THE DETERMINATION OF REFUGEE STATUS IN SOUTH AFRICA:

A HUMAN RIGHTS PERSPECTIVE

by

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Declaration

I, Veronica Ramoroka do hereby declare that “The determination of refugee status in South Africa: A human rights perspective” is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of a complete reference.
Table of Contents

PROPOSAL ........................................................................................................................................ iv

CHAPTER 1 ........................................................................................................................................ 1

1.1 Introduction .............................................................................................................................. 1
1.2 The international regulatory framework ............................................................................. 1
1.3 THE lack of protection as a sine qua non for the granting of refugee status ................ 6
1.4 The regional regulatory framework ..................................................................................... 7
1.5 The national regulatory framework ................................................................................... 10
1.6 The rights and responsibilities of asylum seekers ............................................................. 21
1.7 Conclusion ........................................................................................................................... 23

CHAPTER 2 ...................................................................................................................................... 25

2.1 Introduction ........................................................................................................................... 25
2.2 South Africa’s port of entry .................................................................................................. 25
2.3 Refugee reception offices in South Africa ........................................................................... 28
2.4 Adequate access to the refugee reception offices ............................................................... 29
2.5 Status Determination Committee ....................................................................................... 38
2.6 The Director-General of the Department of Home Affairs ............................................. 45
2.7 The Refugee Appeal Authority ........................................................................................... 46
2.8 Confidentiality in asylum cases ........................................................................................... 49
2.9 Conclusion ........................................................................................................................... 50

CHAPTER 3 ...................................................................................................................................... 52

3.1 Introduction ........................................................................................................................... 52
3.2 What is administrative action? ............................................................................................ 52
3.3 The definition of a decision in terms of PAJA ................................................................. 54
3.4 Lawful, reasonable and fair procedure ................................................................................. 55
3.5 Legal and illegal detention: The role of fair procedure ..................................................... 58
3.6 Pleading one’s own case ..................................................................................................... 60
3.7 Written reasons for rejection ............................................................................................... 61
3.8 Judicial review ...................................................................................................................... 63
3.9 The principle of legality ....................................................................................................... 67
3.10 Transparency ...................................................................................................................... 68
3.11 Conclusion ........................................................................................................................... 70

CHAPTER 4 ...................................................................................................................................... 72
1. PROBLEM STATEMENT AND THE PURPOSE OF THE STUDY

The South African Refugees Act\textsuperscript{1} makes a distinction between an asylum seeker and a refugee. The Act defines an asylum seeker as “a person who is seeking recognition as a refugee in the Republic”. A refugee on the other hand, is a person “who has been granted asylum” in the Republic.\textsuperscript{2} The legal position in South Africa is that before a person is recognized as a refugee, he or she is protected by the Bill of Rights to a certain extent. In the case of \textit{Lawyers for Human Rights v Minister of Home Affairs} the Constitutional court confirmed that the protection afforded by the Bill of Rights applies to everyone, including illegal foreigners and asylum seekers.\footnote{Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC).} This means that asylum seekers and refugees are entitled to most of the rights in the Constitution except those specifically reserved for citizens. Practically though, a refugee enjoys more rights than an asylum seeker. It is therefore in the interest of asylum seekers to have their status as refugees determined.

The process of applying for refugee status can be a challenge for those seeking refuge in the Republic of South Africa. For applicants coming from non-English speaking countries, language barrier can also present its own challenges. In terms of the Refugees Act, the first application is to the Refugee Reception Officer at the refugee reception office. The application must be made in person.\footnote{S 21(1) of the Refugees Act.} When an asylum seeker is deemed fit to qualify for asylum, he or she will be issued with a permit in terms of section 22 of the Refugees Act. The permit allows the asylum seeker to temporarily reside in South Africa until the finalisation of the asylum claim. This permit does not mean that the asylum seeker is already recognised as a refugee. The permit is an indication that the asylum seeker’s application as a refugee is not yet finalised. The application is considered finalised when it has gone through the hearing before the Status Determination Officer and any review or appeal following from that decision.

\footnote{For the difference between an asylum seeker and a refugee, see section 1 of the Refugees Act.}
\footnote{Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC).}
\footnote{S 21(1) of the Refugees Act.}
It is the Refugee Status Determination Officer who will grant asylum or reject the application.\(^5\) For people applying for refugee status, the determination by the Status Determination Officer may in itself mark the beginning of the process to be repatriated back to the country they were running away from in the first place. An aggrieved applicant can also apply to have the adverse decision reviewed or even lodge an appeal in accordance with the provisions of the Refugees Act.\(^6\) For as long as the application is still pending, the government cannot deport any asylum seeker.

An asylum seeker who enters the Republic of South Africa, either through a port of entry or illegally faces many challenges before he or she could reach a refugee reception office. Those who come in through a port of entry face being turned away by Immigration Officers due to lack of documentation. Often, asylum seekers find it hard to reach the refugee reception offices as there is no co-operation between the Immigration Officers, the South African Police Service and the functionaries in the refugee reception offices. To make things worse, the Immigration Amendment Act has reduced the days from fourteen to five, for asylum seekers without valid documentations to reach any refugee reception office. Since refugee reception offices are located only in five cities in the country, these have conditioned asylum seekers and refugees to stay and make their living in those cities as they are required to make frequent renewal of their permit. The closure of some of the refugee reception offices like the Johannesburg refugee reception office has caused a major concern to asylum seekers and refugees. This persistent closure of refugee reception offices may be seen as a further persecution in the eyes of asylum seekers and refugees.

The inability of the different functionaries to differentiate between asylum seekers and economic migrants adds to the problem concerning the process of refugee status determination. Instead of seeking to identify people in need of protection from persecution or events seriously disturbing public order, the process is used as an immigration control and this causes more people to be turned away or returned to countries where their lives may be at risk. The communication between the asylum seeker and all the functionaries of the Department of Home Affairs is very important. The lack of professional interpretation functionaries to help asylum seekers who need interpretation contributes to the problems asylum seekers face. Often, asylum seekers have to provide their own interpreters if the Department is unable to do so. The purpose of the study is

\(^{5}\) S 24(3) (a)-(d) of the Refugees Act 1996.
\(^{6}\) S 11 of the Refugees Act provides for review by the standing committee and section 12 provides for appeal by the Appeal Board.
to investigate the status determination process from a South African perspective and to make recommendations which will try to resolve the problem(s) identified.

2. RESEARCH METHODOLOGY

This study will focus mainly on the statutory framework regulating asylum seekers and refugees in South Africa. These will be discussed within the context of the international, regional and national framework. The study will mainly be a desktop literature review of books, journal articles and case law.

3. POINT OF DEPARTURE AND HYPOTHESIS

The question of asylum seekers cuts across a variety of issues some of which are sociological, economic, and political. This study seeks to give a human rights perspective to the process of refugee status determination. Sociological, political and economic issues will be addressed in as far as they relate to this study. Asylum seekers may not belong to South Africa but once they are within South Africa's boarders, they are protected by the Bill of Rights despite the fact that they may have come into the territory illegally. Asylum seekers are entitled to a wide variety of rights except those that are specifically reserved for citizens, such as political rights.

4. STRUCTURE AND OVERVIEW OF THE CHAPTERS

4.1 CHAPTER 1

REGULATORY FRAMEWORK

The refugee status determination is a process that unfolds in stages. In addition to the Refugees Act and its Regulations 2000, other statutes such as the Immigrations Act and its regulations, and the Promotion of Administrative Justice Act do apply. This chapter seeks to discuss the regulatory framework that governs the refugee status determination process while also pointing out the various rights that are impacted upon.
4.2 CHAPTER 2
THE REFUGEE STATUS DETERMINATION PROCESS IN SOUTH AFRICA

Specific Home Affairs functionaries determine who gets to stay in the Republic and who gets to be repatriated back to the country of their origin. Often when people flee their countries of origin, it is because their rights are threatened. As non-nationals in South Africa, the least they hope for is that their rights would be protected. This introductory section will give an overview of the different stages of the refugee determination process as provided for in the Refugees Act. The Refugees Act and its Regulations make provision for a four-stage Refugee determination process, the first one being a preliminary interview, secondly, the hearing, thirdly, a referral to the Director General in certain instances and lastly, appeals heard by the Appeal Authority.

4.3 CHAPTER 3
CONSTITUTIONAL RIGHT TO JUST ADMINISTRATIVE ACTION

This chapter will focus on the rights of asylum seekers to just administrative action. When considering an application for asylum the decision-makers must have due regard to the provisions of the Promotion of Administrative Justice Act, and in particular, ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented. Administrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair.

4.4 CHAPTER 4
SOUTH AFRICA’S OBLIGATION IN INTERNATIONAL LAW

South Africa is a signatory to a number of international instruments including those governing refugees internationally. Non-refoulement is an established principle in international law. The non-refoulement principle entails that a refugee may not be returned to a country where his or her human rights are at risk. This chapter will discuss the obligations of South Africa and how these have impacted on the process of refugee status determination.
4.5 CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

Chapter five will present recommendations and the findings of the study and then a conclusion.
CHAPTER 1

REGULATORY FRAMEWORK

1.1 INTRODUCTION

Over the years, the international community has developed various instruments to address the plight of asylum seekers and refugees. These instruments have set international standards for the treatment of asylum seekers and refugees by both regional and national bodies. Since 1994, South Africa has experienced a constant influx of people from other countries. The South African approach to the issue of asylum seekers and refugees has to a large degree followed internationally set standards. This chapter seeks to set out the international and regional rules, principles and rights applicable to asylum seekers and refugees. It also discusses the regulatory framework for asylum seekers and refugees in South Africa, as influenced by the above-mentioned standards.

It should be noted that not everyone who enters a foreign state seeking asylum qualifies as a refugee. How a country distinguishes between asylum seekers and economic migrants, for instance, will largely depend on the definitions provided for by the legislative framework of that particular country. In light of this distinction, this chapter will further discuss the different elements of the refugee definition, as well as the rights and responsibilities of asylum seekers in South Africa.

1.2 THE INTERNATIONAL REGULATORY FRAMEWORK

In the aftermath of World War II, the acknowledged widespread disregard for the basic rights of people and their suffering led to the formulation and adoption of the Universal Declaration of Human Rights. Article 14 of the Declaration, for instance, provides that:

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7 United Nations High Commission for Refugees “Displacement: The new 21st century challenge” http://www.unhcr.org/51bacb0f9.html (Date of use: 5 August 2013). The united Nation High Commission for Human Rights will hereinafter be referred to as the UNHCR.

(a) Everyone has the right to seek and enjoy in other countries asylum from persecution.

(b) This may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. 9

It can be said that some of the principles contained in the Declaration have acquired the status of customary international law and are therefore binding on states. 10 The Declaration has become a constitution for human rights in their entirety and the most cited human rights instrument in the world. 11 It follows then that the Declaration not only provides for the right to seek asylum, but also the right to enjoy it. Refugees have been customarily depicted as unprotected persons, a label that is applied to them in recognition of the fact that they do not enjoy national protection. 12 Although states are not compelled to grant asylum, an asylum seeker who finds himself or herself in another territory in which he or she seeks asylum should enjoy protection. Yet asylum seekers cannot demand asylum. Not surprisingly, the countries that receive large numbers of asylum applications are usually economically prosperous and politically stable. 13

The international refugee protection system has been construed as offering human rights protection to a clear and distinct group of people who cannot or can no longer rely on their country of origin or habitual residence for protection. 14 The linking of asylum to international human rights has brought significant relief to asylum seekers and refugees. The Declaration, humanitarian law and international human rights law have influenced the adoption of the United Nations Convention Relating to the Status of Refugees 1951. 15

9 Article 14 of the Declaration.
The 1951 Convention is the centrepiece of international refugee protection, providing the most comprehensive codification of the rights of refugees at an international level. In terms of the 1951 Convention, the term refugee shall apply to any person who:

(1) Has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928, or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;

(2) As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\(^\text{16}\)

As a post-World War II instrument, the 1951 Convention was originally limited in scope to persons fleeing events occurring before 1 January 1951 and within Europe.\(^\text{17}\) The restrictive nature of the 1951 Convention led to the adoption of the Protocol Relating to the Status of Refugees 1967.\(^\text{18}\) The 1967 Protocol removed the geographic and temporal limits of the 1951 Convention, and in so doing gave the Convention universal coverage.\(^\text{19}\) The 1951 Convention was adopted at a time when many people were being tortured and executed on the grounds of their religion, ethnicity and/or race.

A state can either accept refugees individually or in a group. The 1951 Convention supports the individual refugee status determination process, where an asylum seeker’s case is determined

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\(^\text{16}\) Article 1 of the 1951 Convention.

\(^\text{17}\) Introductory note by the Office of the United Nations High Commissioner for Refugees. See page 2 of the 1951 Convention.


\(^\text{19}\) Even after the elimination of temporal and geographic limitations, only those people who could establish a well-founded fear of persecution on grounds contained in the Convention fell within the scope of its protection.
The individualised refugee status determination process, at least as frequently interpreted, has tended to favour the asylum seeker who can show how he or she has been singled out for persecution. The individualisation of refugees has long been a thorny issue when viewed in the light of the UN definition.

Recognised refugees and asylum seekers fall under the protection of the host state, which is under obligation to afford them a collection of rights as specified in the 1951 Convention and other international instruments. Thus, international protection can make up for the failure of the country of nationality to protect its people. The 1951 Convention also prevents states from imposing penalties on refugees for their illegal entry into, or presence in, the country if they are seeking asylum.

The rights afforded to asylum seekers and refugees must be interpreted with due regard to international law, and any limitation to these rights must be properly justified. The 1951 Convention and other human rights instruments support the asylum seeker’s right to freedom of movement in the host country to integrate successfully. These show that there is interplay between humanitarian law, international human rights law and refugee law. The one depends on the existence and application of the other. For example, customary international law prevents decisions being taken to expel or reject persons who come from countries plagued by serious public disturbances or upheavals without explicit attention being paid to their humanitarian needs. It can be argued that humanitarian action can play an important role in safeguarding people’s security, but it should not be used as a substitute for the state willingly respecting the

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20 The individual refugee status determination procedure is one of the ways in which a state can determine whether a person is a refugee or not. Another way is through the mass influx procedure, where people are recognised as refugees as a group, without individual determination.


22 Owing to the United Nations covering both African and western countries, it is difficult to find common ground among countries, especially given the differences in social norms and family traditions. African countries, which are generally faced with mass movements, believe in a communal system while western states support an individual system.


24 S 31(1) of the 1951 Convention.


26 Human rights are a core set of rights that human beings possess simply by virtue of their humanity.

rights of its citizens.\textsuperscript{28} Refugee law and humanitarian principles can be the source of more precise, concrete standards of conduct against which other states' human rights performance can be measured.\textsuperscript{29}

Contracting states to the 1951 Convention must not restrict the movement of refugees other than when it is necessary, and such restrictions should only be enforced until such time as the refugees’ status in the country is regularised.\textsuperscript{30} Contracting states are bound by the 1951 Convention not only when they act within their own territorial borders but also when they act outside their territory.

It should be pointed out that there is no international obligation to accept people who do not qualify for refugee status. The 1951 Convention only obliges states to grant asylum to those who qualify for it, and its protection is limited to persons who have crossed international borders. States remain free to accord or not to accord protection on their territory, subject only to the constraints of \textit{non-refoulement}.\textsuperscript{31} The protection that the receiving country accords may be based on specific international treaties or customary international law or on the general principles of international law.\textsuperscript{32} Although the 1951 Convention covers persecution linked to certain types of violations only rather than all violations of human rights, it remains an effective legal instrument for protecting refugees.\textsuperscript{33}

According to the United Nations High Commission for Refugees Handbook, a person is a refugee as soon as he or she fulfils the criteria contained in the definition.\textsuperscript{34} The UNHCR Handbook states that persons compelled to leave their country of origin as a result of international or national armed conflict are not normally considered refugees under the 1951

\textsuperscript{28} Chakrabarty \textit{Human Rights and Refugees: Problems, Laws and Practice} 21.
\textsuperscript{29} Price \textit{Rethinking Asylum: History, Purpose and Limits} 78.
\textsuperscript{30} Article 31(2) of the 1951 Convention.

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Convention or the 1967 Protocol. Exceptions, however, are made for asylum seekers fleeing ethnic or religious conflicts.\textsuperscript{35} The determination of refugee status is declaratory and not constitutive in character. This means that a person does not become a refugee as a consequence of recognition, but is recognised because he or she is a refugee.\textsuperscript{36} The UNHCR Handbook states that persons compelled to leave their country of origin as a result of international or national armed conflict are not normally considered refugees under the 1951 Convention or the 1967 Protocol. Exceptions, however, are made for asylum seekers fleeing ethnic or religious conflicts.\textsuperscript{37} In addition, it should be pointed out that the 1951 Convention does not specifically state gender persecution as a ground or reason for seeking asylum. Gender can be said to refer to the socially constructed roles, behaviour and attributes that a particular society considers appropriate for men and women.\textsuperscript{38} Claims relating to sexual orientation and gender identity are primarily recognised under the membership of a particular social group.\textsuperscript{39}

\subsection*{1.3 THE LACK OF PROTECTION AS A \textit{SINE QUA NON} FOR THE GRANTING OF REFUGEE STATUS}

Under international law, it is the responsibility of states to protect their citizens. States have both a negative obligation not to violate their citizens' human rights and a positive obligation to respect and protect those human rights. The lack of protection by the asylum seeker's country of nationality is a salient element in the definition of a refugee.\textsuperscript{40} The asylum seeker's country of nationality must be unwilling or unable to protect the asylum seeker before another country can assume the role of a protector. It should be pointed out that persecution, where an effective remedy is available, does not compel a person to flee.\textsuperscript{41} However, there is no need for an asylum seeker to risk his or her life, freedom of movement or any other human rights for the sake of demonstrating the lack of national state protection before fleeing to another country. Carlier is of the opinion that "once the risk of persecution has been established, it is sufficient to

\begin{thebibliography}{9}
\bibitem{unhcr_handbook} UNHCR Handbook 164.
\bibitem{unhcr_handbook} UNHCR Handbook 164.
\bibitem{world_health_organization} World Health Organization “Gender, Women and Health” \url{http://www.who.int/gender/whatisgender/en/} (Date of use: 14 October 2012).
\bibitem{unhcr_guidance_notes} UNHCR “Guidance Notes on Refugee Claims Relating to Sexual Orientation and Gender Identity” \url{http://www.unhcr.org/refworld/docid/48abd5660.html} (Date of use: 17 July 2012).
\bibitem{goodwin-gill} Goodwin-Gill \textit{The Refugee in International Law} 2\textsuperscript{nd} ed 16.
\bibitem{nathwani} Nathwani \textit{Refugees and Human Rights: Rethinking Refugee Law} 64.
\end{thebibliography}
conclude that no adequate national protection exists in order to substitute international protection.”42 The host state acts as a surrogate to those in need of protection due to the lack of protection from the country of origin or nationality.

Protection may be preventive or remedial in nature, and implies the existence and effective functioning of mechanisms and procedures aimed at investigating the violation of the person’s rights, and prosecuting and punishing the violator of such rights.43 To protect implies either to provide physical shelter, or to use legal authority to secure the rights and freedom of those at risk.44 People are usually said to be protected by the law of a particular country if the government can maintain law and order in the country. Once a government loses control in the country, people in that country start to feel unprotected. Lack of national protection has been found in circumstances where there was no direct intent or negligence on the part of the country of origin.45 The question of protection and how it should be measured or evidenced is still not clear even in international law. This brings us to the regional regulatory framework.

1.4 THE REGIONAL REGULATORY FRAMEWORK

At the regional level, the primary document that addresses matters pertaining to refugees and asylum seekers is the Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa.46 The rights of refugees and asylum seekers have been further strengthened by the adoption of the African Charter on Human and Peoples’ Rights.47 Among other things, the African Charter on Human and Peoples’ Rights provides that every individual

45 Hathaway The Law of Refugee Status 132.
46 The Organization of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa 1969 has since undergone a number of changes to enable it to address Africa’s current and changing circumstances, and is now called the African Union (AU). Hereinafter the Refugee Convention will be referred to as the AU Refugee Convention http://www.africa union.org/Official documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf (Date of use: 14 May 2012).
47 African Charter on Human and Peoples’ Rights 1981 http://www.unhcr.org/refworld/type,multilateral,treaty,oau,,3ae6b3630,0.html (Date of use: 10 August 2012).
shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions. The Charter also imposes a duty on the receiving state to ensure that asylum seekers enjoying the right of asylum shall not engage in subversive activities against the country of origin or any other state that is party to the Charter.

According to the AU Refugee Convention, the term refugee shall mean any person who:

(1) Owing to a well-founded fear of persecution for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

(2) Owing to external aggression, occupation, foreign domination or other events seriously disturbing public order either in part or in the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

The AU Refugee Convention has a broader definition of refugee than the 1951 Convention discussed earlier. The AU Refugee Convention protects random victims of war, while the 1951 Convention excludes people who flee generalised violence. Given the state in which most African countries find themselves e.g. war, incursions by rebels, government instability and public disorder, the broader definition in the AU Refugee Convention is more in tune with the needs of asylum seekers and refugees across Africa. The AU Refugee Convention was

50 Article 1 of the AU Refugee Convention 1969.
51 The AU definition of a refugee covers people fleeing general civil war, foreign dominance and situations of public disturbance. This definition is broader than that of the 1951 Convention in a sense that the AU Refugee Convention also protects all persons compelled to flee across national borders for man-made reasons.
originally intended to help asylum seekers to become recognised as refugees in times of war and during a mass influx.\textsuperscript{52}

In cases where there is a mass influx of asylum seekers or refugees into a particular country, the AU Refugee Convention acknowledges such people as being refugees on a \textit{face value} basis.\textsuperscript{53}

The entrenchment of the definition of a refugee in the AU Refugee Convention has led to the widespread use of \textit{face value} asylum determination procedures in most of Africa. This means that a person may qualify for refugee status simply by being a citizen of a particular country.\textsuperscript{54}

This is in contrast to the situation in most host countries elsewhere in the world where an individualised status determination procedure is followed.\textsuperscript{55}

In Africa, the process of decolonisation created political tensions and conflicts, which prompted mass displacements of people. Blatant and excessive violation of human rights in non-democratic states has been a major contributing factor in the creation of millions of refugees across the world.\textsuperscript{56}

The AU Refugee Convention’s definition has been praised in several quarters for upholding the African values of hospitality and community over the western-style individualism.\textsuperscript{57}

South Africa plays a leading role in Africa in relation to protecting refugees and is a party to the AU Refugee Convention\textsuperscript{58} and the 1951 Convention.\textsuperscript{59} In South Africa, the Constitution is the highest authority and it provides the fundamental blueprint for the protection of human rights at a

\textsuperscript{52} The mass influx of refugees in this case refers to a situation where many people seeking refuge come to a given state all at once or in a large group.

\textsuperscript{53} This means that no evidence needs to be adduced to show whether the people are refugees or not.

\textsuperscript{54} Tuepker 2002 \textit{Journal of Refugee Studies} 411.

\textsuperscript{55} Nathwani \textit{Refugees and Human Rights: Rethinking Refugee Law} 2.

\textsuperscript{56} Handmaker and Ndessomin “Implementing a Durable Solution for Angola Refugees in South Africa” in Handmaker, de la Hunt and Klaaren (eds) \textit{Advancing Refugee Protection in South Africa} 143.

