CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 214/24

In the matter between:

DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	First Applicant
DIRECTOR OF ASYLUM SEEKER MANAGEMENT, DEPARTMENT OF HOME AFFAIRS	Second Applicant
CAPE TOWN REFUGEE RECEPTION OFFICE MANAGER	Third Applicant
MINISTER OF HOME AFFAIRS	Fourth Applicant
CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fifth Applicant
and	
AMINA IRANKUNDA	First Respondent
ARAVA NIYONKURU	Second Respondent
and	
SCALABRINI CENTRE OF CAPE TOWN	First Amicus Curiae
TRUSTEES OF THE SCALABRINI CENTRE OF CAPE TOWN	Second Amicus Curiae

Neutral citation: *Director-General, Department of Home Affairs and Others v Irankunda and Another* [2026] ZACC 18

Coram:	Mlambo DCJ, Kollapen J, Mathopo J, Mhlantla J, Musi AJ, Nicholls AJ, Rogers J, Savage J and Tshiqi J
Judgments:	Kollapen J (majority): [1] to [120] Nicholls AJ and Rogers J (dissenting): [121] to [197]
Heard on:	10 November 2025
Decided on:	12 May 2026
Summary:	Refugees Act 130 of 1998 — section 21(1) — asylum seeker applications — subsequent applications — *non refoulement* Interpretation — *sur place* refugee — clear right — no clear right to submit a subsequent asylum application

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ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the Full Court of the High Court of South Africa, Western Cape Division, Cape Town):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
   "The appeal is dismissed."
4. Each party is to pay its own costs in this Court.

JUDGMENT

KOLLAPEN J (Mlambo DCJ, Mathopo J, Mhlantla J, Musi AJ, Savage J and Tshiqi J concurring):

Introduction

[1] This is an application for leave to appeal the judgment and order of the Supreme Court of Appeal which reversed the judgment and order of the High Court of South Africa, Western Cape Division, Cape Town (High Court). The High Court found that there is no clear right under the Refugees Act[1] (Act) to submit a subsequent asylum application following the refusal of a first application. The Supreme Court of Appeal held that asylum seekers whose initial applications were rejected under the Act could submit subsequent applications for asylum and that failure to consider those subsequent applications constituted a reviewable error. This Court is called upon to determine whether there is a clear right in the Act to submit a subsequent asylum application following the refusal of the first application.

[2] The application is brought by the first applicant, the Director-General of Home Affairs; the second applicant, the Director of Asylum Seekers Management in the Department of Home Affairs (Department); the third applicant, the Cape Town Refugee Reception Office Manager; the fourth applicant, the Minister of Home Affairs; and the fifth applicant, the Chairperson of the Standing Committee for Refugee Affairs. The application is opposed by the first respondent, Ms Amina Irankunda, and the second respondent, Ms Arava Niyonkuru.

Legislative framework

[3] Before turning to the background of the appeal, it will be useful to briefly set out the primary features of the legal framework within which this matter arises. International refugee law operates as a legal regime of protection in a world characterised by conflict and strife and in which people are affected by breaches of

[1] 130 of 1998.

human rights standards and the collapse of social orders. Under such circumstances, people may cease to enjoy the protection of their country of origin and may experience persecution in various forms which may compel them to flee their country and seek protection elsewhere. That such persons ought to be assisted and, if necessary, protected from persecution and other drivers of forcible displacement by the international community is at the heart of refugee protection. It is this commitment to protecting such persons that lies at the centre of the various international conventions that have been enacted in pursuit of this noble ideal.

[4] Refugees are afforded legal protection in South Africa under both international treaties and domestic legislation. The principal international instruments relevant in our context are the 1951 Convention Relating to the Status of Refugees[2] (1951 Convention), and its 1967 Protocol Relating to the Status of Refugees[3] (1967 Protocol), and the 1969 Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa[4] (OAU Convention). South Africa acceded to the 1951 Convention and 1967 Protocol in 1996 and ratified the OAU Convention in 1995.

[5] In South Africa, the primary vehicle through which we have accepted and domesticated the obligations flowing from these instruments is through the Act, which was enacted in 1998. Section 1A of the Act explicitly provides that it must be interpreted and applied in a manner that is consistent with these international instruments.[5] The long title of the Act succinctly sets out the purpose of the legislation to—

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[2] Convention Relating to the Status of Refugees, 28 July 1951.

[3] Protocol Relating to the Status of Refugees, 4 October 1967.

[4] Organization of African Unity, OAU Convention Governing the Specific Aspects of the Refugee Problems in Africa, 10 September 1969.

[5] Section 1A of the Act provides that the Act must be interpreted and applied in a manner that is consistent with—

> "(a) the 1951 United Nations Convention Relating to the Status of Refugees;
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> (b) the 1967 United Nations Protocol Relating to the Status of Refugees;
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> (c) the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa;
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> (d) the 1948 United Nations Universal Declaration of Human Rights; and

> "give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees, to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status and to provide for matters connected therewith."

[6] The Act domesticates the principle of *non-refoulement* (prohibition of forcible expulsion or return),[6] widely recognised as the foundational principle of refugee law.[7] Section 2 of the Act contains a general prohibition of refusal of entry, expulsion, extradition or return to other countries in certain circumstances. This provision reads as follows:

> "Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—
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> (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."

[7] The Act provides a detailed framework regulating applications for refugee status. The grounds upon which a person may qualify for refugee status are set out in section 3 of the Act.[8] The definition of a refugee in the Act is in line with the 1951 Convention

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> (e) any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party."

[6] *Non-refoulement* is the obligation of Member States not to expel or forcibly return a refugee to a place where their "life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion". 1951 Convention above n 2 at Article 33(1).

[7] Khan and Schreier *Refugee Law in South Africa* 2 ed (Juta & Co Ltd, Cape Town 2023) at 5.

[8] Section 3 provides the following:

as it was expanded by the 1967 Protocol and the OAU Convention's expanded definition.[9] Section 4 of the Act provides for the exclusion from refugee status and section 5 of the Act for the cessation of status.

[8] The Act sets out the procedures and mechanisms for the making of asylum applications, status determination procedures as well as internal appeals and reviews. The application process is governed by Chapter 3. Section 21(1)(a) provides that upon reporting to the Refugee Reception Office (RRO) within five days of entry into South Africa, an asylum seeker must be assisted by an officer designated to receive asylum applications.[10] An application for asylum must be made in person to a Refugee Status Determination Officer (RSDO) at any RRO or at any other place designated by the Director-General by notice in the Gazette.[11]

[9] The RSDO must, upon receipt of the application, deal with it in terms of section 24 which concerns decisions regarding applications for asylum.[12] The Act provides that when considering an application for asylum, the RSDO must have due regard to the provisions of the Promotion of Administrative Justice Act[13] (PAJA) and

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"Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person—

(a) owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or other events seriously disturbing 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 in another place outside his or her country of origin or nationality; or

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

[9] The 1951 Convention definition, in Article IA(2) formed the basis of the OAU definition in Article I; however, the OAU definition expanded the definition to cover those compelled to leave their country of origin on account of external aggression, occupation, foreign domination or events desirously disturbing the public order.

[10] Section 21(1)(a).

[11] Section 21(1)(b).

[12] Section 21(2).

[13] 3 of 2000.

may consult with or invite a representative of the United Nations High Commissioner for Refugees[14] (UNHCR) to furnish information on specified matters.[15] Upon the conclusion of the hearing conducted in the prescribed manner, the RSDO must make one of the following decisions in terms of section 24(3) to—

> "(a) grant asylum;
>
> (b) reject the application as manifestly unfounded, abusive or fraudulent; or
>
> (c) reject the application as unfounded."

[10] The Standing Committee for Refugee Affairs (SCRA) may monitor and supervise all decisions taken by an RSDO and may approve, disapprove or refer any such decision back to the RRO with recommendations.[16] If asylum is granted in terms of section 24(3)(a), refugee status in terms of the Act is granted.[17] This entails a formal written recognition of refugee status in the prescribed form, following which the refugee is granted a range of rights and entitlements by the Act.[18] If an application is rejected in terms of section 24(3)(b) or section 24(3)(c), the RSDO must furnish the applicant with written reasons for the rejection[19] and inform the applicant of his or her right to appeal in terms of section 24B.[20]

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[14] The UNHCR is the United Nations entity charged with providing international protections to refugees who fall under the scope of the 1951 Refugee Convention and 1967 Protocol, as well as working with countries to improve refugee and asylum law and policies.

[15] Section 24(2).

[16] Section 9C(1)(c) and section 24A(1).

[17] Section 1.

[18] Section 27 provides that a refugee is entitled to all rights in the Bill of Rights except those expressly applicable only to citizens.

[19] See *Koyabe v Minister of Home Affairs* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC); 2010 (4) SA 327 (CC) at paras 61-2 on the importance of reasons.

[20] Section 24(4).

[11] If an application is rejected in terms of section 24(3)(b) as manifestly unfounded,[21] abusive[22] or fraudulent,[23] the decision must be confirmed by the SCRA[24] who on review may confirm, set aside or substitute any such decision taken by the RSDO.[25] If the rejection is confirmed by the SCRA, the asylum seeker must then be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.[26] The SCRA must inform the RRO where the application was lodged of its decision, whereafter it is *functus officio* (having performed the office).[27]

[12] If, however, an application is rejected in terms of section 24(3)(c) as unfounded,[28] then the asylum seeker must be dealt with in terms of the Immigration Act unless they lodge an appeal in terms of section 24B which provides for an appeal to the Refugee Appeals Authority (RAA),[29] who may confirm, set aside or substitute any such decision taken by an RSDO. If new information which is material to the application is presented during the appeal, then the RAA must refer the matter back to the RSDO to deal with the application in terms of the Act.[30]

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[21] Section 1 provides that a "'manifestly unfounded application' means an application for asylum made on grounds other than those contemplated in section 3".

[22] Section 1 provides that—

> "'abusive application for asylum' means an application made—
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> (a) with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or
>
> (b) after the refusal of one or more prior applications without any substantial change having occurred in the applicant's personal circumstances or in the situation in his or her country of origin."

[23] Section 1 provides that a "'fraudulent application for asylum' means an application for asylum based without reasonable cause on information, documents or representations which the applicant knows to be false and are intended to materially affect the outcome of the application".

[24] Section 24A(1).

[25] Section 24A(3).

[26] 13 of 2002. Section 24(5)(a) of the Act.

[27] Section 24A(4).

[28] Section 1 provides that an "'unfounded application' in relation to an application for asylum in terms of section 21, means an application made on the grounds contemplated in section 3, but which is without merit."

[29] Section 24B(1).

[30] Section 24B(5).

[13] During the application and appeal process, the Act provides safeguards for applicants. Pending adjudication of an application in terms of section 21(1), an asylum seeker is entitled in terms of section 22 to be issued with an asylum seeker visa which allows the applicant to sojourn in the Republic temporarily[31] and which may be extended as necessary.[32] Section 21(4) provides that no proceedings may be continued or instituted against any person in respect of their unlawful entry into or presence in the Republic until a decision has been made on their section 21(1) application and where applicable, reviewed in terms of section 24A or appealed in terms of section 24B, or where such person has been granted asylum. Once a final decision is made to refuse an application for asylum, section 24(5) provides that an asylum seeker must be dealt with in terms of the Immigration Act.[33]

[14] Overall, the Act creates a comprehensive framework for the receipt and adjudication of claims for asylum, incorporating significant features of the rules of natural justice to advance fairness and the integrity of the decision-making process. These measures include both internal appeal and review oversight functions and, failing all of that, an aggrieved applicant for asylum may initiate judicial review proceedings.

Background facts

[15] Against this background, it is convenient to turn to the facts of the proposed appeal. The first and second respondents are Burundian nationals who arrived in South Africa in 2008 and 2012, respectively. They applied for asylum after their arrival and say that in 2014 they were informed that their applications were finally rejected as being manifestly unfounded in terms of section 24(3)(b) of the Act, the refusal having been confirmed by the SCRA. There is some dispute relating to the basis on which they

[31] Section 22(1).

[32] Section 22(4).

[33] Section 32 of the Immigration Act 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."

sought asylum at the time. The interview notes prepared by the RSDO record that the first applicant's application was premised on a desire to work and study in South Africa and the second applicant's application was premised on a desire to stay in South Africa. The respondents say that the basis for their applications was their fear of persecution in Burundi given the political events that arose there which had forced them to flee. The respondents explain that problems with language interpretation at the time of their applications may have resulted in the basis of their applications being recorded in the manner in which they were.

[16] Following the final rejection of their applications, which the respondents did not challenge by way of judicial review, the respondents were required to leave South Africa in terms of section 32 of the Immigration Act, as their status had by then been changed from asylum seekers to illegal foreigners, per section 24(5)(a) of the Act. They did not leave South Africa, nor do we have any evidence of attempts on the part of the Immigration Inspectorate to remove them.

[17] The respondents say that the situation in Burundi worsened in 2015 due to widespread political violence caused by, amongst others, the announcement by former President Pierre Nkurunziza that he would be running for a third presidential term. As a consequence, the respondents say they could not have returned to Burundi as it was not safe for them to do so. In 2018, the respondents considered themselves *sur place* (on-site, not moving or on the spot) refugees[34] and were assisted in preparing further applications for asylum which were submitted to the third applicant. The stance taken by the third applicant was that the respondents were not entitled under the Act to bring subsequent applications for asylum after the final rejection of their initial asylum claims,

[34] *Sur place* refugees are described in *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) (*Ruta*) at para 51 as an internationally recognised category of refugees that enter a country on one basis, and are involuntarily rendered refugees due to supervening events in their countries of origin.

and their subsequent applications would not be considered.[35] This impasse led to the litigation which I describe hereunder.

Litigation history

High Court

[18] On 29 November 2018, the respondents approached the High Court on an urgent basis to compel the Department to grant them asylum seeker visas in terms of section 22 of the Act, pending the final relief in the main application which sought to compel the Minister to accept and consider the asylum seeker applications as *sur place* refugees. Their basis for requesting the asylum seeker visas was that in the absence of these visas, they remained undocumented, vulnerable, unable to secure accommodation and unable to obtain jobs and were placed in a position where they could be detained and/or deported back to Burundi at any time. The High Court, relying on *Ruta*,[36] held that the Immigration Act does not trump the Act because the two statutes should be read in harmony and that the respondents had a clear right to have their applications for asylum considered and were thus entitled to the section 22 visas they sought. The High Court ordered that the respondents be issued with section 22 visas as they had demonstrated a clear right to the relief sought in the main application.

[19] In the main application, the respondents claimed that the Act afforded them a clear right to make subsequent asylum seeker applications, which they argued provided an open system designed to allow vulnerable people, such as *sur place* refugees, to apply for asylum. The High Court dismissed this application, holding that the respondents failed to challenge the Department's decision to reject their first asylum applications through judicial review, wrongfully remained in the country and fell to be dealt with under the Immigration Act.

