirety provides:

> "Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—
>
> (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
>
> (b) owing to external aggression, occupation, foreign domination or 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

addition, it specifies precisely when refugee status ceases.[105] Inside the asylum determination process, the Minister may "at any time" withdraw an asylum seeker permit if the application for asylum has been found to be manifestly unfounded, abusive or fraudulent.[106] An asylum seeker whose permit is withdrawn may be arrested and detained.[107] And, finally, a Refugee Status Determination Officer "must" reject an application for asylum if it is "manifestly unfounded, abusive or fraudulent".[108]

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

[104] Section 4 of the Refugees Act above n 9.

[105] Section 5 of the Refugees Act provides:

> "(1) A person ceases to qualify for refugee status for the purposes of this Act if—
>
> (a) he or she voluntarily re-avails himself or herself of the protection of the country of his or her nationality; or
>
> (b) having lost his or her nationality, he or she by some voluntary and formal act reacquires it; or
>
> (c) he or she becomes a citizen of the Republic or acquires the nationality of some other country and enjoys the protection of the country of his or her new nationality; or
>
> (d) he or she voluntarily re-establishes himself or herself in the country which he or she left; or
>
> (e) he or she can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen which justify his or her continued recognition as a refugee.
>
> (2) Subsection (1)(e) does not apply to a refugee who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.
>
> (3) The refugee status of a person who ceases to qualify for it in terms of subsection (1) may be withdrawn in terms of section 36."

[106] Section 22(6)(b) of the Refugees Act provides:

> "The Minister may at any time withdraw an asylum seeker permit if—
>
> . . .
>
> (b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent."

[107] Section 23 of the Refugees Act provides:

> "If the Minister has withdrawn an asylum seeker permit in terms of section 22(6), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity."

[108] Section 24(3) of the Refugees Act provides:

> "The Refugee Status Determination Officer must at the conclusion of the hearing—

[40] None of this provides a sweethearts' charter for bogus asylum seekers or an open door for non-refugees. Nor do the provisions render our borders leaky to a flood of importuning supplicants posing as asylum seekers. The Refugees Act's provisions and its mechanisms are hard-headed and practical. In design and concept they protect our national sovereignty and our borders. It may be that in their application administrative capacity or skills have been lacking, but the source of the difficulty cannot fairly be located in the statute's provision for receiving genuine asylum seekers and facilitating and processing their applications.

[41] At heart the Minister's argument seeks to invest the provisions of the Immigration Act with power to trump those of the Refugees Act. That cannot be. While the Immigration Act determines who is an "illegal foreigner" liable to deportation,[109] the Refugees Act, and that statute alone, determines who may seek asylum and who is entitled to refugee status.[110]

[42] The Refugees Act was enacted some four years before the Immigration Act. Well-established interpretive doctrine enjoins us to read the statutes alongside each other, so as to make sense of their provisions together.[111] But it is equally clear that in this process the Immigration Act's provisions cannot be read to supersede or subordinate those of the Refugees Act. A longstanding principle of statutory interpretation points to the conclusion that a later statute's general provisions do not

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(a) grant asylum; or

(b) reject the application as manifestly unfounded, abusive or fraudulent; or

(c) reject the application as unfounded; or

(d) refer any question of law to the Standing Committee."

[109] See above n 2.

[110] See *Arse* above n 30 at para 19.

[111] Id.

derogate from a statute's specific provisions (*lex generalis specialibus non derogat*).[112]

[43] The Refugees Act makes plain principled provision for the reception and management of asylum seeker applications.[113] The provisions of the Immigration Act must thus be read together with and in harmony with those of the Refugees Act. This can readily be done. Though an asylum seeker who is in the country unlawfully is an "illegal foreigner" under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act. That is the meaning of section 2 of that Act, and it is the meaning of the two statutes when read together to harmonise with each other.[114]

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[112] As van Heerden JA explained in the former Appellate Division, now the Supreme Court of Appeal, in *Khumalo v Director-General of Co-operation and Development* [1990] ZASCA 118; 1991 (1) SA 158 (A) at 165E:

> "[I]n the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. This presumption falls away, however, if there are clear indications that the Legislature none the less intended to repeal the earlier enactment. This is the case when it is evident that the later enactment was meant to cover, without exception, the whole field or subject to which it relates."

