IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: **8684/2024**

In the matter between:

SCALABRINI CENTRE OF CAPE TOWN	First Applicant
TRUSTEES OF THE SCALABRINI CENTRE OF CAPE TOWN	Second Applicant
and	
THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL: DEPARTMENT OF HOME AFFAIRS	Second Respondent
THE CHIEF DIRECTOR OF ASYLUM SEEKER MANAGEMENT: DEPARTMENT OF HOME AFFAIRS	Third Respondent
THE REFUGEE APPEALS AUTHORITY	Fourth Respondent
THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Fifth Respondent
and	
AMNESTY INTERNATIONAL	First Amicus

GLOBAL STRATEGIC LITIGATION COUNCIL
FOR REFUGEE RIGHTS Second Amicus

INTERNATIONAL DETENTION COALITION Third Amicus

HELEN SUZMAN FOUNDATION Fourth Amicus

Coram: Justice J Cloete, Justice L Nuku *et* Acting Justice S Kholong
Heard: 27 February 2025; respondents' supplementary note delivered on 7 March 2025
Delivered electronically: 15 May 2025

JUDGMENT

CLOETE J:

Introduction

[1] The applicants (collectively, "Scalabrini") have approached this court (in Part B[1] of their amended relief)[2] to have certain provisions of the Refugees Act (the "Refugees Act")[3], and the regulations promulgated thereunder ("the regulations")[4] declared to be unconstitutional and invalid. In the event of the court granting the relief sought, the applicants also seek an interdict against the respondents pending confirmation (or otherwise) of our order by the Constitutional Court. I will return to this aspect later.

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1 Part A (the urgent interim relief) was heard by Manca AJ, who handed down judgment on 13 September 2024: Scalabrini Centre of Cape Town v Minister of Home Affairs and Others (8486/2024) [2024] ZAWCHC 263.
2 The additional and/or alternative relief contained in prayer 3 of the amended notice of motion dated 1 November 2024, ie to review and set aside the impugned regulations, was abandoned during argument.
3 No 130 0f 1998.
4 In terms of s38 of the Act, published in GNR 1707, GG 42932 dated 27 December 2019.

[2] The impugned provisions are ss 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Refugees Act, as well as regulations 8(1)(c)(i), 8(2), 8(3) and 8(4). The applicants assert that their effect is to disbar foreign nationals who wish to seek asylum in South Africa from doing so if they hold an adverse immigration status solely due to their non-compliance with bureaucratic and/or procedural requirements. This, they contend, is an unjustifiable violation of the Constitution as well as the right of *non-refoulement* (non-return) enshrined both in international customary law and s 2 of the Refugees Act.

[3] The application is opposed by the respondents, who also unsuccessfully resisted the applications of the first to fourth amici for their admission. After hearing argument the amici were admitted and granted leave to make submissions on the following limited issues as undertaken by them: in the case of the first to third amici, the issues of *non-refoulement* and non-penalisation, and in respect of the fourth amicus, the impact of the impugned provisions on children.

Reasons for admission of the amici

[4] In terms of rule 16A(2) of the High Court rules "any interested party in a constitutional issue raised in proceedings before a court" may seek admission as an amicus curiae. The Constitutional Court in *Fose v Minister of Safety and Security*[5] set out the requirements for admission as follows:

> *"it is clear from the provisions of Rule 9* [of the rules of the Constitutional Court at the time] *that the underlying principles governing the admission of an amicus in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the amicus are relevant to the proceedings and raise new contentions which may be useful to the Court…"*

[5] The applicants filed the rule 16A notice on 26 April 2024. On 3 June 2024, the attorney for the first to third amici ("the international organisations") wrote to the

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[5] 1997 (3) SA 786 (CC) at para 9; see also Brummer v Minister of Social Development 2009 (6) 323 (CC) at para 20.

respective attorneys of the applicants and respondents, requesting their consent to be admitted as amici in respect of the Part B relief. On 11 June 2024, the applicants consented. On 26 June 2024, the respondents refused to grant consent, indicating that the admission of the international organisations was premature because they (the respondents) had not yet filed their answering papers. On 26 November 2024, the international organisations advised that they would await those answering papers before filing any application for admission as amici due to the respondents' concerns. The international organisations noted that the respondents' answering papers were due on 13 December 2024, and undertook to launch their application for admission by 15 January 2025.

[6] On 18 December 2024, the international organisations requested the respondents to provide a copy of their answering papers. No response was received. On 24 December 2024, a follow up e-mail was sent to the respondents, and between that date and 9 January 2025, a number of telephone calls were made by the attorney for the international organisations to the respondents' attorney for the same purpose, all without success. On 9 January 2025, the international organisations received a copy of the answering papers from the applicants (the answering papers had been filed on 13 December 2024). On 28 January 2025, the international organisations launched their application, together with an application for condonation.

[7] This background notwithstanding, the respondents complained that the delay by the international organisations in launching their admission application was "hugely prejudicial" to them, since they were being subjected to a truncated timeline for the filing of their answering papers and heads of argument. While it is correct that the international organisations did not comply with the relevant time period in rule 16A (ie within 20 days from the date upon which the main application and rule 16A notice were filed in respect of both Parts A and B on 26 April 2024) they did not participate in the hearing of the Part A relief, which was determined on 13 September 2024. Further, it was only because the respondents themselves advised the international organisations that their request for admission was premature (because the respondents had not yet filed their answering papers) that the international organisations waited until they had done so.

[8] It cannot be laid at the door of the international organisations that the respondents failed to provide them with a copy of their own answering papers in respect of the Part B relief, not only late but at all. We do not believe that in the circumstances, the international organisations delayed unnecessarily in launching their admission application. Moreover, the respondents delivered their answering affidavit in that admission application on 17 February 2025, nine days before the matter was set down for hearing before us. The international organisations filed their replying affidavit a mere three days later, on 20 February 2025, and their heads of argument in the admission application on the following day, 21 February 2025. In any event, during argument the respondents abandoned their reliance on prejudice; and they were also afforded the opportunity to deliver a supplementary note after the hearing dealing with the submissions made by all four amici on the Part B relief, which was duly filed on 7 March 2025.

[9] The other grounds of opposition raised by the respondents were that the international organisations: (a) did not seek to advance new arguments, but only to repeat arguments already raised; (b) in any event, the arguments to be raised were either irrelevant to the issues or generally of no assistance; and (c) the nature of their arguments were not truly those of an amicus, but rather "a self-standing litigant seeking to advance its own interests". In our view, none of these arguments had merit for the following reasons.