[35] Initially, the Department took the view that the respondents would have to go back to their country of origin and only upon return to South Africa would their applications be considered. Before this Court, the Department no longer takes that view but says that the Act does not provide for subsequent applications.

[36] *Ruta* above n 34 at paras 41-3.

[20] The High Court held that an interpretation that an asylum seeker does not have a clear right to make subsequent applications after a failed application would not be inconsistent with the Constitution, the Act or international law. The High Court referred to *Abore*,[37] where this Court held that the principle of *non-refoulement* and the protection it offered endured until the final determination of the asylum claim.[38] The High Court further held that allowing for subsequent applications without the asylum seeker leaving the country would result in a never-ending cycle of applications for asylum. The Court said that the respondents' reliance on *Ruta* was misplaced since that case dealt with the right to submit an asylum application, not the right to make subsequent applications. The High Court went on to reason that an asylum seeker remaining in the country whilst awaiting the decision of their subsequent application would render section 24(5)(a) of the Act nugatory because as soon as an application is finally determined, the asylum seeker would merely indicate an intention to make a subsequent application to avoid being dealt with under the Immigration Act.

Supreme Court of Appeal

[21] Aggrieved by the order of the High Court, the respondents, with the leave of that Court, had their appeal considered by the Supreme Court of Appeal. The Supreme Court of Appeal held that the Act does not contemplate that applicants whose applications for asylum have been refused can remain in the country and make a subsequent application. In doing so it acknowledged that a failed asylum applicant could only remain in the country pending the final determination of any review or appeal of their failed asylum application,[39] if they are authorised to remain in the country by the Department or if there is some other lawful basis to remain in the country.

[22] However, the Supreme Court of Appeal granted an order in favour of the respondents, holding that once a refugee *sur place* claim has been made, there is no

[37] *Abore v Minister of Home Affairs* [2021] ZACC 50; 2022 (2) SA 321 (CC); 2022 (4) BCLR 387 (CC).

[38] Id at para 42.

[39] As provided for in sections 24A and 24B of the Act, and PAJA.

basis to (a) demand that an asylum seeker return to their country of origin pending the determination of their application, or (b) to reject the application on the basis that the initial one had been finally determined, and that the claim must be addressed, even if it is raised late or brought forward as post-hearing evidence. The appeal was consequently upheld, and the Department was directed to accept the respondents' *sur place* refugee claim applications and determine them within 21 days of receipt. It is this decision of the Supreme Court of Appeal which is the subject of the applicants' application for leave to appeal before this Court.

In this Court

Applicants' submissions

[23] The applicants submit that this matter engages this Court's jurisdiction as it concerns the interpretation of the Constitution and national legislation passed to give effect to South Africa's international law obligations. The constitutional issue is whether the Act permits asylum seekers to lodge subsequent applications for asylum. They also submit that this matter raises an arguable point of law of general public importance concerning whether a person whose application for refugee status that has been declined has, as of right in terms of the Act, to submit subsequent applications. Furthermore, the applicants submit that leave to appeal should be granted as this matter raises a novel question of law which has never been decided by this Court. They contend that in recognising *sur place* refugee claims under South African law, the Supreme Court of Appeal created a new precedent.

[24] According to the applicants, international law does not recognise a right to submit subsequent applications, nor does such a right exist in any of the international law instruments recognised in section 1A of the Act. They argue that the respondents conflate *sur place* claims with subsequent claims. The applicants contend that a *sur place* claim does not equate to a right to make a subsequent claim for asylum, but represents a distinct category of refugee applicant – one who did not flee their country due to persecution, but who subsequently seeks protection as a result of events that

occurred after their departure. Arising from this, the applicants submit that a *sur place* claim is not a right to bring a subsequent application for asylum but a distinct category of asylum claim.

[25] The Act, say the applicants, makes no provision for a subsequent application for asylum – either based on "new facts" or on any other basis. They submit that once the original application process has been concluded, the individual concerned falls to be dealt with in terms of the Immigration Act. Reliance for this submission is placed on section 25(5)(a) of the Act, which, on the applicants' interpretation, points to the fact that the Act does not create room for a subsequent application after an application has gone through all the process stages and has been finalised. This, the applicants posit, is intended to ensure finality and the Supreme Court of Appeal correctly rejected the interpretation proffered by the respondents that a person can apply for asylum as many times as they elect to. The Supreme Court of Appeal said:

> "If their construction were correct, there would never be an end to a cycle of asylum applications. I do not think that the principle goes as far as to suggest that once an asylum seeker makes an application, he or she will never be returned to their country of origin, irrespective of the outcome of such an application or its final determination."[40]

[26] The applicants submit that requiring failed asylum seekers to return to the country from which they fled would not violate customary international law. In support of this submission, the applicants rely on the Supreme Court of Appeal's finding that *non-refoulement* is not a shield that is applicable indefinitely because the protection afforded by the principle endures for as long as an asylum seeker has not exhausted all available remedies, including internal appeals and judicial review. However, once these processes are exhausted and an asylum application is finally rejected, the protection falls away.

[40] *Irankunda v Director of Asylum Seeker Management: Department of Home Affairs* [2024] ZASCA 87; 2024 (6) SA 376 (SCA); 2024 (10) BCLR 1302 (SCA) (Supreme Court of Appeal judgment) at para 74.

[27] The applicants say that the definition of an abusive application in section 1 of the Act does not provide a basis for the submission of successive applications. They submit that this section is designed to categorise the type of application which may be rejected as "abusive" once submitted and does not create a right to make subsequent applications. To this end, they submit that there is no absurdity in defining an "abusive application" and that a clear right cannot be sourced in a definition that does not create a right.

[28] The applicants contend that the Supreme Court of Appeal's judgment is inherently inconsistent. They argue that the judgment rejects the contention that the Act and principle of *non-refoulement* allow for subsequent applications, while simultaneously accepting that international and comparative law do not bar subsequent applications brought on a valid basis.

Respondents' submissions

[29] The respondents accept that this matter concerns a constitutional issue and a novel question of law, but take the view that leave to appeal ought to be refused, as the applicants lack prospects of success in this appeal.

[30] They argue that they are both refugees *sur place* and re-applicants because they are persons who seek to file subsequent applications without returning to their country of origin due to a "substantial change" in the circumstances in their country of origin since the rejection of their previous asylum applications. They also say that the hardships in Burundi from which they seek protection arose while they were outside of Burundi.

[31] The respondents contend that the applicants' approach misunderstands the nature of the right of *non-refoulement* and the protections flowing from that right. Relying on *Ruta* and section 2 of the Act, the respondents argue that this right is not one of procedure but a substantive human right, its purpose being to protect persons from being returned to countries where they reasonably fear persecution. To this end, the

respondents submit that asylum seekers cannot be expected to rely on this right only once (upon the submission and finalisation of the initial application). A final rejection of their initial application, it is submitted, does not extinguish their entitlement to the right of *non-refoulement*.

[32] The respondents submit that the applicants' reliance on *Ruta* and *Abore* for the proposition that the shield of *non-refoulement* can be lifted is misplaced because those cases were not about applicants seeking to file subsequent applications due to a valid fear of persecution. Consequently, the respondents submit that the question is not whether there is a right to submit subsequent applications but whether persons seeking to rely on the right can show that they have the type of well-founded fear that falls within the criteria for refugee protection, and if such well-founded fear is demonstrated, the right of *non-refoulement* shields them for as often and as long as necessary.

[33] The respondents dispute that the Supreme Court of Appeal's judgment is inconsistent as has been suggested by the applicants. On their reading, it firstly sets out the general approach to asylum applications and the limited application of the right to *non-refoulement*, and then deals with the exception to the general approach, which allows for subsequent applications where there is a new basis or new facts arise.

[34] The respondents submit that the definition of an "abusive application" in section 1 of the Act implicitly permits asylum seekers to submit successive applications. Their reliance rests particularly on paragraph (b) of the definition, which they interpret as permitting an asylum seeker to approach an RSDO with a fresh asylum application which the RSDO can dismiss as abusive if the asylum seeker cannot demonstrate the necessary substantial change. As such, the argument goes, asylum seekers must be allowed to at least place their subsequent applications before RSDOs, without which the RSDO can never make a determination that an application is abusive. It is for this reason that the respondents submit that the Act contemplates and allows subsequent applications, subject to the requirement that the applicant is able to demonstrate that the application is not abusive.

[35] The respondents note that the fact that a failed asylum seeker is deemed a so-called "illegal foreigner" subject to the Immigration Act does not disqualify them from applying for asylum because so-called illegal foreigners are allowed to apply for asylum. Reliance for this proposition is placed on *Ruta* where this Court held:

> "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."[41] (Footnote omitted.)

As such, the respondents submit, being rendered an illegal foreigner does not prohibit the filing of asylum applications as contended for by the applicants.

[36] The respondents claim that there is no need to bring a frontal constitutional challenge to the supposed lacuna in the Act as the Act does explicitly contemplate the filing of re-applications, subject only to an RSDO's assessment of whether such re-applications are abusive.

Amici curiae submissions

[37] The Scalabrini Centre of Cape Town and Trustees of the Scalabrini Centre of Cape Town (who I will refer to collectively as the amici) have been admitted as amici curiae (friends of the court) in this matter. They raise that the Act, understood in the light of South Africa's constitutional and international law obligations, both permits and requires the consideration of *sur place* and subsequent applications. The amici highlight that *non-refoulement* is foundational to international refugee law and ensures the protection of fundamental human rights including the right to life and freedom from torture or cruel, inhuman and degrading treatment.

[41] *Ruta* above n 34 at para 43.

[38] The amici submit that one's classification as a refugee is not based on a country's recognition of their refugee status as such; rather, it is based on the individual fitting the criteria within the definition of refugee in the 1951 Convention. They note that even individuals whose refugee applications have not been determined or who have been rejected (either incorrectly or correctly but with a change in circumstances) are *de facto* (in reality) refugees and are guaranteed the protection of *non-refoulement*. The amici also submit that domestic legislation already considers changed circumstances in refugee status determinations. They argue that the Act must consider changed circumstances that would allow for the granting of refugee status if the Act allows for the consideration of changed circumstances to revoke refugee status.

[39] Ultimately, the amici support the following approaches: first-time applications for refugees *sur place* should be permitted when the individual left the country of origin for reasons other than seeking asylum and the individual is currently at risk of *refoulement*; and subsequent applications should be permitted if the individual's personal or country of origin circumstances have changed in such a way that there are facts showing that they are currently at risk of *refoulement*.

[40] This Court is indebted to the amici for their written submissions.

Issues for determination

[41] There are two primary issues for determination. The first is whether this Court has jurisdiction to hear the matter and, if so, whether leave to appeal should be granted. The second is whether failed asylum seekers have a right under the Act to make subsequent applications for asylum. This turns on the proper interpretation of the Act, specifically whether it provides a clear right to submit subsequent asylum applications. This issue also requires a proper understanding of the distinction between *sur place* and subsequent applications.

Jurisdiction and leave to appeal

[42] This matter raises the critical question of the interpretation of national legislation passed to give effect to South Africa's international law obligations and whether the Act recognises or permits asylum seekers to lodge subsequent applications for asylum following a failed asylum application. This Court, in *Ruta*, held that refugee matters invariably implicate the rights to liberty, dignity and sometimes life.[42] I am satisfied that this matter engages our constitutional jurisdiction. Similarly, whether a person whose application for refugee status has been refused has a right in terms of the Act to make subsequent applications for asylum is an arguable point of law of general public importance and our general jurisdiction is also engaged. It is in the interests of justice for this Court to decide whether the Act permits subsequent asylum applications and, if so, on what basis. The issues implicated in this matter have significant and wide implications for future asylum applications, including those whose applications have been finalised but wish to rely on the Act to make subsequent applications. It is also relevant for the integrity of the asylum system in South Africa. For the above reasons, I am satisfied that leave to appeal must be granted.

Condonation

[43] The applicants apply for condonation for the late filing of their application for leave to appeal. The application for leave to appeal is 14 days late. The applicants submit that upon the receipt of the Supreme Court of Appeal's judgment, the Department decided to instruct a new legal team who needed time to familiarise themselves with the matter that commenced in 2015 in only 15 days. Furthermore, the applicants submit that the drafting of the application took considerably longer than anticipated owing to the complexity of the issues. Finally, the applicants submit that the respondents will not suffer any prejudice as a result of the lateness. Condonation is not opposed, the respondents will not suffer any prejudice as a result of the lateness and the delay is adequately explained. Condonation is granted.

[42] *Ruta* above n 34 at para 12.

Is there a right to re-apply?

[44] Before addressing the central issue whether there is a right to make subsequent applications under the Act, I deal with *sur place* and subsequent applications.

Sur place and subsequent applications

[45] A distinct, and to some extent unique, feature of this case is that it raises the concept of a *sur place* refugee for the first time in our law. It is therefore important that we arrive at a correct understanding of the concept. "*Sur place*", which literally means "on the spot" or "in place", describes the situation of a person who was not a refugee when leaving their country of origin but who thereafter becomes a refugee as a result of changed circumstances either relating to the person or the country of origin.[43] To that extent, it is widely recognised that such a person, who would have had no reason to previously seek asylum, is entitled to apply for asylum *sur place*.[44] The applicants do not take issue with that stance.

[46] However, the term *sur place* has also been incorrectly used to describe the situation when a failed asylum seeker makes a subsequent application for asylum "*sur place*" based on changed circumstances. Thus, while both categories of applications may attract the label "*sur place*" in that both relate to changed circumstances and fit the profile of an application "on the spot", there is a significant difference between them: the former category refers to first-time asylum seekers, while the latter category refers to subsequent asylum seekers. The Supreme Court of Appeal did not, as it should have, draw a distinction between first-time and subsequent claims but it simply referred to *sur place* claims, incorporating both types of claims under that heading. It erred in this regard because these two categories of applications are identified and dealt with differently by the UNHCR and in international law.

[43] UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection* (1979) at para 95.

[44] *Ruta* above n 34 at para 51.

[47] The difference is just not one of terminology but of substance. A first-time *sur place* application is in truth no different from an ordinary claim to asylum. Both claims are premised on protection from persecution, the only difference being that in the latter instance the cause of the persecution arose when the claimant for asylum was in the country of origin while in the former instance it arose after the claimant had left the country of origin. Both claims are processed on the same basis and within the same legal framework with no different eligibility requirements, no special determination mechanisms and no expedited procedures.

[48] Subsequent *sur place* claims rest on a different footing and there are valid reasons for treating them differently. Such claims, generally based on changed circumstances, would follow a failed asylum application and any appeal or review process following the rejection. These subsequent claims made by the same person and in respect of the same country of origin generally warrant considerations that were not applicable in a first-time application. Those considerations may relate in part to a heightened criterion such claims may have to meet; a change in substance between what the first claim and the subsequent claims advance; the conduct, if any, of the applicant in the change of their personal circumstances to facilitate a subsequent claim; effectively responding to such claims that have merit; the ability to avoid a replication of unmeritorious claims; and the ability to summarily reject abusive claims. These are all considerations that have direct relevance to subsequent claims and have been the subject of consideration by other jurisdictions in dealing with such claims.

