CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 51/23

In the matter between:

SCALABRINI CENTRE OF CAPE TOWN	First Applicant
TRUSTEES OF THE SCALABRINI CENTRE OF CAPE TOWN	Second Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
CHAIRPERSON OF THE STANDING COMMITTEE FOR REFUGEE AFFAIRS	Third Respondent

and

CONSORTIUM FOR REFUGEES AND MIGRANTS IN SOUTH AFRICA	Amicus Curiae

Neutral citation: *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45

Coram: Zondo CJ, Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Schippers AJ, Theron J, Tshiqi J and Van Zyl AJ

Judgments: Schippers AJ (unanimous)

Heard on: 24 August 2023

Decided on: 12 December 2023

Summary: Refugees Act 30 of 1998 — constitutionality of subsections 22(12) and 22(13) — provisions are unconstitutional

Failure to renew visa — resulting in deemed abandonment of asylum application — violation of principle of *non-refoulement* — infringement of right to dignity, right to just administrative action and children's rights — provisions arbitrary and irrational

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the Western Cape High Court, Cape Town (Goliath DJP), on 13 February 2023, the following order is made:

1. The declaration of constitutional invalidity of subsections 22(12) and 22(13) of the Refugees Act 130 of 1998 (Refugees Act) in paragraph (a) of the High Court's order, is confirmed.
2. The declaration of invalidity is retrospective to 1 January 2020, the date on which subsections 22(12) and 22(13) of the Refugees Act came into operation.
3. Paragraph (b) of the High Court's order is set aside.
4. The first respondent is ordered to pay the applicants' costs, including the costs of two counsel.

JUDGMENT

SCHIPPERS AJ (Zondo CJ, Maya DCJ, Kollapen J, Mathopo J, Mhlantla J, Rogers J, Theron J, Tshiqi J and Van Zyl AJ concurring):

Introduction

[1] This is an application in terms of section 167(5)[1] read with section 172(2)(a) of the Constitution,[2] to confirm an order of constitutional invalidity made by the Western Cape Division of the High Court, Cape Town (High Court).[3] In terms of that order, the High Court declared subsections 22(12) and 22(13) (impugned subsections) of the Refugees Act[4] (Refugees Act), which came into force on 1 January 2020, inconsistent with the Constitution and invalid. In sum, these provisions state that asylum seekers who fail to personally renew their asylum seeker visas issued under section 22 of the Refugees Act within one month of their visa's date of expiry,[5] must be regarded as having "abandoned" their applications for asylum. They may not re-apply for asylum and must be dealt with as illegal foreigners in terms of section 32 of the Immigration Act[6] (Immigration Act).[7]

[1] Section 167(5) of the Constitution provides:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[2] In terms of section 172(2)(a), "an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[3] *Scalabrini Centre of Cape Town v Minister of Home Affairs* [2023] ZAWCHC 28; 2023 (4) SA 249 (WCC).

[4] 130 of 1998.

[5] In terms of section 22, an asylum seeker whose application for asylum has not been adjudicated, is entitled to be issued with an asylum seeker visa allowing the applicant to temporarily sojourn in the Republic. The visa may be extended from time to time.

[6] 13 of 2002.

[7] In terms of section 32 of the Immigration Act any illegal foreigner must be deported.

[2] The first applicant, Scalabrini Centre of Cape Town, is a trust whose main function is to assist migrant communities and displaced people, including asylum seekers and refugees. The first applicant's trustees are collectively cited as the second applicant.

[3] The first respondent is the Minister of Home Affairs (Minister), the member of the Executive responsible for the administration of the Refugees Act. The second respondent, the Director-General of the Department of Home Affairs (Department), is the functionary responsible for running the Department. The third respondent is the Chairperson of the Standing Committee for Refugee Affairs (Standing Committee). The Standing Committee is required to endorse in its records the deemed abandonment of an application for asylum in terms of the impugned subsections when asylum seekers fail to report to a refugee reception office to renew their visas.