[10] It is undisputed that the international organisations are all well- established bodies working in refugee and migrant rights. They have expertise in international and comparative law on refugees' and asylum seekers' rights. They explained their individual activities which concern these rights generally, including the detention of migrants. They then explained that they have two related interests in this litigation. First, the application of the principle of *non–refoulement*, and second, the impact the impugned provisions will have on the detention of migrants. These are interests that go to the heart of the Part B relief. The respondents did not suggest that the international organisations do not have an interest in *non-refoulement*, or that the interest is irrelevant to the matter at hand. Instead they say that the second interest is "insufficient" because the international organisations accept the impugned

provisions do not directly authorize detention. But this is no basis to conclude that the international organisations lack the requisite interest: (a) the latter have two interests, and they only need one; and (b) the respondents do not deny that the impugned provisions may give effect to detention. The undisputed facts are that their implementation radically increased the detention of migrants in South Africa. The international organisations assert that the patterns of detention will be affected – and likely reduced – if the provisions are declared unconstitutional. They clearly have an interest in that. Accordingly there was no sound basis for the respondents to argue that they lacked a sufficient interest.

[11] The international organisations also sought to share their expertise with the court. While the applicants briefly referred to international law, they limited their reference to the UN Refugees Convention and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("the OAU Convention"). The international organisations referred to several other treaties that are directly relevant and impose different and independent *non-refoulement* obligations on South Africa. These are the Convention Against Torture[6] ("CAT") which South Africa ratified in 1998; the International Convention for the Protection of All Persons from Enforced Disappearance ("ICPPED") which South Africa acceded to in May 2024; and two human rights treaties that, although they do not contain an express *non-refoulement* provision, have been interpreted to include *non-refoulement* obligations not only for refugees, but for all persons, including migrants. These are the International Covenant on Civil and Political Rights ("ICCPR") and the African Charter on Human and Peoples' Rights ("ACHPR").

[12] The applicants also did not refer to any of the documents interpreting these obligations by the Human Rights Committee, the African Commission on Human and Peoples' Rights, the United Nations High Commissioner for Refugees, the United Nations General Assembly, the Committee Against Torture, or the UN Special Rapporteur on the Human Rights of Migrants. The international organisations did so. While those sources do not bind South Africa or this court, they are relevant for interpreting South Africa's binding international obligations.

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[6] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

[13] All of this differs in substance from the submissions on international law made by the applicants. In any event this court must have regard to the international law referred to by the international organisations, since s 39(1)(b) of the Constitution makes it incumbent on us to do so, given that we are considering provisions in the Bill of Rights. Yet the respondents claimed that the submissions to be made by the international organisations were also not relevant or novel for three other reasons too. First, they claim the issue has already been dealt with in *Ashebo*[7] which is hotly contested between the applicants and the respondents. The international organisations do not directly enter into the debate as it falls outside the prescripts of international law. However if the court agrees with the applicants that *Ashebo* is not dispositive, then the international law these organisations refer to is plainly relevant.

[14] Second, the respondents argue that the international organisations are wrong that the impugned provisions are inconsistent with the principle of *non-refoulement.* However that is an argument about the merits of the submissions, not their relevance. The fact that the respondents are compelled to rebut the merits of the arguments advanced by the international organisations proves their relevance. Third, the respondents claim the international organisations merely provide "a shopping list of international instruments" which is incorrect. The founding affidavit of the international organisations sets out the substance of their submissions, and then lists the authorities to be relied upon in support of those submissions. We were thus satisfied, having regard to the above, that the submissions of the international organisations were both relevant and new, and the respondents' objections unfounded.

[15] Turning now to the fourth amicus ("HSF"). This amicus applied for admission to represent the interests of a particularly vulnerable group of individuals, namely children. The applicants did not deal specifically with the position of children, and nor did the international organisations. In our view the respondents rightly accepted that HSF thus has an interest in the matter. However they objected to its admission on

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7 Ashebo v Minister of Home Affairs 2023 (5) SA 382 (CC).

two main grounds, the first being the lateness of the admission application, and the second that HSF has not raised new issues that would benefit determination.

[16] HSF launched its application way out of time, on 13 January 2025. It thus also brought a formal application for condonation. HSF similarly did not participate in the Part A proceedings, which pertained only to interim relief designed to suspend the implementation of the impugned provisions until such time as their constitutional validity could be tested in Part B. HSF explained that after the court made an order in the applicants' favour in Part A, it took the decision, on legal advice, to await receipt of the rule 53 record, the applicants' supplementary affidavit and the respondents' answering affidavit. This would allow HSF to make an informed decision regarding intervention, rather than simply seeking to intervene without a full understanding of the respondents' justification for defending the impugned provisions. As previously stated, the respondents' answering affidavit was filed on 13 December 2024. HSF explained that this was the date on which its offices closed for the end of year break and when its legal team became unavailable.

[17] On 10 January 2025 a meeting was held by HSF with its legal team, and a decision taken to proceed with the application for admission. On 13 January 2025, HSF wrote to the parties requesting them to advise by 20 January 2025 whether they consented or objected to its admission. On 22 January 2025, the applicants consented. On 28 January 2025, the respondents declined to consent for the following reasons: (a) the lateness of the application would cause them prejudice, a contention that was similarly abandoned during argument; (b) the expressed intention by HSF to rely on evidence of factual experiences of asylum seekers was irrelevant and inappropriate, since the Part B relief is an abstract challenge to the impugned provisions; (c) the same *Ashebo* argument as before; and (d) the assertion that *"We appreciate … the interests of vulnerable groups, including children, must be considered in the proper interpretation of the impugned provisions. It is not, however, explained how the impugned provisions, properly interpreted and properly implemented, violate the rights of children. In particular, you do not explain whether you are referring to cases in which a child has a self -standing application for asylum seeker status (independent of their parent or parents); or whether you are referring to cases in which a child's right to lawfully remain in the country is*

dependent on their parent or parents obtaining asylum seeker status. We note that in the former, the fact that an applicant for asylum seeker status is a child, could be raised in the good cause hearing. In the latter, a parent could raise the impact on their children in the good cause hearing. Any unlawful action in respect of the child would then flow from unlawfulness against the parent."

[18] It is not necessary to deal with the *Ashebo* submission again in this context. Further, HSF undertook not to deal with factual matters when making its submissions, and the concern raised by the respondents in relation to how the impugned provisions violate the rights of children goes to the merits of Part B, and not to the admission application itself. As with the international organisations, HSF referred to other domestic and international instruments, directly implicating children to which the applicants had not specifically referred. These were the Children's Act[8], The United Nations Convention on the Rights of the Child ("CRC") and the African Charter on the Rights and Welfare of the Child ("Charter"). South Africa ratified the CRC on 16 June 1995, and the Charter on 7 January 2000. In addition, HSF referred specifically to those provisions of the Constitution pertaining to children, Constitutional Court authority in respect thereof, and guidance from General Comments published under the United Nations.

[19] These were the UN Committee on the Rights of Children, General Comment No 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration; Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families; and General Comment No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return. Again, there was accordingly no overlap between the submissions that HSF sought to make and those of the applicants, and for these reasons we concluded that the respondents' objection to the admission of HSF lacked merit.

The impugned provisions

[8] No 38 of 2005.