[113] This is despite the fact that the Aliens Control Act 96 of 1991, a pre-constitutional enactment, predated both the Refugees Act and the Immigration Act. The later Refugees Act is explicit in its pre-eminence, thus overriding the earlier Act.

[114] Similarly, in a recent challenge against the "asylum ban" imposed by the President of the United States of America, the Ninth Circuit Court of the United States in *East Bay Sanctuary Covenant v Donald Trump* No. 18-17274 (9th Cir. 2018) at 14, 16, 17, 43 and 45 correctly noted the appropriate manner in which this issue can be dealt with:

> "Our asylum law has its roots in the 1951 Convention Relating to the Status of Refugees . . . and the 1967 Protocol Relating to the Status of Refugees . . . . The United States was an original signatory to both treaties and promptly ratified both.
>
> . . .
>
> The Refugee Act of 1980 directed the Attorney General to accept asylum applications from any alien 'physically present in the United States or at a land border or port of entry, irrespective of such alien's status.' . . . it currently provides that '[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum.'
>
> . . .
>
> If the Attorney General had adopted a rule that made aliens outside a 'designated port of arrival' ineligible to apply for asylum, the rule would contradict § 1158(a)(1)'s provision that

[44] Moreover, in entrusting the processing of asylum applications to Refugee Reception Officers[115] and the determination of refugee status to Refugee Status Determination Officers[116] the Refugees Act makes precise and detailed provision for the matters it covers in a way that the Immigration Act does not envisage at all. It is the Refugee Status Determination Officer, and that Officer alone, who is empowered under our law to determine whether an asylum claimant is a refugee or is not. This level of specificity indicates that, regardless of chronological order, the provisions of the Refugees Act govern asylum applications.

[45] To impose the system of review the Immigration Act creates[117] wholesale upon all illegal foreigners, without singling out those who seek refugee status, would radically undermine the plain meaning of section 2 of the Refugees Act, in particular, and the import of the statute generally. This is because, in considering whether an applicant qualifies for asylum, the Immigration Act would interpose an assessment of the person's circumstances in determining whether to permit an application for asylum at all. This interposition is not envisaged at all in the Refugees Act. The provisions of that statute are plain: once an application for asylum is filed, the Refugee Reception Officer is obliged to refer the applicant to the Refugee Status Determination Officer.[118] The Refugees Act entails no comparable filtering at this stage. To intrude the Immigration Act would impose a filtering wholly

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> an alien may apply for asylum 'whether or not [the alien arrives through] a designated port of arrival'. Such a rule would be, quite obviously, 'not in accordance with law.' . . . '[A]n agency's authority to promulgate categorical rules is limited by clear congressional intent to the contrary.'
>
> . . .
>
> As the district court observed, '[t]o say that one may apply for something that one has no right to receive is to render the right to apply a dead letter.' We agree. . . . ('[I]n order to be valid [regulations] must be consistent with the statute under which they are promulgated.')" (Footnotes omitted.)

[115] Section 21 of the Refugees Act.

[116] Section 24 of the Refugees Act.

[117] Section 8 of the Immigration Act.