[4] The Consortium of Refugees and Migrants in South Africa (CoRMSA), a non-profit organisation whose objects include the advancement of the rights of asylum seekers, refugees and migrants, was admitted as an amicus curiae in these proceedings. CoRMSA consists of 26 member organisations. The first applicant is a member of CoRMSA.

Litigation history

[5] In March 2020, the applicants launched a two-part application in the High Court. In Part A, they sought an interdict restraining the respondents from implementing the impugned subsections and regulation 9 and Form 3 (impugned regulations) of the Refugee Regulations (Regulations),[8] which gave effect to the impugned subsections,[9] pending final determination of the relief sought in Part B of the notice of motion. On 30 November 2020, the High Court granted the interdict sought in Part A. In Part B, the applicants sought a declaratory order that the impugned subsections and the

[8] The regulations were published under GNR 1707 in *Government Gazette* 42932 dated 27 December 2019 and came into force on 1 January 2020.

[9] Regulation 9 is quoted in para [26]of this judgment.

Regulations are inconsistent with the Constitution and invalid; and an order reviewing and setting aside the Regulations as unlawful and invalid.

[6] In their attack on the impugned subsections and regulations, the applicants alleged that the respondents created a system whereby asylum seekers who failed to renew their visas within one month of the date of expiry were deemed to have abandoned their applications for asylum, unless they could satisfy the Standing Committee that there were compelling reasons for their failure to renew their visas timeously. These visas are valid for a maximum period of six months and entitle asylum seekers to temporarily sojourn, and to work or study in the Republic, pending the determination of their application for asylum. In practice, visas are extended multiple times before an asylum application is decided, which on average takes five years.

[7] This system, the applicants contended, is inconsistent with international law, the Constitution, and the objects of the Refugees Act. It violates the principle of *non-refoulement* (non-return) enshrined in the Act, namely 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".[10] And this, merely because asylum seekers failed to meet a procedural requirement. Even if the failure was the asylum seeker's fault, such harmful and inhumane consequences could not be justified under the Constitution. The applicants also contended that the impugned subsections are irrational and arbitrary, and therefore unconstitutional. They served no legitimate government purpose in that they disqualified asylum seekers from the very system designed to protect them.

[8] The applicants emphasised the grave consequences that the deemed abandonment of asylum applications held for asylum seekers: their visas would not be renewed; they would be barred from re-applying for asylum and face deportation under

[10] *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) at para 25.

the Immigration Act. These visas are critical for asylum seekers to temporarily stay in South Africa and to protect them against arrest, detention and deportation.

[9] In the High Court, the respondents opposed the relief sought by the applicants. They denied that the impugned subsections violate the principle of *non-refoulement* and alleged that they were justifiable under section 36 of the Constitution. The grounds of justification were these. The administration of visas and specifically, expired visas, places a huge burden on the Department's officials, because a substantial number of applicants are not genuine asylum seekers and know that their applications for asylum will be rejected. As a result, the Department has some 737 315 inactive visa applications under section 22 of the Refugees Act. These inactive cases disproportionately exceed the number of active cases, created a massive backlog and resulted in delays in finalising asylum applications.

[10] This backlog, according to the Auditor General, would take about 68 years to clear – excluding any new applications for asylum. This is hardly surprising. As this Court said in *Ruta*:

> "South Africa is amongst the world's countries most burdened by asylum seekers and refugees. That is part of our African history, and it is part of our African present. It is clear from cases this court has heard in the last decade that the Department is overladen and overburdened, as indeed is the country itself. South Africa is also a much-desired destination. As the High Court noted in *Kumah*, the system is open to abuse, with the ever-present risk of adverse public sentiment."[11]

[11] The respondents contended that the penalties for contraventions of visa conditions in section 37 of the Refugees Act "are not as effective to deter the unlawful and recalcitrant conduct of asylum seekers". In most cases, asylum seekers pay an admission of guilt fine for a breach of visa conditions and disappear into society until their next run-in with law enforcement. In summary, the impugned subsections were

[11] Id at para 58.

implemented to reduce the backlog of inactive cases and ensure that asylum seekers pursue their applications to completion.

