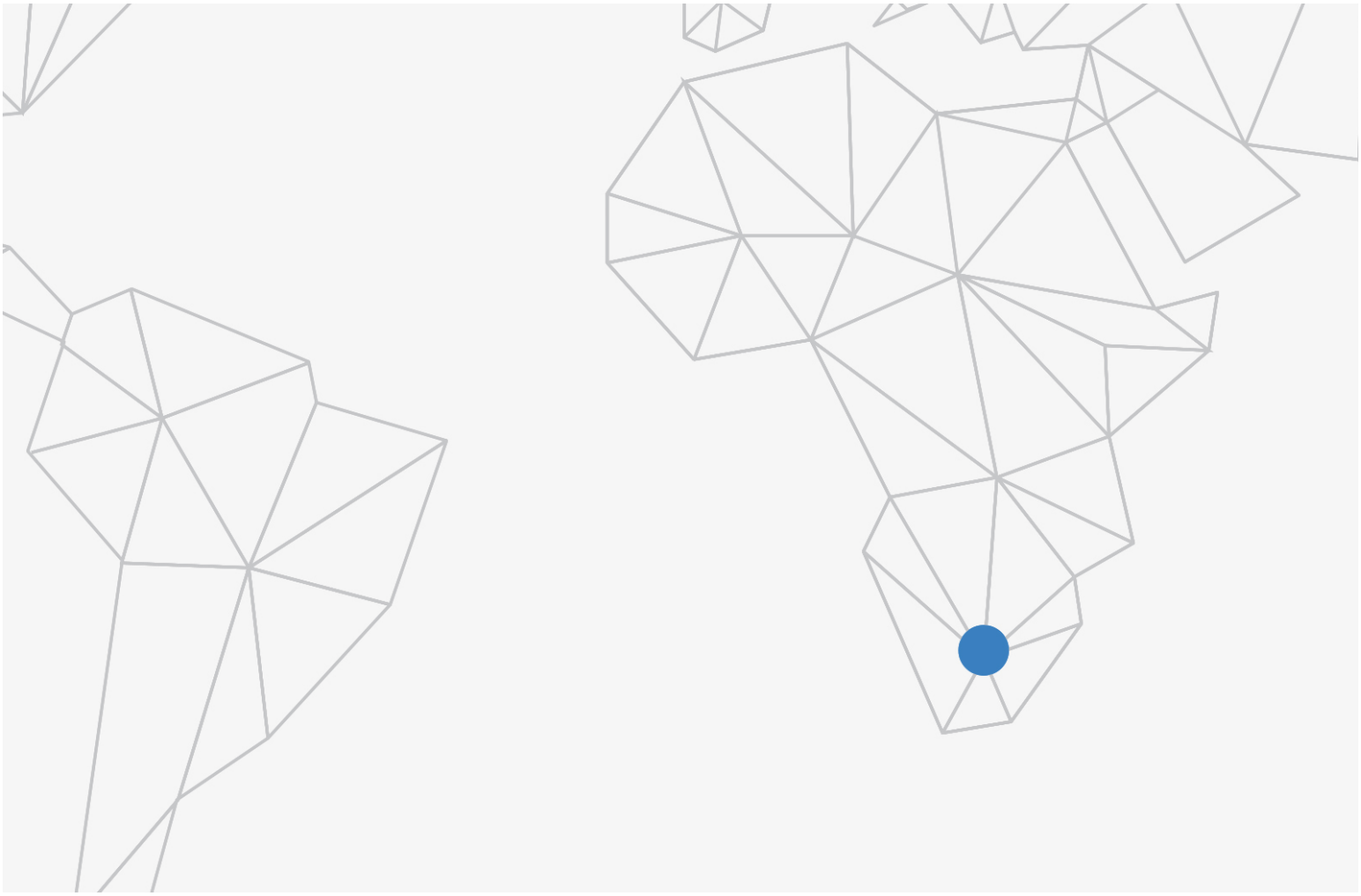

ASILE
Global Asylum Governance and the European Union's Role

Country Fiche
SOUTH AFRICA

Authors
Prof. Fatima Khan &
Ms Nandi Rayner

*University of Cape Town**

October 2020

** This Country Fiche has been conducted under the coordination of Prof. Andrew Geddes and Dr. Leiza Brumat (MPC, EUI) and Prof. Sergio Carrera (CEPS).*

This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement nº 870787. This document reflects only the author's view and the Commission is not responsible for any use that may be made of the information it contains.

CONTENTS

Executive summary

South Africa hosts the third-largest asylum and refugee population in southern Africa after the Democratic Republic of the Congo (DRC) and the United Republic of Tanzania (UNHCR Global Trends 2019). The Department of Home Affairs (National Assembly 2019; Department of Home Affairs 2017) records 186 210 documented asylum seekers and 88 694 documented refugees. However, the exact amount of asylum seekers within South Africa is unknown as scholars note that a large number of persons in need of protection are undocumented due to major gaps and barriers to the asylum system (Fatima and Lee 2018). The majority of documented asylum seekers are from Bangladesh, DRC, Ethiopia, Pakistan and Zimbabwe whereas documented refugees are from Burundi, DRC, Ethiopia, Somalia and Zimbabwe (Department of Home Affairs 2017).

South Africa is a party to the 1951 UN Refugee Convention Relating to the Status of Refugees ("1951 Refugee Convention") and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa ("1969 OAU Refugee Convention"). Both were ratified, with no reservations. These Conventions have been domesticated in terms of the Refugees Act 130 of 1998. This Act is divided into three parts: it defines a refugee, governs the processes for asylum application and provides for the rights and obligations of a refugee. The Refugees Act subscribes to an entirely urban-based policy, where refugees live amongst the communities in South Africa, as opposed to refugee settlements or camps. Refugees and asylum seekers have no restrictions on their freedom of movement. Refugees also have the right to work, while asylum seekers have recently seen limitations to this right. Refugees and asylum seekers have the right to education and the right to health care. The Department of Home Affairs ("DHA") are the main implementers of the asylum system in terms of the Refugees Act; however other ministries and arms of government such as the judiciary and parliament also have a role to play in limiting or providing access to rights such as health, justice, physical security, and education.

The recent amendments to the Refugees Act are restrictive and appear to be in line with the sentiment of the regional body (the Southern African Development Community or SADC): to secure borders and contain refugees. For example, some of the amendments include punishment for illegal entry, unreasonable reporting times to Refugee Reception Offices (five days) and broader powers given to DHA officials for cessation and exclusion. Furthermore, practices such as pre-screening, first and safe country concepts and policy decisions to close the

Refugee Reception Offices across the country make it clear that South Africa is moving from an open policy of free movement to that of containment. This shift has further perpetuated issues in accessing asylum and the creation of "hidden" refugees in the country. Because of the urban nature of refugees in South Africa, several legal instruments are vital to the sojourn of refugees in South Africa. The Immigration Act 13 of 2002, although not the main governing instrument, has ancillary and at times contradictory provisions that govern the admission and place of entry of asylum seekers, naturalisation, offences and deportations. The Promotion of Administrative Justice Act 3 of 2002 (PAJA) applies to all persons living in South Africa and any decision made by the DHA is subject to review in terms of PAJA. PAJA is therefore relevant to asylum seekers in South Africa who have been finally rejected and exhausted all internal appeals in terms of the Refugees Act. PAJA can be used to review the decision of the DHA on grounds of reasonableness, fair procedure and lawfulness. Most importantly, all law is required to be consistent with the Bill of Rights, which includes socio-economic rights, contained in chapter 2 of the Constitution of the Republic of South Africa. The South African judiciary has confirmed on several occasions that constitutional rights apply to refugees. Perhaps most laudably, in *Minister of Home Affairs v Watchenuka* the Supreme Court stressed the universal right to dignity as a fundamental element of South Africa's Constitution and International law, thus stating that human dignity has no nationality. Courts have addressed various aspects of mobility and containment and have recognised the restrictive efforts by the various government departments to contain refugees and have successfully relied on constitutional and international law to ensure that refugee rights are upheld.

In South Africa, the United Nations High Commissioner for Refugees (UNHCR) has no role in the implementation of the Refugees Act and rather plays an advisory and mediatory role. UNHCR however funds various projects around the country which provide direct assistance to refugees. Another stakeholder is an active civil society. NGOs range from those offering legal assistance to social services and trauma support. They play an important role in attending to unlawful or unconstitutional issues facing refugees and act to ensure that refugees and asylum seekers are not excluded from services to which they are entitled. South Africa's history of apartheid has led to a culture that relies heavily on the judiciary to ensure that legal rights are realised. However, the progressive legal system does not always reflect the lived realities of refugees.

Lastly, South Africa has signed and is a party to the Global Compact on Refugees (GCR), and in 2019 at the Global Refugee Forum (GRF) it made a pledge to promote the civil registration and documentation of undocumented refugees in the territory of South Africa.

1. Introduction

1.1. Situating South Africa within the region

1.1.1. South Africa's regional role

There has been a dramatic change in forced displacement in southern Africa in the period between 2011 to 2020 when compared to the previous 50 years in which it 'experienced successive waves of forced migration primarily as a result of armed conflict and civil war' (Crush and Chikanda, 2014). As a result, there has been a significant drop in the number of forced migrants *generated* in this region when compared to the previous ten years. The only country that has produced substantial displacement of persons (both internally and externally) due to conflict, is the Democratic Republic of the Congo (DRC) (UNHCR Global Trends, 2019).

Within southern Africa, South Africa is one of three countries that ratified without reservations the 1951 Refugee Convention Relating to the Status of Refugees (1951 Refugee Convention). Reservations made by other states in the region primarily related to socio-economic rights such as the right to education, right to work, and freedom of movement.

A significant regional convention for refugees is the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969 OAU Refugee Convention). According to Tamara Wood, a scholar in refugee law, "the 1969 OAU Refugee Convention gained much more acceptance than the 1951 Refugee Convention due to its focus on aspirational as opposed to the mandatory obligations imposed by the 1951 Refugee Convention" (Wood, 2019). Notably it does not speak to socio-economic rights other than the right to non-discrimination.

