Practitioners' Refugee Law Resource Manual 2023

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CLIFFE DEKKER HOFMEYR

Acknowledgements

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Table Of Contents

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Introduction

South Africa's International Obligation to Protect Refugees and the 1998 Refugees Act

In 1996 South Africa acceded to various international law treaties governing the rights of refugees and asylum seekers, including the Convention Relating to the Status of Refugees of 1951 (1951 Convention), its 1967 Protocol (the 1967 Convention) and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. In so doing it incurred an international law obligation to give effect to these treaties and to afford refugees and asylum seekers seeking refuge in South Africa the protections provided for in these treaties. In recognition of its international obligations South Africa enacted the Refugees Act 130 of 1998 (the Refugees Act) which was designed to give effect to its international law obligations to receive and treat refugees in its territory in accordance with the standards and principles established in international law, and to put in place the necessary processes and procedures to regulate applications for refugee status. Prior to the enactment of the Refugees Act there was no law in South Africa regulating the reception of refugees in the country. Refugees were dealt with in terms of the Aliens Control Act.

Given its express purpose of incorporating many of the international law principles expounded in the above-mentioned treaties into our domestic law, the Refugees Act was a progressive piece of legislation and was recognised as such. However, over the years Parliament has sought to introduce various amendments to the Refugees Act which have cut back on the protections afforded by the original Act. Most significant are amendments introduced by way of a 2017 Amendment Act.

The 2017 Amendments to the Refugees Act

In 2017 Parliament introduced amendments to the Act by way of the Refugees Amendment Act 11 of 2017 which came into force on 1 January 2020 (the 2017 Amendments). Many of these amendments curtail the rights of refugees and asylum seekers and are cause for concern. The constitutionality of some of these amendments has already been subject to challenge. In recent years the government has also sought to implement several retrogressive policy changes in other areas of the law which have impacted the ability of refugees and asylum seekers to access basic rights. As a result, an increasing number of asylum seekers and refugees find themselves in a shrinking space, where they are unable to access basic human rights, despite our international law obligations, and despite the constitutional and legislative framework providing that asylum seekers and refugees are entitled to most rights in South Africa.

2

Purpose of this manual

The purpose of this manual is to guide practitioners through the asylum application process and to alert them to various scenarios that they may encounter during a consultation with a refugee or asylum seeker. In doing so we hope to sensitise practitioners to instances where there is a disconnect between the legislation and the lived experiences of the clients on the ground. Importantly, we also hope to alert practitioners to potential conflicts between the provisions of the Refugees Act (as amended) and the Immigration Act, and the provisions of the Constitution. It is the practitioner's job to ensure that clients understand the law and how it is applied (or in some cases not applied) in reality, and to help identify and address unlawful practices and conduct.

Note: this manual is only a guide, and in certain circumstances practitioners may deviate from it, should it be necessary.

Acronyms

BDRA	Births and Deaths Registration Act 51 of 1992
DHA	Department of Home Affairs
RAA	Refugee Appeal Authority (previously Refugee Appeal Board)
RRO	Refugee Reception Office
RSDO	Refugee Status Determination Officer
SC	Standing Committee (previously Standing Committee for Refugee Affairs)
UNHCR	United Nations High Commissioner for Refugees

4

Interpretation and application of the Act

In accordance with section 1A of the Act, the Refugees Act must be interpreted and applied in a manner that is consistent with –

- The 1951 United Nations Convention Relating to the Status of Refugees;
- The 1967 United Nations Protocol Relating to the Status of Refugees;
- The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa;
- The 1948 United Nations Universal Declaration of Human Rights; and
- Any domestic law or other relevant convention or international agreement to which the Republic is or becomes a party.

Relationship between the Immigration Act and the Refugees Act

It is important to distinguish between the Refugees Act and the Immigration Act. The Refugees Act caters specifically for two categories of persons, namely: asylum seekers and refugees in South Africa. They are separately categorised from other migrants in the country due to the special status and protections afforded to them under International Law. The Immigration Act, on the other hand, regulates the entering and residence of all other migrants who are not asylum seekers or refugees. These two 'regimes' work parallel to each other, and generally an individual cannot be documented under one and decide to become documented under the other. There are very few circumstances that allow this. One exception to this rule is where the Standing Committee has declared an asylum seeker as a refugee indefinitely, which allows them to apply for permanent residence under the Immigration Act.

However, even where an individual is documented under the Refugees Act, there are still some provisions under the Immigration Act that are applicable to them. A few examples of circumstances where asylum seekers and refugees would be subject to the Immigration Act are:

Deportation – this process is regulated by the Immigration Act. Where asylum seekers or refugees have been unable to renew their permits, or where asylum applications have been unsuccessful, they may be subjected to deportation procedures under the Immigration Act.

Detention – if an asylum seeker or refugee, for whatever reason, is deemed an 'illegal foreigner', they will be detained in terms of the Immigration Act.

6

The Principle of Non Refoulement

Core to the protection of the rights of refugees is the international law principle of non-refoulement (the right of non- return) which was adopted into our domestic law by way of section 2 of the Refugees Act. Section 2 provides:

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

The principle of non-refoulement finds its basis in international law in accordance with Article 33 of the 1951 Convention. Article 33 expressly provides that States are obligated to refrain from returning a refugee to a country where he or she is likely to suffer persecution or endangerment of life or freedom. By adopting this principle into its domestic law, South Africa has demonstrated its commitment to the protection of asylum seekers. The Courts have further provided that it would be unlawful for South Africa to violate the principle of non-refoulement. Below are a few cases that speak to the importance of the principle:

In *Minister of Home Affairs & Others v Watchunuka & Others*[1], the Supreme Court of Appeal provided that the Refugees Act was enacted to give effect to South Africa's international obligations to receive refugees and that section 2 of the Act exemplifies how the Act gives effect to South Africa's international obligations.

The Supreme Court of Appeal again affirmed the importance of the principle in the case of *Abdi & Another v Minister of Home Affairs & Others*[2] – the Court in this case held that the principle of non-refoulement protects an asylum seeker from

1 *[2003] ZASCA 142; [2004] 1 All SA 21 (SCA).*

2 *[2011] ZASCA 2, 2011 (3) SA 37 (SCA).*

being returned to their country of origin where a real risk exists that the person will suffer harm in their country of origin. It further held that deportation to another country where there is no guarantee that the person would not be subjected to cruel or inhumane punishment, is in direct conflict with the values entrenched in the Constitution.

The Constitutional Court in *Ruta v Minister of Home Affairs*[3] handed down a pivotal judgement on the principle of non-refoulement – in this case the Court held that the Refugees Act embodies the principle and therefore where someone flees from persecution they have the right to seek and to enjoy asylum. Further, the principle of non-refoulement is the cornerstone of refugee law and ensures the protection of an asylum seeker from being incorrectly deported under the auspices of the Immigration Act.

3 [2018] ZACC 52, 2019 (2) SA 329 (CC).

Definitions - Section 1

Note: All the sections referred to on the following pages can be found in the Refugees Act, read together with Refugees Regulations: GNR 1707 of 27 December 2019 (Government Gazette No 42932).

"abusive application for asylum" means an application for asylum made –

- with the purpose of defeating or evading criminal or civil proceedings or the consequences thereof; or
- 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.

"asylum seeker" means a person who is seeking recognition as a refugee in South Africa.

"asylum seeker visa" means a visa contemplated in section 22. [previously known as "asylum seeker permit"]

"child" means any person under the age of 18 years.

"Department" means the Department of Home Affairs.

"dependant", in relation to an asylum seeker or a refugee, means any unmarried minor dependent child, whether born prior to or after the application for asylum, a spouse or any destitute, aged or infirm parent of such asylum seeker or refugee who is dependent on him or her, and who is included by the asylum seeker in the application for asylum or, in the case of a dependent child born after the application for asylum, is registered in terms of section 21B (2).

"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.

"manifestly unfounded application" means an application for asylum made on grounds other than those contemplated in section 3.

"marriage" means –

- either a marriage or a civil partnership concluded in terms of the Civil Union Act 17 of 2006;
- a marriage concluded in terms of-

the Marriage Act 25 of 1961;

the Recognition of Customary Marriages Act 120 of 1998; or

a marriage concluded in terms of the laws of a foreign country.

"Non-Refoulement" is a principle recorded in section 2 of the Refugees Act, which provides that: *"no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure if, as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-*

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."

"social group" includes a group of persons of a particular gender, sexual orientation, disability, class or caste.

"spouse" means a person who is a party to:

- a marriage as defined in terms of the Act; or

- a permanent homosexual or heterosexual relationship as prescribed.

"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.