The High Court's judgment

[12] At the inception of the hearing in April 2022, the High Court refused an application by the respondents to postpone the matter for a period of 18 to 24 months. The reason for the postponement was that the Minister wished to approach Parliament to initiate legislation to "do away with the abandonment provisions", in light of the judgment in *Abore*.[12] In that case, this Court affirmed that the principle of *non-refoulement* applies as long as a claim for refugee status has not been finally rejected after a proper procedure,[13] which makes it clear that an application for asylum cannot be regarded as having been abandoned for the failure to renew a visa. Despite this, the respondents' counsel stated in the High Court (and this Court) that the Minister did not concede that the impugned subsections are unconstitutional.

[13] The High Court found that the impugned subsections constitute a violation of the principle of *non-refoulement.* These provisions permit the return of asylum seekers to the countries from which they fled, where they may face torture or death, simply because they are late in renewing a visa. The impugned subsections also have an adverse impact on the rights of children, and cannot be cured by a bureaucratic review by the Standing Committee as to why asylum seekers failed to renew their visas. The purpose of the impugned subsections, according to the Department, is to motivate asylum seekers to attend refugee reception offices more regularly so as to reduce the backlog of asylum applications. This, the High Court said, is a limitation of the rights to dignity, life and the rights of children, which is not justified under section 36 of the Constitution. The impugned subsections fail to treat asylum seekers as presumptive refugees. They are irrational and their impact is indiscriminate.

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

[13] Id at para 42.

[14] The High Court also found that the impugned subsections are arbitrary. Asylum seekers would be deported based solely on the failure to renew their visas, not on the merits of their claims for asylum. That failure is often due to extraneous factors such as the location of a refugee reception office, the length of queues at such office, or the workload of departmental officials on the day. Asylum seekers have no control over these factors. Consequently, the Court declared the impugned subsections and the Regulations inconsistent with the Constitution and invalid. It also issued an order declaring that the State is obliged to enact legislation "to ameliorate and amend" the unconstitutionality of the impugned subsections. The respondents were ordered to pay the applicants' costs.

Submissions in this Court

The applicants

[15] The applicants contend that asylum seekers who take more than a month to renew their visa, and who cannot provide reasons to the satisfaction of the Standing Committee as to the cause of the delay, are prohibited from pursuing their asylum application, deprived of their visa, treated as illegal foreigners and ultimately deported. No matter how broadly one construes the Standing Committee's discretion to reverse the deemed abandonment of an asylum application, it is not an assessment of an asylum claim. Further, nowhere in this process is there any consideration of an asylum seeker's entitlement to *non-refoulement* or the potential persecution that may await them in their country of origin. This is not even a factor to be considered by the Standing Committee when exercising its discretion.

[16] The impugned subsections thus create a different and distinct system in which the right of asylum seekers is not dependent on the merits of their claim to asylum, or the fate which awaits them in their country of origin, but on their ability to comply with a bureaucratic hurdle – the timeous renewal of a visa. The principle of *non-refoulement* is thus directly violated.

[17] The violation of this principle, the applicants contend, results in the infringement of fundamental rights in the Bill of Rights, namely the rights to equality, human dignity, freedom and security of the person, and indeed life. This runs against the raison d'être of the global refugee system: to protect the human rights of asylum seekers and refugees.

The respondents

[18] In their answering papers the respondents do not dispute that the impugned subsections limit constitutional rights. Their initial defence to that limitation was that it is reasonable and justifiable under section 36 of the Constitution.

