

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA  
JUDGMENT**

**Reportable**

Case No: 821/2022

In the matter between:

**A[...] I[...]**

**FIRST APPELLANT**

**A[...] N[...]**

**SECOND APPELLANT**

and

**DIRECTOR OF ASYLUM SEEKER**

**MANAGEMENT: DEPARTMENT**

**OF HOME AFFAIRS**

**FIRST RESPONDENT**

**CAPE TOWN REFUGEE RECEPTION**

**OFFICE MANAGER**

**SECOND RESPONDENT**

**MINISTER OF HOME AFFAIRS**

**THIRD RESPONDENT**

**DIRECTOR-GENERAL OF THE**

**DEPARTMENT OF HOME AFFAIRS**

**FOURTH RESPONDENT**

**CHAIRPERSON OF THE STANDING**

**COMMITTEE FOR REFUGEE AFFAIRS**

**FIFTH RESPONDENT**

**SCALABRINI CENTRE OF CAPE TOWN**

***AMICUS CURIAE***



**Neutral citation:** *I[...] and Another v Director of Asylum Seeker Management: Department of Home Affairs and Others (with Scalabrini Centre of Cape Town intervening as Amicus Curiae)* (821/2022) [2024] ZASCA 87 (5 June 2024)

**Coram:** ZONDI, MAKGOKA and MOLEFE JJA, and KATHREE-SETILOANE and UNTERHALTER AJJA

**Heard:** 7 September 2023

**Delivered:** This judgment was handed down electronically by circulation to the parties' representatives by email; publication on the Supreme Court of Appeal website; and release to SAFLII. The time and date for hand-down is deemed to be 11h00 on the 5th day of June 2024.

**Summary:** Immigration – Refugee Act 130 of 1998 – whether asylum seeker entitled to submit subsequent applications after initial application has been declined.

The 1951 United Nations Relating to the Status of Refugees Convention – The 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa.

*Sur place* refugee claims – nature of – basis for such claims – principle of non-refoulement.

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## ORDER

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Slingers J, sitting as a court of first instance):

1 The appeal is upheld with costs.

2 Paragraphs (iv) and (v) of the order of the high court are set aside and replaced with the following:

‘(iv) The first and second respondents are directed to accept the applicants’ *sur-place* refugee claims applications, within five working days of the granting of this order, and to determine such applications within 21 working days thereafter.

(v) The first and second respondents are ordered to pay the costs of the application, jointly and severally.’

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## JUDGMENT

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**Makgoka JA (Zondi and Molefe JJA, and Kathree-Setiloane and Unterhalter AJJA concurring):**

[1] This case implicates two interrelated concepts of international law. The first is the customary international law principle of non-refoulement, in terms of which a person fleeing persecution should not be made to return to the country inflicting it. The second is refugee status *sur place*, which entails that a person enters the country of refuge on one basis, and thereafter, supervening events in their country of origin render them refugees.

[2] The appellants appeal against the judgment and order of the Western Cape Division of the High Court, Cape Town (the high court). That court dismissed the first and second appellants’ application to compel the first and

second respondents to accept their asylum seeker re-applications. The appeal is with the leave of the high court.

### **The parties**

[3] The appellants are Burundian nationals. They seek to submit further asylum applications in South Africa after their initial applications were unsuccessful. The first respondent is the Director of Asylum Seeker Management in the Department of Home Affairs (the Director). The Director had determined that the appellants may not again apply for asylum in South Africa without returning to their country of origin.

[4] The second respondent is the Cape Town Refugee Reception Office Manager, who manages the Cape Town Refugee Reception Office (the CTRRO). The second respondent oversees the work of the Refugee Status Determination Officers (RSDOs), based at the CTRRO. The second respondent is, in practice, the manager responsible for issuing and renewing asylum seeker permits at the CTRRO. The third respondent is the Minister of Home Affairs (the Minister), a Member of the National Executive responsible for the administration of the Refugees Act.<sup>1</sup>

[5] The fourth respondent is the Director General of the Department. He is responsible for the implementation and administration of the Refugees Act and the Refugee Regulations.<sup>2</sup> The fifth respondent is the Chairperson of the Standing Committee for Refugee Affairs (the SCRA). He is responsible for, among other things, reviewing decisions by RSDOs. The SCRA is the body which made the final decisions on the previous applications made by the appellants for asylum in South Africa. No direct relief was sought against the

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<sup>1</sup> Refugees Act 130 of 1998.

<sup>2</sup> Published in Government Notice R366 in Government Gazette 21075 of 6 April 2000.

SCRA, and it is cited to the extent that it may have interest in this matter. It is convenient to refer to the first to fifth respondents, collectively as ‘the Department’.

[6] Scalabrini Centre of Cape Town (Scalabrini) sought to intervene as *amicus curiae*. To establish its interest in the matter, Scalabrini asserted the following. It is a registered non-profit organisation with a strong track record in protecting migrant and refugee rights through its advocacy work and involvement in public interest litigation on refugee rights. It has been involved in litigation in this Court and the Constitutional Court.<sup>3</sup>

[7] The basis on which a party may be admitted as an *amicus* to a case is well settled. In *Certain Amicus Curiae Applications*<sup>4</sup> the Constitutional Court laid down the following guidelines: (a) the role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn; (b) an *amicus* has a special duty to the Court to provide cogent and helpful submissions that assist the Court; (c) an *amicus* must not repeat arguments already made but must raise new contentions; and (d) generally these new contentions must be raised on the data already before the Court.

[8] In the present matter, the Presiding Judge was satisfied that Scalabrini’s intended submissions satisfied all of the above guidelines. He accordingly admitted it as *amicus curiae* in the case and allowed it to file heads of argument

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<sup>3</sup> *Scalabrini Centre of Cape Town and Others v Minister of Home Affairs and Others* [2017] ZASCA 126; [2017] 4 All SA 686 (SCA); 2018 (4) SA 125 (SCA); *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* [2023] ZACC 45; 2024 (4) BCLR 592 (CC).

<sup>4</sup> *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) para 5. See also *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* [2012] ZACC 25; 2013 (2) SA 620 (CC); 2013 (1) BCLR 1 (CC) para 26.

and to make oral submissions. Scalabrini's late filing of its application to intervene was also condoned.