\textsuperscript{57} Ahmad \textit{Refugee Problems of 21st century} 14.

\textsuperscript{58} Tuepker 2002 \textit{Journal of Refugee Studies} 411.

national level.\textsuperscript{60} This flows from the fact that every government has the right to enact, implement and enforce its own legislation within its own jurisdiction.\textsuperscript{61} South Africa’s Constitution is extremely liberal and generous when it comes to the rights and entitlements that are bestowed on citizens and non-citizens. Any legislation that is inconsistent with the Constitution will be declared invalid to the extent of its inconsistency.\textsuperscript{62} The South African Refugees Act, in turn, is a key piece of legislation when it comes to refugees and asylum seekers.\textsuperscript{63}

\subsection*{1.5 THE NATIONAL REGULATORY FRAMEWORK}

The Refugees Act and the Immigration Act\textsuperscript{64} are the main Acts in South Africa regulating, among other things, the entry, the stay and the documentation of non-nationals in the Republic. These two pieces of legislation, however, differ in scope. Immigration law is ruled by the principle of sovereignty, where every state is free to design and implement its own immigration policies, while refugee law is characterised by various international obligations based on international human rights law.\textsuperscript{65} As a sovereign state, South Africa has the right to detain and deport those who violate its immigration laws.\textsuperscript{66} Without such power, a state would not be able to govern and control its borders. The Refugees Act is the primary piece of legislation that ensures the safety, well-being and dignity of asylum seekers and refugees. It provides for the reception into the country of asylum and regulates the application for and recognition of refugee status.\textsuperscript{67}

In matters concerning asylum seekers and refugees, immigration laws and policies should not be given priority over the rights of asylum seekers and refugees. The integrity of the legal regime underpinning refugee protection would be at risk if asylum policies were considered a sub-set of

\begin{footnotesize}
\begin{enumerate}
\item S 2 of the Constitution of the Republic of South Africa 1996. Hereinafter referred to as the Constitution.
\item Goodwin-Gill \textit{The Refugee in International Law} 2\textsuperscript{nd} ed 52.
\item S 2 of the Constitution.
\item Nathwani \textit{Refugees and Human Rights: Rethinking Refugee Law} 2.
\item S 3(1)(g) of the Immigration Act.
\item S 1 of the Refugees Act.
\end{enumerate}
\end{footnotesize}
migration management strategies that are governed by security concerns. Policies that address the different needs of the various groups in mixed migratory movements are promoted as a safety net for those whose lives and freedom is at risk. Generally states are not in favour of open borders and prefer restrictive immigration policies. Yet owing to relatively unprotected borders, it is impossible to accurately determine the exact number of non-nationals entering, leaving and staying in South Africa. Crossing borders without authorisation is only one of the numerous ways through which non-nationals can enter the Republic. The movement of people into South Africa, especially through irregular migration, has accelerated sharply in the post-apartheid period.

Immigration issues are often linked to fundamental interests in different parts of the government as well as the private sector. Migration, no matter how selective and tightly controlled, arouses nationalist passions and causes moral panic. South Africa’s immigration policies provide little opportunity for African economic migrants to enter the country legally, pushing these individuals into the asylum system in overwhelming numbers. The numerous applications made in bad faith, lead to a backlog in the asylum system which, in turn, creates unnecessary delays for bona fide asylum seekers. The primary concern of states is to prevent having their authority undermined by a refugee definition so broad as to create excessive obligations towards masses of people seeking special consideration from the international community. Faced with the generally narrow definition of a refugee in the 1951 Convention, many countries have found it difficult to respond satisfactorily to the needs of refugees in the broader sense, such as those fleeing generalised violence or civil war. Faced with such a situation, asylum seekers are likely

68 Van der Klaauw 2009 Refugee Survey Quarterly 60.
70 Crush and Pendleton 2004 Southern African Migration Protect 30.
73 Modi Migration to South Africa: A Human Rights Perspective 8.
75 Helton and Jacobs “What is Forced Migration?” in Human Rights and Refugees, Internally Displaced Persons and Migrant Workers 5.
76 Parliamentary Assembly with the contribution of Goodwin-Gill Asylum 16.
to suffer a double violation, the initial violation in their country of nationality and the second one when they are denied guaranteed rights in the receiving state.\textsuperscript{77}

For a person to qualify for refugee status in South Africa, he or she must conform to the definition of a refugee in terms of the Refugees Act. An applicant’s petition for asylum must satisfy both the subjective and the objective component. South Africa’s refugee legislation has to a certain extent incorporated the broader AU Refugee Convention definition and this has afforded most people from African countries the opportunity to be legally identified as refugees. However, this approach does not detract from the fact that South Africa follows an individual refugee status determination procedure.\textsuperscript{78} Section 3 of the Refugees Act provides that a person is a refugee if that person:

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

(b) Owing to external aggression, occupation, foreign domination, or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or

(c) Is a spouse or dependant of a person contemplated in paragraph (a) or (b).\textsuperscript{79}

According to the South African definition, an asylum seeker is a person who has lodged or intends to lodge an asylum application with the Department of Home Affairs and who is awaiting a decision on his or her asylum claim that will either be granted or denied.\textsuperscript{80} A further requirement is that the applicant must not be disqualified in terms of Section 4 of the Refugees

\textsuperscript{77} Chakrabarty Human Rights and Refugees: Problems, Laws and Practice 105.
\textsuperscript{78} Individualism from the 1951 Convention and the broader definition from the AU Refugee Convention.
\textsuperscript{79} S 3 of the Refugees Act has been amended by s 4 of the Refugees Amendment Act 2008.
\textsuperscript{80} S 1 of the Refugees Act.
Act or the 1951 Convention. Asylum seekers are protected under the umbrella concept of a refugee even though they are not expressly included in the definition. Therefore, the term refugee also covers asylum seekers as long as their application for asylum has not been rejected. Asylum seekers and refugees may be protected by the law, but the legal position or status of asylum seekers is more unsteady than that of recognised refugees.

The main goal of asylum seekers is to be granted asylum. The concepts of refugee and asylum are complementary, that is, the one does not exist without the other. It must be noted that refugees are not stateless persons, they have nationality. The only thing refugees lack is the protection of their country of nationality or origin.

Given the multiplicity of criteria used to determine who a refugee is, the definition is open to interpretation and can be problematic at times. In ordinary usage, the term refugee has a broader, looser meaning, signifying somebody in flight. For an asylum seeker to be declared a refugee, he or she must be outside their country of origin or nationality. This means that a person cannot seek asylum in another country while still living in his or her country of origin or nationality. Becoming a refugee brings about an avalanche of changes to an individual’s material and social situation.

It cannot be denied that most asylum seekers or refugees do not want to stay in camps forever. Established refugee camps in Malawi, Mozambique, Kenya and Somalia have been used as temporary stopovers by those seeking to move towards South Africa, putting a strain on scarce

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83 Joshi Protecting Human Rights of Refugees: Issues and International Intervention 47.
86 Goodwin-Gill The Refugee in International Law 2nd ed 3.
humanitarian resources and creating tensions within the camps.\textsuperscript{88} It is unfortunate for the affected parties that South Africa does not recognise refugees on a humanitarian level. Not every person who has endured or will endure a human rights violation in his or her country of origin will be considered a refugee in South Africa or any other country. Similarly, not all people who come from refugee-producing countries are refugees. It is therefore possible to have refugees who come from countries that protect and promote human rights. It is important that asylum seekers are aware that no reasons exist, other than those given in Section 3 of the Refugees Act, for the recognition of refugee status.\textsuperscript{89} It is not always easy to distinguish between refugees and other migrants, but a distinction has to be drawn because their situation is covered by different legislations as well as different conventions.\textsuperscript{90} As Feller notes, “refugees are not migrants and it is very dangerous to confuse the two.”\textsuperscript{91}

Protection is one of the fundamental factors distinguishing a refugee from an economic migrant. Economic migrants have the protection of their country while refugees do not have it. An economic migrant, as distinguished from a refugee, freely chooses to live elsewhere and is capable of having a normal relationship with the authorities of his or her home country.\textsuperscript{92} For the general populace though, it is not always easy to make the distinction between refugees and migrants.

Refugee recognition depends to a large extent on the interpretation given by the Refugees Act and other relevant authority. The merits of the case presented by the asylum seeker as well as the effectiveness of the refugee status determination process also play a role.\textsuperscript{93} The Constitution provides that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and object of the

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\textsuperscript{89} Kleinsmidt and Manicom 2010 Africa Insight 170.
\textsuperscript{91} Feller 2005 Refugee Survey Quarterly 27.
\textsuperscript{92} Chakrabarty Human Rights and Refugees: Problems, Laws and Practice 23.
\textsuperscript{93} Kagan “Assessment of Refugee Status Determination Procedure at UNHCR’s Cairo Office” 2002, Forced Migration and Refugee Studies working paper one 11 http://www.aucegypt.edu/gapp/cmrs/reports/documents/rsdreport.pdf (Date of use: 13 July 2013). From a human rights perspective, the status determination process is effective when the process is undertaken in a fair and reasonable manner.
\end{flushleft}
Bill of Rights.\textsuperscript{94} It also provides that when interpreting any legislation, the court must give preference to any reasonable interpretation of the legislation that is consistent with international law.\textsuperscript{95} The Refugees Act must be interpreted according to the instrument provided in Section 1A of the Refugees Amendment Act.\textsuperscript{96} A human rights-based interpretation marks a shift from causes (textual approach) to effects (purposive and contextual approach) as the focus of refugee law.\textsuperscript{97}

1.5.1 \textbf{WELL-FOUNDED FEAR OF PERSECUTION (S 3(A) OF THE REFUGEES ACT)}

There is no universally accepted definition of persecution, and different sources have tried to come up with their own definition.\textsuperscript{98} The most logical source of a free-standing definition of persecution is international human rights law, with several commentators suggesting that persecution equates to a human rights violation.\textsuperscript{99} As pointed out above, not all human rights violations amount to persecution for the purpose of being granted refugee status. However, it may be inferred that a threat to life or freedom on account of gender, race, religion, nationality, political opinion or membership of a particular social group will mostly amount to persecution.\textsuperscript{100} Persecution must be serious in terms of its nature or repetition, and is a construct of two separate but essential elements; namely, risk of serious harm and failure of state protection.\textsuperscript{101}

The term persecution is said to describe not only a refugee’s vulnerability to harm but also a particular kind of harm, one inflicted maliciously and unjustifiably, usually by the state or with official sanction.\textsuperscript{102} Solomon is of the opinion that the violation must reach a certain degree of

\textsuperscript{94} S 39(2) of the Constitution.
\textsuperscript{95} S 233 of the Constitution.
\textsuperscript{96} S 1A of the Refugees Act as inserted by s 2 of the Refugees Amendment Act 2008. This section repealed and replaced s 6 of the Refugees Act.
\textsuperscript{98} UNHCR Handbook 51.
\textsuperscript{100} UNHCR Handbook 51.
\textsuperscript{101} Haines “Gender-Related Persecution” in Feller, Turk and Nicholson (eds) \textit{Refugee Protection in International Law: UNHCR’s Global Consultation on International Protection} 331.
\textsuperscript{102} Price \textit{Rethinking Asylum: History, Purpose and Limits} 70.
severity before it will be classified as persecution. A person need not be persecuted alone in order to be a refugee; he or she can also be persecuted together with other people. The case for granting asylum purely on grounds of past persecution is strongest when severe persecution is carried out by society at large rather than by the government alone or by a sector of society. An individual may possess a well-founded fear of persecution, not only because of past experience but also if there is a risk of future persecution.

Persecution or denial of human rights prior to flight can create a presumption of future persecution, as long as the basic circumstances have not changed. The concept of well-founded fear is inherently objective, and is intended to restrict the scope of protection to persons who can demonstrate the presence or the prospective risk of persecution. This means that it has nothing to do with the state of mind of the asylum seeker. Persecution can also emanate from individuals, such as from a family, stranger or neighbour. An asylum seeker can therefore establish a valid asylum claim where the state condones or tolerates practices or harmful actions perpetrated against him or her and are unable or unwilling to protect him or her effectively against such harm.

Private persecution should be regarded as persecution that occurs when the state, for illegitimate reasons, is unwilling to make the effort in good faith to provide its citizens with protection from violence inflicted by non-state actors. The persecutory nature of an action will be reinforced when accompanied by discrimination between the asylum seeker and other people, or between the category of persons to which the asylum seeker belongs and another category of persons in a similar situation.

103 Solomon Of Myth and Migration: Illegal Immigration into South Africa 11.
104 Price Rethinking Asylum: History, Purpose and Limits 171.
105 UNHCR Handbook 45.
107 Hathaway The Law of Refugee Status 65.
108 Price Rethinking Asylum: History, Purpose and Limits 147.
Discrimination will amount to persecution where such act or acts of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned.  

A state that seeks to inflict harm on a person because he or she is of a different race, religion or nationality, or because of some other characteristics, cannot be said to be acting on behalf of that citizen. When an asylum seeker’s claim involves non-state actors, it tends to be more complicated to determine. If the country of nationality is the source of the persecution, then the state has violated the human rights of its citizens as well as the internationally recognised limits on legitimate state action. If the state carries out its actions with full knowledge that it will infringe human rights, then it is committing an international wrong. Price is of the opinion that “the violation or persecution must also be for illegitimate reasons or reasons that are contrary to the duty of a state to protect its citizens.” Countries like Rwanda and Burundi are illustrative of how people can be forced out of their native lands on account of their culture and ethnic identity.

Persecution alone cannot afford a person a refugee status; there must be a connection between the persecution and the grounds contained in Section 3 of the Refugees Act. The connection may be revealed by either direct or circumstantial evidence of the reasons that led to the asylum seeker leaving his or her country of nationality to seek asylum elsewhere. The direct and circumstantial evidence will have to be examined in a protection-oriented manner to determine whether the feared persecution is connected to the ground(s) stated in Section 3 of the Refugees Act.

Notwithstanding the above, a line should be drawn between those people who leave their country for personal convenience and those people who leave because of fear of future persecution or the harrowing memory of past persecution. When analysing the reasons why the asylum seeker had to leave his or her country of nationality, it is immaterial to determine whether the grounds for persecution contained in the Refugees Act are the only or sole cause of the

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111 Price Rethinking Asylum: History, Purpose and Limits 106.
112 Price Rethinking Asylum: History, Purpose and Limits 85.
113 Price Rethinking Asylum: History, Purpose and Limits 108.
114 Solomon Of Myth and Migration: Illegal Immigration into South Africa 64.
asylum seeker fleeing his or her country. Asylum is not to be granted merely to compensate for past inflictions; it is the existence of future risk that is crucial.

1.5.2 GENDER-BASED PERSECUTIONS (S 3(A) OF THE REFUGEES ACT)

Originally the Refugees Act did not provide for gender-based persecution as separate grounds for seeking asylum. The Act has since been amended to include this provision. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related persecution is a term that has no legal meaning per se; rather, it is used to encompass the range of claims in which gender is a relevant consideration in the determination of refugee status. Yet it is a vague concept and can cover a variety of violations against both males and females. One recognised form of gender-based persecution is female genital mutilation. This form of persecution is recognised by most states, including South Africa. Female genital mutilation covers:

1. Partial or total removal of the clitoris and/or the prepuce (clitoridectomy);
2. Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora (excision);
3. Narrowing of the vaginal orifice with creation of a covering seal by cutting and positioning the labia minora and/or the labia majora, with or without excision of the clitoris (infibulations); and
4. All other harmful procedures to the female genitals for non-medical purposes, such as pricking, piercing, incising, scraping and cauterising.

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People who are persecuted because of their gender, which is supposedly justified on the basis of culture or custom, can rely on the ground of gender-based persecution. It is not yet clear whether women who escape from participate in certain culture- or tradition-based practices that do not involve any physical harm, will acquire refugee status in South Africa. In cases where an asylum seeker relies on gender to seek asylum, it becomes imperative for decision-makers to be informed about gender-based persecutions.

1.5.3 **EXTERNAL AGGRESSION, FOREIGN DOMINANCE, EVENTS SERIOUSLY DISTURBING PUBLIC ORDER AND COMPELLING REASON (S 3(B) OF THE REFUGEES ACT)**

Section 3(b) of the Refugees Act is similar to Article 1(2) of the AU Refugee Convention.\(^{119}\) People or individuals fleeing from civil war and political instability may be granted asylum in South Africa in terms of Section 3(b) of the Refugees Act. War and violence are usually used as instruments of persecution, targeting people on the basis of their race, religion, nationality, membership of a particular social group or political opinion. Asylum seekers may rely on Section 3(b) if there is war in their country and they cannot prove the element of persecution. The section is mostly concerned with general conditions of instability rather than individual persecution.\(^{120}\) Furthermore, the section covers situations in which a state is controlled or dominated by other, external parties or states. The above circumstances are provided for or dealt with in the AU Refugee Convention.\(^{121}\)

Asylum seekers, especially from Africa, not only flee from civil war but also tribal or ethnic conflicts. As long as a person is compelled to seek asylum because of some anticipated serious disturbance of the public order, he or she need not demonstrate any linkage between his or her personal status and the impending harm.\(^{122}\) Usually, when there is war the government will attempt to calm the situation. However, such an attempt should not serve as a ground for the receiving state to reject the application of the asylum seeker. This is because generalised

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119 Article 1(2) of the AU Refugee Convention 1969 and s 3(b) of the Refugees Act.
121 Article 2(1) of the AU Convention states that the granting of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any member state.
violence and massive human rights violations may nonetheless occur, compelling the individual to flee. 123

1.5.4 DIFFERENCES AND SIMILARITIES BETWEEN SECTION 3(A) AND 3(B) OF THE REFUGEES ACT

An asylum seeker can make an application either in terms of Section 3(a) which has adopted the 1951 Convention approach or Section 3(b) which, as mentioned earlier, has adopted the approach of the AU Refugee Convention. Whether an asylum seeker relies on Section 3(a) or (b), the determination is on an individual basis. The lack of protection from the country of nationality or origin applies to both sections. 124 For a person to rely on Section 3(a), he or she must establish the element of well-founded fear of persecution, among other things. Section 3(a) works well for the asylum seeker if he or she is personally (whether directly or indirectly) affected. However, a person need not establish the element of well-founded fear of persecution when relying on Section 3(b).

Section 3(b) can be relied upon by people fleeing civil war or public disturbance in either the whole or part of the country of nationality or origin. Section 3(b) is different from Section 3(a) in that eligibility depends solely on the presence of general conditions of instability and does not require an individual assessment revealing a differential impact. 125 Populations fleeing civil conflicts often include a number of conventional refugees, 126 so there is a reasonable presumption that a person claiming to be a refugee in terms of Section 3(b) may also be found to be a refugee in terms of Section 3(a).

123 Schreier 2008 Refugee: Canada’s Periodical on Refugees
http://heinonline.org/hol/page?handle=hein.journals/iolr2&div=6&g_sent=1&collection=journals
(Date of use: 3 August 2012).
124 With reference to s 3(b), the lack of protection can be presumed from the general condition of that particular country.
125 Amit 2011 International Refugee Law 473.
126 Conventional refugee in this instance means a refugee in terms of the 1951 Convention.
If a person wants to be granted asylum under Section 3(b), the Status Determination Committee must establish whether the person satisfies the requirements of Section 3(b) and must not include the requirements of Section 3(a) at the same time. In other words, Section 3(a) must not be combined with Section 3(b) to determine somebody’s asylum claim. In his research, Amit found that:

Many of the letters rejecting the asylum application specifically state that the individual was fleeing political instability (therefore Section 3(b) applies) but then proceeded nonetheless to apply Section 3(a), pointing to the fact that the individual did not suffer persecution as the basis for rejection.

To make things worse, in dealing with what they perceive as the foreign menace, police on the ground have become simultaneously more corrupt, militarised and brutal. In the eyes of some officials, illegal foreign nationals are so relentless in their quest to enter South Africa that they are willing to risk their physical integrity and their lives.

1.6 THE RIGHTS AND RESPONSIBILITIES OF ASYLUM SEEKERS

South Africa has committed itself to protecting refugees both within its borders and at its frontiers. In the case of Lawyer for Human Rights v Minister of Home Affairs, the Constitutional Court confirmed that the Bill of Rights protects everyone in the country, including illegal foreign nationals and asylum seekers. Refugees, including asylum seekers, are legally entitled to a standard of treatment in the host countries that encompasses both fundamental human rights and refugee-specific rights. When it comes to basic treatment and respect, fundamental human rights recognise no distinction between people who are South African and

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127 The Refugee Standing Committee was traditionally responsible for the determination of refugee status in South Africa and will be discussed in chapter 2.
128 Amit 2010 Forced Migration Studies Programme 40. Hereinafter referred to as FMSP.
132 Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC) 151.
133 Sachs “From a Refugee to a Refugee Judge” in Simeon (ed) Critical Issues in International Refugee Law 51. Some of the refugee-specific rights are contained in s 27A of the Refugees Act.
those who are not. As a result, all asylum seekers in South Africa are entitled to a minimum degree of protection under the Constitution.

Generally, asylum seekers in South Africa have the right to freedom of movement. The values embodied in the Constitution could be demeaned if the freedom and dignity of non-nationals were violated in the process of preserving their national integrity. This arrangement is generous compared to that of other countries in the region, where asylum seekers are often confined to refugee camps. South Africa also provides for the rights of asylum seekers in the Refugees Act. The Refugees Act provides that an asylum seeker is entitled to:

(a) Formal written recognition as an asylum seeker in the prescribed form pending finalisation of his or her application for asylum;

(b) The right to remain in the Republic pending the finalisation of his or her application for asylum;

(c) The right not to be unlawfully arrested or detained; and

(d) The rights set out in the Constitution of the Republic of South Africa 1996, insofar as those rights apply to an asylum seeker.