8

Grounds for being a refugee in South Africa - Section 3

A person will qualify for refugee status if that person:

• Owing to a well-founded fear of persecution by reason of:

- Race;
- Tribe;
- Religion;
- Nationality; and
- Political opinion or a member of a social group

is outside their country of origin or country of habitual residence and is, owing to such fear, unable or unwilling to avail themselves to the protection of said country and unwilling to return to it.

And/or

Owing to external aggression, occupation, foreign domination or events which seriously disturb or disrupt the public order, either in part or the whole of their country of origin or nationality, is compelled to leave their place of habitual residence in order to seek refuge.

And/or

Is a dependant of a person contemplated in the above two categories.

Applying for asylum in South Africa

(Section 21, read together with Regulation 7, 8 and 10)

[Please read together with applying for asylum online section]

In order to apply for asylum, an asylum seeker must declare their intention to apply for asylum once they have entered the country and do so at a port of entry. At the port of entry, the asylum seeker will be asked to submit their biometrics (or other data) to an immigration officer.

Note: Submission of biometric data can also be submitted at a Refugee Reception Office (RRO). An RRO is a facility run by the Department of Home Affairs, located in various provinces, which facilitates the process of applying for asylum. It acts as the primary point of contact for asylum seekers and refugees.

There are currently 5 operating Refugee Reception Offices

- Musina
- Pretoria
- Durban
- Cape Town
- Gqeberha

Note: Cape Town does not currently accept new asylum applications.

Once the asylum seeker has declared their intention to apply for asylum, they will receive an 'asylum transit visa' which is valid for 5 days.[4]

Note: Where an asylum seeker is not in possession of an asylum transit visa they will be interviewed by an immigration officer to ascertain whether valid reasons exist for the asylum seeker not being in possession of such visa.

Note: If a person appears before a judicial officer and they declare their intention to apply for asylum, they must show good cause – Regulation (3)(4).

4 See Section 23 of the Immigration Act which provides for the granting of an asylum seeker transit visa.

An asylum seeker must report to a Refugee Reception Office within the 5 days during which the transit visa remains valid. Should they fail to do so within the 5 days, the asylum seeker will have to provide reasons to a DHA official for the delay.[5]

An application for asylum must be made in person by the applicant, either when reporting to the Refugee Reception Office, or on a date allocated to the asylum seeker by the Refugee Reception Office.

The application must be made on **Form 2** – DHA-1590. Please refer to **Annexure A** below. Form 2 must be submitted with:

- A valid asylum transit visa issued at a port of entry, or a valid visa under permitted circumstances;
- Proof of any form of identification; and
- The biometrics of the applicant, including any dependant.

Note: Where the applicant cannot provide valid identification, a declaration of identity must be made in writing before an immigration officer.

The asylum seeker must indicate their language proficiency on Form 2. If the asylum seeker does not understand English, they are entitled to request an interpreter who is proficient in the language the applicant understands.

Accurately completing Form 2 is of great importance, as the form cannot later be amended and the applicant's claim will rest on what is contained in this Form. Thus, the Form as completed and the documentation submitted in support of the application are binding on the applicant. Any contradictory information that an applicant seeks to put up at later stages in the process will invariably be used by the Refugee Status Determination Officer / the Appeals Authority as a basis to attack the credibility of the applicant.

Joining of Dependants

It is also important for the applicant to declare all their dependants (spouses and children), whether in the Republic or elsewhere, in the application for asylum.

Note: It is important that all children are included in the original application for asylum, even if the children are not with them at the time of applying.

As of 1 January 2020, an asylum seeker can only join dependants if they declared the dependant in their original application for asylum. If the applicant does not declare a

5 *Importantly, in terms of Section 23(2) of the Immigration Act, if the asylum transit visa expires before the would be asylum seeker reports to a RRO the holder will become an illegal foreigner who can be dealt with as such in accordance with the relevant provisions of the Immigration Act dealing with "illegal foreigners" including being detained and deported.*

dependant and later returns to the Refugee Reception Office to make a claim in terms of section 3 (c) of the Act, the applicant will have to provide proof of the relationship by way of a paternity test, failing which such child will be dealt with as an unaccompanied child.

Note: If a child is born to an asylum seeker or refugee in South Africa after their entry into the country, the child's birth must be registered within 1 month of the child being born in terms of the Births and Deaths Registration Act 51 of 1992 and the birth certificate must be submitted at any Refugee Reception Office in order for the child to be included as a dependant – the child will be conferred with the same status as the parent.

Note: A Refugee Status Determination Officer may request the principal asylum seeker or a dependant to provide proof of their relationship.

The process of documenting a family together as a unit is informally knows as 'family joining'. Each dependant included in an asylum application will be issued with an asylum seeker visa. Dependants of asylum seekers are also required to appear in person for a hearing before a Refugee Status Determination Officer.

Applying for a family joinder online

STEP 1: The asylum seeker must have their own personal email address. If they do not have their own email address, it will be necessary for them to create one – it is important that asylum seekers have their own email address as the Department of Home Affairs may respond to the personal address used. They will **need to have access to the e-mail account in the future.**

STEP 2: To apply for a family joinder, the process will be started by sending an email to the Department of Home Affairs. However, at some stage the asylum seeker or refugee will have to attend physically at the office for an in-person appointment. The email must be sent to the Refugee Reception Office where the asylum seeker or refugee last received their extension. **Note the following addresses:**

Pretoria/Desmond Tutu Refugee Reception Office: **inquiries.dtrro@dha.gov.za**

Musina Refugee Reception Office: **inquiries.musinarro@dha.gov.za**

Cape Town Refugee Reception Office: **inquiries.dtrro@dha.gov.za**

Gqerberha Refugee Reception Office: **inquiries.perro@dha.gov.za**

Durban Refugee Reception Office: **inquiries.durbanrro@dha.gov.za**

The email will be addressed to the Department and the subject line should include the following details :

- family joining;
- name; and
- file number.

STEP 3: After sending the email to the Department of Home Affairs, the Department will send the applicant an appointment letter which reflects the date and time they must attend at the Refugee Reception Office.

STEP 4: The asylum seeker or refugee must take the appointment letter along to the Refugee Reception Office. It is important that the persons the asylum seeker or refugee seeks to join to their file must also be present at the appointment and to have supporting documentation like birth certificates and marriage certificates, on hand.

Termination of dependency

A dependant will cease to be a dependant when by law they are deemed no longer to be a dependant of the main applicant:

- A spouse will cease to be a dependant should they get divorced from the main applicant/ should the main applicant die.
- A child will cease to be a dependant when they get married or cease to be dependent on the main applicant.

Under certain circumstances, the dependant will be allowed to stay in the country.

Dependent child

If a dependent child of an asylum seeker is no longer deemed as a dependant, they can apply for asylum on their own. This application must be done, in person, within six months of no longer being a dependant. The application is completed at the Refugee Reception Office where the asylum seeker's visa was previously issued.[6]

Dependants of refugees no longer deemed to be dependent will need to attend at the Refugee Reception Office where the original application was made and apply, using **Form 4** – Annexed as **Annexure B**, to continue using the document until it expires. After expiry, they will then have to make their own application for asylum.[7]

Dependent spouse

In the instance of a spouse of an asylum seeker who ceases to be a spouse due to divorce or death of the main applicant spouse, they may be permitted to continue

6 Section 21(3A) read with Regulation 11(1).

7 Section 21B(3) read with Regulation 11(2).

to reside in the country - provided that in the case of divorce the Director-General is satisfied that a good faith spousal relationship existed for a period of at least 2 years after having been granted asylum.

The spouse must submit a copy of the order of divorce or death certificate in person to the Refugee Reception Office within 6 months of the occurrence of the relevant event, failing which the dependent spouse may be dealt with as an illegal foreigner.

The spouse must apply to continue to remain in the Republic for a period coinciding with the remaining period of his or her asylum visa. They must also apply in person for asylum at the Refugee Reception Office where the visa or certificate was issued or depart the Republic.[8]

Note: In the event of a divorce, the Department of Home Affairs may request additional documentation in order to prove that the marriage was genuine.

Note: Form 4 is an application form used by persons who were previously dependent. It includes a section where the asylum seeker must detail why they need the continued protection of South Africa.

Unpacking the validity of a marriage and permanent relationship (Regulation 2 & 3)

Authority and termination of marriage

- The existence of a marriage must be proven to the satisfaction of the Director-General, by a party to that marriage.
- In determining the authenticity of a marriage declared when applying for asylum, the Refugee Status Determination Officer or any other authorised official of the Department must:
    - authenticate the marriage certificate and conduct an interview with both parties to the marriage to ascertain whether a genuine marriage was concluded.

Note: Where a marriage was concluded outside of the Republic, and the original marriage certificate is not available for inspection – the parties to the marriage will need to submit an affidavit in which the vital details of the marriage are reflected, including the date and place of the conclusion of the marriage.