### **The issue for determination**

[9] The issue in the appeal is whether a person whose application for refuge has been declined is entitled to submit further applications, and if so entitled: (a) the circumstances under which such applications may be submitted; and (b) the factors to be taken into account when considering such applications. To answer these questions, I consider: (a) the relevant international instruments foundational to refugee law; (b) our domestic refugee legislation; and (c) some foreign law. I will consider the merits of the appeal within that framework.

### **The applicable international and regional instruments**

[10] Refugees are guaranteed legal protection in South Africa under international treaties and domestic legislation. The 1951 United Nations Relating to the Status of Refugees Convention (the UN Convention) and its 1967 Refugee Protocol, as well as the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention)<sup>5</sup>, are key treaties. South Africa has acceded to both treaties.

[11] Article 1A(1) of the UN Convention read with Article 1A(2) of the Protocol and Article 1 of the OAU Convention define a refugee as: any person who is outside their country of origin and is unable or unwilling to return or avail themselves of its protection, owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership in a social group, or political opinion.

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<sup>5</sup> Organization of African Unity (OAU) *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 U.N.T.S 45.

[12] Thus, the protection afforded in the UN Convention requires a person's fear of persecution to be based on one of the five enumerated grounds, namely race, religion, nationality, membership in a particular social group and political opinion. On the other hand, the OAU Convention recognises that in addition to the UN Convention grounds, refugee status may arise due to other factors. Its definition specifically protects refugees experiencing armed conflict in war-torn countries. It provides:

'The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.'

### ***The principle of non-refoulement***

[13] Both the UN Convention and the OAU Convention contain the well-known protection against refoulement. Article 33(1) of the UN Convention provides as follows:

'No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'

Clause 3 of Article II of the OAU Convention provides:

'No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened...'

[14] Article 33(1) of the UN Convention and Clause 3 of Article II of the OAU Convention find expression in s 2 of the Refugees Act, which reads as follows:

'Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be



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

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.’

### ***Sur place refugee claims***

[15] The concept of refugee *sur place* is expressly recognised by the United Nations High Commissioner for Refugees (UNHCR), the body responsible for overseeing the implementation of the UN Convention. In its Handbook on Procedure and Criteria for Determining Refugee Status,<sup>6</sup> (the UNHCR Handbook) it explains the concept and gives guidelines for determining whether a person is a refugee *sur place*. It provides as follows:

‘A person who was not a refugee when he left his country, but who becomes a refugee at a later date, is called a refugee ‘*sur place*’.

A person becomes a refugee “*sur place*” due to circumstances arising in his country of origin during his absence. Diplomats and other officials serving abroad, prisoners of war, students, migrant workers and others have applied for refugee status during their residence abroad and have been recognized as refugees.

A person may become a refugee “*sur place*” as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful exA[...]tion of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person’s country of origin and how they are likely to be viewed by those authorities.’<sup>7</sup>

[16] Thus, the UNHCR Handbook recognises two categories of refugees: first, those who fear returning to their countries due to *circumstances arising in*

<sup>6</sup> UNHCR Handbook and Guidelines on Procedure and Criteria for Determining Refugee Status, re-issued February 2019.

<sup>7</sup> Ibid paras 94-96.

*their country of origin* during their absence; and second, those who fear returning to their countries due to their *own actions* while residing in a host country. Regarding the latter category, for example, the UNHCR Guidelines on International Protection No. 9, identifies members of the LGBTI+ community who do not express their sexual orientation in their country of origin due to fear of persecution, but do so in another country. They would be entitled to make a *sur place* claim.

### **Domestic legislation**

[17] To give effect to the relevant international legal instruments, principles and standards relating to refugees, South Africa enacted the Refugees Act. Its long title says that it is enacted ‘to provide for 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 . . .’.

[18] Section 2 provides that no person may be refused entry into the Republic, expelled, extradited or returned to any other country, if as a result thereof, they will be forced to return to a country where they may suffer persecution on account of one of the reasons stated in the UN Convention, or their life, physical safety or freedom would be threatened.

[19] The grounds upon which an asylum seeker may apply for asylum in South Africa is set out in s 3 of the Refugees Act, which reads as follows:

‘Subject to Chapter 3, a person qualifies for refugee status for the purpose of this Act if that person-

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

country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

- (b) owing to external aggression, occupation, foreign domination or other events seriously disturbing public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country of origin or nationality; or
- (c) is a spouse or dependent of a person contemplated in paragraph (a) or (b).’

[20] The following observations are worth noting about the grounds in (a) and (b): (a) is modelled on the UN Convention, while (b) is based on the expanded definition of a ‘refugee’ in the OAU Convention, which definition, as mentioned, specifically protects refugees experiencing armed conflict from war-torn countries.

[21] The asylum application process commences when an asylum seeker reports to a Refugee Reception Office under s 21(1)(a) of the Refugees Act. This application must be made in person within five days of entry into the Republic. Such a person must be assisted by an officer designated to receive asylum seekers. In terms of s 21(1)(b) an asylum application must be made in person as per the prescribed procedures to a Refugee Status Determination Officer (the RSDO) at any Refugee Reception Office or any other place designated by the Director-General by notice in the Gazette. Upon considering the application, the RSDO must, in terms of s 24(3), make one of the following decisions:

- (a) grant asylum;
- (b) reject the application as manifestly unfounded, abusive or fraudulent; or
- (c) reject the application as unfounded.

