REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: B25/2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) NOT REVISED.

28 February 2023

DATE SIGNATURE

In the matter between:

R[redacted] A[redacted] F[redacted]	First Applicant
S[redacted] F[redacted]	Second Applicant
N[redacted] F[redacted]	Third Applicant
T[redacted] F[redacted]	Fourth Applicant
M[redacted] K[redacted] A[redacted]	Fifth Applicant
A[redacted] K[redacted] A[redacted]	Sixth Applicant
M[redacted] O[redacted] A[redacted]	Seventh Applicant
S[redacted] A[redacted]	Eight Applicant

A[redacted] M[redacted] A[redacted]	Ninth Applicant
M[redacted] H[redacted]	Tenth Applicant
H[redacted] A[redacted]	Eleventh Applicant
K[redacted] A[redacted]	Twelve Applicant
T[redacted] A[redacted]	Thirteen Applicant
H[redacted] A[redacted]	Fourteenth Applicant
A[redacted] F[redacted] A[redacted]	Fifteenth Applicant
Z[redacted] A[redacted]	Sixteenth Applicant
E[redacted] A[redacted]	Seventeenth Applicant
B[redacted] A[redacted]	Eighteenth Applicant
S[redacted] A[redacted]	Nineteenth Applicant
M[redacted] S[redacted] A[redacted]	Twentieth Applicant
M[redacted] S[redacted] A[redacted]	Twenty First Applicant
A[redacted] R[redacted] R[redacted]	Twenty Second Applicant

and

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR - GENERAL: HOME AFFAIRS	Second Respondent
BEITBRIDGE PORT OF ENTRY	
OFFICE MANAGER, SIPHO CHAUKE N.O	Third Respondent

JUDGMENT

FRANCIS-SUBBIAH, J:

[1] The applicants are a group of twenty-two (22) Afghanistan Nationals who are seeking asylum in the Republic of South Africa. They were refused entry into South Africa at the Beitbridge Port of Entry after the Gauteng Division of the High Court granted them entry into the country. This case concerns a government department's regulatory action to issue an Asylum Transit Visa, which grant an asylum seeker temporary refuge.

[2] The respondents were not present at the hearing of the urgent matter when the interim order was granted on 17 February 2023. They anticipated the order upon 24 hours' notice. Despite the anticipation they were not prepared for the hearing of the matter on Saturday evening, 18 February 2023. Additional time for preparation was granted and the return-date of 7 March 2023 was brought forward to 20 February 2023 to be argued for a final order.

[3] The court, as per Molopa-Sethose, J granting the interim order had ordered the respondents to abide by and comply with and give effect to the provisions of the Refugees Regulations, as adopted in terms of the Refugees Act 130 of 1998, as amended and directed the respondents to take all reasonable steps, to give effect to the Applicants' intention to apply for asylum in terms of section 21(B) of the Act, including processing the transit visa applications of the

respective applications, and issuing the transit visas in terms of the same regulations for all Applicants.

Background for the Relief Sought

[4] The applicants alleged that they were forced to flee from their country of origin as they appear on the wanted list of the Taliban, regarded by many as a terrorist organization. When the Americans withdrew from Afghanistan and the Taliban assumed power, the Taliban sought to systematically eliminate those Afghanistan Nationals who actively supported the Americans during the period of American occupation.

[5] In particular, "***Annexure FA1"*** to the founding affidavit, is a copy of the warrant issued by the Taliban written in Arabic and was translated by artificial intelligence technology. An official translation could not be timeously obtained due to the urgency of the matter. The warrant stamped with a seal of the arms of the Islamic Emirate of Afghanistan declares that the applicants worked at the American University in Kabul and helped the USA during the process of withdrawing people from Afghanistan. This includes students who studied at the American University. Such conduct of the applicants ran contrary to the laws of the Islamic Emirate and that this provides the reason why the military forces of the Islamic Emirate seek their arrest.

[6] It is alleged by the applicants that those who are arrested by the Taliban in circumstances such as theirs will face persecution and death, if they returned to Afghanistan. As a result, they travelled from Afghanistan to safe houses in Pakistan, transiting through Zimbabwe on route to South Africa to apply for asylum. At the Beitbridge Port of Entry, the applicants were met by the third respondent, Mr Chauke, an office manager for the Department of Home Affairs, who refused to process the applicants' asylum transit visas on the basis of refusing them entry into South Africa.

[7] The respondents contend that Mr Chauke had a discretion to refuse the applicants' asylum transit visas when they arrived at the Beitbridge port of entry. According to the applicants, Mr Chauke's refusal arises from the basis that South Africa, as a sovereign State, concerned about its security, need not process asylum transit visas before it investigates whether or not the applicants present a security threat to the country.

