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

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Numbers: **A5053/2021; A5054/2021; A5055/2021**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES

_______________ __________________________

DATE SIGNATURE

A5053/2021

In the matter between:

S A Appellant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL,
DEPARTMENT OF HOME AFFAIRS Second Respondent

A5054/2021

In the matter between:

S J Appellant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL,
DEPARTMENT OF HOME AFFAIRS Second Respondent

A5055/2021

In the matter between:

B I Appellant

and

THE MINISTER OF HOME AFFAIRS First Respondent

THE DIRECTOR-GENERAL,
DEPARTMENT OF HOME AFFAIRS Second Respondent

This judgment has been delivered by being handed down at 10h00 on 14 March 2023 and by being uploaded to the CaseLines profile at that time.

JUDGMENT[1]

The Court, (Sutherland DJP, Wilson J et Dodson AJ)

Introduction

[1] South Africa is an attractive destination for poor and oppressed people from Africa and from elsewhere. Not everyone enters our territory in compliance with our laws. Many cross the borders unlawfully. The Department of Home Affairs, headed by the respondents, is responsible for the integrity of our borders. This function is carried out in terms of the Immigration Act 13 of 2002. People who come into our country without lawful permission to enter and to be here are called 'illegal foreigners'. Illegal foreigners are at risk of being detained and deported in terms of section 34 of that statute.[2]

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[1] This judgment deals with an appeal against a single judgment given by the court *a quo* in three applications.

[2] "**Deportation and detention of illegal foreigners**—

(1)Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned—

(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

[2] Our country is a signatory to the 1951 United Nations Convention relating to the Status of Refugees ("the 1951 Convention").[3] This means we are committed to offer sanctuary to refugees in peril of being denied human rights including, in appropriate circumstances, those unlawfully in the country.[4] To give effect to our obligations to apply the norms of the 1951 Convention, the Refugees Act 130 of 1998 was enacted. The function of this statute is to provide a framework and procedure to identify genuine claims for protection under the 1951

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights.

(2) The detention of a person in terms of this Act elsewhere than on a ship and for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes, provided that if such period expires on a non-court day it shall be extended to four p.m. of the first following court day.

(3) The Director-General may order a foreigner subject to deportation to deposit a sum sufficient to cover in whole or in part the expenses related to his or her deportation, detention, maintenance and custody and an officer may in the prescribed manner enforce payment of such deposit.

(4) Any person who fails to comply with an order made in terms of subsection (3) shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or to imprisonment not exceeding 12 months.

(5) Any person other than a citizen or a permanent resident who having been—

(a) removed from the Republic or while being subject to an order issued under a law to leave the Republic, returns thereto without lawful authority or fails to comply with such order; or

(b) refused admission, whether before or after the commencement of this Act, has entered the Republic,

shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 12 months and may, if not already in detention, be arrested without warrant and deported under a warrant issued by a Court and, pending his or her removal, be detained in the manner and at the place determined by the Director-General.

(6) Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.

(7) On the basis of a warrant for the removal or release of a detained illegal foreigner, the person in charge of the prison concerned shall deliver such foreigner to that immigration officer or police officer bearing such warrant, and if such foreigner is not released he or she shall be deemed to be in lawful custody while in the custody of the immigration officer or police officer bearing such warrant.

(8) A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General.

(9) The person referred to in the preceding subsection shall, pending removal and while detained as contemplated in that subsection, be deemed to be in the custody of the master of such ship and not of the immigration officer or the Director-General, and such master shall be liable to pay the costs of the detention and maintenance of such person while so detained if the master knew or should reasonably have known that such person was an illegal foreigner, provided that—

(a) if such master fails to comply with the provisions of that subsection, or if required to pay such costs, such master or the owner of such ship shall forfeit in respect of every person concerned a sum fixed by the immigration officer, not exceeding an amount prescribed from time to time;

(b) the immigration officer may, before such person is removed from such ship, require the master or the owner of such ship to deposit a sum sufficient to cover any expenses that may be incurred by the Director-General in connection with the deportation, detention, maintenance and custody of such person, if there are grounds to believe that the master knew or should reasonably have

Convention and secure asylum in our country.[5] The statute has been amended from time to time. Amendments which came into effect on 1 January 2020 are relevant to the arguments advanced by counsel in this case.

[3] This is the context of the controversy in this case. The critical question is about the authority of the state to detain illegal foreigners evincing an intention to

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known that such person was an illegal foreigner;

(c) if such person is not removed from the Republic on the ship on which he or she was conveyed to the Republic, except by reason of not being an illegal foreigner, and if the master knew or should have known that such person was an illegal foreigner, the owner of that ship shall at the request of an immigration officer convey that person, or have him or her conveyed, free of charge to the State to a place outside the Republic, and any person, other than an immigration officer, charged by the Director-General with the duty of escorting that person to such place, shall be deemed to be an immigration officer while performing such duty; and

(d) if the owner of such ship fails to comply with the provisions of this section, he or she shall forfeit in respect of each such person a sum fixed by the immigration officer, not exceeding an amount prescribed from time to time.