A ‘manifestly unfounded application’, means an asylum application made on grounds other than those contemplated in section 3’, and an ‘unfounded application, in relation to an application for asylum in terms of section 21,

means an application made on the grounds contemplated in section 3, but which is without merit'.<sup>8</sup>

[22] In terms of s 24(3), the decision of the RSDO to grant asylum or to reject asylum is 'subject to monitoring and supervision', whereas the decision to reject the application as manifestly unfounded, abusive or fraudulent, is subject to review by a designated member of the Standing Committee. If an application is rejected as either being manifestly unfounded, abusive or fraudulent in terms of s 24(3)(b) or being unfounded in terms of s 24(3)(c), the RSDO is enjoined to: (a) furnish the applicant with written reasons within five working days after the date of the rejection; and (b) inform the applicant of his or her right to appeal in terms of s 24B.<sup>9</sup>

[23] As to how the asylum seeker is to be dealt with once their application is rejected, depends on the reason for the rejection. In terms of s 24(5)(a), if the reason for the rejection is that the application is manifestly unfounded, abusive or fraudulent, and such a decision is confirmed by the Standing Committee in terms of s 24A(2), then the asylum seeker 'must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act'. On the other hand, if the reason for the decision is that the application unfounded, the asylum seeker must, in terms of section 24(5)(b), 'be dealt with in terms of the Immigration Act, unless he or she lodges an appeal in terms of section 24B(1)'.<sup>9</sup>

[24] Section 24A(1) provides for the review by the Standing Committee of any decision taken by the RSDO to reject an application as being manifestly unfounded, abusive or fraudulent. The Standing Committee may also act in terms of s 9C(1)(c) in respect of any decision taken to grant or reject an asylum

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<sup>8</sup> Section 1 of the Refugees Act.

<sup>9</sup> Section 24(4) of the Refugees Act.

application.<sup>10</sup> In terms of s 24A(3) the Standing Committee may, after having determined a review, confirm, set aside or substitute any decision taken by RSDO that the application is, in terms of s 24(3)(b), manifestly unfounded, abusive or fraudulent. The asylum seeker must be informed of the Standing Committee's decision within five working days of such decision, 'whereafter the Standing Committee is *functus officio*'.<sup>11</sup>

[25] In terms of s 24B appeals against the decisions of the Standing Committee lie with the Refugee Appeals Authority (the Appeals Authority), which may set aside or substitute any decision taken by the RSDO that, in terms of s 24(3)(c), the application is unfounded. In terms of s 24B(5), if new information, which is material to the application, is presented during the appeal, the Appeals Authority is obliged to refer the matter back to the RSDO to deal with that asylum seeker in terms of the Refugees Act.

### **Jurisprudence on *sur place* claims**

[26] South Africa has not yet developed a significant jurisprudence on *sur place* refugee claims. In *Ruta v Minister of Home Affairs*,<sup>12</sup> the Constitutional Court made a passing reference to the issue. This is understandable, as the dispute there centered around two issues, namely: (a) the effect of delay on entitlement to apply for refugee status; and (b) the operation of the exclusionary provisions of the Refugees Act, particularly s 4(1)(b). As far as we could establish, this is the first case in this Court in which a *sur place* claim was directly asserted. Although we are not called upon to determine the merits of the appellants' claim that they qualify as *sur place* refugees, it is important to give some guidance as to how such claims should be considered.

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<sup>10</sup> In terms of s 9C(1)(c) the Standing Committee may monitor and supervise all decisions taken by Refugee Status Determination Officers and may approve, disapprove or refer any such decision back to the Refugee Reception Office with recommendations as to how the matter must be dealt with.

<sup>11</sup> Section 24A(4).

<sup>12</sup> *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC).

[27] Given the absence of authority on this issue in our jurisprudence, it is useful to look to foreign law, as permitted by s 39(1)(c) of the Constitution. I do so bearing in mind what the Constitutional Court said in *H v Fetal Assessment Centre*<sup>13</sup> about the utility of foreign law and how it should be approached. The Court explained:

‘Foreign law has been used by this Court both in the interpretation of legislation and in the development of the common law. Without attempting to be comprehensive, its use may be summarised thus:

- (a) Foreign law is a useful aid in approaching constitutional problems in South African jurisprudence. South African courts may, but are under no obligation to, have regard to it.
- (b) In having regard to foreign law, courts must be cognisant both of the historical context out of which our Constitution was born and our present social, political and economic context.
- (c) The similarities and differences between the constitutional dispensation in other jurisdictions and our Constitution must be evaluated. Jurisprudence from countries not under a system of constitutional supremacy and jurisdictions with very different constitutions will not be as valuable as the jurisprudence of countries founded on a system of constitutional supremacy and with a constitution similar to ours.
- (d) Any doctrines, precedents and arguments in the foreign jurisprudence must be viewed through the prism of the Bill of Rights and our constitutional values.’

[28] With these guidelines in mind, I consider the jurisprudence of two comparable common law jurisdictions – the United Kingdom (the UK) and Canada, as to the treatment of *sur place* refugee claims. Hopefully, this will serve as a basis for developing and shaping our jurisprudence on *sur place* refugee claims. Axiomatically, our jurisprudence will be informed by our constitutional values; our national legislation (the Refugees Act); the OAU’s expanded definition of a ‘refugee’; and the injunction of s 233 of the Constitution which commands us to give an interpretation of the Refugees Act

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<sup>13</sup> *H v Fetal Assessment Centre* [2014] ZACC 34; 2015 (2) BCLR 127 (CC); 2015 (2) SA 193 (CC) para 31.

‘that is consistent with international law over any alternative interpretation that is inconsistent with international law’.

[29] In the UK, the relevant legislation is the Asylum and Immigration Appeals Act 1993. In Canada, the applicable legislation is the Immigration and Refugee Protection Act.<sup>14</sup> Although there may be different conceptual bases between these and our Refugees Act, the UK and Canadian legislations, like ours, are premised on articles 1 and 33 of the UN Convention, which, respectively, set out the definition of ‘refugee’, and contain the well-known protection against refoulement. Thus, the basic premise of these articles is the protection of persons with well-founded fears of persecution.

[30] I consider, in turn, five aspects which I deem relevant to the present case, namely: (a) the effect of bad faith and/or fraud in applications for refuge; (b) countries in a state of war; (c) whether a claimant will be specifically affected by events in their home country; (d) whether the risk of persecution is personalized or generalized; (e) change of government in the claimant’s country of origin.

#### *Bad faith and/or fraud*

[31] In the UK, the leading case is *Danian v Secretary of State for the Home Department*.<sup>15</sup> There, the Court of Appeal concluded that the fact that a refugee *sur place* had acted in bad faith should not on its own exclude him or her from the protection of the UN Convention. Such a person should not be deported to their home country if their fear of persecution is genuine and well-founded for a Convention reason, and there is a real risk that such persecution may take place. Although such an applicant’s credibility is likely to be low and the claim must

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<sup>14</sup> Immigration and Refugee Protection Act (SC 2001, c 27).