The OAU Refugee Convention places a strong emphasis on responsibility-sharing within the region and considers a regional response to refugees. In 1997, the South African Immigration policy paper spoke to this regional response by stating that it would be to South Africa's benefit to join forces with southern Africa to have a regional response to refugees. Nothing to that effect has materialised.

The African Union has also proposed the Free Movement Protocol. South Africa has signed the protocol but subject to very restrictive reservations, which, as discussed below is in line with South Africa's current immigration policy. Furthermore, no states in southern Africa have acceded to the protocol.

The Southern African Development Community (SADC), a regional governance block, consisting of 16 member states[1], including South Africa, in 1995, drafted the Protocol on Free Movement of Persons to allow for the free movement of persons to work within the region under the protection of SADC. The proposal was strongly opposed by South Africa, Namibia, and Botswana. The Protocol was redrafted, watered down, and renamed the Facilitation of the Movement of Persons which sees states individually responsible for migration. Although adopted, it has yet to enter into force as only four states have ratified the protocol, South Africa not being one of them (Maunganidze and Formica, 2018).

SADC also demands through Article 28 of the Protocol on the Facilitation of Movement of Persons that Member States adhere to relevant international agreements to which they are party to, including the 1951 Refugee Convention. To this effect, a Memorandum of Understanding was signed by member states and UNHCR in 2019 which governs the management of refugees in the region. A similar MOU signed in 1996 commits Member States to addressing the social, economic, and political issues in the southern African region that have a bearing on the root causes of forced displacement, provision of humanitarian assistance, and the search for durable solutions.

Speaking to broader issues concerning forced displacement, SADC has also drafted a Regional Disaster Preparedness and Response Strategy, to enhance the region's efforts in coordinating responses and interventions to disasters. In this regard, the SADC Migration Dialogue for Southern Africa (MIDSA) was established in 2000 to facilitate dialogue and cooperation among the SADC Member States and contributing to improved regional migration management.

Importantly, in early 2020, SADC made a commitment to UNHCR for the implementation of the GCR and further discussed how to operationalize the GCR over the long term. SADC agreed to co-organize a much-needed regional conference on the implementation of the Global Refugee Forum (GRF) pledges.

[1] Member States: Angola, Botswana, Comoros, Democratic Republic of the Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Tanzania, Seychelles, South Africa, Zambia, Zimbabwe.

1.1.2. Containment and Mobility trends in southern Africa

In the past decade the southern African region has seen certain trends regarding containment and mobility. States have been reluctant to allow for a free flow of migration for economic reasons. Legal avenues for migrants from one country to work in another have become extremely restricted, leading to considerable undocumented migration and irregular employment. The response of most states has been to try and control the influx with border fortification (World Bank, 2018).

The major shift from a refugee-producing to a refugee-hosting southern Africa led to states adopting a restrictive approach to admitting refugees on its territory. This restrictive approach is informed by the narrative that the current migrants entering the region are not refugees, and therefore not persons in need of protection (Crush and Chikanda, 2014)

Other trends include the mandatory repatriation policy pushed by states in southern Africa. States in the region are also choosing to push for a mandatory repatriation policy when, in their opinion, the conflict is over. The signing of agreements has led to several instances of mandatory repatriation from several countries in the region in the past ten years. This has resulted in the mass withdrawal of refugees' statuses by states with the assistance of UNHCR – as is the case for Angolans from South Africa, Namibians from Botswana, Rwandans from the DRC, and most recently the Congolese from Angola. This approach has created great difficulty in the region with several persons without any legal status remaining in the host state.

At the heart of the current approach by states to forced migration, is a clash between the recently adopted rights-based approach and their need to control migration from a sovereignty perspective which prejudices the rights of refugees.

The key strategy of UNHCR in the region is in line with the ethos of the GCR: to facilitate international responsibility-sharing and the self-reliance of refugees to ease pressures on host states. The issues around protracted refugee situations have meant that UNHCR is particularly focused on self-reliance strategies for refugees. To achieve this UNHCR has focused on engagement with individual states to lift restrictions and reservations on freedom of movement and the right to work to create an environment conducive to self-reliance programs. UNHCR has also facilitated and guided states for the adoption and implementation of the GCR in the region – however with a strong focus on the self-reliance of refugees as opposed to resettlement. It is thus contended that greater emphasis should

be placed on international responsibility-sharing by providing third-country solutions in the form of resettlement instead of a focus on self-reliance of refugees in poorer host countries (Hathaway 2019). Host countries and UNHCR should pay attention to resettlement as a durable solution and be assertive of its inclusion in the implementation of the GCR.

1.2. Historical Overview of South Africa's Asylum System

1.2.1 Colonial and Apartheid Refugee Law and Policy

South African refugee law and policy have evolved from a preoccupation with race as its organising framework under colonialism and the apartheid regime to one that places human rights at its center under the new Constitution. The first refugees to arrive in southern Africa in 1687 were the Huguenots (French Protestants) who fled religious persecution in France. They came to southern Africa from Holland as part of a colonial programme when South Africa was under Dutch colonial rule (Coertzen 2011). After the formation of South Africa as a nation state in the twentieth century, the country provided sanctuary to many refugees from other regions and countries such as eastern Europe, Rhodesia (present-day Zimbabwe) and Mozambique. These refugees were of European descent and race was the basis of their acceptance into South Africa (Peberdy 2009). Jonathan Crush (1998) points out that, 'as soon as it was established that the refugee was readily assimilable with the European inhabitants of the Union (South Africa), meaning that they were white, their presence was embraced'. There were no prolonged periods of living as refugees in South Africa for such refugees. In most cases, the grant of a durable stay was immediate, and their status was equivalent to that of a citizen.

By contrast, South Africa, 'refused to acknowledge the presence of black refugees from these same countries who were refouled, repatriated, or ignored and forced to live as undesirables on the margins of society'. Black Africans were only allowed into South Africa as migrant labourers who could be sent back when no longer needed. It was only in 1991 that the apartheid government enacted the Aliens Control Act, which empowered the Minister to issue temporary permits to 'prohibited' persons. Even though the UN Refugee Convention and the OAU Refugee Convention were already in operation, it had no impact on South Africa's refugee law during apartheid. It was only during the last days of apartheid that a memorandum of understanding was signed with the UNHCR that black refugees from Mozambique would be recognised as such, but only of repatriation.

1.2.2 Post- Apartheid Refugee Law and Policy

By 1994, with the fall of the apartheid government, South Africa decided to move away from the policy of exclusion to one of inclusion based on its constitutional values. South Africa ratified the OAU Refugee Convention in 1995 and acceded to the UN Refugee Convention and its Protocol in 1996. The constitutional developments and ratifications significantly altered the basis of South African refugee law and policy. In 1997, the Green Paper on migration was produced, which conceptualized the draft refugee policy.

The Green Paper led to the development of two White Papers, one for Refugee Law and one for Immigration Law. There was a consensus that immigration and refugee issues should be dealt with separately.

The Immigration White Paper, which resulted in the Immigration Act 13 of 2002, accepted the spirit of the Green Paper and, thus, whilst recognising the potential contribution of migrants, it nevertheless employed an affirmative action policy in immigration in the sense of compelling employers to search for suitably qualified South Africans first and to invest in their training and development. While this policy is not directed at refugees they would inevitably be affected by it. Similarly, the control-oriented aspect of the Immigration Act has an impact on refugees. For example, international refugee law and domestic refugee law allow for the non-penalisation of the illegal entry of refugees, but the Immigration Act criminalises illegal entry. Perhaps most important for refugees is that a permanent residence application straddles both the Refugees Act and the Immigration Act.

1.2.3 A brief overview of the Refugees Act

South Africa enacted the Refugees Act in 1998. Whilst the implementation of the Refugees Act leaves much to be desired, substantively it is compatible with international refugee and human rights law.

Among other things, the Refugees Act sets out structures and mechanisms to administer status determination procedures. These structures include Refugee Reception Offices staffed by reception officers and status determinations officers, as well as two oversight bodies: the Refugee Appeal Authority (RAA) and the Standing Committee of Refugee Affairs (SCRA), to review and to hear appeals against decisions taken by the status determination officers.

The Act defines the refugee in terms similar to the UN Refugee Convention as well as the extended definition of the OAU Refugee Convention. Additionally, it

provides for derivative refugee status in line with the broad definition of a family in terms of South African Law.

1.3. Main Debates in Academic literature

The debates in the academic literature are interlinked and at a fundamental level draw attention to the policy shifts by the South African government towards restrictive immigration policy and the resultant practices by the Department of Home Affairs (DHA) officials to fulfil these new policies in both official and unofficial practices. The government's shift in attitude, from that a human rights-centred approach to that of containment and restriction, is largely due to the pervasive xenophobia in the country. Foreigners have become scapegoats for government failures to deliver services and redress inequality in the country. This sentiment contributes towards the pervasive xenophobia in the country(Human Rights Watch, 2020). Political leaders perpetuate these notions through statements that confirm the anti-foreigner sentiment, imply that foreigners are stealing the jobs and resources of South Africans, and continue to paint foreigners as criminals entering the country.[2]

As a starting point on restrictive immigration practices, Carciotto and Johnson (2017) have drawn attention to the high levels of mobility and migration flows in South Africa combined with the exclusionary immigration law which favours highly skilled migrants making it next to impossible for most migrants to seek work legally in South Africa (Peberdy 2009). Many low-skilled migrants have turned to the asylum system to temporarily regularise their stay. This narrative of bogus asylum claims collapsing the asylum system has been well-documented in South Africa and resulted in the government viewing individuals in the asylum system as illegitimate claimants without protection needs.