[118] Section 21(2) of the Refugees Act.

inconsistent with the specific and special structures and mechanisms that the Refugees Act creates.[119]

[46] The two statutes can, as already indicated, be read in harmony: the Immigration Act affords an immigration officer a discretion whether to arrest and detain an illegal foreigner.[120] 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.[121]

[47] And this is not to say that the provisions of the Immigration Act deserve lower status or should be circumvented because they impose undue inconveniences on applicants for asylum. It is to say that the Refugees Act creates a detailed system for processing those applications, with which the adjunct provisions of the Immigration Act can and must be harmonised.[122]

[48] Also, the Minister's argument fails to account for the great bulk of vulnerable asylum seekers, who do not dispose over opportunities to obtain transit permits or to file asylum applications in a timely manner as the Immigration Act demands. This means it is irreconcilable with the overriding provisions of the Refugees Act. As this Court recognised in *Union of Refugee Women*[123] and recently reaffirmed in *Ahmed*[124] refugees are especially vulnerable persons who are traumatised and in flight from serious human rights abuses.

[49] The avenue of recognition for asylum seekers that the Immigration Act embodies and on which the Minister relies is suffocatingly occlusive. That statute

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[119] *Jeebhai v Minister of Home Affairs* [2009] ZASCA 35; 2009 (5) SA 54 (SCA) at para 25.

[120] Section 34(1) of the Immigration Act.

[121] *Jeebhai* above n 119 at para 25.

[122] *Ahmed* above n 36 at paras 58-9.

[123] *Union of Refugee Women* above n 71 at paras 28-9.

[124] *Ahmed* above n 36 at para 22.

caters only for one narrow category of refugees, namely those who arrive at a recognised port of entry.[125] To this category it affords entitlement to an asylum transit visa.[126] What this appears to envisage is a kind of desktop-management of self-identifying refugees who have the opportunity and the agency to self-describe as asylum seekers and claim the consequent statutory entitlements.

[50] The realities of our continent, of Europe, of North America and of South Asia, and perhaps elsewhere, seem more complex. Asylum seekers do not arrive only where they should, nor do they always have the opportunities and agency to claim what they should. This, both international refugee law and international human rights law recognise. An appreciable number of asylum seekers are informal cross-border migrants who do not arrive at recognised ports of entry and are not able to claim desktop-afforded privileges.[127]

[51] In particular, refugees *sur place*, an internationally recognised category of refugees, enter the country of refuge on one basis. Thereafter, supervening events in their country of origin involuntarily render them refugees.[128] On the Minister's argument, the Immigration Act does not apply to refugees *sur place* at all, except insofar as they may seek ministerial exemption or indulgence.

[52] The Minister's contention that a departmental appeal, or an appeal to the Minister, may provide access to the asylum process rightly proceeds on the premise that the decisions appealed against must be irregular. Of necessity, this entails a time

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[125] Id at para 34.

[126] Section 23 of the Immigration Act.

[127] In *Ersumo* above n 32, the asylum seeker entered through a port of entry and obtained an asylum transit permit, at para 2. In *Bula* above n 32 at para 4, 19 asylum seekers crossed the South Africa / Mozambique border on foot without being discovered by border inspection. In *Arse* above n 31 at paras 2-3, the asylum seeker entered through a port of entry and obtained a permit, and did not apply until the permit expired. In *Abdi* above n 30 at para 4, the asylum seeker and refugee attempted to enter the Republic at an airport an official port of entry, but they were denied entry.

[128] Zimmermann et al *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* Oxford University Press, 2001at 324–35.

consuming and ineffective means of access to the asylum process, which places an undue burden on asylum seekers, and creates the always-imminent risk of perilous or fatal *refoulement*. It is correct that convenience for asylum applicants should not be elevated to an insuperable priority. South Africa's obligation is to ensure that refugees are afforded an opportunity to apply. The manner in which this is afforded is for Parliament to decide. Yet, if the only avenue through which an asylum seeker can access the Refugees Act is by way of appeal against a determination of "illegal foreigner" status,[129] then asylum seekers face a very possibly insuperable burden. This is inimical to the provisions of section 2 of the Refugees Act, which Parliament itself enshrined into law.