[20] The impugned provisions of the Refugees Act are as follows:

" 4. Exclusion from refugee status

(1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she—

(f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or …

(h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or

(i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum…'

21. Application for asylum

(1B) An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa."

[21] The impugned regulations are as follows:

" Application for asylum

8. (1) An application for asylum in terms of section 21 of the Act must—

(c) be submitted together with—

(i) a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted circumstances, a valid visa issued in terms of the Immigration Act;

(2) Any person who submits a visa other than an asylum transit visa issued in terms of section 23 of the Immigration Act must provide proof of change of circumstances in the period between the date of issue of the visa and the date of application for asylum.

(3) Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees.

(4) A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub-regulation (3)."

Meaning of the impugned provisions

[22] The impugned provisions were published as amendments to the Refugees Act[9] and regulations, and took effect on 1 January 2020. The preamble to the Amendment Act describes one of its purposes as being "to include further provisions relating to disqualification from refugee status". Included in these further provisions are s 4(1)(f), (h) and (i). In terms of the amended s 4, new grounds for exclusion from refugee status are placed in the hands of a refugee status determination officer. An asylum seeker does not qualify for refugee status if such an officer "has reason to believe" that such seeker: has committed an offence in relation to travel or sojourn documents (s 4(1)(f)); or cannot provide "compelling reasons" for illegal border crossing (s 4(1)(h)); or cannot provide "compelling reasons" for failure to report to a refugee reception office within 5 days of entry (it is unclear what type of entry is envisaged) (s4(1)(i)).

[23] The refugee status determination officer is thus vested with the sole discretion to have "reason to believe" that a foreigner has committed an offence pertaining to unlawful documentation; and the sole discretion to have "reason to believe" that "compelling reasons" are absent for purposes of s 4(1)(h) or (i). The only guidance afforded to the refugee status determination officer as to how that discretion is to be exercised is limited to s 4(1)(i), which provides that "compelling reasons… may include hospitalisation, institutionalisation or any other compelling reason". Section 21(1B) however confers a power, not on a refugee status determination officer, but on an immigration officer, to "ascertain" whether "valid reasons" exist for why an applicant for asylum (not refugee status) is not in possession of an asylum transit visa.

[24] Regulations 8(3) and (4) impose a different test. Instead of the refugee status determination officer (who would be located as a refugee reception office) exercising the discretion conferred on him or her in terms of s 4, the applicant for asylum must show "good cause" for illegal entry or sojourn in the Republic before being permitted to apply for asylum; and the same applies to "any foreigner" appearing before a court who indicates their intention to apply for asylum. Because these regulations arise from the impugned provisions of the Refugees Act, we will focus on the provisions in

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9 Refugees Amendment Act 11 of 2017.

the Act, since if they are found to be unconstitutional, the impugned regulations will be suspended as a result.

[25] During argument before us it became apparent that the applicants now squarely rely on an abstract constitutional challenge to the impugned provisions, despite the reference in their papers and heads of argument to fact-specific cases of how the provisions have allegedly been implemented by the relevant officials, and which was the subject of criticism by the respondents.

[26] In order to consider the meaning of the provisions, it is necessary to first have regard to certain portions of the related piece of legislation to which s 4(1)(h) and (i) of the Refugees Act and regulations 8 (1)(c)(i) and (2) refer. Section 23 of the Immigration Act[10] deals with asylum transit visas. Section 23(1) provides that the Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue such a visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of 5 days only, to travel to the nearest refugee reception office in order to apply for asylum. In terms of s 23 (2), and "*[d]espite anything contained in any other law"* when the visa contemplated in s 23(1) expires before the holder reports in person at a refugee reception office in order to apply for asylum in terms of s 21 of the Refugees Act, the holder of that visa "*shall become an illegal foreigner and be dealt with"* in terms of the Immigration Act.

[27] Section 32 of the Immigration Act deals with illegal foreigners. Section 32(1) stipulates that any illegal foreigner shall depart, unless authorized by the Director-General in the prescribed manner to remain in South Africa pending his or her application for a status. Section 32(2) provides that "*[a]ny illegal foreigner shall be deported."* The applicants do not challenge the constitutionality of any provision in the Immigration Act – their focus is on the Refugees Act.

[28] In *Ashebo*[11] the Constitutional Court dealt with two issues on the facts before it. The first concerned the period afforded to an illegal foreigner to apply for an asylum seeker permit in terms of the Refugees Act after entering the country. The

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[10] No 13 of 2002.
[11] Ashebo v Minister of Home Affairs 2023 (5) SA 382(CC).

second was whether such an illegal foreigner is entitled to be released from detention after expressing an intention to seek asylum while awaiting deportation, until such time as his or her application is finalised.[12] The Constitutional Court, referring to the principles established in *Ruta*[13] and *Abore*[14], reiterated that "*until an applicant's refugee status has been finally determined, the principle of non-refoulement protects the applicant from deportation"* [my emphasis]. This principle is set out in s 2 of the Refugees Act and provides as follows:

> *" **2. General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances-** Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return, or other measure, such person is compelled to return to or remain in a country where –*
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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*
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> *(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in any part or the whole of that country."*

[29] In *Ashebo* the applicant entered South Africa illegally with no knowledge of the laws and regulations of this country, including the 5-day period. He submitted that regulation 8 (3) of the regulations makes it incumbent upon an individual seeking asylum to make application in person at a refugee reception office. Because he had been detained he was unable to do so. The applicant also referred to s 7(2) and s 12(1)(a) – (c) of the Constitution. In terms of s 7(2) the State must respect, protect, promote and fulfil the rights in the Bill of Rights. Section 12(1)(a) –(c) provide that

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[12] At para 28.
[13] Ruta v Minister of Home Affairs 2019 (2)SA329 (CC) at para 24.
[14] Abore v Minister of Home Affairs 2022 (2) SA 321 (CC) at para 44.

everyone has the right to freedom and security, which includes the right not to be deprived of freedom arbitrarily or without just cause; not to be detained without trial; and to be free from all forms of violence from either public or private sources.

[30] However that applicant did not formally challenge the constitutionality of any particular provision of the Refugees Act or regulations. This is clear from footnote 30 of the judgment of the Constitutional Court where it was stated that:

> *" The applicant challenged the constitutionality of s21(1) of the Refugees Amendment Act in his written submissions. But no claim at all was made for such relief during the hearing, and accordingly I say no more about this submission. Nor do I venture any opinion on the constitutionality or otherwise of any of the amendments to the Refugees Act and the new regulations thereto, as no substantial constitutional attack has been launched against them."*
>
> [my emphasis]

[31] In dealing with the first issue, the Constitutional Court held that it could be disposed of swiftly since it had already been settled in *Ruta* and *Abore*:

> *"[29] ... These decisions have unequivocally established that once an illegal foreigner has indicated their intention to apply for asylum they must be afforded an opportunity to do so. A delay in expressing that intention is no bar to applying for refugee status. Abore. following Ruta, held that, although a delay in applying for asylum is relevant in determining credibility and authenticity, which must be made by the RSDO, it should at no stage 'function as an absolute disqualification from initiating the asylum application process'. Until an applicant's refugee status has been finally determined, the principle of non- refoulement protects the applicant from deportation."*[15]

[32] Regarding the second issue, the Constitutional Court held:

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[15] At para 29.

