CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 250/22

In the matter between:

B[redacted] A[redacted] Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS Second Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS Third Respondent

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES Fourth Respondent

HEAD OF THE KGOSI MAMPURU II CENTRAL CORRECTIONAL CENTRE, PRETORIA Fifth Respondent

Neutral citation: *A[redacted] v Minister of Home Affairs and Others* [2023] ZACC 16

Coram: Maya DCJ, Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J

Judgment: Maya DCJ (unanimous)

Heard on: 16 February 2023

Decided on: 12 June 2023

Summary: Section 12(1) of the Constitution — principle of non-refoulement — section 49(1) and 34 of the Immigration Act 13 of 2002 — illegal foreigner's intention to apply for asylum — lawfulness of detention

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria:

1. Leave for direct appeal is granted and the appeal succeeds.
2. The order of the High Court is set aside and is replaced with the following:
   "(a) It is declared that in terms of section 2 of the Refugees Act 130 of 1998 (Act), the applicant may not be deported until he has had an opportunity of showing good cause as contemplated in section 21(1B) of the Refugees Amendment Act 11 of 2017, read with regulation 8(3) thereto, and, if such good cause has been shown, until his application for asylum has been determined in terms of the Act.
   (b) The first and second respondents shall pay the costs, including the costs of two counsel where employed."
3. The first, second, fourth and fifth respondents are directed, to the extent necessary, to take all reasonable steps, within 14 days from the date of this order, to give effect to paragraph 2(a), failing which the applicant must be released from detention forthwith unless he may lawfully be detained under the Criminal Procedure Act 51 of 1977.
4. The first and second respondents shall pay the costs, including the costs in this Court of two counsel where employed.

JUDGMENT

MAYA DCJ (Kollapen J, Madlanga J, Majiedt J, Makgoka AJ, Mathopo J, Potterill AJ, Rogers J and Theron J concurring):

Introduction

[1] This is an urgent application for leave to appeal directly to this Court.[1] The applicant, Mr B[redacted] D[redacted] A[redacted], seeks to challenge the order of the High Court of South Africa, Gauteng Division, Pretoria (High Court). That Court struck his urgent application from the roll for lack of urgency and mulcted him with costs.

[2] In the High Court the applicant sought an order, inter alia, interdicting the respondents from deporting him until his status under the Refugees Act,[2] alternatively under the Refugees Amendment Act,[3] had been lawfully and finally determined; declaring his continued detention unlawful and that he was entitled to remain in South Africa for a period of 14 days in order to allow him to approach a Refugee Reception Office (RRO); and for his immediate release from detention. He also prayed for an order directing the respondents to accept his asylum application and to issue him with a temporary asylum seeker permit pending finalisation of his

[1] The applicant mischaracterised the application as one for direct access in his notice of motion. But nothing turns on this technical error as the threshold for the grant of applications for direct leave to appeal and direct access requires the exercise of discretion by this Court in consideration of the same factors. These include the importance of the constitutional issue and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute may arise in the matter, the possibility of obtaining relief in another court, the time and costs that may be saved by coming directly to this Court and the overarching interests of justice. See *Zondi v MEC for Traditional and Local Government Affairs* [2004] ZACC 19; 2005 (3) SA 589 (CC); 2005 (4) BCLR 347 (CC) at para 12; and *e.TV (Pty) Ltd v Minister of Communications and Digital Technologies* [2022] ZACC 22; 2023 (3) SA 1 (CC) 2022 (9) BCLR 1055 (CC) at para 26.

[2] 130 of 1998.

[3] 11 of 2017.

application, including any review or appeal in terms of Chapter 3 of the Refugees Act and the Promotion of Administrative Justice Act[4] (PAJA), if he applied for such a review or appeal.

Parties

[3] The applicant is an Ethiopian national and an "illegal foreigner" for purposes of the Immigration Act.[5] He is currently detained at Kgosi Mampuru II Correctional Services Centre (Kgosi Mampuru) pending his trial and deportation. The first respondent is the Minister of Home Affairs, cited in his official capacity as the official responsible for the administration of the Refugees Act. The second respondent is the Director-General, Department of Home Affairs, also cited in his official capacity. The third to fifth respondents are the National Director of Public Prosecutions, the Minister of Justice and Correctional Services, and the Head of Kgosi Mampuru. They are respectively cited in their official capacities. Only the first and second respondents participated in these proceedings in the High Court. They did not oppose this application and only filed written submissions in response to the directions of the Chief Justice to do so. Any reference to "the respondents" in this judgment is reference to them.

