IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

CASE NO: 3096/2016

In the matter between:

TASHRIQ AHMED	First Applicant
ARIFA MUSADDIK FAHME	Second Applicant
KUZIKESA JULES VALERY SWINDA	Third Applicant
JABBAR AHMED	Fourth Applicant

And

THE MINISTER OF HOME AFFAIRS	First Respondent
THE DIRECTOR-GENERAL OF HOME AFFAIRS	Second Respondent

Heard: 6 June 2016
Delivered: 21 September 2016

JUDGMENT

SHER, AJ:

[1] This matter lies at the intersection of immigration and refugee law, and their competing interests and principles. The essential question it poses is whether a failed asylum seeker is entitled to apply for a temporary residence permit or "*visa*" as it is known, in terms of our current immigration law.

[2] A central tenet of immigration law is founded on the accepted maxim of international law *"that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe"*.[1] As such, immigration law is essentially about control over the admission of foreigners, or so-called *"aliens"* as they are commonly referred to, and as such *"states the world over consistently have exhibited great reluctance to give up their sovereign right to decide which persons will, and which will not, be admitted to their territory and be given a right to settle there"*.[2]

[3] On the other hand, fundamental to refugee law (at least in respect of States who are parties to international instruments such as the 1951 Convention Relating to the Status of Refugees (hereinafter *"the Refugee Convention"*), the 1967 Protocol Relating to the Status of Refugees, and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of

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[1] *Nishimura Ekiu v The United States* 142 US 651 (1892) at 659 cited with approval in *Minister of Home Affairs and Ors v Watchenuka and Ano* 2004 (4) SA 326 (SCA) at para [29]; *R (European Roma Rights Centre) v Immigration Officer at Prague Airport (United Nations High Commissioner for Refugees Intervening)* [2004] UK HL 55 paras [11] and [19]; *Vilvarajah v UK* [1991] EHRR 248 at para [102].

[2] Per Lord Hope in *R (on the application of ST (Eritrea)) (FC) (Appellant) v Secretary of State for the Home Department* [2012] UK SC 12 at para [32]; *European Roma Rights* n 1 at para [19].

Refugee Problems in Africa (hereinafter *"the OAU Refugee Convention"*) to which South Africa has acceded), is the principle that such states have a duty, in terms of international law, to give refuge to aliens who are fleeing from persecution, and a duty not to return or surrender them to countries where their life or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or the political opinion they hold. This principle of *"non refoulement"* as enshrined in the Refugee Convention[3] is central to refugee and asylum seeker law. As the House of Lords pointed out in *R (European Roma Rights Centre)*,[4] the Refugee Convention itself represents a compromise between competing interests ie the need to provide for the humane treatment of refugees from oppression and the right of sovereign States to exercise control over those who seek admission to their countries. But that said, refugee law is essentially about the protection of vulnerable groups of people or individuals. This is because, as Prof James Hathaway points out,[5] a refugee's rights are determined by virtue of their status alone and as such, refugees must be protected by their host States unless and until a negative determination is made against them. This is because refugee status arises out of a predicament rather than from a formal determination of status ie the recognition of refugee status does not make a person a refugee, but declares him or her to be one. This case is about balancing these competing interests and principles.

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[3]Article 33.

[4] Note 1, cited with approval in *R (on the Application of ST (Eritrea)* n1 at para 29.

[5]*The Rights of Refugees Under International Law* (2005) at 278.

[4] It comes at a time when many countries are having to deal with waves of foreigners who are seeking to claim asylum, or who are migrating in search of a better life, because of conflict and civil strife in their homelands. Over the course of the last year thousands of displaced people have fled countries in turmoil or in a state of war, such as Syria and Libya, and travelling by boat or on foot, have sought refuge in member states of the European Union. And as a response many countries are reviewing their immigration and refugee policies.

[5] Closer to home, the United Nations High Commissioner for Refugees (*"UNHCR"*) recently reported[6] that as at the end of 2015 there were some 1.5 million 'internally displaced persons' in the Democratic Republic of the Congo alone, and in South Sudan some 2.3 million people have been forced to flee their homes, of which 650 000 have fled to Ethiopia, Kenya and Uganda and 1.65 million remain displaced inside their country despite a peace agreement having been signed in August 2015. Last year, some 234 000 Burundians were forced to flee into neighbouring territories and more than 18 million African refugees, internally displaced people and people at risk of statelessness received assistance from the UNHCR. The South African regional office of the UNHCR reportedly spent in the order of USD 12. 9 million on refugee programmes last year.[7] It is common knowledge that South Africa too has faced an increase in asylum seekers as well as illegal migrants from a number of countries north of our borders. Recently, the Supreme

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[6]In its 2015 Global Report for Africa.

[7]*Id.*

Court of Appeal warned in *Somali Association of South Africa and Ors v Limpopo Department of Economic Development Environment and Tourism and Ors*,[8] that *"the frustration experienced by the authorities as they deal with a burgeoning asylum seeker and refugee population must not blind them to their constitutional and international obligations"* and must *"especially not be allowed to diminish their humanity".*

[6] In *MSS v Belgium and Greece*,[9] the European Court of Human Rights similarly warned out that although States can take steps to prevent unlawful immigration, and have a *"legitimate concern to foil"* increasingly frequent attempts to circumvent immigration law, they must also not deprive asylum seekers of the protections afforded by the Refugee Convention and the European Convention on Human Rights, for *"the end does not justify the use of no matter what means"*.[10]

The application

(i) The facts:

[7] First applicant is an attorney who specialises in migration law, and the bulk of his clients are asylum seekers. He has represented second to fourth applicants in their various dealings with the authorities as outlined hereunder,

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[8] 2015 (1) SA 151 (SCA) at para [44].

[9] App No 30696/09 (ECtHR, Grand Chamber 21 January 2011).

[10] Para 216. See also *Medvedyev v France* App No 3394/03 (ECtHR, Grand Chamber 29 March 2010) at para 81.

and has joined in the application in the interests of the general public, and of his clients in particular. He seeks no relief in is own name.

[8] Second, third and fourth applicants are failed asylum seekers. Second applicant, Arifa Fahme, is an Indian citizen who was issued with an *"asylum seeker's temporary permit"* on or about 3 June 2009, in terms of s 22 of the Refugees Act,[11] which permit was subsequently extended 12 times. The last extension, which was valid for 5 months, was granted on 28 September 2015. On 10 March 2002 Mrs Fahme was married to Musaddik Hanif Fahme in Dapoli, India. Mr Fahme is the holder of a general work permit which was issued by the Department of Home Affairs in terms of the Immigration Act[12] on 25 March 2015, and which is valid for 5 (five) years, until 20 March 2020. In terms of this permit, Mr Fahme is entitled to work for the Piketberg Bazaar as a Manager. The Fahmes have 4 (four) children, who are living with them in South Africa and whose ages range between 14 and 4 years of age. In terms of her permit, Mrs Fahme had the right to reside temporarily in this country for the purpose of applying for asylum in terms of the Refugees Act. It is common cause that Mrs Fahme's application for asylum was rejected (although the date when this occurred has not been set out in the respondents' papers).

[9] Mrs Fahme contends that she is entitled to apply for a visitor's permit, or "*visa*" (as it is more properly referred to in terms of current legislation)

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[11]Act 130 of 11998.

[12] In terms of s 10(2)(i) read together with s 19(2) of the Immigration Act, no. 13 of 2002, which provides that a general work visa may be issued by the Director-General to a foreigner.

permitting her to stay in the country temporarily with her husband while he is here in terms of his general work permit, by virtue of the provisions of s 11(1)(b)(iv) of the Immigration Act, read with Regulation 11(4)(a) thereof,[13] which provides that a visitor's visa may be issued to the spouse or dependent child, of the holder of a visa of the kind issued to Mrs Fahme's husband, in certain circumstances. It appears that some time earlier this year, Mrs Fahme attempted to apply for such a visitor's visa by lodging an application in this regard with VFS Global, an entity which acts as agent for the Department of Home Affairs, and which refused to accept it. On 19 February 2016, VFS Global indicated in an e-mail which it sent to the first applicant (who was acting on behalf of Mrs Fahme), that they were not accepting any applications from asylum seekers for temporary visas in terms of the Immigration Act, pursuant to Immigration Directive No 21 of 2015 (hereinafter "*Directive 21*"), which was issued by the Director-General of the Department of Home Affairs (who is the second respondent herein) on 3 February 2016. It is common cause that prior to the issue of this Directive, and for the last 13 years or so, the Department of Home Affairs has been processing applications from failed asylum seekers for temporary residence visas in terms of the Immigration Act. The provisions of Directive 21 read as follows:

"***IMMIGRATION DIRECTIVE NO 21 0F 2015:***

WITHDRAWAL OF CIRCULAR NO 10 OF 2008 CONFIRMING THE 11 NOVEMBER 2003 DABONE COURT ORDER

[13] Immigration Regulations 2014.