[49] It is therefore useful, in order to avoid any conceptual confusion, to refer to *sur place* claims made in a first application as first-time applications and any subsequent application that happens to be *sur place*. In the latter case the defining feature of the application is that it is a subsequent application, while in the former case it is that it constitutes a first application. That both are made *sur place* cannot be a dispositive consideration that they should be treated in the same way, as I have explained above.

[50] The conceptual distinction between these two categories of applications also emerges from how these applications fit into the broad scheme of refugee protection that the UNHCR supports. The UNHCR, in its Effective Processing of Asylum Applications: Practical Considerations and Practices guidelines,[45] distinguishes between first-time applications and subsequent applications. In relation to the latter it refers to the concerns in terms of fairness and efficiency that may arise and says:

> "[A]ddressing issues related to *subsequent applications* for international protection has emerged as a concern in many national asylum systems, both in terms of fairness and efficiency. UNHCR advises that asylum systems should adopt sound procedures for the processing of *subsequent applications* or re-opening of cases rejected in final instance in order to ensure fairness and integrity of the systems. When a subsequent application is made, a preliminary assessment, in an accelerated process, can be done to determine whether new facts or circumstances have arisen which would warrant an examination of the substance of the claim or whether a case should be re-opened."[46] (Emphasis in original.)

[51] Those concerns are understandable. While fairness may require that changed circumstances should open the door to a subsequent application on the part of a failed asylum seeker, protecting the integrity of the asylum system should ensure that the system is able to consider such cases within a carefully delineated framework. This is to ensure that determination systems are properly able to address such applications in terms of eligibility and processing requirements and to deal differently with claims that are abusive or totally without merit. They generally are not treated on the same basis as first-time claims since the same applicant would have had a previous claim rejected and the risk of a subsequent claim made without a proper basis is heightened. The Supreme Court of Appeal was also concerned by this when it said "there is much scope for abuse, in which *sur place* claims are made, sometimes on a repeated basis, without proper foundation, to extend protections for lengthy periods of time".[47] The

[45] UNHCR *Effective Processing of Asylum Applications: Practical Considerations and Practices* (2022) (UNHCR guidelines).

[46] Id at para 31.

[47] Supreme Court of Appeal judgment above n 40 at para 82.

Supreme Court of Appeal could have only been referring to subsequent *sur place* claims and not first-time *sur place* claims.

[52] Some jurisdictions have recognised a right to make subsequent applications, and their approach generally reflects how these twin concerns of fairness and the integrity of the asylum system have been balanced. The legal basis for considering subsequent applications is generally dealt with in legislation or rules and the terminology used includes "subsequent application" or "fresh claim" all denoting a second or further claim to asylum.[48] Similarly, changed circumstances, be it in one's country of origin or one's personal life, which may affect one's classification as a refugee are recognised by many jurisdictions as a significant consideration in both asylum and deportation procedures. However, there is a variance in how and at what point such changed circumstances come into play within both the asylum and immigration systems. This differentiation points to the matter falling within the realm of the country's legislative branch.

[53] In New Zealand, the default position is that such applications are not to be considered unless they meet a clearly set threshold which relates to a significant change in circumstances and the claimant acting in good faith at all times. In addition, a refugee and protection officer may refuse to consider a claim that is abusive or manifestly unfounded.[49]

[54] In the United Kingdom, the Immigration Rules (Rules) distinguish between *sur place* claims and fresh claims. *Sur place* claims refer to claims which are based on events which occurred after an asylum seeker has left their country of origin.[50] In other words, a successful claimant would be a *sur place* refugee in its true and proper

[48] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection (Recast) (EU Directive) refers to "subsequent applications" in Article 2(q). United Kingdom Immigration Rules 353 refers to "fresh claim". Section 140(1) of the New Zealand Immigration Act 51 of 2009 (New Zealand Immigration Act) refers to "subsequent claim".

[49] Section 140(3) of the New Zealand Immigration Act entitled "limitation on subsequent claims".

[50] Rule 339P of the Rules.

meaning. Further submissions cater for the circumstances wherein a claim has been refused but the asylum seeker wishes to present new evidence in support of the claim. The decision maker must then assess whether the further submissions amount to a fresh claim. A fresh claim is established if the further submissions presented by the asylum seeker are significantly different from the initial claim and enjoy a reasonable prospect of success.[51] Where the decision maker identifies a fresh claim, the asylum seeker is entitled to an appeal. A *sur place* claim would fall into the category of a first-time claim while a fresh claim is a *de facto* subsequent claim. The Rules provide clear criteria within which fresh claims must fall and also define what changed circumstances mean.

[55] The European Union also recognises the right to make a subsequent application, but again does so within a dedicated framework that sets both the standard for such applications and an alternate method of processing them.[52] The more recently codified EU Regulation[53] requires a claimant to present "new elements which significantly increase his or her likelihood of qualifying as a beneficiary of international protection or which relate to the reasons for which the previous application was rejected as inadmissible".[54]

[56] Canada, on the other hand, expressly prohibits the consideration of subsequent applications following the rejection of an asylum application. One of the grounds of ineligibility is set out in section 101(1)(b) of the Canadian Immigration and Refugee Protection Act (Canadian Act)[55] providing that "a claim is ineligible to be referred to the Refugee Protection Division if a claim for refugee protection by the claimant has been rejected by the Board". However, Canada allows submissions to address a risk of irreparable harm upon the removal of the failed asylum seeker which may result in

[51] Id at Rule 353.

[52] EU Directive above n 48.

[53] Regulation 2024/1348 of the European Parliament and of the Council of 14 May 2024 Establishing a Common Procedure for International Protection in the Union and Repealing Directive 2013/32/EU.

[54] Id at para 77.

[55] Section 101(1)(b) of the Immigration and Refugee Protection Act SC 2001, c.27.

protection.[56] Section 113(a) of the Canadian Act allows new evidence for a Pre-Removal Risk assessment provided that—

> "an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection."

[57] What all this demonstrates is that there is a distinction between first-time and subsequent *sur place* applications both in relation to the legal basis that underpins their recognition, as well as the procedures that apply to such applications when they are permitted. In addition, national legislation or rules provide the framework within which such applications are to be considered, setting the normative framework for the consideration of such applications and distinguishing both substantively and procedurally between the two types of applications. Foreign national legislation does not treat such claims on the same footing, nor do they do so within a uniform legal framework. This same treatment is what the respondents say the interpretation they contend for should result in and this is the effect the order of the Supreme Court of Appeal will have.

[58] I conclude this part of the analysis noting that there is a fundamental difference between first-time and subsequent claims which is relevant to how they fit into our understanding of *sur place* claims; they are dealt with differently both in terms of eligibility requirements and procedural standards and they are generally addressed through legislation or special rules. This understanding must also be factored into our interpretation of the Act.

The principles of interpretation

[59] It is trite that the proper approach to interpretation involves a unitary exercise that considers the language used, understood in its context and with regard to the

[56] Section 101(1)(b)-(c) of the Immigration and Refugee Protection Act SC 2001, c.27.

purpose.[57] Section 39(2) of the Constitution provides a mandatory canon of interpretation.[58] It says:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[60] The effect of section 39(2) is that all legislation must be "interpreted through the prism of the Bill of Rights".[59] In addition, 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."

[61] It is against this background that I embark on the interpretive exercise. However, before doing so I pause to remark on what this case is about. It is only about whether the Act, properly interpreted, creates the right for a failed asylum seeker to make subsequent applications. It is not about whether, as a matter of policy, such a right should exist in the scheme of the refugee protection framework in South Africa, nor is it about whether the Act has failed to make provision for the inclusion of such a right if it is found to exist. Those questions, important as they are, do not arise from the case that the respondents advanced and the relief that was sought, but they loom large within the context in which the case was argued.

[62] Whether a right that exists in international law but is not provided for in legislation is a question about the inclusiveness of that legislation and may also relate to the constitutionality of the Act. These questions which to a significant extent have

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[57] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28 and *Capitec Bank Holdings Ltd v Coral Lagoon Investments 194 (Pty) Ltd* [2021] ZASCA 99; 2022 (1) SA 100 (SCA) at para 25.

[58] Du Plessis "Interpretation" in Woolman and Bishop (eds) *Constitutional Law of South Africa* (Juta & Co Ltd, Cape Town 2013).

[59] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC) at para 21.

been foreshadowed in this matter, may well arise for determination in the future. This Court should not pre-empt that issue. In *SANDU*,[60] this Court cautioned that where a constitutional challenge on legislation has not been mounted, the Court's attention will be drawn to the legislative provisions rather than the constitutional provision.[61] Furthermore, it was held that in such instances the Court should refrain from determining the proper interpretation of constitutional provisions as it would be inappropriate to do so.[62]

[63] I accept the broader importance of the question whether our law should recognise the right of a failed asylum seeker to bring a subsequent application when personal or country of origin circumstances change. As noted, many jurisdictions allow for subsequent applications, albeit within a clear legislative framework. There is the understandable temptation to attempt to answer that question here, and then, having done so, to find a way to accommodate that answer within the framework of the Act. But therein lies the danger we must avoid. The Supreme Court of Appeal reached a conclusion that a right to make a subsequent application existed in international law and, arising from that, concluded that the subsequent *sur place* applications of the respondents should be considered by the Department. It did not undertake any analysis of the Act as to the source of the right in relation to the relief it granted.

[64] If the Act is reasonably capable of interpreting the existence of a subsequent right, then such a conclusion must follow; but equally if it is not, such a conclusion cannot follow. One cannot use an interpretive exercise to impermissibly achieve that which a constitutional challenge is designed to do.

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[60] *South African National Defence Union v Minister of Defence* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC).

[61] Id at paras 48-54.

[62] Id at para 56.

Does the Act contain a right to re-apply?

[65] In *Ruta*, this Court provided an incisive analysis of the scope and contours of what the Act contemplated in its protective scheme. It was concerned with ensuring that those who sought to apply for asylum did not face unjustified obstacles in their attempts to do so. It demonstrated a strong commitment to interpreting the Act in the spirit that would allow the consideration of all claims – noting that it was not the role of the courts to determine the merits of such claims but that of the RSDO and the other structures created in the Act.

[66] At the same time, the Court recognised that while the compass of the Act was emphatically wide, it provided adequate mechanisms to ensure that genuine claims to asylum were properly considered and claims that were without foundation or abusive could also be addressed.[63] Finally, in dealing with the operation of the principle of *non-refoulement*, it importantly observed that the protective features of the principle would be activated once a claim to asylum was made and would endure until the final determination of the claim.[64] All of this suggests a carefully balanced approach to claims to protection under the Act, and identifies the role of various institutions in that process. In particular, the Court said that South Africa's obligation was to ensure that asylum seekers had the opportunity to apply but that the manner in which this was afforded was for Parliament to decide.[65] And so one may rightly say that the jurisprudence in *Ruta* and the other cases that it referenced[66] was precisely about the carefully balanced contours in the asylum system found in the Act, which the Court in *Ruta* described as creating a system that was both practical and hard-headed.[67]

[63] *Ruta* above n 34 at para 39.

[64] Id at para 29.

[65] Id at para 52.

[66] *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2010 (7) BCLR 640 (SCA); 2012 (4) SA 544 (SCA); *Abdi v Minister of Home Affairs* [2011] ZASCA 2; 2011 (3) SA 37 (SCA); [2011] 3 All SA 117 (SCA); and *Bula v Minister of Home Affairs* [2011] ZASCA 209; [2012] 2 All SA 1 (SCA); 2012 (4) SA 560 (SCA).

[67] *Ruta* above n 34 at para 40.

[67] That system is firmly in place and, even though it operates in a challenging environment, the respondents have been able to access it, have their claims for asylum processed and determined and have enjoyed the protection of the principle of *non-refoulement* during the determination process. They were afforded their rights and received the protection of the system in the manner *Ruta* contemplated. They now, after their claims were rejected as being manifestly unfounded, say that the Act gives them the right to bring a subsequent claim on account of changed circumstances and that such a claim falls to be considered on the same basis, within the same legal framework and with all of the same safeguards that applied to their first claim. They do not, nor can they, suggest a different framework to address subsequent claims, because the Act evidences a single framework and not one designed for first claims and another for subsequent claims.

[68] The respondents place reliance on the definition of an "abusive application for asylum" in section 1 in support of their stance that the Act creates a right to make subsequent applications. That section reads as follows:

> "'[A]busive application for asylum' means an application for asylum made—
> (a) with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or
> (b) after the refusal of one or more prior applications without any substantial change having occurred in the applicant's personal circumstances or in the situation in his or her country of origin."

[69] Beyond defining what is abusive, which I accept may allude to prior applications, there is nothing else in the section 1 definition, or the Act as a whole, which provides for the right to make a subsequent application after rejection of the first application or the content of such a right, nor does it say anything about the threshold that such a claim may have to meet. As outlined, the Act seeks to give effect to international legal instruments, principles and standards and to regulate applications for the recognition of refugee status. It provides a comprehensive framework for the basis upon which to recognise refugee status, the exclusions from refugee status, the process of applying for

asylum and review and appeal procedures. Throughout this framework, the Act is silent on the possibility of subsequent applications. If the Act evidences a right to make subsequent applications, then it should at the very least describe the right and what it entails, as well as how it is to be exercised. Mindful that this is a subsequent application, one would have expected more. Perhaps a framework to which such applications must conform, the power to summarily reject abusive applications, different and expedited determination procedures as well as different internal appeal and review processes that may apply to such claims. This is how other jurisdictions deal with recognising the difference between a first and a subsequent application.[68] There is nothing in the Act that speaks to this important distinction.

[70] It would require a giant leap in reasoning to suggest that the mere inclusion of a reference to prior applications in the definition section coupled with the absence of provisions excluding such applications is dispositive in answering the question as to the existence of a right. Section 1 simply records how such an application, if brought, will be characterised. There is no definition of a subsequent application and section 21 does not allude to a subsequent application, post-rejection, in any form. It is unreasonable to suggest that such a framework evinces a clear right to bring a subsequent application. It does not.

[71] Examining other provisions of the Act, what emerges is that the Act, while silent on subsequent applications, can only reasonably be interpreted as being designed for and applying to a first-time application. Again, the issue is not whether the Act should have provided for such applications. Section 21 requires disclosure in the asylum application process, but there is no requirement for disclosure of any previous failed applications. Section 22 deals with withdrawal of an asylum seeker visa and provides that the Director-General may at any time prior to the expiry of such visa withdraw the visa if, amongst other reasons, the application for asylum has been rejected.[69] The

[68] Including New Zealand, the United Kingdom and the European Union.