(10) A person who escapes or attempts to escape from detention imposed under this Act shall be guilty of an offence and may be arrested without a warrant.

(11) A person detained on a ship may not be held in detention for longer than 30 days without an order of court."

In *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC), the Constitutional Court declared section 34(1) *(b)* and *(d)* unconstitutional and invalid. The declaration of invalidity was suspended for 24 months to enable Parliament to pass correcting legislation. In the interim, or if no correcting legislation was passed, any illegal foreigner detained under section 34 (1) was required to be brought before a court in person within 48 hours from the time of arrest or not later than the first court day after the expiry of the 48 hours, if 48 hours expired outside ordinary court days. In the event of Parliament failing to pass correcting legislation within 24 months, the declaration of invalidity was to operate prospectively. No correcting legislation was passed.

[3] Adopted on 28 July 1951 and inforce from 22 April 1954. Accessible at https://www.uncr.org>1951-refugee-convention.

[4] See Articles 31 to 33 of the Convention:

"**Article 31 - Refugees unlawfully in the country of refuge**

1.The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees' restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

Article 32 - Expulsion

1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

Article 33 - Prohibition of expulsion or return ("refoulement")

1. 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,

seek asylum, preparatory to deporting them or until such time as a decision can be made whether or not they qualify for asylum. Before this Court is an appeal against a decision in which the court *a quo* refused to order the release of three illegal foreigners who were being held in detention pursuant to section 34 and who had each expressed a desire to apply for asylum. The court *a quo* instead directed that these three individuals be taken before a refugee status determination officer (RSDO), as soon as practicable, but refused to grant an order for their release from detention while that process was taking place. The correctness of the refusal to order their release is the crux of the controversy on appeal.[6]

The Relevant Legislation and Regulations

[4] The primary instrument to regulate the entry and exit of persons into and out of South Africa is the Immigration Act. In terms of this statute immigration officers are appointed to administer its provisions. Section 34(1), in setting out how illegal foreigners may be detained and deported, vests in an immigration officer the authority to arrest an illegal foreigner. The detention of an illegal foreigner must be revisited by a court not later than 48 hours after arrest. Before it was declared constitutionally invalid, in terms of section 34(1)(d) the maximum

nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

[5] See the title of, and the preamble to, the Refugees Act:
"To give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; 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; and to provide for matters connected therewith.
Preamble. —
WHEREAS the Republic of South Africa has acceded to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law."

[6] The judgment subject to appeal is at odds in this regard with other decisions in the same division: *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* [2020] ZAGPJHC 377; *Ndlovu v Minister of Home Affairs and Others; Dwatat v Minister of Home Affairs*, unreported judgment of the Gauteng Division of the High Court, Johannesburg, 2021/230230 and 2021/22509 (31 May 2021); *Mafadi and Another v The Minister of Home Affairs and Another* [2021] ZAGPJHC 141.

period of detention, if so authorised by a court, was 90 days.[7] The permissible duration of detention, subsequent to the declaration of invalidity of section 34(1)(d) and Parliament's failure to pass correcting legislation, is unclear but a power of detention remains.[8]

[5] What is plain is that detention in terms of section 34 is an accessory instrument to facilitate deportation and no more. This attribute of the 'section 34-type detention' is significant. It has been referred to as 'administrative detention', a useful label to distinguish it from imprisonment, in the international literature on the 1951 Convention.

[6] The Refugees Act, having declared that the statute has been brought into being to fulfil South Africa's undertakings under the terms of several international conventions, including the 1951 Convention, sets out the principle of non-refoulement in section 2 of the statute in categorical terms:

> "**General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances** .—
>
> 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 public order in any part or the whole of that country."

[7] Notable is the extraordinary injunction in section 2 that causes it to trump every other law. Plainly, the Refugees Act, therefore, trumps the Immigration Act. It also trumps the other sections of the Refugees Act. Simply put, any power lawfully exercised in terms of section 34 of the Immigration Act, insofar as it is

[7] Section 34(1)(d). See n 2 above on the scope of the section as modified by the decision in *Lawyers for Human Rights v Minister of Home Affairs and Others*, in which sections 34(1)(b) and (d) were declared invalid.