Background facts

[4] The applicant entered South Africa illegally from Zimbabwe on 11 June 2021 as he recounts. He claims to have been persecuted by the ruling party in his homeland for his political and religious beliefs. His family was torched and killed, but he managed to escape and fled to South Africa to save his life. He did not have a passport with him and did not use any of the official ports of entry as he feared being arrested and deported to Ethiopia.

[4] 3 of 2000.

[5] 13 of 2002.

[5] On 7 July 2022, he was arrested in Pretoria for unlawfully entering and residing in South Africa, in contravention of the Immigration Act, and was charged in terms of section 49 thereof. He alleges that upon his arrest, he tried to explain to the arresting officers that he was an asylum seeker and had been trying to apply for asylum since his arrival but the RRO had been closed due to the COVID-19 outbreak. He also told the officials who arrested him that he was fleeing his country for fear of persecution. Shortly after his arrival in the country he had launched an application to compel the respondents to accept his application for an asylum seeker permit but abandoned it because of a lack of funds.[6] However, his explanation fell on deaf ears.

[6] He informed the detention officer of the reasons he had entered the country illegally. But the officer countered that he was in the country for economic reasons and would not accept his explanation. The applicant alleges that he is not fluent in English. During his conversation with the detention officer, which was conducted in English, no interpreter was employed. Thus, he could not express himself properly and could not understand fully what was being said. He contends that he was made to sign a document although he did not understand its contents.

Litigation history

[7] On 9 September 2022 the matter was on the opposed roll in the High Court. It was fully argued. The respondents' counsel merely raised the defence that the matter was not urgent and argued that the applicant could not claim a right to apply for asylum because he had been in the country unlawfully for more than a year, and had also failed to take the court into his confidence about the grounds on which he intended seeking asylum.

[8] The following is gleaned from the record of the hearing in the High Court. As soon as the proceedings started, the presiding Judge informed the parties that she was of the view that the alleged urgency was self-created. The Judge indicated that she had

[6] The relevant notice of motion is dated 18 June 2021 and was issued by CR Masilela Attorneys.

read the papers and found the applicant's version – that for the year preceding his arrest he had been trying to apply for an asylum permit – to be unbelievable, contradictory and inconsistent. In her view, it was only when the applicant was arrested after being in the country illegally for more than a year that he created the urgency for purposes of approaching the Court.

[9] Regarding the earlier application supposedly filed by the applicant on 18 June 2021, which bore a court stamp, the Judge found it improbable that it was filed because the applicant's affidavit stipulated that upon his arrival in South Africa he did not know where to go until he was advised by his countrymen. The Judge questioned why the applicant's affidavit indicated that he started visiting the RRO in May 2021, when on his version he only arrived in the country in June 2021. When counsel for the applicant indicated that this was an error, as the applicant had left Ethiopia in May 2021 and arrived in South Africa in June 2021, the Judge pointed out that the error was not corrected in the replying affidavit.

[10] The Judge also dismissed a submission by counsel for the applicant that refusing to hear the matter urgently would deny him an opportunity to apply for an asylum permit, as he would be barred from applying once he was convicted for being in the country illegally in breach of the Refugees Act in the trial which would be conducted in a few days. She also paid no heed to counsel's submission that it was for the Refugee Status Determination Officer (RSDO) to determine the truthfulness of the applicant's version and reasons for his delay in due course. In a terse judgment, the High Court held that the urgency was self-created by the applicant as he had delayed evincing his intention to seek asylum. On that basis, the Court struck the matter from the roll with costs for lack of urgency.

Preliminary matters in this Court

Jurisdiction and standing

[11] The applicant submits that his application engages this Court's jurisdiction. This is so, he contends, because it raises a constitutional issue in terms of section 167(7) of the Constitution as it concerns his right to freedom and security of the person contained in section 12(1)[7] of the Constitution. He also argues that, in addition to standing in his own interest, he has standing in terms of section 38(d)[8] of the Constitution because there are thousands of similarly positioned asylum seekers who will benefit from certainty on the question of release from detention when an asylum seeker has evinced an intention to apply for asylum. The applicant's section 12 right is undoubtedly affected and this factor alone vests this Court with the jurisdiction to entertain the application which the respondents rightly concede.

Urgency

[12] The applicant submits that his arrest and detention triggered the urgency of this matter. He submits that, given his unemployment, he acted as fast as reasonably possible to approach the courts. He contends that he cannot obtain relief in the ordinary course because he cannot apply for asylum while he remains in detention. His detention, he contends, is unlawful and should not be allowed to endure any longer. Although no conviction or date for deportation has been secured, there is an imminent

[7] Section 12(1) in relevant part reads:

> "Everyone has the right to freedom and security of the person, which includes the right—
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> (a) not to be deprived of freedom arbitrarily or without just cause;
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> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources."