[69] Section 22(5)(c).

provision does not carve out any measure to address unmeritorious subsequent applications following a failed asylum application. Section 24(5) provides that following a final rejection of an application in terms of section 24(3)(b) or (c), an asylum seeker whose application has been rejected must be dealt with in terms of the Immigration Act. Again, the provision does not create any exceptions or room for subsequent applications.

[72] In any event one must be careful in using provisions of the Act designed to support the integrity of the asylum system, such as section 24(3)(b) (relating to the rejection of applications that are manifestly unfounded, abusive or fraudulent) and section 21(6) (where an application containing false, dishonest or misleading information must be rejected), as a basis to argue that they can be deployed to effectively address subsequent applications that are abusive. They cannot because they, in general terms, apply to all applications. The upshot of those provisions is that a first and subsequent application stand to be treated on the same footing. This is no answer to the "revolving door" problem but more importantly this illustrates the futility of trying to fit a model for subsequent applications within a legal framework that did not contemplate it, nor was designed for it.

[73] Given how the UNHCR and other jurisdictions have dealt with subsequent applications as falling into a dedicated category of applications with specially crafted provisions either providing for their recognition and processing or prohibiting them, I have sought to demonstrate that the making of subsequent applications triggers different substantive and procedural concerns and is best dealt with through dedicated legislative frameworks. This, however, is not peremptory and would largely depend on whether existing legislation, reasonably interpreted, can accommodate subsequent applications. The Act, in the absence of a framework for subsequent applications, will result in every subsequent application, irrespective of its merit, being treated in the same way as a first application. The failed asylum seeker will be entitled to make unlimited subsequent applications and there could be no basis for the system to summarily reject the

application even if it is abusive, fraudulent or manifestly unfounded.[70] As noted above, the Act's carefully designed assessment and determination procedures would apply to all claims.

[74] Such a subsequent applicant would follow the ordinary course of having an interview and a full determination of the application and would also be entitled to the review and appeal rights that attach to a first application. The asylum seeker will also be entitled to the issuance of a section 22 visa that will regularise their stay in South Africa. If such a person is in detention as an illegal foreigner following a failed asylum application, they will be entitled to their release following an intimation that they wish to apply for asylum again. All these rights flow from the Act and would apply to all applications (first and subsequent) if the Act is interpreted as creating the right the respondents contend for. There will be absolutely no difference between a first and a subsequent application in how the asylum system receives and determines such applications. Is this the practical system that *Ruta* described?

[75] The suggestion is not that every failed asylum seeker will seek to exploit the opportunity to make a subsequent application and enjoy the benefits that go with it, even when there is no basis to do so. Rather, it is to be practical and recognise that unless the protection system is able, if required, to separate out and provide a proper framework for addressing first and subsequent applications, then a real risk will exist of the single system being abused.

[76] While it is so that a section 22 visa may be withdrawn if the application is manifestly unfounded, abusive or fraudulent, this provision applies with equal force to all applications and is not meant to deal with subsequent applications differently. The threat of the withdrawal of a visa may have a deterrent effect but would leave firmly in place all the substantive and procedural rights of the asylum seeker in any subsequent application that may follow a failed asylum application. In addition, the Director-

[70] As is the case in other jurisdictions. See above at [53] to [56].

General would be required to follow *audi alteram partem* (hear the other side) before the withdrawal of such a visa.[71]

[77] Section 38(1)(d) provides that the Minister may regulate the manner and the period within which applications that are manifestly unfounded, abusive or fraudulent are to be dealt with. This provision is not general in its framing – it empowers the Minister to regulate the listed categories of applications, meaning the provision cannot form the basis to create a model for subsequent applications. To do so would open what is clearly a closed list. The Minister will not, by regulation, be able to unsettle or disturb both substantive and procedural rights that the Act has afforded.[72] At best, the processing of subsequent applications may be expedited but there is nothing in the section that suggests that this is a power that is intended for use to address subsequent applications. We have seen that subsequent applications generally fall into a different legal regime of consideration – such a regime, if one is required, requires careful consideration and is pre-eminently a matter for the Legislature.

[78] Finally, the Act, in section 24B(5), which was introduced in January 2020, contemplates new information that may emerge during an appeal before the RAA. This new information, though not defined, would in my view include the possibility of changed circumstances. The Act says that if such information is material, the application must be referred back to the RSDO to deal with. So the lawmaker, alive to the possibility of changed circumstances in the form of new information, amended the Act to deal with such information but did not address new information that may emerge after a failed appeal. This is another clear indication that the Act does not provide for a subsequent application. If it did, it would have been relatively easy to also deal with new information that emerged after a failed determination. It did not do so.

[71] Refugees Act, 1998, GN 1707 *GG* 42932, 27 December 2019 (Regulations). See especially regulation 13.

[72] See generally *Executive Council, Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

[79] So, what emerges is that the Act does not evidence an intention to provide for subsequent applications. In addition, it cannot be said that its provisions are reasonably capable of being interpreted in support of the existence of a right to make a subsequent application. On the contrary, if one follows the respondents' suggestion, a model designed for, and on its face suited to, first applications will simply be applied without modification to deal with subsequent applications. This uniform model of dealing with first-time and subsequent applications is unprecedented in other jurisdictions that allow for the consideration of subsequent applications. It also fails to heed the advice of the UNHCR "that asylum systems should adopt sound procedures for the processing of *subsequent applications* or re-opening of cases rejected in final instance in order to ensure fairness and integrity of the systems".[73] I have offered various reasons why the Act, rather than pointing in the direction that it allows subsequent applications which can be addressed with fairness and integrity, points firmly away from it.

[80] The respondents say that a higher standard is required in subsequent applications, but there is, with respect, nothing apart from defining what an abusive application is in the Act that says that a subsequent application must meet a different standard. Common sense may suggest that it should, but the Act is silent on that, probably because that is not what the Act contemplated. It could hardly have been alive to this prospect of an unending cycle of identical applications and reconciled itself with that. If we were to accept that the Act is reasonably capable of being interpreted to provide for subsequent applications, it must be on the basis of the current framework. The spectre of the "revolving door" looms large in this scenario.

[81] Such an outcome is neither sensible nor practical and will have the effect of this Court foisting upon the Department a model of how subsequent applications are to be dealt with largely on the foundation of a definitional clause and neutral provisions of the Act. This, beyond stretching the bounds of interpretation to impermissible limits, also carries with it the danger that the Court is legislating by putting in place such a

[73] UNHCR guidelines above n 45 at para 31. (Emphasis in original).

model when on the face of the legislation it does not exist nor is it contemplated. This has serious implications for the separation of powers and carries consequences for the integrity of the asylum system in South Africa.

[82] This matter is distinguishable from *Saidi*[74] where the majority of this Court found that despite the text pointing away from such an interpretation, the Act provided for the power of an RRO to extend a temporary permit pending finalisation of proceedings for judicial review, in terms of PAJA, of a decision made in terms of the Act to refuse an application for asylum. This Court held that the principle of *non-refoulement* had an overarching effect that endured until judicial review proceedings had been finalised. In *Saidi*, such an interpretation was tenable.[75] However, in this matter, the interpretation advanced by the respondents would not be tenable and would lead to an absurdity. It would produce an outcome at odds with the Act, which favours the integrity[76] and finality of proceedings.[77]

[83] The Supreme Court of Appeal was mindful of these risks when it said that—

> "[a]bsent a new basis or new facts, a failed applicant for asylum is not entitled to make one application after another. There has to be finality to the processes . . . . Therefore, the suggestion that one can without more, submit one application after the other when the previous one has been finally determined, is not what the Refugees Act contemplates."[78]

[84] Despite this caution, the model for subsequent applications that will apply if this Court recognises that the Act creates a right to make such applications will do precisely that without even having to satisfy the caution of the Supreme Court of Appeal in providing a new basis or new facts. Of course, and it must again be emphasised, this

[74] *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC).

[75] Id at para 36.

[76] See sections 21(6) and 24(3)(b).

[77] See section 24(5).

[78] Supreme Court of Appeal judgment above n 40 at paras 75-6.

conclusion does not mean that this Court has concluded that there is no right to make a subsequent application – that is not a question we are required to address. This conclusion simply says that such a right that the respondents say exists in the Act does not find expression in the Act.

Can interpretation fill a lacuna?

[85] Having concluded that the Act is not reasonably capable of being interpreted as creating a right on the part of a failed asylum seeker to make a subsequent application, I briefly address the issue whether our law should recognise such a right. This issue was the subject of considerable discussion during the hearing, and understandably so, as it is difficult to separate out conceptually whether a right should exist as opposed to whether the law gives expression to it.

[86] This was precisely the issue that the respondents' legal representatives identified prior to the launch of the proceedings in the High Court in a letter they sent to the Department dated 3 August 2018. They said:

> "South Africa has ratified, and is party to, the 1951 UN Convention Relating to the Status of Refugees but has not established a policy relating to the procedure of *sur place* asylum applications. This is an unfortunate gap in our law as foreign nationals cannot be returned to their countries of origin if there is a risk of persecution [or] a threat to their life, safety or physical freedom, due to the principle of *non-refoulement*."

[87] The respondents however took the view that, even with this lacuna, the guarantee of *non-refoulement* found in section 2 of the Act would be breached if the subsequent applications of the respondents were not processed and considered. It was on that basis that they sought relief. While they acknowledged the insufficiency of the Act, the respondents elected to litigate on what they regarded as the sufficiency of the Act to address the relief their clients sought. While they were entitled to make that election, its consequence however is that the case before this Court is confined to the correct interpretation of the Act and nothing more. It is not about whether such a right exists but is not catered for in the Act, nor is it about whether the Act complies with

South Africa's international obligations, nor is it about the interpretation of any constitutional provision. We must therefore be careful in not allowing the case to extend its reach beyond that which was pleaded as the basis for the relief sought. I simply mention it to the extent that those issues have arisen. This Court does not offer any view on those issues – they are not before this Court nor is their determination necessary for the disposition of this matter.

Consistency with international law

[88] While the interpretative question is whether the Act is reasonably capable of being interpreted to allow for subsequent claims to be made, it was argued that the right to make a subsequent application is a right that exists in international law and section 233 of the Constitution compels this Court to give the Act an interpretation that "is consistent with international law over any alternative interpretation that is inconsistent with international law". The Supreme Court of Appeal concluded that it was indeed a right in international law. I proceed to examine this conclusion.

[89] As a starting point, the principle of *non-refoulement* is a feature of our law, having been domesticated in section 2 of the Act. In principle, it could also be accepted that *sur place* refugees are recognised in international law. The issue that arises here however is whether the right to make subsequent applications is part of international law.

[90] In the international instruments outlined in section 1A of the Act, there is nothing that suggests a universally recognised right to make a subsequent application. That question has not been resolved. For now, it is very much a matter that falls within the remit of national jurisdictions and is dealt with differently in many of the jurisdictions surveyed. Ultimately, the model that may be adopted is a matter that falls within the remit of the Legislature.

[91] The reasoning of the Supreme Court of Appeal that the respondents were *sur place* claimants and therefore entitled to submit a claim for asylum failed to

distinguish between first-time *sur place* applicants and subsequent *sur place* applicants. I have shown why such a distinction has been recognised internationally and the importance of such a distinction in considering the question whether the Act creates a right for *sur place* applicants. The short answer is that it does create the right in relation to first-time *sur place* applicants but not so in relation to subsequent *sur place* applicants. In *Ruta*, this Court, in recognising *sur place* refugees, referred to them as an internationally recognised category of refugees who enter the country of refuge on one basis but are involuntarily rendered refugees due to supervening events in their country of origin. This accords with the manner in which the UNHCR and this judgment identify a *sur place* refugee. *Ruta* did not refer to a category of persons who, having failed to secure asylum, thereafter seek to do so on a basis of changed circumstances — subsequent applicants. The tenor of *Ruta* and its concern about inclusiveness and the opportunity to apply for asylum relate to those who are unable to access the system and the barriers they confront. That case was not about subsequent asylum applicants.

[92] The Supreme Court of Appeal, after failing to distinguish first-time and subsequent *sur place* applications, then called into aid the jurisprudence of the Canadian courts on *sur place* applications. It concluded that courts of Canada have held that a *sur place* claim that comes before a decision maker must be addressed and the failure to do so amounts to a reviewable error. On that basis, the Supreme Court of Appeal similarly concluded that the failure by the Department to consider the applications of the respondents constituted a reviewable error.

[93] The Supreme Court of Appeal however erred in placing reliance on Canadian jurisprudence. As indicated, Canada does not recognise subsequent applications like the one that is the subject of this application. The jurisprudence that developed in Canada and that the Supreme Court of Appeal referred to was in relation to first-time *sur place* claims and could not have any bearing on subsequent claims as Canadian law

does not recognise such claims.[79] The *Manzila* case,[80] relied on by the Supreme Court of Appeal, concerned the judicial review of a decision of the Refugee Division. The matter concerned a first-time *sur place* application and the issue whether the applicant's activities in Canada, which may have led to repercussions in his home country, were relevant to the application. The case was not about a subsequent application. Similarly, the Supreme Court of Appeal relied on *Gebremichael*[81] where the court was seized with a review of a decision of the Refugee Division in relation to a first-time application and was concerned with whether the failure to consider the *sur place* elements of the claim was a reviewable error.

[94] The conclusion by the Supreme Court of Appeal that international instruments and international law recognise that a person whose refugee application has been declined is entitled to submit subsequent applications is, with respect, flawed for the reasons I have given. That conclusion is arrived at largely by collapsing the distinction between first-time and subsequent *sur place* applications.

[95] At the hearing of the matter, there was some time spent and strong examples offered in showing why the right to make subsequent applications should be recognised as a means to ensure that proper effect is given to the right of protection afforded to those in need under the various international and regional instruments to which I have referred. Important as the issue no doubt is, and persuasive as some of those arguments may be, it bears repeating that this application is not about whether such a right should exist. If the answer to that question is in the affirmative then the avenue to address that does not lie in a strained or unreasonable interpretation of the Act but in a legislative amendment or a direct challenge to the Act's under-inclusiveness. In any event, that is not the relief the respondents sought from the outset. Rather, it is whether the Act is reasonably capable of being interpreted to provide for such a right.

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[79] Section 101(1)(b)-(c) of the Immigration and Refugee Protection Act SC 2001, c.27.

[80] *Manzila v Canada (Minister of Citizenship and Immigration)* 1998 CanLII 8405 (FC); 165 FTR 313, [1998] FCJ No 1364 (QL) at para 3.

[81] *Gebremichael v Canada (Minister of Citizenship and Immigration)* 2006 FC 547 (CanLII); [2006] FCJ No 689 (QL) at para 52.