To further strengthen the rights of asylum seekers, the court in Minister of Home Affairs v Watchenuka pointed out that an applicant for asylum is not ordinarily entitled to take up employment or study pending the outcome of his or her application, but that there will be circumstances in which it would be unlawful to prohibit it. The court went on to say that where the right to employment is restricted, the restriction must not humiliate or degrade the person involved. Asylum seekers are entitled to some socio-economic rights, like the right to education and the right to employment. Even though asylum seekers can be regarded as having entered the receiving state in an unauthorised manner, they are under its jurisdiction

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135 Lawyers for Human Rights v Minister of Home Affairs 2004 (4) SA 125 (CC) 137.
136 There are refugee camps in Northern Kenya and South Sudan.
137 S 27A is an insertion made by the Refugees Amendment Act 2008.
138 Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA) 342. Hereinafter referred to as the Watchenuka case.
139 Watchenuka 339.
140 Watchenuka 342.
merely as a consequence of it being the receiving state which processes their applications and decides their fate.\textsuperscript{141}

Many of the rights that asylum seekers are entitled to and that are upheld by the courts remain unrealised, while asylum seekers and refugees continue to suffer human rights violations.\textsuperscript{142} For example, the \textit{Mail & Guardian} newspaper published a story in which a pregnant refugee woman was denied healthcare services in a public hospital despite the fact that she was in pain. After waiting for more than four hours, she eventually went to a private hospital.\textsuperscript{143} In this case, the failure of the nurses to help the woman was not due to a lack of resources but rather due to her not being a South African national. Such treatment stands in stark contrast to South Africa's commitments to preserve and promote the human rights of all people living in the country. It also goes against the South African notion of \textit{Ubuntu}.\textsuperscript{144} The Immigration Act, in turn, protects a person's right to healthcare services.\textsuperscript{145}

\subsection*{1.7 CONCLUSION}

This chapter discussed the regulatory framework for asylum seekers and refugees in South Africa, as influenced by internationally set standards. The chapter highlighted the fact that South Africa's refugee laws are largely influenced by international refugee laws and standards. Every state wants and is entitled to control the entry, the departure and the residence of every person at its ports of entry. Furthermore, the regulation of refugees and asylum seekers is not purely a national matter; it also involves regional states and the international community. With the adoption of the 1951 Convention, contracting states were given a standard against which they could implement their own national regulatory framework for asylum seekers and refugees. In this regard, international or regional regulations help to promote uniformity in the way refugees and asylum seekers are treated.

\begin{footnotesize}
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\item Odhiambo 19-03-2012 \textit{Mail & Guardian} 1-2.
\item This word means humanness. More specifically, it means that a human is a human because of other human. It is widely used by South Africans.
\item S 44 of the Immigration Act as substituted by s 42 of the Immigration Amendment Act 2004. Section 44 of the Immigration Act provides that: When possible, any organ of state shall endeavour to ascertain the status or citizenship of the person receiving its services and shall report to the Director-General any illegal foreigner or any person whose status or citizenship could not be ascertained, provided that such a requirement shall not prevent the rendering of services to which illegal foreigners and foreigners are entitled under the Constitution or any law.
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The chapter also clarified who a refugee is, including his or her distinctive features. Although the definition and interpretation of refugee will differ from one state to another, the existence of an international standard will always serve as a useful yardstick against which all states can apply their definition and interpretation, and measure their actions. It must be emphasised that not everybody who seeks asylum will be granted such in South Africa. The chapter also discussed South Africa’s obligations towards refugees or asylum seekers.

Regional treaties also help with the refugee definition and interpretation. Every state is at liberty to grant refugees and asylum seekers certain rights, but is not at liberty to deny asylum seekers and refugee’s fundamental human rights and the rights contained in the 1951 Convention if the state involved is a party to the Convention finally, this chapter highlighted the rights and responsibilities of asylum seekers and refugees while living in South Africa. Undoubtedly, the rights awarded to asylum seekers and refugees in South Africa meet the acceptable international refugee standard.
CHAPTER 2

THE REFUGEE STATUS DETERMINATION PROCESS IN SOUTH AFRICA

2.1 INTRODUCTION

In chapter 1, both the international and South African normative framework for the regulation of refugees was outlined. The journey of asylum seekers from the port of entry to the point where their application for refugee status is accepted or rejected is accompanied by processes that are influenced by legislation. The refugee reception centres in South Africa are intended to be administrative facilities that process asylum applications and receive individual applications as opposed to dealing with a mass influx of refugees. This means that the status determination process of asylum seekers is assessed on an individual basis at designated offices or centres. This chapter will provide an in-depth discussion on the refugee reception centres. It will also outline the status determination process in South Africa. Finally, the chapter will look at the designated offices and functions of the people responsible for processing applications for refugee status, as outlined in the legislation, regulations and policies.

2.2 SOUTH AFRICA'S PORT OF ENTRY

The Minister of Home Affairs may, in a prescribed manner, designate any place in the Republic, which complies with the prescribed requirements, where all persons have to report before they may enter, sojourn or remain in, or depart from the Republic. South Africa may be accessed by land, sea or air. Any person entering the Republic becomes subject to the provisions of the Immigration Act with the exception of asylum seekers who are already subject to the Refugees Act. It must be emphasised that even asylum seekers are subject to the Immigration Act except in circumstances where the Refugees Act applies. Until an asylum seeker permit has been issued to a person seeking asylum who has entered the Republic of South Africa in contravention of the provisions of the Immigration Act, he or she is illegal in the Republic.

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148 For further information on the ports of entry in the Republic of South Africa, see http://www.home-affairs.gov.za/South%20African%20ports%20of%20entry.html (Date of use: 21 June 2012).

Illegality in this instance is not necessarily due to the asylum seeker being without proper documentation; it may be because he or she entered the Republic in an unregulated manner. The asylum seeker will therefore be dealt with in accordance with the Immigration Act until the Refugees Act takes over.\textsuperscript{150} This means that an asylum seeker without proper documentation can report to any port of entry where he or she will be given a transit permit legalising his or her presence in the country for a specific period. In Abdi \textit{v Minister of Home Affairs}, the court held that the denial of constitutional rights to persons who are physically in South Africa but have not formally entered the country because they are still at sea or in the air or at airports, constitutes a negation of the values underlying the South African Constitution.\textsuperscript{151}

It is unfortunate that most asylum seekers that transit through Zimbabwe to South Africa choose to avoid the official crossing at Beit Bridge, and rather cut their way through the electrified razor wire fence that separates the two countries.\textsuperscript{152} Many of the people or asylum seekers who enter South Africa illegally are poor. It can be argued that asylum seekers who enter South Africa through a legitimate port of entry, that is, legally, are better off than those who enter illegally.\textsuperscript{153} For instance, those who have entered through a designated port of entry will be subjected to less harassment by the police as they would be in possession of some documentation allowing them to sojourn in the Republic.

By reason of the provision contained in Section 21(4) of the Refugees Act, no proceedings may be instituted or continued against such a person in respect of his or her unlawful entry into or presence in the country until a decision has been made on his or her application.\textsuperscript{154} The Director-General of Home Affairs may, subject to the prescribed procedure under which an

\textsuperscript{150} Kiliko \textit{v Minister of Home Affairs} 2007 (1) SA 97 (C) 107. Also see section 32, 33 and 34 of the Immigration Act 2002.

\textsuperscript{151} Abdi \textit{v Minister of Home Affairs} 2011 (3) SA 37 (SCA) Para 20-22.

\textsuperscript{152} Crisp and Kiragu 2010, "Refugee protection and international migration: A review of UNHCR's role in Malawi, Mozambique and South Africa" \url{http://www.humansecuritygateway.com/documents/unhcr_refugeeprotectionandinternationalmigration_reviewofunhcrsroleinmalawimozambiqueandsouthafrica.pdf} (Date of use: 20 July 2012).

\textsuperscript{153} People who enter South Africa illegally often cross the border in dangerous places to avoid being detected by the immigration police. Groups like Gumaguma gangs target such people, and many women are raped and killed. Such groups operate in areas referred to as `no man's land' which does not fall under the jurisdiction of any state. Davies \url{http://www.aljazeera.com/focus/2008/07/20087188353663376.html} (Date of use: 6 October 2013).

\textsuperscript{154} Arse \textit{v Minister of Home Affairs} 2010 (7) BCLR 640 (SCA) para19. See also section 21(4) of the Refugees Act. In actual fact, the Section allows the asylum seeker to be exempted from the general immigration laws.
asylum transit permit may be granted, issue a permit to a person who at a port of entry claims to be an asylum seeker. Such a permit will be valid for a period of 5 days only, allowing the individual to travel to the nearest refugee reception office in order to apply for asylum. The transit permit allows an asylum seeker without proper documentation to approach any refugee reception office and apply for asylum. It has been reported that Home Affairs officials have developed the practice of requiring asylum seekers to produce their transit permit before their applications can be accepted. However, this practice violates the purpose of the Refugees Act and is therefore unlawful. Although resources and capacity are often strained, South Africa is not permitted to refuse protection to anyone who meets or may meet the refugee definition.

Previously, asylum seekers without documentation had 14 days to report to any refugee reception office. The Immigration Amendment Act has reduced the period for an asylum seeker without relevant documents to report to such an office to apply for asylum. The Department of Home Affairs may condone a longer period if the applicant or asylum seeker can establish a just cause for the late application. Even though the number of days has been reduced, this has in no way reduced the number of asylum seekers at refugee reception offices. With these procedural changes, there is a high risk of human error by staff overburdened by the large number of applications.

The change in the time period helps the Department of Home Affairs to track and control all asylum seekers but on the other hand, it is putting pressure on the asylum seeker to approach a refugee reception office within a very short period. It must be stated that asylum seekers do not get any official or government transportation. Often asylum seekers make their way on foot, 

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156 A transit permit, allowing an asylum seeker a grace period to approach a refugee reception centre within a certain period. Section 23 of the Refugees Act.
158 S 2 of the Refugees Act. Exceptions are made in terms of section 4 of the Refugees Act.
159 S 2(2) of the Refugee Regulations (Forms and Procedures) 2000.
161 S 3(4) of the Refugee Regulations (Forms and Procedures) 2000.
162 For example, if 2000 asylum seekers entered the Republic at a given time, the Department of Home Affairs would know that they are expecting a certain number of people within the stipulated time at the refugee reception offices. The monitoring can be done through a computerised system.
and the reduced number of days could well be a disadvantage for them. Some asylum seekers are lucky to receive transport from relatives who are already in the Republic, and sometimes even from strangers. The majority of them, however, must make their own arrangements to get to the refugee centre.

2.3 REFUGEE RECEPTION OFFICES IN SOUTH AFRICA

The Department of Home Affairs is responsible for refugee affairs in South Africa and is central to the processing of asylum applications. The Director-General of Home Affairs may, by notice in the Gazette, establish as many refugee reception offices in the Republic as he or she regards necessary for the purpose of the Refugees Act.163 There are currently five refugee reception offices in South Africa.164 In cases where there is an influx of asylum seekers, the Minister may, after consultation with the UNHCR representative and the Premier of the province concerned,

designate areas, centres or places for the temporary reception and accommodation of asylum seekers or refugees, or any specific category or group of asylum seekers or refugees who entered the Republic on a large scale, pending the regularisation of their status in the Republic.165

Access to the refugee reception offices or any other place designated for the purpose of determining refugee status is free. Asylum seekers are not required to pay any money or give security when lodging a claim for asylum. Given the vulnerable position of an asylum seeker in an alien environment, it is important that the asylum seeker receives, on arrival, appropriate information on how to submit his or her asylum application.166 In this regard, the Department's officials are obliged to ensure that once there is an intention to apply for asylum, they should assist the person concerned to lodge such an application at a refugee reception office.167 Section 2(1) of the Refugee Regulations stipulates that an asylum seeker must be physically

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163 S 8(1) of the Refugees Act as substituted by section 10 of the Refugees Amendment Act 2008.
164 There are refugee reception offices in Pretoria (Marabastad), Cape Town, Port Elizabeth, Durban and Musina, but some of these offices are only a temporary arrangement.
165 S 35(2) of the Refugees Act.
167 Abdi v Minister of Home Affairs 2011 (3) SA 37 (SCA) Para 22.
present at the refugee reception office to apply for refugee status. This means that a person cannot send a representative to the office to apply on his or her behalf. The rationale for this is to eliminate any form of fraud or abuse of the refugee system.

International law does not set out in detail the requirements for refugee determination procedures. Instead, it identifies the internationally required goals or standard and then leaves it to individual states to decide exactly how to fulfil their obligations. The Refugees Act and its Regulations make provisions for a four-stage refugee status determination process. The first stage involves a preliminary interaction with the Refugee Reception Officer; the second stage involves a hearing or interview by the Status Determination Committee; the third stage involves a referral, in certain instances, to the Director-General; and the last stage, with some exceptions, involves an appeal heard by the Refugee Appeal Authority. Depending on the asylum seeker’s particular case, he or she may go through the first and the second stages of the determination process only, while others may go through the first two stages of the process as well as the third and/or fourth stage(s) before the enquiry is finalised.

2.4 ADEQUATE ACCESS TO THE REFUGEE RECEPTION OFFICES

Although there are few refugee reception offices in South Africa, the government started closing these offices in metropolitan areas in 2011, with plans to reopen them at border posts. The government started by closing the Crown Mines office in Johannesburg in May 2011. The

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168 S 2(1) of the Refugee Regulations (Forms and Procedures) 2000.
170 All applications for review in terms of Section 24(3) (b) are now heard by the Director-General and no longer by what was previously known as the Standing Committee. See s 24A of the Refugees Amendment Act 2008.
171 S 8A of the Refugees Amendment Act 2008 established the Appeal Authority. S 12(1) of the Refugees Act is therefore repealed and substituted with the above provision.
172 Processes or functionaries: firstly: the asylum seeker’s first encounter at the refugee reception office, secondly: an encounter with the Refugee Standing Committee, thirdly: a review by the Director-General, and fourthly: an appeal to the Refugee Appeal Authority.
government also wanted to close down the Maitland refugee reception office in Cape Town and open a temporary facility at Customs House on the Foreshore to wrap up the centre’s work.\textsuperscript{174}

The Legal Resources Centre launched an application in the Western Cape High Court to keep the Maitland refugee reception office (Cape Town) open.\textsuperscript{175} Davis J of the Western Cape High Court decided in favour of continued access to the Cape Town refugee reception office for new asylum applicants, and found that the decision by the Department of Home Affairs was taken without the legally required consultation with the Standing Committee for Refugees Affairs and was neither rational nor reasonable.\textsuperscript{176} The Department of Home Affairs appealed against the decision of the High Court, and the Supreme Court of Appeal held that:

The Director-General should be given an opportunity to consider afresh, after consulting with the interested parties, what is to become of the Cape Town office.\textsuperscript{177}

Almost a year after the attempted closure of the Cape Town refugee reception office, asylum seekers are still struggling to get the asylum seeker’s permit. The Department of Home Affairs has proposed that asylum seekers move from the Maitland refugee reception office to other refugee offices as the business community in the area has applied for its closure on the grounds that the office constitutes a nuisance.\textsuperscript{178} The Scalabrini Centre in Cape Town reported that there had been no effort made by the Department of Home Affairs to document new asylum seekers at the Cape Town refugee office, and that hundreds of asylum seekers actually remain undocumented in the Western Cape.\textsuperscript{179} Asylum seekers are afraid to move to other centres without the relevant permit because of the possibility of being arrested or even

\begin{itemize}
\item \textsuperscript{174} South African government information relating to the closure of the refugee reception office \url{http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=28028&tid=71085} (Date of use: 10 January 2013).
\item \textsuperscript{175} Scalabrini Centre Cape Town v Minister of Home Affairs \url{http://www.saflii.org/za/cases/zawchc/2012/147.pdf} (Date of use: 18 July 2012).
\item \textsuperscript{176} Scalabrini Centre Cape Town v Minister of Home Affairs \url{http://www.saflii.org/za/cases/zawchc/2012/147.pdf} (Date of use: 18 July 2012). Even though the decision is an interim order requiring the Department of Home Affairs to accept new applicants for asylum pending a full review, it has made a huge difference to asylum seekers. (\textsuperscript{177} Minister of Home Affairs and Others v Scalabrini Centre Cape Town and Others \url{http://www.saflii.org/za/cases/ZASCA/2013/134.html} Para 79 (Date of use: 28 October 2013). Some of the Judges of the Supreme Court of Appeal held a different view.
\item \textsuperscript{178} BuaNews (Tswana) \url{http://allafrica.com/stories/201206050932.html} (Date of use: 6 October 2013).
\item \textsuperscript{179} Scalabrini Centre Cape Town “Contempt of court application filed against the Department of Home Affairs for failure to document asylum seekers in Cape Town” \url{http://www.scalabrini.org.za/images/stories/reports/contemptofcourt.pdf} (Date of use: 27 September 2012).
\end{itemize}
Around June 2012, the People Against Suffering, Oppression and Poverty Organisation had even made an urgent appeal to all undocumented asylum seekers to present themselves to the Cape Town refugee reception office before the end of June 2012. Despite these efforts, the Department of Home Affairs still insists that asylum seekers go to other refugee reception offices in the country to apply for asylum.

Difficulties in accessing a refugee reception office can also be encountered in Pretoria and Musina. For instance, the capacity of the refugee reception offices at Marabastad (Pretoria) and Musina are not sufficient to cope with the large numbers of applications being registered in those areas. As a result, the Status Determination Committee is under increasing pressure to speed up the status determination process to reduce unprocessed cases and alleviate the growing demand being placed on the reception offices. Because of limited resources to fully accommodate asylum seekers, many individuals who require the services of the Status Determination Committee or Refugee Reception Officers have to stand in long queues often having to endure the early morning cold and many hours standing on their feet. It is not unheard of for asylum seekers to wait about a week before entering a refugee reception office and receiving assistance.

By 4 a.m. or 5 a.m. in the morning, many people are already waiting for the Department of Home Affairs offices to open in the hope that they will be able to renew their permit before the expiry date or obtain a permit for the first time, as the case may be. Some of the asylum seekers and refugees in Marabastad, for example, sleep on the queues to secure a place for themselves in the morning. The refugee reception offices are weighed down by the large numbers of asylum applications and renewal requests that they receive every day, yet denial of access to a refugee

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182 The distance between the Maitland refugee reception office and Customs on the Foreshore is about 6.7km. The distance has been taken from Google map.


reception office is a denial of the fundamental rights of asylum seekers and refugees. Even gaining access to the building does not necessarily mean that an asylum seeker will be able to see the Refugee Reception Officer or the Status Determination Committee. Unfortunately, a lack of access to the refugee reception offices increases the chances of officials and other people engaging in corruption.  

186 Washinyira "How immigrants are scammed at Maitland Home Affairs" http://groundup.org.za/content/how-immigrants-are-scammed-maitland-home-affairs (Date of use: 5 August 2013).

(a) First encounter

In the first stage of applying for refugee status, the asylum seeker will meet the Officer of the Department of Home Affairs 187 who will give the asylum seeker an eligibility determination form to complete (BI-1590 form). 188 If the asylum seeker is unable to complete the form properly, the Officer must offer assistance.

(b) Language Interpreters

The Department of Home Affairs will sometimes make competent interpreters available to asylum seekers for all stages of the asylum application process 189 but only if it is practicable to do so. If not, the asylum seeker will be required to acquire an interpreter. The interpreter must be competent to translate what the asylum seeker is saying into a language that is understood and spoken by the Officer or the Status Determination Committee, and vice versa. 190 In cases where the interpreter is available but temporarily busy with other asylum seekers, the applicants must wait until the interpreter is available. Depending on the number of asylum seekers requiring the services of an interpreter, an individual can wait for weeks for an interpreter to become

187 Previously known as Refugee Reception Officer.
188 Please see Annexure C for a copy of the BI 1590.
189 S 5(1) and (2) of the Refugee Regulations (Forms and Procedures) 2000.
190 S 5(3)(b) of the Refugee Regulations (Forms and Procedures) 2000.
available. Clearly, those who can provide their own interpreters are in a better position than those who cannot.

High quality language interpretation is crucial as poor interpretation can weaken an asylum seeker’s testimony and even render it incoherent. The asylum seeker must be aware that he or she cannot bring an interpreter who is a representative or employee of the country in which he or she fears persecution or harm. The same can be said of situations where the asylum seeker relies on Section 3(b) of the Refugees Act. Many asylum seekers have, for a variety of reasons, not had the opportunity to go to school. Thus, where an asylum seeker is crossing a border and he or she does not understand English, he or she is at a disadvantaged position because there are no UNHCR representatives or interpreters at the border. Some organisations and individuals offer free interpretation to asylum seekers who need it, but the reality of the situation is that they cannot cater for all asylum seekers as resources are limited.

Thousands of asylum seekers run the risk of deportation if the Refugees Act is not interpreted correctly by decision-makers in the Department of Home Affairs. Sometimes an incorrect interpretation of the law is not the fault of the decision-makers but rather stems from the changing demands of refugees in general and the particular circumstances of each asylum seeker. This could result in asylum seekers and other people losing hope in the refugee system and the way the refugee status determination process is administered.

It is important for an asylum seeker to be very clear about the reasons why he or she needs asylum. The Refugee Reception Officer may also try to elicit information from the asylum seeker that he or she believes will help the Status Determination Committee to assess the applicant’s claim. The officials need to take into account the different cultures or ethnic groups of those seeking refuge in South Africa. Otherwise they may behave in a way that will be viewed as

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191 The availability of an interpreter from the Department of Home Affairs usually depends on how frequently a particular language is needed. Interpreters for unfamiliar languages might take longer to find.

192 Some of the organisations that can provide interpreters for asylum seekers are the Scalabrini Centre in Cape Town, the University of Pretoria Legal Centre and the Wits University Legal Centre.
unacceptable or disrespectful, such as using a certain tone of voice or asking direct personal
questions. This could influence the way asylum seekers answer questions or present evidence.

(c) Section 22 permit

Documentation is only the beginning of the process whereby asylum seekers and refugees
acquire effective protection. It must be borne in mind that most asylum seekers flee without
much documentary evidence. Without documentation, however, almost any act, from petty trade
to walking in the street, becomes illegal in the state’s eyes and can serve as a justification for
suspicion and arrest.\textsuperscript{193} An asylum seeker who is approaching the office for the first time may
need to provide, where applicable, the following information:

(a) Name
(b) Nationality
(c) Ethnic group
(d) Religion
(e) Number of people in their family
(f) Whether they have any identity or travel documents
(g) Whether they have ever been to South Africa before
(h) Education and work experience
(i) Whether they have done military service
(j) A brief statement of the reason why they left their country
(k) A brief description of their country and place of residence
(l) Names of organisations/political parties of which they have been a member.\textsuperscript{194}

\textsuperscript{193} Landau 2006 Journal of Refugee Studies 316.
The above information is important because it is sometimes difficult to determine the country of origin of the asylum seeker and other relevant personal information. All the information that an asylum seeker provides to the Department of Home Affairs, whether in terms of the Refugees Act or the Immigration Act, must be correct and any changes must be communicated to the relevant officer. An asylum seeker must abide by the laws of the Republic and inform the officer of his or her residential address and any changes to that address.195 The address contemplated above is, for the purpose of the Refugees Act, deemed to be the address to which correspondence is sent.196 The need for a physical address tends to be a challenge for asylum seekers who do not have a stable place of abode. Asylum seekers are usually on the move during the first few months after entering the Republic.

A person who applies for refugee status in terms of Section 21 of the Refugees Act and who would also like his or her spouse and/or one or more dependant(s) to be granted refugee status must include the details of such spouse and/or dependants in the asylum application form.197 It is crucial that the principal asylum seeker provides proof of relationship, which may be established by documentary evidence, such as a marriage or birth or baptismal certificate, or travel documents.198 The importance of documentation elevates the role of Home Affairs when it comes to issuing papers to refugees and asylum seekers.199 In the absence of such documentary evidence and a reasonable explanation as to why such documentary evidence is not available, relationship may be established through affidavits.200 Once the asylum seeker has completed the application form and his or her biometrics201 have been taken, he or she will be issued with a Section 22 permit.202 A Section 22 permit does not recognise the asylum seeker as a refugee; it simply allows the asylum seeker to legally reside in South Africa on a temporary basis until the finalisation of the asylum claim. The permit issued in terms of Section 22 of the Refugees Act:

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195 S 34A (1) of the Refugees Act as inserted by section 28 of the Refugees Amendment Act 2008.
196 S 34A (2) of the Refugees Act as amended by section 15 of the Refugees Amendment Act 2008.
198 S 16(3) of the Refugee Regulations (Forms and Procedures) 2000.
200 S 16(3) of the Refugee Regulations (Forms and Procedures) 2000.
201 S 22(4) of the Refugees Act is amended and the words fingerprint and photograph were removed and the word biometrics was inserted.
202 S 22 of the Refugees Act as amended by section 15 of the Refugees Amendment Act 2008. The permit is usually called the Section 22 permit.
(a) must be in the form and contain substantially the information prescribed in Annexure 3 of the Refugee Regulations (Forms and Procedures) 2000;

(b) will be of limited duration and contain an expiry date; and

(c) will be renewed at the refugee reception office or any other designated place upon the appearance of the applicant for each scheduled appointment.\(^{203}\)

The Refugees Act does not specify the period within which a Section 22 permit must be issued but it can be inferred that asylum seekers are entitled to it either immediately or without undue delay. Failure to issue a Section 22 permit to asylum seekers upon their application whether the practice is a policy directive or a decision made on a case-by-case basis is unlawful and inconsistent with the Refugees Act.\(^{204}\) Delays may result in unnecessary detention or even deportation. The asylum seeker must sign the Section 22 permit and keep the document with him or her at all times in order to prove his or her status should the need arise. It becomes a challenge for dependants of an asylum seeker to produce a Section 22 permit, because only the principal applicant will be in possession of such a permit. It is just the dependant’s names that will be included in the permit. It seems that the best solution in such a situation is for them to carry a copy of the Section 22 permit as proof of status. A Section 22 permit is usually valid from one month to three months at a time.