See also *Abore v Minister of Home Affairs* [2021] ZACC 50; 2022 (4) BCLR 387 (CC); 2022 (2) SA 321 (CC) at para 9.

[8] Section 38(d) reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (d) anyone acting in the public interest."

threat of deportation and he will suffer great prejudice if the matter is not heard urgently, whereas the respondents will not be prejudiced if the matter is heard urgently.

[13] The respondents dispute that the matter is urgent and insist on having it heard in the High Court in due course. But their approach completely overlooks the fact that the applicant was in detention, presumably since his arrest on 7 July 2022, awaiting imminent deportation once he is convicted for breaching the Immigration Act when the High Court struck his matter off the roll in September 2022. He remains in detention to date and still faces the same threats. That clearly renders the application urgent.

Leave for direct appeal

[14] For his prayer for "direct access", the applicant relies on *Mazibuko*.[9] In that decision, which endorsed what was said in *Bruce*,[10] this Court held that for a matter to warrant bypassing other courts, the interests of justice requirement will ordinarily be met only where there are exceptional circumstances such as sufficient urgency or public importance, and proof of prejudice to the public interest or the ends of justice and good government.[11]

[15] The applicant submits that there are exceptional circumstances justifying this application, namely that he remains in detention awaiting deportation to a country where he is likely to face the death sentence or be killed; the application has prospects of success on the merits as he was not afforded an opportunity to apply for asylum status; his detention is unlawful because he still intends to apply for asylum and he needs to be recognised as an asylum seeker; and he has exhausted all other avenues available to him,[12] and has nowhere else to go but to this Court in view of the order striking his matter from the roll.

[9] *Mazibuko v Sisulu* [2013] ZACC 28; 2013 (6) SA 249 (CC); 2013 (11) BCLR 1297 (CC) at paras 34-5.

[10] *Bruce v Fleecytex Johannesburg* [1998] ZACC 3; 1998 (2) SA 1143; 1998 (4) BCLR (CC) 415 at para 4.

[11] *Mazibuko* above n 8.

[12] *Besserglik v Minister of Trade, Industry and Tourism (Minister of Justice Intervening)* [1996] ZACC 8; 1996 (4) SA 331 (CC) 1996 (6) BCLR 745 (CC) at para 6.

[16] The respondents argue that this matter does not warrant the attention of this Court. They submit that once the matter was struck from the roll for lack of urgency, the applicant should have enrolled it on the ordinary motion court roll, which he can still do, or should have approached the Supreme Court of Appeal, as the urgency was created by his own lengthy delay in seeking asylum after entering the country illegally. They submit that the applicant is forum shopping, flouting the court hierarchy and depriving this Court of the views of the High Court and the Supreme Court of Appeal before it makes its decision.

[17] In addition to the other factors flagged as exceptional by the applicant, there is the important question raised by this Court in respect of which it must provide guidance and clarity – whether the applicant is entitled to be released from immigration detention upon expressing an intention to make an application for asylum in terms of the Refugees Act. I grant leave for direct appeal in the circumstances.

The merits

The applicant's contentions

[18] The applicant submits that the legislation that ought to regulate his circumstances as an asylum seeker is the Refugees Act and not the Immigration Act. He contends that this is because section 23[13] of the Immigration Act itself directs an asylum seeker to the provisions of the Refugees Act, as the Immigration Act does not apply to that class of persons. He relies on section 2 of the Refugees Act and further references section 21(1)(a) of the Refugees Amendment Act[14] and regulation 8(1)(a) and (3) of the new Refugees Regulations,[15] which, inter alia, envisage two requirements to be met for an application for asylum, namely that (a) an asylum seeker must report to the RRO within five days for an interview by an immigration officer in which, if the asylum

[13] Section 23 states that "[t]he Department may issue an asylum permit to an asylum seeker subject to the Refugees Act, 1998 (Act No. 130 of 1998), on any prescribed terms and conditions".

[14] Section 21 is quoted at [36].

[15] Refugees Regulations 2018, GNR 1707 *GG* 42932, 27 December 2019.

seeker fails to produce a valid asylum transit or other visa, the asylum seeker must show good cause for his or her illegal entry or stay in South Africa; and (b) the application must be made in person.

[19] With regard to the first requirement, the applicant submits that he entered the country with no knowledge of the laws and regulations of the country and was therefore unaware of the five-day requirement. He further argues that he could not meet this requirement because the RRO was closed due to the COVID-19 pandemic. Regarding the second requirement, he contends that he cannot make an application in person as he is currently unlawfully detained.