Section 21 of The Refugees Act, No. 130 of 1998 provides the conditions under which a section 22 Asylum Seeker Permit may be issued. These conditions which at all times should not be in conflict with the Constitution of the Republic of South Africa, 1996 or international law are determined and endorsed by the Standing Committee for Refugees Affairs (SCRA).

The management and issuance of asylum seeker permits is administered through the Refugees Act while the management and the regulation of admission of other foreigners, their residence in, and their departure from the Republic and for matters connected therewith is done through the Immigration Act, No. 13 of 2002.

It is the considered view of the Department that no change of condition or status should be premised on the provisions of the Immigration Act for a holder of an asylum seeker permit whose claim to asylum has not been formally recognized by SCRA.

Section 27(c) of the Refugees Act stipulates that a Refugee is entitled to apply for an <u>Immigration permit</u> after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.

The immigration permit referred to in the Refugees Act is the permanent residence permit of section 27(d) of the Immigration Act. It therefore follows that a holder of an asylum seeker permit who has not been certified as a Refugee may not apply for a temporary residence visa or permanent residence permit.

In view of the above provisions I wish to advise all immigration officials that Department Circular No 10 of 2008 has fallen away since the 26th of May 2014 and is hereby officially withdrawn.

All applications for change of status from asylum seeker permit to temporary residence visa which are still pending in the system should be processed as per this directive regardless of the date of application".

[10] Third applicant, Kuzikesa Swinda, is a citizen of the Democratic Republic of the Congo. Pursuant to an application which he made in this regard on 19 April 2010, he was similarly granted an asylum seeker's temporary permit

which was subsequently extended on 13 occasions, with the last such extension being valid to 1 August 2016. His application for asylum was similarly rejected on an unknown date and is currently on appeal before the Refugees Appeal Board.[14] Mr Swinda has also sought to apply for a visa allowing him to sojourn temporarily in the Republic of South Africa, in terms of the Immigration Act. In his case, he has made application for the issue of a so-called *"critical skills visa"*,[15] as he is an *"information technology specialist"*, which apparently is a *"critical skill"* listed in the Regulations to the Immigration Act. His application for such a visa was rejected on 4 January 2016, on the basis that his asylum claim was still subject to an appeal before the Refugees Appeal Board, which could result in the rejection of his application for refugee status being set aside or confirmed. On 18 January 2016 first applicant lodged an appeal against the rejection of third applicant's application for a visa, which is still pending.[16]

[11] Fourth applicant, Jabbar Ahmed, is a Pakistani national who, it appears, was granted an asylum seeker's temporary permit on or about 26 September 2014, which was subsequently extended twice, with the last such extension being vaild for a period of 6 months, until 26 October 2015. As in the case of the other applicants, his application for refugee status has also been rejected, and subsequent thereto, Mr Ahmed similarly made application for a *"critical skills visa"* on the basis that he was employed as a sheep-shearer, an occupation which is allegedly also listed as a *"critical skill"* in terms of the

[14]In terms of s 26 of the Refugees Act.

[15]In terms of s 19 of the Immigration Act.

[16]In terms of s 8 of the Immigration Act.

Immigration Regulations. His application too, was rejected on the basis that his application for the grant of asylum was still pending before the Refugee Appeals Board. On 19 October 2015, first applicant similarly lodged an appeal against the refusal to consider his application for a visa, which is also still pending.

(ii) The parties' contentions:

[12] The applicants seek an Order declaring Directive 21 to be inconsistent with the Constitution and invalid, and setting it aside. They claim that the contents of the Directive are irrational and are based on an incorrect interpretation of certain provisions of the Refugees and Immigration Acts. They also contend that Directive 21 is inconsistent with, and contrary to, the provisions of an Order which was granted by this Court by agreement between the self-same respondents in this matter and a number of applicants who were also asylum seekers, in 2003. That Order is referred to as the *"Dabone"* Order, which was the surname of the first applicant in that matter. The applicants contend that the effect of the *Dabone* Order was to direct officials of the Department of Home Affairs to accept applications for visas or permanent residence permits from foreigners, even though they might be asylum seekers whose application for refugee status was still pending. The applicants contend that there is no basis in logic or law to prevent foreigners who may happen to be asylum seekers in terms of the Refugees Act, from making application for visas or permanent residence permits in terms of the Immigration Act, should they comply with the conditions prescribed for such visas or permits.

Consequently, they contend that the Department of Home Affairs should be directed to consider second and third applicants' appeal against the rejection of their application for 'critical skills' visas in the light thereof. As for second applicant, it is contended that the respondents' refusal even to permit her to apply for a visa is a violation of her constitutional right to dignity, contrary to the decision of the Constitutional Court in the matter of *Dawood and Ano v Minister of Home Affairs and Ors; Shalabi and Ano v Minister of Home Affairs and Ors; Thomas and Ano v Minister of Home Affairs and Ors*.[17] Consequently, the applicants not only seek an Order setting aside Directive 21, but also an Order directing the respondents to comply with the *Dabone* Order, together with certain ancillary relief thereto, and an Order that the second applicant be permitted to submit an application for a visitor's visa in terms of the relevant provisions of the Immigration Act.

[13] The respondents in turn contend that the *Dabone* Order was not only *"clearly incorrect"* and as a result this Court should decline to follow it, but is also unconstitutional as it breaches the principle of separation of powers. In support of these contentions the respondents aver that the *Dabone* Order has resulted in absurdity in certain respects, and is inconsistent with certain Regulations to the Immigration Act which have subsequently been promulgated. In addition, according to the respondents the *Dabone* Order runs contrary to the *"ipsma verba"* (sic) of the Refugees Act and the Immigration Act. Respondents maintain that the two statutes deal with *"conceptually difference scenarios"* (sic) ie with asylum seekers and refugees

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[17] 2000 (3) SA 936 (CC).

(in terms of the Refugees Act) on the one hand and immigrants (under the Immigration Act) on the other and the legislature has seen fit *"to make only one single allowance for "cross pollination""* (sic) between the two Acts. Consequently, respondents contend that save for this single instance, asylum seekers and refugees are regulated exclusively by the provisions of the Refugees Act, and asylum seekers are not at liberty to make application for any form of visa in terms of the Immigration Act.

Some guiding principles

[14] Although this matter is principally concerned with issues of interpretation of the provisions of the Refugees and Immigration Acts, regrettably, neither of the parties sought to really engage with such issues and the submissions which were made in this regard were rather cursory. In the main, the parties' arguments revolved around the terms of the *Dabone* Order and their interpretation, and no real consideration was given to an analysis of the historical origins and context of the two statutes under discussion, nor was there an attempt made to analyse the legislative scheme of each statute. In the circumstances, it is necessary for me to start by setting out what I believe are the relevant principles of interpretation which should guide me.

[15] In the first place, inasmuch as interpretation is an exercise in attributing meaning to the words used in a statute,[18] consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, in the

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[18]Per Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18], 603F-G.

context of the statute as a whole and the relevant circumstances which were attendant upon its coming into existence.[19] But context is not limited to the language of the rest of the statute *"as throwing light of a dictionary kind on the part to be interpreted"* and *"often of more importance is the matter of the statute, its apparent scope and purpose and within limits, its background"*.[20] The Constitutional Court has also pointed out that context also includes the socio-economic and institutional context in which the statutory provisions in question function.[21] In seeking to arrive at a meaning of the provisions in question, the court is not, as was previously the approach adopted, so much seeking to divine or ascertain the intention of the legislature[22] (a genuflective approach based on an era when parliament reigned supreme) as it is concerned with ascertaining the objective *purpose* of the legislation.[23]

[16] In the second place, inasmuch as the process of interpretation *"is a co-operative venture between legislator and judge, bounded by mutually understood rules, in which the latter seeks to give meaning to the text enacted by the former"*,[24] a court is required to remember to stay within its

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[19]*Id.*

[20]Per Schreiner JA in *Jaga v Dönges NO and Ano; Bhana v Dönges NO and Ano* 1950 (4) SA 653 (A) at 662G-663H, referred to with approval in *Du Toit v Minister for Safety and Security and Ano* 2009 (6) SA 128 (CC) at para [37].

[21]Per Sachs J in *SA Police Service v Public Servants Association* 2007 (3) SA 521 (CC) at para [20], 529C-D.

[22]Which was previously referred to as the primary or golden rule of statutory interpretation and which, as was pointed out by Wallis JA in *Natal Joint Municipal Pension Fund* n19 (at para [22]), led to a *"studied literalism"* as it "*denied resort to matters beyond the ordinary grammatical meaning of the words used*".

[23]*Id* at para [23].