8 Regulation 2(6) read with 2(5).

- Where the parties are interviewed to authenticate their marriage, both parties are to be interviewed separately, on the same date, by the same official and the outcome of the interview, notwithstanding the existence of an authentic marriage certificate or affidavit, will be regarded as definitive.
- Either spouse to a marriage must submit a copy of the divorce order, in the case of divorce, or a copy of a death certificate, in the case of a death of their spouse – in person to the Refugee Reception Office within 6 months of the event. The consequence of not doing so will be that any dependent spouse may be treated as an illegal foreigner in terms of the Immigration Act (see discussion above regarding termination of dependency).

- Both parties to a marriage are required to inform the Refugee Status Determination Officer whether a marriage still subsists, at the time of renewing their document. An affidavit, similar to **Form 1(A)** (Annexed as **Annexure C**) must be submitted.

Authenticity and notification of termination of permanent homosexual or heterosexual relationship

- The existence of a *permanent homosexual or heterosexual relationship* must be proven to the satisfaction of the Director-General, by a party to that relationship – the onus to prove such a relationship rests with the one alleging to be part of the said relationship.
- To determine whether a permanent homosexual or heterosexual relationship exists at the time of applying for asylum, an official must authenticate the notarial agreement signed by both parties and conduct an interview with both parties to determine whether a genuine relationship exists.
- During the interview, both parties must be interviewed separately, on the same date, by the same official. The decision made, notwithstanding an authentic notarial agreement, will be definitive.
- Both parties to a permanent relationship are required to inform the Refugee Status Determination Officer whether the relationship still subsists, at the time of renewing their document. An affidavit, similar to **Form 1(B)** (Annexed as **Annexure D**) must be submitted.
- Where the relationship has been terminated, either party is required to submit an affidavit confirming that the relationship has been terminated and, where a partner has died, a copy of a death certificate must be submitted to the Refugee Reception Office within 6 months of the relevant event.
- The partner is required to apply to continue to remain in the Republic for

a period coinciding with the remaining period of his or her asylum visa or recognised refugee certificate. The partner must apply in person for asylum at the Refugee Reception Office where the visa or certificate was issued or depart the Republic.

Unaccompanied minors and persons with mental disabilities – Section 21A read with Regulation 10

Note: An unaccompanied child is a person under the age of 18 who is not accompanied by his or her biological parent/s or adoptive parent/s or legal guardian.

Where a child is found to be unaccompanied and it is found that the child is clearly an asylum seeker and a child in need of care, the child must be issued with an asylum seeker visa and brought before the children's court in the district in which they were found – this process must be dealt with in terms of the Children's Act 38 of 2005 and referred to the Department of Social Development.

If after investigation a person suspected to have a mental disability is found to be an asylum seeker the person must be issued with an asylum visa and be referred to a health establishment in terms of the Mental Health Care Act 17 of 2002.

The Director-General must, on referral of an unaccompanied minor and a person with a mental disability, record the name of the official who received the child or person and keep a record of all referrals to the Department of Social Development or health establishments.

Applying for asylum online

Since the beginning of the COVID-19 pandemic, the Department of Home Affairs requires asylum seekers to apply for asylum online, using an email address.

[**All applications are done online:** please see the UNHCR website for further details: **https://help.unhcr.org/southafrica/get-help/asylum/** and the Department of Home Affairs FAQ, Annexed as **Annexure E**].

STEP 1: It is important that the asylum seeker knows at which Refugee Reception Office they intend to apply, as at some stage during the process they will need to travel to the Refugee Reception Office where they have applied. To start the application process, the asylum seeker will use an email address.

Note: Despite Cape Town having a Refugee Reception Office, they are currently not accepting new applications.

STEP 2: The asylum seeker must have their own personal email address. If they do not have their own email address, it will be necessary for them to create one – it is important that asylum seekers have their own email address as the Department of Home Affairs may respond to the personal address used. They will need to have access to the e-mail account in the future.

STEP 3: The asylum seeker must then send an email to **newasylum2022@dha.gov.za.** In the email, the asylum seeker needs to state that they intend to apply for asylum at the Refugee Reception Office.

The email will be addressed to the Department and the subject line should include the full name of the Refugee Reception Office where application for asylum is being made. In the body of the email, the following should be included:

- Full name and surname of applicant;
- Country of origin;
- Intention to apply for asylum; and
- Contact details.

STEP 4: After sending the email to the Department of Home Affairs, the asylum seeker will receive a form that must be completed (either by hand or electronically). Attach all supporting documents to the form, i.e. marriage certificate, birth certificates of children, etc. The asylum seeker must then return the form to the Department, via email.

STEP 5: After sending the application form, the asylum seeker will then receive another email from the Department which will include a letter that serves as an appointment letter. The letter will reflect a date and a time and a location – the asylum seeker will have to attend at the relevant Refugee Reception office on the specified date and time. All dependants declared in the asylum seeker's application form will need to attend the appointment as well.

10

Interview with a RSDO – Regulation 14

Once an asylum seeker attends at a Refugee Reception Office and the intake process has been completed, the asylum seeker will be scheduled for an interview with a Refugee Status Determination Officer (RSDO). The interview can take place immediately after the asylum seeker's biometrics and information has been taken, or they can be given a specified time and date to report for the interview.

Before the interview can take place, the RSDO must inform the asylum seeker of the procedure that must be followed in considering their application for asylum.

Note: The proceedings of the interview must be recorded.

During the interview, the RSDO will ask a series of questions in order to determine whether the asylum seeker qualifies to be a refugee, such as: why they fled their country and why they cannot return.

The RSDO may also require further information or make reference to certain country information at their disposal.

11

Receiving a decision from the RSDO – Section 24

After the Refugee Status Determination Officer (RSDO) conducts an interview with the asylum seeker, the RSDO must either:

1. Reject the application as unfounded[9];
2. Reject the application as manifestly unfounded[10];
3. Refer any question of law to Standing Committee[11];
4. Grant refugee status[12].

The decision, as mentioned before, is recorded in writing and a copy thereof is given to the asylum seeker. The decision must be given to the asylum seeker within 5 working days after the date of the rejection. Upon receipt of the decision (which will usually be handed to the asylum seeker at the relevant Refugee Reception Office where they go to renew their asylum seeker permit) the asylum seeker will be required to sign for it.

Note: It is quite common for asylum seekers to receive decisions months and sometimes years after applying for asylum.

While waiting for his or her asylum application to be finalised an asylum seeker is entitled to be issued with an asylum seeker visa. This visa will allow the asylum seeker to reside in South Africa legally. From time to time, the visa will have to be extended.

It should be noted that it can take many months, if not years, for an asylum seeker application to be processed because there are huge backlogs. An asylum seeker accordingly may have to return many times to renew their permit and may remain stuck in the system as an asylum seeker for a long time.

9 section 24(3)(c) of the Refugees Act
10 section 24(3)(b) of the Refugees Act
11 section 24(3)(d) of the Refugees Act
12 section 24(3)(a) of the Refugees Act

12

Application rejected as unfounded – Section 24B and Regulation 16

Where an application for asylum has been rejected as 'unfounded', the asylum seeker has the right to appeal the decision to the Refugee Appeals Authority – an internal tribunal set up in terms of section 8A of the Act. It is the duty of the RSDO to inform the asylum seeker of their right to appeal the decision. The appeal must be submitted, in writing, to the Refugee Reception Office within 10 working days of receiving the decision.

The appeal must detail the grounds of appeal and must correspond to **Form 9**, attached as **Annexure F**. It is important for applicants to understand that if the information contained in the grounds of appeal is inconsistent with information stated in their original application this may prejudice them because the Refugee Appeal Authority may find that the inconsistencies negatively affect the credibility of the applicant and his or her case.

The consequence of not submitting an appeal within 10 days will result in the decision taken by the RSDO to be considered final. The application will therefore have been finally rejected and the asylum seeker will no longer be permitted to remain in South Africa.

Note: If the asylum seeker is able to prove that they have compelling reasons for submitting the appeal after 10 days, their appeal might be considered. Reasons for late lodgement of appeal:

- Institutionalisation
- Entry into a witness protection programme
- Quarantine
- Arrest without bail
- Any other compelling reasons

The asylum seeker will have to make an application for condonation to the Refugee Appeals Authority, supported by evidence, in accordance with its Rules.

12

Once the appeal has been submitted, it will be sent to the Refugee Appeals Authority for consideration. The Refugee Appeals Authority will then schedule a date to hear the appeal. The asylum seeker will be notified of the date and time of the hearing, in writing. Asylum seekers will sometimes refer to this as a 'second interview'.

Note: An asylum seeker is entitled to have legal representation at the hearing.