<sup>15</sup> *Danian v Secretary of State for the Home Department* [1999] EWCA Civ 3000; [2000] Imm AR 96, [1999] INLR 533 (*Danian*).

be rigorously scrutinised, they are still entitled to the protection of the Convention if a well-founded fear of persecution is accepted.

[32] In that case, a Nigerian national had been given leave to live in the UK as a student in 1985. In 1990 he was convicted of a criminal offence for working in breach of the conditions of his leave to remain in the UK as a student. Following his conviction, a deportation order was issued against him. Resisting his deportation, he applied for asylum on two grounds: first, that he had suffered discrimination and ill-treatment in Nigeria; and second, that political activities that he had undertaken in the UK on behalf of the pro-democracy movement would place him at risk was he to be deported to Nigeria. The Immigration Appeal Tribunal (the Tribunal) found that his political activity before 1995 would not have come to the attention of the Nigerian authorities, and his political activities after 1995 were motivated by a desire to tailor a false asylum claim. It further held that a refugee *sur place* who has acted in bad faith to create a risk of persecution is not entitled to the protection of the UN Convention.

[33] The Court of Appeal disagreed with the Tribunal's reasoning, and set aside the decision of the Tribunal. Lord Justice Brooke, who gave the leading opinion, reasoned:

'I do not accept the Tribunal's conclusion that a refugee *sur place* who has acted in bad faith falls out with the Geneva Convention and can be deported to his home country notwithstanding that he has a genuine and well-founded fear of persecution for a Convention reason and there is a real risk that such persecution may take place. Although his credibility is likely to be low and his claim must be rigorously scrutinised, he is still entitled to the protection of the Convention, and this country is not entitled to disregard the provisions of the Convention by which it is bound, if it should turn out that he does indeed qualify for protection against refoulement at the time his application is considered.'<sup>16</sup>

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<sup>16</sup> *Danian* fn 37.



[34] The court also referred with approval to *Mbanza*<sup>17</sup> in which it was said: ‘If, therefore, despite having made such a claim and having had it rejected he can nevertheless at any time thereafter and on whatever basis satisfy the authorities that he has a well-founded fear of persecution for a Convention reason if he is returned to the country of his nationality, it would be a breach of the United Kingdom's international obligations under the Convention to return him to face possible death or loss of freedom.’

[35] The issue in *M v Secretary of State*<sup>18</sup> was whether a person whose claim for asylum is fraudulent could nevertheless benefit from the terms of the UN Convention. In his asylum application, the appellant had made false claims about his arrest, imprisonment and escape from Zaire.<sup>19</sup> His asylum application was refused based on these falsehoods. The applicant appealed to the Tribunal, contending that he was at risk of persecution if he returned to Zaire because he had made an asylum claim. The Tribunal dismissed the appeal because: (a) a person who put forward a fraudulent and baseless claim for asylum could not bring himself within the convention and (b) in any event, the evidence was insufficient to show that there was a reasonable likelihood that the appellant would be persecuted, as required by the UN Convention.

[36] The Court of Appeal held that the making of a false asylum claim could not act as a total barrier to reconsideration of an applicant's status as a potential refugee, since it was possible that, by the very act of claiming asylum, an applicant could put himself at risk of persecution. However, where an application is rejected on the basis that it was based on fraudulent facts, this would affect the claimant's credibility. He would likely find it extremely

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<sup>17</sup> *Mbanza* [1996] Imm AR 136; [1995] EWCA Civ 44.

<sup>18</sup> *M v Secretary of State for the Home Department* [1996] 1 All ER 870, [1996] 1 WLR 507, United Kingdom: Court of Appeal (England and Wales), 24 October 1995, available at:

<https://www.refworld.org/jurisprudence/caselaw/gbr/caciv/1995/en/15975> [accessed 08 May 2024].

<sup>19</sup> Now Democratic Republic of Congo.

difficult to demonstrate to the required standard a genuine subjective fear of persecution within article 1A(2)a of the UN Convention.

[37] In Canada, the position is also that there is no ‘good faith’ requirement in making a *sur place* claim. A decision-maker should not reject a *sur place* claim solely on the basis that the claimant was acting for an improper motive without examining the potential risk to the claimant upon return to their country of origin.<sup>20</sup> Professor Hathaway sums up the effect of lack of good faith in *sur place* refugees claims as follows:

‘It does not follow, however, that all persons whose activities abroad are not genuinely demonstrative of oppositional political opinion are outside the refugee definition. Even when it is evident that the voluntary statement or action was fraudulent in that it was prompted primarily by an intention to secure asylum, the consequential imputation to the claimant of a negative political opinion by authorities in her home state may nonetheless bring her within the scope of the Convention definition. Since refugee law is fundamentally concerned with the provision of protection against unconscionable state action, an assessment should be made of any potential harm to be faced upon return because of the fact of the non-genuine political activity engaged in while abroad.’<sup>21</sup>

[38] In *Ghasemian*<sup>22</sup> the court followed the reasoning of the English Court of Appeal in *Danian* and held that opportunistic claimants are still protected under the UN Convention if they can establish a genuine and well-founded fear of persecution for a Convention ground. There, an Iranian Muslim national had asserted *sur place* refugee status on the basis that she had converted to Christianity while in Canada. On that basis, she said, she would be persecuted were she to return to Iran. The decision-maker rejected her application on the basis that her conversion to Christianity was not genuine, but a ruse for her to

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<sup>20</sup> See, for example, *Ngongo, Ndjadi Denis v M.C.I.* (F.C.T.D., no. IMM-6717-98), Tremblay-Lamer, October 25, 1999.

<sup>21</sup> J C Hathaway *The Law of Refugee Status* 4 ed (1991) at 39.

<sup>22</sup> *Ghasemian, Marjan v M.C.I.* (F.C., no. IMM-5462-02), Gauthier, October 30, 2003; 2003 FC 1266. See also, *Ding v Canada (Citizenship and Immigration)* 2014 FC 820; *Yang v Canada (Citizenship and Immigration)* 2012 FC 849.

remain in Canada. Thus, the basis of her application (her conversion) was not made in good faith.

[39] The court held that while it was open to the decision-maker to reject her *sur place* claim based on a lack of subjective fear, the decision-maker misconstrued her evidence regarding her alleged lack of fear of reprisals and applied the wrong test by rejecting her claim on the basis that it was not made in good faith, i.e., she did not convert for a purely religious motive.