The government justified this narrative with adjudication rejection rates by the status determination officers (Carciotto and Johnson 2017). They argue that the system is collapsing due to bogus claims as seen by the rate of rejections. The

[2] Statements collected by political leaders "How can a city in South Africa be 80% foreign national? That is dangerous. South Africans have surrendered their own city to the foreigners." – Deputy Minister of Police Bongani Mkongi ; "[when immigrants] get admitted in large numbers, they cause overcrowding, infection control starts failing" – Former Minister of Health Aaron Motsoaledi, currently the Minister of Home Affairs; "We condemn all criminal elements hellbent on undermining the rule of the law in this country and making this country ungovernable. We can't co-govern with criminals, especially foreign nationals who want to turn our country into a lawless Banana Republic." MEC for Community Safety Faith Mazibuko ; "Some foreign nationals who sell counterfeit goods and occupy buildings illegally in the Joburg CBD attacked our police with bottles and petrol bombs. This despicable crime against our state will never be tolerated. [Operation] Okae Molao will respond in full force to defend [the] rule of law," Premier of Gauteng David Makhura

narrative does not acknowledge a long-standing problem of high rejection rates due to general failures by Refugee Status Determination Officers (RSDO) to apply their minds or use sound legal reasoning. As discussed below in point 4.2, RSDO's lack of training in refugee law – which is highly evident from the RSDO's decisions – that do not come close to meeting an administratively fair standard (Amit 2011).

The mindset by the government was further legitimised by UNHCR and IOM, who supported this idea of 'mixed migration', where streams combine genuine refugees and voluntary economic migrants seeking to legitimise their irregular status by submitting asylum applications. Crush and Chikanda (2014) note that "the South African government has shown great interest in the notion of 'mixed migration' for it perfectly buttresses its argument that the country's refugee system is being abused by non-refugees".

The Department of Home Affairs was reclassified as not merely an administrate government department but rather an important partner in the national security of the country (Carciotto, and Johnson 2017). Policymakers have thus continued to state an intent to better manage migration while still meeting international obligations; however, policies and practices are designed to restrict access of refugees to the territory and status determinations to alleviate the caseload with the asylum system. This is represented in the latest immigration policy (discussed below), administrative practices at the Refugee Reception Offices (RRO) and restrictive amendments made to the Refugees Act.

Academics have continued to draw attention to these practices, such as pre-screening activities at the RROs, quota systems, first and third safe country concepts being applied in an ad hoc manner, unpublished lists of "safe countries", asylum transit visas and the RRO closures (Carciotto and Johnson 2017). Most of these practices have been successfully challenged in court, although these victories have not stopped the South African Government from perpetrating the same human rights violations (Landau and Amit 2014).

*Ruta v Minister of Home Affairs (*2018*)*, which is discussed in detail below, is a seminal case in refugee law as the Constitutional Court[3] reaffirmed the

[3] The Constitutional Court is the apex court in all matters relating to the Constitution. The Supreme Court of Appeal (SCA) is the apex court on all matters not related to the Constitution; however their jurisdiction is not limited as such, and they are able to hear all matters, which, if the matter has constitutional implications may be appealed to the Constitutional Court. The SCA only deals with cases sent to it from the High Court. The High Courts have jurisdiction to hear cases over its defined provincial areas, and the decisions of the High Courts are binding on Magistrates' Courts within their areas of jurisdiction. The Magistrates' Courts are the lower courts which deal with the less serious criminal and civil cases.

importance of non-refoulement, limited the definition of an illegal foreigner and affirmed previous cases of High Courts and the Supreme Court of Appeal concerning containment practices. The case sets a strong precedent in which to challenge the amendments and restrictive practices.

One of the cases drawn on by the Constitutional Court was *Ersumo v Minister of Home Affairs (2012)*. This case was brought before the court to challenge the Department of Home Affairs' practice to arrest and detain asylum seekers whose transit visa had lapsed. Immigration officials argued that they were entitled to refuse to allow a person to apply for asylum where there had been undue delay in the asylum application. The court held that the deterrence practice of undue delay cannot be a bar to apply for asylum and affirmed that as soon as intention is shown to apply for asylum the Refugees Act applies.

Another deterrence policy resulting in containment, used by the DHA in 2006 was pre-screening forms, which was beyond the authority of officials as they were not mandated by the Refugees Act. The forms asked a series of questions to determine who would be allowed to apply for asylum. This practice was challenged in *Tatira v Ngozwana* (2006) where the Court held that the practice precludes persons from applying for asylum and thus amounted to a violation of their right to seek asylum. Another case heard in 2006 was *Kiliko v Minister of Home Affairs,* where the DHA policy to only allow 20 applications for asylum per day was challenged and declared to be unlawful and a violation of an asylum seeker's right to dignity and freedom of movement in terms of the Constitution. The DHA argued that the quotas were a measure to relieve the pressures on the system, yet it resulted in asylum seekers sleeping outside offices with the hope of being able to apply (Vigneswaran 2008). Despite the quota systems being unlawful, since this judgement, capacity constraints have not been dealt with and only a limited amount of asylum seekers can apply for asylum daily.

First and third safe country practices have also been privy to court action. The first safe country principle was first seen in 2000 where a memo was circulated across DHA to return and detain asylum seekers who had passed through a safe country where they could have applied for asylum. In the unreported case of *Lawyers for Human Rights v Minister of Home Affairs (2001)*, the parties reached an order by settlement, and the memo was withdrawn. However, Polzer (2013)

in her joint report found that this practice is still used as a means to deny entry at the borders and in an ad hoc manner to reject asylum applications by RSDOs.

The third safe country principle, has also seen ad hoc application by the DHA and has resulted in non-entry or negative status determinations of asylum seekers. The application of the principle by the DHA was challenged *in Abdi v Minister of Home Affairs (*2011). In this case, the DHA wanted to deport an asylum seeker back to Namibia (a safe third country), where he had last resided. The Court held that the principle of non-refoulement entitled him to enter South Africa and deportation to a third safe country would result in cruel and inhumane treatment and thus in violation of the South African Constitution. Despite the Supreme Court of Appeals' clear ruling on this, as will be discussed below, this principle was included in the latest immigration policy paper.

The DHA has also applied an unpublished white list of "safe countries" of origin to status determinations to exclude certain nationalities, accelerate the asylum processes or deny entry at the border (Handmaker et al. 2001). Van Selm (2001) notes that this practice places a geographical limitation and discriminates based on the country of origin. Schreier (2008) notes that the Cape Town Office did not allow applicants from Fiji or Nepal to apply for asylum as it was deemed safe. In 2011 this practice was again seen with Zimbabweans wanting to apply for asylum but denied entry into the country and, wherever present, access to Refugee Reception Offices (Lawyers for Human Rights 2011).

Another significant policy decision was the decision to close three Refugee Reception Offices (RRO)[4] across South Africa in or around 2011, which resulted in deterrence from the asylum system. Of the six RROs across South Africa, the Johannesburg office was closed entirely, while the Port Elizabeth and Cape Town offices were closed to new applications for asylum. In almost every city where this happened, litigation was launched to challenge this decision. The Supreme Court of Appeal in *Scalabrini v the Minister of Home Affairs (2018)* held that the policy decision to close the Cape Town office was procedurally unfair and therefore unlawful and ordered the office to reopen to new applicants. Likewise, in the *Minister of Home Affairs v Somali Association of South Africa, Eastern Cape* (2015) the Supreme Court of Appeal ordered the Port Elizabeth office to reopen to new applicants. Despite judgement, the Port Elizabeth RRO only opened in 2019 and the Cape Town office remains closed to new applicants. It has been

[4] The Department of Home Affairs established 6 RRO's in Cape Town, Durban, Johannesburg, Port Elizabeth, Pretoria and Musina to give effect to the Refugees Act.

reported that the Port Elizabeth office has backlogs for applications for asylum of up to a year. While the offices that remain open reported being unable to manage the numbers caused by the closure of the other offices.

Lastly in 2012, The DHA decided to not allow asylum seekers to renew their permits at reception offices other than the office of their first application. Litigation ensued in the Cape Town High Court in *Nbaya and Others v Director-General of Home Affairs* (2015) which held that the Cape Town RRO must renew all asylum permits regardless of the office of the first application. The Cape Town RRO did not comply, and only in 2019 through further litigation did the office begin renewing all asylum permits. Asylum seekers, some for up to seven years, who had been unable to afford to travel to renew their permits, remained on expired documents.

Fatima Khan in her article "Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers" notes how these restrictive and exclusionary policies and practices have contributed towards the creation of a mass population of hidden and undocumented refugees and asylum seekers, which forces many to remain in the country undocumented and unprotected (Khan and Lee, 2018).

These practices mentioned above, and the overwhelmed asylum system have resulted in a secondary topic of great debate: the protracted nature of the refugee situation in South Africa. Although this is not specific to South Africa (Crisp 2002; Gallagher 2009), the urban setting of refugee protection has relegated refugees to "second-class citizens". Undocumented asylum seekers are unable to access applications for asylum; documented asylum seekers – due to backlogs – remain on their permits for up to five years; and refugees are now required to remain on their refugee document for 10 years before they can apply for permanent residence. Barriers to accessing documentation, schooling, employment and housing highlight the dangers of refugees in protracted situations in urban settings as refugees and asylum seekers struggle to locally integrate. There is little political will to end refugeehood, leading to protracted situations where refugees and asylum seekers struggle to find socio-economic inclusion (Khan 2019).

A sentiment held throughout South Africa, by academics and civil society alike is that South Africa is moving from its rights-based refugee policies towards containment and repulsion and limiting access to rights which has had a profound negative effect on the protection of refugees in South Africa (Crush et

al. 2017). This is all in an attempt to make South Africa an undesirable destination for protection.

1.4 Latest policy developments, current main issues in the refugee and asylum governance debate

1.4.1 Policy and amendments

In 2017, South Africa signed the White Paper on International Migration for South Africa. The main differences or changes in the policy were regarding migrants from Africa, the SADC regions, permanent residence and citizenship, the South Africa asylum system, and other international migrants. The policy document in some respects is progressive, in that it acknowledges how migration is important in reaching development goals. However, it remains focused on the security risk of migration, criminalising migration and pushing for the securitisation of migration. The most drastic re-positioning of the asylum system has been the call to introduce asylum-seeking processing centres on the northern borders, where asylum seekers will remain while having their claims adjudicated. This could easily result in the creation of refugee camps as it currently takes South Africa between 5 to 15 years to adjudicate claims.

