

<i>S A v Minister of Home Affairs and Another; S J v Minister of Home Affairs and Another; B I v Minister of Home Affairs and Another</i>			
Project code			
URL	https://lawlibrary.org.za/akn/za-gp/judgment/zagpjhc/2023/178/eng@2023-03-14		
Citations	[2023] ZAGPJHC 178 (14 March 2023)		
Country	South Africa		
Date of judgment	14 March 2023		
Court	High Court		
Location	Gauteng, Johannesburg		
Court jurisdiction	Appellate		
Status	Asylum seekers		
Nationality/ statelessness	Nationality	Identity documents	Stateless
	N/A	N/A	N/A
Reason for fleeing	N/A		
Migration corridor	Countries of origin	Country of transit	Country of destination
	N/A	N/A	South Africa
Return/Repatriation	N/A		
Keyword(s):	Asylum seeker, illegal foreigner, asylum, asylum transit visa, asylum permit, non-refoulement, detention, administrative detention, imprisonment		
Case type	Appeal		
Result	Upheld		
Flynote	<p>Protection of asylum seekers — the right to seek and enjoy asylum — application of the principle of non-refoulement during consideration of asylum claims.</p> <p>Illegal foreigners — immigration laws vs refugee protection laws — what triggers the application of the Refugee Act for illegal foreigners detained under section 34 of the Immigration Act? (an intention to apply for asylum vs a formal application for asylum) — lawfulness of detention under section 34 of the Immigration Act after the expression of intention to seek asylum by an illegal foreigner</p> <p>2020 amendments to the Refugee Act and its Regulations — interpretation of sections 4 and 21 of the Refugee Act and Regulations 8(3) and (4) of the Regulations — authority of the State to continue detaining illegal foreigners, under section 34 of the Immigration Act, when they indicate an intention to seek asylum — Regulations 8(3) and (4): is the entitlement to apply for asylum in cases of illegal</p>		

<p>Legislation and International Instruments</p>	<p>entry dependant upon good cause being shown?</p> <p>Legislation</p> <ul style="list-style-type: none"> • Section 34 of the Immigration Act 13 of 2002 • Sections 2, 4, 21, 21(1B), 22(1), 23, 29, 34 of the Refugees Act 130 of 1998 • Regulation 2(2) of the Refugees Regulations (Forms and Procedure) 2000 GN R.366 GG 21075, 6 April 2000 • Amendment Acts 33 of 2008; 12 of 2011; and 11 of 2017 • Regulations 7, 8(3), 8(4) of the Refugees Regulations, 2018, GN R. 1707 GG 42932, 1 January 2020 <p>International instruments</p> <ul style="list-style-type: none"> • Articles 31, 32, 33 of the 1951 United Nations Convention relating to the Status of Refugees ("the 1951 Convention") • Articles 27-30 of the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Status in Africa.
<p>Cases cited as authority</p>	<ul style="list-style-type: none"> • <i>Nkwankwo v Minister of Home Affairs and Others; Anyacho and Another v Director General: Department of Home Affairs and Another; Onwuakpa v Director General: Department of Home Affairs and Another</i> [2020] ZAGPJHC 377 • <i>Ndlovu v Minister of Home Affairs and Others; Dwatat v Minister of Home Affairs</i>, unreported judgment of the Gauteng Division of the High Court, Johannesburg, 2021/230230 and 2021/22509 • <i>Mafadi and Another v The Minister of Home Affairs and Another</i> [2021] ZAGPJHC 141 • <i>Ruta v Minister of Home Affairs</i> [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) • <i>Abdi and Another v Minister of Home Affairs and Others</i> [2011] ZASCA 2; 2011 (3) SA 37 (SCA) • <i>Arse v Minister of Home Affairs and Others</i> [2010] ZASCA 9; 2012 (4) SA 544 (SCA) • <i>Bula and Others v Minister of Home Affairs and Others</i> [2011] ZASCA 209; 2012 (4) SA 560 (SCA) • <i>Ersumo v Minister of Home Affairs and Others</i> [2012] ZASCA 31; 2012 (4) SA 581 (SCA) • <i>Abore v Minister of Home Affairs and Another</i> [2021] ZACC 50; 2022 (2) SA 321 (CC); 2022 (4) BCLR 387 (CC) • <i>Mafadi and Another v Minister of Home Affairs and Another</i> [2021] ZAGPJHC 141