#### *Countries in a state of war or political upheaval*

[40] In *R v Secretary of State ex p Adan*<sup>23</sup> the UK House of Lords considered the distinction between persecution and the ordinary incidents of civil war. It held that where a country is in a state of civil war, it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare. The matter concerned a Somalian national who had fled Somaliland because of civil war in his country. The court found that all sections of society in northern Somalia were equally at risk so long as the civil war continues. There was no ground for differentiating between the claimant and the members of his own or any other clan. Accordingly, it held that the claimant was not entitled to refugee status.

#### *Whether a claimant will be specifically affected by events in their home country*

[41] Where a claimant will be not specifically affected by events in their home country, and will be affected to the same degree as all citizens of their country, a *sur place* claim would ordinarily fail. In *Zaied v Canada (Citizenship and Immigration)*<sup>24</sup> the applicants based their *sur place* claim on the insecurity and

<sup>23</sup> *Adan, R (on the application of) v Secretary of State for Department* [1999] EWCA Civ 1948, [1999] 4 All ER 774, [1999] COD 480, [1999] 3 WLR 1274, [1999] Imm AR 521, [1999] INLR 362.

<sup>24</sup> *Zaied v Canada (Citizenship and Immigration)* 2012 FC 771.

major upheaval in his country of origin, Tunisia, which occurred after the claimants had left country. They had obtained a six months' visa in Canada in September 2008, which was extended for a further six months. In March 2010 the applicants applied for asylum as *sur place* refugees alleging possible religious persecution in Tunisia as minority Shi'ite Muslims in a predominantly Sunni country, which was refused by the Refugee Protection Division (the RPD).

[42] On review, the Federal Court found that it was reasonable for the panel to draw negative inferences from, *inter alia*, the fact that: (a) the applicants did not provide clear explanations to the panel's questions about their persecutors; (b) the applicants made a claim for refugee protection following a two-year stay in Canada and following two visa extensions; and (c) the applicants' responses indicated that they wished to remain in Canada for economic and family reasons.

[43] Concerning the *sur place* refugee claim, the court concluded thus: the evidence of what could happen to the applicants if they were to return to Tunisia was speculative. It did not demonstrate how their situation differed from those of other Shi'ite Muslims in Tunisia. It was therefore reasonable to conclude that there was no connection between that situation and the applicants' claim for refugee protection in that they were affected to the same degree as all Tunisians. The applicants were not specifically affected by the events arising from the revolution. They would therefore face the same fate as the rest of the Tunisian population.

*Whether the risk of persecution is personalized or generalized*

[44] In *Prophète v Canada*<sup>25</sup> a national of Haiti claimed to have been the target of gang violence on multiple occasions, in the form of vandalism, extortion, and threats of kidnapping. He alleged that he was targeted because he was a known businessman, and perceived to be wealthy. His application for asylum in Canada was rejected by the Refugee Protection Division of the Immigration and Refugee Board on two grounds: (a) his fear of persecution had no nexus with any of the five grounds contained in the definition of Convention refugee; (b) he failed to demonstrate that he would be subject to danger or to a risk to his life or cruel or unusual treatment owing to his personal circumstances or those of similarly situated individuals.

[45] On review of the Board's decision, Justice Tremblay-Lamer pointed out the difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states. She addressed the second of the two conjunctive elements contemplated by paragraph 97(1)(b)(ii), in circumstances in which the first of those elements (personal risk) had been established. She determined that s 97(1) can be interpreted to include a sub-group within the larger one that faces an even more acute risk. She explained:

“The difficulty lies in determining the dividing line between a risk that is “personalized” and one that is “general”. Under these circumstances, the Court may be faced with applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.”<sup>26</sup>

[46] After a survey of the jurisprudence of the Federal Court, the court concluded that the applicant did not face a personalized risk that is not faced generally by other individuals in or from Haiti. The risk of all forms of criminality was general and felt by all Haitians. While a specific number of individuals may

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<sup>25</sup> *Prophète v Canada (Minister of Citizenship and Immigration)* 2008 FC 331.

<sup>26</sup> *Ibid* para 18.

be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence. Consequently, the application for judicial review of the Immigration and Refugee Board decision was dismissed.

[47] Subsequently, in *Baires Sanchez v Canada (Citizenship and Immigration)*,<sup>27</sup> the Federal Court narrowed the test further. It held that in order to show that a risk is not generalized, applicants must establish that the risk of actual or threatened similar violence is not faced generally by other individuals in or from that country, and that applicants must demonstrate that the respective risks that they face are not prevalent or widespread in their respective countries of origin, in the sense of being a risk faced by a significant subset of the population. This case also concerned apprehension of risk at the hands of gangsters, this time in El Salvador. The court concluded that the gang violence (including murder), was a risk faced widely by people in El Salvador.<sup>28</sup>

[48] In *Portillo v Canada*<sup>29</sup> the Federal Court developed a two-step test for determining whether the risk is generalized or personalized. First, the RPD must determine the nature of the risk faced by the claimant under the following subsets: (a) an assessment of whether the claimant faces an ongoing or future risk; (b) what that risk is; (c) whether it is one of cruel and unusual treatment or punishment and; and (d) the basis for the risk. Secondly, the correctly described risk faced by the claimant must then be compared to that faced by a significant group in the country at issue. This is to determine whether the risks are of the same nature and degree. In this enquiry, it will typically be the case that where an individual is subject to a personal risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general.<sup>30</sup>

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<sup>27</sup> *Baires Sanchez v Canada (Citizenship and Immigration)* 2011 FC 993.

<sup>28</sup> *Ibid* para 23.

<sup>29</sup> *Portillo v Canada (Citizenship and Immigration)* 2012 FC 678.

<sup>30</sup> *Ibid* paras 40 and 41.

### *Change of government*

[49] Where there has been a change of government in the claimant's country of origin, and it is asserted this had eliminated the cause of fear of prosecution, Canadian courts have held that in such cases, the evidence must be subjected to a detailed analysis to determine whether the change is significant enough to eliminate the claimant's fear of persecution.<sup>31</sup> The decision-maker must consider the objective basis of the claimant's fear of persecution, the alleged agents of persecution and the form or nature of the persecution feared.