[8] The applicants' case is that Mr Chauke when provided with the information required in Regulation 7[1] must issue them with the non-renewable asylum transit visas to permit each individual entry into South Africa for the purposes of lodging an application for asylum status. He has no discretion to exercise in granting them asylum or refugee status. His role is merely to provide an asylum transit visa as

[1] Regulation of the Refugee Act No 130 of 1998. Provisions of Regulation 7 also find application in regulation 22 (2) of the Immigration Act No 13 of 2002.

required by Regulation 7 and have no further discretion to turn the applicants away without processing their asylum transit visas.

Framework of the International and South African Legislation

[9] South Africa is a signatory to the United Nations Convention of 1951 that created an agency for refugees. In its precise words:

> *"Everyone has the right to seek and to enjoy in other countries asylum from persecution."*

This convention is the principal instrument of International Law in relation to refugees. South Africa has undertaken and bound to offer asylum seekers refuge from those who persecute them while their refugee status is being considered.

[10] Under the 1951 United Nations Convention a person seeking refugee status must have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a political or social group or political opinion. Secondly, such a person must be outside the country of his or her nationality and must be unable to return or, owing to such fear, unwilling to avail himself or herself to the protection of that country.

[11] The ethos of protecting humanity is established in Refugee Law that gives rise to the principle of *non-refoulement*. The principle obliges States to refrain from

returning a refugee to a State where he or she is likely to suffer persecution or endangerment to life or freedom.[2] Under international human rights law, the principle of *non-refoulement* '*guarantees that no one should be re-turned to a country where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm*.[3] The principle is contained in Article 33 of the 1951 United Nations Convention. Counsel for the applicants,' Mr Hopkins, submits that if the applicants return to Afghanistan where they will face the Taliban or if they are returned to another State which threatens to deport them, this too will result in *refoulement*.

[12] Accordingly, *non-foulement* as a rule of international law finds application in South African law. The South African Constitution provides for the application of international law when interpreting any legislations. It reads as follows:

> *When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.*[4]

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[2] Costello & Foster "Non-refoulement as Custom and Jus Cogens: Putting the prohibition to the test" (2015) 46 *Netherlands Yearbook of International Law* 273.
[3] United Nations Human Rights , Office of the High Commissioner https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf accessed 28 February 2023.
[4] Section 233 of the Constitution of 1996.

[13] The provisions relating to international obligations are incorporated into South African domestic law. The relevant legislation in this regard is the Refugees Act[5] and the Immigration Act[6] together with its regulations[7].

[14] The purpose of the Refugees Act is stated as follows:

> *To give effect within the Republic of South Africa to the relevant international instruments, principles and standards relating to refugees; to provide the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.*[8]

[15] The preamble further affirms the obligations to receive and treat refugees in accordance with principals and standards established in international law as follows:

> *WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the I969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed*

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[5] Act No 130 of 1998.
[6] Act No 13 of 2002.
[7] Regulations in terms of the Refugees Act No 130 of 1988 published in Notice No. R1707 on 27 December 2019 in Government Gazette No. 42932 came into operation on 1 January 2020.
[8] Act 130 of 1988.

certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law.[9]

[16] In particular Section 21 of the Refugees Act provides for the procedure of the application for the asylum. It provides at section 21 (1) that:

> *An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.*[10]

[17] It is further read with Regulation 7 of the regulations promulgated in terms of the Refugees Act that provides as follows:

> *Any person who intends to apply for asylum must declare his or her intention, while at a port of entry, before entering the Republic and provide his or her biometrics and other relevant data as required, including—*
>
> *(a) fingerprints;*
>
> *(b) photograph;*
>
> *(c) names and surname;*
>
> *(d) date of birth and age;*
>
> *(e) nationality or origin; and*

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[9] Act 130 of 1988

[10] Within 5 days although Form 17 provides for 14 days

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

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

[18] Having regard to Section 23 of the Immigration Act it provides as follows:

*(1) The Director-General **may**, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest Refugee Reception Office in order to apply for asylum.*[11]

(2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act.

[19] Moreover, Regulation 22 of the Immigration Act is directive where it provides as follows:

[11] 14 days are provided in Form 17 of the Immigration Regulations.

(1) A person claiming to be an asylum seeker contemplated in section 23(1) of the Act shall apply, in person at a port of entry, for an asylum transit visa on Form 17 illustrated in Annexure A and have his or her biometrics taken.