[20] The applicant contends that these requirements are irrational, unconstitutional and invalid in his circumstances because they have no conceivable legitimate purpose and are not a reasonable means to attain the intended end. He was arrested and charged under the Immigration Act, which does not apply in his case as he has evinced his intention to apply for asylum. He contends that he should be released immediately so that he can apply for asylum status, as his detention is not justified under the Immigration Act, the Refugees Act or the Constitution.

This Court's directions

[21] The respondents filed a notice of withdrawal of opposition and a notice to abide. Thereafter, this Court, on 28 October 2022, issued directions calling upon the parties to file written submissions on the question whether the applicant is entitled to be released from detention after expressing an intention to make an application for asylum in terms of the Refugees Act, and with reference to *Shanko*.[16]

[22] It should be noted that the High Court decision in *Shanko*, which I favour for reasons set out later in this judgment, has recently been overturned by the Full Court of

[16] *Shanko v Minister of Home Affairs; Shambu v Minister of Home Affairs; Bogala v Minister of Home Affairs* [2021] ZAGPJHC 857.

its Division. In that case the High Court dealt with the authority of the state to detain three illegal foreigners for breaching the Immigration Act by entering and staying in the country illegally. The men were held in detention under section 34 of the Immigration Act despite their expression of a wish to apply for asylum. The High Court ordered that all reasonable steps be taken to give effect to the intention of the applicants to apply for asylum, within 14 days from the date of the order, but refused to order their release during that process. Challenging the lawfulness of some of the new Refugee Regulations[17] and in direct contrast to the decision of the High Court, the Full Court[18] held that an illegal foreigner is entitled to be released from detention under section 34 of the Immigration Act once he expresses a wish to apply for asylum.

The applicant's submissions

[23] In his submissions filed in response to this Court's directions, the applicant rehashes the importance of his constitutional rights envisaged in section 12(1)(a) to (c) of the Constitution and highlights section 7(2) of the Constitution which requires the state to protect, respect and promote the fundamental rights in Chapter 2 of the Constitution. He submits that section 12 guarantees him both substantive and procedural protection, which respectively require that the state must have sound reasons for depriving him of his freedom and the deprivation must accord with fair procedures.

[24] The applicant states that he has shown that he is a genuine candidate for refugee status in accordance with article 31(1) of the 1951 United Nations Convention relating to the Status of Refugees (Convention).[19] He argues further that his continued detention

[17] In particular, regulations 8(3) and (4) and 4(1)(h) and (i), which are discussed later in the judgment.

[18] In a judgment of the Full Court of the High Court of South Africa, Gauteng Division, Johannesburg delivered on 14 March 2023 in *Shanko Abraham v The Minister of Home Affairs and Another; Shambu Jamal v The Minister of Home Affairs; Bogala Iyoba v Minister of Home Affairs* Case numbers A5053/2021; A5054/2021; A5055/2021 2023 ZAGPJHC 253.

[19] Convention relating to the Status of Refugees, 28 July 1951. South Africa acceded to the Convention on 12 January 1996. Article 31(1) provides:

> "The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorisation, provided they

is unlawful and constitutes a penalty in terms of the article and that the threat of deportation violates the principle of non-refoulement[20] as his refugee status has not been finally rejected after a proper procedure in the manner envisaged in this Court's judgments in *Abore*[21] and *Ruta.*[22] He concludes that this Court is required by regulation 8(4) to come to his rescue and order his release from detention so that he can apply for asylum.

The respondents' submissions

[25] The respondents repeat their submissions in the High Court and insist that this matter is not urgent. They press for the re-enrolment of the matter on the ordinary High Court roll and argue that it is incorrect and disingenuous for the applicant to contend that there would be delay in hearing it under ordinary court procedures, as there have been many immigration and asylum cases which have been considered timeously by the High Court, among them *Shanko*.

[26] The respondents bemoan the applicant's long delay in applying for asylum and contend that there is a need for a yardstick regarding timelines for refugee status applications so that they are brought within a reasonable period after foreign nationals enter the country. In their submission, the applicant can only be released from detention after he has applied for an asylum seeker permit in terms of section 22 of the Refugees Act and it is granted by Home Affairs. They argue that to do otherwise would render the Immigration Act an empty vessel in relation to foreigners who enter the country illegally and, after a long stay in the country, make assertions that they seek to make an application for asylum.

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present themselves without delay to the authorities and show good cause for their illegal entry or presence."

[20] The principle that one fleeing persecution or threats to "his or her life, physical safety or freedom" should not be made to return to the country inflicting it.

[21] *Abore* above n 7 at para 45.

[22] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at paras 14-16.

[27] The respondents seek a dismissal of the application. However, they submit that they embrace the overriding principle of non-refoulement and propose a specific order in the event that this Court finds in the applicant's favour. They propose that he should be ordered to enrol the matter in the High Court for hearing and the respondents ordered to ensure that he is not deported to Ethiopia pending finalisation of his application for asylum by a RSDO and to provide him with a temporary 14-day asylum permit, to be extended if his application is not finalised within 14 days.