[50] This evaluation must relate to the particular circumstances of the claimant and the decision-maker should provide a clear indication or explanation for its finding.<sup>32</sup> It should not rely on or give much weight to changes that are short-lived, transitory, inchoate, tentative, inconsequential or otherwise ineffective in substance or implementation.<sup>33</sup> The changes which are being relied on as removing the reasons for the claimant's fear of persecution are not to be assessed in the abstract but for their impact on the claimant's particular situation.<sup>34</sup> The decision-maker must consider the quality of the institutions of the democratic government.<sup>35</sup>

## **The appellants' appeal**

### *Factual background*

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<sup>31</sup> *Ahmed v Canada (Minister of Employment and Immigration)* (1993), 156 N.R. 221 (F.C.A.), at 223- 224.

<sup>32</sup> *Mohamed, Mohamed Yasin v. M.E.I.* (F.C.T.D., no. A-1517-92), Denault, December 16, 1993 para 4.

<sup>33</sup> In this regard, in its Discussion Paper (2021) Chapter 7, the Immigration and Refugee Board of Canada has made a useful collation of cases in which the issue is discussed.

<sup>34</sup> *Alfaro v Canada (Citizenship and Immigration)* 2011 FC 912 para 16.

<sup>35</sup> *Soe v Canada (Public Safety and Emergency Preparedness)* 2018 FC 1201.

[51] It is now convenient to turn to the present appeal. As mentioned, both appellants are Burundian nationals. The first appellant entered the country illegally in May 2008 and applied for asylum in September 2009. She stated in her application for asylum that her parents died a long time ago and that she wished to work and study in South Africa. The second appellant entered the country illegally in May 2009 and applied for asylum in August 2009. She also stated that she wished to study, work and have access to medical facilities in South Africa. According to her application form, she informed the RSDO that she wished to return to Burundi and that nothing would happen to her if she did.

[52] The appellants' applications were rejected by the RSDO as being manifestly unfounded in terms of terms of s 24(3)(b) of the Refugees Act. The refusal of the applicants' asylum applications was automatically reviewed by the Standing Committee which confirmed the finding of the RSDO in February and December 2014, respectively. Thereafter, they were both informed in writing that, in terms of the Immigration Act,<sup>36</sup> they were illegal foreigners, and had to leave the country within 30 days of receipt of the notice.

[53] The appellants neither left the country nor appealed against the decisions of the Standing Committee. By virtue of not challenging the rejection of their initial applications, it must be accepted that the appellants' reasons for leaving Burundi were those advanced in their initial applications. The upshot is that the appellants did not flee Burundi because of any persecution, nor did they have a well-founded fear of persecution upon their arrival in South Africa. On their version, their alleged fear of persecution only arose in 2015, when, according to them, the political situation in Burundi changed for the worse.

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<sup>36</sup> Immigration Act 13 of 2002.



[54] On 3 August 2018, after over four years of inactivity on the appellants' part, an attorney on behalf of the appellants, wrote a letter to the Manager of the Cape Town Refugee Reception Office, and stated that the appellants accepted that their asylum applications had been finally rejected. The appellants averred that, after the rejection of their applications, circumstances changed in Burundi. Widespread political violence broke out, following which, thousands of Burundians fled the country. Those who remained were subjected to oppression, torture, rape, and sexual violence. The applicants said that it was therefore not safe for them to return to Burundi, as this would place them at risk of persecution or serious threat to their lives, safety and/or physical freedom. For these reasons, they considered themselves to be *sur place* refugees, and made new applications for asylum as such.

[55] The appellants did not explain the nearly four years of inactivity on their part since being informed of the decisions to decline their applications. Be that as it may, the appellants were subsequently interviewed in September 2018. Nothing was heard from the Department after the interviews, and after an enquiry by the appellants, an official of the Department stated that their case was 'closed'. On 25 October 2018 the official wrote to the appellants' attorney as follows:

'A failed asylum seeker who has not departed the Republic after he/she was rejected must be deported, that's my instruction to the Officials and I am [a]waiting their update. Those who return from their countries and wish to apply, they are free to apply at any Refugee Centre accepting newcomers.'

### **In the high court**

[56] The stance by the Department triggered an application by the appellants in the high court on 29 November 2018. The appellants sought an order directing the Department to accept their asylum seeker applications based on their *sur place* refugee claims within five days of the order. In their founding affidavit, the appellants advanced substantially different reasons for leaving Burundi to seek asylum in South Africa, to those they furnished in their unsuccessful asylum applications. This time they alleged that they left Burundi because of persecution at the hands of members of rebel soldiers. Both alleged that they were abducted and raped, and their family members killed. As a result, they suffered trauma and loss in Burundi, which led them to flee to South Africa to seek asylum. The appellants attributed this to misunderstanding between them and immigration officials, due to language barriers.

[57] The appellants alleged that in April 2015 – after their asylum applications had been rejected, the spiral of political violence in Burundi worsened due to then-President Nkurunziza’s announcement that he would seek a third term in office. This led to mass oppression, torture, sexual violence, illegal arrests, and killings. These political developments, they asserted, placed them at risk of harm if they were to return to Burundi, as demanded by the Department and would violate the principle of non-refoulement. Thus, they were entitled to make new applications as *sur place* refugees.

[58] Accordingly, the appellants sought an order directing the Department to accept their new asylum applications under s 21 of the Refugees Act without requiring them to leave the country.

[59] In its answering affidavit, the Department accepted that foreigners who leave their countries of origin for reasons other than being refugees can become *sur place* refugees. In these circumstances, the Department accepted that a

foreigner can apply for asylum without departing South Africa. However, the Department did not accept that the appellants are *sur place* refugees. According to the Department, the circumstances upon which the appellants rely for their *sur place* refugee applications, existed in their country at the time of their departure. To contend that the circumstances worsened since then, did not render them *sur place* refugees. They were not refugees when they left Burundi, given the reasons originally furnished to the RSDO.

[60] According to the Department, when the asylum process is completed and an application is finally rejected, the Refugees Act does not contemplate that they may apply for asylum again. Such people must depart the Republic, and their continued presence in the Republic, until their departure, is regulated by the provisions of the Immigration Act.