[19] The respondents however abandoned that defence in this Court, in accordance with what they term "a revised approach with reference to *Abore* and *Ruta*". They now accept – as they must – this Court's holding in *Ruta*, affirmed in *Abore*:

> "Until the right to seek asylum is afforded and a proper determination procedure is engaged and completed, the Constitution requires that the principle of *non-refoulement* as articulated in section 2 of the Refugees Act must prevail. The 'shield of *non-refoulement*' may be lifted only after a proper determination has been completed."[14]

[20] What is more, the respondents concede that, in terms of the Refugees Act, South Africa is obliged to receive refugees in accordance with international law standards, and that the principle of *non-refoulement* is enshrined in the Act. Despite this concession, this Court is obliged to determine the constitutionality of the impugned subsections. As was stated in *Phillips*:[15]

> "[A] finding of constitutional invalidity by a High Court does not relieve this Court of the duty to evaluate the provision of a provincial Act or Act of Parliament in the light of the Constitution. A thorough investigation of the constitutional status of a legislative

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[14] *Ruta* above n 10 at para 54; *Abore* above n 12 at para 40.

[15] *Phillips v Director of Public Prosecutions* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC).

> provision is obligatory in confirmation proceedings. This is so even if the proceedings are not opposed, or even if there is an outright concession that the section under attack is invalid."[16]

The amicus curiae

[21] The amicus curiae, CoRMSA, in its submissions, addresses four issues. These are the rights-limiting impact of the impugned subsections as demonstrated by the experiences of individual asylum seekers; the limitation of children's rights; the lack of justification for these limitations; and the availability of less restrictive means to achieve the purpose ostensibly served by the impugned subsections.

Are the impugned subsections constitutional?

[22] The correct approach to the constitutionality of the impugned subsections is this:

> "[L]egislation must be construed consistently with the Constitution and thus, where possible, interpreted so as to exclude a construction that would be inconsistent with judicial independence. If held to be unconstitutional, the appropriate remedy ought, if possible, to be in the form of a notional or actual severance, or reading in, so as to bring the law within acceptable constitutional standards. Only if this is not possible, must a declaration of complete invalidity of the section or sub-section be made."[17]

[23] The starting point is section 22 of the Refugees Act. In relevant part, it provides:

> "(1) An asylum seeker whose application in terms of section 21(1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, in the prescribed form, allowing the applicant to sojourn in the Republic temporarily, subject to such conditions as may be imposed, which are not in conflict with the Constitution or international law.
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> . . .

[16] Id at para 8.

[17] *S v Van Rooyen (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 88.

(4) The visa referred to in subsection (1) may, pending the decision on the application in terms of section 21, from time to time be extended for such period as may be required."

[24] The impugned subsections are contained in subsections (12) and (13), which read as follows:

"(12) The application for asylum of any person who has been issued with a visa contemplated in subsection (1) must be considered to be abandoned and must be endorsed to this effect by the Standing Committee on the basis of the documentation at its disposal if such asylum seeker fails to present himself or herself for renewal of the visa after a period of one month from the date of expiry of the visa, unless the asylum seeker provides, to the satisfaction of the Standing Committee, reasons that he or she was unable to present himself or herself, as required, due to hospitalisation or any other form of institutionalisation or any other compelling reason.

(13) An asylum seeker whose application is considered to be abandoned in accordance with subsection (12) may not re-apply for asylum and must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act."

[25] Section 32 of the Immigration Act provides:

"(1) Any illegal foreigner shall depart,[18] unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.

(2) Any illegal foreigner shall be deported."