Once the hearing is scheduled, the asylum seeker will have to appear in person at the hearing. The Refugee Appeal Authority will ask the asylum seeker questions about their claim. An asylum seeker who fails to appear before the Refugee Appeals Authority may have their appeal determined on the documentation submitted to the Refugee Appeals Authority.

The Refugee Appeals Authority will consider the claim for asylum and provide an outcome, in writing.

The Refugee Appeals Authority can make either one of the following decisions:

- Issue a final rejection: it may dismiss the appeal and uphold the RSDO's decision to refuse asylum. In such instance the appellant will receive a notice to leave the country within a stipulated period of time.

Note: The only way to challenge a final rejection is by way of a judicial review instituted in a High Court.

- Grant refugee status: it may uphold the appeal and set aside the decision of the RSDO and grant the asylum seeker refugee status.
- Remittal to the RSDO: it may remit the matter back to the RSDO in order for the RSDO to re-interview the asylum seeker and to reconsider the matter and make a new decision. This can occur where new information, which is material to the application, is presented during the appeal.

Note: While the asylum seeker is waiting for a decision to be made on his or her appeal they are entitled to have their asylum visa renewed.

13

Application rejected as manifestly unfounded, fraudulent or abusive – Section 24 (read with 9C) and Regulation 15

If an application for asylum has been rejected as manifestly unfounded, abusive or fraudulent, the Standing Committee (which is a Committee set up in terms of section 9 of the Refugees Act) must review the decision. In this instance, the decision will automatically be referred to the Standing Committee.

Note: Previously asylum seekers could submit written representations to the Standing Committee, however with the amendment of the Refugees Act, it is not clear whether this is possible.

The Standing Committee, after receiving the decision from the RSDO will review the decision and can make one of the following decisions:

- Issue a final rejection: It may confirm the decision of the RSDO to reject the claim which will mean that the asylum seeker's claim will have been finally rejected. Pursuant to such a decision the asylum seeker will receive a notice to leave the country within a stipulated period of time.

Note: The only way to challenge a final rejection is by way of a judicial review instituted in a High Court.

- Grant refugee status: the Standing Committee may set aside the decision of the RSDO and granted the asylum seeker refugee status.
- Remit back to the Refugee Reception Office: the Standing Committee may remit the matter back to the Refugee Reception Office with recommendations as to how the matter must be dealt with.

The Standing Committee will inform the Refugee Reception Office of its decision, and record the decision in writing on **Form 8**, annexed as **Annexure G**. The written decision will be sent to the Refugee Reception Office, whereafter the Standing Committee will be *functus officio*. The decision will then be given to the asylum seeker at the Refugee Reception Office where the application was made.

14

Application for asylum is granted – Section 27 and regulation 17, 18, 19.

If an asylum seeker is granted refugee status, it means that they met the definition of a refugee contained in Section 3 of the Act and are a recognised refugee (see above).

A refugee, and their dependants, will be issued with a certificate of recognition as a refugee. This certificate will ordinarily last 4 years from the date on which it was issued, unless it is withdrawn or it ceases prior to expiry. The certificate must be renewed at least 90 days before it expires.

A refugee is entitled to the following:

Identity document: A refugee, upon application, must be issued with an identity document (refugee identity document). A refugee who is older than 16 must, immediately after receiving their certificate of recognition as a refugee, apply at the relevant RRO for an identity card or document on **Form 11** attached as **Annexure H**. An application for an identity document must be accompanied by a copy of the applicant's certificate and their biometrics. The identity document will be valid for the same time period as the certificate. Should a refugee need to replace the identity document, a fee will be charged.

This identity document is also known as the red ID book.

Travel document: A refugee can apply for a travel document on **Form 12** attached as **Annexure I**.

Note: A refugee cannot leave the country without a travel document. And if they are in possession of a travel document, they may not return to their country of nationality, as doing so will be deemed as them re-availing themselves.

An application for a travel document must be accompanied by a copy of the applicant's certificate (which must be valid for a period of 180 days at the time of applying); a copy of a valid refugee identity document and the applicant's biometrics.

Where the applicant is younger than 16, the applicant must be assisted by a parent or legal guardian and the application must be accompanied by a copy of a birth certificate, a copy of the certificate of recognition and their biometrics.

A fee is charged for the application.

Seek employment: A refugee does not have to apply to have their certificate of recognition endorsed in order to seek employment.

Permanent residence: Where a refugee has held refugee status for ten or more years, they may apply for permanent residence in terms of section 27(d) or 31(2)(b) of the Immigration Act. The refugee will however first need to apply for certification, to be recognised as a refugee indefinitely by the Standing Committee. [13]

Note: When a refugee applies for certification, the Standing Committee can either confirm that they will be a refugee indefinitely or the Standing Committee can withdraw their refugee status. There is accordingly some risk attached to applying for certification and clients need to be made aware of this.

13 In terms of Section 27(c) of the Refugee Act,

15

Application for a refugee ID or travel document online

STEP 1: The refugee must have their own personal email address. If they do not have their own email address, it will be necessary for them to create one – it is important that asylum seekers have their own email address as the Department of Home Affairs may respond to the personal address used. They will need to have access to the e-mail account in the future.

STEP 2: To apply for an identity document or travel document, the process will be started by sending an email to the Department of Home Affairs. However, the refugee will have to attend physically at the office for an in-person appointment. **Take note of the following addresses:**

Refugee Identity Document: **refugeeID@dha.gov.za**

Enquiries related to Identity Documents: **enquiryRefugeeID@dha.gov.z**a

Travel Documents: **traveldoc@dha.gov.za**

Inquiries related to Travel Documents: **enquirytraveldoc@dha.gov.za**

For collection of Identity Documents and Travel Documents:

Pretoria: **collectionDTRRO@dha.gov.za**

Durban: **collectionDurban@dha.gov.za**

Musina: **collectionMusina@dha.gov.za**

Cape Town: **collectionCTRRO@dha.gov.za**

Gqeberha: **collectionPERRO@dha.gov.z**a

STEP 3: After sending the email to the Department of Home Affairs, the refugee should receive an appointment letter which reflects the date and time they must attend at the Refugee Reception Office.

Note: The online application process is hurdled with issues. The most common issue is the Department of Home Affairs delay in responding to applicants. Where necessary, further legal intervention may be necessary, i.e. writing a letter of demand. However, each matter will have to be determined on a case-by-case basis.

16

Renewing an Asylum Seeker Visa/Refugee Document

From time to time, an asylum seeker must renew their asylum seeker visa or refugee document – this includes principal applicants and dependants. When dependants renew their visa or document, the principal applicant is required to attend at the Refugee Reception Office with them.

Generally, an asylum seeker or refugee would attend at a Refugee Reception Office in person to renew their permit. However, since the COVID-19 pandemic, renewals can be done via email.

Renewing asylum or refugee documents online

STEP 1: The asylum seeker/refugee must have their own personal email address. If they do not have their own email address, it will be necessary for them to create one – it is important that asylum seekers have their own email address as the Department of Home Affairs may respond to the personal address used. They will need have access to the e-mail account in the future.

STEP 2: The asylum seeker/refugee will need to download a form and complete it, either by hand or electronically. One form must be completed for each person.

It is important that the asylum seeker/refugee attach the current asylum or refugee document and their proof of address. If the asylum or refugee document has been lost, a commissioned affidavit stating the date and how it was lost, is needed.

Parents or legal guardians must sign the form on behalf of minor dependants.

STEP 3: After the form has been completed, the completed form together with the supporting documents must be sent from the asylum seeker or refugee's personal email address. The email must be addressed to the Refugee Reception Office where the most recent visa or certificate was obtained.

The subject line must include the asylum seeker or refugee's file number, as reflected on their documentation.

Take note of the relevant email addresses:

Pretoria/Desmond Tutu Refugee Reception Office

Asylum seeker renewal: **dtrrc.extension22@dha.gov.za**

Refugee renewal: **dtrrc.extension24@dha.gov.z**a

Musina Refugee Reception Office

Asylum seeker renewal: **musinarrc.extension22@dha.gov.za**

Refugee renewal: musinarrc.**extension24@dha.gov.za**

Cape Town Refugee Reception Office

Asylum seeker renewal: **ctrcc.extension22@dha.gov.za**

Refugee renewal: **ctrcc.extension24@dha.gov.za**

Gqerberha Refugee Reception Office

Asylum seeker renewal: **perrc.extension22@dha.gov.za**

Refugee renewal: **perrc.extension24@dha.gov.za**

Durban Refugee Reception Office

Asylum seeker renewal: **durbanrrc.extension@dha.gov.za**

Refugee renewal: **durbanrrc.extension@dha.gov.za**

STEP 5: If the refugee or asylum document expired after 26 February 2020 – the Department of Home Affairs will send a renewed asylum or refugee document by email. The relevant document will be sent to the email address used to request the renewal. The password needed to open the document will be the asylum seeker or refugee's file number, as it appears on their document.