#### *The judgment of the high court*

[61] The high court accepted the contention by the Department that an asylum seeker whose application has been unsuccessful should leave the country. It said that to allow for resubmission without the asylum seeker leaving the country would:

(a) result in a never-ending cycle of asylum applications, and thus undermine the public interests in finality of decisions. As soon as an asylum application is refused, the asylum seeker would simply re-submit a new application, thereby rendering him or her subject to the protections and general rights set out in s 27A of the Refugees Act. This, the high court reasoned, would render the asylum system nugatory, as the asylum seeker need only continuously apply for asylum to be granted the right to stay in the country in terms of s 27A(b).

(b) render s 24(5)(a) of the Refugees Act invalid because as soon as an application is finally determined, the asylum seeker need merely indicate an

intention to reapply for asylum to escape the provisions of s 24(5)(a) and avoid being dealt with in terms of the Immigration Act.

(c) render s 21(4) of the Refugees Act to be tautologous or superfluous.

[62] The high court emphasised the fact that the appellants' asylum applications had been finally determined as manifestly unfounded and they had accepted this decision. Thus, reasoned the court, the shield of non-refoulement had been lifted. The high court said that on the appellants' approach, the application of the Immigration Act could potentially be deferred indefinitely as an asylum seeker could always have an asylum application pending.

[63] Consequently, the high court concluded that there was no general obligation on the Department to accept a new application for asylum upon the refusal of an application that was found to be manifestly unfounded. The high court reasoned that the Refugees Act does not contemplate that a failed refugee application can be re-submitted. The court reasoned that an interpretation of the Refugees Act which allowed for such re-submission would defeat the purpose of the legislation and would result in a never-ending process. For all of these reasons, the high court dismissed the appellants' application. However, the high court subsequently granted the appellants leave to appeal to this Court against paragraphs (iv) and (v) of the high court's order.<sup>37</sup>

### **In this Court**

[64] Before us, the parties persisted with their respective positions adopted in the high court. The appellants do not request this Court to determine whether indeed they qualify as *sur place* refugees, and are thus entitled to asylum on that basis. All they seek is for an order directing the Department to consider their

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<sup>37</sup> Paragraphs (i), (ii) and (iii) concerned a third applicant in the high court, who is not before this Court.

applications. Thus, the merits of those claims need not be determined in this appeal.

[65] As mentioned, what is at issue is whether a person whose refugee application has been declined is entitled to submit subsequent applications. With reference to international instruments and comparative law, I have already established that there is no bar to subsequent claims, as long as there is a valid basis to do so.

[66] At the heart of refugee law is the principle of non-refoulement. In our domestic law, this finds expression in s 2 of the Refugees Act. It provides:

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

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.’

[67] The Constitutional Court pointed to the significance of this section as follows:

‘This is a remarkable provision. Perhaps it is unprecedented in the history of our country’s enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of non-refoulement, the concept that one fleeing persecution or threats to “his or her life, physical safety or freedom” should not be made to return to the country inflicting it.’<sup>38</sup>

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<sup>38</sup> *Ruta* para 24.

[68] The appellants and Scalabrini, on the one hand, emphasised the absolute nature of this principle of non-refoulement. The appellants submitted that having regard to the principle of non-refoulement, there was nothing in the Refugees Act that precluded an asylum seeker from submitting a second or further applications if there is a reason to do so. By ordering the appellants to leave the country and submit their subsequent applications while in their country of origin, the high court's order breached this principle.

[69] Scalabrini contended that the right does not fall away just because an adjudication process has declared that a person is not entitled to refugee protection under the Refugees Act. Thus, so went the submission, if a person is not granted refuge protection under the Refugees Act but factually meets the definition of being a refugee, such a person cannot be compelled to return to the country from which they fled. Compelling them to return to such a country would violate customary international law.

[70] Scalabrini centred its submissions on the existence of conflict as a *raison de'etre* for asylum systems in the first place. According to Scalabrini, for as long as conflict persists in its various manifestations, asylum seekers maintain the right to make subsequent applications. On the other hand, the respondents contended that the principle of non-refoulement applies once, and upon a final rejection, the protection is lifted.

[71] It is convenient to clarify the reach of the principle of non-refoulement. When it is said that the principle is absolute, it means this: the protection afforded by the principle endures for as long as an asylum seeker has not exhausted all available remedies, including internal appeals and judicial review. But once these processes are exhausted, and an asylum application is finally rejected, the protection falls away. For, it is implicit in that rejection that the

claimant does not meet the definition of a refugee. In other words, they do not have a well-founded fear of persecution for a Convention reason, as envisaged in article 1A(1) of the UN Convention.

[72] Under those circumstances, requiring them to return to the country from which they fled would not violate customary international law. As explained by the Constitutional Court in *Ruta*:

‘Until the right to seek asylum is afforded and a proper determination procedure is engaged and completed, the Constitution requires that the principle of non-refoulement as articulated in section 2 of the Refugees Act must prevail. The “shield of non-refoulement” may be lifted only after a proper determination has been completed. . .’<sup>39</sup>

[73] Also, as correctly observed by this Court in *Somali Association v Refugee Appeal Board and Others*<sup>40</sup> (*Somali Association*) ‘there is a legitimate State interest and concern to ensure that refugee status is granted only to those who qualify, to disqualify unfounded applications and to provide for the cessation of refugee status’. (Emphasis added.)

[74] The construction of the principle favoured by the appellants and Scalabrini is at odds with the above dicta. If their construction were correct, there would never be an end to a cycle of asylum applications. I do not think that the principle goes as far as to suggest that once an asylum seeker makes an application, he or she will never be returned to their country of origin, irrespective of the outcome of such an application or its final determination.

[75] This brings me to the Refugees Act, and the context in which the principle of non-refoulement should be construed. The legislation does not,

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<sup>39</sup> *Ruta* para 54.

<sup>40</sup> *Somali Association of South Africa and Others v Refugee Appeal Board and Others* [2021] ZASCA 124; [2021] 4 All SA 731 (SCA); 2022 (3) SA 166 (SCA) para 1.

without more, contemplate that applicants whose applications for asylum have been lawfully refused can remain in the country and simply re-submit their applications. A new application can only be brought based on substantially different or changed circumstances. An application brought on the same facts would likely constitute an abuse of the asylum system. Absent a new basis or new facts, a failed applicant for asylum is not entitled to make one application after another. There has to be finality to the processes.