The officers contemplated in Section 8(3) of the Refugees Act must, pending the decision on the application in terms of Section 21, from time to time extend the period for which a permit has been issued in terms of Section 22(1) of the Refugees Act.\(^{205}\) In this regard an asylum seeker must renew his or her permit before it expires up until the time that his or her application is finalised. This can be done at any refugee reception office in the Republic. Previously, all asylum seekers were required to go to the refugee reception centre where they had made their initial application for asylum in order to renew their Section 22 permits. However, this was an

\(^{203}\) S 7(1) of the Refugee Regulation (Forms and Procedures) 2009. Section 7(1)(e) does not apply anymore because an asylum seeker may now renew his or her permit at any refugee reception office or any place designated by the Minister.


\(^{205}\) S 22(3) of the Refugees Act as amended by the Refugees Amendment Act.
extremely onerous arrangement for asylum seekers as few could afford to travel from one city to
another for the purpose of renewing their permits.206

Failure to comply with the conditions207 set out in a permit may result in the asylum seeker being
found guilty of an offence and liable for a fine or imprisonment for a period of five years, or both
a fine and imprisonment.208 The Section 22 permit is very important as the holder is entitled to
most of the rights extended to South Africans, except those that are specifically conferred on
citizens. Since the Watchenuka case, all Section 22 permits have had to be endorsed, allowing
asylum seekers to work or study during the refugee status determination period unless there are
reasons to deny an asylum seeker such rights.209

An application for asylum will generally be adjudicated by the Department of Home Affairs within
180 days (almost 6 months) after completing the application form.210 In reality, asylum claims
usually take longer to process than the period stipulated in the Refugee Regulations. It may
even take years for an asylum case to be brought to finality.211 The failure to fully and
adequately implement the provisions of the Refugees Act and the Constitution leaves many
asylum seekers without documentation and therefore vulnerable to arrest, detention and
deporation, despite having valid asylum claims.212

206 De la Hunt and Kerfoot “Due Process in Asylum Determination in South Africa from a Practitioner’s
Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the
Refugees Act” in Handmaker, de la Hunt and Klaaren (eds) Advancing Refugee Protection in South
Africa 103.
207 Some of the conditions that can appear in a Section 22 permit are: the date of the permit’s renewal,
restrictions on the type of work an asylum seeker can undertake while the permit is active,
conditions relating to the right to study, and conditions relating to the condonation of late renewal of
a permit.
208 S 22(7) of the Refugees Act.
209 Watchenuka case 342.
210 S 3(1) of the Refugee Regulations (Forms and Procedures) 2000.
211 Social Change Assistant Trust “Intolerable queue at Port Elizabeth Home Affairs”
http://www.scat.org.za/news/intolerable-queues-port-elizabeth-home-affairs 1 & 2 (Date of use: 5
August 2013).
212 CoRMSA “Protecting refugees, asylum seekers and immigrants in South Africa”
http://www.cormsa.org.za/wpcontent/uploads/Resources/CoRMSA%20Report%202009%20-
%20Protecting%20Refugees,%20Asylum%20Seekers%20and%20Immigrants%20in%20South%20
Africa.pdf 85 (Date of use: 2 July 2012).
In South Africa, the asylum system is coordinated countrywide by an electronic database making it possible for each refugee reception office to detect when people attempt to submit asylum applications more than once. Although procedures are in place to minimise the abuse of the asylum system, some people still find ways to get around it, and re-apply again. The electronic database is effective up to a point, but people whose asylum applications have been rejected may give a different name when they approach a different refugee reception office. Asylum seekers’ application should not, however, be treated as bogus asylum seekers unless the fraudulence of the claim has established through the asylum procedure.

2.5 STATUS DETERMINATION COMMITTEE

Refugee status determination can be described as a process whereby the host country determines whether the asylum seeker meets the eligibility criteria under national legislation and international law. The process further outlines the procedure by which refugees are distinguished from migrants. Inevitably, the refugee status determination process often touches on politically sensitive issues, such as gender relations, ethnicity, race and religion, as well as the politics of foreign governments.

Each refugee reception office in South Africa must have at least one Status Determination Committee established by the Director-General to consider and deal with applications for asylum in a prescribed manner in accordance with Section 24 of the Refugees Act. The Status Determination Committee consists of officers who have the qualifications, experience and knowledge of refugee matters that enable them to perform their functions in terms of the Refugees Act. Each asylum seeker will have to appear before a Status Determination Committee for his or her refugee status to be determined. An asylum seeker is entitled to have a representative or counsel, or witnesses present, and/or to submit affidavits of witnesses and other evidence. When conducting an interview or considering an application for asylum, the Status Determination Committee must have due regard for the provisions of the Promotion of

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215 S 8 of the Refugees Act as amended by section 3 of the Refugees Amendment Act 2011.
216 S 8 of the Refugees Act as substituted by section 10 of the Refugees Amendment Act 2008 and amended by section 13 of the Refugees Amendment Act 2011.
217 S 10(4) of the Refugee Regulations (Forms and Procedures) 2000.
Administrative Justice Act 3 of 2000 (PAJA)\textsuperscript{218} in particular, so as to ensure that the asylum seekers fully understand the procedures, responsibilities and evidence to be presented.\textsuperscript{219}

A lack of information about the interview process prevents most applicants from preparing for their interview or bringing the relevant supporting documents. From the port of entry until the refugee reception offices, there is no clear information regarding the refugee status determination process. The only pamphlet that an asylum seeker can obtain from some refugee reception offices is not sufficiently clear as to the asylum seeker’s role in the process or how to prepare for the interview or assessment.\textsuperscript{220} In addition, the often male-orientated nature of the questioning can result in women who have been involved in indirect political activity or to whom political views have been attributed, always disclosing their full story.\textsuperscript{221}

The right to equality in the Constitution,\textsuperscript{222} when applied to refugee status determination, requires that women who fear for their security or lives be assessed according to the specific and unique circumstances inherent in their gender.\textsuperscript{223} In circumstances where the asylum seeker prefers to be interviewed by a man or a woman, as the case may be, due to the nature of the evidence, the right to equal protection under the law should be sought. The Status Determination Committee should begin the interview by briefing the asylum seeker fully of the determination process, as well as explaining the asylum categories.\textsuperscript{224} In practice, the determination of refugee status as a prerequisite for granting asylum can be problematic and can lead to many asylum seekers being denied asylum.\textsuperscript{225}

\begin{itemize}
  \item \textsuperscript{218} S 24(2) of the Refugees Act as amended by section 17(2) (a) of the Refugees Amendment Act 2008 and section 7(a) of the Refugees Amendment Act 2011.
  \item \textsuperscript{219} S 24(2) of the Refugees Act as amended by section 17(2) (a) of the Refugees Amendment Act 2008 and section 7(a) of the Refugees Amendment Act 2011.
  \item \textsuperscript{220} See the official information pamphlet available on http://www.ctrc.co.za/upload/asylum%20application%20process.pdf (Date of use: 6 October 2013).
  \item \textsuperscript{221} Edwards “Age and Gender Dimensions in International Refugee Law” in Feller, Turk and Nicholson (eds) Refugee Protection in International Law: UNHCR’s Global Consultation on International 77.
  \item \textsuperscript{222} S 9(1) of the Constitution 1996.
  \item \textsuperscript{223} Moffett, de la Hunt and Valji “Protecting the Invisible: The Status of Women Refugees in Southern Africa” in Handmaker, de la Hunt and Klaaren (eds) Advancing Refugee Protection in South Africa 216.
  \item \textsuperscript{224} Moffett, de la Hunt and Valji “Protecting the Invisible: The Status of Women Refugees in Southern Africa” in Handmaker, de la Hunt and Klaaren (eds) Advancing Refugee Protection in South Africa 226.
  \item \textsuperscript{225} Most countries or states follow a system of individual refugee status determination rather than mass acceptance of asylum seekers.
\end{itemize}
During an interview with the Status Determination Committee, the officer may ask the asylum seeker some questions in order to clear up any points of uncertainty in the eligibility form or confirm any information that the Committee regards as important. It sometimes happens that the Status Determination Committee confines itself to the information the asylum seeker has provided on the eligibility form without going any further. In such a case, the interview might last only a few minutes which could lead to the assessment being based on incomplete information. Amit argues, though, that “the Department of Home Affairs does not view as problematic the fact that status determination interviews last approximately ten to twenty minutes.” A quality decision process is one where the decision-maker and the recipient of the decision view the outcome as justified.

Asylum seekers can strengthen their case if they explain their experiences coherently, in a chronological order, and in the kind of detail that only a person who has lived through such experiences, could do. The hearing or interview must be non-adversarial. Every answer given by the asylum seeker during the interview will be used to decide whether or not he or she qualifies for refugee status. As refugee status flows primarily from an evaluation of the applicant’s statement, the quality of the interview is crucial for a proper determination of the claim. The asylum seeker bears the burden of proof to establish that he or she is a refugee, as defined in Section 3 of the Refugees Act, and is not excluded from refugee status pursuant to Section 4 of the Refugees Act. Ultimately, the Status Determination Committee must assess on an individual basis the story of each asylum seeker. Clearly, then, the procedure for determining refugee status and for identifying real refugees is expensive and time-consuming.

The problems associated with obtaining evidence to substantiate a refugee claim should promote a flexible approach concerning the evidence. After the interview, the asylum seeker’s permit will be renewed and date-stamped. The Status Determination Committee will then assess the applicant’s asylum claim. Where a refugee claimant’s country is established precisely, his or her claim for protection should be assessed with reference to conditions in that particular

228 Quality in this instance includes both procedural and substantive quality.
229 S 11 of the Refugee Regulations (Forms and Procedures) 2000.
230 Owing to the high number of asylum seekers crossing over the border into South Africa as well as individual determinations, the Department of Home Affairs has to hire more functionaries. This places a burden on the country’s economy.
country. The Status Determination Committee must conduct the necessary background research into, among other things, the condition of the country of origin or the authenticity of certain documents, and so forth. The practice in South Africa is to rely on nationality, thus simplifying the status determination process. Whereas the situation in the asylum seeker’s country of nationality is important, the Status Determination Committee should not make the error of granting refugee status only to people who come from what are regarded as refugee-producing countries and disregarding other asylum seekers.

The Status Determination Committee should not give the nationality of asylum seekers centre stage when determining the outcome of applications at the risk of disregarding other important factors surrounding the applicant. The refugee adjudication process will yield accurate results only if the decision making officers have access to complete and accurate information on the applicant’s home countries and the law should be correctly applied. When a person claims that he or she is subject to persecution or fears persecution in the country of origin, the authenticity of his or her claim for refugee status may be ascertained by examining the general human rights situation in that country, with particular reference to the details of his or her claim. It must again be pointed out that not all human rights violations enable a person to seek asylum. The Status Determination Committee must make a finding of facts with regard to the asylum seeker’s status in the Republic. Caution must be exercised in this regard to minimise the risk of personal feelings getting in the way of a well-reasoned decision.

Credibility assessment is perhaps the most difficult part of refugee status determination. It requires detecting flaws in testimony provided by nervous people speaking to a foreign official and often in a foreign language. It can be argued that evaluating an asylum seeker’s

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231 Hathaway The Law of Refugee Status 55.
credibility forms part of the gathering of evidential proof of the case, and thus is an indispensable part of refugee status determination. The most important thing that the Status Determination Committee or any other decision-maker has to do is determine those who are eligible for refugee status. The interpretation of the refugee definition and the correct application of the Refugees Act depend on credible judgment and the consideration of all the surrounding circumstances.

The Status Determination Committee must attempt to verify an asylum seeker’s story, and to a large extent must rely on the asylum seeker’s evidence and credibility in the absence of supporting evidence. A detailed account of events goes a long way towards proving that the asylum seeker is telling the truth. Whether credibility relates to the impression the decision-maker gains from the asylum seeker’s body language or testimony is not clear. Kagan is of the opinion that demeanour is an unreliable means of determining whether or not a refugee applicant is being truthful.237

All decision-makers in the process of determining refugee status need to make an independent credibility assessment of asylum seekers’ applications free from undue interference from any interested parties including the government. If the applicant’s account appears credible, he or she should be given the benefit of the doubt, unless there are good reasons to the contrary.238 It is widely recognised that refugee status determination is always exposed to the risk of factors that are irrelevant to the legalities surrounding the definition of a refugee, being given undue attention. Furthermore, no matter how accurately and completely the refugee status determination officers record the applicant’s testimony, it is not possible to adequately record non-verbal indication of credibility.

An asylum seeker’s failure to convince the decision-maker of his or her credibility could be attributed to psychological factors, such as the presence of post-traumatic stress syndrome. The psychological effects of traumatic events can, for instance, hamper a refugee’s ability to communicate why he or she is afraid to return home. This, in the end, may make it difficult for

238 Article 203 of UNHCR Handbook.
some of the most vulnerable refugees to present claims that would give them legal protection.\textsuperscript{239} It is easier to be open and to share information with a person once you are certain that he or she can be trusted, and/or when you feel comfortable in the person’s presence.

Omitting to elaborate on the most critical information during the interview may lead the decision-maker to derive a negative inference from such omission. However, the Status Determination Committee should refrain from arriving at such a conclusion during the initial stages of the refugee status determination process. This is because there is not enough space on the eligibility form for an asylum seeker to include everything of importance, making it even more important for officers to elicit all the relevant information during the interview.

Inconsistent statements by the asylum seeker can also have a detrimental effect on his or her application for asylum. However, an asylum seeker should not be discredited merely because of one or more trivial inconsistencies. The inconsistency should only be considered if it goes to the heart of the enquiry. In all situations that negatively affect the credibility of the asylum seeker, the Status Determination Committee or any other officials should give the asylum seeker a chance to clear up any misunderstanding. The fact that a witness has been untruthful in respect of one or other aspect on another occasion does not mean that he has been untruthful in relation to the enquiry at hand, or that his entire testimony should be rejected on account of any admitted untruth.\textsuperscript{240} The credibility and reliability of the asylum seeker for the purpose of establishing whether he or she has a well-founded fear of persecution must be established by looking at the inherent probabilities and the presence or absence of external or internal contradictions.\textsuperscript{241}

The decision of an asylum seeker not to leave his or her country of nationality quickly or sooner may sometimes call into question the credibility of that person or whether in fact there were compelling reasons to leave his or her country of nationality. Despite their importance, credibility-based decisions in refugee and asylum cases are frequently based on personal judgments that

\begin{itemize}
\item \textsuperscript{239} Kagan 2003 Georgetown Immigration Law Journal 396.
\item \textsuperscript{240} Tantoush v Refugee Appeal Board 2008(1) SA 232 (T) 57. Hereinafter referred to as the Tantoush case 268 Para 102.
\item \textsuperscript{241} Tantoush case 268 Para 105.
\end{itemize}
are inconsistent from one adjudicator to another.242 At the conclusion of the hearing that was conducted in a prescribed manner, the Status Determination Committee must:

a) Grant asylum;

b) Reject the application as manifestly unfounded, abusive or fraudulent; or

c) Reject the application as unfounded.243

Applicants whose applications are fraudulent or who came to South Africa in search of economic opportunities will mostly fall within Section 24 (3)(b) of the Refugees Act. In the context of asylum adjudication, the task of distinguishing between those deserving and those not deserving of protection goes to the core of administrative justice.244 It would be wrong for decision-makers to exclude a matter from consideration solely because the claimed occurrence did not take place. Where there is no adequate reason for the state to grant asylum, South Africa is free to remove the asylum seeker from its territory with due regard to the person’s human rights and other international and national laws or standards. The Status Determination Committee may not refuse to grant refugee status to an applicant solely because the officer is of the opinion that the person can seek refuge elsewhere, especially when the act of persecution is committed by private individuals. It can be argued that where the asylum seeker is without assistance, the Status Determination Committee may assess the claim on another basis if he or she is of the opinion that the claim will not succeed under the section that the asylum seeker wants to invoke.245 This may be done on a bona fide basis as the Refugees Act (including its Regulations) does not make any provision for such a transition.

Finally, a person who has been granted refugee status in South Africa will enjoy the benefits of being a refugee in the Republic. Throughout the process, the Status Determination Committee and all other decision-makers are bound by the Bill of Rights, and they have to keep this in mind when dealing with asylum claims, whether at the initial assessment or during review or appeal.

243 S 24(3) of the Refugees Act as amended by the section 17(3) of the Refugees Amendment Act 2008 and section 7(b) of the Refugees Amendment Act 2011.
244 Thomas Administrative Justice and Asylum Appeal: A Study of Tribunal Adjudication 25.
245 Either section 3(a), (b) or (c) of the Refugees Act.
2.6 THE DIRECTOR-GENERAL

The Director-General of Home Affairs may confirm or set aside a decision made in terms of section 24(3) (b) of the Refugees Act. Although the Director-General does not work in isolation, he or she must be independent and be seen to be as such by the applicant or the general public. In determining whether an application was correctly rejected as manifestly unfounded, abusive or fraudulent, the Director-General may:

(a) request any person who is in a position to do so to provide him or her with information relevant to the matter being dealt with;

(b) make such further enquiries into the matter being dealt with as he or she deems appropriate; and

(c) request the applicant to provide such other information as the Director-General may deem necessary.

The Director-General must inform the Status Determination Committee concerned (that is involved in the case under review) of his or her decision. What constitutes a prescribed time is not mentioned in the Refugees Act but in practice, an asylum seeker can wait for months for the decision of the Director-General. An application reviewed in terms of Section 24A of the Refugees Act is deemed to have been finalised upon receipt of the said decision by the applicant in accordance with Sub-Section 24A (6).

An asylum seeker whose application for asylum has been rejected in terms of Sub-Section 24(3) (b) of the Refugees Act and confirmed by the Director-General in terms of Section 24A (3) of the

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246 S 24A (3) of the Refugees Act as inserted by s 19 of the Refugees Amendment Act 2008 and which refers to manifestly unfounded cases.
247 Manifestly unfounded application means an application for asylum made on grounds other than those contemplated in Section 3 of the Refugees Amendment Act.
248 S 24A (2) of the Refugees Act as inserted by the Refugees Amendment Act 2008.
249 S 24A (4) of the Refugees Act as inserted by s 19 of the Refugees Amendment Act 2008 and amended by section 8(b) of the Refugees Amendment Act 2011.
Refugees Amendment Act, must be dealt with in terms of the Immigration Act. Should the asylum seeker fail to present his or her case and the decision of the Status Determination Committee is confirmed, the asylum seekers will be forced out of the refugee system. The person in question will be deported within 30 days if there is no other legal basis on which he or she can legally remain in South Africa. Deportation should not be viewed as a punishment and the asylum seeker is allowed to provide a written statement or comment pertaining to his or her application being rejected. However, rejection of an asylum application places an individual in a vulnerable position and he or she is usually deprived of certain rights or privileges. Section 34 of the Immigration Act provides that:

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 determined by the Director-General.

2.7 THE REFUGEE APPEAL AUTHORITY

The Refugee Appeal Authority is an independent entity and must function without any bias. It consists of a chairperson who is legally qualified and such number of other members as the minister of Home Affairs may determine. The chairperson and other members of the Refugee Appeal Authority are appointed by the Minister with due regard to their experience, qualifications and expertise, as well as their ability to properly perform the functions of the Refugee Appeal Authority. A person may not be appointed as a member of the Refugee Appeal Authority if that persons:

(a) is not a South African;
(b) has been sentenced to imprisonment without the option of a fine during the preceding four years;

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251 S 24(5) of the Refugees Act as amended by s 17(c) the Refugees Amendment Act 2008 and section 7(e) of the Refugees Amendment Act 2011.
252 They will still have the benefit of all fundamental rights contained in the Constitution because of their physical presence in the Republic.
253 For the full version of the section, please see section 34 of the Immigration Act.
256 S 8B (2) of the Refugees Act as inserted by section 11 of the Refugees Amendment Act 2008.
(c) is an unrehabilitated insolvent;

(d) has been judicially declared of unsound mind;

(e) has been removed from office of trust on account of misconduct involving theft, fraud or corruption; or

(f) is a political office bearer holding a position in the national executive structure of any political party.\(^{257}\)

If a person meets any of the above criteria, he or she may not be eligible for membership of the Refugee Appeal Authority. One of the reasons why people described in Section 8E (f) are not eligible to be members of the Refugee Appeal Authority is to ensure the independence of the Authority and the avoidance of external political influence. The Refugee Appeal Authority may determine its own rules, which may not be in conflict with the provisions of the Refugees Act.\(^{258}\) The use of the word may in the last part of Section 8C (3) does not suggest that the Refugee Appeal Authority has a choice to determine any procedure that may be in conflict with the Refugees Act. An asylum seeker whose application for asylum has been rejected in terms of Section 24 (3) (c) of the Refugees Act must be dealt with in terms of the Immigration Act, unless he or she lodges an appeal in terms of Section 24B (1) of the Refugees Act.\(^{259}\) The provision means that any person whose application has been rejected as unfounded\(^ {260}\) may lodge an appeal with the Refugee Appeal Authority in the prescribed manner.\(^ {261}\) Every asylum case that makes it to the Appeal Authority must be conducted properly and in a satisfactory manner so that the asylum seeker can be assured of a due process.

An appeal in terms of the Refugees Act must be lodged in person within 30 days of the asylum applicant receiving the letter of rejection from the Status Determination Committee, and it must be lodged directly at a designated refugee reception office.\(^ {262}\) Asylum seekers may wait for

\(^{257}\) S 8E of the Refugees Act as inserted by section 11 of the Refugees Amendment Act 2008 and amended by section 5 of the Refugees Amendment Act 2011.

\(^{258}\) S 8C (3) of the Refugees Act as inserted by section 11 of the Refugees Amendment Act 2008.

\(^{259}\) S 24 (5) (b) of the Refugees Act as inserted by section 7 of the Refugees Amendment Act 2011.

\(^{260}\) An unfounded application in relation to an application for asylum in terms of Section 21 means an application made on the grounds other than those contemplated in Section 3 or made on the grounds contemplated in Section 3 but which is without merit, Section 1 of the Refugees Amendment Act 2011.

\(^{261}\) 24B (1) of the Refugees Act as inserted by section 19 of the Refugees Amendment Act 2008.