If the refugee or asylum document expired before 26 February 2020 – the Department of Home Affairs will arrange an appointment. The Department of Home Affairs will inform the asylum seeker or refugee via email that they will be given a date for an appointment. The appointment date will come via a further email and have an appointment letter attached to it. Because of the date of expiry, the asylum seeker or refugee will have to attend at a Refugee Reception Office to renew their permit. They will not be permitted to renew their document online.

17

Failing to renew an asylum visa (Section 22(12); 22(13) and Regulation 9)

According to the 2017 Amendments to the Refugees Act, an application is automatically considered abandoned if an asylum seeker does not renew their asylum visa within 30 days of their visa expiring. Upon the expiry of the 30 days, the RSDO will refer the matter to the Standing Committee and inform them that the asylum seeker's claim has been abandoned.

Should the asylum seeker not have renewed their visa because of the following 'compelling reasons', the asylum seeker would need to provide proof thereof to the Standing Committee:

- Hospitalisation
- Quarantine
- Arrest without bail
- Involvement in a witness protection programme
- Institutionalisation
- Or other 'compelling reasons'

If the Standing Committee endorses that the application for asylum is abandoned, the asylum seeker will be referred to an immigration officer. The application will then be classified as abandoned and the asylum seeker will not be allowed to apply for asylum again.

However, these provisions were recently declared invalid and unconstitutional in the matter of *Scalabrini v Department of Home Affairs (5441/20) [2023] ZAWCHC 28 (13 February 2023)* – please see below case summary.

The Scalabrini Centre of Cape Town launched an application for an interdict in the High Court to stop the implementation of certain provisions in the Refugees Act and Regulations which state that an application for asylum is deemed as abandoned if not renewed within 30 days of its expiration. The High Court granted the interdict pending the outcome of a constitutional challenge against these provisions, and the Scalabrini Centre subsequently launched a constitutionality challenge. The abandonment provisions severely impacted asylum seekers, who faced arrest and deportation to countries where they may face persecution. It was argued that these

provisions violated the international law principle of non-refoulement, which forbids the return of asylum seekers to a country where they would face persecution. The Minister argued that the abandonment provisions served a purpose, but on 13 February 2023, Judge Goliath in the High Court held that the provisions were arbitrary and violated the core principle of refugee law. The High Court ruled that the abandonment provisions are inconsistent with the Constitution and therefore invalid. The Minister was ordered to pay Scalabrini's legal costs. The matter was referred to the Constitutional Court for confirmation.

Note: An asylum seeker cannot leave South Africa while their application for asylum is still in process. If they leave the country without the requisite authority, their asylum claim will cease.

18

Exclusion From Refugee Status – Section 4

If the Refugee Status Determination Officer believes that an asylum seeker has been involved in the following activities, the asylum seeker will not qualify for refugee status:

- A crime against peace, a crime against torture, a war crime or a crime against humanity.
- An offence defined in the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004 (i.e. terrorist acts)
- Committed a crime outside the Republic – which was not political in nature, and if committed in South Africa would be punishable by imprisonment without the option of a fine.
- Is guilty of acts contrary to the tenets of the United Nations or the African Union.
- Enjoys protection of another country where refugee status has been granted, or is a resident or citizen.
- Committed a crime listed in Schedule 2 of the Criminal Law Amendment Act 105 of 1997.
- Committed an offence related to being in possession, or acquiring, or presenting a fraudulent South African ID, passport, travel document, temporary residence visa or permanent residence permit.
- Is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary.
- Did not enter the country through a recognised port of entry and had no compelling reasons for doing so.
- Failed to report to the Refugee Reception Office within 5 days of entry into the Republic in the absence of compelling reasons.

19

Cessation of refugee status - Section 5

A person will cease to qualify for refugee status, should the following occur:

- They voluntarily re-avail themselves of the protection of the country of their nationality.
- Having lost their nationality, they re-acquire it by some voluntary and formal act.
- They become a permanent resident or citizen of the Republic or acquire the nationality of another country and enjoy protection of said country.

Note: Where a person has had their permanent residence withdrawn, they are entitled to re-apply for refugee status.

- They voluntarily re-establish themselves in the country they left or return to visit said country.
- They can no longer continue to refuse to avail themselves of the protection of the country of their nationality because the reason they were recognised as a refugee has ceased to exist and no other circumstances can justify them continuing being recognised as a refugee.

Note: This provision does not apply to a refugee who is able to invoke compelling reasons for refusing to avail themselves of the protection of the country of their nationality.

- Where a person has committed:
    a. A crime listed in Schedule 2 of the Criminal Law Amendment Act 105 of 1997; or
    b. An offence related to being in possession, or acquiring, or presenting a fraudulent South African ID, passport, travel document, temporary residence visa or permanent residence permit.
- The Minister has issued an order to cease the recognition of the refugee status of any individual refugee or a category of refugees, or to revoke such status.

Note: a person is deemed to have re-availed themselves if they:

- seek consular services at a diplomatic mission representing their country;
- apply for assistance or an official document at a diplomatic mission representing their country;
- avail themselves of the assistance of any State official or institution associated with or in their country of origin;
- present themselves on the premises of any diplomatic premises;
- travel abroad other than with a refugee travel document;
- apply and/or receive a benefit afforded to citizens of their country;
- stand for political office or vote in any election in respect of their country;
- enter (irregularly or through port of entry) their country, without the approval of the Minister;
- participate in a political campaign or activity related to their country; or
- travel abroad in violation of the conditions attached to the Refugee travel document.

20

Withdrawal of refugee status – Section 36 and Regulation 23

The Standing Committee can under the following circumstances withdraw a refugee's status:

- where a person was conferred with refugee status due to fraud, forgery, false or misleading information of a substantive nature;
- where a person was conferred with refugee status due to an error, omission or oversight; or
- where the person ceases to qualify for refugee status.

Before the Standing Committee can withdraw a refugee's status, they must provide a written warning to the refugee, indicating:

- that the Standing Committee intends on withdrawing their status;
- the reasons for the intended withdrawal; and
- that the refugee is entitled to make written representations to the Standing Committee, within 30 days of the date of receipt of the notice.

Once the Standing Committee receives the submissions, they must consider them and decide whether to uphold the refugee status or withdraw the refugee status.

Note: If a refugee fails to make representations within 30 days, their refugee status shall automatically lapse.

21

Detention and deportation

Where a person does not have a legal basis to stay in the Republic, they must vacate the country immediately, otherwise they can be subject to deportation and detention in terms of the Immigration Act 13 of 2002 – such a person is generally referred to as an 'illegal foreigner'.

Deportation is a function performed by government which results in a foreign national being returned to their country of origin when they no longer have the legal authority to reside in a country. The process is provided for and regulated by section 34 of the Immigration Act.

Deportation and Detention in terms of Section 34 of the Immigration Act

Section 34 of the Immigration Act provides immigration officers with very wide powers to arrest and deport illegal foreigners without a warrant, and more importantly, to detain them in a manner and at a place to be determined by the Director-General pending deportation.

Detention and deportation will usually be initiated where an immigration officer identifies an individual as an 'illegal foreigner'. The individual will be informed, in writing, of the decision to deport them – they are entitled to appeal this decision.

The immigration officer has the discretion to detain an individual pending their deportation. Detention will not take place in all instances. Should an immigration official arrest and detain an individual to await their deportation, they can only be held at a specified place. However, at some point during the detention, the individual may be transferred to the Lindela Repatriation Centre, or they can be deported from the place of initial detention.

Prior to judicial intervention, the section allowed for suspected illegal foreigners to be detained potentially for up to 90 days with little protections afforded, including no automatic judicial review of the detention before 30 days or right to appear before a court reviewing the decision to detain. This without setting out any objectively determinable criteria that need to be considered by an immigration officer when exercising their discretion to arrest and detain illegal foreigners, or providing any guidance as to the circumstances in which these powers are to be exercised.

As a result, in 2017 Lawyers for Human Rights (LHR) successfully challenged the constitutionality of subsections 34(1)(b) and (d) - the provisions regulating the

detention of illegal foreigners - in the High Court. The matter made its way on appeal to the Constitutional Court which, while agreeing that the provisions were unconstitutional, set aside the order of the High Court because it found that the High Court had overreached in making the order it did. The Constitutional Court declared section 34(1)(b) and (d) of the Immigration Act to be inconsistent with sections 12(1) and 35(2)(d) of the Constitution and therefore invalid. It however suspended the declaration of invalidity for 24 months to enable Parliament to correct the defect and provided that, pending the legislation to be enacted or upon the expiry of this period:

1. any illegal foreigner detained under section 34(1) shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days.