Non-refoulement

[96] The final consideration in the interpretive exercise is the influence of the principle of *non-refoulement* on the interpretation of the Act. As mentioned, the principle of *non-refoulement* is codified in section 2 of the Act.[82] This provision captures the principle of *non-refoulement* as enunciated in the 1951 Convention[83] and the OAU Convention.[84]

[97] In *Ruta*, this Court described that provision as follows:

> "This is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of *non-refoulement*, the concept that one fleeing persecution or threats to 'his or her life, physical safety or freedom' should not be made to return to the country inflicting it."[85]

[98] In describing how this principle was operationalised, this Court went on to say:

> "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

[82] Quoted above at [6].

[83] Article 33(1) of the 1951 Convention provides that:

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

[84] The OAU Convention in Article II(3) declares that:

> "No person shall be . . . subjected to measures such as rejection at the frontier, return or expulsion, which would compel him [or her] to return to or remain in a territory where his [or her] life, physical integrity or liberty would be threatened."

[85] *Ruta* above n 34 at para 24.

> *non-refoulement*' may be lifted only after a proper determination has been completed."[86]

[99] What this Court described was when the principle would prevail and when it would be lifted, and clearly contemplated that the shield of protection could not endure without end. When it ends, it does so because the determination process would have concluded that the asylum seeker was not in need of protection in the manner the Act contemplates. That such a person is then to be dealt with as an illegal foreigner is a consequence of the conclusion that the person is not in need of protection and dealing with the person as an illegal foreigner does not under those circumstances violate the principle of *non-refoulement*.

[100] I also accept that in situations where a subsequent application is provided for, that principle will operate during the adjudication of that application in the same way that *Ruta* contemplates. This is about when the shield prevails and when it is lifted, which *Ruta* reminds us is the essence of the protection afforded by the principle. It is not absolute,[87] and in the context of asylum law exists together with and within asylum determination systems. The Act captures the principle in section 2 but the principle is also relevant to the interpretation of the Act as a whole.[88]

[101] When used as an interpretive tool and in the unitary exercise, that interpretation evinces, we consider whether the Act, inclusive of the principle of *non-refoulement*, is capable of supporting the conclusion that it creates a right to make subsequent applications. I pause to mention that the question is not whether the principle in itself must mean such a right exists in the Act. I do not understand that the principle of *non-refoulement* can in itself displace the outcome of the interpretative exercise I have described. It is a principle that must be observed and honoured but it does not override

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[86] Id at para 54.

[87] Hathaway *The Rights of Refugees Under International Law* 2 ed (Cambridge University Press, Cambridge 2021) at 312.

[88] Khan and Schreier above n 7 at 4-6.

the unitary exercise of interpretation which considers text, context and purpose, even in a constitutional and human rights context. To allow that would result in arriving at a meaning that may broadly align with the principle but one that is at odds with the ordinary language of the words in the Act seen in context and purpose.

[102] Put differently, if the interpretation of the Act, inclusive of the principle of *non-refoulement*, concludes that the Act does not create a right to subsequent applications, that would be the end of the issue for this case. The principle cannot be used to argue that a right to make a subsequent application must be found to exist, and unreasonably strain the text to do so, simply because that is what the principle requires. This would misconceive how the principle is understood in our law and may inadvertently over-burden the principle. If the principle of *non-refoulement* points to the need to provide for subsequent applications which the Act does not provide for, then the solution may lie elsewhere. But, as indicated, this is not an issue before us.

[103] In addition, one must guard against the real risk that the integrity of the principle can be undermined if it will be formally activated simply by the submission of one or many subsequent applications. In this matter, the effect of the Supreme Court of Appeal judgment will be that once a subsequent application is made, it will activate the shield of *non-refoulement* even if the application is manifestly unfounded, abusive or fraudulent; and that shield will endure until the application is finalised and the same process may be replicated after rejection. This could never be a proper use of the principle of *non-refoulement*.

[104] Is this Court dealing here with a breach of the principle of *non-refoulement*? The principle is not breached when an application for asylum is properly considered and rejected for reasons that are justified in law. In a similar vein, the principle is not breached when, through an exercise in interpretation, we conclude that the Act does not contemplate nor create a right to make subsequent applications. In both instances the principle is properly considered, given its proper weight and is considered in the

determination process as well as in the interpretative exercise. It was never intended to and cannot override those processes.

[105] In conclusion, and even if one accepted that the right to make a subsequent application is a part of international law and also flows from the duty of *non-refoulement* (which are questions this judgment is not required to answer), the conclusion of the interpretative issue will remain the same. One cannot, purely on the strength of those conclusions, arrive at an interpretation not supported by the text, context or purpose of the Act. The Act was not intended to, nor is its design competent to, deal with subsequent applications. It also does not offer a normative or a procedural framework within which to do so, which is imperative in dealing with subsequent applications in order to advance the twin objectives of fairness and the integrity of the asylum system. It is for all of these reasons that the appeal must succeed.

Second judgment

[106] I have read the judgment of my Colleagues Nicholls AJ and Rogers J (second judgment) which concludes that the Act is reasonably capable of being interpreted to provide for a subsequent application for asylum on the part of a failed asylum seeker. I disagree with that conclusion. It is not tenable and its effect and outcome put in jeopardy the integrity and the efficacy of the systems of asylum and immigration that are meant to function in harmony with each other. It also dilutes the practical and hard-headed system described by this Court in *Ruta* and risks establishing, at worst, a sweethearts' charter and, at best, an open door for uncertainty and abuse.[89]

[107] The second judgment commences with a number of hypothetical, but realistic, scenarios of failed asylum seekers who would be severely prejudiced if they were not afforded the opportunity to bring a subsequent application for asylum. The reasoning in support of a subsequent application is substantive and may be even persuasive. This case, with respect, is not about whether such persons should have such an opportunity

[89] *Ruta* above n 34 at para 40.

to bring a subsequent application. It is about the narrow and discrete issue the respondents have identified – whether the Act creates a clear right to bring such an application. One must be cautious in simply moving from the conclusion that a failed asylum seeker should have the right to bring a subsequent application, to the conclusion that such a right must accordingly be found to exist in the Act.

[108] This Court cautioned against doing so in *Wary Holdings*[90] when it said:

> "This Court has no mandate, constitutional or otherwise, to afford to any law a meaning that it cannot reasonably bear. Courts ought never to go down that road, even to fulfil the laudable aim of achieving greater harmony between fundamental rights conferred by the Constitution and the law in question."[91]

In doing so, the Court in *Wary Holdings* relied on *Hyundai*[92] which stated:

> "On the one hand, it is the duty of a judicial officer to interpret legislation in conformity with the Constitution so far as this is reasonably possible. On the other hand, the Legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them. A balance will often have to be struck as to how this tension is to be resolved when considering the constitutionality of legislation. There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read 'in conformity with the Constitution'. Such an interpretation should not, however, be unduly strained."[93] (Footnote omitted.)

[109] What is clear is that the constitutional dimensions relied upon by the respondents, and to an extent posited in the second judgment, cannot arise for adjudication unless the meaning sought to be given to the legislative provision is reasonable.[94] The Act cannot

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[90] *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* [2008] ZACC 12; 2008 (11) BCLR 1123 (CC); 2009 (1) SA 337 (CC).

[91] Id at para 105.

[92] *Hyundai* above n 59.

[93] Id at para 24.

[94] *Wary Holdings* above n 90 at para 106.

be interpreted in a manner that gives it a strained meaning (a meaning removed from its language). To do so, would not be an interpretive exercise but a legislative one.

[110] The second judgment does not, in support of its conclusion, point to a single provision in the Act which supports the view that a subsequent application is contemplated and provided for in the Act except for the definition section which is confined to defining an abusive application and not a subsequent application. A clear right to bring a subsequent application can hardly be said to arise from the definition of an abusive application.

[111] The second judgment says that the right to bring a subsequent application is to be located in section 21 of the Act. That right is a general right to bring an application for asylum and the interpretation that the second judgment gives to that section will have the effect of the Act creating not just a second right but a recurring right on the part of a failed asylum seeker to bring an unlimited number of subsequent applications, each attracting the rights that go with a first application. That will include the right to have an asylum seeker permit issued pending the outcome of any such further application and the right to have any such further application fully considered on its merits including internal and external appeals. There will be no mechanism to summarily reject abusive applications, no standard such applications should comply with and no procedure to be followed in respect of such applications. In particular, there will be no authority to consider the asylum seeker's application history as a whole when considering each subsequent application. In those circumstances, which the Supreme Court of Appeal described as a never-ending cycle, an unsuccessful applicant for asylum will never be capable of being returned to their country of origin. They would simply have the opportunity to bring subsequent applications with all the attendant protections that go with them. This can hardly be said to be a reasonable interpretation of the Act.

[112] In order to illustrate the far-reaching and prejudicial consequences for the proper management of the systems of immigration and asylum that would go with the

interpretation the second judgment contends for, I use the example of a hypothetical migrant (X) who unlawfully enters South Africa. Such a person would be properly classified as an illegal foreigner who falls to be dealt with under the Immigration Act and would face the risk of arrest, prosecution and deportation. Our law, notwithstanding X's illegal entry and presence in the country, would allow X to apply for asylum. If X does so, he would then be treated as an asylum seeker whose stay in the country would be regularised pending the final determination of X's asylum application (this would include internal reviews and appeal) as well as a recourse to judicial review. Should X prove to be unsuccessful at the end of that comprehensive process, he would no longer enjoy the protection of the Act, and would revert to the status of an illegal foreigner. On the interpretation that the second judgment advances, X would at that point have an unconditional right to bring a subsequent application for asylum which would then move X from the immigration system back to the asylum system. X would enjoy the protection of the asylum system even if his subsequent application was manifestly unfounded, abusive or simply a repetition of his previous application. At the end of that process, and upon the inevitable rejection of X's second application, X would once again revert to the status of an illegal foreigner to be dealt with under the Immigration Act. But then X would once again, at his election, be entitled to bring a further application for asylum and revert to being protected under the Act.

[113] This process could have no end as the second judgment does not only support the idea of a subsequent application, but its interpretation would support an unending stream of applications. To force the Act to bear the weight of subsequent asylum applications, as it stands, will place those applications in a framework which was not designed to accommodate them. So too will it invite the inevitable chaos which accompanies what at best may be vagueness. In *Affordable Medicines*,[95] this Court, dealing with regulations considered vague for uncertainty, held that—

[95] *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC).

> "the court must first construe the regulation applying the normal rules of construction including those required by constitutional adjudication. The ultimate question is whether, so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them."[96] (Footnotes omitted.)

I do not see how the interpretation advanced by the second judgment may confront the vagueness of the Act in respect of subsequent applications. As indicated, this includes the possibility of abusive applications and the absence of standards and procedures with which subsequent applications should comply.

[114] This would have catastrophic consequences for the proper administration of the asylum and the immigration system. While I do not suggest that abuse will be inevitable, one must in the real world accept that if a system, by its design, is open to abuse then the risk of abuse will be real. Certainly, in a world fractured by poverty and lack of opportunity, many people seek a better life through economic migration and if the system of asylum is open to providing them with ongoing protection, they will consider it and will likely opt to use its benefits – even in instances where they have no prospects of obtaining asylum. The "revolving door" scenario, which will be the likely outcome of the interpretation the second judgment advances, will undermine the integrity of the system. In *Ruta*, this Court spoke to the need to interpret the Immigration Act and the Refugees Act in a manner where they can exist in harmony,[97] and providing an illegal foreigner with the right to apply for asylum is a part of that harmony. However, providing such a person with a recurring right to do so will hardly be harmonious and will undermine and jeopardise the effective implementation of both Acts. It will simply allow the free migration of individuals between the two Acts and status determination will not be determined by law but by the election individuals make.

[115] Finally, the second judgment suggests that, but for the interpretation it advances, asylum seekers with a *bona fide* (good faith) claim to a subsequent application for

[96] Id at para 109.

[97] *Ruta* above n 34 at paras 43 and 46.

asylum will be at risk of being forced to return to their country of origin in violation of the principle of *non-refoulement*. This ignores the case the respondents in this matter initially identified some years ago when they described the Act as creating a lacuna in failing to provide for a right to bring a subsequent application. But, the issue of a legislative lacuna is not before this Court – it has not been pleaded nor argued. This Court is not required to determine that issue nor express a view on it and under those circumstances it is incorrect to suggest that this judgment is dispositive of that issue. It does not and is not required to address it.

[116] It is for these reasons that the stance adopted in the second judgment is simply not sustainable. More worrying however is that the conclusion it reaches unacceptably brushes up against the principle of the separation of powers by finding a right and a framework for dealing with subsequent asylum applications, when it is clear that the Act is not reasonably capable of such an interpretation. The dictum in *Zuma*[98] is apposite:

> "If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination."[99]

[117] It is for these reasons that I persist in my view that the Act does not support the submission of a subsequent application for asylum on the part of a failed asylum seeker.

Costs

[118] The respondents are protected by the *Biowatch* principle,[100] because the issues in this litigation brush up against various rights in the Bill of Rights. The respondents, in seeking the relief they sought, were not frivolous or vexatious in doing so.[101]

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[98] *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC). See also *Cool Ideas* above n 57 at para 52.

[99] *Zuma* id at para 18. See also *Cool Ideas* id at para 52.

[100] *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[101] Id at para 24.

Conclusion

[119] For the reasons given it must follow that the Act is not reasonably capable of being interpreted to provide a right on the part of a failed asylum seeker to make subsequent applications. As a result, the appeal must be upheld.

Order

[120] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the Supreme Court of Appeal is set aside and replaced with the following:
   "The appeal is dismissed."
4. Each party is to pay its own costs in this Court.

NICHOLLS AJ AND ROGERS J:

Introduction

[121] We have read the judgment of our Colleague Kollapen J (first judgment). Unlike him, we consider that the Act is capable of an interpretation that allows a second asylum application to be made after a first one has failed and that this is how the Act should be interpreted. We shall adopt the abbreviations used in the first judgment. We agree with the first judgment that we have jurisdiction and that it is in the interests of justice to grant leave to appeal.

[122] The applicants' original position was not that subsequent applications were never allowed but rather that they were only permitted if the asylum seeker first returned to their home country. The proceedings in the High Court were triggered by correspondence from the first applicant stating:

> "A failed asylum seeker who has not departed the Republic after he/she was rejected must be deported, that's my instruction to the officials and I am waiting their update. Those who return from their countries and wish to apply, they are free to apply at any Refugee Centre accepting newcomers."

[123] The applicants changed tack after the High Court application was launched, denying that subsequent applications were permissible under any circumstances. That is the position now embraced in the first judgment.

[124] As we read the first judgment, it acknowledges that, absent a right to bring a second application, the Act might suffer from a lacuna. The first judgment suggests or implies that it might well be desirable and fair for the Act to allow a second application to be made. However, our Colleague considers that this would require a specially tailored mechanism to deal with the abuses inherent in a system that allows more than one application. The Act as it stands, so the first judgment holds, does not contain any mechanism for a second application.