\(^{262}\) S 14 of the Refugee Regulations (Forms and Procedures) 2000.
several months to get a hearing and are allowed to bring a legal representative to the Appeal Board hearing if they request to do so. In theory, the Refugee Appeal Authority must make a decision within 90 days of the appeal hearing. Unfortunately, in practice, it takes much longer to finalise appeals. The fact that an initial decision to refuse an asylum claim is overturned on appeal is not necessarily an indication that the initial decision was of poor quality.263

If the Appeal is successful, the asylum seeker will be granted refugee status and will be entitled to apply for a refugee identity document in accordance with Section 30 of the Refugees Act. The refugee identity document will be valid for two years, and must be renewed at the refugee reception office ninety days before the expiry date to avoid lapses between the date of expiry and any renewal of the document.264 After five continuous years in South Africa, a refugee may apply for permanent residence in terms of Section 27(d) of the Immigration Act.265 International instruments do not establish a right of refugees to permanent admission to an asylum state.266 Therefore, there is no binding requirement to grant permanent residence in the asylum state. Asylum seekers not found to be refugees and therefore failing to qualify for asylum will generally be returned to their home countries, but asylum seekers who present a strong case not to be returned to their country of origin are often eligible for temporary or humanitarian protection.267

The Refugees Act does not provide for the reopening of a case in order to afford an asylum seeker the opportunity to apply for the discretionary relief that was available during the hearing of the case, unless a gross irregularity had occurred.268 The case, if allowed to be heard again, will be dealt with by the Refugee Appeal Authority or alternatively, the High Court of South Africa. Although the Refugees Act provide for an appeal system or procedure, the outcome will

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263 Thomas Administrative Justice and Asylum Appeals: A Study of Tribunal Appeals 77.
264 S 15(3) of the Refugee Regulations (Forms and Procedures) 2000.
265 S 27(c) of the Refugees Act as substituted by section 10 of the Refugees Amendment Act 2011. Section 10 of the Refugees Amendment Act 2011 provides that a refugee will be entitled to apply for permanent residence in terms of Section 27(d) of the Immigration Act after five years of continuous residence in the Republic from the date on which he or she was granted asylum, if the Minister, after considering all the relevant factors and within a reasonable period of time, certifies that he or she will remain a refugee indefinitely.
267 As was stated in Chapter 1, an asylum seeker cannot be granted asylum in South Africa on humanitarian grounds but may be granted temporary residence in the country.
268 This view is supported by the Promotion of Administrative Justice Act 2000.
never satisfy everybody who has some interest in them because the results may be positive for some and negative for others.

2.8 CONFIDENTIALITY IN ASYLUM CASES

Everyone has the right to privacy, which includes the right not to have the privacy of their communication infringed.\(^\text{269}\) The right to privacy in asylum cases must be respected by all state and non-state actors alike. All interviews, for example, must be held in private to enable the asylum seeker to fully disclose his or her case. Sometimes even other family members may not be present if this would be to the benefit of the applicant. The decision in this regard is at the hands of the functionaries of the Department of Home Affairs. The information contained in an asylum application and elicited at the hearing, as well as other records that indicate that an individual has applied for asylum, shall not be disclosed without the written consent of the applicant, except under certain circumstances.\(^\text{270}\) In addition, files containing an asylum seeker’s information should not be left on the tables for other people to gain access easily. However, the right to non-disclosure of the asylum seeker’s information does not apply to government officials or employees of the Republic who need to examine the information in connection with certain cases specified in the Refugee Regulations.\(^\text{271}\)

On the one hand, it can be argued that the publication of asylum cases would facilitate a legal system that forces decision-makers to rationally adjudicate asylum cases and furnish proper reasons for their decisions. On the other hand, it could be argued that the risk associated with publication is higher than non-disclosure. This risk, though, could be minimised by omitting the names of the asylum seekers when publishing refugee status determination cases, as it is done in divorce cases. In the case of *Mail & Guardian v Chipu*, the court held that the limitation imposed by Section 21(5) of the Refugees Act on the rights contained in Section 16(1) of the

\(^{269}\) S 14 of the Constitution 1996.

\(^{270}\) S 6(2) of the Refugee Regulations (Forms and Procedures) 2000.

\(^{271}\) S 6(3) of the Refugee Regulations (Forms and Procedures) 2000. Usually the information will be used for survey or data purposes.
Constitution does not constitute a justifiable limitation of those rights as well as the ‘open justice’ principle, and is accordingly unconstitutional.\textsuperscript{272}

In South Africa, there is not a single case reported that was adjudicated by the Status Determination Committee, the Director-General or the Refugee Appeal Authority. The cases only appear in the form of reviews or appeals to the High Court of South Africa.\textsuperscript{273} In other words, when it comes to the decisions of the Department of Home Affairs, there is no precedent as the cases are unreported and every decision-maker has to look at the facts of each case without any case law to help him or her make a decision. Whether this is the direct practice or policy of the Department of Home Affairs is not known.

\section*{2.9 CONCLUSION}

This chapter discussed the journey of the asylum seekers from the port of entry or place where he or she enters the Republic of South Africa to the point that his or her asylum status is determined. The chapter also highlighted that international law does not set out in detail the requirements for refugee determination, instead, it identifies the internationally required goals or standards and leaves it up to states to decide how exactly to fulfil their obligations. South Africa, through the Refugees Act and its Regulations, has laid down specific procedures that must be followed in the determination of an applicant’s refugee status. The status determination process that asylum seekers go through in South Africa provides the answer to the question as to whether or not the applicant will be granted asylum. This process includes the means by which refugees are distinguished from migrants. South Africa’s refugee status determination process highlights the importance of the Status Determination Committee and all other decision-makers as they are the main deciders of the asylum seekers’ fate in the Republic.

\textsuperscript{272} \textit{Mail & Guardian and Others v Chipu and Others} 2013, \url{http://www.saflii.org/za/cases/zacc/2013/32.pdf} (Date of use: 6 October 2013).

\textsuperscript{273} For example, \textit{Abdi v Minister of Home Affairs} 2011 (3) SA 37 (SCA), \textit{Aol v Minister of Home Affairs and Others} 2006 (2) SA 8 (D) and \textit{Arse v Minister of Home Affairs} 2010 (7) BCLR 640 (SCA).
All the role players in the determination of refugee status must work together for the common purpose of benefiting the people for whom the Refugees Act is intended. In this regard, asylum seekers should be given the necessary facilities, including the services of a competent interpreter, for filling out the forms and submitting their cases to the relevant authority. Due attention must be given to every factor when evaluating the evidence of each asylum seeker. The Refugees Act also leaves room for review and appeal options in cases where a negative decision is given. The period within which a review or appeal should be lodged must be observed, failing which the law also makes provision for the application of condonation.
CHAPTER 3

CONSTITUTIONAL RIGHT TO JUST ADMINISTRATIVE ACTION

3.1 INTRODUCTION

Chapter 2 explained the process of status determination, as well as the officials involved. It also pointed out that asylum seekers enjoy the rights enshrined in the South African Constitution, except for those specifically aimed at citizens of the country. Respect for the rule of law, as well as for the dignity, equality and freedom of all people is what distinguishes South Africa’s Constitutional democracy today from the oppressive system of apartheid.274 When it comes to fundamental rights, all those involved in public administration must take reasonable steps to ensure maximum compliance with constitutional obligations, even under difficult circumstances.275 The Constitution imposes a duty on all administrators exercising public power to act lawfully and reasonably, to follow fair procedure and to give written reasons when the rights of any person in a subordinate position are adversely affected.276 Procedural rights offer protection for substantive rights.277 Asylum seekers should also be afforded such rights. In light of the foregoing discussion, this chapter seeks to discuss the right of asylum seekers to just administrative action. The discussion will be limited to the Promotion of Administrative Justice Act, case law, the Refugees Act and the Constitution.

3.2 WHAT IS ADMINISTRATIVE ACTION?

According to the Promotion of Administrative Justice Act (PAJA), administrative action means any decision taken, or any failure to take a decision, by:

(a) an organ of state, when:

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276 S 33 of the Constitution.
277 May Global Justice and Due Process 52.
(i) exercising a power in terms of the Constitution or a Provincial Constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

which adversely affects the rights of any person and which has a direct, external legal effect.  

In the case of Grey’s Hout Bay (Pty) Ltd v Minister of Public Works, administrative action was described as “the conduct of the bureaucracy in carrying out the daily functions of the state, which necessarily involves the application of policy, usually translated into law, with direct and immediate consequences for groups or individuals.” In order to determine whether a certain action constitutes administrative action, the enquiry must be directed at the power exercised and not at the person per se.

Administrative action that materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair. The qualification of being materially and adversely affected implies a marked deprivation or diminution in the rights or legitimate expectations of the individual. In the case of Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority, the court held that:

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278 S 1 of the Promotion of Administrative Justice Act 3 of 2000. The last part of section 1 excludes the exercise of certain powers and the performance of certain actions from the definition of administrative action. Hereinafter referred to as PAJA.

279 Grey’s Hout Bay (Pty) Ltd v Minister of Public Works 2005 6 SA 313 Para 24.

280 President of the Republic of South Africa and Others v South African Rugby Football Union and Others 2000 (1) SA (CC) 120.

281 S 3(1) of PAJA.

282 Brynard 2010 Administration Publication 125. Also available on http://uir.unisa.ac.za/bitstream/handle/10500/6460/brynardadminipub2010184.pdf?sequence=1 (Date of use: 20 September 2013).
The refusal to register an applicant as a private security service provider is an adverse
determination of the applicant’s rights; the decision has a direct, external, legal effect and
constitutes administrative action in terms of PAJA.\textsuperscript{283}

The right to just administrative action depends on whether administrative action has been
performed by an organ of state or any other person exercising public power or performing a
public function in terms of legislation. Not all actions that look like administrative action qualify as
such. This is evidenced in Section 6 of PAJA.\textsuperscript{284} Decisions by the Department of Home Affairs
that materially and adversely affect the asylum seeker’s rights will amount to administrative
action. The asylum seeker is in a subordinate position and the decision-maker is in a superior
position. All the employees of the Department of Home Affairs must respect the asylum seeker’s
rights under PAJA. The fairness and effectiveness of the refugee status determination procedure
is key to effective refugee protection

\section*{3.3 THE DEFINITION OF A DECISION IN TERMS OF PAJA}

Under PAJA, a decision means any decision of an administrative nature made, proposed to be
made, or required to be made, as the case may be, under an empowering provision, including a
decision relating to:

(a) Making, suspending, revoking or refusing to make an order, award or determination;

(b) Giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or
permission;

(c) Issuing, suspending, revoking or refusing to issue a licence, authority or other instruction;

(d) Imposing a condition or restriction;

(e) Making a declaration, demand or requirement;

\textsuperscript{283} \textit{Union of Refugee Women and others v Director, Private Security Industry Regulatory Authority} 2007
BCLR 339 (CC) 32.

\textsuperscript{284} S 1 of PAJA excludes some actions that normally amount to administrative action in terms of the
definition of administrative action, such as legislative functions of Parliament, the executive powers
or functions of the provincial executive, and the judicial functions of a judicial officer of a court
referred to in section 155 of the Constitution.
(f) Retaining, or refusing to deliver up, an article; or

(g) Performing or refusing to perform any other act or do something of an administrative nature, with a reference to a failure to take a decision having to be construed accordingly.285

The failure of the Department of Home Affairs to issue Section 22 permits to asylum seekers in terms of the Refugees Act amounts to an administrative action. The same applies to conditions imposed on the asylum seeker if such conditions adversely and materially have an external effect on the rights of the asylum seeker. Refugee law is constantly changing and even the circumstances of asylum seekers change with time. Refugee law in South Africa should be flexible to the extent that it takes the circumstances of the asylum seeker into account. Flexibility in this sense does not, however, mean following procedures that are contrary to the principles contained in PAJA and the Constitution.

3.4 LAWFUL, REASONABLE AND FAIR PROCEDURE

Decision-makers in asylum cases must consistently uphold the law.286 Lawful administrative action means that administrative actions and decisions must be duly authorised by law, and any statutory requirements or preconditions that attach to the exercise of the power must be complied with.287 In terms of PAJA, unlawful administrative action is one of the grounds, among other things, for judicial review.288 The decisions of the decision-makers must also have a reasonable outcome or result. Procedural fairness is not concerned with the correctness of or the justification for a decision but rather the process followed to arrive at a decision. Fairness is not a state of mind or outcome, but a way or method to reach a decision.289 A fair procedure in deciding an asylum case induces confidence in the person who is subject to the procedure and who is then better able to convince the decision-maker of the validity of his or her application.290

285 S 1 of PAJA.
286 Law in this context means the Constitution, relevant legislation, common law, case law and, where applicable, relevant customary law.
287 Hoexter Administrative Law in South Africa 2nd 253.
288 S 6(2) (i) of PAJA. Grounds for judicial review may relate to the administrator (6(2) (a) (i)-(iii)), the manner in which the decision was taken (section 6 (2) (b)-(e)) or administrative action (6(2) (f)-(i)). The review proceedings must be instituted within 180 days after domestic remedies have been exhausted.
289 May Global Justice and Due Process 49.
290 Arakaki Refugee Law and Practice in Japan 80.
A fair procedure also allows an asylum seeker a reasonable amount of time to prepare his or her case and offers an indication of the period in which his or her application for asylum will be decided. Asylum seekers are entitled to due process, which includes a fair hearing of their claim. In this regard, Kagan made the following remarks:

Fair procedures accomplish three essential things. Firstly, they eliminate any appearance of arbitrariness, and give applicants confidence that their cases will be considered impartially. Secondly, they ensure that all relevant facts come out before a final decision. Thirdly, they establish safeguards against human error in the decision-making process.²⁹¹

This means that a hearing or an interview is important to the fairness of the refugee status determination process. Fairness depends on the circumstances of each case. Fair procedure eliminates the situation where a person makes a decision in good faith but does not realise that critical information has been left out or misunderstood, which could have negative consequences. A court of law having jurisdiction may review any decision to detain an asylum seeker for more than 30 days, and such detention must be reviewed immediately after the expiry of every subsequent period of 30 days of detention.²⁹²

The importance of ensuring that an administrator observes fundamental rights and acts in an ethical and accountable manner should not be understated.²⁹³ A material mistake of fact should be a basis upon which a court can review a decision.²⁹⁴ It is important to ensure that the applicant who will be affected by the decision is accorded procedural fairness, which often means that the applicant should be plainly confronted with matters that adversely affect his or her case.²⁹⁵ If a piece of evidence is relevant to the material facts of the case, then the decision maker must decide if there is any reason why it should not be admitted as evidence.²⁹⁶ A case

²⁹² S 29 of the Refugees Act as substituted by s 24 of the Refugees Amendment Act 2008.
²⁹³ Quinot Administrative Law: Cases and Materials 110.
that appears weak at first may appear strong after a fair and open process. The procedure followed in South Africa should be reasonable so that legitimate refugees are not forced to use illegal means to advance their cause. Fair procedure also helps to differentiate between illegitimate and legitimate asylum seekers.

The unfairness of a decision has never in itself constituted grounds for review. A review of over 300 letters from South Africa’s refugee reception offices, conducted by the Forced Migration and Refugee Studies Programme, concluded that the status determination process does not conform to refugee law and just administrative procedure. The failure to observe principles of procedural fairness can lead to an administrative injustice. Also, the failure to meet the required standard of administrative justice can result in the decision making process being fatally flawed. Except where legislation prescribes otherwise, administrative bodies are at liberty to adopt whatever procedure they deem appropriate, provided that it is fair and does not defeat the purpose of the empowering legislation. The exercise of discretion is an important part of procedural fairness and such discretion should not create the appearance of bias or unreasonableness. The Department of Home Affairs may not unilaterally change the procedure that the asylum seekers are familiar with without giving them timeous, public warning of the impending changes. Any procedure used by the Status Determination Committee and other officers dealing with asylum seekers must always respect the gender and age of the applicant. Procedural fairness is best understood as equal treatment of like cases and the use of a similar standard or procedure.

To achieve procedural fairness, the final decision in asylum cases must be free of bias. Where unfairness is suspected, it has to be such that a degree of inference can be drawn from it that the person who made the decision had erred in a way that constitutes grounds for review.

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300 Aol v Minister of Home Affairs and Others 2006 (2) SA 8 (D) 13.
301 Brynard 2010 Administration Publication 132.
302 May Global Justice and Due Process 48.
303 Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC) 292.
Unfair procedure, which violates the right to seek and enjoy asylum, is evidenced when excessive restraints are imposed on individuals or they are treated in an unacceptable manner. An asylum seeker has a legitimate expectation that his or her application will be processed fairly and in accordance with the law. It is not yet clear, however, whether an asylum seeker whose application was rejected can seek judicial review under PAJA on the basis of his or her legitimate expectation of being granted asylum. Generally it can be said that as long as one or more grounds for review under PAJA are present, the asylum seeker can refer the decision to the High Court for review.

3.5 LEGAL AND ILLEGAL DETENTION: THE ROLE OF FAIR PROCEDURE

Detention can be described as the physical apprehension of a person. This includes the limitation of the physical movement of the detainee. The Immigration Act provides for the detention of illegal non-nationals. The Constitution of South Africa, in turn, extends certain rights to detainees. It can be argued that the rights of detainees apply to legal and illegal non-nationals, unless the contrary is proven. It is unlawful to arrest and detain a non-national who has informed the officers that he or she has applied for asylum, without verifying whether he or she has made such application or has the intention of doing so. There must be clear and reasonable grounds for suspicion before a non-national can be detained for not having the necessary documents. Unfortunately, there are no clear and concrete grounds on which suspicion can be based, which can sometimes lead to harassment, prejudice and even xenophobic treatment.

The Refugees Act does not make provision for the detention of the asylum seeker pending the adjudication of his or her asylum application. Previously South Africa used to detain asylum seekers while they awaited the outcome of their asylum application. As it sometimes took

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305 Legitimate expectation works in situations where the rules of fair procedure are extended to those cases where no vested rights exist. Legitimate expectation can arise when a person expects a substantive benefit or procedural fairness.
306 S 35(2) of the Constitution.
307 Zimbabwe Exile Forum v Minister of Home Affairs 27.
months before their cases were finalised, asylum seekers had to wait in detention until their applications were granted or refused. This process was found to be unlawful and an infringement of the asylum seeker’s right to movement and dignity. More specifically, the court held that the practice and/or directive of the Department of Home Affairs to detain asylum seekers whose applications for asylum were not yet finalised, was unlawful and inconsistent with the Refugees Act.

Detention for the purpose of deportation is a different issue. Non-nationals who are about to be deported are detained in Lindela Repatriation Centre. Due process and judicial review are crucial wherever there are detainees who are deprived of their basic liberty. Research conducted by Whittaker revealed that the detention and deportation of foreign nationals are regularly carried out in an irregular manner in South Africa. The problem with refugee detention cases is the patently unfair way in which detention is used as punishment. Detention as a result of being in the Republic illegally should be effected only after the status of the non-national has been verified and confirmed. It can be argued that detention of non-nationals should be authorised where other sufficient but less coercive measures cannot be applied effectively. In addition, deportation should be carried out only after it has been verified that the person is not a refugee and does not have any legal grounds for remaining in the country.

310 The Department of Home Affairs is legally and administratively responsible for all matters pertaining to the apprehension, holding, processing, repatriation and release of illegal non-nationals at Lindela Repatriation Centre. The centre is situated in Krugersdorp and is only for non-nationals who were in the country illegally. It is at this centre that non-nationals await deportation to their countries of origin.
311 May Global Justice and Due Process 119.
313 May Global Justice and Due Process 159.
314 The Department of Home Affairs conducts the verification procedure, usually by using names or fingerprints.
3.6 PLEADING ONE’S OWN CASE

After the asylum seeker has applied for asylum, the Department of Home Affairs will give him or her a return date on which the application will be heard. On this date, the asylum seeker will have to convince the Department of Home Affairs personnel that he or she qualifies for asylum. The right to be heard before a decision is taken is also covered by common law under the audi alteram partem rule. When dealing with asylum seekers, the decision-makers must uphold the requirements of reasonable notice and give the applicant enough time to prepare. It is not always easy for an asylum seeker to speak openly to strangers and to share with them his or her deepest secrets or past experiences of persecution or other hurtful events.

The period within which an asylum seeker is expected to appear for the hearing must be reasonable and fair. Section 26(4) of the Refugees Act implies that the applicant is entitled to be present at the hearing of his or her appeal, and to be given notice of the hearing in order to be able to request and arrange legal representation at the hearing. It is procedurally unfair not to give the applicant a chance to plead his or her case before a decision is reached. Unless the asylum request is heard in person, the consistency of his or her claim for asylum cannot be proved for consistency against what is written in the application form, or against what was said in the earlier interview or communication.

The process of consultation satisfies the need for information and provides the opportunity for views to be expressed on the matter. Gathering evidence and arguments from a person about whom a decision will be made is likely to produce a better and more accurate outcome, and such a decision is likely to be accepted as legitimate. If individual refugee status determination procedures are not designed to give a fair hearing to applicants, people in danger of persecution

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316 This principle means that everyone performing a judicial function must hear all sides of the case before making a decision.
317 Although the applicant’s case is not determined in an open court, the requirements of notice and proper hearing should be adhered to.
318 Aol v Minister of Home Affairs and Others 2006 (2) SA 8 (D) 13 & 14.
319 Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC) 341.
320 Macklin “Asylum and Rule of Law in Canada: Hearing the Other Side” in Kneebone (ed) Refugees, Asylum Seekers and The Rule of the Law 84.
at home are likely to be erroneously rejected, putting them in danger of deportation.\textsuperscript{321} A state violates applicant’s right to seek asylum when it returns asylum seekers to the country from whence he or she came without giving him or her adequate opportunity to present his or her case.\textsuperscript{322} The Consortium for Refugees and Migrants in South Africa has revealed that the status determination process continues to be administratively unfair, denying asylum seekers a full and fair hearing as well as an individualised, well-reasoned decision based on the details of their asylum claims.\textsuperscript{323} The right to be heard is not restricted to formal enquiries but may apply in situations where privileges or legitimate expectations are at stake.

### 3.7 WRITTEN REASONS FOR REJECTION

After every administrative action is taken, the reasons for such an action should be stated. If an application is rejected in terms of Sub-Section 24(3)(c) of the Refugees Act, the Status Determination Committee must furnish the applicant with written reasons within five working days from the date of rejection and must inform the applicant of his or her right to appeal in terms of Section 24B.\textsuperscript{324} If an asylum seeker is not given written reasons of why his or her application has been rejected or the written reasons are not clear enough, then his or her chances of succeeding with a review or appeal are very slim. Information used to determine an asylum seeker’s case gives the asylum seeker something to work with in the event of a decision being disputed. In cases where a decision-maker is unable to furnish the asylum seeker with adequate reasons for administrative action, it can be presumed, in the absence of any proof to the contrary, that the administrative action was taken without good reason.\textsuperscript{325}


\textsuperscript{324} S 24 of the Refugees Act as amended by the Refugees Amendment Act 2008 and 2011, and section 24B as inserted by the Refugees Amendment Act 2008 and amended by the Refugees Amendment Act 2011.

\textsuperscript{325} S 5(3) of PAJA.
A refusal to provide reasons often leads to suspicion and mistrust on the part of the asylum seeker. The administrator may refuse a request for reasons if written reasons are publicly available and the requesting party is informed where and how they are available, or if the reasons have already been given to the requesting party. The refusal to give written reasons to an asylum seeker must be in accordance with the limitations clause. Reasons are not real unless they are truly informative. In their assessment of written reasons given to asylum seekers, Hunt and Kerfoot found that:

The reasons given indicate that the standing committee considers the majority of applications from the stand point of well-founded fear, and there appears to be no consideration of the AU definition of a refugee.