[24]*National Credit Regulator v Opperman and Ors* 2013 (2) SA 1 (CC) at para [99].

assigned role and not to stray outside of it into *"amendment, enactment or innovation"*.[25] As the Constitutional Court put it, a court cannot *"fill the gap"*.[26] In this regard, there is a presumption that the legislature has dealt exhaustively with the subject of an enactment and it is thus not for courts to fill omissions in it, and courts are not at liberty to supplement statutes by providing what they surmise the legislature omitted therefrom.[27]

[17] Most importantly, at all times when interpreting the legislation concerned, the court is required to do so through the prism of the Constitution,[28] and it is duty-bound to promote the spirit, purport and objects of the Bill of Rights,[29] particularly where the legislative enactments implicate or affect any such rights.[30] And where legislative enactments limit or intrude upon constitutional rights, they must be interpreted in a manner which is *"least restrictive"* of such rights, if the text is reasonably capable of bearing such a meaning.[31] In addition, where constitutional rights are implicated, the Court is to prefer a *"generous"* construction over a merely textual or legalistic one in order to

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[25] *Id* at para [100].

[26] Per Moseneke J (as he then was) in *City of Cape Town and Ano v Robertson and Ano* 2005 (2) SA 323 (CC) at para [52], 348A. This is of course not to deny that a court can employ techniques of reading-down, or reading-in, or severance in order to render a provision constitutionally compliant.

[27] *Id* at footnote [62], 348F referring to *Stafford v Special Investigating Unit* 1999 (2) SA 130 (E) at 140C-F.

[28] *Investigating Directorate; Serious Economic Offences and Ors v Hyundai Motor Distributors (Pty) Ltd and Ors In re: Hyundai Motor Distributors (Pty) Ltd and Ors v Smit NO and Ors* 2001 (1) SA 545 (CC) at para [21], 558E.

[29] In terms of s 39(2) of the Constitution.

[30] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13 at para [88]; *Fraser v ABSA Bank Ltd* 2007 (3) SA 484 (CC) at para [43].

[31] *SATAWU and Ors v Moloto and Ano NNO* 2012 (6) SA 249 (CC) at para [44].

afford those affected the fullest possible protection of their constitutional *"guarantees"*.[32]

[18] Finally, and insofar as it is still permissible to speak of legislative intent (as opposed to textual meaning), the provisions of the Acts must be read in the context of the presumption that unless a contrary intention clearly appears from the language, the legislature did not intend "*unfair, unjust or unreasonable results to flow from its enactments*"[33] and the legislation was not meant to be absurd or anomalous.[34] And where the court is faced with two or more possible interpretations, it will not favour an interpretation which leads to "*impractical, unbusinesslike or oppressive*" consequences that will "*stultify*" the operation of the legislation.[35]

The historical context

[19] In a paper entitled *"Asylum and Refugee Policies in Southern Africa: A Historical Perspective"*,[36] Dr Bonaventure Rutinwa has identified three generations of asylum and refugee policies and laws in countries in Southern Africa. The first generation, which owes its origins to the post-colonial period,

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[32] *Department of Land Affairs and Ors v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at para [53].

[33] *Rutenberg v Magistrate, Wynberg & Ano* 1997 (4) SA 735 (C) at 754B-C; *Road Accident Fund v Smith* 1999 (1) SA 92 (SCA) at 102C-D; *Principal Immigration Officer v Bhula* 1931 AD 323, at 337.

[34] Expressed by the maxim "*interpretatio quae parit absurdam non est admittenda*" see Du Plessis *The Re-interpretation of Statutes* at p162; *Barnard v Regspersoon van Aminie* 2001 (3) SA 973 (SCA) at para [27].

[35] Per Wallis JA in *Natal Joint Municipal Pension Fund* n19 at para [26].

[36] Presented at a SAMP/LHR/HSRC Workshop on Regional Integration, Poverty and South Africa's Proposed Migration Policy, Pretoria on 23 April 2013.

commenced at the beginning of the 1960s when thousands of refugees fled from the former Portuguese colonies of Angola and Mozambique in order to escape the civil wars which were being fought for independence, and the wars for liberation from racist minority rule in the then South West Africa, Southern Rhodesia, and later South Africa, in the 1970s and 1980s.

[20] The first generation of such refugee policies was characterised by the absence of *"refugee specific"* laws, with refugee matters generally being dealt with as part of immigration policy and law in general, which at that time concerned itself principally with issues of entry and residence by foreigners, without providing much, if anything, in the way of refugee protection.

[21] The second generation of refugee policies led to the introduction of refugee specific laws which were mainly aimed at controlling rather than protecting refugees.[37] These laws vested a wide discretionary power in functionaries to determine who was to be treated as a refugee and permitted expulsion of refugees back to their countries of origin, at whim, contrary to the principle of *non refoulement*.[38] But, as Dr Rutinwa has pointed out, paradoxically, notwithstanding the draconian nature of much of this legislation, in practice refugee policy was protectionist and most refugees were not returned to

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[37] *Id* at 53-54*.* The oldest of this generation of refugee control-orientated laws was Tanzania's Refugee Control Act of 1966, which was followed in 1968 by Botswana's Refugee (Control and Recognition) Act, in 1970 by Zambia's Refugee (Control) Act and by the Refugee Control Order (1978) in Swaziland.

[38] *Id.* The laws of some of these countries permitted all manner of arbitrary treatment of refugees such as allowing for the confiscation and slaughter of their animals and the impounding of their vehicles, without compensation.

countries where they might face persecution, and the standards of treatment of refugees were generally reasonable.[39]

[22] From the early 1980s, a new generation of refugee laws began to be passed in countries in Southern Africa.[40] This third generation of laws sought to bring refugee policy in line with international humanitarian law by adopting the extended definition of a refugee in terms of the Refugee Convention[41] and the OAU (Refugee) Convention, and the principle of *non refoulement*. In this regard South Africa's Refugees Act, which was enacted in 1998, similarly sought to give effect to these Conventions and principles.

[23] But, notwithstanding the advent of a democratic dispensation and the adoption of the Constitution in 1994, and lagging behind advances made by other countries in the Southern African region, until the passing of the Refugees Act, South Africa still treated refugees in terms of its second generation immigration-based law, to wit, the then Aliens Control Act of 1991.[42] As Rutinwa points out, the central element of the system of control which was effected under this Act, was the concept of a *"prohibited"* person, which included all foreigners who were not in possession of a valid passport and visa at the time of their entry into South Africa. Applicants for asylum

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[39] *Id* p 54.

[40] The first of these being Zimbabwe's Refugees Act of 1983 and Lesotho's Refugees Act of the same year, which was followed in 1989 by the Refugee Act of Malawi and the Refugee Status Act of Angola in 1990, and the Refugee Act of Mozambique in 1991, the Tanzanian Refugees Act of 1998 and the Namibia Refugees (Recognition and Control) Act of 1999.

[41] And the 1967 Protocol.

[42] Act 96 of 1991.

were either granted temporary permits allowing them to enter and remain in the country for a restricted period of time,[43] or alternatively, were granted exemption from the prescribed entry and residence requirements of the Act, on the grounds of special circumstances.[44] As Rutinwa explains the consequence of applying ordinary immigration laws to refugees resulted in a tendency to label all asylum seekers as illegal immigrants,[45] and the law was ever increasingly unable to cope with the mass influx of asylum seekers, as it was based on a legislative system aimed at dealing with the regulation of the admission of foreigners on an individualized and *ad hoc* basis.

[24] Johnson[46] has outlined how the post-1994 immigration regime was initiated by a consultative process which resulted in a draft Green Paper on migration, which was prepared by civil society, government officials and international scholars. The Green Paper proposed a rights-based legal immigration framework (with a refugee-specific chapter therein), a collectivised approach to the sharing of the burden of refugees in the region as a whole, and an inclusive approach to regional migration that sought to address irregular immigration through increased means for legal participation in the economy. However, the resulting legislation that culminated in the Refugees Act *"largely avoided"*[47] many of the Green Paper's recommendations, and the draft Bill which was produced instead originated from internal drafting attempts, and

[43]In terms of s 41 of Act 96 of 1991.

[44]In terms of s 29.

[45]*Id* at p 53.

[46]*"Failed Asylum Seekers in South Africa: Policy and Practice"* in AHMR, Vol 1 No 2 May-August 2015.

[47]*Id* p 4.

emphasised a bureaucratic approach to refugee protection based on a policy that it still fell within the ambit of migration control.[48] Despite these shortcomings, the regime which has been established by the Refugees Act, which is based on individualised refugee status determinations, and which allows asylum seekers the right to freedom of movement within the country and the right to assimilate (instead of being confined to refugee camps, as in the case of many other countries in Africa), as well as the right to work and study,[49] was lauded by the UNHCR in 2007 as being one of the most advanced and progressive systems of refugee protection, in the world.[50]

[25] However, as against the *"strong legal framework"* within which refugees are offered protection in terms of the Refugees Act, Johnson points out that in practice, refugee protection *"has existed uneasily next to the country's immigration regime"* with its focus on immigration control, particularly in the context of undocumented migrants.[51] In his view, the Immigration Act and its accompanying regulations have established a *"restrictive"* immigration regime that *"facilitates immigration for highly skilled immigrants but offers few options for low-skilled workers"*.[52] As a result *"the lack of legal options under the Immigration Act has led many migrants to lodge asylum claims to temporarily and imperfectly legalise their sojourn"*.[53] This has resulted in an ever

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[48]*Id* pp 4 – 5.