[125] In our view it is undoubtedly so that the Act would suffer from a lacuna if a second application could not be made. It is not hard to postulate circumstances where the absence of a right to make a second application could cause grave injustice. It might be a case of life and death for the asylum seeker. And it could give rise to anomalous distinctions.

[126] Suppose that X comes to South Africa intending to seek asylum. She makes an asylum application, but the authorities correctly rule that the circumstances in her country do not qualify her for asylum, and so her application is rejected. For whatever reason, X does not leave South Africa and the authorities do not take steps to make sure that she does. Four years later, while X is still in South Africa, the conditions in her home country deteriorate to an extent that a first-time asylum application would succeed. (Assuming for the moment that the facts stated by the respondents in their second asylum applications are true, our supposed case is not very different from theirs.)

[127] What does the first judgment say about X? It says that she may not make a second asylum application. She must be treated as an illegal foreigner and deported to her home country, despite the fact that there she may face death, rape, assault or other forms of persecution. The guarantee of *non-refoulement* in section 2 of the Act counts for nothing.

[128] And it does not end there. To change our example, suppose that X goes back to her home country straight after her first asylum application is refused, but flees again to South Africa four years later when the conditions in her country deteriorate. On our understanding of the first judgment, she is still barred from making a second asylum application (despite the applicants' initial stance that a second application would be permitted if she left the country). If, contrary to our understanding, our Colleague considers that in this example X *could* bring a second application, the law would compel her to go back to her home country – even if by then the conditions in her home country were desperate – just so that she can again flee and qualify to make a second application. Such a distinction between a person who went home after the initial rejection and one who stayed in South Africa would be utterly irrational. The distinction would simply be a penalty against the person who remained in South Africa.

[129] Let us now contrast X's position with that of Y who comes to South Africa from the same home country at the same time as X. Y chooses not to make an asylum application, perhaps because she knows she does not qualify for it, or fears that her application will be refused even though she believes she is entitled to asylum, or just because she is ignorant of the process or cannot get to see an RSDO. After four years, with the deterioration in conditions in her home country, Y – so the first judgment holds – can make an asylum application and will, on our supposed facts, be granted asylum.

[130] X, however, must be deported to face persecution in her home country. X is penalised for having made an earlier application in circumstances where she should not have done so. Perhaps the earlier application was misconceived, because X thought she

could get asylum merely on account of poor economic conditions in her home country. Perhaps the earlier application was not without merit, but the circumstances in her home country were not quite bad enough to justify asylum. Or perhaps, even, the earlier application was dishonest. Whatever the reason, when she first applied for asylum she was not entitled to it. But she is worse off than Y, who perhaps tried to live undetected in this country as an illegal foreigner and only brought her asylum application when apprehended by an immigration officer. X and Y are identically placed insofar as their need for asylum is concerned, but while Y will be granted asylum status X will be deported.

[131] Should this state of affairs be tolerated? Not if we can reasonably help it. In the process of interpretation, we must have regard, among others, to sections 39(2) and 233 of the Constitution and the broader context of the Act. Each of these considerations is diametrically opposed to the conclusion reached in the first judgment.

[132] The Act was extensively amended with effect from 1 January 2020. The respondents made their second asylum applications in August 2018 and instituted the High Court proceedings in November 2018. In principle, therefore, the case falls to be decided with reference to the law as it stood before the amendments. Since in our view the outcome is unaffected by which version of the Act is analysed, it is more useful to refer to the Act as it now reads. Here and there, however, we shall draw attention to any relevant differences.

Section 39(2) of the Constitution – fundamental rights

[133] Our Colleague has referred to section 39(2) of the Constitution – the duty of every court, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights. Courts must prefer an interpretation that does not render the statute unconstitutional. The principle of *non-refoulement* safeguards a cluster of fundamental

rights.[102] Leaving aside those fundamental rights which in their formulation are confined to citizens,[103] the fundamental rights in the Bill of Rights are not reserved for South African citizens; every foreigner who enters our country, legally or illegally, can claim the benefit of them.[104]

[134] *Non-refoulement* protects a person from being returned to a country where they may face persecution on account of their race, religion, nationality, political opinion or membership of a particular social group or where their life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order.[105] Inevitably, one or more of the person's fundamental rights in the Bill of Rights will be at stake, for example equality,[106] human dignity,[107] life,[108] freedom and security of the person,[109] freedom of religion, belief and opinion,[110] freedom of expression[111] and freedom of association.[112]

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[102] See *Ruta* above n 34 at para 12. See also the opening paragraph of the UNHCR Note on the Principle of Non-Refoulement, November 1997:

> "The principle of *non-refoulement* is the cornerstone of asylum and of international refugee law. Following from the right to seek and to enjoy in other countries asylum from persecution, as set forth in Article 14 of the Universal Declaration of Human Rights, this principle reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, including the rights to life, to freedom from torture or cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution or danger."

[103] Section 19 (political rights); section 20 (citizenship rights); section 21(3) (the right to enter, remain in and reside anywhere in South Africa); section 21(4) (the right to a passport); and section 22 (freedom of trade, occupation and profession).

[104] See *Minister of Home Affairs v Tsebe* [2012] ZACC 16; 2012 (5) SA 467 (CC); 2012 (10) BCLR 1017 (CC) at para 65.

[105] Sections 2 and 3 of the Act.

[106] Section 9 of the Bill of Rights.

[107] Section 10.

[108] Section 11.

[109] Section 12.

[110] Section 15.

[111] Section 16.

[112] Section 18.

[135] The rights of children will often also be implicated,[113] because generally asylum for dependent children follows the fate of their caregiver's asylum application.[114] If the caregiver cannot bring a second application despite an adverse change in their home country, the caregiver's children will have to accompany the caregiver back to their home country. There, persecution of the caregiver may deprive the children of parental care; the children may be deprived of nutrition, shelter and health care; they may suffer maltreatment, neglect, abuse or degradation; and they may be used, or not protected, in armed conflict. The barring of second applications cannot be regarded as treating the rights of children as paramount.[115]

[136] There is another dimension to the Bill of Rights' impact on the interpretive exercise. In terms of section 9(1) of the Constitution, everyone is equal before the law and has the right to equal protection and benefit of the law. Section 2 of the Act confers the right of *non-refoulement* on everyone. In our earlier example, X and Y are identically placed in terms of their need for protection against *refoulement*. The first judgment, however, grants the protection to Y but not X. X is penalised because she

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[113] Section 28(1) states in relevant part:

> "Every child has the right—
>
> (a) . . .
>
> (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
>
> (c) to basic nutrition, shelter, basic health care services and social services;
>
> (d) to be protected from maltreatment, neglect, abuse or degradation;
>
> (e) to be protected from exploitative labour practices;
>
> (f) not to be required or permitted to perform work or provide services that—
>
> (i) are inappropriate for a person of that child's age; or
>
> (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
>
> (g) not to be detained except as a measure of last resort . . . ;
>
> (h) . . .
>
> (i) not to be used directly in armed conflict, and to be protected in times of armed conflict."

[114] See sections 3(c), 21(3), 21B and 28 of the Act.

[115] Section 28(2) of the Bill of Rights states that "[a] child's best interests are of paramount importance in every matter concerning the child".

previously made an unsuccessful application. An application by Y at the same time would also have been unsuccessful, but Y is advantaged for no other reason than that she did not make an application at that time.

[137] To borrow a metaphor from a different legal context, X's making of the first application when she wasn't entitled to asylum should, in the eyes of the law, be treated as "a thing writ in water". Yet we find in the first judgment that it is elevated to decisive significance. In comparison with people who have not made a prior application, all those who have made unsuccessful prior applications are treated unequally and are denied the equal protection and benefit of the law. The distinction in our view is also irrational, thus implicating the founding value of the rule of law.[116]

Section 233 of the Constitution – international law

[138] As to international law, which in terms of section 233 of the Constitution is also a mandatory feature of statutory interpretation, *non-refoulement* is the fundamental norm. The *non-refoulement* prohibition is contained in Article 33(1) of the 1951 Convention and Article 2(3) of the OAU Convention. In an introductory note to the 1951 Convention, the United Nations High Commissioner for Refugees states that the principle of *non-refoulement* "is so fundamental that no reservations or derogations may be made to it".[117] In keeping with the rule of *non-refoulement*, the right to make subsequent asylum applications is taken for granted in the UNHCR's guidance on the effective processing of asylum applications.[118]

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[116] Section 1(c) of the Constitution.

[117] Introductory Note to the 1951 Convention by the Office of the United Nations High Commissioner for Refugees (Geneva, December 2010).

[118] UNHCR guidelines above n 45 at para 31, the opening part of which is quoted in the first judgment at [50]. In full the paragraph reads:

> "In addition to the core principles and standards discussed above, addressing issues related to *subsequent applications* for international protection has emerged as a concern in many national asylum systems, both in terms of fairness and efficiency. UNHCR advises that asylum systems should adopt sound procedures for the processing of *subsequent applications* or re-opening of cases rejected in final instance in order to ensure fairness and integrity of the systems. When a subsequent application is made, a preliminary assessment, in an accelerated process, can be done to determine whether new facts or circumstances have arisen which would warrant an examination of the substance of the claim or whether a case should be re-opened. A subsequent application should, in principle have *suspensive effect*, although there may be exceptions, for

[139] Given that the interpretive issue will often affect the interests of dependent children, it is relevant, too, that South Africa has ratified the UN Convention on the Rights of the Child[119] (CRC) and the African Charter on the Rights and Welfare of the Child[120] (ACRWC). The CRC makes the best interests of the child a primary consideration.[121] This injunction is binding, among others, on legislative bodies and courts of law. To the maximum extent possible, States must ensure the survival and development of the child. States must take appropriate measures, including legislative measures, to protect children from all forms of violence, injury, abuse, neglect;[122] exploitation;[123] and torture and other cruel, inhuman or degrading treatment.[124] States must respect and ensure respect for rules of international humanitarian law where children are affected by armed conflict. Specifically in relation to asylum, Article 22(1) of the CRC provides:

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

> instance where there is clearly abusive behavior on the part of an applicant, or where the unfoundedness of a claim is manifest. However, even in these cases, review of a court or another independent body must be possible, and this court should have the authority on the request of the applicant or ex officio to grant suspensive effect of the appeal." (Emphasis in original.)

See also paras 27-9: Providing adequate reasons for rejections, and making adequate legal representation available to asylum seekers, may, among other things, prevent "subsequent applications".

[119] Convention on the Rights of the Child, 20 November 1989 (ratified by South Africa on 16 July 1995).

[120] African Charter on the Rights and Welfare of the Child, 11 July 1990 (ratified by South Africa on 7 January 2000).

[121] Article 3(1).

[122] Article 19(1).

[123] Article 36.

[124] Article 37(a).

[140] The ACRWC contains similar provisions,[125] including specifically in relation to refugee children.[126]

[141] Section 1A of the Act requires the Act to be interpreted and applied in a manner that is consistent with these and other relevant international instruments.[127]

The Refugees Act

Section 2

[142] The fact that *non-refoulement* is the fundamental norm in international refugee law no doubt explains why it has been given an extraordinary status in section 2 of the Act. In terms of section 2,[128] the *non-refoulement* injunction applies "notwithstanding any provision of this Act or any other law to the contrary". In *Ruta*[129] this Court described this provision as "remarkable", perhaps "unprecedented in the history of our country's enactments". And as this Court pointed out, the section not only contains a prohibition against *refoulement* in the circumstances stated; it also expresses a principle.[130]

[143] The paramountcy of section 2 calls into question the statement in the first judgment that section 2 "does not override the unitary exercise of interpretation".[131] If there were an express prohibition in the Act against the bringing of a second application, section 2 might well override it. As this Court said in *Abore*, "if there are any other

[125] See Article 4(1) (best interests of the child); Article 5(2) (ensuring survival and development of the child to the maximum extent possible); Article 16(1) (States to take appropriate measures, including legislative measures, to protect children from all forms of injury, abuse, neglect, exploitation and torture or other cruel, inhuman or degrading treatment); and Article 22(1) (States to respect and ensure respect for rules of international humanitarian law where children are affected by armed conflict).

[126] Article 23(1).

[127] Section 1A of the Act only came into effect on 1 January 2020. However, substantially the same injunction applied to the unamended Act by virtue of section 233 of the Constitution.

[128] Act id section 2 was amended with effect from 1 January 2020, but the changes were of formulation, not substance.

[129] *Ruta* above n 34.

[130] Id at para 24.

[131] See the first judgment at [101].

provisions in the Refugees Act that provide anything contrary to section 2, the latter prevails over such provisions".[132] However, and as we shall explain, there is no such express prohibition. On the contrary, the Act can be interpreted harmoniously with section 2. Even on the first judgment's approach, section 2 would at the very least have to be a powerful factor in the process of interpretation.

[144] There is no getting away from the fact that, in the examples we gave earlier, X will be returned to her home country after four years, without the protection of section 2. It is no answer to say that the shield of *non-refoulement* can justifiably be lifted once an asylum application is rejected. That is true in relation to the circumstances which were the subject of the failed asylum application, and ordinarily no difficulty will arise if the authorities make sure that X is returned to her home country promptly after her first asylum application fails. But if X finds herself in South Africa four years later, either because she never returned to her home country or because she fled again to South Africa after four years, the shield of *non-refoulement* now applies to a different set of circumstances. The first judgment, however, would grant the shield of *non-refoulement* to Y but not to X.

Sections 3, 4 and 5

[145] Section 3 tells us when a person qualifies for refugee status. Following the language of section 2, it does so in unqualified terms. Section 4 sets out circumstances in which a person does not qualify for refugee status. The rejection of an asylum application is not a listed ground of exclusion. Section 5 tells us when a person ceases to qualify for refugee status. The rejection of an asylum application is not a listed ground of cessation.[133]

[132] *Abore* above n 37 at para 44.

[133] Sections 3, 4 and 5 were all substituted with effect from 1 January 2020. The unamended sections dealt with the same subject matter, and did not differ from the current sections in any respect material to this case.

Section 21

[146] Section 21 grants the right to make an asylum application in accordance with the prescribed procedure.[134] Although section 21(1)(a) requires an asylum seeker to report to an RRO within five days of entry into the Republic, the fact that she has not done so does not take away her right to apply for asylum. Even if she entered South Africa illegally and has been in the country illegally for a long time, she is entitled, once apprehended, to make an asylum application. It was so held by this Court in *Ruta*[135] and confirmed in *Abore*[136] and *Ashebo.*[137]

[147] Section 21 does not say that a person may make only one asylum application. True, the section also does not say that a person may make more than one asylum application. However, one would expect that a person who qualifies for asylum should be able to make an asylum application. The right to apply for asylum in section 21 is not expressly confined to a single application. Since there is, on the face of it, nothing to bar a second application under section 21, it is a case of having to imply a restriction rather than having to imply an extension.