"[43] It is clear, therefore, that the combined effect of the amended provisions in ss 4(1)(h) and 4(1)(i) and s 21(1B) of the Refugees Amendment Act , and regs 7 and 8(3), is to provide an illegal foreigner, who intends to apply for asylum, but who did not arrive at a port of entry and express his or her intention there, with a means to evince the intention, even after the five-day period contemplated in s 23 of the Immigration Act. The illegal foreigner does so during an interview with an immigration officer at which they must show good cause for their illegal entry or stay in the country and furnish good reasons why they do not possess an asylum transit visa, before they are allowed to apply for asylum.

[44] In my view, these provisions do not offend the principle of non-refoulement embodied in s2 of the Refugees Act. Their effect is by no means out of kilter with art 31 of the Convention, the fount of s2. Rather, they accord with its import because it too does not provide an asylum seeker with unrestricted indemnity from penalties. The article provides that a contracting state may not impose penalties on refugees on account of their illegal entry or presence in the country, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

[my emphasis]

[33] The Constitutional Court went on to state the following in considering whether there is a lawful basis to detain an illegal foreigner while the process of establishing good cause for the absence of a visa is completed and an asylum application is yet to occur:

"[47] It must be observed, at the outset, that the fact that an illegal foreigner is still entitled to apply for asylum does not negate the fact that he or she has contravened the Immigration Act by entering and remaining in the country illegally. Where the detention is solely for the purpose of deportation then the detention is authorized by s34 of the Immigration Act. However, where the

detained person has been charged with a criminal offence in terms of s49(1), further detention may also be authorized by the Criminal Procedure Act …"

[34] It found that in either instance release from detention cannot occur, but should the detained illegal foreigner evince an intention to apply for asylum, he or she :

"[59] .. Is entitled to an opportunity to be interviewed by an immigration officer to ascertain whether there are valid reasons why he is not in possession of an asylum transit visa. And he must, prior to being permitted to apply for asylum, show good cause for his illegal entry and stay in the country, as is contemplated in the above provisions. Once he passes that hurdle and an application for asylum is lodged, the entitlements and protections provided in ss 22 and 21(4) of the Refugees Act - being issued with an asylum seeker permit that will allow him to remain in the country, without delay, and being shielded from proceedings in respect of his unlawful entry into and presence in the country until his application is finally determined - will be available to him."

[my emphasis]

[35] The applicants argue that *Ashebo* was, fundamentally, about issues distinguishable from those in the current constitutional challenge. It was a case focused on whether an illegal foreign national can be released from detention within the constraints of the legislation, and not about the effect and/or lawfulness of what the applicants refer to as the "disbarment regime". They submit this must be so, given the absence of any constitutional challenge to the impugned provisions in that matter, and the Constitutional Court's express disavowance of any consideration thereof. They also contend that there are three stages to an asylum application. The first is when a foreign national is in South Africa but has not, for whatever reason, been able to access a refugee reception office to apply for asylum. The second occurs once a foreign national has managed to access a refugee reception

office, but is, prior to being permitted to apply for asylum,[16] subject to the disbarment regime created by the challenged provisions. The third is the application for asylum itself, which can only commence once the foreign national who is required to do so, has been found to show good cause under the disbarment regime.

[36] In our view it is, subsequent to *Ashebo*, a two-stage process. The first stage is to be found in s 21(1B) of the Refugees Act: an illegal foreigner not in possession of a valid 5-day asylum transit visa, irrespective of how that came about, must be interviewed by an immigration officer (not a refugee status determination officer) to first ascertain whether valid reasons exist for why the illegal foreigner is not in possession of such visa. The second stage only arises once the illegal foreigner has satisfied the immigration officer that "valid reasons" exist. However unlike s 4(1)(i), which appears to be some sort of unclear parallel process where a refugee status determination officer is provided with guidance by the Refugees Act as to what "compelling reasons" are for having failed to report to a refugee reception office within 5 days of entry into the Republic, the immigration officer, on the plain wording of s 21(1B): (a) does not need compelling reasons but only needs to satisfy him or herself of "valid reasons"; and (b) the factors to be taken into account in that determination lie solely in his or her discretion without the Refugees Act providing any guidance whatsoever.

[37] As we understand it, the crux of the applicant's complaint is that if a foreign national is not in possession of a valid 5-day asylum transit visa (whether due to illegal border crossing or it having lapsed), and that foreign national cannot persuade an immigration officer that he or she has "valid reasons" for failure to be in possession thereof, then that foreign national will not get to the next stage at all. In other words, so the applicants say, given the over-arching principle of *non – refoulement,* it should not be incumbent on such an individual to satisfy a bureaucratic official of the "valid reasons" requirement in order to exercise the rights of an asylum seeker.

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[16] The applicants accept however that certain of the challenged provisions – ie. S 4(1)(f), 4(1)(h) and 4(1)(i) – can in principle operate after a foreigner is allowed to apply for asylum.

[38] The applicants go further, and submit that the overall goal of the challenged provisions (including s 21(1B) and s 4(1)(i)) is to identify those newcomers who have no valid or compelling reasons for their adverse immigration status, and deprive them of access to the asylum system. The respondents take issue with this. They complain that the applicants' interpretation is "plainly tendentious" and ignores the purpose of the provisions as found by the Constitutional Court in *Ashebo* at paragraph 43 referred to above, namely *"with a means to evince the intention, even after the five-day period …*" to apply for asylum. In other words, rather than depriving illegal foreigners of the possibility to apply for asylum, the provisions create a "safety valve" which allows for illegal foreigners to make application, notwithstanding their illegal presence in the country. The respondents thus assert that in cases of those individuals who are present in the country unlawfully, they are not shut out. On the contrary, a process is set out in the Refugees Act which still allows them to submit an application for asylum status, and to enjoy asylum seeker status in the interim, provided they show valid reasons or compelling reasons (depending on whether it is an immigration officer or refugee status determination officer) for their unlawful presence.

[39] The applicants and amici agree that there is a process in the impugned provisions which allows illegal foreigners to submit an application for asylum status. To this extent all are agreed that this is the meaning of the provisions. But it is the process, the applicants and amici contend, that is the problem: the very purpose of *non-refoulement*, and of refugee law both domestically and internationally, is to provide shelter to foreign persons who have illegally entered the country or have become illegal since entry due to the lapsing of their asylum transit visas, <u>not because they qualify under the usual immigration procedures</u> but because they have a well-founded fear of persecution so inhumane that they cannot justifiably be returned to their countries of origin. To require of them to undergo the so–called "safety valve" exercise falls foul of that principle, which in truth, they say, is not a safety valve at all but a threshold requirement. Accordingly the impugned provisions do not accord with overarching principle; they constitute an unjustifiable limitation under s 36 of the Constitution; and in any event cannot serve any legitimate rational purpose. We thus turn to consider whether the impugned provisions pass constitutional muster.