[49]These rights were largely achieved by judicial intervention and were not initially granted in legislative enactments.

[50]*Id* p 1.

[51]*Id* p 2.

[52]*Id.*

[53]*Id.*

increasing number of asylum applications, many of which are without a legitimate basis, which stretch the resources and capacity of the Department of Home Affairs to effectively administer the asylum system as well as the immigration system.[54] According to Johnson this restrictive immigration regime, which is focused on exclusion, has exacerbated the tension between the formal protection offered under the Refugees Act and the exclusionary immigration regime envisaged in the Immigration Act, as a result of which refugee protection is largely *"subsumed by immigration concerns"*.[55] Previously, in terms of the predecessor statute to the Immigration Act,[56] foreigners were able to apply for a number of lower-end *"temporary residence permits"*,[57] which included work, business and work-seekers' permits which did not require the lodging of onerous financial guarantees.[58] In contrast to this the current Act does not provide for work seekers' permits, and has made provision for 'high-end' immigration by way of new visas such as retirement[59] visas (for so-called 'high net worth' individuals), and so-called business visas which allow for the admission of foreigners who invest capital or establish businesses, in the country.[60]

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[54] *Id*.

[55] *Id* at p 6.

[56] The Aliens Control Act 96 of 1991.

[57] As they were then known, now referred to as *"visas"* in terms of the current Act.

[58] Save in the case of applications for a visitor's, business or medical permit – ss 26(3)(a) and (4)(a) of Act 96 of 1991.

[59] S 10(2)(j) rtw s 20 of Act 13 of 2002.

[60] S 10(2)(e) rtw s 15.

[26] Recently, in a further draft Green Paper on migration, the government has proposed the re-introduction of a work-seekers' visa to enable migrants from neighbouring countries to come to our shores in search of better opportunities, without the stratagem of applying for asylum in order to do so.

An overview of the legislative scheme of the Immigration and Refugee Acts

[27] In order to determine whether a failed asylum seeker is excluded from applying for the right to *"sojourn"* in the country by applying for a visa which will allow him or her to remain temporarily, regard must be had for the legislative scheme of the two Acts in question and whether there are any express or implied contra-indications to such a construction, therein.

[28] In its preamble, the Immigration Act states that its aim is to provide for the regulation of admission of *"foreigners"* to, their residence in and their departure from the Republic and for matters *"connected"* therewith. Foreigners are defined as individuals who are not citizens.[61] The Act has the following objectives: (i) to set in place a *"new"* system of immigration control which will ensure that visas and residence permits will be issued as expeditiously as possible on the basis of objective, predictable and *"reasonable"* requirements and criteria[62] (ii) to promote economic growth through *"the employment of needed foreign labour"*, facilitating foreign investment and enabling the entry of *"exceptionally skilled or qualified"* people thereby increasing *"skilled"* human resources, and to facilitate academic

[61] S1.

[62] Para (a) of the preamble.

exchanges[63] (iii) to ensure that the South African economy will have access *"at all times to the full measure of needed contributions by foreigners"*[64] (sic) and (iv) immigration control will be performed within the *"highest applicable standards of human rights protection"*[65] in such a way that the international obligations of the Republic will be complied with[66] and a human rights based culture of enforcement will be promoted.[67]

[29] The types of *"visas"* and permanent residence permits which can be issued to a foreigner in terms of the Act, are set out in ss 10 – 23 (in respect of temporary residence) and ss 25 – 27 (in regard to permanent residence). Amongst the 12 types of temporary residence permits or *"visas"* by means of which a foreigner may sojourn temporarily in the Republic are visitors',[68] study,[69] business,[70] relatives',[71] work,[72] retirement,[73] and so-called exchange[74] visas. As far as work visas are concerned, two types are provided for ie a general work visa which may be issued to a foreigner who complies with certain prescribed requirements[75] and a so-called *"critical skills"* visa[76] which

[63] *Id* para (d).

[64] *Id* para (h).

[65] *Id* para (l).

[66] *Id* para (o).

[67] *Id* para (n).

[68] S 10(2)(b) rtw s 11.

[69] S 10(2)(c) rtw s 13.

[70] S 10(2)(e) rtw s 15.

[71] S 10(2)(h) rtw s 18.

[72] S 10(2)(i) rtw ss 19 and 21.

[73] S 10(2)(j) rtw s 20.

[74] S 10(2)(k) rtw s 22.

[75] S 19(2).

[76] S 19(4).

may be issued to an individual who possesses such skills or qualifications as may be determined to be *"critical"* for the country, from time to time, by the Minister. Visas may also be issued to members of the immediate family of such skilled foreigners, under such circumstances as may be prescribed by the Director-General.[77]

[30] A number of the aforesaid visas are predicated upon some form of financial or human capital investment in the country, in line with the aims and objectives set out in the preamble to the Act. In this regard, the business visa[78] requires an investment of a prescribed financial or capital contribution or the employment of a certain number of persons, the work visa[79] envisages the contribution of human capital in the form of critical skills, amongst others, the retired person visa[80] provides for individuals with a prescribed high net worth and with sufficient pension, annuity, or retirement funding to be allowed into the country, the corporate visa[81] caters for the situation where corporate entities set up facilities to employ foreigners in SA, and the exchange visa[82] may be issued to foreigners who participate in a programme of cultural, economic or social exchange, administered by an organ of state or a learning institution.

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[77] *Id*.

[78] S 15(1)(a) and (c)(ii).

[79] S 19.

[80] S 20(1)(a) and (b).

[81] S 21(1).

[82] S 22.

[31] As far as permanent residence permits are concerned the Immigration Act distinguishes between those which may be granted to foreigners on the grounds of "*direct residence*"[83] and those to whom permanent residence may be granted "*on other grounds*".[84]

[32] As regard the former, the Act provides that the Director-General may issue a permanent residence permit to any foreigner who has been the holder of a work visa for 5 years and has received an offer for permanent employment.[85] As regards the latter, the Director-General may issue a permanent residence permit to any foreigner who is of "*good and sound character*" and who has received an offer for permanent employment in respect of a position for which no suitably qualified citizen or permanent resident is available to fill it;[86] or who possesses extraordinary skills or qualifications;[87] or who intends to establish a business in the Republic or to invest a prescribed financial or capital contribution therein as determined to be *"in the national interest"*.[88]

[33] There are also provisions in the Act for the issue of either temporary or permanent residence permits, in certain prescribed circumstances, to foreigners who are the spouses of citizens or permanent residents, or relatives of such persons within the first degree of kinship.[89]

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[83]In terms of s 26.

[84]In terms of s 27.

[85]S 26(a).

[86]S 27(a)(i).

[87]S 27(b).

[88]S 27(c)(i).

[89]See ss 11(6) (visitors'), 18 (relatives'), and 20(1)(a) (retirement) visas and ss 26(b) and 27(a)(iii) and 27(g) in respect of permanent residence permits.

[34] The preamble to the Refugees Act provides that whereas South Africa has acceded to the Refugees Convention, the 1967 Protocol relating to the Status of Refugees and the OAU (Refugees) Convention as well as other human rights instruments, it has assumed certain obligations to receive and treat refugees in its territory in accordance with standards and principles established in international law. Accordingly, the purpose of the Act is said to be to give effect to the aforesaid relevant international legal instruments and the principles and standards applicable to refugees, and to provide for the reception into South Africa of asylum seekers, and to regulate applications for and the recognition of refugee status, and to provide for matters connected therewith. The Act makes a distinction between two types of persons: 1) *“refugees”,* being persons who have been granted asylum in terms of the Act after having made application therefor according to certain prescribed requirements and conditions and 2) *“asylum seekers”* being persons who seek recognition as refugees ie who are making application for such status.[90]

[35] In order to apply for asylum, an application must be made in person to a Refugee Reception Officer,[91] and pending the outcome thereof the Officer must issue to the applicant an *“asylum seeker permit”* which will allow the applicant to sojourn in the Republic temporarily, subject to any conditions which may imposed, which may not be in conflict with the Constitution or international law.[92] Once application has been made for asylum, no legal proceedings may be instituted against the asylum seeker in respect of his/her

[90]*“Asylum”* is defined as the grant of refugee status in terms of the Act, s 1.

[91] In terms of s 21(1).

[92]S 22(1).

unlawful entry into or presence in the Republic, until the outcome thereof, and until the applicant has had an opportunity to exhaust his or her rights of review or appeal.[93]

[36] A Refugee Status Determination Officer must consider the application and may either grant asylum or reject the application as being "*manifestly unfounded, abusive or fraudulent*"[94] or simply as being "*unfounded*".[95] Depending on the reason for rejection, the applicant either has a right to review such decision,[96] or alternatively, may lodge an appeal with the Refugees Appeal Board.[97]

[37] In the event that an asylum seeker is successful and obtains refugee status, he/she is entitled to a formal written recognition thereof[98] and will enjoy *"full legal protection"* which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the country.[99] The Act also provides that a person's refugee status may be withdrawn if he/she was recognised as a refugee erroneously as a result of an application which was materially incorrect or false, or which was made fraudulently or in a misleading manner, or where such person ceases to qualify for refugee status in terms of the

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[93]S 21(4).