Discussion

[28] Two issues arise from this background. The first concerns the time afforded to an illegal foreigner, in this case the applicant, to apply for an asylum seeker permit in terms of the Refugees Act after entering the country. The second is whether the illegal foreigner is entitled to be released from detention after expressing an intention to seek asylum while awaiting deportation until such time that his or her application has been finalised.

[29] The first issue may be disposed of shortly as this Court has already settled it in *Ruta*[23] and, more recently, in *Abore*.[24] These decisions have unequivocally established that once an illegal foreigner has indicated their intention to apply for asylum, they must be afforded an opportunity to do so. A delay in expressing that intention is no bar to applying for refugee status. *Abore*, following *Ruta*, held that although a delay in applying for asylum is relevant in determining credibility and authenticity, which must be made by the RSDO, it should at no stage "function as an absolute disqualification from initiating the asylum application process".[25] Until an applicant's refugee status has been finally determined, the principle of non-refoulement protects the applicant from deportation.

[23] Id.

[24] *Abore* above n 7.

[25] Id at para 47.

[30] To answer the second issue, it is necessary to consider the relevant legislative framework which underwent amendment with effect from 1 January 2020.[26] These amendments followed after *Ruta* but do not detract from its ratio and the relevant broad principles this Court laid down in the decision.[27] The starting point is section 2 of the Refugees Act which was unaffected by the changes and reads:

> "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 subjected to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where—
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> (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
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> (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."

[31] *Abore* neatly articulated this Court's eloquent description of the nature and purpose of these provisions and the other principles laid down in *Ruta* as follows:

> "In a nutshell, this Court in *Ruta* highlighted that our country adopted [a]rticle 33 of the [Convention], which guarantees the right to seek and enjoy in other countries asylum from persecution. It also clarified that Parliament decided to enforce the Convention in the country through section 2 of the Refugees Act. Section 2 captures the fundamental principle of non-refoulement. As this Court reasoned, the 1951 Convention protects both what it calls 'de facto refugees' (those who have not yet had their refugee status confirmed under domestic law), or asylum seekers, and 'de jure refugees' (those whose status has been determined as refugees). The protection applies as long as the claim to refugee status has not been finally rejected after a proper

[26] Sections 4 and 21 of the Refugees Act, which are relevant for present purposes, were substantively amended and the Refugees Regulations 2000 GN R366 *GG* 21075, 6 April 2000 (old Regulations) were repealed in their entirety and replaced with the Refugees Regulations, 2018, GN R1707 *GG* 42932, 1 January 2020 (new Regulations).

[27] *Ruta* above n 20. See also *Abore* above n 7 at para 42 citing *Ruta*.

> procedure. This means that the right to seek asylum should be made available to every illegal foreigner who evinces an intention to apply for asylum, and a proper determination procedure should be embarked upon and completed. The 'shield of non-refoulement' may only be lifted after that process has been completed."[28]

[32] *Ruta* also made the point that the Immigration Act, which regulates the entry and exit of foreigners (including potential asylum seekers) into and out of the country, and the Refugees Act, which provides for the reception and management of asylum seeker applications, must be read harmoniously. This Court went on to say:

> "Though an asylum seeker who is in the country unlawfully is an 'illegal foreigner' under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act. That is the meaning of section 2 of that Act, and it is the meaning of the two statutes when read together to harmonise with each other.
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> . . .
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> [T]he Immigration Act affords an immigration officer a discretion whether to arrest and detain an illegal foreigner. That discretion must, in the case of one seeking to claim asylum, be exercised in deference to the express provisions of the Refugees Act that permit an application for refugee status to be determined."[29]

[33] Section 23(1) of the Immigration Act empowers the Director-General, subject to the prescribed procedure under which an asylum transit visa may be granted, to issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker. This visa is valid for five days only, for travel to the nearest RRO in order to apply for asylum. In terms of section 23(2), if that visa expires before the person reports at a RRO in order to apply for asylum in terms of section 21 of the Refugees Act, its holder shall become an illegal foreigner and be dealt with in accordance with the Immigration Act.

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[28] *Ruta* above n 20 at para 42.

[29] Id at paras 43 and 46.

[34] Section 4(1) of the Refugees Act, which deals with exclusion from refugee status, was amended with effect from 1 January 2020 to incorporate two new grounds of exclusion, as follows:

> "An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she—
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> . . .
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> (h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or
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> (i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum."

[35] These provisions require an asylum seeker to advance compelling reasons to the RSDO for the failure to have an asylum transit visa or for entering the country illegally or for failure to report to a RRO within five days.