Whether the impugned provisions pass constitutional muster

[40] The starting point is the right of *non- refoulement* enshrined in s 2 of the Refugees Act. In *Ruta* the Constitutional Court emphasized that this section :

> "*[24]…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."*

[41] The Constitutional Court recognized in *Ruta* that the right of *non-refoulement* has "*also become a deeply lodged part of customary international law."*[17] Since the inception of the Refugees Act in 1998, this right has ensured that the asylum system remains open to all who seek its protection, notwithstanding how or when they entered South Africa. On that basis, the Constitutional Court in *Ruta*[18] held, with reference to four earlier decisions of the Supreme Court of Appeal, that:

> *"[16] Closely consonant, these four decisions establish a body of doctrine that thrummed with consistency, principle and power… [they] conclusively determined that false stories, delay and adverse immigration status nowise preclude access to the asylum application process, since it is in that process and there only, that the truth or falsity of an applicant's story is to be determined…"*

[42] That Court explicitly considered and rejected an argument advanced on behalf of the Department of Home Affairs that s 23 of the Immigration Act (dealing with asylum seeker visas) can serve as a basis to disbar newcomers from seeking asylum.[19] The applicants are thus correct that it is not necessary for them to challenge s 23 of the Immigration Act, or s 32 thereof, since the latter is consequent

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17 Ruta at para 26.
18 At para 16.
19 At paras 41 to 43.

upon the former. *Ruta* pre-dated the impugned provisions, but *Abore*[20] was decided after 2020. In *Abore* the Department of Home Affairs submitted that the amendments had changed the law, so that the principles laid down in *Ruta* no longer applied. The Constitutional Court, noting that the amendments were "more stringent" than their predecessors, nonetheless concluded that "*the amendments have not taken away the shield of non-refoulement from aspirant asylum seekers".*[21]

[43] The applicants submit that the impugned provisions introduced an overlapping set of mechanisms whereby newcomers must first demonstrate adequate compliance with immigration procedures before they are entitled to apply for asylum. Having regard to the meaning of the impugned provisions, this must be correct. What is important for present purposes is that s 2 of the Refugees Act remains as it was before the amendments were made. Accordingly these amendments must be measured, for purposes of constitutionality, against s 2 and how it has been interpreted by the highest court in our country, as well as the section dealing with interpretation of the Refugees Act in the Act itself, international customary law and the instruments to which South Africa has become a signatory.

[44] Section 1A of the Refugees Act, which was also inserted by way of the amendments in 2020, makes it obligatory for the Act to be interpreted and applied in such a manner that is consistent with: (a) the 1951 United Nations Convention Relating to the Status of Refugees; (b) the 1967 United Nations Protocol Relating to the Status of Refugees; (c) the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa; (d) the 1948 United Nations Universal Declaration of Human Rights; and (e) any domestic or other relevant convention or international agreement to which South Africa is or becomes a party.

[45] The 1951 Convention is directed at refugees. Section 1 of the Refugees Act defines a "refugee" as "any person who has been granted asylum in terms of this Act". However a person seeking recognition as a refugee in the Republic is defined as a "asylum seeker". In principle, any person who meets the requirements for

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[20] At para 45.
[21] At para 40 and following.

refugee status is a refugee even before they are formally recognised as such. In *Ruta* the Constitutional Court held:

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

[46] In *Scalabrini 3*[22] the Constitutional Court, after reiterating that the principle of *non-refoulement '…is a cornerstone of the international law regime governing refugees'* held:

> *'[30] Thus, article 33(1) of the 1951 Geneva Convention and its 1967 Protocol (both ratified by South Africa) provide that no contracting party shall expel or return refugees to territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. The 1951 Geneva Convention is both a status- and rights-based instrument and is underpinned by several fundamental principles, most notably non-discrimination, non-penalisation, and* non-refoulement*. The principle of* non-refoulement *is so fundamental that no reservations or derogations may be made to it. Likewise, article 2(3) of the 1969 OAU Convention, which this country has also ratified, states that no person shall be returned or expelled to a territory where their life, physical integrity or liberty would be threatened on account of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.*

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[22] Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others 2024 (3) SA 330 (CC) ('Scalabrini 3').

[31] The principle of non-refoulement *accordingly forms part of customary international law and international human rights law. Indeed, in their answering affidavit in the High Court, the respondents concede that South Africa has "assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law". And the principle applies to asylum seekers or* de facto *refugees (those who have not yet had their refugee status confirmed under domestic law), as well as* de jure *refugees (those whose status has been determined as refugees).'*

[47] *Ashebo* determined that the respondents may not rely on detention to prevent an illegal foreign national from taking the first step to apply for asylum seeker status. However in the matter before us – as we see it – the focus is different, namely whether the impugned provisions uphold the substance or content of the *non-refoulement* principle (of which non-penalisation is one of the considerations). Put differently, the issue in the present case is not about detention pending an asylum application but rather whether the impugned provisions permit a process which may scupper that application in the sole discretion of a bureaucratic official (whether it be an immigration officer or refugee status determination officer).

[48] At the heart of this – and during argument this became the focus of the debate – is whether or not the assessment by the official concerned includes an evaluation of the substantive merits of an illegal foreigner's asylum seeker application in determining whether: (a) in the case of an immigration officer under s 21(1B); or (b) a refugee status determination officer under s 4(1)(f), (h) or (i), the individual concerned has demonstrated "valid reasons" or "compelling reasons" respectively for being in South Africa illegally.

[49] In terms of s 21(1B) all that is required – and no more – on its plain wording, is that the immigration officer must "ascertain whether valid reasons exist" as to why "an applicant" is not in possession of an asylum transit visa. The enquiry must thus logically pertain to the failure or inability to have procured one within the legislative scheme of the Refugees Act. The respondents' counsel were themselves constrained to say they would be most surprised to discover that such an

assessment did not go any further than that, since it would otherwise not be in compliance with the *non-refoulement* principle. However they could not point us to anything in s 21(1B) that this "merits" assessment is an integral part of the immigration officer's exercise of the discretionary power conferred on him or her by the Refugees Act. Ultimately it was suggested that because courts must try to interpret statutory provisions in conformity with constitutional imperatives, then we should interpret s 21(1B) as including a "merits" assessment.

[50] However as the applicants point out, it is impermissible for us to attempt to breathe constitutional life into a statutory provision which plainly says something else, even if we wished to; and in *Dawood*[23] the Constitutional Court stated the following:

> *'[53] Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made. There is nothing to suggest that any of these circumstances is present here.*
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> *[54] We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often*

[23] Dawood; Shalabi; Thomas v Minister of Home Affairs 2000 (3) SA 936 (CC).

be required to ensure that the Constitution takes root in the daily practice of governance. When necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.