[94]S 24(3)(b).

[95]S 24(3)(c).

[96]Before the Standing Committee for Refugee Affairs in terms of s 25, where the basis for the rejection was that the application was "*manifestly unfounded, abusive or fraudulent*".

[97]In terms of s 26(1), if the basis for the rejection is simply that the application was "*unfounded"*.

[98]In terms of s 27(a).

[99]S 27(b).

Act.[100] In this regard the Act provides that a person ceases to qualify for refugee status if he or she voluntarily re-avails himself of the protection of the country of his nationality or re-acquires such nationality (if he previously lost it), or if he voluntarily re-establishes himself in the country which he left, or acquires the nationality of some other country and enjoys its protection.[101] In addition, a person is also liable to have his refugee status withdrawn if he can no longer continue to refuse to avail himself of the protection of the country of his nationality because the circumstances in connection with which he has been recognised as a refugee, have ceased to exist.[102]

An evaluation

[38] As pointed out above, the respondents contend that save for one instance of *"cross-pollination"* (sic), the two statutes in question are hermetically sealed off from one another and, as a result, asylum seekers and refugees fall to be dealt with in terms of the Refugees Act exclusively, and all other foreigners, including immigrants and migrants, are to be dealt with under and in terms of the Immigration Act. In regard to the averred single instance of *"cross-pollination",* the respondents make reference to s 27(c) of the Refugees Act which provides that a refugee is entitled to apply for an *"immigration permit"* in terms of the Immigration Act[103] after 5 years' continuous residence in the

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[100] S 36(1) rtw s 5(1) and s 5(3).

[101] S 5(1)(a) – (d).

[102] S 5(1)(e).

[103] The wording at present refers to the Aliens Control Act of 1991, but after amendment by the Refugees Amendment Act 33 of 2008 which will be put into operation by Proclamation, this Act has been substituted by a reference to the Immigration Act.

Republic, from the date on which he or she was granted asylum, if the Standing Committee on Refugee Affairs[104] certifies that he or she will remain a refugee indefinitely. Respondents contend that the reference to an immigration permit in terms of the Immigration Act, must mean the permanent residence permit which may be issued to a refugee who is of *"good and sound character"* in terms of s 27(d) of the Immigration Act. As it stands, however, the current wording of s 27(c) of the Refugees Act is such that it could be read to include not only a permanent residence permit (in terms of s 27(d) of the Immigration Act), but also any one or more of the temporary residence permits or *"visas"* as they are currently known, provided for therein. Although I cannot see why a refugee who has been resident in the country for 5 years and who is entitled to obtain a permanent residence permit would ever want to obtain temporary status in terms of a visa under the Immigration Act, there may, nonetheless, be situations where a refugee may want to rather elect to obtain temporary status under one or other visa, for some reason, rather than to apply to obtain permanent residence. And there may be instances where a refugee cannot apply for a permanent residence permit because he does not comply with the prescribed requirements therefor, but is eligible to meet the requirements necessary to apply for a temporary permit ie a visa.

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[104]Which will be amended to read *"the Minister"* in terms of a further amendment to the Refugees Act, by means of the Refugees Amendment Act 12 of 2011, which will come into force and effect simultaneously with the coming into operation of the Refugees Amendment Act 33 of 2008.

[39] In terms of the provisions of the Refugees Amendment Act 33 of 2008[105] (which will come into effect on a date to be proclaimed), s 27(c) of the Refugees Act will be amended to provide, expressly, that a refugee will be entitled to permanent residence in terms of s 27(d) of the Immigration Act (ie by way of a permanent residence permit as referred to in this sub-section of the Immigration Act), after 5 years of continuous residence in the Republic from the date on which he was granted asylum (if the relevant functionary[106] after considering all the relevant factors and within a reasonable period of time, certifies that he or she will remain a refugee indefinitely). In the circumstances, the respondents are probably correct in their reading of the current wording of the relevant corresponding provisions of the two Acts and the meaning which should be ascribed thereto.[107] But it is not necessary for me to make a finding on this, and nothing that I have said herein should be construed as if I have done so.

[40] Applicants contend that the fact that refugees may be entitled to apply for a permanent residence permit in terms of the Immigration Act after 5 years' continuous residence in the Republic, in the circumstances outlined in the relevant provision in the Refugees Act, does not necessarily mean that

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[105]Which was assented to on 21 November 2008.

[106]S 27A(c) of the Refugees Amendment Act 33 of 2008 was to provide that this was to be the Director-General, but in terms of the further proposed amendment in terms of the Refugees Amendment Act 12 of 2011, this will be amended to refer to the Minister.

[107]In *Watchenuka v Minister of Home Affairs* n1 at para [3], Nugent JA accepted *obiter* that once an asylum seeker had obtained refugee status he or she was was entitled, after 5 years as a refugee, to apply for permanent residence. This implicitly is a reference to permanent residence in terms of s 27(d) of the Immigration Act.

asylum seekers, who have not yet obtained refugee status, may not seek to apply for temporary residence permits ie visas, or even permanent residence permits, in terms of the Immigration Act. On the other hand, respondents contend that the fact that the legislature saw fit, in the Refugees Act, to only provide for refugees to have a right to apply for a permit in terms of the Immigration Act, is a clear indication that the legislature intended that asylum seekers were not to have such a right.

[41] There are two comments that can be made in response to this. Firstly, the fact that the legislature may not have expressly granted such a right to asylum seekers, does not in itself necessarily mean that the legislature deliberately intended to exclude them from having such a right. Our courts have found, in numerous instances before, that although the legislature may not have expressly catered for a certain eventuality or situation, it is nonetheless implicitly covered by the legislative provisions in question. It is always a matter of interpretation, having regard to the overall purpose of the statutory provisions, and their context. Secondly, there are indications from certain proposed amendments to the Refugees Act which are scheduled to come into effect in the future, of what the legislature's intentions are in regard to this issue.

[42] Currently, the provisions of s 27 of the Refugees Act (which fall under Chapter 5 of the Act, and which is presently entitled *"The Rights and Obligations of Refugees")*, do not make provision for any express, specific rights for asylum seekers and the provisions of this Chapter (of which s 27 is one), all only refer

to the protection and rights of refugees, and not of asylum seekers. However, in terms of certain proposed amendments in terms of the Refugees Amendment Act 33 of 2008, the heading of Chapter 5 will be amended to refer to the rights and obligations, not only of refugees, but also of asylum seekers, and a new section ie s 27(A) will be inserted into the Refugees Act which will specifically deal with rights of protection for asylum seekers. To this end, the proposed amendment will provide that as in the case of refugees, an asylum seeker will be entitled to formal written recognition of his status, pending the outcome of his application for asylum[108] and will have the right to remain in the Republic pending the finalisation of such application,[109] the right not to be unlawfully arrested or detained,[110] and the protection of the rights set out in the Constitution, insofar as such rights may apply to an asylum seeker.[111]

[43] Can it be said then that, in the light of the current wording of the Refugees Act (and in the light of the proposed future amendments thereto as outlined above), asylum seekers are necessarily precluded from seeking to rely on the provisions of the Immigration Act, and may not apply for temporary residence rights by way of a visa in terms of the Immigration Act?

[44] In my view, the answer to this question lies in a holistic, contextual interpretation of both Acts in the light of the language of their legislative

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[108] S 27A(a).

[109] S 27A(b).

[110] S 27A(c).

[111] S 27A(d).

scheme and the legislative purpose they are directed at ie the objectives they seek to achieve, viewed through the prism of the Constitution. As I see it, they should be read and evaluated in a complementary fashion, and should not be treated as separate and distinct legislative regimes, insulated save for where the point where they expressly intersect by way of provisions which cross-refer to one another, such as s 27 of both Acts.

[45] In my view, the best place to start the exercise is with the provisions of the Immigration Act. It is a far wider and more encompassing statute than the Refugees Act, which pertinently seeks to deal with refugees and asylum seekers only. In contrast to this, the Immigration Act provides for the regulation of the admission of all *"persons"* to, their residence in and their departure from the Republic and to this end, the Act distinguishes between citizens[112] and *"foreigners",* who are defined as individuals who are not citizens. As such, on an ordinary reading therefore, the group of persons covered by the Act encompasses all manner of foreigners including visitors, and those seeking temporary or permanent residence because they are migrants in search of better opportunities and, in my view, for the reasons set out hereinafter, would also include persons such as failed asylum seekers in search of refugee status, save where they are expressly excluded, or save where a contrary intention clearly appears from the text. Applicants rightly point out that if it was intended to exclude asylum seekers or refugees from the provisions of the Immigration Act, the legislature could have expressly provided for them to be excluded in the definition of a 'foreigner', or in regard

[112]Who are persons defined as such in terms of the South African Citizenship Act, Act 88 of 1995.

to their eligibility to apply for temporary residence rights by way of the various visas referred to, but it has not done so.