[76] Therefore, the suggestion that one can without more, submit one application after the other when the previous one has been finally determined, is not what the Refugees Act contemplates. For such applicants, the period between the final rejection of their asylum and their departure, is regulated by the Immigration Act. Without any permit to remain in the country, such applicants are regarded as illegal foreigners as defined in the Immigration Act. Section 32 of the Immigration Act provides that ‘any illegal foreigner shall depart unless authorised by the Department to remain in the Republic’.

[77] Thus, a failed asylum applicant can only remain in the country on either of the following bases: (a) that the final determination of their asylum application is pending; (b) that he or she has authorisation by the Department to remain in the country; or (c) that there is some other lawful basis to remain in the country. This is the essence of the rule of law – a foundational value of our Constitution.

[78] Applied to the present case, one should bear in mind the following. The appellants have neither applied to review the decisions to reject their initial asylum applications nor do they have authorisation from the Department to remain in the country. Ordinarily, that rendered them illegal foreigners under the Immigration Act, as they had no legal basis to remain in the country.



[79] However, by asserting *sur place* claims, the appellants sought to remove themselves from the clutches of the Immigration Act and placed themselves back in the purview of the Refugees Act. The appellants alleged that after their asylum applications had been rejected, the situation in their country of origin became risky for them to return home. They said that this entitled them to submit subsequent applications for asylum without being obliged to leave the country. The high court was, correctly so, concerned that this amounted to an abuse of the system, especially that for four years since their applications were refused, the appellants did nothing about their situation. As mentioned, there is no explanation for this period, during which the applicants lived in the country without any lawful basis, thus rendering them illegal foreigners in terms of the Immigration Act. Having said that, it was not the high court's place to determine whether the appellants' *sur place* applications were genuine. That duty fell on the Department after having had regard to the merits of the application. This is where the high court erred.

[80] The basis for the new applications was, on the face of it, different from the initial one. This time, it was alleged that since the rejection of their initial applications, circumstances in their country of origin have changed for the worse, which exposed them to the risk of harm were they to return home. Hence, they claim to be *sur place* refugees. In the circumstances, the Department was obliged to consider the applications, investigate the grounds on which they are made, and decide whether there was merit in the applications. The Department was not entitled to simply refuse to consider the applications. Indeed, the high court recognised that there may well be circumstances that would allow an applicant to re-submit an application. However, it did not explain or explore what those circumstances might be.

## Conclusion

[81] Be that as it may, it was wrong of the Department to demand that the appellants leave the country and make such applications while in the country of origin. To be clear, once a refugee *sur place* claim is made, there is no basis to: (a) demand that an asylum seeker returns to their country of origin pending the determination of their application; or (b) reject the application on the basis that the initial one had been finally determined. The Canadian courts have held that once an applicant asserts a *sur place* claim before a decision-maker, it must be addressed. Failure to do so amounts to a reviewable error.<sup>41</sup> The claim must be addressed, even if it is raised late, even in post-hearing evidence.<sup>42</sup> In the same breath, the Department should have considered and determined the appellants' *sur place* claims. It follows that the failure to do so constituted a reviewable error.

[82] These conclusions must be understood to be subject to some cautionary observations. First, a *sur place* claim is not validly made by reformulating a claim that has already been finally determined. Second, a *sur place* claim must set out a proper evidential basis for the claim. What circumstances have changed, the evidence of that change, and their specific consequences for the applicant must be set out in the application. Absent this content, an application may be summarily rejected. Third, there is much scope for abuse, in which *sur place* claims are made, sometimes on a repeated basis, without proper foundation, to extend protections for lengthy periods of time. This should not be tolerated. And the Department should develop expedited procedures to bring to finality *sur place* claims that facially have no basis.

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<sup>41</sup> See for example, *Manzila v Canada (Minister of Citizenship and Immigration)* (1998) 165 FTR 313; [1998] FCJ 1364 paras 4 and 5; *Gebremichael v Canada (Minister of Citizenship and Immigration)* 2006 FC 547 para 52; *Hannoon v Canada (M.C.I.)* (2012), 408 F.T.R. 118 (FC).

<sup>42</sup> *Gurung, Subash v M.C.I.* 2013 FC 1042.

[83] The appeal must succeed. The decision of the Department should be set aside and remitted to the Department for it to consider the appellants' new applications. In doing so, the Department should, generally, be faithful to the injunction of this Court in *Somali Association*:

'In dealing with such applications, it must be emphasised, once again, that State authorities are required to ensure that constitutional values, including those that embrace international human rights standards set by international conventions and instruments in relation to those seeking asylum, adopted by South Africa are maintained and promoted.'<sup>43</sup>

[84] In particular, the Department should have regard to the principles discussed in this judgment, and principally, whether:

(a) there has been a deterioration in the political situation in Burundi since the appellants left that country, and whether such situation persists to the date of the inquiry. The Department will no doubt receive up-to-date evidence about the situation in Burundi before it reaches its decision on the appellants' applications and determine them based on the facts known at the date of the inquiry.

(b) If the answer to (a) above is in the affirmative, whether the appellants, as a result, have a well-founded fear of persecution were they to return to Burundi.

(c) If the answer to (c) above is in the affirmative, whether such fear of persecution is owed to:

(i) any of the five UN Convention grounds, ie race, nationality, membership of a particular social group or political opinion; or

(ii) events seriously disturbing public order in either part or the whole of Burundi as envisaged in the OAU Convention.

[85] Costs should follow the result. There should not be any costs order occasioned by the participation of the *amicus*.

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<sup>43</sup> *Somali Association* para 8.

**Order**

[86] The following order is made:

1 The appeal is upheld with costs.

2 Paragraphs (iv) and (v) of the order of the high court are set aside and replaced with the following:

‘(iv) The first and second respondents are directed to accept the applicants’ *sur-place* refugee claims applications, within five working days of the granting of this order, and to determine such applications within 21 working days thereafter.

(v) The first and second respondents are ordered to pay the costs of the application, jointly and severally.’

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**T MAKGOKA**  
**JUDGE OF APPEAL**

## APPEARANCES:

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