*(2) An asylum transit visa **may not** be issued to a person who-*

(a) has not completed Form 17 as contemplated in sub regulation (1);

(b) already has refugee status in another country; or

(c) is a fugitive from justice.

[20] It is evident from the provisions of Regulation 22(2) that an asylum transit visa may not be issued in specific circumstances. It is trite that the interpretation of may indicates that the Director-General may refuse entry in three limited circumstances only:

(a) when Form 17 is not completed, or

(b) when the asylum seeker already has refugee status in another country, or

(c) when the asylum seeker is a fugitive from justice.

[21] The exercise of power by an Official of Home Affairs provided by regulation 22(2) is limited to the powers conferred by the legislation. In his affidavit, Mr Chauke stated that the applicants were in possession of a double entry Zimbabwean visa that authorized them to reside in Zimbabwe where they already

had protection and there was no threat of persecution and deportation back to Afghanistan by the Zimbabwean Government. He further stated that "to me I understood that a person who signal an intention to apply for asylum is one who is fleeing persecution from the country where he is resident. The applicants did not fall into that category. They were not facing persecution in Pakistan and there was no threat of deportation back to Afghanistan by the Pakistani Government."

[22] Moreover, he was unaware of the death warrant allegedly issued by the Afghanistan Taliban Government which was not disclosed to him by the applicants. For these reasons he handed the applicants to the Zimbabwean Immigration Officers who escorted them to Harare, Zimbabwe on 18 February 2023. These are his reasons for not granting them the Asylum Transit Visas to enter the Republic.

[23] The answering affidavit of the Applicants confirm that on Saturday, 18 February 2023 the applicants were handed over to the Zimbabwean Immigration Services. They were further informed that they had to leave Zimbabwe and if they did not comply or agree to leave they would be handed over to the Zimbabwean police authorities for immediate detention. They had spent two days without access to basic amenities between the Zimbabwean and South African border posts. They were subsequently assisted by Dr Mills of the South African Institute of International Affairs who arranged for tourist visas in Zambia as a temporary safe stop over for travel to South Africa. They confirm that they have not been given asylum or refugee status by any country.

[24] Regulation 22(2) defines the powers to be exercised by Mr Chauke. He refused the applicants entry into the Republic on the basis that they came directly from Zimbabwe which is a safe country and therefore they may not prefer seeking asylum in South Africa. However, regulation 22(2) is clearly mandatory and provides that entry may be refused, only on the basis that an asylum seeker already has refugee status in another country.

[25] The applicants do not have asylum or refugee status by any country. This is confirmed by their answering affidavit. They have been fleeing from their country of origin, Afghanistan where a warrant of is issued. They sought refuge in safe houses in Pakistan but had to flee from there as their safety was threatened. They arrived in Zimbabwe on route to South Africa to seek asylum. Facing the threat of deportation by the Zimbabwean officials on 19 February 2023 they were urgently assisted by the Zambian government with a 30-day visa stay in Zambia awaiting entry into the Republic to seek asylum.

[26] The exercise of discretion by government departments had been defined in various judgments including *Sadie and Others v Minister of Home Affairs and Others*[12] where it was held as follows:

> *Discretion means, when it is said that something is to be done within the discretion of the authorities, that something is to be done according to the*

[12] (2018) 4 SA 333 CC

rules of reason and justice, not according to private opinion . . . according to law and not to humour. It is to be not arbitrary, vague and fanciful, but legal and regular.[13]

[27] When a discretion is applied arbitrary, vaguely and in accordance with a private opinion an official is acting outside of the scope of the conferred powers. In the matter of *Vorster v Department of Economic Development, Environment and Tourism: Limpopo Province*[14] Fabricius, AJ held that the government department had acted *ultra vires* because it assumed powers that it did not have and held as follows:

Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness depends on the terms of the empowering statute. If the exercise of public power is not sanctioned by the relevant empowering statute, it will be unlawful and invalid.[15]

[28] Similarly, in *Fedsure Life Insurance v Greater Johannesburg Transitional Metropolitan Council,*[16] the Constitutional Court held that it was central to our

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[13] *Saidi* at para 83 referring to *Ismail v Durban City Council* 1973 (2) SA 362 (A); [1973] 2 All SA 307 (N) at 373-4. See also *Goldberg v Minster of Prisons* 1979 (1) SA 14 (A); [1979] 3 All SA 238 (AD).
[14] 2006 (5) SA 291 (T)
[15] See *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC); *Affordable Medicines Trust vs. Minister of Health of RSA* 2006 (3) SA 246 (CC): and *Minister of Health* v *New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC).