[36] Section 21 of the Refugees Amendment Act[30] stipulates the procedure for the making of an asylum application and now provides in relevant part:

> "(1)(a) Upon reporting to the Refugee Reception Office within five days of entry into the Republic, an asylum seeker must be assisted by an officer designated to receive asylum seekers.
>
> (b) An application for asylum must be made in person in accordance with the prescribed procedures, to a Refugee Status Determination Officer

[30] The applicant challenged the constitutionality of section 21(1) of the Refugees Amendment Act in his written submissions. But no claim at all was made for such relief during the hearing and accordingly I say no more about this submission. Neither do I venture any opinion on the constitutionality or otherwise of any of the amendments to the Refugees Act and the new Regulations thereto as no substantial constitutional attack has been launched against them.

at any Refugee Reception Office or at any other place designated by the Director-General by notice in the *Gazette*.

(1A) Prior to an application for asylum, every applicant must submit his or her biometrics or other data, as prescribed, to an immigration officer at a designated port of entry or a Refugee Reception Office.

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

. . .

(2) The Refugee Status Determination Officer must, upon receipt of the application contemplated in subsection (1), deal with such application in terms of section 24.

(2A) When making an application for asylum, every applicant must declare all his or her spouses and dependants, whether in the Republic or elsewhere, in the application for asylum.

(3) When making an application for asylum, every applicant, including his or her spouse and dependants, must have his or her biometrics taken in the prescribed manner.

(4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if—

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such application has been reviewed in terms of section 24A or where the applicant exercised his or her right to appeal in terms of section 24B; or

(b) such person has been granted asylum."

[37] Regulation 7 of the new Regulations is titled "Asylum transit visa", and provides:

"Any person who intends to apply for asylum must declare his or her intention, while at a port of entry, before entering the Republic and provide his or her biometrics and other relevant data as required, including—

(a) fingerprints;

(b) photograph;

(c) names and surname;

(d) date of birth and age;

(e) nationality or origin; and

(f) habitual place of residence prior to travelling to the Republic.

and must be issued with an asylum transit visa contemplated in section 23 of the Immigration Act."

[38] Regulation 8 in relevant part provides:

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

(a) be made in person by the applicant upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office;

(b) be made in a form substantially corresponding with Form 2 (DHA-1590) contained in the Annexure;

(c) be submitted together with—

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

(ii) proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and

(iii) the biometrics of the applicant, including any dependant.

. . .

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

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

[39] Importantly, regulation 2(2) of the old Regulations, which perished with the rest of those regulations when the new Regulations came into force on 1 January 2020, gave

an illegal foreigner who intended seeking asylum an automatic right to so apply and made provision for the temporary release of an illegal foreigner pending the making of an asylum application. The new Regulations do not contain a comparable provision. Regulation 2(2) of the old Regulations provided:

> "Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."

[40] The ordinary wording of this provision was clear. Read with section 22 of the unamended Refugees Act, once that intention was expressed, the person was entitled to be freed subject to further provisions of the Refugees Act.[31] As stated, there are no provisions similar to the old regulation 2(2) in the new Regulations. Instead, regulation 7 of the new Regulations, which deals with asylum transit visas, imposes conditions more stringent than the old Regulations and requires an individual to declare his or her intention to apply for asylum while at a port of entry before entering the country and not when he or she is encountered in violation of the Immigration Act. And once he or she has expressed such an intention, he or she must provide his or her biometrics and other relevant data as required and only then would he or she be eligible to be issued with an asylum transit visa for five days.

[41] Regulation 8, which governs the asylum application process, is similarly strict. It requires a person who does not possess an asylum transit visa when seeking asylum at a RRO to show good cause for his illegal entry into or stay in the Republic as contemplated in article 31(1) of the Convention. This must be done before the person is permitted to apply for asylum. Article 31(1) envisages that refugees must present

[31] *Abore* above n 7 at para 23.

themselves without delay to the authorities and show good cause for their illegal entry or presence.[32]

[42] On the interpretation of section 21(1B), this Court said the following in *Abore*:[33]

> "Section 21(1B) of the [Refugees Act] imposes its own requirements which seem to be aimed at eliciting more information from an illegal foreigner. It provides that a person who may not be in possession of an asylum transit visa, contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why that person is not in possession of such a visa. It is not clear at what stage the interview envisaged in section 21(1B) should be conducted. However, it seems that the requirement in regulation 8(3) that the applicant for asylum should show good cause for his or her illegal entry or stay in the Republic prior to them being permitted to apply for asylum, means that this must be done during the interview. It also seems that the applicant for asylum must furnish good reasons why he or she is not in possession of an asylum transit visa before he or she is allowed to make an application for asylum. In addition, regulation 8(4) empowers a judicial officer to require any foreigner appearing before court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub-regulation (3). If regulations 8(3) and (4) are read with section 21(1B), it appears that good cause which is required to be shown refers to the reasons that must be given on why the applicant for asylum does not have an asylum transit visa."