[148] When a statute permits an administrative application to be made, there is no general rule that only one application can be made. It may well be that a substantially identical second administrative application cannot be entertained. That is so, however, not because the law in general prohibits further applications but because the relevant officialdom is *functus officio*. The *functus officio* doctrine has the effect that, in the absence of contrary indications in the statute, officialdom cannot revisit an administrative decision the outcome of which has been communicated to the applicant. The *functus officio* doctrine cannot be circumvented by making a second application that is substantially a repeat of the first one.

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[134] Section 21 was extensively amended with effect from 1 January 2020. In various respects it has been made more stringent, but for purposes of our analysis the changes are not material.

[135] *Ruta* above n 34 at paras 16 and 43.

[136] *Abore* above n 37 at para 42.

[137] *Ashebo v Minister of Home Affairs* [2023] ZACC 16; 2023 (5) SA 382 (CC); 2024 (2) BCLR 217 (CC) at para 29.

[149] The *functus officio* doctrine does not, in our view, apply to a second administrative application based on different grounds. If, for example, a statute permits a person to apply for an exemption on either of grounds A and B, and X's application to be exempted on the basis of ground A fails, X is not precluded from bringing a second exemption application on the basis of ground B. After all, the circumstances justifying reliance on ground B might only have come into existence after the first application was rejected. And it is the same if the circumstances justifying reliance on ground A change after the first application has been rejected: officialdom applied its mind to the facts stated in the first application, and it is that act of consideration and administrative decision-making that results in officialdom being *functus officio*.

[150] The *functus officio* doctrine is most often encountered where officialdom seeks to revoke or adversely vary an initial decision that was in favour of the applicant. In principle, however, it also applies where the applicant asks officialdom to make a favourable variation of an initial adverse decision. The doctrine operates, however, alongside section 10(1) of the Interpretation Act.[138] That subsection states that when a law confers a power or imposes a duty then, unless the contrary intention appears "the power may be exercised and the duty shall be performed from time to time as occasion requires". In relation to the variation of initial decisions that were unfavourable to the applicant, Professor Baxter has written:

> "[T]he public authority cannot be expected to receive continual applications for reconsideration; and where the interests of third parties are affected, it would be unreasonable for them to be obliged to return continually to represent their own views. Thus it is not surprising to find that what little case law there is on the subject of unfavourable determinations inclines in favour of the *functus officio* principle.
>
> It is submitted that what is required is a balanced approach which accommodates the interests of all the parties: the public authority, in accordance with its duty to exercise its powers 'from time to time as the occasion requires', should be obliged to reconsider

[138] 33 of 1957.

> its decision when asked to do so, but only if it is shown that circumstances have changed in such a manner that it is likely to come to a different conclusion, or if a reasonable time has elapsed."[139]

[151] We venture to suggest that "reconsideration" in the case of a material change in circumstances would in any event not ordinarily attract the *functus officio* principle, since there is usually nothing in the statute to bar the applicant from bringing a new application on new facts that arose after her previous application was dismissed. And as will appear presently, the Act contains language powerfully supporting the proposition that a later asylum application may be granted if there has been a material change in circumstances. We distinguish this from a case where the applicant merely asks the official to reconsider the same application and vary the previous decision.

[152] The conclusion that section 21 does not permit a second application has to rest on an implication to that effect. Words cannot be read into a statute by implication unless the implication is "a necessary one in the sense that without it effect cannot be given to the statute as it stands" or is "necessary in order to realise the ostensible legislative intention or to make the [statute] workable".[140] Effect can be given to the Act without reading in the limitation adopted in the first judgment. And to bar a second application is not only unnecessary to realise the ostensible legislative intention; it is positively inimical to the ostensible legislative intention, because it fails to honour the overriding rule of *non-refoulement* in section 2.

[153] Since implying a term into a statute is a process of interpretation, one must have regard to ordinary principles of interpretation. These naturally include sections 39(2) and 233 of the Constitution, to which we have already referred. Those sections are dead against the implication on which the first judgment necessarily depends. Also relevant

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[139] Baxter *Administrative Law* (Juta & Co Ltd, 1984) at 373.

[140] *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) BCLR 1 (CC); 2008 (1) SA 566 (CC) at para 192 and cases there cited in fns 58-9 (judgment of Ngcobo J). See also *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29; 2022 (5) BCLR 571 (CC) at para 187; and *United Manganese of Kalahari (Pty) Limited v Commissioner of the South African Revenue Service* [2025] ZACC 2; 2025 (5) BCLR 530 (CC); 2026 (2) SA 227 (CC) at para 71 and fn 92.

is context; section 21 must be interpreted in the light of the terms of the Act as a whole. That includes, in addition to the overriding rule of *non-refoulement* in section 2, the definitions in section 1.

Section 1 – definition of "abusive application for asylum"

[154] The first judgment has quoted the definition of "abusive application for asylum".[141] An abusive application includes, in paragraph (b) of the definition, an application made after the refusal of one or more prior applications without any substantial change in circumstances. The first judgment brushes this aside, stating that, while the definition "alludes" to prior applications, nothing else in the definition or the Act as a whole gives the right to make a second application or sets out the standard or threshold to be met in a second application.[142]

[155] Section 1 does not "allude" to prior application. It expressly states, as one of only two factors rendering an application abusive, the case where one or more prior applications have been refused without any substantial change in circumstances.

[156] One would not expect to find, in a definition, the substantive right to bring a second application after a first one has been refused. That substantive right is to be found in section 21, unless there is a necessary implication barring a second application. This is the importance of the definition: it conveys, in unmistakably express language, that later applications may indeed be made, and that later applications will only be abusive where there has not been any substantial change in circumstances. And section 21 is the only section which the lawmaker could have had in mind as the section under which a second application might be made.

[157] The definition makes it impossible to imply, into section 21, a restriction that only one application can be made. Yet the first judgment does two things: it implies

[141] See the first judgment at [68]. The formulation but not the substance of the definition was amended with effect from 1 January 2020.

[142] See the first judgment at [69].

just such a limitation in section 21, and at the same time ignores the express language of the definition. The first judgment does not suggest that the lawmaker made a mistake by including paragraph (b) in the definition of "abusive application for asylum". Even more drastic than reading words into a statute is reading them out. On what basis, then, can the 31 words contained in paragraph (b) be ignored or reconciled with the supposed limitation of section 21? It is a well-established principle of interpretation that words in a statute should not be treated as tautologous or superfluous.

[158] The significance we attach to the definition of "abusive application" is an entirely conventional approach to interpretation, one that insists on interpreting a statutory provision (here, section 21) in the context of the enactment as a whole (for immediate purposes, the definition of "abusive application" in section 1). This is not to say that a definition section may not go further and itself be the source for implying a substantive power, as this Court's judgment in *AmaBhungane* shows.[143]

[159] In *AmaBhungane*, which concerned constitutional challenges to the Regulation of Interception of Communications and Provision of Communication-Related Information Act[144] (RICA), the Act defined "designated judge" as meaning "any judge of a High Court discharged from active service . . . or any retired judge, who is designated by the Minister to perform the functions of a designated judge for purposes of [RICA]". There was no substantive provision in RICA for the Minister to make this designation. This Court held that the power to make the designation was an implied primary power vesting in the Minister.[145] In the course of reaching this conclusion, the Court referred to the definition of "court" in PAJA. That definition included a "Magistrate's Court . . . designated by the Minister by notice in the *Gazette*". PAJA

[143] *AmaBhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services; Minister of Police v AmaBhungane Centre for Investigative Journalism NPC* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC).

[144] 70 of 2002.

[145] *AmaBhungane* above n 143 at paras 62-79.

contained no express provision empowering the Minister to make such a designation. The power to designate was inherent in the definition, so this Court held.[146]

[160] In the two instances discussed in *AmaBhungane* (RICA and PAJA), the definition itself was held to be the source of the relevant power, albeit by implication. As we have emphasised, we do not need to rely on the definition of "abusive application" as the source of an asylum seeker's right to make a second application. The definition merely confirms that section 21 should not be construed as permitting only one application.

[161] The first judgment's premise, though unstated, is that section 21 doesn't permit a second application. In the absence of a barring implication, the first judgment's analysis of the Act's scheme falls apart.

Need for different threshold and procedure?

[162] The first judgment assumes that there has to be a different threshold and procedure for a second application, and that this is lacking in the Act. The proposition that there must be a different threshold and procedure is not self-evidently right. A legislative scheme could draw a distinction, but it would not have to do so.

[163] Furthermore, the Act does, in at least one respect, draw a distinction and, in other respects, makes it possible for distinctions to be drawn. Decisions on applications for asylum are dealt with in section 24. Section 24(3)(a)-(c) requires the RSDO to make one of three decisions: (a) grant asylum; (b) reject the application as manifestly unfounded, "abusive" or fraudulent; or (c) reject it as unfounded.[147] Having regard to the definition of "abusive application for asylum", the RSDO must, therefore, in the case of a second application, assess whether there has been a substantial change in

[146] *AmaBhungane* above n 143 at paras 73-5.

[147] Prior to the amendments with effect from 1 January 2020, section 24(3) permitted the RSDO to make a fourth decision, namely to "refer any question of law to the Standing Committee [for Refugee Affairs]".

circumstances. If there has not, the RSDO must reject the application as "abusive". This in turn triggers the procedures set out in sections 24(4)[148] and 24A.[149]

[164] So for repeat applications there is an altered threshold: a substantial change in circumstances. This is not an insignificant limitation. It precludes reliance on circumstances that existed when the first application was made but which were not placed before the RSDO. Once it appears, however, there has been a substantial change in circumstances, it is entirely natural that the repeat application should be assessed in the same way as a first-time application.

[165] As to procedure, the first judgment states that an asylum seeker does not have to disclose that she has had a previous application rejected.[150] However, the detail of what must be disclosed is not found in the Act but in the Regulations. If the Regulations do not require this information to be stated, that is a flaw in the Regulations. The absence of such a requirement in the Regulations cannot be used to support the first judgment's interpretation of the Act.[151]

[166] The Minister's power to make regulations is contained in section 38(1). The Minister may, among others, make regulations as to the "forms to be used under certain circumstances", the "manner in which and the period within which applications for asylum which are manifestly unfounded, fraudulent or abusive, must be dealt with" and "any other matter which is necessary or expedient to prescribe in order that the objects of this Act may be achieved". There is thus ample power to require asylum seekers to disclose whether a previous application has been rejected and to require repeat

[148] If an application is rejected in terms of section 24(3)(b), the applicant must, in terms of section 24(4), be furnished with written reasons.

[149] If an application is rejected in terms of section 24(3)(b), the decision must be reviewed by the SCRA in terms of section 24A. Prior to the amendments with effect from 1 January 2020, the review by the SCRA was governed by the now repealed section 25 of the Act. Unlike the current section 24A, the repealed section 25 conferred greater powers of investigation on the SCRA.

[150] See the first judgment at [71].

[151] *Moodley v Minister of Education and Culture, House of Delegates* [1989] ZASCA 45; 1989 (3) SA 221 (A) at 233D-F; *National Lotteries Board v Bruss N.O.* [2008] ZASCA 167; [2009] 2 All SA 164 (SCA); 2009 (4) SA 362 (SCA) at para 37; and *Road Accident Fund v Masindi* [2018] ZASCA 94; 2018 (6) SA 481 (SCA) at para 9.

applications to be dealt with on an expedited basis. The RSDO could, during the mandatory interview, ask the applicant whether she has made a previous application.[152] And of course if the Department has an electronic database of previous applications, cross-checking could be done administratively.

Section 24(5)(a)

[167] Section 24(5)(a) states that an asylum seeker whose application has been rejected in terms of section 24(3)(b) and confirmed by the SCRA must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act. This means that the person must be dealt with in the same way as any other person who is illegally in South Africa. This provision was introduced with effect from 1 January 2020. There was no comparable provision in the Act prior to that date. Arguably, therefore, the unamended Act was more favourable to the present respondents than the current version, but on the view we take of the case, nothing turns on this.

[168] The fact that a person is illegally in South Africa does not, however, prevent her from bringing an asylum application. This is what this Court held in *Ruta*. If there has been a material change in circumstances since the first application was rejected, the illegal foreigner may bring a further application. And, of course, following the rejection of a first application, the person might have left South Africa or been deported, and may have come back to South Africa when circumstances in her home country changed.

Section 21(4)

[169] The High Court said that if the present respondents' version were correct, section 21(4)[153] would be rendered superfluous.[154] That subsection provides that no proceedings may be instituted or continued against a person in respect of their unlawful

[152] See regulation 10(2) of the Regulations to the Refugees Act, GN R366 *GG* 21075, 6 April 2000 (old Regulations) and regulation 14(5) of the Refugees Regulations, GN R1707 *GG* 42932, 27 December 2019 (new Regulations).

[153] Section 21(4) prior to its amendment with effect from 1 January 2020 contained a comparable provision, save that it referred to the procedures of review and appeal contained in the now-repealed Chapter 4 of the Act.

[154] *AI v Director of Asylum Seeker Management: Department of Home Affairs* [2022] ZAWCHC 271 at para 24.

entry into or presence in South Africa if the person has applied for asylum in terms of section 21(1), until a decision has been made on the application and the review or appeal procedures in sections 24A and 24B have been finalised.

[170] We disagree. If an unsuccessful first asylum application is finalised, the protection in section 21(4) immediately falls away. Proceedings in respect of the person's unlawful entry into, or presence in, South Africa may then be continued. The proper interpretation of section 21(4) was not the subject of argument in this Court, but it does not necessarily have the effect which the High Court supposed. A plausible interpretation of section 21(4) is that a second asylum application, based on a material change in circumstances, would not reactivate protection in respect of the person's initial unlawful entry into and unlawful presence in South Africa up to the time of the making of her first asylum application; it would only give her protection in respect of unlawful entry and unlawful presence occurring after the final rejection of the first application.

[171] If this is the correct interpretation, the person could be prosecuted, convicted and sentenced in respect of her initial entry and earlier unlawful presence. The fact that the person may be so convicted does not mean, though, that they can also be deported. Whether they can be deported depends on whether at the time of threatened deportation the person can claim the benefit of *non-refoulement*. There is no necessary link between prosecution for unlawful entry and unlawful presence on the one hand and deportation on the other. The former can occur without insistence on the latter.

[172] However, and assuming that a second application would reactivate protection in respect of the initial entry and earlier unlawful presence, this would occur only if and when the person brings a second asylum application. In the present cases, the period during which proceedings for unlawful entry or presence could have been instituted or continued after the rejection of the respondents' first applications was some four years. If the authorities were promptly to institute or continue such proceedings after the final

rejection of first asylum applications, the scope for second applications would be greatly diminished.

[173] One must also bear in mind that section 21(4) is only relevant where a person's entry into and presence in South Africa, whether on a first or second occasion, were unlawful. A second asylum application could be brought by a person who lawfully entered South Africa on the first occasion, went back to her home country immediately after the final rejection of her first application, and then lawfully re-entered South Africa after a material change in circumstances and promptly made a second asylum application. As we understand it, the first judgment holds that this person may not make her second application. This would be so despite the fact that section 21(4) would at no stage have been germane, given the absence of any grounds for alleging unlawful entry into or unlawful presence in South Africa.