[16] 1999 (1) SA 374 (CC)

constitutional order that the legislature and executive, in every sphere, are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.

[29] Mr Chauke acted *ultra vires* in respect of the provisions of Regulation 22(2) of the Immigration Act read with Regulation 7 of the Refugee Act. He cannot give himself an unlimited discretion in circumstances where the regulation is specific and defined. He cannot assume the power for himself that the regulation did not give him. In his opinion the applicants' preference to seek asylum in South Africa was not a legitimate reason and therefore should be turned away.

[30] A foreign national who is not refused entry into the Republic on the basis set out in regulations 22(2) who comes to South Africa to seek asylum is entitled to apply for asylum status. The pronouncement of the Constitutional Court referring to Section 2 of the Refugee Act as held in *Saidi* continues to find application in these circumstances where it held that "Officials in the Department of Home Affairs are obliged to permit entry into this country of any foreign national who desires to seek asylum."[17]

[31] A foreign national can only apply for asylum when he or she is first granted an Asylum Transit Visa. The dictum in *Abdi vs. Minister of Home Affairs and*

[17] At para 58

Others[18] further remains relevant to the circumstances of the applicants in the current matter, held by the SCA as follows in para 22:

> *"...[T]he Act provides for the admission of foreigners who find themselves in distressed circumstances owing to conditions enumerated in sections 2 and 3 thereof. The words of the Act mirror those of the UN Convention... they patently prohibit the prevention of access to the Republic of any person who has been forced to flee the country of his or her birth because of any circumstances identified in section 2 of the Act. ... Such persons have a right to apply for refugee status, and it is unlawful to refuse them entry if they are bona fide in seeking refuge. The Department's Officials had a duty to ensure that attending applicants for refugee status are given every reasonable opportunity to file an application with the relevant Refugee Reception Office..."*

[32] The provisions of Regulations 22(2) do not exist in a vacuum and is not determined in isolation of Section 2 of the Refugees Act. Once an asylum seeker has satisfied the requirements of regulation 22(2) the officials of the Department of Home affairs are constrained to act within the ambit of the powers conferred on him or her. Section 2 of the Refugees Act and the duty of the Republic to satisfy its international and humane obligations must be complied with. In *Abore v The Minister of Home Affairs*[19] the Constitutional Court held that as section 2 is still

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[18] (734/10) [2011] ZASCA 2 (15 February 2011)
[19] *Abore v Minister of Home Affairs & Another* 2022 (2) SA 321 CC

applicable after the amendments to the Refugee Act, the principle of *non-refoulement* still applies. It is succinctly stated in *Saidi* as follows at para 84-86:

> *[84]... Section 2 of the Refugees Act guarantees foreign nationals certain protections, which are consistent with the international law principle of non-refoulment in terms of which states are obliged not to deport a refugee to a country where he or she would be persecuted or face physical harm.*
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> *[85] Section 2 does not only oblige South Africa to give entry into its territory to every refugee seeking asylum, but also forbids expulsion, extradition or return if the person concerned would be persecuted, lose freedom or be physically harmed as a result of such expulsion, extradition or return. This prohibition takes precedence over all other laws, including the Refugees Act itself. Moreover, the protections in section 2 do not depend on the existence of a permit or any other condition, except those stipulated in that section.*
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> *[86] Again, we must proceed from the premise that officials of the Department of Home Affairs would comply with section 2. For if they do not, their decisions would be susceptible to review to protect the rights of foreign nationals.*

[33] For all of the above reasons, the applicants made out a case to be granted a *rule nisi*. On a *prima facie* basis they do face imminent danger and fear of deportation to Afghanistan. Their reliance on a warrant of arrest and fear of death

is admissible in their circumstances to acquire an Asylum Transit Visa. The discretion to be exercised whether they are granted asylum status is still to be decided by the Refugee Reception Officer. Further authentication of their foreign documents can be done at that stage. The application has not become moot as the applicants remain seeking asylum in South Africa. There is no reason why costs should not follow the application and it is so ordered on the attorney and client scale.

[34] **The Order is as follows: -**

[34.1] The rule nisi is confirmed as a final order.

[34.2] The respondent is ordered to pay the applicant's costs on an attorney and client scale.

FRANCIS-SUBBIAH, J

THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Applicant:	: Adv. K Hopkins SC
Instructed by:	: Schindlers SI Attorneys
Counsel for the Respondent:	: Adv. W Mokhare SC
	Adv. M Mojapelo
Instructed by:	: The State Attorney
Date of hearing:	18 February 2023, 20 February 2023
Date of judgment:	28 February 2023