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

[32] See n 18 above.

[33] *Abore* above n 7 at para 29.

and furnish good reasons why they do not possess an asylum transit visa, before they are allowed to apply for asylum.

[44] In my view, these provisions do not offend the principle of non-refoulement embodied in section 2 of the Refugees Act. Their effect is by no means out of kilter with article 31 of the Convention, the fount of section 2. Rather, they accord with its import because it too does not provide an asylum seeker with unrestricted indemnity from penalties. The article provides that a Contracting State may not impose penalties on refugees on account of their illegal entry or presence in the country provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

[45] The applicant admittedly entered the country illegally by "jumping the border", in his own words. He had no passport and did not obtain an asylum transit visa at a port of entry. He remained in the country illegally for over a year. He alleges that since his arrival on these shores he has been precluded from making an asylum application by circumstances beyond his control – the closure of the RROs due to the COVID-19 outbreak. These facts form a basis for him to show good cause as required by law. The door is not closed to an application for asylum.

The lawfulness of the continued detention

[46] It remains to be determined whether there is a lawful basis to detain an illegal foreigner whilst the process of establishing whether there was good cause for the absence of a visa and an asylum application is yet to occur.

[47] It must be observed, at the outset, that the fact that an illegal foreigner is still entitled to apply for asylum does not negate the fact that he or she has contravened the Immigration Act by entering and remaining in the country illegally. Where the detention is solely for the purpose of deportation then the detention is authorised by section 34 of the Immigration Act. However, where the detained person has been

charged with a criminal offence in terms of section 49(1), the further detention may also be authorised by the Criminal Procedure Act.[34]

[48] It is important to note that the applicant was charged under section 49(1)(a) of the Immigration Act. Sections 34 and 49 both regulate illegal entry and stay by non-South African citizens in the country. However, each has a distinct purpose. Section 34 does not create or refer to any criminal offence. But section 49 does. Section 34 is primarily intended for deporting illegal foreigners and detaining them for that purpose whereas section 49 criminalises certain conduct.

[49] Section 49(1) reads:

> "(a) Anyone who enters or remains, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.
>
> (b) Any illegal foreigner who fails to depart when so ordered by the Director-General, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding four years."

[50] The applicant in this case falls within the ambit of paragraph (a) of the subsection. However, and whether the detention was in terms of section 34 or pursuant to a criminal charge in terms of section 49(1)(a), the same question arises – whether the applicant's expression of an intention to apply for asylum entitled him to be released from such detention. The answer must be no.

[51] Once more, it is significant to mention that article 31 of the Convention does not give an illegal foreigner unrestricted indemnity from penalties. It requires them to present themselves without delay to the authorities and to show good cause for their illegal entry or presence.

[34] 51 of 1977.

[52] Further, this Court in *Ruta* made clear that the Refugees Act, despite its wide compass, is meant to cater only for authentic asylum seekers and genuine refugees. This Court left no doubt as to the great importance of the responsibility which this legislation is intended to regulate – the sanctity of our country's sovereignty and the protection of our national borders. As this Court put it:

> "The statute spells out prominent exclusions from refugee status. In addition, it specifies precisely when refugee status ceases. Inside the asylum determination process, the Minister may 'at any time' withdraw an asylum seeker permit if the application has been found to be manifestly unfounded, abusive or fraudulent. An asylum seeker whose permit is withdrawn may be arrested and detained. And, finally, a Refugee Status Determination Officer 'must' reject an application for asylum if it is 'manifestly unfounded, abusive or fraudulent'.
>
> None of this provides a sweetheart's charter for bogus asylum seekers or an open door for non-refugees. Nor do the provisions render our borders leaky to a flood of importuning supplicants posing as asylum seekers. The Refugees Act's provisions and its mechanisms are hard-headed and practical. In design and concept they protect our national sovereignty and our borders."[35]

[53] It follows that the implementation of the statute must be equally hard-headed and practical. This brings one to a practical challenge which is created by the applicant's submission that an illegal foreigner may not be detained from the time of evincing an intention to seek asylum until formally making the asylum application and that an illegal foreigner in immigration detention is entitled to be released from detention immediately once an intention to apply for asylum is expressed.