[53] The fact is that there is a gap in the twin pieces of legislation. Asylum seekers who do not enter through official ports of entry are not explicitly covered by either statute, though the Refugees Act covers them implicitly. Because section 2 of the Refugees Act impels this conclusion, and because the international principles our country has embraced impel the same conclusion, it must follow that the Refugees Act is the governing legislation in these cases.

[54] These considerations point away from the conclusion that the Immigration Act covers the field of refugee applications or predominates within it. Until the right to seek asylum is afforded and a proper determination procedure is engaged and completed, the Constitution requires that the principle of *non-refoulement* as articulated in section 2 of the Refugees Act must prevail. The "shield of *non-refoulement*" may be lifted only after a proper determination has been completed. The Immigration Act then applies, subject, of course, to the continuing obligation not to contravene customary international law and human rights and to indigenous constitutional safeguards.

[129] See section 31 of the Immigration Act.

[55] All this impels the conclusion that the principles affirmed and the practical determinations made in *Abdi*, *Arse*, *Bula* and *Ersumo* were correct. This entails that the majority decision must be overturned. It also means that the decision of the High Court in *Kumah*,[130] upon which the majority in the Supreme Court of Appeal relied, is incorrect and must be overruled.

[56] What it does not mean is that delay in seeking refuge is irrelevant. On the contrary, it is highly relevant. It is a crucial factor in determining credibility and authenticity. This is a determination that the Refugee Status Determination Officer must make. At no stage however does delay function as an absolute disqualification from initiating the asylum application process.

[57] These principles also mean that both the High Court[131] and the dissent in the Supreme Court of Appeal[132] rightly construed the exclusion in section 4(1)(b). It cannot apply to the offences of which Mr Ruta was convicted. This is because they were committed within South Africa. Indeed, the preamble to the Refugees Act states that the purpose of the statute is to implement South Africa's commitment to the 1951 Convention and the Organisation of African Unity Convention. Both these conventions explicitly provide that exclusionary crimes must be committed outside the country of refuge.[133] Quite beyond the explicit language of section 4(1)(b), to which the High Court and the dissent in the Supreme Court of Appeal rightly gave credence, this is a further indication that only crimes outside South Africa operate exclusionarily.

[58] At a time when the world is overladen with cross-border migrants, judges cannot be blithe about the administrative and fiscal burdens refugee reception imposes

[130] *Kumah* above n 16.

[131] High Court judgment above n 5 at paras 7-8.

[132] Supreme Court of Appeal judgment above n 5 at paras 44-6.

[133] Article 1(F)(b) of the 1951 Convention above n 73 and article 1(5)(b) of the Organisation of African Unity Convention above n 82.

on the receiving country.[134] South Africa is amongst the world's countries most burdened by asylum seekers and refugees. That is part of our African history, and it is part of our African present. It is clear from cases this Court has heard in the last decade that the Department is overladen and overburdened, as indeed is the country itself. South Africa is also a much-desired destination. As the High Court noted in *Kumah*,[135] the system is open to abuse, with the ever-present risk of adverse public sentiment.

[59] Yet, as in *Makwanyane*[136] and *Mohamed*[137] and *Tsebe*,[138] and many other cases, our founding principles as a constitutional democracy direct us with unavoidable clarity. There are solutions to the problems of refugees, and they lie within the principles expressly articulated in and underlying our existing statutes.

[60] Leave to appeal must be granted and the appeal must succeed with costs. The order of the High Court need not be reinstated.

Order

[61] The following order is made:

1. Leave to appeal is granted and the appeal succeeds with costs, including the costs of two counsel.
2. The order of the Supreme Court of Appeal is set aside and in its place is substituted:
   "The appeal is dismissed with costs".

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[134] *Ahmed* above n 36.

[135] *Kumah* above n 16.

[136] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 229-30.

[137] *Mohamed v President of the Republic of South Africa* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at paras 69-72.

[138] *Minister of Home Affairs v Tsebe; Minister of Justice and Constitutional Development v Tsebe* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) at paras 43 and 65.

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