A further worrying aspect is that the policy seeks to contain exclusions based on "third safe countries", despite the SCA's ruling on this and acknowledgement by the Minister of Home Affairs as to it being unconstitutional (National Assembly 2019). Currently, no formal externalisation agreements exist where South Africa has abdicated their responsibility for the protection of asylum seekers by using a third country to manage their asylum. Extraterritorial state actions that prevent asylum seekers from entering the territory or applying for asylum based on a bilateral agreement with a third country do not exist. Yet the inclusion of "third safe countries" speaks towards the possibility of these agreements emerging. Furthermore, it has come to our knowledge that bilateral talks have happened between South Africa and Kenya to discuss the responsibility of Somali refugees who pass through Kenya en route to South Africa. According to Frelick et al. (2016) agreements like this have the potential to amount to externalisation, indicating the trajectory of the South African policy. Little research however exists on the externalisation practices of South Africa and is thus noted as an area of further research.

The white paper on immigration is a threat to the rights of refugees and asylum seekers and these restrictions are starting to be reflected in the recent amendments to the Refugees Act.

Much of the work done by civil society and the judiciary in protecting the rights of refugees and asylum seekers has been undone by the most recent amendments and regulations that came into operation on the first of January 2020. Unlike the human rights ethos that was overwhelmingly the approach post-apartheid, the new amendments and regulations appear to be informed by the pervasive xenophobia of the country and the need to secure borders and contain refugees. For example, some of the amendments include punishment for illegal entry, unreasonable reporting time requirements to Refugee Reception Offices (five days), broader powers given to Home Affairs officials for cessation and exclusion (for illegal entry), the banning of refugees from participating in the political affairs of their home country, abandonment of claims within 30 days and limitations on the right to work of asylum seekers.

The asylum seeker system is overwhelmed, with adjudication of claims taking up to 10 years. While the amendments were introduced to streamline the process, the amendments have complicated and contained the access to rights. For example, asylum seekers now have to prove that they don't have access to social assistance and they are unable to support themselves while waiting on their claims to be processed to gain the right to work as opposed to the automatic right that was there previously. It is unlikely that the amendment will withstand the Supreme Court of Appeal case of *Minister of Home Affairs v Watchenuka* (2004) where it was stated that the limitation on the right to work is about more than limiting self-fulfilment, it constitutes a 'restriction upon his or her ability to live without positive humiliation and degradation and thus a violation on right to dignity.

These inconsistencies, broad discretion given to home affairs officials and restrictive regulations places into question the lawfulness of the amendments considering the South African democratic system and international law. It is clear that South Africa has moved from an open policy of free movement to that of containment. Whether it will be able to withstand the progressive approach of the Constitution will once again be tested through our courts.

1.4.2 Legal Status and documentation

The biggest issue facing refugees in South Africa is access to proper documentation. This was also the main pledge made by South Africa at the Global Refugee Forum (GRF). Arguably the amendments were a step back and rather created further barriers to access documentation.

Various factors led to the creation of this problem. The first was the decision by the DHA to close three of the six Refugee Reception Offices in South Africa. Three High Courts (Cape Town, Port Elizabeth, and Gauteng) and the Supreme Court of Appeal ruled that it was irrational to close the RROs without proper consultation and ordered that the offices be reopened. The decision to close these offices was made in 2014, and only in 2019 were the Johannesburg RRO and Port Elizabeth RRO reopened. The Cape Town RRO remains closed to new asylum applicants despite a court order directing the DHA to reopen this office. The closure of the offices resulted in many asylum seekers being unable to initiate applications for asylum if they were living outside the metropolitan city where an RRO was still open. As a result, large numbers remain undocumented (Khan and Lee, 2018). The newly reopened offices have also proven that they cannot assist all applicants as is evident from those asylum seekers with appointments slips for asylum processing dated for 2022.

There is currently no monitoring of these appointment slips or how many asylum seekers remain undocumented other than informal records by NGOs and UNHCR implementing partners providing legal assistance to these undocumented refugees.

Home Affairs have also refused to register births where a child is born to an undocumented mother. Although unlawful, fathers are struggling to register the birth of the child, even if documented, should the mother be undocumented. A mother once documented must do a late registration of birth. Once a mother can register a birth, the child is given an unabridged birth certificate, handwritten on folio paper, which if lost requires the DHA to find that folio replica to reissue.

The last issue and probably the most prominent are rejected asylum seekers. South Africa currently boasts a 96 % rejection rate (Amnesty International, 2019) even though refugee applicants are from the DRC, Burundi and Somalia. South Africa's low rate of recognition of refugees at 4% is similar to Israel, whose recognition of refugees sits at 1% (Hias Israel 2020).

One reason for the high rate of rejection, according to Amit (2011), is because of the practices at many of the RROs in South Africa who have instituted an automatic review of positive determinations (Amit 2011). Asylum seekers who are rejected as unfounded do however have recourse to the law. They are given the right to appeal the rejection to the Refugee Appeal Authority (RAA). Unfortunately, this is not very helpful because asylum seekers remain on asylum papers for 5 to 15 years waiting for a hearing before the RAA. Many of these asylum seekers end up before the RAA due to flawed decisions by the Refugee Status Determination Officers (RSDO) (Amit, 2011). Refugees who end up in this backlog face prejudice. If they were initially granted refugee status, they would have been able to apply for permanent residence within five years (most recently ten). Secondly, asylum documents are required to be renewed every six months as opposed to the four-year renewal period of a refugee status document. The asylum documents and their short renewal period limit options of employment and access to financial services.

2. Asylum and refugee statistics

It is currently estimated that South Africa hosts 4.2 million foreign nationals (UN DESA Migrant Stock, 2019) from several African countries including Lesotho, Zimbabwe, Mozambique, Swaziland and Botswana (DHA, 2016). Recognised refugees originate from Burundi, the DRC, Ethiopia, the Republic of the Congo, Somalia, and Zimbabwe while documented asylum seekers are mainly from Bangladesh, the DRC, Ethiopia, Pakistan and Zimbabwe (DHA 2017). UNHCR Global trends (2019) records 89 285 active refugees and 188 296 active asylum seekers.

The first issue to be highlighted is the distinction the DHA draws between active and inactive asylum seekers and refugees. An active asylum seeker and refugee is defined as a person who has been documented in terms of the Refugees Act and is actively renewing their permit with the DHA on expiry (DHA, 2017). Inactive asylum seekers and refugees have not renewed their permits leaving no way of determining whether they have received a final rejection (Auditor General, 2018). The DHA (2017) has recorded 946 314 inactive asylum seeker permits and 37 305 inactive recognised refugees. The auditor general in their report in 2019 stated that the DHA has no way of recording whether persons with inactive permits (refugee or asylum) have remained in South Africa.

A possible explanation for the large number of "inactive cases" could be because of the large numbers of refugees and asylum seekers who were affected by the closure of the RROs mentioned above and a further policy which restricted refugees and asylum seekers to access services only at the RRO of first application. (As mentioned, this policy has only recently been lifted at the Cape Town RRO due to litigation[5].) That policy decision however resulted in large amounts of asylum seekers being unable to renew their permits due to a lack of funding to travel to the office in which they first applied, and thus having expired permits. Consequently, within these "inactive" cases many have expired permits through no fault of their own and remain in South Africa with expired documents (Khan and Lee 2018).

Persons with expired permits are not subject to the Immigration Act (deportations or charges as an illegal foreigner). Rather an expired permit, either refugee or asylum, is an offence in terms of the Refugees Act, and without just cause for non-renewal, subject to a fine – after which an asylum seeker or refugee can renew their relevant permit. Despite this, Immigration and prosecutors continue to misapply the law and charge asylum seekers on expired permits in terms of the Immigration Act and some cases subject them to deportation.

A secondary issue that must be considered is that South Africa has no way to account for asylum seekers never documented but living in South Africa (Auditor General 2019). With the closures of RROs and long waiting periods, many asylum seekers have yet to apply for asylum and remain undocumented. Risks that arise from remaining undocumented have led to NGOs stepping in to fill this gap with legal assistance. Statistics sourced from the University of Cape Town Refugee Rights Clinic and the Nelson Mandela University Refugee Rights Centre (UNHCR implementing partners) combined assisted 9354 undocumented asylum seekers who have been unable to apply for asylum since 2017.

Undocumented asylum seekers and asylum seekers with expired permits face the risk of deportation. Once deportation is confirmed, persons are taken to the Lindela Repatriation Centre, which has throughout 2017 and 2018 deported 15 033 persons (DHA, 2018) which likely included refugees and asylum seekers. This number has substantially lowered from the 300 000 deportations in 2008.

---

[5] *Nbaya and Others v Director General of Home Affairs and Others* 6534/15; *Abdulaahi and 205 Others v The Director-General of the Department of Home Affairs and Others,* unreported, Case No. 7705/2013 (Western Cape High Court).

Asylum seekers in South Africa remain on their temporary asylum visas until they have been finally rejected by an internal review or appeal body. After an asylum seeker's biometrics have been captured and they have completed their application form, they are given an asylum seeker permit. South Africa has a less than 4% approval rate for the recognition of refugees which is applied in an ad hoc manner and has resulted in the Refugee Appeal Authority (RAA) and Standing Committee for Refugees (SCRA) having backlogs. The stats on the number of cases before SCRA are unknown, but with the slow turnaround rates and the approval of RSDO decisions without consideration, there is an indication of a backlog. RAA, a body consisting of three members has an appeal backlog of 147 794 cases outstanding estimated to take up to 68 years to work through not counting the cases still coming in (Auditor General 2019).

Statistics as to how many refugees and asylum seekers who are formally employed do not exist. However, the African Centre for Migration and Society found that within the formal labour market, approximately 4% of foreign-born residents are working. Within the informal labour market, the percentage of foreign-born migrants is almost twice as high as the percentage of South Africans working (ACMS 2014).

3. Asylum governance instruments

South Africa, as noted above, is a State party to the 1951 Refugee Convention and its 1967 Protocol, without reservation. In more ways than one South Africa has enacted a more progressive version of the Refugee Convention. For example, Section 2 of the Refugees Act embodies the principle of non-refoulement and goes further than the 1951 Convention with more generous wording which is derived from the OAU Refugee Convention. Section 2 of the Refugee Act includes a *general prohibition* of refusal of entry, expulsion, extradition, or return to other countries, prohibits return on the safe third country principle, and extended to include not only persons who will face serious harm but anyone whose life will be at risk of harm. The expanded definition of a refugee in the OAU Convention was also included in the Refugees Act and extended to those at risk due to external aggression or events seriously disturbing the peace (Khan, 2014).