[26] The impugned subsections were implemented in terms of regulation 9 of the Regulations. As already stated, the High Court made an order declaring regulation 9 unconstitutional. The respondents did not apply for leave to appeal

[18] The expression "depart or departure" is defined in section 1 of the Immigration Act as meaning "exiting the Republic from a port of entry to another country in compliance with this Act".

that order. This Court is not required to confirm the order striking down regulation 9.[19] Since the impugned subsections were struck down, regulation 9 could hardly stand. It provided:

> "(1) The endorsement by the Standing Committee of an application as an abandoned application as contemplated in section 22(12) of the Act must be made on Form 3 contained in the Annexure.
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> (2) The Refugee Reception Office Manager shall refer or cause an abandoned application to be referred following an endorsement by the Standing Committee as contemplated in subregulation (1), to an immigration officer to deal with such a person as contemplated in section 22(13) of the Act.
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> (3) Compelling reasons as contemplated in section 22(12) of the Act shall relate to—
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> (a) entry into a Witness Protection Programme;
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> (b) quarantine;
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> (c) arrest without bail; or
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> (d) any other similar compelling reasons, and must be supported by documentary evidence."

[27] The impugned subsections have the following effects:

(a) An asylum seeker who fails to renew his or her visa within one month of its expiry is automatically deemed to have "abandoned" his or her application for asylum, regardless of its merits. The visa will not be renewed and the asylum seeker must be dealt with as an "illegal foreigner", defined in section 1 of the Immigration Act as a person who is in the Republic in contravention of that Act.

(b) A "Notification of Abandoned Application"[20] is then referred to the Standing Committee for its endorsement in the Department's records. Asylum seekers are entitled to furnish reasons "to the satisfaction of the Standing Committee" why they were unable to renew their visas in person

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[19] *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC) at para 13; *Mulowayi v Minister of Home Affairs* [2019] ZACC 1; 2019 (4) BCLR 496 (CC) at paras 27-9.

[20] Form 3 of the impugned regulations.

(at a refugee reception office). This, it must be stressed, is not an assessment of the application for asylum. Section 22(12) is silent on the question whether the asylum seeker may be issued with a new visa, pending the Standing Committee's decision. The respondents have not explained the status of an asylum seeker in this situation.

(c) If the Standing Committee endorses the deemed abandonment of the asylum application, the asylum seeker is precluded from re-applying for asylum and must be dealt with as an illegal foreigner. This status carries the risk of arrest, detention and deportation.[21] In addition, the Immigration Act prohibits the employment, education, harbouring, or the aiding and abetting of illegal foreigners.[22] Unless the Department authorises an illegal foreigner to remain in the Republic pending their application for a status, they must be deported.[23]

(d) Nowhere in the deemed abandonment of the asylum application, the endorsement of that abandonment by the Standing Committee, or its assessment of the reasons for the failure to renew the visa, is there any consideration of the principle of *non-refoulement*. The potential persecution that genuine asylum seekers may face in their country of origin is simply ignored.

Violation of the principle of non-refoulement

[28] Refugees are by definition persons in flight from persecution or threats to their life, physical safety or freedom and other serious human rights abuses, and should not

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[21] Section 34(1) of the Immigration Act provides:

> "Without need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at the place under the control or administration of the Department."

[22] Section 38 of the Immigration Act provides that no person shall employ an illegal foreigner. Section 39 proscribes training or instruction to an illegal foreigner by any learning institution. Section 40 prohibits the harbouring of an illegal foreigner. Section 42 states that no person shall aid or abet an illegal foreigner, save for providing necessary humanitarian assistance.

[23] Section 32(1) of the Immigration Act.

be forced to return to the country inflicting these harms.[24] They are an "especially vulnerable group" in our society, and their plight calls for compassion.[25] The impugned subsections are directly at odds with this, and the principle of *non-refoulement*.

[29] In terms of section 1A, the Refugees Act must be interpreted and applied in a manner that is consistent with inter alia the 1951 United Nations Convention Relating to the Status of Refugees (1951 Geneva Convention); the 1967 United Nations Protocol Relating to the Status of Refugees (1967 Protocol); and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Convention), all of which embody the principle of *non-refoulement*. This principle is a cornerstone of the international law regime governing refugees.