2. illegal foreigners who were in detention at the time the order was issued shall be brought before a court within 48 hours from the date of this order or on such later date as may be determined by a court.

Parliament and the Minister failed to pass corrective legislation in accordance with the Constitutional Court's order, which was required to be passed in 2019, causing much confusion about the legal position subsequent to the expiry of the 24 months. Certain magistrates have taken the view that the failure to pass corrective legislation on time means that sections 34(1)(b) and (d) are no longer in force, with untenable consequences. In 2023 the Minister belatedly sought to approach the Constitutional Court to "revive" the suspension order (the revival application). LHR argued that it was not possible for the Court to grant such an order and submitted that the Court should grant the following order instead:

1. It is declared that, on a proper interpretation of the Court's 2017 order and subject to what follows, sections 34(1)(b) and (d) of the Immigration Act continue to be in force and effect.

2. Any illegal foreigner detained under section 34(1) of the Immigration Act shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of 48 hours, if 48 hours expired outside ordinary court days.

3. A warrant of court extending the detention of the illegal foreigner in terms of section 34(1)(d) of the Immigration Act may not be granted unless the

illegal foreigner has appeared in person before the court concerned and been given an opportunity to make representations to the court concerned.

4. Any immigration officer or court considering a detention in terms of section 34(1) must consider whether the interests of justice permit the release of the illegal foreigner concerned, subject to reasonable conditions.

5. The Minister is, within two months of this order, to file a report with the court and Lawyers for Human Rights setting out a plan and proposed timetable for the enactment of legislation to amend section 34(1) of the Immigration Act in accordance with the Court's 2017 judgment and to file progress reports every three months thereafter until the legislation is enacted.

At the time of finalising this Guide the Constitutional Court had yet to hand down its order in the revival application. It appears however that in the interim the most sensible interpretation of the position is that sections 34(1)(b) and (d) continue to operate but subject to the proviso as per the Constitutional Court's 2017 order that an illegal foreigner detained under section 34(1) shall be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours if the 48 hours expires outside of ordinary court days. In our view, if detainees are not brought before a court within 48 hours as required by the Constitutional Court's order their continued detention will be unlawful.

Detention and Deportation in terms of the Refugees Act - Section 28 and Regulation 21

Section 28 and 29 of the Refugees Act as amended also make provision for the Minister to order the removal and detention of an asylum seeker or refugee. In certain instances, the Minister of Home Affairs may make an order to remove a refugee, asylum seeker or categories of refugees or asylum seekers (and their dependants) based on grounds of national security, national interest, or public order. Should an order of this nature be made, any visa or status granted to a refugee or asylum seeker will be revoked – in these circumstances, the UNHCR will be informed, and they can remove or resettle the person. The person will have their asylum or refugee document removed, and the Director-General of Home Affairs will arrange that they be transported to any destination in South Africa and removed. If the person wishes to challenge their removal, they can approach the High Court within 48 hours. If the High Court upholds the affected asylum seeker/

21

refugee's challenge to the decision to remove him or her, it must be confirmed by the Constitutional Court within 2 weeks. If not, the High Court order preventing deportation will lapse and the person can be removed from the Republic.

However, the principle of *non-refoulement* prevents government from deporting individuals or categories of persons where there exists a 'reasonable risk of harm' that these persons will face persecution upon their return to their country of origin.

An individual can also choose to deport themselves voluntarily, if they satisfy an immigration officer that they have the means and proper documentation to vacate th**e country within 14 days. I**n this instance, the individual will be provided with a **Form 21**, annexed as **Annexure J**, which will require them to attend at the Department of Home Affairs on a stipulated date in order to prove that they are able to vacate the country.

22

The Right to education

Everyone in South Africa has the right to basic education, regardless of their immigration status – this right is affirmed in Section 29(1) of the South African Constitution which provides that:

" Everyone has the right to basic education, including adult basic education."

Basic education means from Grade 1 to Grade 9.

Note: At section B.10 of an asylum seeker visa, the condition to seek and receive basic education or adult basic education will appear.

In terms of Regulation 5 (3)(a) it is up to the Standing Committee to determine the conditions under which qualifying asylum seekers may be employed or study (post basic education) and to determine in which sectors an asylum seeker is not permitted to work or study.

If an asylum seeker wishes to study after the completion of their basic education, they will have to complete **Form 7** – Letter of Enrolment at School, annexed hereto as **Annexure K**.

After submitting Form 7 at a Refugee Reception Office, the Standing Committee will determine the time period and conditions under which an asylum seeker can continue with their studies.

If an asylum seeker is given permission to study further, they will have to furnish the Department with a letter from the relevant institution, confirming enrolment, within a period of 14 days from the date of the asylum seeker obtaining permission.

Admission to public schools

The Admissions Policy for Ordinary Public Schools provides a framework for schools to develop their admission policies.

It is important to note that denying learners access to schools because of their immigration status is prohibited by the South African Schools Act 84 of 1996, as it unfairly discriminates against the learners.

Previously, sections 15 of the Admissions Policy required parents to present a birth certificate for their child to the principal when applying for admission of their child to an ordinary public school. A child could only be "conditionally" admitted for 3 months while a copy of their birth certificate was sought to be obtained. Thereafter

if they still were not able to produce a birth certificate the child could be compelled to leave. Section 21 of Admissions Policy moreover required parents of learners classified as " illegal aliens" to prove that they had applied to legalise their stay before their children could be admitted to school.

These provisions of the Admission Policy were declared unconstitutional in the matter of *Centre for Child Law & Others v Minister of Basic Education (2840/2017) [2019] ZAECGHC 126; [2020] 1 All SA 711 (ECG); 2020 (3) SA 141 (ECG) (12 December 2019)*

Case summary:

In 2016, the Superintendent General of the Eastern Cape Department of Education issued a Circular ordering that funding for learners without valid identity or passport numbers was to be withheld from schools.

This resulted in the exclusion of undocumented children from schools and furthermore excluded non-national children who were unable to present permits which allowed them to reside in the country. The Applicants in this matter therefore set out to have both the circular set aside and deemed unlawful and unconstitutional and also sought to have clauses 15 and 21 of the Admission Policy as well as certain provisions of the Immigration Act declared unconstitutional. Just prior to the hearing the Eastern Cape Education Department undertook not to implement the circular any longer and accordingly this aspect of the matter fell away.

The High Court did however go on to rule on the constitutionality of the two offending clauses of the Admission Policy. It held that both clauses which had the effect of excluding undocumented children from schools constituted a severe limitation of various constitutional rights of the impacted children including s 9(1), 10, 28(2) and 29(1)(a). The Court reiterated the importance of section 29(1)(a) of the Constitution which affords everyone the right to basic education regardless of their documentation or immigration status. In addition, the court ordered that alternative proof of identification be accepted such as a sworn statement deposed to by a parent, caregiver or guardian in instances where children do not have birth certificates or other forms of formal documentation. This judgment emphasises the rights of all children to receive a basic education in South Africa regardless of whether they have a birth certificate and alleviates the challenges associated with obtaining official documentation. The court emphasised that education is a right and not privilege.

The Department of Basic Education has since issued Circular 1 of 2020, clarifying that the right to education extends to everyone and that schools are directed to follow the CCL judgment.

Schools are therefore not allowed to refuse admission to any leaner who wishes to seek admission to the school, on the basis that the learner does not have a birth certificate, passport or permit. Should the school require some form of identification, same can be obtained by way of an affidavit or a sworn statement in which the parent, guardian or caregiver of the child fully identifies the child.

23

The Right to work

Prior to the 2017 amendments to the Refugees Act, asylum seekers were generally entitled to work in accordance with directives issued by the Standing Committee. This is pursuant to a decision made in the Supreme Court of Appeal in the *Watchanuka matter*. Currently in terms of section 22(8) an asylum seeker no longer has the automatic right to work in South Africa, even if they are in possession of an asylum seeker visa. An asylum seeker will have to apply for an asylum seeker document that is endorsed with permission to work. Once the application has been submitted, the Standing Committee will assess whether they will grant the asylum seeker permission to work while their claim is being adjudicated.

Note: In considering whether to grant an asylum seeker permission to work, an assessment will be conducted in which the Standing Committee will determine whether the asylum seeker is able to sustain themselves, and their dependants, either with or without the help from family and friends or assistance from an organisation.

If an asylum seeker is given permission to work, they will have to furnish the Department with a letter of employment within a period of 14 days from the date of the asylum seeker obtaining employment. The letter from the employer must be written on **Form 6,** annexed hereto as **Annexure L.**

If after 6 months the asylum seeker is not able to prove that they are gainfully employed, the Director-General must revoke the endorsement.

24

The Right to health care

Section 27(1)(a) of the Constitution provides that everyone has the right to health care services, including reproductive health care. Section 27(3) further provides that 'no one may be refused emergency medical treatment.'