[54] The absence in the legislation of provisions similar to the old regulation 2(2) poses an anomalous and highly undesirable scenario that could result if an illegal foreigner in the applicant's position were simply allowed to remain at large on their mere say-so that they intend to seek asylum. That person would remain undocumented

[35] *Ruta* above n 20 at paras 39-40.

and there would be absolutely no means of checking whether they indeed promptly applied for asylum. There would be nothing to stop them from making the same claim to the next immigration officer who encounters them, thus repeatedly preventing their detention. That is not a result the Legislature could have intended.

[55] In *Abore* this Court was not required to decide the lawfulness of detention under the Immigration Act before an application for asylum had been submitted. But it did make findings which support the view that the detention of an illegal foreigner pending the submission of an application for asylum that is authorised by a court's warrant of detention is valid as the court order must be obeyed until set aside.[36]

[56] The order of the High Court before us made no provision for the applicant's release. One presumes that as an illegal foreigner awaiting deportation or criminal trial for his contravention of the Immigration Act, he would have been lawfully detained under the auspices of sections 34 and 49(1)(a) of the Immigration Act read with the Criminal Procedure Act. But, the respondents' legal obligation to assist him with the process of applying for asylum in accordance with his expressed wish, which they should have set in motion once he made his intention to seek asylum known to them, throws a spanner in the works.

[57] It was undisputed in the High Court papers that the applicant informed the officers who arrested him, in July 2022 that he wanted to apply for asylum and had been trying to do so since his arrival in the country in June 2021. However, until the hearing of the application before this Court, the respondents had made no effort at all to assist him in that regard. The lapse of several months of inaction on the respondents' part whilst the applicant was left to wallow in detention hardly accords with this Court's injunction in *Ruta*, *Abore* and their ilk, that once an illegal foreigner evinces an intention to seek asylum they must be afforded an opportunity to do so.

[36] *Abore* above n 7 at paras 49-51.

[58] In that case, the applicant's detention – to the extent that it rested on section 34 – may have become unlawful at some point, once a reasonable period elapsed with no effort made on the respondents' part to bring him before a RSDO for the process envisaged in section 21(1B) of the Refugees Amendment Act, read with regulation 8(3). But precisely when that would have been is difficult to discern in light of the new amendments to the relevant legislative regime, especially the repeal of the old regulation 2(2), discussed above. To the extent that the applicant's detention was authorised pursuant to section 49(1) of the Immigration Act read with the Criminal Procedure Act, the immigration officials' failure to facilitate his asylum application would not render his detention unlawful. In my view, a just and equitable remedy under section 172(1)(b) in all the circumstances would be to compel the respondents to facilitate his application for asylum, failing which to release him from detention unless he may lawfully be detained under the Criminal Procedure Act.

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

[60] Once the applicant has an asylum seeker visa issued in terms of section 22, he would be entitled to remain in this country temporarily. His continued detention, to the extent that it rests solely on section 34 of the Immigration Act, would unquestionably become unlawful, because he would no longer be an "illegal foreigner" for purposes of the Immigration Act. Merely expressing an intention to seek asylum does not entitle the applicant to release from detention. On the other hand, however, the respondents,

particularly the first, second, fourth, and fifth are obliged – regardless of the basis of his detention – to assist him to give effect to his intention to apply for asylum. At a practical level, this simply means that these respondents must facilitate arrangements either to transport the applicant to a RRO for his interview or to bring the relevant immigration and refugee officials to the correctional centre in which he is detained to conduct the necessary processes, whichever means is convenient. They must further refrain from deporting him until his asylum application is finalised.

Costs

[60] The applicant has enjoyed substantial success in the matter and is, on the basis of the principle in *Biowatch*,[37] entitled to the costs of the applications in the High Court and in this Court.

Order

[61] I make the following order:

1. Leave for direct appeal is granted and the appeal succeeds.
2. The order of the High Court is set aside and is replaced with the following:
   "(a) It is declared that in terms of section 2 of the Refugees Act 130 of 1998 (Act), the applicant may not be deported until he has had an opportunity of showing good cause as contemplated in section 21(1B) of the Refugees Amendment Act 11 of 2017, read with regulation 8(3) thereto, and, if such good cause has been shown, until his application for asylum has been finally determined in terms of the Act.
   (b) The first and second respondents shall pay the costs, including the costs of two counsel where employed."
3. The first, second, fourth and fifth respondents are directed, to the extent necessary, to take all reasonable steps, within 14 days from the date of

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

this order, to give effect to paragraph 2(a) failing which the applicant must be released from detention forthwith unless he may lawfully be detained under the Criminal Procedure Act 51 of 1977.

4. The first and second respondents shall pay the costs, including the costs in this Court of two counsel where employed.

For the Applicant:	S Vobi and A Nase instructed by Manamela MA Attorneys
For the Respondents:	N A R Ngoepe instructed by State Attorney, Pretoria