Section 6 of PAJA provides that administrative decisions must be rationally connected to the reasons given. Thus, reasons for a decision taken should promote rationality. Rationality demands the achievement of a justifiable balance between the extent to which the rights have been affected and the reasons for the decision. Schreier argue that 'the decision taken by Refugee Status Determination Officers in South Africa are generally of a poor quality in that a specific application of the AU Refugee Convention’s definition cannot be properly gleaned'. For instance, individuals who were fleeing civil war and political instability as required by Section 3(b) of the Refugees Act were incorrectly required by the Refugee Status Determination Officers to prove individual persecution.

326 S 3(5) (b) of the Rules of Procedure for Judicial Review of Administrative Action 2009
327 S 36 of the Constitution which provides that the limitation of any rights in the Bill of Rights must satisfy the requirements of section 36.
328 Hoexter Administrative Law in South Africa 1st ed 414.
329 At the time of this dissertation the Standing Committee had been dissolved and the refugee assessment was being done by the new Status Determination Committee. The Refugees Amendment Act 33 of 2008 dissolved the Standing Committee.
331 S 6(2) (f) (ii) (dd) of PAJA.
332 Schreier 2008 Refuge: Canada’s Periodical on Refugees 56.
333 Amit 2010 FMSP 40.
Few Officers in the Department of Home Affairs properly understand or utilise Section 3(b) of the Refugees Act.\textsuperscript{334} This highlights the importance of being able to distinguish between people who want to rely on Section 3(a) and those who want to rely on Section 3(b) of the Refugees Act, and of conveying the correct information to the people concerned. A court may also review a decision where the administrative action has been taken because of an unauthorised or unwarranted dictates of another person or body.\textsuperscript{335} Unproven allegations of acting under duress and failure to properly consider an application constitutes sufficient grounds for concluding that the applicant’s constitutional and statutory rights to reasonable, rational and procedurally fair administrative action have been violated.\textsuperscript{336}

It would appear that the notion of fairness is also dependent on the review body providing proper grounds for it decision, so that the applicant can be reassured that he or she has had a fair hearing and the procedure has been properly applied. It is not the job of the refugee officer to convince the asylum seeker that the decision taken is the correct one, but the officer must inform the asylum seeker how the decision was taken. The higher the stakes in a particular case,\textsuperscript{337} the more people should have access to all the evidence and supporting documents. Administrative action that is justified with reasons minimises or neutralises the effect of bad decisions. The reasons given in asylum cases are important as they reveal whether or not the Department of Home Affairs, acting through its officials, is fulfilling its legal obligations vis-à-vis refugees.

### 3.8 JUDICIAL REVIEW

PAJA provides a set of legislated rules and principles generally aimed at ensuring the lawful, reasonable and procedurally fair exercise of a particular administrative power.\textsuperscript{338} Courts are the appropriate places where a person can have his or her rights or interests determined, resolved and declared.\textsuperscript{339} The Constitutional guarantees equal access to courts (including other independent and impartial tribunals or fora) and a fair hearing to all people without regard to  

\begin{itemize}
\item \textsuperscript{334} Amit 2011 \textit{International Refugee Law} 464.
\item \textsuperscript{335} S 6(2) (e) (iv) of PAJA.
\item \textsuperscript{336} \textit{Tantoush} case 36.
\item \textsuperscript{337} The more important the right, the more critical it is for the applicant to have all the information needed to protect that right.
\item \textsuperscript{338} Currie 2006 \textit{Acta Juridica} 335-336.
\item \textsuperscript{339} S 34 of the Constitution.
\end{itemize}
nationality as long as the dispute can be resolved by the application of law. The court or tribunal in this case must have jurisdiction before the matter can be adjudicated. Adjudication is usually understood to involve an independent and impartial court acting as a passive arbiter to resolve a dispute in light of existing rules and precedents, and in such a way that only the actual parties to the dispute are affected.

The role of the courts has always been to ensure that administrative processes are conducted fairly and that decisions are taken in accordance with the law. Mostly that the process is consistent with the controlling legislation. If the refugee status determination system were to operate without procedural safeguards, it would increase the risk of errant rejection which is defined as the refusal of protection to a person who is in fact a refugee under the legal definition. Adjudicating disputes between asylum seekers and The Department of Home Affairs will necessarily affect the administration and implementation of the Refugees Act. Judicial adjudication in refugee cases is often viewed as subsidiary to the dominant administrative model. This means that the Department of Home Affairs is often seen as the dominant feature of the adjudication of asylum cases, and the judicial adjudication as the last resort or lesser option.

If an asylum seeker is dissatisfied with the decision of the Department of Home Affairs, he or she may, after exhausting all the available remedies under the Refugees Act, approach the High Court for relief. Relief may be by way of review or appeal. It should be noted that an appeal involves the re-hearing of the matter which is restricted to the record of the proceedings. In a review, on the other hand, the applicant is not bound by the record. In an appeal the applicant can contend that the decision maker came to an incorrect conclusion given the facts or the law, whereas in a review the applicant is limited to the grounds for review as set out by law. This

340 S 34 of the Constitution of the Republic.
341 Hoexter Administrative Law in South Africa 2nd ed 53.
342 Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC) 267.
344 Administrative models mean decisions taken by the Status Determination Committee or the Refugee Appeal Authority.
345 S 7(2) (a) of PAJA.
346 Grounds for judicial review may relate to the administrator (6(2) (a) (i)-(iii)), the manner in which the decision was taken ( 6 (2) (b)-(e)) or administrative action (6(2) (f)-(i)). The review proceedings must be instituted within 180 days after domestic remedies have been exhausted.
means that during an appeal, the court may examine the merits of the decision. Review processes can also be used in situations where an asylum seeker’s permit has been suspended or refugee status has been revoked.

One of the most important rules in PAJA is that the application for judicial review must be made within 180 days of the date on which all internal remedies were exhausted. 347 Where no internal remedies are available, the application must be made within 180 days of the date on which the applicant became aware of the decision. 348 Internal remedies are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first before aggrieved parties resort to litigation. 349 However, the obligation to exhaust internal remedies should not be rigidly imposed. 350 A person need not exhaust all internal remedies if the court exempts the person from such an obligation. For example, an exemption will be given if there are exceptional circumstances supporting the waiver and it is in the interest. 351

Asylum reviews and decisions are not primarily aimed at raising legal issues for determination, but rather finding an answer to the question as to whether or not the asylum seeker is a refugee in terms of the Refugees Act. An asylum seeker shall have free access to the courts in the territories of all contracting states. 352 Despite this free access, using the services of a legal representative is expensive. Judicial review can be regarded as an external safeguard against the improper administration of South African law. Before a High Court can review a case under PAJA, an asylum seeker’s rights must be adversely affected by the administrative action and the administrative action must have a direct, external legal effect.

347 S 7(1) (a) of PAJA.
348 S 7(1) (b) of PAJA.
349 Koyabe and Others v Minister of Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) 2010 (4) SA 327 (CC) 341.
350 Koyabe and Others v Minister of Home Affairs 2010 (4) SA 327 (CC) 343.
351 S 7(2) (c) of PAJA.
352 Article 16 of the 1951 Convention.
An application for judicial review of an administrative action must be brought by a notice of motion substantially in accordance with Form F and supported by an affidavit. Judicial review of administrative action has always distinguished between procedural fairness and substantive fairness, and while procedural fairness and the *audi* principle are upheld, substantive fairness is treated differently.

In an asylum claim, an appeal rejected by the Appeal Board Authority may be reviewed by the High Court if the decision of the Appeal Board was reached improperly on legal grounds. A review rejected by the Director-General may also be referred to the High Court for adjudication. Within the asylum application procedure, many states face significant challenges in ensuring a proper balance between the need for both fairness and efficiency. The court or tribunal, in proceedings for judicial review in terms of section 6(1) of PAJA, may grant any order that is just and equitable, including orders:

(a) directing the administrator

   (i) to give reasons; or

   (ii) to act in a manner the court or tribunal requires;

(b) prohibiting the administrator from acting in a particular manner;

(c) setting aside the administrative action and

   (i) remitting the matter for reconsideration by the administrator, with or without directions; or

   (ii) in exceptional cases

   (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or

   (bb) directing the administrator or any other party to the proceedings to pay compensation;

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353 S 8(3) of the Rules of Procedure for Judicial Review of Administrative Action 2009. For an example of Form F, please see Annexure B.

354 *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) 291.

(d) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(e) granting a temporary interdict or other temporary relief; or

(f) as to costs.  

It is the duty of the reviewing court to determine whether the use of discretion is exercised properly within the confines of the law. It is desirable for asylum seekers who seek a review of an administrative action to identify clearly both the facts upon which they base their cause of action and the legal basis of such action. If the court finds that the Appeal Board Authority or the Director-General from Home Affairs reached his or her decision incorrectly, it may send the matter back for a new hearing and in certain circumstances may even substitute the decision of the administrator with what the court perceives is the appropriate decision. Judicial review is becoming the principal means of articulating general standards of legality that apply to a cross section of individuals.

It cannot be denied that there is a high incidence of legal challenges against negative decisions, and these prolong the decision-making process and place an additional burden on the courts. PAJA only provides for the review of administrative action and if a person wants to appeal the decision, he or she must seek relief either through the provisions of specific legislation or the Supreme Court Act 1959. Any decision taken must be reasonable and proportionate to the circumstances of the case.

3.9 THE PRINCIPLE OF LEGALITY

The basis of the principle of administrative legality is that the administration must promote the public interest, on the one hand, and protect and respect individual rights, on the other. The principle of legality dictates that officialdom in all its guises must act in accordance with legal prescripts. This is done to protect people from possible indiscriminate action on the part of the

356 S 8(1) of PAJA.
357 Quinot Administrative Law: Cases and Materials 90.
358 Proportionality in this case refers to the balance between the results of the decision and the means used to achieve the results.
359 Burns Administrative Law under the 1996 Constitution 95.
360 Bula and Other v Minister of Home Affairs 2012 SA (4) 560 SCA Para79.
state or from people exercising public power or executing public functions. The principle of legality remains an essential safeguard in respect of actions that do not fall under PAJA’s definition of administrative action, and it offers some administrative law control.\textsuperscript{361} Put differently, the principle of legality can be described as a constitutional principle, one that makes more explicit the essential constitutional nature of administrative law.\textsuperscript{362} In \textit{Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council}, the Constitutional Court said that “it seems central to our constitutional order that the legislature and the executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.”\textsuperscript{363} This means that decision-makers must act within the scope of their duty.

The principle of legality must also be respected by those interpreting and applying the Refugees Act and the Immigration Act. As pointed out in chapter 2, the chairperson of the Refugee Appeal Authority must be legally qualified to hold such a position.\textsuperscript{364} Failure to satisfy this requirement renders the decision taken by an unauthorised person invalid. Whether a legislative provision confers a power or imposes a duty depends to a large extent on the language used in the legislation.\textsuperscript{365} Every decision that the Refugee Status Determination Officer or any other officer takes must not exceed his or her duty.\textsuperscript{366} The principle of legality can be used to determine whether administrative action is not only authorised by law but also performed in accordance with the prescripts laid down in the law.

3.10 TRANSPARENCY

Administrative action and decision-making processes should be clear and certain to ensure transparency and accountability.\textsuperscript{367} The importance of the protection of the individual and the prevention of the abuse of power by administrators can be emphasised through the principle of

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\textsuperscript{361} Hoexter \textit{Administrative Law in South Africa 2\textsuperscript{nd} ed} 137.


\textsuperscript{363} \textit{Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council} 1999 (1) SA 37 (CC) 37-38 & 45.

\textsuperscript{364} S 8B (1) of the Refugees Act as inserted by s 11 of the Refugees Amendment Act 2008.

\textsuperscript{365} Hoexter \textit{Administrative Law in South Africa 2\textsuperscript{nd} ed} 43.

\textsuperscript{366} S 2 (a) (i) of PAJA provides that a court or tribunal has the power to review an administrative action if the administrator who took it was not authorised to do so by the empowering provision.

\textsuperscript{367} Brynard 2010 \textit{Administrative Publication} 129.
transparency. Transparency must be fostered by providing the public with timely, accessible and accurate information.\textsuperscript{368} This means that the Department of Home Affairs or those who are responsible for determining the status of refugees must make available all the information an asylum seeker might need in order to make an asylum application. They must also be transparent about the information they usually consider in determining refugee status.\textsuperscript{369}

During the interview with the asylum seeker, the decision-maker must document or record the proceedings. Even if the proceedings are not completed on the same day, the decision-maker must also document or record the rest of the interview or consultation with the asylum seeker. In South Africa, the Department of Home Affairs does not usually use tape recordings to record the interview or any consultation with asylum seekers.\textsuperscript{370} Irrespective of the manner in which the proceedings are recorded, an asylum seeker has the right to ask for the transcripts of the interview from the Status Determination Committee. They can also ask any other officer involved in the status determination process, as well as any other information that they may have.

Access to information will be possible if the transcripts are readily available. Access to information discourages corruption, arbitrariness and other improper government conduct.\textsuperscript{371} The administrator is at liberty, however, to refuse to furnish a list of documents in arriving at a decision if there are valid grounds for such refusal.\textsuperscript{372} The test for determining whether the decision-maker has used his or her power to achieve the authorised purpose is an objective one. In the case of \textit{Parapanov v Minister of Home Affairs}, the court held that procedural fairness does not necessarily require disclosure of all detailed facts, and this was taken into account when the decision was made against the applicant.\textsuperscript{373}

\begin{footnotesize}
\begin{itemize}
\item S 195(1) (g) of the Constitution.
\item Practically, decision-makers do not make available the information they consider in determining refugee status.
\item The Department records the interview or consultation on paper and sometimes types them up on the computer in order to keep a proper record.
\item Hoexter \textit{Administrative Law in South Africa} 2\textsuperscript{nd} ed 94.
\item \textit{Parapanov v Minister of Home Affairs and Others} 2000 (4) BCLR 393 (W) 400.
\end{itemize}
\end{footnotesize}
Lack of transparency about policies and procedures used to determine refugee status fosters an appearance of arbitrary decision making and can leave an applicant in the dark as to the criteria by which he or she will be judged.\textsuperscript{374} Courts are inclined to apply a formal test based on the scope of administrative power, which means that important requirements for valid administrative action, such as reasonableness or fairness, have been overlooked.\textsuperscript{375} The principle of transparency offers checks and balances when it comes to the rights and powers of the decision-makers.

### 3.11 CONCLUSION

This chapter has explored the principle of just administrative action with a view to finding out whether the decisions taken by the Department of Home Affairs with regard to asylum seekers fall under the Promotion of Administrative Justice Act (PAJA). From evidence presented, just administrative action is based on the principle of legality and the rule of the law, and is embraced to a large extent in PAJA. PAJA describes what administrative action is and what constitutes a decision in terms of the Act. Although it is not possible to identify the criteria used to evaluate the quality of administrative action, there is some value in identifying the general standard to be used.

Preventing maladministration will involve more than simply putting in place a uniform set of rules; all the role players need to get involved. South Africa has made it possible for asylum seekers to challenge the decision of the Department of Home Affairs regarding their application, using PAJA as an authority. This can be seen as the protection of the asylum seeker’s right to seek asylum. Although court processes take longer to complete, they are there to be used by anybody who is in need of them. The review and appeal processes should be utilised for the benefit of asylum seekers. Although the administrative and policy reform processes are still developing, it is essential that the refugee status determination process retains its integrity.\textsuperscript{376}

\textsuperscript{375} Burns Administrative Law under the 1996 Constitution 59.
\textsuperscript{376} Amit 2010 FMSP Report 7.
It can be concluded that administrators in the Department of Home Affairs must use their power or perform their function for the purposes set out in the Immigration Act or the Refugees Act, whichever is applicable. Public administration must be governed by democratic values and the principles enshrined in the Constitution, including the promotion and maintenance of a high standard of professional ethics and the accountability of public administrators.\textsuperscript{377} All officials handling cases of asylum seekers and refugees are mandated to process applications in accordance with the rules on just administrative action outlined in the Constitution and (PAJA).

\textsuperscript{377} S 195(1) (a) and (f) of the Constitution.
CHAPTER 4

SOUTH AFRICA'S OBLIGATION IN INTERNATIONAL LAW

4.1 INTRODUCTION

Chapter 3, the right of asylum seekers to just administrative action was discussed. It was pointed out that asylum seekers are protected by PAJA in their dealings with state officials. If any asylum seeker is aggrieved by the decision of the Standing Committee, the Director-General or the Refugee Appeal Authority, he or she can rely on PAJA to challenge their decision or failure to take a decision if the circumstances fall under PAJA. In chapter 1, it was stated that an asylum seeker has the right to seek and enjoy asylum in the host country, and that this right is protected by international principles and law. This chapter will focus on the principle of non-refoulement, its development and South Africa’s view towards it. The non-refoulement principle will also be compared to the principle of repatriation.

4.2 THE NON-REFOULEMENT PRINCIPLE

It is quite true to say that asylum, in the strictest sense of the word, is the admission to safety in another country and security against refoulement. The principle of non-refoulement prescribes that no refugee should be returned to a country where he or she is likely to face persecution or torture. Thus, the principle of non-refoulement is the cornerstone of asylum and of international refugee law. It can be said that the principle has crystallised into a rule of customary international law. For a rule to become part of customary international law, two elements are required: consistent state practice and opinio juris. Refoulement can happen directly, such as by deporting someone to his or her country of origin or nationality. It can also happen indirectly, such as by making a refugee’s life miserable to the extent that he or she is forced to leave the country and return to his or her country of origin. Article 33 of the 1951

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378 The section applies to any person who meets the definition of a refugee under the 1951 Convention or, in this case, the Refugees Act. The concept includes people whose refugee status is not yet determined or finalised (asylum seekers).

379 Goodwin-Gill and McAdam The Refugee in International Law 3rd ed 201.

380 The principle of non-refoulement is fundamental to refugee law.

381 Goodwin-Gill and McAdam The Refugee in International Law 3rd ed 248.

382 This means that the rule must be widely practiced and obeyed by most people.


Constitution formally codified the principle of *non-refoulement*.\(^{385}\) When a state signs and ratifies a treaty, it accepts a legal obligation to make sure that it has the means to implement it. The principle of *non-refoulement* is not dependent on a prior formal recognition of the individual’s refugee status.\(^{386}\) Even though states have not always protested specific cases of *refoulement*, they have consistently shown respect for the principle of *non-refoulement*.\(^{387}\)

*Non-refoulement* principle applies to situations where the asylum seekers are already in the host state’s territory or at its port of entry. It is an established principle of international refugee law that asylum seekers should not be returned or expelled pending a final determination of their status. Although states may wish to backtrack from their obligations, having committed themselves to 1951 Convention they cannot act against the principle of *non-refoulement*. States are also bound not to transfer any individual to another country if this would result in exposing him or her to serious human rights violations, including putting his or her life at risk.\(^{388}\) Non return necessarily implies a right to temporary stay in a place of asylum, as well as a right to a reliable determination of refugee status.\(^{389}\)

It must be noted that the 1951 Convention does not create any legal obligation to grant asylum. States are still able to decide who a refugee is in their territory, and may independently reject the application of an asylum seeker if they find that the applicant does not meet the requirements of a refugee.\(^{390}\) This means that the Convention does not give the individual the right to receive asylum in a particular country. In the light of international law, a host state should let the asylum seeker enter its territory and allow him or her to stay for a certain period of time, or indefinitely. It has been proposed that any violation of international law should be a basis for acquiring refugee status under the 1951 Convention,\(^ {391}\) but this kind of thinking should not be allowed considering

\(^{385}\) Article 33(1) of the 1951 Convention.
\(^{387}\) Goodwin-Gill and McAdam *The Refugee in International Law* 3rd ed 228.
\(^{388}\) For example, in cases of extradition.
\(^{389}\) Helton and Jacobs “What is Forced Migration?” in *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* 7.
\(^{390}\) Asylum seekers who do not qualify for refugee status are not entitled to such status, and the host state may deport them according to the law.
the wide range of human rights violations taking place throughout the world. Procedures or arrangements for identifying refugees should provide a guarantee against refoulement. The duty to protect against torture that is, to refrain from refoulement ensures the dignity and integrity of people who are at risk of persecution. The implementation of the principle of non-refoulement requires scrutiny of the facts and circumstances of each individual before a decision is made.

4.3 SOUTH AFRICA’S VIEW ON THE ISSUE OF REFOULEMENT

In South Africa, the Refugees Act protects asylum seekers and refugees against refoulement. Section 2 of the Refugees Act provides that:

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 subject to any other similar measure, if as a result of such refusal, expulsion, extradition, return or other measures, such a person is compelled to return to or remain in a country where:

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

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

The mass expulsion (aimed at racial, ethnic or religious groups) of non-nationals shall be prohibited. More often than not, mass expulsion is a deliberate strategy used by the sending country to destabilise or embarrass strategic or political adversaries and to undermine regional stability. The number of positive obligations inherent in the formulation of a right determines the existence and scope of an implicit prohibition of refoulement. It was pointed out in chapters 1 and 2 that there is a general principle in immigration law that a state has the sovereign right to decide who is allowed to enter and stay in its territory, but asylum law

393 Article 12(5) of the African Charter on Human and Peoples’ Rights.
proposes an exception to this rule. This case applies to asylum seekers who want to enter the Republic of South Africa but do not have the necessary documentation. They, too, have a right to apply for refugee status, and it is unlawful to refuse them entry into South Africa if they are seeking refuge.

The Status Determination Committee must look objectively at the facts uncovered to establish whether there is a real risk of the asylum seeker being persecuted if returned to the country of origin or if there are events seriously disturbing public order still persist? If the answer is yes, then the asylum seeker or refugee cannot be returned to that particular country. The refusal of the authorities to consider the merits of claims or their inability to do so by reason of general policy on persecutions will almost inevitably result in the state in question, breaching its international obligations of non-refoulement.

Goodwin-Gill and McAdam argue that the idea that a state ought not to return persons to other states in certain circumstances is a comparatively new one. The closure by neighbouring states of their doors to asylum seekers in the face of the systematic targeting of the civilian population, combined with a lack of international will, can produce disastrous results. A state that exposes a person to a foreseeable real risk of his or her fundamental rights being violated through expulsion is itself held to have violated that person’s rights. Most migrants feel that South Africa has a moral obligation to the African countries that took up a position against apartheid and should therefore embrace and welcome foreign migrants.

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397 Bona fide asylum seekers are applicants who genuinely seek asylum and are not, for example, economic migrants abusing the asylum system.
398 See the functions and duties of the Status Determination Committee in chapter 3.
400 Goodwin-Gill and McAdam The Refugee in International Law 3rd ed 201.
402 Modi Migration to South Africa: A Human Rights Perspective 11.
In the case of Union of Refugee Women v Director: Private Security Industry Regulatory Authority and Others, the Constitutional Court emphasised that “during the liberation struggle many of those who now find themselves among our country’s leaders were refugees themselves, forced to seek protection from neighbouring states and abroad.”\textsuperscript{403} The connection between human rights violations and refugee movements is not an accidental one where humanitarian intervention is justified merely by the presence of refugee.\textsuperscript{404}

When all possible appeal and review procedures have been exhausted and the asylum application is rejected, the asylum seeker is no longer entitled to remain in South Africa. Subject to Section 2 of the Refugees Act, a refugee may be removed from the Republic on grounds of national security or public order. A removal under Sub-Section 28(1) may only be ordered by the Minister of Home Affairs with due regard for the rights set out in Section 33 of the Constitution and the rights of the refugee in terms of international law.\textsuperscript{405} The cost of deportation is high, and it has been and still is proving to be a futile exercise to deport people as most of them return to the Republic.