Asylum governance in South Africa is primarily enacted through the Refugees Act. However other instruments interact and govern ancillary aspects of entry and sojournment in the country. The following section outlines in detail the structure of asylum governance: the various instruments applicable to entry to

South Africa, the application to asylum, socio-economic rights of asylum seekers and refugees, durable solutions and humanitarian pathways to protection while highlighting issues of non-entry and deterrence.

3.1 Entry to South Africa

When an asylum seeker enters South Africa, either through a port of entry or irregularly the instruments at play are the Refugees Act, Immigration Act, and more recently the Border Management Act (22 July 2020) which establishes the Border Enforcement Authority who have wide discretion to detain persons for illegal entry or deny entry without referring to the possibility of refugee protection. It is unlikely that all refoulement risks could be properly assessed in such a procedure by the border enforcement authority. Such accelerated border processes envisaged by the Border Management Act are likely to violate the principle of non-refoulement in terms of the Refugees Act by preventing entry of asylum seekers at the border. It is envisioned that the policy context of the country will further influence the decisions of border officials as to who can enter.

The amendments to the Refugees Act and regulations create an exclusion for an asylum seeker who is not in possession of an asylum transit visa or the visa has expired on an application for asylum. In both instances, the exclusion may only be waived on good cause[6] and is decided before a status determination. This visa is issued in terms of the Immigration Act when an asylum seeker states their intention to apply for asylum at a designated port of entry and gives them five days (previously 14) in which to report to a Refugee Reception Office (RRO). Data on how many of these visas are issues are not monitored. Delays in the application for asylum at an RRO are up to a year and the closure of the Cape Town RRO means asylum seekers will unlikely be able to apply for asylum within 5 days of entering South Africa. This impossible reporting period, under the guise of asylum management, seeks to ensure deterrence by ignoring the reality of time frames of application for asylum and precedents of the Courts. Furthermore, asylum seekers who do not enter through a port of entry are unable to obtain this visa. The exclusion amounts to penalisation for illegal entry despite the right to non -penalisation.

[6] Good cause must be shown for illegal entry where the asylum seeker is not in possession of the permit; and where it has expired good cause amounts to hospitalisation or institutionalisation.

An important case heard by the Constitutional Court, although before the amendments still holds relevance today in the interaction between the Immigration Act and Refugees Act. In *Ruta v the Minister of Home Affairs*, the applicant entered South Africa irregularly and over a year later was detained in terms of the Immigration Act as an illegal foreigner to be deported despite expressing his intention to apply for asylum. The Court held that the Refugees Act and the principle of non-refoulement apply to de facto and de jure refugees and thus all asylum seekers are protected by non-refoulement and the protection applies as long as the claim to refugee status has not been finally rejected after the proper procedure in terms of the Refugees Act.

The Immigration Act affords an immigration officer discretion over whether to arrest and detain an illegal foreigner. That discretion must, in the case of one seeking to claim asylum, be exercised in deference to the express provisions of the Refugees Act that permit an application for refugee status to be determined. Asylum seekers who do not enter through official ports of entry are not explicitly covered by either statute, though the Refugees Act covers them implicitly by the fundamental principle of non-refoulement. The "shield of *non-refoulement*" may be lifted only after a proper determination has been completed. The Court further held that the delay in stating his intention to apply for asylum at no stage can act as an absolute disqualification from initiating the asylum application process (*Ruta v the Minister of Home Affairs* 2019).

The exclusion based on the asylum transit visa goes against and attempts to circumvent the essence of *Ruta* by tying the criminal act of illegal entry and requirement to report with undue delay in terms of the Immigration Act to the Refugees Act and piercing the "shield of *non-refoulement*" which may only be lifted after a proper determination has been completed. The exclusion based on not having an asylum transit visa has the effect of prioritizing the management of migration over protection needs and is incongruent with human rights law in South Africa as it acts as a deterrence to adequate protection.

3.2 Asylum application

Once an asylum seeker has entered South Africa, an obligation is placed on them in terms of the Refugees Act to apply for asylum at a Refugee Reception Office (RRO) where they must first apply and later have a status determination interview.

The RROs are notorious for not carrying out their obligations in terms of the law. A report indicates that many asylum seekers do not understand or have

explained to them the procedure to apply for asylum (De Jager 2014). The effectiveness of the administration of the RSD system in South Africa suggests that the majority of RSD decisions are characterised by errors of law, focus on irrelevant factors over and above relevant facts, a failure to give adequate reasons, a lack of individualised decision-making and a biased incentive system that encourages the issuing of rejections (Amit 2011). The RSDO's lack of expertise or training in refugee law is evident from the numerous poor RSDO decisions. Many RSDO decisions blatantly ignore the expanded definition of a refugee and state that the applicant does not qualify for refugee status despite stating in a following line that the applicant has fled due to civil war. Some individual claims, such as those based on sexual orientation, will include the RSD reason for rejection being that the person could simply return home and choose not to be homosexual. Decisions fixate on inconsistency in irrelevant facts which results in a finding of lacking credibility, a blatant incorrect application of the law which was already adjudicated upon.[7] Most decisions do not even include some form of country of origin information. Another major problem is a language barrier in interviews. Asylum seekers have reported interpreters speaking different dialects of their language or interpreters communicating in an asylum seeker's "second language". This has a major impact on the information that is produced in an interview and an asylum seeker's ability to know whether the information relayed is accurate.

Certain amendments appear to justify these poorly made decisions. For instance, an RSDO is compelled to reject an asylum claim if any false, dishonest or misleading information is contained in an asylum application, giving justification to the high rejection rate for irrelevant information. Furthermore, the new laws state that if a preference is shown to a language in an application form that person will be considered proficient in such language (Refugees Act 1998), appearing to justify the lack of adequate translators in the RSDO interview.

With a 96% chance of rejection as a refugee, an asylum seeker will either be rejected as manifestly unfounded (with right of review) or unfounded (with right of appeal). Despite obligations on officials to properly explain the rights to asylum seekers in a language they understand, asylum seekers are almost always given a brief explanation of their rights on paper in English. The issues mentioned here are also common in review decisions by the Standing Committee

[7] See *Tantoush v Refugee Appeal Board and Other* 2008 (1) SA 232

of Refugee Affairs (SCRA), known for "rubber-stamping" decisions of the RSD and appeals before the Refugee Appeal Authority.

Non–refoulement is intrinsically linked to the administrative act of the RSD; ineffective and flawed procedures, as well as restrictive or incorrect interpretation of concepts, violate the principle of non-refoulement and further rights to a properly conducted RSD.

The Refugees Act allows for the right to family unity by allowing for the joining of dependents to the main applicant's status. The issue of cessation of dependency when a child turns 18 or where a spouse is divorced, regardless of whether they previously had refugee status or asylum papers, has become problematic. Though it has not led to refoulement yet, dependents are required in terms of law to reapply for asylum. This indirectly prejudices women and children. Where a dependent was joined at initial application, the discriminatory practices ignore the claim of the female and children and place the male as the main applicant. In cases of divorce or desertion, the women and children are forced to reapply. Children face the greatest risk, as they often enter the country at young ages or are born in South Africa and may not have a claim as they have little connection to the country of origin. Furthermore, in some instances, this can constitute an unlawful withdrawal of refugee status where a dependent's status is forcibly changed from refugee to asylum seeker on reapplication.

Once an asylum seeker has been rejected in terms of the Refugees Act after an internal review or appeals process, the last port of call is the Courts through the Promotion of Administrative Justice Act (PAJA). The courts can review any administrative decision by the government, which includes the decision not to grant asylum, on the basis that it was unlawful, procedurally unfair or unreasonable. The court can remedy this by substituting the DHA decision and grant refugee status to the applicant or order that RSDO or RAA rehear the matter. An asylum seeker is entitled by law to be documented pending the outcome of their case and has six months (or longer with an application for condonation) to review the decision of the DHA. This is an important tool; however, it is expensive and requires legal assistance. Asylum seekers are often at the mercy of NGOs having adequate funding or capacity to launch a judicial review. Many rejected asylum seekers remain undocumented in South Africa and are unable to return home.

3.3 Socioeconomic rights

The Refugees Act provides a basic framework for rights and entitlements of refugees, the Bill of Rights also generously extends those entitlements; many rights in the Bill of Rights are extended to everyone, which in South African law has been interpreted to include non-citizens and in some cases all those present in the country. By virtue of their humanness, refugees and asylum seekers can access these socioeconomic rights in the Bill of Rights.

Although a child may be undocumented, the universal right to primary education in terms of the Bill of Rights entitles every child – regardless of status – to attend a public school. In the *Centre for Child Law v the Minister of Basic Education*, the High Court stated that the Immigration Act could not be a reason to prevent the Department of Basic Education from rejecting children from or continuing with public education purely on the reason that they lack identification documents. Following this case, the Minister of Basic Education issued a directive stating that documentation is not to be a factor in the consideration of admission (Department of Basic Education, 2020).

Regarding healthcare, the Constitution guarantees "everyone" the right to basic health care and that no one can be refused emergency medical treatment. In terms of the National Health Act only documented asylum seekers and refugees can access the public system for non-emergency treatment or chronic conditions such as hypertension. Documented and undocumented asylum seekers and recognised refugees are responsible to pay for their treatment in accordance with their means – via a means test (Department of Health 2007). However recent internal directives in hospitals have seen undocumented asylum seekers being charged as private patients regardless of their means.

The Refugees Act does not specifically mention the right to social security. However, a refugee can rely on Section 27 of the Constitution which states that everyone has the right to social security, including those instances where they are unable to support themselves. Refugees are provided with social assistance in terms of the Social Assistance Act. Before March 2012 refugees were only provided with social assistance in certain limited circumstances. In *Khosa v Minister of Social Development,* the Constitutional Court found that the exclusion of permanent residents from the welfare scheme amounted to unfair discrimination and infringed on the right to equality. This case importantly recognised that the right to equality should not be denied simply because the person is a foreign national. On the reasoning of *Khosa,* the Western Cape High Court in *Scalabrini Centre v Minister of Social Development* found that the

exclusion of disabled refugees was unconstitutional and extended the right to social assistance to disabled refugees.[8] In March 2012, the Minister of Social Development amended the regulations to the Social Assistance Act 13 of 2004 which now enables Refugees to access social assistance in the same manner as citizens and permanent residents. The right was not however extended to asylum seekers due to the temporary nature of their status.