	<ul style="list-style-type: none"> • <i>Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another</i> [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) • <i>Biowatch Trust v Registrar, Genetic Resources and Others</i> [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) 		
Facts	<p>The court below had refused to order the release of three illegal foreigners (the Applicants), who were being held in detention according to section 34 of the Immigration Act and had expressed a desire to apply for asylum. This was an appeal against that judgment. The Court noted that the Applicants were released long ago, and the case was resolved in relation to their personal interests, but the matter was heard because public interest required the clarification of the effect of the 2020 amendments to the Refugees Act and its Regulations. Particularly, the Court needed to clarify whether the detention of illegal foreigners under the Immigration Act extinguishes when they indicate an intention to apply for asylum and the procedure for making an asylum application.</p>		
Detention/alternative methods	Detention	Alternative method(s)	N/A
	Detention according to section 34 of the Immigration Act		
Summary	<p>The court interpreted the right to seek and enjoy asylum in relation to asylum seekers who are in the country unlawfully as ‘illegal foreigners’.</p> <p>The court dealt with the interplay of the Immigration Act and the Refugees Act. The court was guided by the decisions of the Constitutional Court in <i>Ruta v Minister of Home Affairs</i>, and <i>Abore v Minister of Home Affairs and Another</i>, which interpreted the application of the principle of non-refoulement before and after the 2020 amendments to the Refugees Act and its regulations. These decisions held, amongst other things, that the right to seek asylum goes beyond the procedural right to lodge an application for asylum, although this is an important component of the right. The decisions noted that the Immigration Act should be read in harmony with the Refugees Act. If an asylum seeker is in the country unlawfully as an ‘illegal foreigner’, they have</p>		

	<p>the right to seek and enjoy asylum once they indicate an intention to apply for asylum. The right applies for as long as the claim to refugee status has not been rejected after a proper procedure. Section 2 of the Refugees Act captures the protection of refugees and asylum seekers under the principle of non-refoulement and should prevail when there is a conflict with other provision(s) in the Refugee Act or other laws.</p> <p>The court interpreted the 2020 amendments and summed them as follows: The detention of ‘illegal foreigners’ under section 34 of the Immigration Act should cease when the application of the Refugee Act is triggered by the foreigner making an indication of an intention to apply for asylum, not by a formal application being submitted. Further, the enquiry into good cause referred to in Regulation 8(3) of the Refugee Regulations is not a precondition for making an application for asylum, and must be read as part of the overall enquiry to facilitate the application. Finally, the court declared Regulation 8(4) to be <i>ultra vires</i> (made without the necessary powers) because it introduced a requirement that could not be found in the Refugees Act. Regulation 8(4) sought to limit the right to seek asylum by empowering a judicial officer to require a foreigner who appears before court and indicates an intention to seek asylum to show good cause. Therefore, it conflicted with section 2 of the Refugees Act and must be ignored or read <i>pro non scripto</i>.</p>
Decision/ Judgment	<p>The appeal was upheld, and the court ordered the respondents to bear the costs of the applicants, including the costs of two counsel where so employed. The costs ordered included the costs of the initial applications, the applications for leave to appeal, the application to waive security and the appeal. The costs were on the scale as between party and party.</p>
Basis of the decision	<p>The court interpreted the 2020 amendments to the Refugees Act and Regulations according to section 2 of the Refugees Act, which captures the protection of refugees and asylum seekers under the principle of non-refoulement.</p> <p>The court was also guided by the decisions of the Constitutional Court in <i>Ruta v Minister of Home Affairs</i>, <i>Abore v Minister of Home Affairs and Another</i>.</p>
Reported by Date	<p>Ghati Nyehita 17 March 2023</p>