Once a state makes a decision to deny entry or expel a refugee, it becomes implicitly linked to that person’s destiny and becomes part of the causative chain\textsuperscript{406} Owing to various interpretations of the non-refoulement principle, the destiny of asylum seekers and refugees depends upon whether they reach the border or territory of a state that will interpret the principle in their favour. A denial of protection without a proper determination of a person’s circumstances constitutes an infringement of the person’s right to non-refoulement. Refoulement is an integral component of the many approaches used to deal with irregular migration. Wherever possible, refoulement should be voluntary, based on the informed choice of the individual, with due regard for the individual’s dignity and the prospect of reintegration into the country of origin.\textsuperscript{407}

\begin{itemize}
\item\textsuperscript{403} Union of Refugee Women v Director: Private Security Industry Regulatory Authority and Others 2007 (4) SA (CC) Para 30.
\item\textsuperscript{404} Loescher “Refugees as Grounds for International Action” in Newman and van Selm (eds) Refugees and Forced Displacement: International Security, Human Vulnerability, and the State 42.
\item\textsuperscript{405} S 28 of the Refugees Act.
\item\textsuperscript{406} O’Nions 2008 European Journal of Migration and Law 150.
\item\textsuperscript{407} International Organization for Migration (IOM) 2010 report \url{http://publications.iom.int/bookstore/free/wmr_2010_english.pdf} (Date of use: 16 July 2012) 36.
\end{itemize}
The obligations of states are clearer, and non-fulfilment of the non-refoulement is now more likely to be the subject of sanctions and other appropriate measures.\textsuperscript{408} The practice of detaining asylum seekers in order to deter illegal migrants and spurious applications could amount to refoulement.\textsuperscript{409} There are some cases, like mass influx, where migrations or refugees movement have severe impact on the host state, especially its safety. Denial of access to safety can occur if legal and administrative measures are applied that prevent asylum seekers from reaching the frontiers of potential asylum countries.\textsuperscript{410} Detention has also often been used in response to the influx of refugees and asylum seekers, and can prove to be the anti-thesis of asylum, even if those detained are not otherwise required to return to their country of origin.\textsuperscript{411} States pay lip service to the importance of honouring the rights of asylum seekers, but in practice devote significant time and resources to keeping refugees away from their borders.\textsuperscript{412} Goodwin-Gill is of the opinion that the discretion to grant asylum and the obligation to abide by non-refoulement are not in alignment.\textsuperscript{413}

Preventing refoulement is an effective, and sometimes the only, means of preventing further human rights violations.\textsuperscript{414} When asylum seekers, coming by sea, land or air, are denied entry to a country and are obliged to continue their journey to another destination, there is a strong argument that they have in effect been rejected at the border.\textsuperscript{415} Where the asylum seeker testifies that he or she has left his or her country in anticipation of serious harm being inflicted had he or she stayed, both the general human rights record of the country of origin and the similar situation of other people should be considered as an alternative means of establishing the objective risk associated with the person’s return.\textsuperscript{416}

\textsuperscript{410} Chakrabarty Human Rights and Refugees: Problems, Laws and Practice 5.
\textsuperscript{411} Parliamentary Assembly with the contribution of Goodwin-Gill Asylum 15.
\textsuperscript{412} Hathaway “Preface: Can International Refugee Law be made Relevant Again?” in Reconceiving International Refugee Law xvii.
\textsuperscript{413} Goodwin-Gill The Refugee in International Law 202.
\textsuperscript{414} Protecting Human Rights of Refugees: Issues and International Intervention 34.
\textsuperscript{415} Joshi Protecting Human Rights of Refugees: Issues and International Intervention 60.
\textsuperscript{416} Hathaway The Law of Refugee Status 89.
The international norms, institutions and laws that govern the management of refugees, asylum seekers and their rights are at the centre of refugee policies and analysis. Yet it can be argued that the principle of non-refoulement is not binding on a state outside its own national territory.

4.4 CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 1984 AND THE PRINCIPLE OF NON-REFOULEMENT

Another treaty that is said to uphold the principle of non-refoulement is the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984. Article 3 provides that:

No state party shall expel, return (refouler) or extradite a person to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture.

The Convention against Torture protects any person who alleges torture at the hands of the state or individuals. Torture does not include pain or suffering arising from, inherent in or incidental to lawful sanctions. Protection of a refugee cannot be regarded as complete unless he or she is also protected against the risk of extradition to a country where he or she fears persecution. Humanitarian law also tries to minimise suffering and casualties during times of armed conflict. The Convention against Torture protects refugees as well as people who are not refugees. But the fact that a person is protected by a certain state in terms of the Convention against Torture does not mean that the person will receive refugee status in that particular state. For example, a state can protect a person against the actions of another state if it is alleged that

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418 This means that a state cannot be held responsible for the actions of another state, whether directly or indirectly.


420 Article 3(1) of the Convention against Torture.

421 Article 1 of the Convention against Torture.

422 The non-refoulement prohibition also covers the risk of arbitrary deprivation of life, in particular through the imposition of the death penalty.

423 Dewulf The Signature of Evil: Re-defining Torture in International Law 42.
the person will receive cruel, inhuman or degrading treatment. The standard of proof for Article 3 of the Convention against Torture is that there are substantial grounds for believing that a person would be in danger of being subjected to torture if sent back to his or her home country.

Substantial grounds can be described as factors upon which a person can make an informed decision. States must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment by returning them to another country or to their country of origin. It can be argued that the principle of non-refoulement is applicable to people who fear torture or other ill-treatment under human rights law where the fear of persecution is connected to the grounds specified in the 1951 Convention or the Refugees Act. Weissbrodt and Danielson are of the opinion that “the norm of non-refoulement under the Convention against Torture does not require that the torture that the individual faces is for any reason contained in 1951 Convention refugee definition.”

Non-refoulement in the context of torture protects norms that are as significant as those protected by refugee law, such as the right to life and the right to physical integrity. The asylum seeker is the one who must show or prove that he or she will be subjected to torture if returned to his or her country of origin. If the asylum seeker maintains his or her burden of proof regarding the likelihood of torture, he or she must not be returned to such a country. Torture may be regarded as persecution in terms of the refugee definition, and thus a person may be tortured for the reasons contained in the refugee definition. It is not clear whether the prohibition of torture principle forms part of customary international law at the moment, but once it attains such status the prohibition of torture may become a peremptory norm of international law.

Intervention in refugee-producing situations because of the threat to peace and security, rather than for purely humanitarian reasons, also changes some of the considerations and conditions

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424 This may come in the form of a request for extradition.
425 Goodwin-Gill and McAdam The Refugee in International Law 3rd ed 304.
426 See Article 1 of the 1951 Convention or section 3 of the Refugees Act in this regard.
427 Weissbrodt and Danielson Immigration Law and Procedure: In a Nutshell 433.
in executing refugee policies. The current international refugee system, influenced by wider immigration policies, is giving rise to grave human rights violations as the status determination process fails to uphold the non-refoulement principle. From a human rights perspective, a flawed status determination process may return a genuine asylum seeker to a life-threatening situation, creating grave humanitarian concerns.

4.5 REPATRIATION AS OPPOSED TO REFOULEMENT

There is a huge difference between repatriation and refoulement. In the case of repatriation, the wrong that was previously committed by the country of origin or nationality would have been resolved. In the case of persecution, the state will be in a position to protect the asylum seeker again. A state that is planning to transfer a person to another state must assess whether there is a risk of violation of the applicant’s fundamental rights. There will be a cessation of refugee status if the refugee or asylum seeker can no longer refuse to avail himself or herself to the protection of his or her country of origin. Repatriation is not suitable when there is only a temporary change in the circumstances or conditions relating to the asylum seeker or the country of origin, but it would be a suitable option when conditions genuinely and permanently improve. This is in contrast to a situation where a state wants to refoule the asylum seeker or refugee merely to get rid of them. In every refugee system a cardinal principle should be that voluntary return to the asylum seeker’s or refugee’s original home, is the most desirable solution for those found not to be in need of international protection.

The South African Constitution reaffirms the fundamental human rights that every person living in South Africa is entitled to, including the right to life. Having refugee status means that the person has the protection of the South African government and cannot be forced to return home.

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432 S 5(1) (e) of the Refugees Act.
433 Whittaker Asylum Seekers and Refugees in Contemporary World 83.
434 S 11 and also see CoRMSA 2013 Commemorates South African Human Rights Day by calling for the Finalisation and Implementation of the National Action Plan to Address Racism and Xenophobia in South Africa http://www.cormsa.org.za/2013/03/ (Date of use 10 May 2013).
until it is deemed safe to do so. South Africa is bound by Article 5(1) of the AU Refugee Convention which states that “the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his or her will.” South Africa has to consider this provision before making a decision to send someone back to his or her country of origin. When repatriation is carried out due to a change in the circumstances of the asylum seeker or in the country of origin, due caution must be exercised. This means that the risk involved must be taken into account when a state wants to return asylum seekers to their country of origin, especially as entry is sometimes refused.

Changes in the circumstances of asylum seekers' home country may affect their application for asylum. In general terms, the individual bears the burden of proof that being sent back to his or her country of origin would constitute a real threat to his or her life or freedom. The state that alleges that the circumstances of the individual seeking asylum have changed significantly must put forward a *prima facie* case to this effect. The principle of *non-refoulement* applies to asylum seekers who are still under the refugee status determination system. It is gratifying that conditions in a refugees’ or asylum seeker’s country of origin often change to such an extent that repatriation becomes possible.

Developing a broader understanding of protection rests on the realisation of the state’s duty to respect, protect and fulfil legal obligations and norms. The determination as to whether or not it is safe for a person to go back to the country of origin should not be based on the signing of a peace agreement or the introduction of a new constitution. For individuals, hearing the news that it is safe for them to return to their country of origin may be cold comfort when the state has based its decision on factors that are in no way related to their past experiences, and that the

435 S 2 Refugees Act.
436 Article 5(1) of the AOU Convention.
437 The circumstances in the asylum seeker’s home country must have changed to such an extent that the asylum seeker cannot rely on the principle of *non-refoulement*.
438 Mozambique and Angola are perfect examples of such countries.
threat to their life and liberty is still very prevalent. Not all refugees will choose to voluntarily return to their state of origin, even when a safe and dignified return is possible. Their unwillingness to return may be due to the fact that the refugees have established themselves in the host country and their children may not even know how to speak the language which is spoken in their parents’ country of origin.

4.6 LIMITATION OF ARTICLE 33(1) OF THE 1951 CONVENTION

Article 33(1) of the 1951 Convention prohibits the return of asylum seekers under any circumstances of asylum seekers to life-threatening circumstances in their countries of origin. However, article 33(2) of the 1951 Convention gives states authority not to accept any person who has been finally convicted of a crime and who would pose a danger to the receiving state. The discretion to exclude such a person helps the receiving state to protect itself against future threats to its community. It can therefore be said that an asylum seeker who has been excluded from the refugee definition or the benefit of non-refoulement cannot use the principle of non-refoulement to support his or her request for asylum. What is considered reasonable grounds as stipulated in article 33(2) will depend on individual circumstances.

Section 4 of the Refugees Act preludes certain people from qualifying as refugees. Allain is of the view that “if refugees are to be denied refugee status because they have been involved in the so-called political crimes, then very little substance remain in the term refugee.” Even if an asylum seeker has been involved in violent crime, he or she cannot simply be denied refugee status because of those crimes. The crime must be a crime against humanity and be of a particular nature. There are differences of opinion as to whether the refusal of asylum in such a situation would be in conflict with the principle of non-refoulement. Some writers suggest that the

442 Article 33(2) of the 1951 Convention provides that the benefit of the present provision (Section 33(1)) may not be claimed by a refugee who can reasonably be regarded as a danger to the security of the country in which he is or who, having been convicted of a particularly serious crime, constitutes a danger to the community of that country.
443 For example, people who have committed crimes against humanity, as defined in any international legal instrument dealing with any such crimes, do not qualify for asylum.
rejection of an asylum application is not an infringement of the asylum seeker's right not to be returned to a country where his or her right to life or movement will be infringed. The host state must try to strike a balance between its own interests and the interests of the asylum seeker. The view adopted in this study is that the non-refoulement principle is applicable in almost all circumstances, regardless of the nature of the activities the person concerned may have been engaged, in as long as the applicant does not pose a danger to the host state.

4.7 THE IMMIGRATION OFFICER’S POWERS ON ARRIVAL OF ASYLUM SEEKERS AT THE PORT OF ENTRY

Due to the number of people fleeing human rights violations and poverty, many countries perceive the wave of immigrants and asylum seekers as a direct threat to their own identity. The influx of large numbers of asylum seekers in a certain country sometimes also places a great strain on the country’s inadequate national resources.

According to South African refugee laws, immigration officers are not allowed to turn away asylum seekers at border posts if they communicate their intention to apply for asylum. States cannot be held responsible for any fatalities resulting from their attempts to control their borders. Controls at the border check points make it easier for South Africa to determine who enters or exits the Republic, and when do they enter or exit. It can happen that an asylum seeker might, while exercising his or her right, breach the immigration law of the host state. However, even if the immigration officer is of the opinion that the person in question does not satisfy the requirements for entry into the Republic, he has no right to refuse entry if the person is an asylum seeker. Unauthorised migration and border control measures can reflect negatively on the country's immigration policy.


446 This means that a state can set up requirements for people entering the Republic. If a person does not meet the requirements and then resorts to illegal entry and gets killed or hurt, the Republic will not be held responsible for the outcome.
The principle of *non-refoulement* is not dependent on an asylum seeker entering the receiving state legally or fulfilling the immigration requirements of the receiving state. The principle of *non-refoulement* also protects asylum seekers who entered the Republic without using the legal ports of entry. Some states maintain that normal immigration control and visa policies do not amount to *refoulement*. The immigration or visa policies should not in any case apply to people who claim to be asylum seekers. In such cases the person must be allowed to enter the Republic and apply for asylum. If a state does not allow the asylum seeker to enter and turns him or her away, it might have breached the principle of *non-refoulement*. The return of an asylum seeker who is already inside the state territory is far more serious than rejection at the border.\(^{447}\)

With the AU Refugee Convention and the Refugees Act being in force, South Africa has to go further by upholding its duty to accept refugees who flee for reasons not as specific as personal persecution. As pointed out above, it does not matter how an asylum seeker got into the territory of the country of refuge. What is important is the action of the receiving state after such an entry. Refusal of entry at the border post for security reasons does not primarily infringe the principle of *non-refoulement*. It can be argued that the rights of the applicant in this instance should be weighed against the interests of the community. The denial of access into a state equates to a denial of a fair refugee status determination procedure. In South Africa the voices of refugees and migrants are often not heard, and so these groups are marginalised, as evidenced in, for example, the denial of access to services like housing and healthcare services and various forms of abuse by state officials.\(^{448}\)

The existence of reasonable reasons for refusal of entry is not an unlawful deviation from the host country’s right of discretion.\(^ {449}\) However, a host country will be barred from removing a refugee if this would result in exposing him or her to a substantial risk of persecution. Border officials are now believed to routinely turn away would-be asylum seekers who have transited

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\(^{447}\) People within the Republic of South Africa are protected by the Constitution, and the right to life immediately comes into play. This does not mean that people who seek asylum and are at the border post are less important. It all comes down to the degree of protection afforded to them.


\(^{449}\) Clayton *Immigration and Asylum Law 3rd* ed 235.
other countries on the basis that they should have sought asylum in the first safe country they reached.\textsuperscript{450} Asylum applications in South Africa will not decline any time soon because most African countries are experiencing dire poverty and/or an ever-continuing cycle of civil war.\textsuperscript{451} According to the United Nations Refugee Agency, UNHCR, the number of refugees globally was estimated at 10.5 million at the end of 2012.\textsuperscript{452} In Africa, hundreds of thousands have fled conflict in among others, the Democratic Republic of Congo, Mali, Sudan and South Sudan.

At a conference held in Mangaung by South Africa’s ruling party, the African National Congress, it was noted that undocumented migrants pose both an economic and security threat to the Republic.\textsuperscript{453} It was stated that the state should provide competent and well-trained border officials to regulate the various services and people at the border.\textsuperscript{454} However, the role of the Immigration Officers should not be to decrease the number of asylum applications brought to the refugee reception offices. Rather, it should be to inform asylum seekers of their rights to apply for asylum. States cannot simply make asylum seekers disappear by denying them access to the territory.

\section*{4.8 THE FIRST COUNTRY OF ARRIVAL AND SAFE THIRD STATE}

According to the \textit{UNHCR Handbook}, “a person will not be excluded from refugee status merely because he could have sought refuge in another part of the same country, if under all the circumstances it would not have been reasonable to expect him to do so.”\textsuperscript{455} A safe third state is a state that the international community regards as being a safe location in which an asylum seeker can seek asylum. It has been said that what is left of a state’s sovereignty in the matter of asylum is the possibility of indicating to the individual asylum seeker that another country is, in

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{450}] IRIN News Johannesburg “Migration: Human smugglers profit as tragedies multiple” \url{http://www.irinnews.org/report/95845/migration-human-smugglers-profit-as-tragedies-multiply} (Date of use: 16 July 2012).
\item[\textsuperscript{451}] Countries like the Democratic Republic of Congo, Sudan, Central African Republic and Mali are in a continuous state of political upheaval/civil war.
\item[\textsuperscript{452}] UNHCR “Displacement: The new 21\textsuperscript{st} century challenge” \url{http://www.unhcr.org/51bacb0f9.html} (Date of use: 5 August 2013).
\item[\textsuperscript{453}] Paton “Hard line on immigration ‘no answer’” \url{http://www.bdlive.co.za/national/2013/02/14/hard-line-on-immigration-no-answer} (Date of use: 5 August 2013).
\item[\textsuperscript{454}] Paton “Hard line on immigration ‘no answer’” \url{http://www.bdlive.co.za/national/2013/02/14/hard-line-on-immigration-no-answer} (Date of use: 5 August 2013).
\item[\textsuperscript{455}] Article 91 of the \textit{UNHCR Handbook}.
\end{itemize}
\end{footnotesize}
the state’s opinion, a better prospect from the point of view of providing the necessary protection. 456 Whichever state the asylum seeker first arrives in will be the state where he or she must remain unless fear of persecution in that state can be substantiated. 457

The presumption of safety is drawn from the general situation in the country and projected onto the individual. 458 A country is considered a safe country if it observes the basic standards laid down in international human rights treaties or law. It can be argued that this may not be an adequate yardstick for determining whether an asylum seeker should have sought asylum in the first safe country. To determine whether a country is a safe country requires a lot of research and one must not depend on only one source of information. 459 Even if states are not seen as directly violating the principle of non-refoulement, the safe third country rule provides a way to circumvent international law. The principle of non-refoulement can be said to also prohibit secondary refoulement. 460

The safe third country rule is usually used to permit states to redistribute refugees or asylum seekers to safe countries in order to better allocate the responsibility of providing asylum and in other instances to run away from such responsibility. In cases of mass influx, the safe third country may be unable to care for the asylum seekers and some of them may be forced to move to other countries. The receiving country must not turn away the asylum seeker due to the first safe country principle or custom. The receiving state must admit the asylum seeker if the first safe country is unable to do so due to the large number of arrivals.

What is legally considered safe is not clear. The grounds for a safe third country refusing access to asylum seekers tends to be based on the misplaced presumption that the country can and will

459 Different information from different sources about a specific topic or country should be used to place the decision-maker in a better position to make an informed decision.
460 Secondary Refoulement occurs when a state sends an asylum seeker or refugee to a first receiving country or safe third country while knowing that there is a possibility that the asylum seeker or refugee might be returned to a country that he or she fears.
offer protection to refugees. The difficulty in establishing whether a state is in fact a safe third
country places asylum seekers in a dangerous position as they may be returned or sent to
unsafe countries. If South Africa wishes to apply the safe third country rule, it takes upon itself
the responsibility of verifying all information required so that it does not become guilty of
refoulement.

Without overstating the principle of non-refoulement, the government might be prevented from
returning an asylum seeker to a country where his or her life could be at risk, because Section
11 of the Constitution provides that everyone has the right to life. Newman is of the opinion
that “the legal rights of refugees, institutional responses and support mechanisms must be
reoriented within a framework of the broad definition of security in the contemporary, inter-
dependent era”. In an effort by states to control illegal migration, would-be refugees may find
that they, too, are subject to the control measures linked to immigration and visa policies. It is
also possible that refugees or asylum seekers may be denied basic human rights in the country
of first refuge – that is, their lives and freedom may be threatened by elements within that
country that are motivated by racial or religious intolerance.

States must not use the safe first country rule to exclude asylum seekers who have passed
through what is regarded as a safe country to seek asylum. Thus, huge numbers of refugees
pouring out of a certain country into another country should not be used as an excuse/reason by
the receiving state to infringe the principle of non-refoulement. The safe third country rule in
South Africa can be regarded as a way of minimising the number of people who wish to take up
asylum in the Republic. The option of referring an asylum seeker to a safe third country is an
action that hovers between the principle of state sovereignty and the principle of non-

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461 Vedsted-Hansen “Non-Admission Policies and the Right to Protection: Refugees; Choice versus
462 S 11 of the Constitution.
Vulnerability, and the State 16.
464 Gorlick “(Mis)perception of Refugees, State Sovereignty and the Continuing Challenge of
International Protection in Human Rights and Refugees, Internally Displaced Persons and Migrant
Workers 7.
refoulement.\footnote{Kjaerum 1992 \textit{International Journal of Refugee Law} 514-515.} Ultimately, it is the responsibility of the state not to blur the lines between state sovereignty and the principle of non-refoulement, and to deny people their fundamental human rights.

4.9 CONCLUSION

This chapter discussed the principle of non-refoulement and in particular how it influences South Africa’s law when it comes to sending asylum seekers to their respective homes. The study has discussed that the asylum seeker’s right to seek and enjoy asylum can be disturbed or infringed when he or she is forced to leave the country in which asylum is sought. Infringement can also occur where entry is refused before the asylum seeker can make an actual application. The 1951 Convention as well as other named documents prohibits the return of refugees to countries where their lives or freedom might be at risk. Although the principle of non-refoulement must be respected by other states, including South Africa, states have the discretion to refuse to grant asylum to an asylum seeker who is excluded under the provisions of the 1951 Convention and other documents. This means that the right to seek and enjoy asylum is not absolute.