[30] Thus, article 33(1) of the 1951 Geneva Convention and its 1967 Protocol (both ratified by South Africa) provide that no contracting party shall expel or return refugees to territories where their lives or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion. The 1951 Geneva Convention is both a status- and rights-based instrument and is underpinned by several fundamental principles, most notably non-discrimination,[26] non-penalisation,[27] and *non-refoulement*.[28] The principle of *non-refoulement* is so fundamental that no reservations or derogations may be made to it. Likewise, article 2(3) of the 1969 OAU Convention, which this country has also ratified, states that no person shall be returned or expelled to a territory where their life, physical integrity or liberty would be threatened on account of a

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[24] *Ruta* above n 10 at para 24.

[25] *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) SA 395 (CC); 2007 (4) BCLR 339 (CC) at paras 28-9; *Ahmed v Minister of Home Affairs* [2018] ZACC 39; 2019 (1) SA 1 (CC); 2018 (12) BCLR 1451 (CC) at para 22; *Ruta* above n 10 at para 48.

[26] Article 3 of the 1951 United Nations Convention Relating to the Status of Refugees.

[27] Id at Article 31(1).

[28] Id at Article 33(1).

well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

[31] The principle of *non-refoulment* accordingly forms part of customary international law and international human rights law.[29] Indeed, in their answering affidavit in the High Court, the respondents concede that South Africa has "assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law". And the principle applies to asylum seekers or *de facto* refugees (those who have not yet had their refugee status confirmed under domestic law), as well as *de jure* refugees (those whose status has been determined as refugees).[30]

[32] The principle of *non-refoulement* is enshrined in section 2 of the Act. It provides:

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

[33] The impugned subsections fly in the face of the prohibition contained in section 2 of the Act. The effect of section 2 is to "permit any person to enter and to remain in this country for the purpose of seeking asylum from persecution" on account

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[29] *Ruta* above n 10 at paras 26-7.

[30] Id at para 27.

of the factors listed in subsections (a) and (b).[31] It is then that the obligation not to return (*refouler*) an asylum seeker arises. Recently in *G v G*,[32] Lord Stephens put the position as follows:

> "Under the 1951 Geneva Convention recognition that an individual is a refugee is a declaratory act. The obligation not to refoule an individual arises by virtue of the fact that their circumstances meet the definition of 'refugee', not by reason of the recognition by a Contracting State that the definition is met. For this reason a refugee is protected from refoulement from the moment they enter the territory of a Contracting State whilst the State considers whether they should be granted refugee status."[33]

[34] The impugned subsections however disregard the protection of asylum seekers from refoulement: those who do not renew their visas timeously are deemed to have abandoned their asylum applications, and they may be expelled or returned to the countries from which they fled. As stated in the applicants' submissions in this Court, in those countries they may face torture, imprisonment, sexual violence and other forms of persecution, even death. And this, without any consideration of the merits of their claim for asylum.

[35] As this Court stated in *Ruta*, "all asylum seekers are protected by the principle of *non-refoulement*, and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure".[34] This procedure necessarily requires a determination of the merits of the asylum claim. The impugned subsections impose a double penalty: they not only exclude determination of the merits, but also prohibit any re-application for asylum.

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[31] *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) at para 2.

[32] *G v G* [2021] UKSC 9 at para 81.

[33] Id.

[34] *Ruta* above n 10 at para 29.

Infringement of fundamental rights

[36] The impugned subsections also infringe the right to dignity.[35] The value of dignity in our constitutional framework is beyond doubt. The Constitution asserts dignity "to invest in our democracy respect for the intrinsic worth of all human beings". Human dignity "informs constitutional adjudication and interpretation at a range of levels".[36]

[37] Applied to the present case, asylum seekers are issued with visas that are essential for a life of dignity, pending the determination of their asylum applications. As this Court stated in *Saidi*:

> "Temporary permits [visas] … are critical for asylum seekers. They do not only afford asylum seekers the right to sojourn in the Republic lawfully and protect them from deportation but also entitle them to seek employment and access educational and health care facilities lawfully."[37]

[38] For an asylum seeker, a life of dignity entails:

> "[E]mployment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue state interference."[38]

[39] CoRMSA presented evidence that the impugned subsections had been applied to 394 asylum seekers whose applications for asylum were deemed to have been abandoned. For nearly two years some of them were denied the opportunity of renewing their visas. Consequently, they were unable to find work in the formal sector, could not

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

[36] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 35.