[55] Such guidance is demonstrably absent in this case. It is important that discretion be conferred upon immigration officials to make decisions concerning temporary permits. Discretion of this kind, though subject to review, is an important part of the statutory framework under consideration. However, no attempt has been made by the Legislature to give guidance to decision-makers in relation to their power to refuse to extend or grant temporary permits in a manner that would protect the constitutional rights of spouses and family members.

[56] Nor can it be said that there is any legislative purpose to be achieved by not supplying such guidance at all. The Minister, in his written argument, did not seek to suggest the contrary. It would be neither unduly complex nor difficult to identify the considerations relevant to a justifiable refusal of a temporary permit. There is no reason therefore for the legislative omission that can be weighed in the limitations analysis. In this case, the effect of the absence of such guidance, coupled with the breadth of the discretion conferred upon immigration officials and the DG by s 26(3) and (6), significantly undermines the purpose of s 25(9)(b).'

[Footnotes omitted]

[51] It also cannot be gainsaid that a determination of this nature which is unfavourable to an illegal foreigner may result, without more, in deportation. This defeats the very purpose of the *non-refoulement* principle enshrined in s 2 of the Refugees Act. It also falls foul of international customary law. The respondents suggested that apart from the so-called "safety valve" of the determination by an immigration officer or refugee status determination officer, as the case may be, it is open to an affected individual to pursue an appeal or review process. But to us this begs the question: if the s 21(1B) or s 4(1)(f), (h) or (i) assessments do not involve a "merits" determination as to the substance of the application itself, it is unclear on what basis such an appeal or review might be predicated. We thus agree with the

applicants that the impugned provisions do not provide a “safety valve” but rather a threshold requirement which must be successfully met before the merits of an illegal foreigner’s asylum seeker application can be assessed.

[52] We are fortified in our view by the following. Section 4(1)(i) gives a measure of guidance to a refugee status determination officer on what he or she should consider to be “compelling reasons”. These “may include hospitalisation, institutionalisation or any other compelling reason”. It seems therefore that what is contemplated by the sub-section are factors extraneous to, rather than inclusive of, those contained in s 2 of the Refugees Act, namely that the individual concerned: (a) may be subjected to persecution in their home country on account of race, religion, nationality, political opinion or membership of a particular social group; or (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in any part or the whole of that country.

[53] As submitted by counsel for the international organisations, the obligation of *non-refoulement* is imposed, in differing forms, by multiple treaties that South Africa has – since becoming a democracy – ratified. The formulations are slightly different. The Refugee Convention applies only to refugees; CAT and ICPPED apply to specific risks in the country of return. But taken together, they impose a broad and strict obligation on South Africa – not to extradite, deport or otherwise transfer any person to any country where they would be at real risk of persecution or other serious human rights violations. South Africa can only comply with that obligation if it assesses, on its merits, any claim by an individual that returning them to a country would place them at real risk of irreparable harm.

[54] As the international organisations also submitted, *non-refoulement* is not only a treaty obligation. It is a fundamental principle of customary international law and international human rights and refugee law. It is binding on all states, and is a law in South Africa in terms of s 232 of the Constitution. The content of the principle of *non-refoulement* in international law is aptly summarised by the Special Rapporteur on

the Human Rights of Migrants in a 2021 Report to the Human Rights Council.[24] He emphasises the following:

> 54.1 It is a "fundamental principle of international human rights and refugee law" and prohibits the "removal and transfer of any individual, regardless of their status, when there are substantial grounds for believing that the individual would be at risk of irreparable harm, such as death, torture or cruel, inhuman or degrading treatment or punishment, persecution, enforced disappearance or other serious human rights violations; and
>
> 54.2 The principle is characterised by its absolute nature without any exception applying to all persons, including all migrants, at all times, irrespective of their citizenship, nationality, statelessness, migration status, gender, sexual orientation and gender identity.

[55] We note that art 33(2) of the Refugees Convention provides a narrow exception to the principle of *non-refoulement*. It states that the benefit of art 33(1) which encapsulates the principle of *non-refoulement*, *'may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country'.* This exception is not recognised in customary international human rights law. The OAU Convention, CAT and ICPPED do not include any exception to the principle. The Committee against Torture – which interprets CAT – has made clear that there are no exceptions when it comes to the risk of torture or inhumane and degrading treatment. The European Court of Human Rights has taken the same approach, as has the House of Lords.[25] The inevitable result is that, even in cases of a risk to national security, before deporting, a state must make an assessment of

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[24] Special Rapporteur on the Human Rights of Migrants *Report on Means to Address the Human Rights Impact of Pushbacks of Migrants on Land and Sea*, A/HRC/47/30 (12 May 2021).

[25] The sources are: General Comment No 31 (n 14) at para 12; CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment) (1992) at para 9. See also International Organisation for Migration IML Information Note on the Principle of Non-refoulement (2023) at 9; Seid Mortesa Aemei v Switzerland, Communication No 34/1995, U.N. Doc. CAT/C/18/D/34/1995 (1997) at para 9.8; D v the United Kingdom 24 EHRR 423, [1997] ECHR at para 47; Secretary of State for the Home Department v Rehman [2003] 1 AC 920.

whether the deportation is consistent with the principle of *non-refoulement.* In our view this must necessarily also include a "merits" assessment.

[56] As the international organisations submit, irregular entry by a refugee or asylum seeker cannot serve as a bar to have their refugee status determined. To do so would be in conflict with what is required in terms of South Africa's international law obligations. The only way to determine if they are a bona fide refugee is to conduct a proper evaluation of their application. Refusing to evaluate an application because of the way a person entered South Africa inevitably creates the risk that people will be removed contrary to the principle of *non-refoulement*.

[57] HSF submits, correctly in our view, that the effect of the impugned provisions is aggravated by the harm they impose on children: they have the consequence that children of asylum seekers who fail to show "valid reasons" or "compelling reasons" will be deported with their parents, in circumstances where the substantive merits of the asylum application are not assessed at all. Furthermore, the impugned provisions unjustifiably limit the constitutional rights of children who are illegal foreigners while living in South Africa, depriving them of their most basic rights.