The study has also discussed that an applicant may technically qualify for asylum, but due to his or her past actions or potential danger to the host country, asylum may not be granted. Denial of asylum in these circumstances usually does not infringe the principle of non-refoulement, but it can be further adduced from this chapter that in exceptional circumstances the denial of asylum for excluded persons may amount to refoulement. Although states are sovereign, there are limitations to their powers, especially when it comes to asylum seekers and refugees. This chapter has demonstrated further that most cases of refoulement occur at the borders of South Africa. It may happen, for example, that non-nationals do not have certain documents or forms of identity that are required in terms of South Africa’s immigration laws and thus may be refused entry.
By not accepting such asylum seekers, South Africa is contravening the Refugees Act and the UN Convention and Protocols relating to the status of refugees, of which it is a signatory. In view of what is often at stake, the state and its organs have to be consistent with both the values of the Constitution and the human rights imperative set out therein. South Africa’s constitutional framework and the various pieces of legislation supporting the protection of refugees have given rise to very high and exacting standards, particularly insofar as they relate to the protection and promotion of human rights. A line should be drawn between *refoulement* and repatriation. Repatriation may be seen as a safe way of returning refugees to their countries of origin, but a thorough investigation must be undertaken to avoid infringing the *refoulement* principle. Although South Africa is at liberty to repatriate people to their countries, there are few cases of it having been done in a reckless manner or without establishing whether the circumstances in the home country have permanently changed for the better.

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467 The rights involved amongst others are: The liberty of the individual, their freedom and security and their rights to just administrative including their right to seek and receive the protection of the state in appropriate circumstances.
CHAPTER FIVE

5.1 CONCLUSIONS

Refugee status determination is an internationally established practice. Accordingly, there are set norms and standards that states must follow in determining whether or not an asylum seeker is a refugee. Asylum seekers are entitled to certain internationally recognised rights. Such rights, as this study has discussed, apply from the moment asylum seekers reach a port of entry to a time when a determination regarding their status has been finalised. The purpose of this study has been to investigate the status determination process from a South African perspective.

The refugee status determination process takes place within a regulated environment. In light of this, chapter 1 presented an overview of the international, regional and national regulatory framework pertaining to asylum seekers and refugees. It soon became clear from the discussion that South Africa’s refugee law has been influenced by the international and regional regulatory framework.

Determining the status of an asylum seeker is a process that takes place in different stages which may involve the asylum seeker having to interact with a number of institutions and personnel along the way. Chapter 2 dealt with the journey of an asylum seeker as he or she goes through these different stages. Chapter 2 also discussed the procedural as well as the substantive issues relating to asylum seekers and refugees. It became evident that there is a difference between procedures aimed at dealing with refugees and those aimed at dealing with migrants. While the procedures are not the same, it is not always easy to make a clear distinction between a refugee and other migrants, especially if humanitarian principles are applied. Chapter 3 discussed the asylum seeker’s rights to just administrative action. In particular, the chapter highlighted the fact that asylum seekers have a right to just administrative action in terms of the Constitution of South Africa and PAJA. This mean that all the procedures (including review and appeal) under PAJA are readily available to asylum seekers should they need to exercise some of their rights. Although PAJA affords the asylum seeker the rights of
review and appeal against the decisions taken against him or her by the Department of Home Affairs, these procedures are expensive and time-consuming.

One of the internationally recognised principles in refugee law is *non-refoulement*. This principle was the subject of the discussion in chapter 4. States can *refoule* asylum seekers in different ways, giving all sorts of different reasons. One of the most common reasons, as was pointed out in the discussion, is that of the first country of arrival and safe third country rule. Chapter 4 further highlighted the difference between *refoulement* and repatriation.

The discussions in the different chapters gave rise to the following collective findings or challenges (which, as far as this study is concerned, require attention from South Africa): firstly, although South Africa might go to significant lengths to adhere to the international principles of refugee law, adoption alone will not suffice. The interpretation of the Refugees Act and refugee regulations and policies, as well as the procedures involved in identifying asylum seekers and refugees are still a major problem. This may be due to constant changes being posed to the Refugees Act and surrounding refugee laws.

The first challenge is the lack of co-operation or interrelationship among the South African Police Service, the Immigration Officers, the officers/functionaries dealing with asylum seekers and refugees means that during the process of status determination the human rights of asylum seekers can potentially be violated. It cannot be over-emphasised that the difference between a refugee or asylum seeker and an economic migrant or any other migrant is crucial in any interpretation of the Refugees Act and international refugee law.

The second challenge is the accessibility of the places where asylum seekers should apply for asylum. As stated in chapter 2, there are only 5 refugee reception offices in South Africa, in five of the country’s nine provinces. The closest refugee reception office from the port of entry is at Musina (Limpopo province), and this office is largely used by asylum seekers entering the country on foot. Those who can afford the transport costs or have families in South Africa go to
other refugee reception offices. A major problem at present is that not only are the refugee reception offices relatively inaccessible due to the large number of applicants, but the South African government has started closing some of the offices in the hope of relocating them to the border posts. The closure of some of the refugee reception offices, it is argued, puts pressure on the remaining offices and fuels the backlog, which results in even more delays. The insistence on closing some of the refugee reception offices amounts to further persecution in the eyes of asylum seekers and refugees.

The period within which asylum seekers in possession of a transit permit must report to a refugee reception office has been reduced to 5 days. This has added to asylum seekers’ burden. The reduction from 14 days to 5 days is proving to be prejudicial to the asylum seeker and also puts a strain on the reception offices. Often, too, asylum seekers find it difficult to reach the refugee reception offices as there is no co-operation among the Immigration Officers, the South African Police Service and the functionaries in the refugee reception offices.

The third challenge is the shortage of professional, well-trained and readily available interpreters to provide assistance, at state expense, to those applicants who are unable to provide their own interpreters during the interview process. Although the state sometimes makes interpreters available to refugees, the interpreters are not employed on a full-time basis and on certain days they are simply not available. It is even worse for asylum seekers who do not speak or understand English because when they arrive at the port of entry, they may not receive assistance due to the language barrier. Also, the South African government does not contract foreign interpreters to assist asylum seekers at the port of entry, this increases the chances of their being turned away.

The fourth challenge is the application of PAJA when it comes to asylum applications. For reasons unknown, asylum decisions are isolated from the application of PAJA. Most of the asylum seekers are poor and without a proper family support system, and most of asylum seekers will not be able to afford the expensive remedies provided outside PAJA.
The fifth challenge is the application of the non-refoulement principle and how it differs from repatriation. From the study it was pointed out that the refoulement of an asylum seeker at the port of entry is treated more lightly than when a person is within the Republic of South Africa. Immigration offices are not trained to identify asylum seekers, especially those without proper documentation. In order to give effect to the obligations under the 1951 Convention, South Africa should grant individuals seeking asylum international protection, access to the territory, and a fair and efficient asylum procedure. This will be the first step in preserving the rights of asylum seekers and refugees. South Africa’s current plan to close down certain refugee reception offices should be re-evaluated, taking into account the effects of such closures on refugees, young children and women.

5.2 RECOMMENDATIONS

The Refugees Act prescribes a procedure for determining refugee status and requires that the decision on an asylum application be taken in accordance with the Act and without bias. A fair and effective refugee status determination process allows people who are fleeing persecutions or events that seriously disturb public order to safely arrive in South Africa and seek asylum. The government in this regard is no longer a passive decision-maker with limited policy goals focused solely on preserving social order.\textsuperscript{468} For all migration control methods to give effect to the Refugees Act, the difference between a refugee and other migrants needs to be emphasised. The Department of Home Affairs should teach all officers dealing with asylum seekers and refugees the difference between the two.

A uniform standard for the evaluation of asylum applications should be established to reduce the number of inconsistencies in refugee identification and asylum decision making. South Africa must adopt a guideline against which refugee status determination officers may judge someone’s conduct when assessing an application for asylum. The guideline must not be absolute but rather be sufficiently flexible to allow the decision-maker to accommodate the different personal circumstances of the applicants. The adoption of a standard set of rules will bring uniformity to the South African asylum system.

\textsuperscript{468} Thomas Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication 7.
South Africa should stop closing down the existing refugee reception offices. Instead it should open additional offices next to South Africa’s ports of entry. In addition, interpreters should be readily available to asylum seekers, either in the initial stage at the port of entry or during the interview process. The interpreters should be well-trained and knowledgeable about refugee law and immigration law. Furthermore, asylum seekers or refugees who are not satisfied with the decision of the Department of Home Affairs should have access to speedy and inexpensive relief before they may be deported or removed from the asylum system.

Deportation and repatriation must not be used as a means of getting rid of non-nationals from South Africa. The country can avoid having its deportation and repatriation processes abused, if the government trains the Department of Home Affairs personnel in the core elements of refugee and immigration law. South Africa has a duty to establish, prior to the implementation of any removal measure, that the person whom it intends to remove from its territory would not be exposed to any risk that would endanger his or her life or freedom. The difference between *refoulement* and repatriation should be at the top of the list of urgent matters that the Department of Home Affairs is educating its officials or employees in. In order to ensure that asylum seekers are not forced to return to countries where their lives or freedom of movement are at risk, the procedure for admitting and returning asylum seekers should be transparent.

South Africa’s regulatory framework must remain open to genuine refugees but at the same time it must prevent the asylum system from being exploited by those who are not entitled to it. Ultimately, it is about balancing the needs of South Africa as a whole with those of all the people who live within its borders and/or have a legitimate right to make the country their home.
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FORM A
REQUEST FOR REASONS

Legal context of this form: Section 5(1) of the Promotion of Administrative Justice Act (PABA) permits any person who is materially and adversely affected by an administrative action to request reasons within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action. Section 5(2) of PABA requires the person who made the decision (the administrator) to give reasons for the administrative action within 90 days of the request. These time limits may be reduced or extended by consent.

The request for reasons and variation of time must be done in accordance with rule 3 which prescribes that the request must be made in accordance with this Form.

The relevant provisions of PABA are reproduced:

What this form is about: You need to fill in this Form if you have been materially and adversely affected by an administrative action and:

- the administrator has not given reasons and you want the reasons for the administrative action;
- you need to shorten or extend the periods contained in PABA for reasons.

You do not have to make both requests in this Form.

How do you send or deliver this request? Delivery of this Form shall be affected in one or other of the following ways: hand delivery, registered post, fax or electronic mail.

PART A: DETAILS OF REQUESTER

How to fill this part of the Form:

1. Provide full details:
   - The requester must state the address for delivery of the reasons and state the manner in which the reasons must be delivered.
   - The requester may choose one of the following methods of delivery:
     - registered post
     - facsimile
     - electronic mail

2. You must explain why you are materially and adversely affected by the administrative action. The administrator may refuse to provide you with reasons if you have not been so affected.

3. If an individual:
   - Full name 
   - Date of birth 
   - Identity or Passport number 

4. If a company, closed corporation, partnership etc:
   - Name and description 
   - Registration details, if any, 
   - Persons authorised to act on its behalf

5. Contact details:
   - Telephone number 
   - Email address 
   - Details of legal representative (if represented) 
   - Postal address 
   - Manner of delivery
4. Explain why you are materially and adversely affected by the administrative action. 

5. When and how did you become aware of the administrative action? 

**PART B: NAME AND DETAILS OF ADMINISTRATOR**

How to fill this part of the Form:

1. These details are important because they identify who must respond to your request.
2. If you do not know the name of the person responsible for the action, then it is sufficient to give the details of the body responsible for the decision. The body may be one of the following:
   - a national department
   - a provincial department
   - a municipality
   - an official or institution like the CCMA, FASSA or a bargaining council.

1. Details of administrator who took the action (if known):
   - Full name 
   - Official designation 
   - Work address 
   - Contact details including facsimile, telephone number and email address.

2. Details of department or institution responsible for the action:
   - Name of department or institution
   - Address
   - Contact details including facsimile, telephone number and email address
   - Head of the office

**PART C: DETAILS OF THE ADMINISTRATIVE ACTION**

How to fill this part of the Form:

Part C of the Form must be as detailed as possible. This will assist the administrator in identifying the administrative action and will accordingly eliminate unnecessary delays.

1. Have you been informed of the administrative action? If "yes" provide:
   - The date of the administrative action
   - Any file or reference number used by the administrator
   - Any other details that will assist in identifying the administrative action
   - In terms of which law was the administrative action taken (if known)?

2. If you have not been informed of the administrative action, then provide:
   - A description of the administrative action
   - Any details that will assist in identifying the administrative action
   - Any file or reference number used in any documentation concerning the administrative action

3. Have you been provided with reasons for the administrative action referred to in this section? yes/no
FORM F

NOTICE OF MOTION: APPLICATION FOR JUDICIAL REVIEW

IN THE ................................................................. COURT

HELD AT ...........................................................................

CASE NO. ..............................................................

IN THE MATTER BETWEEN:

.............................................................. Applicant

And

.............................................................. Respondent

TAKE NOTICE that the applicant intends to make application to this Court for the review of the following administrative action:

..........................................................................................................................

..........................................................................................................................

..........................................................................................................................

and claims an order in the following terms:

..........................................................................................................................

..........................................................................................................................

..........................................................................................................................

and take notice that the accompanying affidavit(s)
of.................................................. will be used in support thereof.

TAKE NOTICE FURTHER that the applicant has appointed the following address at which delivery of all process in these proceedings will be accepted and method of delivery for all procedures and documents in these proceedings.

..........................................................................................................................

..........................................................................................................................

..........................................................................................................................
TAKE NOTICE FURTHER that the applicant has elected the following manner in which he or she will accept delivery of documents:

TAKE NOTICE FURTHER that if you intend opposing this application, notice of intention to oppose must be given within 15 days of receipt of the notice of motion. This notice must appoint an address for and manner of delivery of all process and documents. If you provide a physical address and require that the documents be served on you by hand, the address provided must be within 25km of a Court.

TAKE NOTICE FURTHER that within 15 days after giving notice of your intention to oppose, you must deliver an answering affidavit, if any.

If no such notice of intention to oppose is given, the registrar will be requested to set the matter down for hearing on ........................................ date at ......................... time.

DATED at ..................................this ...................................... day of ........................................ 20......

..........................................................

Applicant or his Attorney
(address)

To:
(1) The Registrar of the above Court;

(2) The Administrator;

(3) Any persons against whom relief is sought; and

(4) Any other person necessary to join in the proceedings.
ANNEXURE C

REPUBLIC OF SOUTH AFRICA
DEPARTMENT OF HOME AFFAIRS

ELIGIBILITY DETERMINATION FORM FOR ASYLUM SEEKERS

1. PERSONAL DETAILS

A. SURNAME /FAMILY NAME: .............................................

- NAME/S: ..............................................................

- DATE OF BIRTH: ......................................................

<table>
<thead>
<tr>
<th>MALE</th>
<th>PLACE OF BIRTH</th>
<th>COUNTRY OF BIRTH</th>
</tr>
</thead>
<tbody>
<tr>
<td>FEMALE</td>
<td>CURRENT NATIONALITY</td>
<td>ETHNIC GROUP</td>
</tr>
<tr>
<td></td>
<td>PREVIOUS NATIONALITY/IES (IF ANY)</td>
<td></td>
</tr>
<tr>
<td>LANGUAGE</td>
<td>OTHER LANGUAGES</td>
<td>RELIGION</td>
</tr>
<tr>
<td>RESIDENCY DURING THE LAST TEN YEARS</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
B. FAMILY DETAILS

- MARITAL STATUS: UNMARRIED/ MARRIED/ DIVORCED
  
  (Delete where applicable)

<table>
<thead>
<tr>
<th>NAME OF SPOUSE:</th>
<th>D.O.B</th>
<th>NATIONALITY</th>
<th>WHEREABOUTS</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>LIST CHILD/REN</th>
<th>GENDER</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td></td>
</tr>
<tr>
<td>3.</td>
<td></td>
</tr>
<tr>
<td>4.</td>
<td></td>
</tr>
<tr>
<td>5.</td>
<td></td>
</tr>
</tbody>
</table>

NAME OF APPLICANT'S MOTHER

<table>
<thead>
<tr>
<th>NAME OF APPLICANT'S FATHER</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
</tr>
</tbody>
</table>

C. IDENTITY/TRAVEL DOCUMENTS:

- ARE YOU IN POSSESSION OF YOUR PASSPORT /TRAVEL DOCUMENT /IDENTITY DOCUMENT? (YES/NO)

- IF YES, PLEASE COMPLETE THE FOLLOWING TABLE:

<table>
<thead>
<tr>
<th>PASSPORT/TRAVEL DOCUMENT/ IDENTITY DOCUMENT</th>
<th>AUTHENTIC</th>
<th>FALSE</th>
<th>ISSUED BY THE UNITED NATIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>PLACE AND DATE OF ISSUE</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ISSUING AUTHORITY</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DATE OF EXPIRY</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>DOCUMENTS DESTROYED/DISPOSED OF</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

REASON:
D. PREVIOUS VISITS TO THE RSA

☐ HAVE YOU VISITED THE RSA PREVIOUSLY? YES/NO

☐ IF YES, WHEN AND FOR HOW LONG?

☐ ON WHAT PERMIT DID YOU ENTER THE RSA?

☐ WHAT WAS THE PURPOSE OF YOUR VISIT?

☐ HAVE YOU EVER OVERSTAYED OR BEEN ORDERED TO LEAVE THE RSA? YES/NO

☐ IF YES, WHEN AND WHY?

E. EDUCATION

☐ HIGHEST QUALIFICATION OBTAINED

☐ PROFESSION

☐ PREVIOUS EMPLOYMENT

☐ DURATION: ............... FROM: ............... TO ............... 

F. ROUTE TAKEN TO THE RSA

☐ PLEASE LIST THE COUNTRIES YOU TRANSITED EN ROUTE TO THE RSA AND THE DURATION OF YOUR STAY:

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>DURATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td></td>
</tr>
<tr>
<td>2.</td>
<td></td>
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<td>3.</td>
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<td>4.</td>
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<tr>
<td>5.</td>
<td></td>
</tr>
</tbody>
</table>
DID YOU APPLY FOR ASYLUM IN THE COUNTRY/IES LISTED ABOVE?

IF YES, GIVE DETAILS:

IF NO, WHY DID YOU NOT APPLY FOR ASYLUM?

WAS YOUR APPLICATION DECIDED UPON? YES / NO

IF NOT, STATE REASON/S

WAS YOUR APPLICATION GRANTED? YES / NO

IF YES, PLEASE GIVE REASONS FOR YOUR DEPARTURE

G. CRIMINAL CONVICTIONS

DO YOU HAVE PREVIOUS CRIMINAL CONVICTIONS? (YES/NO)

IF YES, PLEASE STATE THE DATE AND NATURE OF THE CRIME/OFFENCE COMMITTED

H. MILITARY SERVICE

IS MILITARY SERVICE COMPULSORY IN YOUR HOME COUNTRY? YES/NO

IF YES, HAVE YOU BEEN CALLED UP FOR DUTY? YES/NO

WHAT WAS THE LENGTH/DURATION OF SERVICE?
2. COUNTRY BACKGROUND

- CAPITAL CITY: ...........................................
- MAJOR CITIES: ...........................................
- CURRENCY: .............................................
- LANGUAGES SPOKEN: ....................................
- RELIGION: .............................................

- POLITICAL PARTIES AND LEADERS: ......................

- NEIGHBOURING COUNTRIES: ..............................
- DESCRIPTION OF NATIONAL FLAG: ......................
- NATIONAL ANTHEM: ....................................

3. APPLICANTS STORY (CHRONOLOGICALLY)

a. WHEN DID YOU LEAVE YOUR COUNTRY OF ORIGIN? ..............

b. MODE OF TRAVEL (AIR/LAND/SEA)? .............................

- WHEN DID YOU ENTER THE RSA? ............................

- WHERE DID YOU ENTER THE RSA? .........................
4. REASONS FOR APPLYING FOR ASYLUM

(FOR THIS SECTION, APPLICANTS SHOULD PROVIDE PROOF/EVIDENCE, WHERE POSSIBLE)

a. ARE YOU RECOGNISED AS A REFUGEE BY THE UNHCR? YES / NO
   □ IF YES, DATE: ___________ UNHCR FIELD OFFICE: ___________

b. ARE YOU REGISTERED WITH ANY OTHER INTERNATIONAL OR NATIONAL AGENCY? YES / NO
   □ IF YES, GIVE DETAILS
   ..........................................................................................................................................................................................................................................................................................................................

C. ARE YOU REGISTERED WITH AN EMBASSY, A CONSULATE OR ANY OTHER AUTHORITY OF YOUR HOME COUNTRY? YES / NO
   □ IF YES, GIVE DETAILS
   ..........................................................................................................................................................................................................................................................................................................................

d. WERE YOU ACTIVE IN ANY ORGANISATION? YES / NO
   □ IF YES, PLEASE GIVE DETAILS:
   NAME: .................................................................................................................................
   LEADER .............................................................................................................................
   ACTIVITIES ...........................................................................................................................
   ...........................................................................................................................................
   ...........................................................................................................................................
   ...........................................................................................................................................

f. IF YOU WERE ARRESTED PREVIOUSLY, PLEASE ANSWER THE FOLLOWING QUESTIONS:

cd WHY WERE YOU ARRESTED?
   ...........................................................................................................................................
   ...........................................................................................................................................
   ...........................................................................................................................................
   ...........................................................................................................................................
   ...........................................................................................................................................
WHEN WERE YOU ARRESTED?

WERE YOU ARRESTED INDIVIDUALLY OR AS PART OF A GROUP?

WHO ARRESTED YOU? (ARMY, POLICE, OTHER).

WHERE WERE YOU ARRESTED? (NEAREST IDENTIFIABLE TOWN).

WHEN WERE YOU RELEASED?

DID YOU RECEIVE ASSISTANCE FROM LAWYERS OR ORGANISATIONS DURING OR AFTER YOUR ARREST? GIVE DETAILS

WHY ARE YOU APPLYING FOR ASYLUM? (ADDITIONAL PAPER MAY BE USED)
WHICH MEASURES DID YOU TAKE TO SOLVE YOUR PROBLEM?

☐ DO YOU WISH TO RETURN TO YOUR HOME COUNTRY? YES/NO

☐ IF NOT, PLEASE GIVE REASONS:

5. THE APPLICANT HAS BEEN INFORMED (mark with an X):

☐ THAT ALL INFORMATION PROVIDED IS CONFIDENTIAL

☐ THAT ALL FACTS STATED DURING THE INTERVIEW WILL BE USED TO REACH A DECISION

☐ THAT IDENTITY MUST BE CONFIRMED IN OTHER WAYS IF IDENTIFICATION DOCUMENTS ARE NOT AVAILABLE

☐ THAT FALSE OR INCORRECT INFORMATION MAY LEAD TO PROSECUTION OR DISCREDIT THE CLAIMANT

6. DECLARATION BY THE APPLICANT

I, .............................................................., HAVE SUBMITTED TO THE FACT THAT THE ABOVE INFORMATION IS TO THE BEST OF MY KNOWLEDGE TRUE AND CORRECT

SIGNATURE ......................................... DATE: ..................
7. **INTERPRETER:**

- NAME OF INTERPRETER: ....................................................
- QUALIFICATION/S: ............................................................
- ADDRESS: ...........................................................................
- CONTACT NUMBER: ............................................................
- INSTITUTE: ..........................................................................
- DATE: ............................................................................... 

8. **DECLARATION BY THE APPLICANT IN REGARD TO THE CONTENTS OF THE ENTIRE ELIGIBILITY DETERMINATION FORM**

I, ........................................................................................., NATIONAL,
OF.......................................................................................
SOLEMNLY DECLARE THAT THE CONTENTS OF THIS FORM ARE
TRUE AND CORRECT

SIGNATURE: .................. DATE: .........................
9. FOR OFFICE USE ONLY

A. PRELIMINARY COMMENTS BY REFUGEE RECEPTION OFFICER:


SIGNATURE ...................... DATE: .................................

B. DECISION BY REFUGEE STATUS DETERMINATION

OFFICER: .................................


SIGNATURE: ...................... DATE: .................................