[37] *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at para 13.

[38] Id at para 18.

gain access to basic services such as healthcare and banking, and faced the risk of arrest, detention and deportation. Many other asylum seekers may have suffered a similar fate, had the High Court not granted the interdict restraining the implementation of the impugned subsections.

[40] The deemed abandonment of the asylum application under the impugned subsections also cuts across other fundamental rights. The right to just administrative action is directly infringed,[39] since the asylum application is not considered, let alone determined. Worse, the asylum seeker must then be treated as an illegal foreigner, subject to arrest, detention and deportation. The rights to personal liberty,[40] and indeed life itself,[41] are then threatened. All this, simply because a visa has not been renewed.

[41] Aside from this, the impugned subsections also unjustifiably limit the rights of children, as submitted by the amicus.[42] This Court has emphasised that "[t]he recognition of the innate vulnerability of children is rooted in our Constitution, and protecting children forms an integral part of ensuring the paramountcy of their best interests."[43] It cannot be in the best interests of children to deem their applications as having been abandoned, with all its consequences, due to bureaucratic circumstances beyond their control.

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[39] Section 33 of the Constitution states that everyone has the right to just administrative action that is lawful, reasonable and procedurally fair. These rights have been given effect to in the Promotion of Administrative Justice Act 3 of 2000.

[40] Section 12(1)(a) of the Constitution provides inter alia that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.

[41] Section 11 of the Constitution provides that "[e]veryone has the right to life."

[42] Section 28(1)(b), (c) and (d) of the Constitution provides that every child has the right to family or parental care; to basic nutrition, shelter, basic healthcare services and social services; and to be protected from maltreatment, neglect, abuse or degradation. Section 28(2) provides that a child's best interests are of paramount importance in every matter concerning the child.

[43] *Centre for Child Law v Media 24 Ltd* [2019] ZACC 46; 2020 (1) SACR 469 (CC); 2020 (3) BCLR 245 (CC) at para 64.

[42] Children's applications for asylum are generally tied to those of their parents. The deemed abandonment of parents' asylum applications has had drastic consequences on their children. CoRMSA adduced evidence that the children of an asylum seeker whose application was deemed to be abandoned could not attend school for the entire 2020 academic year because they had no visas. In another case, an asylum seeker's son could not register for matric. Like their parents, without visas, children also face the risk of arrest, detention and deportation. As this Court said in *Centre for Child Law*,[44] it is unjust to penalise children for matters over which they have no power or influence.

[43] Moreover, the deemed abandonment of an asylum application disregards the constitutional recognition of children as individuals, with distinctive personalities and their own dignity, who are entitled to be heard in every matter concerning them.[45] The impugned subsections operate automatically after 30 days, without regard to their impact on affected children.

Irrationality and arbitrariness

[44] The impugned subsections are irrational and arbitrary: they serve no legitimate government purpose. In *New National Party*,[46] this Court held that the exercise of legislative power (in that case the establishment of an electoral scheme) is subject to two constitutional constraints:

> "The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds bears the onus of establishing the absence of a legitimate government purpose, or the absence of a rational relationship between the measure and that purpose.

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[44] Id at para 72.

[45] *AB v Pridwin Preparatory School* [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC) at para 234; *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 18.

[46] *New National Party v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC).

> A second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in chapter 2 of the Constitution. The onus is once again on the party who alleges an infringement of the right to establish it."[47]

[45] The threshold question in the rationality inquiry is whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise.[48] There is no rational connection between the impugned subsections and their alleged purposes. The respondents asserted that these provisions were enacted to reduce the backlog of asylum applications; to motivate asylum seekers to pursue their applications timeously; to discourage unauthentic and deceptive applications for asylum; and to reduce the heavy administrative burden on refugee and immigration officials, the Standing Committee and the Refugee Appeal Board. As stated, the respondents also claimed that the penalty provisions under section 37 of the Refugees Act could not on their own motivate asylum seekers to pursue their applications.