In terms of the law, recognised refugees are unequivocally given the right to work. However, asylum seekers, who were once granted this right, are limited by the new amendments. Before the amendments, in the case of the *Minister of Home Affairs v Watchenuka,* the Supreme Court stressed the universal right to dignity as a fundamental element of our Constitution and international law, thereby allowing asylum seekers the right to work. In arguing the need for financial independence, the court boldly stated that 'human dignity has no nationality' and that limiting the right to work is about more than limiting self-fulfilment; it constitutes a 'restriction upon his or her ability to live without positive humiliation and degradation.'

This case provides an important platform to challenge the new amendments which state that asylum seekers will not qualify to work if they can support themselves for four months and are not being supported by a charitable organisation. Based on *Watchenuka* alone, enforcing a ban that requires a person to rely on charitable aid would amount to humiliation and degradation which would violate the right to dignity in terms of the Bill of Rights.

The rights regarding work are linked to the initiation of the asylum application. Undocumented asylum seekers are not afforded this right. They do however benefit from other protections to fair labour practices. The courts have ruled that the definition of the employment relationship does not include the legality of the work or the illegality of the person and thus does not affect the application of the right to fair labour practices. [87]

3.4 Durable solutions

Socioeconomic inclusion is a key component towards integration in a host state and of easing the burden on the host state. However, many asylum seekers and refugees, despite remaining in South Africa for up to 15 years, struggle to integrate. While self-reliant, they remain a refugee or asylum seeker for a very

[8] *Kylie v Commission for Conciliation Mediation and Arbitration and Others* 2010 (4) SA 383 (LAC); *Discovery Health Limited v CCMA & Others* [2008] 7 BLLR 633 (LC)

long time. The Refugees Act, together with the Immigration Act, states that to become a permanent resident a refugee must have been documented as a recognised refugee for 10 years. Before the amendment, the requirement was 5 years. Furthermore, the SCRA must certify that the person will remain a refugee indefinitely, which is yet to be defined. A refugee further risks having their status withdrawn on application.

Another avenue for naturalisation is for refugee children born in South Africa to apply for citizenship at the age of majority. The DHA does not have regulations to accept these applications and has refused to accept applications. This was brought before the SCA in *Minister of Home Affairs v Ali* where the court ordered that the Department of Home Affairs must accept applications for citizenship by naturalization in terms of s 4(3) of the Act on affidavit pending the promulgation of regulations. Despite this order, the DHA has not implemented protocols to accept these applications for citizenship on affidavit.

The last durable solution in terms of the Refugees Act is cessation which follows with voluntary repatriation. The only formal voluntary repatriation agreement signed in South Africa since the introduction of refugee legislation pertained to Angolan refugees in 2003 (Handmaker et al. 2011). This was later followed by a cessation agreement in 2013. Neither the voluntary repatriation agreement nor the cessation agreement has led to significant repatriation to Angola, as evidenced by the small number of Angolans (137) who have been repatriated since 2003 (UNHCR Pretoria). The Angolan cessation permit was given to Angolan nationals who had their refugee status withdrawn after the cessation was announced by the South African government. Many Angolans, who had spent a significant portion of their lives in South Africa wished to remain in South Africa, and with pressure from civil society, were given the Angolan cessation permit which was valid for two years. Through advocacy by the Scalabrini Centre, the Department of Home Affairs agreed to grant Angolans a further permit known as the Angolan Special Permit which was valid for a further four years (due to expire in 2021). The Scalabrini Centre has continued to engage the DHA to have former Angolan refugees granted permanent residence.

3.5 Complementary pathways and humanitarian corridors

Complementary pathways are safe and regulated avenues for a refugee to be admitted into a third country that complements refugee resettlement. South Africa does not offer resettlement to South Africa, however humanitarian corridors, such as dispensations provided to countries that are economically struggling, do exist. What will however be highlighted is that this pathway falls

on the fringe of a complementary pathway in terms of the Global Compact for Refugees because it does not provide for international protection needs, making it purely labour-related.

These humanitarian pathways focus on migrants being forced to leave for economic reasons. A positive aspect of the Immigration White Paper is that it has encouraged South Africa to consider humanitarian assistance through special dispensation projects.

Currently, South Africa has two dispensation programs: the Zimbabwean Dispensation Program and the Lesotho Dispensation Program. It is currently considering extending a dispensation to Malawians.

There are no specific laws that allow a person to legally migrate to South Africa for work unless they can assert a scarce or critical skill (Immigration Act). Many low-skilled migrants from neighbouring countries enter South Africa with the sole purpose of working and thus the creation of a special dispensation to deal with economic migrants was a step in the right direction.

When South Africa created the special dispensation for Zimbabweans it provided much-needed humanitarian assistance. Where the DHA has received a total of 294 511 applications, of those 242 731 were granted permits while 51 780 was either rejected or not finalised. At the time, Zimbabwe was experiencing both political and economic instability and many Zimbabweans who came to seek asylum in South Africa felt compelled to transfer onto the Zimbabwean Dispensation Program (ZDP) as the permits issued were valid for four years as opposed to the asylum seeker permit that was valid for only three to six months at a time. The permits pose issues concerning non-refoulement as many Zimbabweans were not informed that if they were to apply for the ZDP they would have to reapply for asylum. Asylum seekers that remained on their permits remained entitled to the full protection afforded by the Refugees Act. While the secondary corridor was necessary its use was not meant to relabel refugees to ordinary migrant status.

At the time Zimbabwe was a refugee-producing country; however, the Lesotho dispensation and the consideration of extension to Malawians is purely for economic reasons, as both countries are not considered refugee-producing. The dispensations generally, as a policy instrument are not seen as a tool for complementary protection, however, in the case of ZDP, due to Zimbabwe being a refugee producing country, the dispensation acted as a complementary

pathway to protection as defined in the GCR, despite not being created to be a complementary pathway to refugee protection.

4. Governance actors

The non-encampment approach adopted by South Africa requires a whole-of-government response (not merely the DHA) for the meaningful integration of refugees.

The DHA must provide access to the asylum system, it must conduct the status determination interview and provide documentation for refugees to legally sojourn in South Africa. They must also provide opportunities for the appeal and review of claims in line with the right to administrative justice in terms of the Constitution of South Africa. Within the DHA, the actors are immigration and asylum departments, RSDO's, RRO, Centre managers of reception offices, the Standing Committee Refugee Affairs officials, Refugee Appeals Authority, and peace officers (police) (Refugees Act 1998)

In addition to providing access to the asylum system, the government has a duty to allow for access to socioeconomic rights in order for refugees to live a meaningful life in South Africa. Therefore, other government departments also have a role to play: for example, the Department of Health in providing access to medical care to asylum seekers; the Department of Education's policies to enable access to schools; the police providing physical security, and so on.

In terms of the South African Constitution (1996) and subsequent legislation thereof, the government can be held accountable through the democratic structures and legislation enacted to give effect to the Constitution of South Africa. This means that where government officials violate the rights afforded to refugees in terms of the Refugees Act or the Constitution they can be held to account through the courts or independent institutions.

Firstly, the Constitution of South Africa establishes institutions in terms of its Chapter 9. These are independent institutions that hold the government to account. They include the National Prosecuting Authority, South African Human Rights Commission, Auditor General, and Public Protector. Secondly, all legislation and regulations can be challenged to determine whether they violate the extensive and substantive Bill of Rights or the Constitution. Lastly, all decisions taken by government officials, like the RSDO or Refugee Appeal Board can be challenged in terms of administrative law (Constitution of South Africa, 1996; Promotion of Administrative Just Act, 2000).

The South African judiciary has confirmed on several occasions that constitutional rights apply to refugees (Watchenuka, 2004). Courts have addressed various aspects of mobility and containment. The courts have successfully relied on constitutional and international law to ensure that refugee rights are upheld. The courts play a vital role in the South African democracy as they continue to uphold the values of the Refugees Act and the Constitution. They also provide for the important victories that facilitate meaningful livelihoods for refugees. The cases mentioned above are a few examples of this. Although the case law is extensive in South Africa in declaring containment practices of the government actors unlawful, the judiciary have generally shown deference to the executive branch of government in how such orders are to be implemented. Thus although the courts may order that a refugee or asylum seeker be granted access to a right or that a practice is unlawful the courts are careful to respect the separation of powers and thus "best practices" or structural interdicts are rare in the case law.

Even though UNHCR is the custodian of the UN Convention and OAU, its role is more of an advisory one in South Africa and established in terms of a Memorandum of Understanding (2019;1996). For example, UNHCR is currently advising the RAA on clearing its backlog (UNHCR, 2020)[9]. They have also been allowed to provide the appeal and review bodies with country of origin information, among other things.

Most importantly, UNHCR *funds* organisations to provide a direct service to refugees. For example, UNHCR funds legal partners who can litigate and set precedents in law to ensure the protection of refugees and asylum seekers. UNHCR also assists minimally to provide social assistance to refugees. Thus far the UNHCR has signed one voluntary repatriation tripartite agreement between SA, UNHCR, and the Angolan government (Handmaker et al. 2011). It only facilitates voluntary repatriations on an individual basis through its legal implementing partners. The UNHCR has also been involved in resettlement programmes – several thousand refugees have been resettled to the US and Canada in the last 20 years (UNHCR Statistics 2020). However, since the ban on Somalia resettlement in the USA, this number has drastically been reduced.

Civil society is another important actor in South Africa. South Africa has an active civil society stemming from apartheid days. There are over 40 organisations that work with refugees and asylum seekers to assist with education, legal services,

[9] This information was provided to the writers via email and consent was given to share this information.

social assistance, trauma support, skills development, access to health and gender-based violence.