However, despite section 27(1)(a) providing that everyone is entitled to access health care services, this right must be read with section 27(2) which limits the state's obligation to taking reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. In practice therefore, section 27 does not entitle everyone to free health care on demand, and accordingly the state has sought to put in place policies and practices which either limit or deny migrants access to health care on the basis of their immigration status. The constitutionality of such discriminatory practices has not yet been tested before our courts. Furthermore, even in instances where migrants are entitled by virtue of legislation to free health care or to access health care based on a means test assessment, they are often denied free treatment or treatment at all due to medical xenophobia, or else are unlawfully required to pay unaffordable private patient rates. The complexity of access to health care is also exacerbated by laws and policies that are often not aligned, and by hospitals implementing and interpreting policies incorrectly.

Relevant Provisions of the National Health Act and the Refugees Act

The Refugees Act provides that Refugees are entitled to the same access to health care as South African citizens. This right is widely interpreted to include asylum seekers as well.

In practice, even though everyone can access health care services, this does not mean they are entitled to these services free of charge. Only certain services and certain categories of persons are entitled to state medical services free of charge.

Most South Africans are entitled to access health services on the basis of the application of a means test. This means that an individual will be charged according to their household income. In terms of the National Uniform Patient Fee Schedule for the payment of fees in public hospitals, foreigners are categorised as full paying patients, except for the following categories of foreign patients:

- Immigrants permanently resident in the Republic of South Africa, who have attained citizenship;

- Non-South African citizens with temporary residence or work permits; and
- Persons from SADC countries who enter the RSA and are undocumented.

Accordingly in terms of this Schedule, refugees and asylum seekers are required to pay full fees, which certainly in so far as refugees is concerned is inconsistent with the Refugees Act, and unlawful.

Below is detailed the legal framework relating to categories of persons who should receive health care for free, at any level.

Section 4(3) of the National Health Act and the Provision of Free Health Care Services

Section 4(3) of the National Health Act 61 of 2003 (the National Health Act) provides for the provision of certain free healthcare services (subject to any conditions the Minister may prescribe)[14]. These include:

1. The provision of free primary health care services for persons who are not beneficiaries of medical schemes. This is generally understood to include, at the least, free health care services at public and community clinics; and
2. The provision of free health care to pregnant and lactating women and to children under the age of six at all state healthcare facilities.

However, despite the provisions of section 4(3), migrant pregnant women and children are often denied access to health care because of their immigration status. And in circumstances where they are provided with services, they are often being charged as 'foreign private patients', which means they are being billed at the highest tariff. This practice was recently challenged in the Johannesburg High Court – due to certain policies and subordinate and provincial legislation still being in place in Gauteng, hospitals were using these instruments as the basis for overcharging migrant patients and/or denying them access to hospitals. The Johannesburg High Court handed down an order in which these policies and subordinate and provincial legislation were declared invalid to the extent that they deny pregnant and lactating women and children under the age of six access to free health care. The order also provided that the Gauteng Department of Health issue circulars to all health care facilities which instruct staff that all pregnant and lactating women and children under the age of six are entitled to free health care, regardless of their immigration status.

The court order is attached hereto as **Annexure M**.

14 The Minister has not prescribed any conditions.

We are aware that there are instances where this court order is not being complied with. Below are contact details where non-compliance of the court order can be reported:

24

Emergency Health Care

As mentioned above, the current legal framework in South Africa governing emergency care expressly provides that no person may be denied emergency medical care.

The definition of a medical emergency can be found in the Medical Schemes Act of 1998 ("the Act") and it defines a medical emergency as the sudden and unexpected onset of a health condition that requires immediate medical or surgical treatment, where failure to provide medical or surgical treatment would result in serious impairment to bodily functions or serious dysfunction of a bodily organ or part or would place the person's life in serious jeopardy.

The Constitutional Court in the matter of *Soobramoney v Minister of Health* ZACC 17, 1998 (1) SA 765 (CC) sought to carefully give content to section 27(3) and defined a medical emergency as "a dramatic, sudden situation or event which is of passing nature in terms of time. There is some suddenness and at times even an element of unexpectedness in the concept of emergency medical treatment."

The National Health Act, in section 5, provides that a health care provider or a health care worker or any health establishment may not refuse a person emergency medical treatment – this means that in an emergency case, an individual must be assisted, regardless of an individual's immigration status or nationality. The outright refusal of medical emergency treatment is unlawful and unconstitutional.

25

Birth Registration

Birth registration for foreign national children is complicated due to the manner in which the legislation is framed and because of unlawful practices.

Section 28(1)(a) of the Constitution expressly states that every child has the right to a name and a nationality from birth. This constitutional right is entrenched in international law, which South Africa must adhere to. It is a right that seeks to protect a child and ensure that their birth is registered. It is key to ensuring a child's right to legal identity, recognition of their legal personality and for them to access basic human rights. It is a constitutional right that is not limited to a particular category of children and indeed applies to every child.

The right to nationality starts with ensuring the right to birth registration – the issuing of a birth certificate for each and every child born in a country is important, as that birth certificate is used at every stage of a child's life and to deny a child that right will fundamentally affect their ability to assert their legal personality and, in some instances, stands in the way of the child accessing rights they are entitled to.

More than this, the right to nationality enshrined in section 28(1)(a) means that when a child is born, regardless of where the child is born, or to whom the child is born, or the immigration status of the child's parents – that child automatically has the right to a name and to a nationality – and this right is very significant.

The fact that every child born in South Africa should be entitled to have their birth registered does not mean however that they are automatically a South African citizen. There is a common misconception that this is the case. It is important to note that issuing a child with a birth certificate does not automatically confer citizenship on the child – a child born to a foreign national parent assumes the parent's nationality from birth. What the birth certificate means is that there is physical proof that the child was born in the country, to their parents, on a specific date. And more importantly, a birth certificate is often the gateway for the child to access rights, such as education, health and, later in life (when the child turns 18), the ability to apply for citizenship.

Moreover, without a birth certificate one cannot apply for an ID or a passport. Accordingly, registration of birth is a key and essential process for all children.

The Births and Deaths Registration Act 50 of 1992

Registration of birth is governed by the Births and Deaths Registration Act 50 of 1992 (the Births and Deaths Registration Act). It provides the requirements for birth

registration of all persons born in South Africa.

Section 9 of the Births and Deaths Registration Act provides for Notice of Births. It provides that in the case of any child born alive, any one of his or her parents or, if the parents are deceased, any of the prescribed persons, shall within 30 days after the birth of such child, give notice thereof in the prescribed manner and in compliance with the prescribed requirements.

The process is governed by Regulations 3 – 8 which detail the requirements that must be met for the registration of the birth of different categories of persons. We specifically look at Regulation 8 which details the process to be followed to give Notice of Birth for children born to parents who are non-South African citizens.

Note: Refer to Regulations 3 - 7 when dealing with clients who are citizens, permanent residents or refugees.

Regulation 8 provides for **notice of birth of children born of parents who are non-South African citizens**:

- A notice of birth of a child born of parents who are non-South African citizens and who are not permanent residents or refugees must be given within 30 days of the birth of the child in the Republic.
- Where the parents are deceased, the notice of birth may be given by the next-of-kin or legal guardian of the child.
- A notice of birth must be given to the Director-General on **Form DHA-24** illustrated in **Annexure N**, hereto and be accompanied by—
    - proof of birth on Form DHA-24/PB attested to by a medical practitioner who—
        attended to the birth; or
        examined the mother or the child after the birth of the child;
    - an affidavit attested to by a person who witnessed the birth of the child where the birth occurred at a place other than a health institution;
    - a certified copy of a valid passport and visa or permit of the mother or father, or both parents, of the child, as the case may be;
    - where applicable, a certified copy of a valid identity document or passport and visa or permit of the next-of-kin or legal guardian;
    - where applicable, a certified copy of an asylum seeker permit issued

in terms of section 22 of the Refugees Act to the mother or father or both biological parents of the child;

- where applicable, a certified copy of the death certificate of any deceased parent of the child;

- where applicable, a certified copy of the marriage certificate of the parents of the child whose birth is sought to be registered;

- Upon approval of a notice of birth, the Director-General must issue to the parents a birth certificate without an identity number.

Notably the documentary requirements listed in Regulation 8 restrict the applicability of the regulation to the birth registration of children born to documented temporary residents or asylum seekers and do not make provision for the registration of births of undocumented migrants.

Note: Recently, a case has been launched to try and do away with this and other barriers related to birth registration. The application concerns the right of every child to have their birth registered immediately or as soon as possible after they are born. The case looks at birth registration from a rights-based approach and from the viewpoint that the right to birth registration is the right of every child, irrespective of their parents' nationality and status in the country. It addresses three broad scenarios, namely;

- Children whose parents are foreign nationals and do not have valid documentation;

- Late registration of children born to foreign parents (currently the regulations do not make provision for this); and

- Abandoned adults.