[58] HSF focuses on children who are accompanied by parents or guardians in their asylum claims. They are referred to as dependents in the legislative scheme (as opposed to unaccompanied minors whose circumstances are regulated by other provisions in the Refugees Act and Immigration Act). The starting point is that a child is entirely dependent on the conduct of the parents/guardians, for both an asylum transit visa and an asylum application:

> 58.1 The application for an asylum transit visa under s 23 of the Immigration Act must be made in terms of Form 17 to the Immigration Regulations.[26] Form 17 provides that the person applying for the asylum transit visa must complete the Form for their dependents as well;
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> 58.2 As for an asylum seeker application, the Refugees Act defines a child as anyone under 18 years of age and includes children under the definition of

[26] Published in GN R413, GG 37679 dated 22 May 2014.

dependents.[27] The person seeking asylum is then instructed to include their dependents in their application. Children are thus treated as dependents in those applications;

58.3 The legislative scheme ties the state of the child directly to that of their parent/guardian. Section 21(2A) of the Refugees Act provides that *'(a)ny child of an asylum seeker born in the Republic and any person included as a dependant of an asylum seeker in the application for asylum has the same status as accorded to such asylum seeker'.* Accordingly, if the parent is disbarred for failing to comply with the procedural requirements of the impugned provisions, their child is similarly disbarred even if they have a meritorious asylum claim. In this way, children are placed in harm of *refoulement*. Children may also face a host of other harms, since they live with the fear of arrest and detention. In addition they are denied other rights whilst being illegally in South Africa, because children without documentation experience many difficulties, including gaining access to healthcare, education and available social assistance.[28] This has been recognised by the Constitutional Court in *Scalabrini 3*:

> *'[42] Children's applications for asylum are generally tied to those of their parents. The deemed abandonment of parents' asylum applications has had drastic consequences on their children. CoRMSA adduced evidence that the children of an asylum seeker whose application was deemed to be abandoned could not attend school for the entire 2020 academic year because they had no visas. In another case, an asylum seeker's son could not register for matric. Like their parents, without visas, children also face the risk of arrest, detention and deportation. As this Court said in* Centre for Child Law*, it is unjust to penalise children for matters over which they have no power or influence'.*

[Footnote omitted]

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[27] In terms of s 1 of the Refugees Act.

[28] See, for example, Centre for Child Law v Minister of Basic Education 2020 (3) SA 141 (ECG) concerning the exclusion of undocumented children from schools; and Centre for Child Law v Director-General Department of Home Affairs [2020] ZAECHGHC 43, concerning a challenge to the Births and Deaths Registration Act to the extent that it leaves children without birth certificates. The latter challenge was subsequently upheld by the Constitutional Court in Centre for Child Law v Director-General: Department of Home Affairs 2022 (2) SA 131 (CC).

[59] The first underlying principle is that children are individual right bearers and not mere appendages of their parents. The second is that, even if it can be justified that a parent ought to be barred from applying for asylum for procedural missteps – which we have found cannot be countenanced – children are not to be penalised for the missteps of their parents. We deal with each of these principles.

[60] Sections 28(1)(d) and 28(2) of the Constitution place positive obligations on the state to protect children, given their high level of vulnerability. The right springs from the realisation that children are individuals with personality distinct from that of their parents. As the Constitutional Court noted in *S v M*[29] *'every child has his or her own dignity'*. A child is to be constitutionally imagined *'as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size'.*[30]

[61] The Constitutional Court has also stressed that *'the recognition of the innate vulnerability of children is rooted in our Constitution, and protecting children forms an integral part of ensuring the paramountcy of their best interests'* and underscored *'the importance of the development of a child, and the need to protect them and their distinctive status as vulnerable young human beings'*.[31]

[62] Included in this is a crucial procedural component: the right to be heard. Children are to be heard in all matters concerning their interests, before actions that have an adverse effect on their rights. In *AB v Pridwin*,[32] the Constitutional Court confirmed that s 28(2) *'incorporates a procedural component, affording a right to be heard where the interests of children are at stake'.* Moreover the same court stated that *'it is essential in asylum applications, to pay due regard to constitutional recognition of children as individuals, with distinctive personalities and their own dignity, who are entitled to be heard in every matter concerning them'.*[33] We agree with HSF that the impugned provisions are at odds with this principle. Their impact

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[29] S v M (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC).
[30] At para 18.
[31] Centre for Child Law and Others v Media 24 Limited and Others 2020 (1) SACR 469 (CC) at paras 71 to 72.
[32] AB v Pridwin Preparatory School 2020 (5) SA 327 (CC) at para 141.
[33] S v M at para 43.

is, effectively, that a disbarment of the parent(s)' asylum application equates to a refusal to consider the separate merits of the child's asylum claim. In this way, the impugned provisions regard children as appendages, whose fate is tied to the conduct of their parents, with no regard to the merits of their own claims. Put differently, even if it could be justified to disbar an asylum seeker based on conduct unrelated to the merits of their claim, it cannot be justifiable to disbar their children from applying for asylum based on the conduct of those parents. This principle has three times been repeated by our Constitutional Court in various contexts.

[63] First, in relation to criminal sanctions of parents, in *S v M* it was held that:

> *'Every child… cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new* [Constitutional] *dispensation the sins and traumas of fathers and mothers should not be visited on their children.'*[34]

[64] Second, the same court found in *Centre for Child Law v Director-General: Department of Home Affairs*[35] that it is fundamentally unjust to penalise children for matters over which they have no power or influence. Third, this was repeated subsequently, in *Scalabrini 3*. HSF emphasises the similarities between *Scalabrini 3* and the present application. *Scalabrini 3* dealt with the lapsing of asylum seeker permits due to procedural missteps of asylum seekers. The Constitutional Court struck down the sections that provided for the permits to lapse as they violated the right of *non-refoulement*, no matter how severe the procedural missteps. That court specifically considered the rights of children and concluded that the fact of a parent's asylum seeker permit lapsing cannot prejudice the child of the asylum seeker.[36]

[65] We have already touched on the paramountcy principle enshrined in s 28(2) of the Constitution. We agree with HSF that the impugned provisions are not capable of an interpretation that protects the best interests and dignity of children in their own

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[34] At para 18.

[35] See fn 28 above at paras 71 to 74.

[36] At para 42.

right. In fact, children have no say in the determination at all. Although it has been accepted that s 28 rights are not absolute,[37] the positive obligation resting upon the state, coupled with the court's obligation to act in the best interests of the child generally, has consequences for the application of s 36 of the Constitution, simply because s 28(2) requires the rights of the child to take precedence over other state interests. Moreover, the same section sets out the rights of every child irrespective of status: the drafters of the Constitution consciously included all children within our borders as rights holders and did not reserve the s 28 rights only for citizens. The respondents themselves rightly do not suggest that the s 28(1)(d) right of children to be protected from maltreatment, neglect, abuse or degradation, is restricted to abuse only taking place within South Africa's borders. Thus any legislation that enables the state to send children to jurisdictions where they may be subject to such abuse (particularly in circumstances where they are at the mercy of their parents and government officials) must be in conflict with s 28(1)(d). HSF thus agrees with the applicants that the impugned provisions are not rational; and that being the case there is no saving them, and they must be declared unconstitutional and invalid. HSF also points out that the impugned provisions cannot pass the s 36 justification analysis – indeed the respondents have not seriously attempted to justify a violation if s 36 was even to come into play.

[66] In our view it matters not that a parent could raise the impact on their children in their own good cause hearing, since this is irrelevant to the requirement of valid or compelling reasons for non-compliance with procedural requirements. Put simply, we are unable to place any benign interpretation on the impugned provisions vis-à-vis children.