[46] Respondents point out that foreigners seeking to enter the country legally are ordinarily[113] required in terms of the Immigration Act to make application for the appropriate visa which may be applicable to them (and which will grant them temporary rights of sojourn), from outside of the country ie before they arrive at a port of entry. In this regard the Act provides[114] that any foreigner who enters the Republic is required to produce on demand a valid *"port of entry"* visa to an immigration officer. To this end, amongst others, the study, business, medical treatment, relative, work, retirement and exchange programme visas previously referred to are deemed[115] to be valid port of entry visas. Respondents point out that asylum seekers on the other hand are expressly dealt with in terms of certain provisions of the Refugees Act which require that any person seeking asylum must do so by applying in person at a Refugee Reception Office,[116] at which point the Refugee Reception Officer is obliged, pending the outcome of the application for asylum, to issue to the applicant an asylum seeker permit in the prescribed form in terms of the Refugees Act,[117] which will allow him or her to sojourn in the Republic temporarily. Consequently, respondents submit it was clearly intended by the

[113]There are important exceptions which are dealt with later in regard to visitors and asylum transit visas.

[114]In s 10A(1).

[115] By virtue of s 10A(2)(a)(i)-(ix) rtw s 10(2).

[116]In terms of s 21(a) of the Refugees Act.

[117]S 22(1).

legislature to make a distinction between asylum seekers who obtain temporary residence rights in the country by way of a permit in terms of the Refugees Act once they are inside the country, and other foreigners, who must generally obtain such rights by applying for visas before they enter the country, and from outside it, in terms of the Immigration Act. Consequently there is a distinct difference between the various permits which these two disparate groups of persons require to obtain in order to lawfully enter and remain in the country and respondents contend thus that the entry and sojourn of asylum seekers in South Africa is regulated solely by the Refugees Act.

[47] Respondents have, however, failed to have regard for ss 10(A)(2)(x) and 23 of the Immigration Act. These provisions provide that a foreigner who, at a port of entry claims to be an asylum seeker, may be issued by the Director-General with an *"asylum transit"* visa, which is deemed to be a valid port of entry visa and which will grant such asylum seeker the right to enter the country and the right to travel to the nearest Refugee Reception Office in order to apply for asylum, within a period of 5 days. So, on the face of it, the first permit which an asylum seeker may obtain on entering the country, and which affords him the right to enter and to remain in the country temporarily, is a permit or visa in terms of the Immigration Act and not the Refugees Act. The asylum seeker permit referred to in the Refugees Act[118] is only issued once the asylum seeker has duly reported to the Refugee Reception Officer under the protection of an asylum transit visa granted in terms of the

[118] S 22(1).

Immigration Act, and lodges an application for asylum. Thus, when an asylum seeker and potential refugee comes into the country, he does so in terms of the Immigration Act. And, on my reading of the two statutes, the same position holds when he is required to leave the Republic. In this regard, s 23(2) of the Immigration Act provides that in the event that the asylum transit visa granted to an asylum seeker expires before the holder thereof reports at a Refugee Reception Office in order to apply for asylum in terms of the Refugees Act, he/she shall become an illegal foreigner and shall be dealt with in accordance with the Immigration Act. Similarly, a failed asylum seeker ie an asylum seeker whose application for asylum has either been rejected by a Refugee Status Determination Officer[119] or by the Standing Committee on Refugee Affairs on review[120] or on appeal by the Refugees Appeal Board,[121] as well as any asylum seeker whose asylum seeker permit has been withdrawn,[122] and any refugee whose refugee status has been withdrawn[123] in terms of the Refugees Act, becomes liable to be arrested and detained, and to be dealt with as a prohibited person under the Immigration Act.[124] So, when having to exit the country under compulsion, the mechanisms and legislative provisions generally applicable to such persons are those in terms of the Immigration Act and not the Refugees Act.[125] The Refugees Amendment Act

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[119]In terms of s 24(3) of the Refugees Act.

[120]In terms of s 25(3) of the Refugees Act.

[121]In terms of s 26(2).

[122]In terms of s 22(6).

[123]In terms of s 36(2).

[124]Although the current wording of s 36(2)(and (3) speaks of the Aliens Control Act, in terms of the Refugees Amendment Act 33 of 2008, this will be amended to refer to the Immigration Act.

[125]The only provision in the Refugees Act which authorises the removal of a refugee from the country, is

33 of 2008 and the Refugees Amendment Act 12 of 2011, will provide, when they come into operation, for the introduction of a new sub-section to section 24[126] of the Act, which will stipulate that an asylum seeker whose application for asylum has been rejected must[127] be dealt with in terms of the Immigration Act; and after certain proposed amendments to s 36, it will also continue to provide[128] that a person whose refugee status is withdrawn, must be dealt with in terms of the Immigration Act unless he or she has lodged an appeal.

[48] In the circumstances, at the two extreme ends of the spectrum of movement of an asylum seeker or refugee into and out of the country there are clearly provisions in the Immigration Act which are applicable, and which regulate their right to be in the country.

[49] I can find nothing in either Act (read together as they stand as well as in the light of the envisaged amendents I have referred to), which would, in my view make it inherently inimical or offensive to their legislative scheme, for a failed asylum seeker to apply for temporary residence and work rights under the Immigration Act. I am mindful of the provisions of s 22(2) of the Refugees Act which state that upon the issue of an asylum seeker permit, any permit which was issued to the applicant in terms of the Immigration Act, becomes null and void (and which, notwithstanding, the section also requires must be returned to the Director-General for *"cancellation")*. This is clearly an indication that

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ss 28(1) and (2), which allows for the removal of a refugee by order of the Minister, on the grounds of national security or public order.

[126]To wit, s 24(5).

[127]Unless he or she lodges an appeal.

[128]In s 36(2).

the legislature did not intend for a foreigner who holds temporary residence rights in terms of the Immigration Act to hang on to such rights and status in the event that he seeks to be dealt with as a refugee, and it may be argued that this constitutes an indication that a foreigner who is a temporary resident, cannot also be an asylum seeker, at the same time. To my mind, however, this does not necessarily mean that a failed asylum seeker ie one whose application for asylum has been rejected or withdrawn, or a failed refugee ie a refugee whose status has been withdrawn, cannot subsequent thereto, make application for temporary residence rights in terms of the Immigration Act, and there is no express provision in either Act barring such a course of action.

[50] There are, in fact, further indications in the Immigration Act that favour the construction that a failed asylum seeker may apply for residency rights in terms of the Immigration Act. In this regard, s 32(1) provides that any illegal foreigner shall depart unless authorised by the Director-General to remain in the Republic *"pending his or her application for a status"* and 'status' is defined to mean status under and in terms of the Immigration Act. As I read this provision, a failed asylum seeker or refugee who reverts to be dealt with under the Immigration Act as an illegal foreigner when he loses his status under the Refugees Act, can thus expressly be authorised to remain in the country in terms of the Immigration Act, pending the outcome of an application he might wish to lodge for a visa.

[51] I am mindful that the definition of an *"illegal foreigner"*, in terms of the Immigration Act means a foreigner who is in the Republic in contravention of

such Act. However, inasmuch as the Refugees Act provides that persons who have lost their status as asylum seekers or refugees, as pointed out above, fall to be dealt with under the Immigration Act, in the absence of any status being afforded to them in terms of such Act they constitute illegal foreigners in terms thereof and thus to my mind the provisions of the Immigration Act, including s 32, are applicable to failed asylum seekers and ex-refugees, who may be granted permission by the Director-General to remain in the Republic pending their application for a status under and in terms of the Immigration Act, be it temporary or permanent.

[52] The respondents also pointed out that in terms of s 9(4)(a) and (b) of the Immigration Act, a foreigner who is not the holder of a permanent residence permit,[129] in terms of the Immigration Act, may only enter the Republic if he has a valid passport and has been issued with a valid visa in terms of the Act. Their submission was that, in the circumstances, a failed asylum seeker or refugee will not be able to comply with these provisions, as in numerous instances he or she will not have a valid passport and would not have been issued with a valid visa prior to entering the country. There are two ripostes to this submission. In the first place, and as I have previously pointed out, one of the visas referred to in the Immigration Act in terms of which a foreigner may be granted leave to enter and to remain in the country, is an asylum transit visa.[130] This is a visa which is issued and obtained at a port of entry, and not from outside the country. In the second place, it may be pointed out

[129] As contemplated in terms of s 25.