The last actor comprises community leaders and organisations. Community organisations help with the dissemination of important information regarding access to legal and social services, documentation and rights of refugees. Some organisations are a source of support and representation (Institute of Development 2018). There has been a proliferation of refugee organisations within South Africa since the 2008 xenophobic attacks (Institute of Development 2018).

5. Global Compact on Refugees

South Africa has signed and is a party to the GCR, and in 2019 at the Global Refugee Forum, the national government made one pledge regarding asylum to promote the civil registration and documentation of undocumented refugees in the territory of South Africa. Although the only pledge made by the national government, documentation of refugees, as discussed above is one of the biggest issues in South Africa. The department is embarking on issuing Refugee ID Smart cards and Travel Documents to refugees, using modern and secured technology. These modernized and secured documents will be issued at offices that are located closer to where refugees reside with effective from April 2020 (on hold due to COVID-19), and the roll-out is envisaged to be complete by 2024. Despite pledges made there has been no documented action towards actioning this pledge.

Sadly, after this pledge was made, despite being a signatory to the GCR, South Africa passed the above mentioned restrictive amendments that do not promote the self-reliance of refugees (a core objective of the GCR), perpetuate risks on refoulement and create further problems in regard to documentation.

The local government of the eThekwini Municipality, in Durban, made various pledges about burden-sharing and responsibility, jobs and livelihoods, and solutions. More specifically regarding responsibility-sharing the pledges looked at social cohesion and integration of refugees in communities, with the assistance of UNHCR, IOM, UN-habitat, Durban Chamber of Commerce, and refugee and local community leaders and organisations. The local government, with the assistance of others, plans to create a one-stop-shop for refugees that will assist with information, linguistic and cultural mediation which ultimately will assist in accessing education and welfare. In the area of jobs and livelihoods,

the government seeks to support opportunities for youth from all backgrounds with support from international investments. Lastly, regarding solutions, the pledges also look to address xenophobia in South Africa by creating platforms for dialogue between local host communities and refugee communities to eradicate violence. Furthermore, the municipality seeks to train its staff to work with diverse populations.

The pledges made by the local government are small but achievable and importantly look at the training of civil servants, who often, due to lack of knowledge of documentation and laws, create barriers for refugees in accessing services in South Africa.

Civil society and other private organisations made various pledges at the GFR. The Vodacom group made pledges regarding assisting refugees to access online resources required for their primary and tertiary education by providing free data. However, on following up on this pledge at the start of the COVID-19 pandemic when schooling was moved online, it appeared that the pledge made was actually about existing structures, and thus not expansion for refugees. Civil organisations, such as Lawyers for Human Rights, Nelson Mandela University Refugee Rights Centre, Scalabrini, Legal Resources Centre, and UCT Refugee Rights Unit in conjunction with the UNHCR pledged to participate in a dedicated online network of exchange of knowledge and good practice in the field of refugee and citizenship law in South Africa.

The local government gave themselves until 2021 to start implementation on their pledges; yet with the COVID-19 pandemic, this may be extended. It is doubtful whether the pledges can be taken seriously because of the lack of information on both the local and national pledges made and the fact that no statement was published by government as to these pledges. Furthermore, as mentioned above, the national government, after their commitment to the GCR and the following pledges, passed restrictive laws that undermine the very pledge made. Government actors have also continued to make xenophobic statements that are not in line with South Africa's progressive Bill of Rights (see above).

6. COVID-19 Response

6.1 Government response

On 26 March 2020 South Africa declared a national state of disaster due to the spread of the Coronavirus. The country went into a hard lockdown, which saw

the complete closure of the economy and borders. The closure of the borders, which remain closed at the date of writing, has meant that asylum seekers cannot currently enter South Africa unless done so irregularly as no exception in terms of the regulations was made for asylum seekers to enter South Africa (DHA notice 2020). Concern has been raised that the closure of South Africa's borders by the Department of Home Affairs has been done so in a manner that does not provide for measures to ensure that international law principles of non-refoulement will be respected.

Despite the easing of the lockdown and opening of the economy, all Refugee Reception Offices have remained closed for six months (at the date of writing). Asylum seekers and refugees whose permits expired during this time could not renew their permits. The DHA published regulations stating that by operation of law all permits of asylum seekers and refugees are extended until the 31st October 2020. (DHA notice 2020). Furthermore, no new applications for asylum can be made, placing undocumented asylum seekers at risk.

The South African government's response to the Coronavirus resulted in many people losing their source of income. In response to this, the government had to step in to relieve pressures on the most vulnerable persons. The first step was a moratorium on the granting of eviction orders for non-payment of rent for everyone present in South Africa. The Department of Labour created emergency relief funds for employers and employees, this included documented asylum seekers and refugees (Department of Labour Regulations 2020). The government also put forward the social distress grant, which at first excluded refugees and asylum seekers who did not have a 9-digit ID number in use by all South Africans. However, this exclusion was considered unconstitutional, and documented asylum seekers and refugees now have access to this social relief grant (Department of Social Assistance notice, 2020). Undocumented asylum seekers remain vulnerable during this time as they do not have access to relief measures and are likely affected by the impact the virus has had on the economy.

6.2 Border Fortification

Under the guise of protecting South Africa from the COVID-19 pandemic, the government used emergency procurement money of R37.2 million in terms of the Disaster Management Act to complete repairs and extend the border fence between South Africa and Zimbabwe - 40km long and 1,8 meters high. Various parliamentary oversight bodies, including the portfolio committee for the Department of Home Affairs, took issue with the building of the fence. The Special Investigating Unit (SIU) has since found that the fence, which ended up

costing R40 million in tender was awarded irregularly and amounted to wasteful expenditure (Parliamentary Monitoring Group 2020).

The building of the fence not only reaffirms South Africa's move towards policies of deterrence and preventing entry, but the determination of illegality of the tender speaks to a common practice seen within the executive branch: to place their agenda of securitisation and deterrence above the law. Many practices mentioned above were also done outside the purview of the law and with a lack of respect for human rights and due procedure.

At this time, it is unclear what effects this fence has had on asylum seekers; however, news reports have indicated that the fence has not stopped the flow of irregular crossings from Zimbabwe (Times Live 2020).

7. Conclusion

South Africa offers refugees and asylum seekers a generous range of rights and entitlements which are compatible with international refugee and human rights law. However, the rights and entitlements on paper are a far reach from the lived realities of refugees and asylum seekers living within South Africa. During the last decade, the country has been characterised by a continued effort to contain refugees by limiting their rights to access the asylum system and socio-economic inclusion. This has been justified by narratives of the asylum system collapsing due to abuse by economic migrants. The resultant effect of actions by the state has resulted in undocumented asylum seekers and refugees in protracted refugee situations struggling to remain self-reliant.

The Refugees Act establishes the reception of asylum seekers, adjudication of claims, including internal reviews and appeals, and rights of asylum seekers and refugees. The Refugees Act further establishes the actors responsible for the implementation: reception offices, status determination officers, members of the appeal authority as well as the standing committee of refugee affairs responsible for the reviewing of decisions. The Refugees Act does not however exist in a silo and due to the urban policy, where refugees and asylum seekers live alongside communities in South Africa, other government actors are also involved in the implementation of the rights of asylum seekers and refugees.

The restrictive policies and containment measures have affected the implementation and effectiveness of the Refugees Act in affording adequate protection to people of concern. Immigration policies, border management and ad hoc application of safe country concepts applied at the border can prevent

entry and access to protection in terms of the Refugees Act. Those asylum seekers who can enter South Africa are prevented from gaining access to documentation in terms of the Refugees Act – due to closures and capacity constraints of the RRO.

Where asylum seekers manage to gain access to the system, poor status determination decisions have created backlogs, ultimately forcing asylum seekers to remain as such for extended periods and not benefit from the recognition of refugee status in terms of the Refugees Act. Rejected asylum seekers who are not caught by the overburdened safety net of the review or appeal bodies, risk refoulement. The amendments under the guise of assisting the collapsing asylum system only further complicate and contain the access of refugees and asylum seekers to their rights. This ultimately creates a barrier to the effective protection provided for in the Refugees Act.

Although the amendments and practices take steps back in protection, the Bill of Rights and the strong precedents set by the judiciary will allow for these changes to be successfully challenged. The Refugees Act has been interpreted by the Courts with due regard to the particular vulnerabilities faced by refugees. Yet, a theme throughout the asylum instrument analysis is that the application of refugee law is continuously hampered by xenophobic attitudes and South Africa's preoccupation with refugees as a security risk.

This restrictive approach has placed immense pressure on refugee community leaders and NGOs to ensure that refugees and asylum seekers not only gain access to the Refugees Act but further that refugees and asylum seekers can live meaningful lives while within the country – as envisioned by the Refugees Act and its human rights-centred approach.

BIBLIOGRAPHY

Abdulaahi and 205 Others v The Director-General of the Department of Home Affairs and Others, unreported, Case No. 7705/2013, Western Cape High Court.

Abdi v Minister of Home Affairs (2011), ZASCA 2.

Aliens Control Act 96 of 1991.

African Union, Convention Governing the Specific Aspects of Refugee Problems in Africa, (adopted 10 September 1969, entered into force 20 June 1974), 1001 UNTS 45 (OAU Refugee Convention).

African Centre for Migration and Society (2017), "Fact sheet on foreign workers in South Africa".

Amit, R. (2011), "No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection", *International Journal of Refugee Law,* 23 No 3:458-488.

Amit, R. (2010), "Protection and pragmatism: Addressing administrative failures in South Africa's Refugee Status Determination Decisions", Forced Migration Studies Programme, Wits University.

Amnesty International (2019), "South Africa: Failing asylum system is exacerbating xenophobia", 29 October.

Auditor General (2019), "Follow-up performance audit of the immigration process for illegal immigrants at the Department of Home Affairs".

Border Management Act 2 (2020), *Government Gazette of South Africa*, 21 July.

Centre for Child Law v the Minister of Basic Education (2017), Case No: 2840/2017 (ECD).

Carciotto, S. and C. Johnson (2017), "The state of the asylum system in South Africa", in Maria O'Sullivan and Dallal Stevens (eds), *States the Law and Access to Refugee Protection*, Hart Publishing.

Constitution of the Republic of South Africa 1996.

Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (UN Refugee Convention).