[46] The short answer to these assertions is that they cannot justify the automatic abandonment of an asylum application, simply because of a failure to renew a visa. As stated, the consequence of the impugned subsections is that the merits of a claim for asylum are never considered, and the principle of *non-refoulement* is violated. In any event, the respondents wrongly assume that most asylum seekers have no valid claims to asylum and no interest in pursuing those claims. This assumption violates the core principle of refugee law that asylum seekers must be treated as presumptive refugees until the merits of their claim have been finally determined through a proper process.[49] Moreover, the visa protects asylum seekers against arrest and deportation, and allows them to access employment, education and health services. Therefore, they have sufficient motivation to seek renewal. Apart from this, the evidence shows that the

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[47] Id at paras 19-20.

[48] *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at paras 32 and 35.

[49] *Ruta* above n 10 at paras 26-7; *Abore* above n 12 at para 42; *Ashebo v Minister of Home Affairs* [2023] ZACC 16; 2023 (5) SA 382 (CC) at para 31.

non-renewal of visas – often the consequence of long queues, the financial burden of getting to reception offices and taking time off from work to do so – has not caused the backlog of asylum applications, nor imposed a significant burden on the Department.

[47] Given that the impugned subsections are arbitrary and do not serve a legitimate government purpose, that is the end of the rationality inquiry, and the provisions fall to be struck down as constitutionally bad.[50] Consequently, a limitation analysis under section 36 of the Constitution does not arise. So too, any consideration of CoRMSA's submission that there are less restrictive means to achieve the ostensible purpose of the impugned subsections.

Conclusion

[48] In short, the impugned subsections violate the principle of *non-refoulement*, infringe the right to dignity, unjustifiably limit the rights of children and are irrational and arbitrary. It follows that these provisions are unconstitutional and that the High Court's order to that effect must be confirmed.

Order

[49] The High Court was correct in declaring that subsections 22(12) and (13) of the Refugees Act are inconsistent with the Constitution and invalid, in paragraph (a) of its order. However, paragraph (b) is inappropriate. It states:

> "(b) It is declared that the State is obliged by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in sections 9, 10, 28, and 34 of the Constitution by preparing, initiating, introducing, enacting and bringing into operation, diligently and without delay as required by section 237 of the Constitution, legislation to ameliorate and amend part (a) of the order above-mentioned."

[50] *Law Society of South Africa* above n 48 at para 35.

[50] Paragraph (b) of the order is unsustainable because it instructs Parliament to prepare legislation to "ameliorate and amend part (a) of the order", purportedly "as required by section 237 of the Constitution", which provides that "[a]ll constitutional obligations must be performed diligently and without delay". As was held in *National Coalition*,[51] a court must keep in mind the principle of the separation of powers and, flowing therefrom, the deference it owes to the Legislature in devising a remedy for a breach of the Constitution in any particular case. What is more, the applicants did not ask for any order in the terms of paragraph (b) in the High Court; neither did they ask that paragraph (b) be confirmed by this Court.

[51] The following order is made:

1. The declaration of constitutional invalidity of subsections 22(12) and 22(13) of the Refugees Act 130 of 1998 (Refugees Act) in paragraph (a) of the order issued by the Western Cape Division of the High Court, Cape Town (High Court), on 13 February 2023, is confirmed.
2. The declaration of invalidity is retrospective to 1 January 2020, the date on which subsections 22(12) and 22(13) of the Refugees Act came into operation.
3. Paragraph (b) of the High Court's order is set aside.
4. The first respondent is ordered to pay the applicants' costs, including the costs of two counsel.

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[51] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 66.

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