[130] In terms of s 23(1).

that all of the applicants in this matter are in possession, on the face of it, of valid passports. There may be instances where asylum seekers or refugees are not in possession of a passport and an issue may arise as to whether they may be entitled to apply for status under and in terms of the Immigration Act, but this is not something upon which I need to pronounce upon or determine in this matter and I expressly refrain from doing so. Thirdly, the provisions of s 9(4) of the Immigration Act are, in my view, only applicable at the moment of *entry* of a foreigner into the Republic. An asylum seeker who accordingly enters the Republic with a valid passport and is who issued with a valid visa in terms of s 23 of the Immigration Act in order to apply for asylum in terms of the Refugees Act, thus complies with these provisions. If such person later becomes a failed asylum seeker or failed refugee, in my view, the provisions of s 9(4) do not serve to bar him or her from seeking to obtain temporary or permanent residence status in terms of the Immigration Act thereafter, as these provisions no longer regulate the asylum seeker's status at that point in time.

[53] It must also be pointed out that s 9(4)(b) does not explicitly state that the visa must be issued outside the country, only that a foreigner may enter the country if he has been *issued* with a valid visa, and s 10(3) of the Act simply provides that if a visa is issued outside the Republic, it is deemed to be of force and effect only after admission. Thus, there is some ambiguity present as to whether or not all visas need necessarily to be obtained from outside the country, if one reads s 9(4) and 10(3) together. It may be a requirement of the Regulations that visas must be obtained from outside the country, and before

entry, but this is not a requirement expressly in terms of the Act. In addition it must be noted that a visitor's visa ie a visa which is ordinarily obtained outside of the country for the purpose of visiting and residing with someone therein, is not one of the visas listed as a *"port of entry visa"* in terms of s 10A of the Act, although it is referred to in s 10(2) thereof. In the circumstances, any foreigner who enters the Republic for the purposes of applying for asylum and who is issued with a valid "*asylum transit*" visa in terms of the Immigration Act,[131] and who later becomes a failed asylum seeker, is, to my mind, a foreigner who has complied with the provisions of ss 9(4) and 10A of the Immigration Act; and provided he or she otherwise complies with the requirements of s 11 of the Act (in regard to the necessary financial or other guarantees required in respect of his or her departure), there is no reason why he or she cannot apply for a visitor's visa in terms thereof, from inside the country.

[54] S 11(6) of the Immigration Act provides that a visitor's visa may be issued to a foreigner who is the spouse of a citizen or permanent resident.[132] I cannot see any reason why, in logic or fairness, a person such as the second applicant who is the spouse of a temporary resident and who, it is not disputed, is living with her husband and four children in this country, should not similarly be entitled to apply for a visitor's visa in terms of s 11.[133]

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[131]In terms of s 23(1) rtw with s 10A(2)(x).

[132]Provided such a person does not qualify for any of the visas contemplated in ss 13 – 22 and for so long as a *"good faith spousal relationship"* exists.

[133]The applicants contend that such an application is competent in terms of s 11(1)(b)(iv) which provides that a visitor's visa may be issued by the Director-General for a period up to 3 (three) years to a foreigner who has sufficient available financial resources as may be prescribed and who is engaged

Regulation 11(4)(a) of the Immigration Regulations provides that a visitor's visa may be issued to the spouse or dependant child of the holder of a work visa which has been issued in terms of s 19 of the Act, in certain circumstances. The issue I have to deal with is whether or not there is any bar, in principle and in law, why a failed asylum seeker such as the second applicant cannot make application to be issued with such a visa. Such an application may well be approved by the relevant authorities. It is only in the event that it were to be rejected for wont of compliance with one or other condition as may be prescribed in terms of the aforesaid sections or the Regulations, that the legality or constitutionality of the terms of such legislation or Regulations becomes an issue. It will be evident from the cases referred to herein that the courts have not hesitated, in appropriate circumstances, to strike down provisions of the Immigration Regulations or of the Act, where these have been found to be unconstitutional. This is however not an issue which arises in this matter, nor is it a decision which I am called upon to make. All that second applicant asks for is that she be permitted to make application for a visitor's visa, and for it to be duly considered.

[55] As the applicants also point out, the Act provides that the Minister may, for good cause, waive any prescribed requirement,[134] and there was no suggestion by the respondents that any of the requirements necessary to obtain either a visitor's visa (in the case of the second applicant) or a so-

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in the Republic in *"any other prescribed activity"*.

[134] S 31(2)(c).

called critical skills visa (in the case of third and fourth applicants) could not be so waived by the Minister if he or she deemed it appropriate.

[56] In *S v Makwanyane and Ano*[135] the Constitutional Court recognised the importance of dignity as a foundational value of the Constitution and held that the constitutional rights to life and dignity were the most important of all human rights, and the source of all other personal rights enshrined in the Bill of Rights.[136] In a number of judgments both the Constitutional Court and the Supreme Court of Appeal have struck down provisions of immigration legislation which conflicted with the right to dignity.

[57] In *Lawyers for Human Rights v Minister of Home Affairs*[137] the Constitutional Court held that where the Constitution provides that a constitutional right is available to *"everyone"* it should be given its ordinary meaning ie it should be understood to apply to all persons, both citizens as well as foreigners, including those who may be physically in the country but have not been granted formal permission to enter and remain.[138] Consequently whereas the Constitution provides that only citizens have the right to enter, remain and reside in South Africa and the right to a passport,[139] all persons in the country have the right to have their dignity respected. The Court warned that *"the*

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[135] 1995 (3) SA 391 (CC).

[136] At para [144].

[137] 2004 (4) SA 125 (CC).

[138] At paras [26] – [27]. In *Kiliko v Minister of Home Affairs and Ors* 2006(4) SA 114 (C) at paras [27]-[28] the court confirmed that foreigners are entitled to all the fundamental rights entrenched in the Bill of Rights, save for those specifically reserved for citizens.

[139] In terms of ss 21(3) and (4) of the Constitution.

very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity".[140]

[58] In *Minister of Home Affairs and Ors v Watchenuka and Ano*,[141] Nugent JA pointed out that:

> *"Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And whilst that person happens to be in this country – for whatever reason – it must be respected, and is protected by s 10 of the Bill of Rights"*.[142]

[59] Consequently, and notwithstanding that the right to enter and to remain in the Republic, and the right to choose a specific trade, occupation or profession are rights which are reserved to citizens in terms of the Bill of Rights,[143] the Supreme Court of Appeal held in *Watchenuka* that where a foreigner may be destitute and has sought to exercise his right to apply for asylum, a general prohibition on him being able to work[144] constitutes an unjustifiable limitation of his right to dignity.

[60] In *Dawood and Ano v Minister of Home Affairs and Ors; Shalabi and Ano v Minister of Home Affairs and Ors; Thomas and Ano v Minister of Home Affairs and Ors*,[145] the Constitutional Court was concerned with the circumstances in

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[140] At para [20], 137D.

[141] 2004 (4) SA 326 (SCA).

[142] At para [25], 339B-C.

[143] Ss 21 and 22.

[144] In terms of Regulation 7(1)(a) of the then Refugee Regulations.

[145] 2000 (3) SA 936 (CC).

which foreign spouses of South African residents were required to make application for the issue of permanent residence permits (referred to at that time as *"immigration permits")* in terms of the Aliens Control Act 96 of 1991. The Act provided that an application for such a permit had to be made in the country of which the applicant held a valid passport, or in which he or she normally lived, and could thus not be made from within South Africa.

[61] The effect of the provisions in question was that a South African citizen who was married to a foreigner was forced to choose between going abroad with his or her partner, whilst their application for permanent residence was being considered, or to remain behind in the country, on their own. The Court pointed out that marriage and family were social institutions of *"vital importance"*.[146] The institution of marriage gave rise to moral and legal obligations on both spouses including a reciprocal duty of support and cohabitation and joint responsibility for supporting and raising children born of the marriage.[147] Article 23 of the International Covenant on Civil and Political Rights (to which South Africa has acceded) provides that the family is the *"natural and fundamental group unit of society"* and is entitled to protection by the State[148] and the African Charter on Human and Peoples Rights (to which South Africa has also acceded), provides similarly that the family, as the *"natural unit and basis of society"* shall be protected by the State.[149] The Court held that although the Constitution contained no express provision

[146]At para [30].

[147]At para [31].

[148]Art 23(1).

[149]Art 18(1).

protecting the right to family life or the right of spouses to cohabit, their right to dignity was infringed in the case of any legislation that significantly impaired their ability to honour their marital obligations to one another.[150] In the circumstances, the Court held that the relevant provisions of the Aliens Control Act which compelled applicants for permanent residence permits to be out of the country at the time of their application violated their rights of dignity.

[62] In *Booysen and Ors v Minister of Home Affairs and Ano*[151] the Constitutional Court similarly found that a provision in the Aliens Control Act[152] which stipulated that an application for a work permit could only be made by a foreign national who was married to a local South African, whilst he or she was out of the Republic, similarly constituted a violation of such foreign national's right to dignity, as the effect thereof was to impair the ability of the spouses to honour their marital obligations to one another, because it effectively prevented the foreign spouse from working and from fulfilling his or her duty of support.