Crisp, J. (2002), "No end in Sight: the problem of protracted Refugee Situations in Africa", Working paper No. 68, December.

Crush J. (1998), "Immigration, Human rights and the Constitution", in J Crush (ed.) *Beyond Control: Immigration and Human rights in a Democratic South Africa,* IDASA: Cape Town.

Crush, J., S. Ramachandran and W. Pendleton (2013), "Soft targets: Xenophobia, public violence and changing attitudes to migrants in South Africa after May 2008" Migration policy Series No. 64, Southern african Migration programme (SAMP).

Crush, J. and A. Chikanda (2014), "Forced Migration in Southern Africa", in Elena Fiddian-Qasmiyeh, Gil Loescher, Katy Long, and Nando Sigona, "*The Oxford Handbook of Refugee and Forced Migration Studies*", Oxford University Press, pp. 554-569.

Coertzen, P. (2011), "The Huguenots of South Africa in History and Religious identity", *Stellenbosch Theological Journal,* Vol 122, pp. 45–57.

Department of Basic Education Circular no.1 2020.

Department of Health Revenue Directive 19 September 2007.

Department of Home Affairs (2018), "Annual Report 2017-2018 Financial Year".

Department of Home Affairs (2017), "White paper on international migration for South Africa", Pretoria, July.

Department of Home Affairs (2016), "Green paper on international migration", Pretoria, 21 June.

Department of Home Affairs (2017), "2017 Asylum Trends Report", Asylum seeker management.

Denis, P. (2003), "The Cape Huguenots and their legacy in apartheid South Africa", in Bertrand van Ruymbeke and Randy J. Sparks (eds), *Memory and Identity: The Huguenots in France and the Atlantic Diaspora,* University of South Carolina Press: Columbia, pp. 286-291.

Discovery Health Limited v CCMA & Others [2008] 7 BLLR 633 (LC).

Disaster Management Act 57 of 2002: Regulations and Notices made in terms of the Act:

Department of Co-operative Governance and Traditional Affairs Regulations (29 April 2020) GG 43258.

Department of Home Affairs Notice (26 March 2020) GG 43162

Department of Home Affairs Notice (29 April 2020) GG 43258

Department of Home Affairs Notice (9 March 2020) GG 43301

Draft Green Paper on International Migration published in South African Government Gazette - GN 849 in GG 18033 of 30 May 1997.

Draft Refugees White Paper incorporating the Draft Refugees Bill (1998) Government Gazette Vol 396 18 June 1998 No.18988.

Ersumo v Minister of Home Affairs 2012 (4) SA 581 (SCA).

Frelick, B., J. Kysel and J. Podkul (2016), "The impact of externalisation of migration controls on the rights of asylum seekers and other migrants", *Journal on Migration and Human Security,* Vol. 4 (4) pp. 190 -220.

Hathaway, James C. (2019), "The Global Cop-Out on Refugees", *International Journal of Refugee Law* 30(4):591–604.

Hayem, J. (2013), "From May 2008 to 2011: Xenophobic Violence and National Subjectivity in South Africa", *Journal of Southern African Studies,* Vol 39 (1).

Handmaker, J. and D. Ndessomin (2011), "Solucão Durável? Implementing a Durable Solution for Angolan Refugees in South Africa", in J. Handmaker, L. A. De la Hunt and J. Klaaren (eds), *Advancing Refugee Protection in South Africa,* Berghahn Book.

Handmaker J., L. A. De la Hunt and J. Klaaren (2001), "Perspectives on Refugee Protection in South Africa", Lawyers for Human Rights Report.

Hassim, S., T. Kupe and E. Worby (2008), *Go Home or Die Here: Violence, Xenophobia and the Reinvention of Difference in South Africa*, Wits University Press.

HIAS Israel (2020), "Refugees in Israel" (https://www.hias.org/where/israel) [Accessed on 27 October 2020].

Human Rights Watch (2018), "Israel: Don't Lock up our asylum seekers", Human rights watch report.

Human Rights Watch (2020), "South Africa: Widespread xenophobia violence" (https://www.hrw.org/news/2020/09/17/south-africa-widespread-xenophobic-violence) [Accessed on 27 October 2020].

Immigration Act 13 of 2002.

Institute of Development (2018), "Understanding the functions, roles, responsibilities, accountability and decision-making processes within refugee leadership structures" (https://static.pmg.org.za/Download-File-4.pdf) [Accessed on 20 July 2020].

Khan, F. (2019), "In chronic exile: rethinking the legal regime for refugees in protracted refugee situations", *Stellenbosch Law Review*, 30(2), 186–211.

Khan, F. and M. Lee (2018), "Policy shifts in the asylum process in South Africa resulting in hidden refugees and asylum seekers", *African Human Mobility Review* 4, No.2, 1205-1225.

Khan, F. (2014), "The Principle of non-refoulement", in Fatima Khan and Tal Schreier *(eds), Refugee Law in South Africa,* Juta Publishers, 153-170.

Kiliko v Minister of Home Affairs 2006 (4) SA 114 (C).

Khosa v Minister of Social Development 2004 (6) SA 505 (CC).

Kylie v Commission for Conciliation Mediation and Arbitration and Others 2010 (4) SA 383 (LAC).

Jager, J. (2014), "Refugee status determination in South Africa", in Fatima Khan and Tal Schreier *(eds), Refugee Law in South Africa,* Juta Publishers.

Landau, Loren B. and R. Amit (2014), "Wither Policy? Southern African Perspectives on Understanding Law, 'Refugee' Policy and Protection", *Journal of Refugee Studies,* 27(4), 534-552.

Landau Loren B. (2012), *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in contemporary South Africa*, United Nations University Press.

Lawyers for Human Rights v Minister of Home Affairs 2001 (TDP) unreported. Case no: 10783/2001.

Maunganidze, O. and J. Formica (2018), "Freedom of Movement in Southern Africa, A SADC (pipe) dream?", Southern Africa Report 17 | November, *Institute for Security Studies*.

McKnight, J. (2008), "Through the Fear: A Study of Xenophobia in South Africa's RefugeeSystem", *Journal of Identity and Migration Studies,* Vol 2.

Migration Data Portal (2020), "South Africa", (https://migrationdataportal.org/) [Accessed on 30 March 2020].

Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another (831/2013) [2015] ZASCA 35; 2015 (3) SA 545 (SCA).

Minister of Home Affairs and Others v Watchenuka and Others (2004) 1 All SA 21 (SCA).

Minister of Home Affairs v Ali and Others 2019 (2) SA 396 (SCA).

National Assembly (2019), "Question for written reply, question no.832", Internal Question Paper 14 of 2019.

National Assembly (2019), "Question for written reply, question no 12", Internal Question Paper 1 of 2019.

National Health Act 61 of 2003.

Nbaya and Others v Director General of Home Affairs and Others 6534/15.

Ngwato, Tara Polzer (2013), "Policy shifts in the South African Asylum system: evidence and Implications", *African Centre for Migration Studies and Lawyers for Human Rights Report.*

Peberdy, S. (2008), *Selecting Immigrants: National Identity and South Africa's policies 1910 – 2008*, Wits University Press.

Promotion and Administrative Justice Act 3 of 2000.

Protocol Relating to the Status of Refugees, UN GA Res 2198 (xxl), entered into force 4 October 1967.

Parliamentary Monitoring Group (2020), "Beitbridge border fence finding; with Minister, SIU and Treasury" (https://pmg.org.za/committee-meeting/30925/) [Accessed on 9 September 2020].

Refugees Act 130 of 1998.

Ruta v Minister of Home Affairs 2019 (2) SA 329 (CC).

Tantoush V Refugee Appeal Board and Others 2008 (1) SA 232.

Smit, R. and P. Rugunanan (2014), "From precarious lives to precarious work: The dilemma facing refugees in Gauteng, South Africa", *South African Review of Sociology*, *45*(2), 4-26.

Scalabrini Centre v Minister of Social Development 2013 (3) SA 531 (WCC).

Scalabrini v the Minister of Home Affairs 2018 (4) SA 125 (SCA).

Scalabrini Centre Cape Town. 2020. "Migration Statistics: South Africa", (https://scalabrini.org.za/resources/migration-statistics-south-africa/) [Accessed on 9 September 2020].

Schreier, Tal Hanna (2008), "An Evaluation of South Africa's application of the OAU Refugee Definition", *Refuge: Canada's Journal on Refugees,* 25(2), 53–63.

Social Assistance Act 13 of 2004.

Tatira v Ngozwana (12960/16) ZAGPHC 136 (TPD) 12 December 2006.

Times Live " Beitbridge border fence was up hardly a day before crooks struck", (https://www.timeslive.co.za/politics/2020-05-05-beitbridge-border-fence-

was-up-hardly-a-day-before-crooks-struck-de-lille/) [accessed on 9 September 2020].

UNHCR (2019), "Global Trends: Forced Displacement in 2019" (https://www.unhcr.org/afr/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html) [Accessed on 1 July 2020].

United Nations General Assembly (2018), *The Global Compact on Refugees*, Final Draft, June 26 (https://bit.ly/2QBhGFj).

UNHCR Statistics (2020), "Resettlement data finder" (https://rsq.unhcr.org/en/#P6kg) [Accessed 9 September 2020].

UN IOM Migration (2018), "Southern Africa: The Regional migration context" (https://www.iom.int/southern-africa).

Van Selm, J. (2001), "Access to Procedures: 'Safe third countries', 'Safe country of origin' and 'Time limits'", Background paper, Third Track Discussions, Global Consultations on International protection.

Vigneswaran, D., (2008), "A Foot in the Door: Access to Asylum in South Africa", *Forced Migration Studies,* Working Paper 40, University of Witwatersrand, August.

White Paper on Refugee Protection (GN 1122, GG No 18988 of 19 June 1998).

Wood, T. (2019), "The 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa", in Satvinder Singh Juss (ed.), *Research Handbook on International Refugee Law,* Edward Elgar Publishing.

ASILE PARTNERS

The ASILE project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No 870787

Project Coordinator

CEPS

1 Place du Congrès, B-1000

Brussels, Belgium

info.asileproject@ceps.eu

Follow us:

www.asileproject.eu

@AsileProject