Despite the Births and Deaths Registration Act providing that any one of the parents or guardians may register the child's birth, the Department of Home Affairs often refuses to register a child's birth if the mother is undocumented or does not have valid documentation, even where the father is a South African citizen and wants to register the child's birth. This practice was challenged in the Constitutional Court in *Centre for Child Law v Director General: Department of Home Affairs and Others (CCT 101/20) [2021] ZACC 31; 2022 (2) SA 131 (CC); 2022 (4) BCLR 478 (CC) (22 September 2021)* – the Department of Home Affairs continually denied fathers their right to register their children's birth due to the limitation imposed on them by section 10 of the Births and Deaths Registration Act. The Constitutional Court

handed down an order providing that fathers are entitled to register their children's birth. See case summary below:

The case concerned Menzile Lawrence Naki, a South African man, and his partner Dimitrila Marie Ndovya, a citizen of the Democratic Republic of Congo, who sought to register the birth of their daughter at the Department of Home Affairs in Grahamstown. The Department refused to register the child's birth on the basis that the mother lacked a valid visa or permit and could not comply with the Regulations made under the Act. The couple subsequently brought an application to the High Court to review and set aside the decision refusing to register their daughter's birth and challenged the constitutionality of the relevant Regulations.

The High Court held that sections 9 and 10 of the Birth and Deaths Registration Act do not prohibit unmarried (South African) fathers from registering the births of their children in the absence of the mother who gave birth to such children. The relief relating to the registration of the child's birth was granted. With leave, the Centre for Child Law appealed to the Full Bench of the High Court ('Full Court') on the question of the constitutional validity of section 10. The Full Court disagreed with the approach taken by the High Court and found that section 10 prevents a father from giving notice of the birth of his child under his surname in the mother's absence. The Full Court thus declared section 10 invalid and inconsistent with the Constitution. This declaration was suspended for 24 months to allow Parliament to remedy the defects. The applicant sought confirmation of the order of the Full Court in terms of section 172(2)(a) of the Constitution before the Constitutional Court. The Constitutional Court confirmed the order of constitutional invalidity made by the Full Court declaring section 10 of the Births and Deaths Registration Act 51 of 1992 (Act) invalid and inconsistent with the Constitution to the extent that it prohibits an unmarried father from giving notice of the birth of his child under his surname, in the absence of the child's mother or without her consent.

However, the Department of Home Affairs has since introduced a practice which requires a father to undergo DNA testing to prove the existence of a relationship between the father and the child(ren). This has resulted in considerable challenges for fathers trying to register their child's birth – not only are DNA tests expensive, but public laboratories have built up a significant backlog which has resulted in DNA test results being delayed.

Withholding Proof of Birth

Recently, there has been an increase in cases reported where public health care institutions are refusing to issue proof of birth notices to certain migrant mothers until they pay the often-large amounts hospitals are unlawfully charging them for delivery.

As mentioned above, when a parent or guardian gives notice of a child's birth to the Department of Home Affairs, the notice must be accompanied by a proof of birth form from the medical facility where the child was born. This form is an essential requirement in order to register a child that was born in a hospital. This practice is unlawful for various reasons. First because, as we have already mentioned, section 4(3) of the National Health Act provides that pregnant and lactating women and children under the age of 6 are entitled to FREE health care if they are not a member or a dependant of a medical aid scheme. Second, because neither the Birth and Death Registration Act nor the relevant regulations empower the Department of Health to withhold a proof of birth form for reasons of non -payment of hospital fees.

In these circumstances, it is imperative that the relevant hospital/clinic be made aware of the recent court order declaring that pregnant and lactating women and children below the age of six have the right to free health care, regardless of their immigration status, and that the practice of withholding proof of birth is not lawful.

26

Citizenship Rights

The Citizenship Act 88 of 1995 (the Citizenship Act) sets out who is entitled to citizenship under South African law and the requirements that need to be met in each instance for a person to qualify for citizenship. It entitles certain categories of persons born in the country, of parents who are not South African citizens, to citizenship, including:

- Children born in South Africa who would otherwise be stateless – Section 2(2) of the Act;
- Children born in South Africa and who have lived in South Africa until they turned 18 and whose parents are permanent residents – Section 2(3) of the Act;
- Children adopted by South African citizens – Section 3; and
- Children born in South Africa to migrants (non-citizens and non-permanent residents) and who have lived in South Africa until the age of eighteen – Section 4(3)

The most common route for children born to foreign national parents who have not been admitted as permanent residents to apply for citizenship is in terms of section 4(3) of the Citizenship Act. It lists four requirements that must be met:

- The applicant must have been born in South Africa;
- The applicant must have lived in South African until the age of 18;
- The applicant's birth must have been registered in accordance with the Birth and Deaths Registration Act ; and
- The applicant's parents must not have been admitted as permanent residents.

Section 2(3) of the Citizenship Act provides for the circumstance where a child was born to foreign national parent(s) who have been admitted as permanent residents. The requirements are otherwise similar to section 4(3) of the Citizenship Act.

Until very recently the Minister failed to promulgate regulations to give effect to section 4(3) of the Citizenship Act, despite the Supreme Court of Appeal ordering him to do so in *Minister of Home Affairs v Ali and Others (1289/17) [2018] ZASCA 169; 2019 (2) SA 396 (SCA) (30 November 2018).*

On 12 June 2023 the Minister finally signed into law regulations governing applications for citizenship in terms of section 4(3). However, the Minister has since withdrawn the Regulations, without providing reasons, and has given notice that he intends to promulgate amended regulations in due course.

At the time this manual was published, the Minister had yet to publish the amended Regulations.

Discussion of Relevant Case Law

Minister of Home Affairs v Ali and Others (1289/17) [2018] ZASCA 169; 2019 (2) SA 396 (SCA) (30 November 2018).

The Supreme Court of Appeal dismissed an appeal by the Minister against a High Court decision that required the Minister to accept and adjudicate section 4(3) citizenship applications made on affidavit (in the absence of regulations) and to promulgate regulations providing for the necessary application forms for section 4(3) applications. The Minister had refused to receive and grant such applications despite the applicants having satisfied the requirements of section 4(3) (which came into effect on 1 January 2013) – arguing that the section did not have retrospective effect and only applied to children born after that date. The High Court rejected the Minister's interpretation and found that the Minister should accept applications on affidavit. It also ordered him to promulgate regulations within one year. The Minister argued that this order encroached on the doctrine of separation of powers.

The Supreme Court of Appeal held that the High Court's decision did not encroach on the doctrine of separation of powers and was necessary given the Minister's delay in making regulations. The Court also found that the Minister's interpretation of the Act did not promote the spirit, purport and objects of the Bill of Rights.

Since the order in Ali, countless applicants have submitted applications by way of affidavit but very few of these applications have been considered and approved. Insurmountable obstacles have been placed in the way of eligible applicants securing their right to section 4(3) citizenship.

Joseph Emmanuel Jose v Minister of Home Affairs (38981/17) [2019] ZAGPPHC 88; 2019 (4) SA 597 (GP)

This case concerned two brothers born and raised in South Africa of Angolan refugee parents who discovered they were eligible for citizenship under section 4(3). After being turned away by the Department of Home Affairs (DHA), the brothers sought the assistance of a legal NGO and then the Pro Bono Practice of a law firm.

26

The law firm assisted the brothers to make applications on affidavit to the Minister, but the Department purported to reject the applications for various spurious reasons. The brothers brought an application to the High Court to enforce their rights in which the brothers argued that once the requirements of section 4(3) are met there is no room for the Minister to exercise a discretion and no basis upon which such application could be refused. The High Court upheld this argument and in March 2019 it ordered the Minister to grant each of the brothers citizenship in terms of section 4(3) within 10 days of the order. The Minister appealed the decision on the question of whether it was competent for the court to order the Minister to grant rather than consider/reconsider the brothers' applications. In August 2019, the Supreme Court of Appeal (SCA) dismissed the appeal and ruled in favour of the brothers.

The SCA recognised the importance of citizenship and considered the requirements for citizenship under section 4(3). The SCA confirmed that the brothers met the requirements and rejected the Minister's defences, including the argument that the brothers had "never applied" for citizenship because they had not used the correct application forms (finding the argument to be spurious because no forms had been made for section 4(3) applications). The SCA also held that the Minister's argument that the matter had to be referred back to him was pointless, given that the brothers clearly met the requirements of section 4(3), and therefore the appeal was contrived and served no purpose. The SCA held that citizenship is not a discretionary decision but a question of law and, therefore, the Minister is required to recognise citizenship if the necessary conditions are met, without further consideration.