[67] HSF, as previously indicated, also referred us to the CRC and African Charter. These in essence reaffirm that the best interests of the child is a paramount consideration. South Africa is bound to the provisions of both. Accordingly, the impugned provisions should be consistent with these instruments, which, for the reasons already given, it is our view they are not. We have also considered the other

[37] S v M at para 26.

international instruments to which we were referred by HSF, with particular reference to children. All of them support our view.

[68] To round off, we emphasise what the Constitutional Court held in *Ruta*:

> *'[58] At a time when the world is overladen with cross-border migrants, judges cannot be blithe about the administrative and fiscal burdens refugee reception imposes on the receiving country. South Africa is amongst the world's countries most burdened by asylum seekers and refugees. That is part of our African history, and it is part of our African present. It is clear from cases this court has heard in the last decade that the Department is overladen and overburdened, as indeed is the country itself. South Africa is also a much-desired destination. As the High Court noted in* Kumah*, the system is open to abuse, with the ever-present risk of adverse public sentiment.*
> *[59] Yet, as in* Makwanyane *and* Mohamed *and* Tsebe*, and many other cases, our founding principles as a constitutional democracy direct us with unavoidable clarity. There are solutions to the problems of refugees, and they lie within the principles expressly articulated in and underlying our existing statutes.'*
> [Footnotes omitted]

<u>The question of s 172(2)(b) relief</u>

[69] In terms of s 172(2)(b) of the Constitution, a court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, pending confirmation or otherwise by the Constitutional Court. In prayer 4 of their amended notice of motion, the applicants seek an interdict against the respondents from:

> *'4.1 Deporting or causing any foreign national who has indicated an intention to seek asylum under the Act to be deported or otherwise compelled to return to their countries of origin unless and until their asylum application has been finally rejected on its merits;*

4.2 Implementing sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Act and Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4)… including not arresting and/or detaining foreign nationals pursuant to the application of these provisions; or

4.3 Refusing to allow any person to apply for asylum on the basis of the provisions listed in paragraph 4.2 above;…'

[70] The applicants note, correctly, that: (a) in the ordinary course, any order of this court regarding the constitutional invalidity of the impugned provisions of the Act would only be effective once confirmed by the Constitutional Court in accordance with s 167(5) of the Constitution; but (b) any order regarding the unlawfulness of the impugned regulations would apply immediately, and would not have to be confirmed by the Constitutional Court. In our view the interim relief sought by the applicants is too far-reaching and would effectively have the consequence that we step into the shoes of the legislature for an indefinite period. This does not sit comfortably with us. In the Part A proceedings, the respondents agreed to limited relief, which was curtailed in the judgment and order pertaining to that relief to the following:

'The respondents are interdicted from initiating any process to deport any foreign national present in the Republic in the event that such foreign national has indicated an intention to make an application for asylum – in terms of section 21 [1B] of the Refugees Act 130 of 1998.'

[71] The applicants themselves say that the order in Part A has had the unintended consequence that the respondents have ceased to allow any new asylum seekers to apply for asylum. In other words, the asylum system has been shut down. The respondents, in their supplementary note, highlight a number of possible practical difficulties if we were to grant the s 172(2)(b) relief the applicants seek. They range from the potentially prejudicial consequences to individuals who are in the country lawfully under another type of visa, and who now seek to apply for asylum, having the onus of proving a change in circumstances whisked away from them, leaving them only with the "valid reasons" threshold, to the "protections" of regulation 8(4) being denied to individuals who appear before court on a charge of being an illegal foreigner under the Immigration Act.

[72] We have weighed all of this up. We have also taken into account that the constitutional challenge before us is an abstract one; and accordingly there is nothing to prevent any particular affected individual from approaching court in his or her own right for the relief granted in *Ashebo*, or any other relief, given our findings and pending confirmation or otherwise by the Constitutional Court. We deliberately adopt a cautious approach in declining to grant any s 172(2)(b) relief, because as indicated, the ramifications to hundreds of thousands of individuals in this country, as well as the respondents, are potentially both too risky and too great. We shall thus simply suspend our declaration of invalidity of the regulations pending the outcome of the confirmation proceedings in relation to the impugned statutory provisions by the Constitutional Court (the latter are automatically suspended in terms of s 172(2)(a)).

Costs

[73] The costs of Part A were ordered to costs in the cause in Part B. The *Biowatch*[38] principle applies. The applicants have been substantially successful. Although not possible to say with certainty, we are comfortable with attributing roughly 20% of the applicants' costs to the unsuccessful application for the s 172(2)(b) relief. It is well settled that an amicus curiae appears not as a party, but as a friend of the court, and is thus not generally entitled to costs[39] (none of the amici seek costs in any event). Both the applicants and the respondents employed three counsel. All were agreed that, if costs were to be awarded, they should be on Scale C.

[73] **The following order is made:**

1. It is declared that sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Refugees Act 130 of 1998 ("the Act") are inconsistent with the

[38] Biowatch Trust v Registrar, Genetic Resources, and Others 2009 (6) SA 232 (CC) at paras 21 to 28.

[39] See inter alia Eskom Holdings Soc Ltd v Resilient Properties (Pty) Ltd 2021 (3) SA 47 (SCA) at para 92.

Constitution of the Republic of South Africa, 1996 ("the Constitution") and invalid;

2. **It is declared that regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Refugee Regulations, published in GNR 1707, Government Gazette 42932, on 27 December 2019 ("the Regulations") are inconsistent with the Constitution and invalid;**
3. **In terms of section 172(2)(a) of the Constitution, paragraph 1 of this order is referred for confirmation or otherwise by the Constitutional Court;**
4. **The declaration in paragraph 2 of this order is suspended pending the outcome of the proceedings referred to in paragraph 3 above;**
5. **The interim interdict granted in Part A of this application is discharged;**
6. **The relief sought by the applicants in terms of section 172(2)(b) of the Constitution is refused; and**
7. **The respondents shall pay 80% of the applicants' costs (including those incurred in respect of Part A) on Scale C (party and party), jointly and severally, the one paying, the others to be absolved, and including the costs of 3 (three) counsel where so employed.**

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JUSTICE J CLOETE

I agree.

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JUSTICE L NUKU

I agree.

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ACTING JUSTICE S KHOLONG

For the applicants: Adv A Katz SC with Adv D Simonsz and Adv G Slingers

Instructed by: Lawyers for Human Rights (Ms N Mia)

For the respondents: Adv N Arendse SC with Adv D Borgstrom and Adv A Nacerodien
Instructed by: Denga Inc. (Mr A Denga)

For the first to third amici: Adv M Bishop with Adv M Mokhoaetsi
Instructed by: Cliffe Dekker Hofmeyr Inc. (Mr G Xaba)

For the fourth amicus curiae: Adv I De Vos
Instructed by: Norton Rose Fulbright South Africa Inc. (Mr J Whyte)