[63] I can see no reason in principle or law, why the decisions in *Dawood* and *Booysen* are not of application in this matter. Second applicant contends that the refusal by the Department of Home Affairs to even permit her to apply for a visitor's visa in order for her to remain with her spouse, who has been granted the right to work and to remain lawfully in the country until 2020 in terms of a general work visa, will have the effect of impairing their marital

[150] At paras [36] – [37].

[151] 2001 (4) SA 485 (CC).

[152] S 26(2)(a) of Act 96 of 1991.

relationship and the duties of support and cohabitation which they owe to one another as spouses. It also impacts upon the family unit and the duty which they both have to jointly rear their children. As I previously pointed out the Act provides that a foreign spouse of a citizen or permanent resident may, provided the prescribed requirements are complied with, apply for a visitor's visa. I can see no rational reason why, in law or fairness, the foreign spouse of a foreign temporary resident (ie a foreign national who is lawfully in this country together with his family in terms of a visa, and who has the right to work and to reside in the country temporarily), should not similarly be entitled to at least apply for the temporary right to sojourn with her spouse until the expiry of his visa. To my mind, it could not have been intended by the legislature that such an anomalous and unjust distinction should be made between the two such foreigners, who are both married to persons lawfully entitled to be in the country. In my view, to exclude persons such as the second applicant in such circumstances would be contrary to the spirit, purport and object of the Bill of Rights and the refusal by the Department to even entertain an application from second applicant in this regard constitutes an unjustifiable violation of her right to dignity as well as that of her spouse.

[64] As far as the second and third applicants are concerned, they seek an order that the second respondent be directed to consider their appeals against their refusal of an application for a critical skills visa, in the light of this judgment and that they should make a decision in the appeal within 2 weeks from date of the order that issues. As I have pointed out above, amongst the principal aims and objectives of the Immigration Act, according to its preamble, is to

promote economic growth through the employment of *"needed foreign labour"* and to enable the entry of *"exceptionally skilled or qualified people"* thereby increasing our *"skilled human resources"*.[153] In the light of these stated aims and objectives, one would have imagined that foreigners who have exceptional or rare skills of which there is a shortage in this country, would be given every incentive and assistance to apply for permission to work in this country. Once again, I can discern no reason why, in the light of the legislative scheme of the two Acts in question and the aims and objectives of the Immigration Act in particular, a failed asylum seeker should not be entitled to apply for temporary work rights by way of an application for a critical skills visa[154] in terms of the Immigration Act, if he or she is possessed of such skills and otherwise meets the prescribed requirements. In fact, to recognize that skilled foreigners may apply for a 'critical skills' visa in such circumstances, would further the aims and objectives of the Act. There was no suggestion that either third or fourth applicant were not *bona fide* in their applications for a 'critical skills' visa, nor was it suggested that second applicant was not motivated by a genuine need and desire to live with her husband and children, and to care and support them.

[65] One can postulate a number of other situations where failed asylum seekers or refugees should have the right to apply for temporary residence by way of the appropriate visa in terms of the Immigration Act. So, for example, why can the wealthy politician from a neigbouring country who flees his homeland,

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[153]Para (d) of the preamble.

[154]In terms of s 19(4).

obtains an asylum seeker permit and eventually refugee status, but before he can apply for permanent residence has such status withdrawn by the Department of Home Affairs because the underlying circumstances which gave rise to his having to flee his country no longer exist, not apply for a retirement visa, if he qualifies for it? And what about the prominent academic who comes to the country on the basis of a work visa and cannot return to his country of origin because a civil war has broken out, and he thus applies for an asylum seeker permit, but does not obtain refugee status because hostilities have ceased by that time. Why can he not apply for a study visa?

[65] I understand that there are foreigners who abuse the immigration system and who try to circumvent it by applying for asylum in terms of the Refugees Act at the moment of entry into the country, thereby obtaining an asylum seeker's permit as of right, and who then play the system and gain a foothold in the country for a number of years until their application ultimately fails, at which point they seek to obtain temporary residence rights in the country by applying for a visa in terms of the Immigration Act, with the aim of ultimately obtaining permanent residence. This is a matter of serious concern as such persons effectively seek to enter this country via the proverbial 'back-door' and thereby become an administrative, financial and legal burden to the state, and deplete its resources, which are severely stretched as it is, and barely able to cover its own citizens' needs. But, to my mind, this is an issue which can and should be dealt with by means of proper and timeous enforcement of the law and due attention to asylum seeker claims, and the fashioning of a legislative remedy if needs be, and is not something that should serve to

prevent legitimate failed asylum seekers who can make a valuable contribution to the country and its economy, from being able to make application to remain in the country, temporarily in terms of the Immigration Act.

Conclusion

[66] In *Pharmaceutical Manufacturers Association of SA and Ano: In re Ex parte President of the Republic of South Africa and Ors*[155] the Constitutional Court held that it was a requirement of the rule of law and the principle of legality which is an incident of it, that the exercise of public power by functionaries of the State should not be arbitrary and their decisions should be rationally connected to the purpose for which the power was given, otherwise such decisions and any actions taken pursuant thereto would be similarly be arbitrary and unconstitutional.

[67] In my view, in stating in Directive 21 that, because s 27(c) of the Refugees Act, read together with the provisions of s 27(d) of the Immigration Act provides that a refugee with 5 years continuous residence in the country may be entitled to apply for a permanent residence permit, it "*therefore follows*" that the holder of an asylum seeker permit who has not been certified as a refugee may not apply for a temporary residence permit in terms of the Immigration Act, second respondent acted arbitrarily and irrationally. He jumped to a conclusion that is not borne out by a proper interpretation of the

[155] 2000 (2) SA 674 (CC) at para [85]; *South African Broadcasting Corporation Society Ltd and Ors v Democratic Alliance and Ors* 2016 (2) SA 522 (SCA) at para [59].

provisions in the context of the two Acts as a whole, for the reasons I have set out above.

[67] In the circumstances the provisions of Directive 21 are arbitrary and liable to be set aside on that ground alone as well as on the grounds that they are inconsistent with the Constitution, on the basis that they offend against second applicant's rights to dignity in terms of s 10 of the Constitution.

[68] The parties were *ad idem* that in the event the Court were to declare that the provisions of Directive 21 were unconstitutional, the applicants would fall to be dealt with in terms of the dispensation which applied prior to the issue of the said Directive. This dispensation was regulated by the provisions of Circular 10 of 2008. In terms of paragraph 2 of said Circular, asylum seekers in possession of an asylum seeker permit,[156] were allowed to apply for any one of the visas contemplated in the Immigration Act. This dispensation was one that was in effect for 8 years, since the issue of the Circular, and for some 13 years since the *Dabone* Order.

[69] The parties were further in agreement that in the event that the provisions of Directive 21 were found to be unconstitutional and were to be struck down, it would not be necessary for the Court to deal with the provisions of paragraph 3 of the Notice of Motion, in terms of which the applicants sought an order directing the respondents to comply with the *Dabone* Order. I may point out that it was in any event common cause that in essence, Circular 10 constituted an incorporation of the material provisions of the *Dabone* Order.

[156] In terms of s 22 of the Refugees Act.

[70] In the circumstances, it would not, in my view, be proper for me to express any view in regard to the *Dabone* order, nor would it be proper for me to make an order directing the respondents to comply with it, and that is a matter which must be left for another day, if it ever arises. As I have indicated, the respondents allege that the *Dabone* order is wrong, has been superseded by subsequent regulations which were enacted and offends against the principle of the separation of powers. Although I have some difficulty understanding some of their arguments in this regard, for the reasons I have already given it is not necessary, nor would it be appropriate, for me to consider these submissions and to pronounce on them.

[71] In the result, and for the reasons set out above, I make the following Order:

(i) Immigration Directive 21 of 2015, which was issued by the Director-General of the Department of Home Affairs on 3 February 2016, is declared to be inconsistent with the Constitution of the Republic of South Africa 1996 and invalid, and is set aside.

(ii) Second respondent is directed to permit the second applicant to submit an application for a visitor's visa in terms of s 11(b)(iv) of the Immigration Act, no. 13 of 2002, within 15 days from date of this Order.

(iii) Second respondent is directed to consider third applicant's appeal against the refusal of his application for a critical skills visa, as rejected by him on 4 January 2016, in the light of this judgment and to make a decision in the appeal within 15 days of the date of this Order.

(iv) Second respondent is directed to consider fourth applicant's appeal against the refusal of his application for a critical skills visa, as rejected by him on 6 October 2015, in the light of this judgment and to make a decision in the appeal within 15 days of the date of this Order.

(v) Second respondent shall be liable for applicants' costs of suit, including the costs of two counsel where so employed.

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SHER AJ

Appearances:

For the applicants: Mr A Katz SC (assisted by Mr A Brink)
Instructed by: Kassel Sklaar Cohen Attorneys, Cape Town

For the respondents: Mr W Mokhari SC (assisted by Messrs A Nacerodien and M Nyathi)
Instructed by: The State Attorney, Cape Town