[174] Finally, and even if section 21(4) were thought to sit uncomfortably alongside a right to make a second application (we do not think so), we must, as this Court held in *Saidi*,[155] respect the paramountcy of section 2. In *Saidi* the question was whether failed asylum seekers were entitled to the extension of their temporary asylum permits pending judicial review in terms of PAJA. Textually, section 21(4) was strongly against this view, because it drew the curtain on protection against prosecution for unlawful presence once the statutory review and appeal procedures in sections 24A and 24B were exhausted; it did not extend the period of protection during a subsequent PAJA review. However, such a view was held by this Court to be at odds with "international law imperatives".[156] Despite the wording of section 21(4), the principle of *non-refoulement* was said to have "an overarching effect", enduring at least until judicial review proceedings were finalised.[157] Section 2, as the Court had noted earlier in the judgment, "takes precedence over section 21(4)".[158]

[155] Above n 74.

[156] Id at para 37.

[157] Id.

[158] Id at para 28.

New evidence on administrative appeal?

[175] During the hearing, the question was raised whether a material change in circumstances could be accommodated by way of new evidence on appeal. The answer is no.

[176] If an asylum application is rejected as "manifestly unfounded, abusive or fraudulent", there is no right of appeal in terms of section 24(4) read with section 24B. Once the application has been rejected, the only remaining procedure is an automatic review by the SCRA in terms of section 24A. In the present case, the respondents' first applications were rejected as "manifestly unfounded", so they had no right of appeal. In terms of section 24A as read with the Regulations, there is no procedure for new evidence to be placed before the SCRA.[159]

[177] There is a right of appeal in terms of section 24B if the asylum application is rejected as "unfounded" (that is, not "manifestly unfounded"). In such an appeal, new evidence can be put before the RAA.[160] Even in these cases, however, section 24B is an inadequate procedure for dealing with a material change in circumstances. In terms of the new Regulations,[161] that is with effect from 1 January 2020, an appeal in terms of section 24B(1) must be submitted within 10 working days of receipt of the RSDO's rejection letter.[162] An asylum seeker can apply for condonation for non-compliance

[159] Section 24A was introduced with effect from 1 January 2020. At the time the present respondents' asylum applications were rejected in April 2011 and August 2014 respectively, the automatic review by the SCRA was contained in the now repealed section 25, and this was the provision in terms of which the rejection of their applications was confirmed in May 2012 and October 2014 respectively. In terms of section 25, the SCRA could exercise similar powers to those of the Refugees Appeal Board (RAB). The RAB was the forerunner of the current RAA. Among other things, the SCRA could undertake further enquiry and investigation and could request the applicant to appear before it to provide further information. So, contrary to the current regime, the SCRA could receive further evidence. However, there is no indication that in the present cases the SCRA exercised these powers. In any event, the respondents' automatic reviews under section 25 were finalised before the alleged change of material circumstances in 2015. Accordingly, the old review procedure would not have assisted them.

[160] The now repealed section 26 conferred a similar right of appeal with similar powers granted to the RAB.

[161] See new Regulations above n 153.

[162] Id regulation 16(1).

with the 10-day time limit, but only on specified grounds.[163] Given the short prescribed timeframe for pursuing a section 24B appeal, such an appeal would only rarely be available by the time a material change of circumstances occurs in the asylum seeker's home country. If an appeal is long-delayed, the asylum seeker would have to overcome the hurdle of condonation. Grounds for condonation might not exist, and condonation might in any event be refused.[164]

Sur place jurisprudence

[178] The first judgment may be right that the foreign *sur place* jurisprudence, on which the Supreme Court of Appeal placed reliance, was not specifically directed to the question whether a second asylum application could be made on account of a change in circumstances after the rejection of a first application. What foreign *sur place* jurisprudence does make clear is that asylum is not precluded because the circumstances entitling a person to asylum arose only after they left their home country.

[179] A person who is unlawfully in South Africa might, by virtue of changed circumstances in their home country, become a *sur place* asylum seeker. If the changed circumstances in principle justify the grant of asylum to a *sur place* asylum seeker, one should not lightly assume that such a right is debarred by the fact that the person previously made an unsuccessful application before those circumstances arose. Otherwise one has the anomalous distinction between X and Y in our earlier example. Particularly in light of the principle of *non-refoulement*, it is difficult to understand why, as the first judgment posits, this should be a crucial distinction. The principle of

[163] The right to seek condonation is contained in regulation 16(3) of the new Regulations, the listed grounds of condonation being—

> "(a) institutionalisation;
> (b) entry into a Witness Protection Programme;
> (c) quarantine;
> (d) arrest without bail; or
> (e) any other similar compelling reasons".

[164] Regulation 14 of the old Regulations (see above n 153), in force prior to 1 January 2020, required an appeal in terms of the old section 26 to be lodged within 30 days of the rejection letter. While this period was more generous than the 10 days allowed by regulation 16(1) of the new Regulations, the old Regulations made no provision for condonation.

non-refoulement cannot be applied selectively based on the reason for a person's departure from their home country or the person's past experience with the asylum system. In our view, no valid distinction exists between first-time *sur place* applications and subsequent *sur place* applications.

Abuse of the system?

[180] The first judgment expresses concern about the abuse of the asylum system if multiple applications from the same person have to be considered. There are several answers to this. First, it cannot be assumed that all subsequent applications are abusive. One cannot penalise deserving repeat asylum seekers out of concern that others will abuse the system.

[181] Second, the State is under a duty to ensure that it can comply with its international and constitutional obligations. The evidence in this case does not show that the Department is insufficiently resourced to handle repeat applications. According to the respondents, there was almost a 90% decrease in the number of asylum applications between 2009 and 2018. They add that although there are many "inactive" asylum seekers, the very fact that they are inactive means that they do not place an administrative burden on the Department. If, contrary to this evidence, the Department is insufficiently resourced, the answer is not to tailor the interpretation of the Act to make the Department's life easier. The answer lies in making sure that the Department has the resources to comply with its duties efficiently.

[182] Third, for present purposes the analysis leading us to the conclusion that a failed first application does not bar a second application is not affected by amendments made to the Act subsequent to its promulgation in 1998. There is no reason to assume that in 1998 the lawmaker thought that the Department would be swamped and paralysed if subsequent applications were permitted. The paramountcy given to *non-refoulement* and the definition of "abusive application for asylum" point strongly the other way. If later experience, not contemporaneous with the passing of the legislation, has shown that for some of the subsequent 28 years the Department had indeed been overwhelmed

by large numbers of asylum applications, that subsequent history cannot be taken into account in interpreting the Act.

[183] Fourth, and as we have already pointed out, the Act and the Regulations permit an expedited regime to be created for processing certain kinds of applications. This would include repeat applications.

[184] It is indeed so, as the first judgment points out, that in terms of section 22[165] an asylum seeker is entitled to be issued with an asylum seeker visa pending the adjudication of the asylum application. This legitimises the asylum seeker's sojourn in South Africa pending adjudication. This would undoubtedly be an attraction for people abusing the system, just as it would be a necessary ancillary right for genuine asylum seekers. The primary way of preventing the abuse, in the case of repeat applications, is to streamline their adjudication, something that could be achieved administratively or in the Regulations.

[185] In terms of section 22(5),[166] the Director-General may withdraw an asylum seeker visa if the applicant contravenes any condition endorsed on the visa; or if the asylum application has been found to be manifestly unfounded, abusive or fraudulent; or if the application has been rejected; or if the applicant is or becomes ineligible for asylum in terms of section 4 or 5. The distinction between the rejection of an asylum application and a finding that the application is manifestly unfounded, abusive or fraudulent suggests that the lawmaker saw a distinction between rejection and a finding that the application is manifestly unfounded, abusive or fraudulent. This is puzzling, since a finding that an application is manifestly unfounded, abusive or fraudulent would automatically lead to a rejection of the application.

[165] For present purposes there is no material difference between the old section 22 and the current section 22.

[166] The comparable provision prior to 1 January 2020 was to be found in section 22(6). In terms of that provision, it was the Minister rather than the Director-General who had the power to withdraw the visa.

[186] We thus accept, for present purposes, that in the case of repeat applications, section 22(5) would not allow an asylum seeker visa to be withdrawn before the RSDO has determined that the repeat application is abusive and has thus rejected the application. At that point, however, the visa could be withdrawn pending the SCRA's review. In terms of section 23,[167] the person would be liable to be arrested and detained pending the finalisation of the asylum application.

Foreign law

[187] The laws of other countries in relation to repeat applications are not directly relevant to the interpretation of our Act. It is nevertheless noteworthy that all the jurisdictions discussed in the first judgment, and all the additional jurisdictions we have examined, have some or other procedure available for asylum to be granted where there has been a material change in circumstances after the rejection of an initial asylum application.

[188] As summarised in the first judgment, in New Zealand[168] and the United Kingdom[169] a subsequent application can be considered if the threshold of a significant change in circumstances is met. The first judgment refers to an EU Directive to broadly similar effect.[170] The first judgment states that in Canada there is an express prohibition against the consideration of a subsequent application, but our Colleague goes on to mention that irreparable harm on account of changed circumstances can indeed be taken into account so as to protect the asylum seeker from *refoulement*.[171]

[189] As to other jurisdictions, in Australia, the default rule is that a person who has unsuccessfully applied for a "protection visa" (the equivalent of our asylum) is

[167] In section 23, as it read before 1 January 2020, it was the Minister rather than the Director-General who could cause the asylum seeker to be arrested and detained.

[168] See the first judgment at [53].

[169] Id at [54].

[170] Id at [55].

[171] Id at [56].

prohibited from making a second application.[172] However, the Minister may disapply this prohibition if it is in the public interest to do so.[173] If the Minister does so, the person is entitled to bring another application. When the second application is considered, only new information need be considered; the Minister is not required to take the earlier information into account and may assume that the decision on the information contained in the earlier application was correct.[174] In terms of another provision, the Minister may replace a decision by the Administrative Review Tribunal with a decision more favourable to the asylum seeker if the Minister considers it to be in the public interest to do so.[175]

[190] Germany permits a subsequent application if there are "grounds for resumption". These include a material change of circumstances in the country of origin or new evidence showing that the person will be in danger should they be returned to their country of origin. This procedure is only available if the person was unable, through no gross negligence, to assert the grounds for resumption when making the initial application. If these conditions are met, the administrative authority may then revoke or amend the earlier decision.[176]

[191] In Switzerland, an asylum application brought within five years of the rejection of an earlier application is treated as a repeat application. Such an application may be considered if there is proper motivation. However, a second application which merely repeats the contents of an earlier application may be rejected without a formal decision.[177]

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[172] Section 48A of the Migration Act 62 of 1958.

[173] Id at section 48B.

[174] Id at section 50.

[175] Id at section 501J.

[176] See section 71 of the Asylum Act of 2008 (*Asylgesetz*) read with section 51 of the Administrative Procedure Act of 1976 (*Verwaltungsverfahrensgesetz*).

[177] See Article 111c-d of the Asylum Act 142.31 of 1998.

[192] In Sweden, new circumstances arising after the rejection of an earlier application may be considered under the grounds of "impediments to enforcement". The new circumstances may give rise to the grant of a residence permit or a re-examination of the initial application. A residence permit will be considered if there is reason to believe that the country of origin will not accept the person or if there are medical or other special grounds for not enforcing the order. Reconsideration will be entertained where there are new circumstances that can be assumed to constitute a lasting impediment to enforcement and where the Migration Board cannot grant a residence permit. The person must show that the new circumstances could not previously have been invoked or that there is valid cause for not having previously invoked them.[178]

[193] In terms of a decision of the Swedish Migration Court of Appeal in 2019, a valid excuse for having previously failed to invoke the circumstances in question need not be shown if there are reasonable grounds to believe that the person would, if returned, be in danger of being punished with death or being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment.[179]

[194] In the Netherlands, subsequent asylum applications may be made, having regard to the *non-refoulement* principle. In terms of the administrative procedure applicable as from July 2019, there is a so-called "one-day review" to assess whether the new application contains "new elements or findings". This refers to relevant circumstances that occurred after the earlier application was rejected or relevant pre-existing circumstances if it would be unreasonable to preclude reliance on them. If the subsequent application is held to be admissible, it will then be assessed on its merits to

[178] Chapter 12, sections 18-19 of the Aliens Act 716 of 2005. Section 1 of Chapter 12 contains the *non-refoulement* rule.

[179] Migration Court of Appeal, UM 12194-18, MIG 2019:5, 10 April 2019. The judgment is referenced and summarised in European Council on Refugees and Exiles, *Asylum Information Database: Country Report: Sweden* (2019 update) at 52, available at https://asylumineurope.org/wp-content/uploads/2020/05/report-download_aida_se_2019update.pdf.

determine whether the new elements and circumstances add significantly to the likelihood of the applicant qualifying as a beneficiary of international protection.[180]

[195] For present purposes, the precise way in which these other jurisdictions handle requests for asylum based on a material change in circumstances is not important. After all, and as we have demonstrated, our own Act recognises a limitation on the circumstances in which a subsequent application may be made without being categorised as "abusive", while the Minister's regulation-making powers permit special and expedited procedures to be prescribed for repeat applications. The important point is that all these other jurisdictions give protection against *refoulement* in case of a material change in circumstances. By adopting the interpretation it does, the first judgment will put South Africa – whose jurisprudence has hitherto been a progressive beacon of light in refugee law as in so much other human rights law – sadly out-of-step.

Conclusion

[196] In our view, an interpretation that the Act allows for reapplications is a tenable interpretation that does not strain the language of the Refugees Act. Reapplications are not prohibited by the Act nor listed as a consequence of a failed application for asylum. To recognise that the Act permits reapplications best protects the cluster of constitutional rights safeguarded by the principle of *non-refoulement*. As this Court held in *Ruta*, "[o]ur founding principles as a constitutional democracy direct us with unavoidable clarity".[181] The first judgment's conclusion, which has the potential to expose persons to harm and danger, is incompatible with the Bill of Rights and offends the very principles underlying our constitutional order.

[180] Clause 4.6 of the Aliens Circular (*Vreemdelingencirculaire*) 2000 (Vc 2000) issued pursuant to the Aliens Act (*Vreemdelingenwet*) 2000 (Vw 2000). This is seen as giving effect to Article 40(2) and (3) of the EU Directive: European Council on Refugees and Exiles, *Asylum Information Database: Country Report: Netherlands* (2025 update), available at https://asylumineurope.org/reports/country/netherlands/asylum-procedure/subsequent-applications/.

[181] *Ruta* above n 34 at para 59.

[197] We would thus grant leave to appeal but dismiss the appeal, with the applicants to pay the first and second respondents' costs, including the costs of two counsel.

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