[8] See the introductory section of section 34(1) and section 34(1)(e).

inconsistent with any entitlement that an illegal foreigner can claim under section 2 of the Refugees Act, is overridden.[9] The Refugees Act does also provide for the detention of an illegal foreigner in sections 23 and 29. However, this power is applicable in quite specific and limited circumstances and arises only after the asylum process has got under way:

> "**23. Detention of asylum seeker.** — If the Director-General has withdrawn an asylum seeker visa in terms of section 22 (5), he or she may, subject to section 29, cause the holder to be arrested and detained pending the finalisation of the application for asylum, in the manner and place determined by him or her with due regard to human dignity.
>
> [S. 23 substituted by s. 16 of Act No. 33 of 2008 and by s. 19 of Act No. 11 of 2017 with effect from a date immediately after the commencement of the Refugees Amendment Act, 2008 (Act No. 33 of 2008) and the Refugees Amendment Act, 2011 (Act No. 12 of 2011): 1 January, 2020.]
>
> …
>
> **29. Restriction of detention.**—(1) No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a court in whose area of jurisdiction the person is detained, and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days of detention.
>
> (2) The detention of a child must be used only as a measure of last resort and for the shortest possible period of time, taking into consideration the principle of family unity and the best interest of the child.
>
> [S.29 substituted by s. 24 of Act No. 33 of 2008 with effect from: 1 January, 2020.]"

[8] *Ruta*,[10] decided before the amendments to the Refugees Act which took effect on 1 January 2020, dealt with the interplay between the Immigration Act and the Refugees Act. The principal holding in that case was that an illegal foreigner who delayed expressing a desire to apply for asylum was not, for that reason *per se*, barred from making such an application and was immune from deportation and detention pending a decision on whether the application was justified. The judgment declares unequivocally that the Refugees Act prevails over the Immigration Act:

> "Of relevance to Mr Ruta's position when arrested is that the 1951 Convention protects both what it calls "*de facto* refugees" (those who have not yet had their refugee status confirmed under domestic law), or asylum seekers, and "*de jure* refugees" (those whose status has been determined as refugees).The latter the Refugees Act defines

[9] See in this regard, *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) (*Ruta*) at paras 40-4.

[10] *Ruta* above n9 at paras 27-30 and 40-3.

as "refugees". This unavoidably entails an indeterminate area within which fall those who seek refugee status, but have not yet achieved it. Domestic courts have also recognised that *non-refoulement* should apply without distinction between *de jure* and *de facto* refugees.

The right to seek and enjoy asylum means more than merely a procedural right to lodge an application for asylum — although this is a necessary component of it. While states are not obliged to grant asylum, international human rights law and international refugee law in essence require states to consider asylum claims and to provide protection until appropriate proceedings for refugee status determination have been completed.

In sum, all asylum seekers are protected by the principle of *non-refoulement*, and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure.

Section 2 of the Refugees Act embodies all these principles. Yet it goes further than the 1951 Convention. Its more generous wording is derived from our own continent — the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Status in Africa."[11]

[9] Further, the Constitutional Court said the following:[12]

"[24] [Section 2 of the Refugees Act] 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.
…
[41] At heart the Minister's argument seeks to invest the provisions of the Immigration Act with power to trump those of the Refugees Act. That cannot be. While the Immigration Act determines who is an "illegal foreigner" liable to deportation, the Refugees Act, and that statute alone, determines who may seek asylum and who is entitled to refugee status.
…
[43] The Refugees Act makes plain principled provision for the reception and management of asylum seeker applications. The provisions of the Immigration Act must thus be read together with and in harmony with those of the Refugees Act. This can readily be done. Though an asylum seeker who is in the country unlawfully is an "illegal foreigner" under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act. That is the meaning of section 2 of that Act, and it is the meaning of the two statutes when read together to harmonise with each other.
…
[54] These considerations point away from the conclusion that the Immigration Act covers the field of refugee applications or predominates within it. 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."

[11] Id at paras 27-30.

[12] Id at paras 24, 41, 43 and 54.

[10] Applying this interpretation of the two statutes, *Ruta* considered the correctness of four judgments of the Supreme Court of Appeal that had preceded its judgment.[13] It summarised the effect of these judgments as follows:[14]

> "The quartet of cases decided that asylum applicants held in an "inadmissible facility" at a port of entry into the Republic enjoy the protection of the Refugees Act and of the courts (*Abdi*);[15] ordered the release from detention of an asylum seeker whose asylum transit permit had expired, and whose application for asylum had been rejected by the Refugee Status Determination Officer but whose appeal before the Refugee Appeal Board was pending (*Arse*);[16] affirmed that if a detained person evinces an intention to apply for asylum, he or she is entitled to be freed and to be issued with an asylum seeker permit valid for 14 days (*Bula*);[17] and conclusively determined that false stories, delay and adverse immigration status nowise preclude access to the asylum application process, since it is in that process, and there only, that the truth or falsity of an applicant's story is to be determined (*Ersumo*)."[18]

[11] The Constitutional Court went on to confirm the correctness of these judgments[19] and, importantly for present purposes, recorded the effect of *Bula* to be that "once an intention to apply for asylum was evinced, the protective provisions of the Refugees Act and regulations come into play and 'the asylum seeker is entitled as of right to be set free subject to the provisions of the [Refugees Act]'… ."[20]

[12] Consistent with this aspect of *Ruta*, at the time that decision was given, Regulation 2(2) of the Refugees Regulations provided that:[21]

> "Any person who entered the Republic and is encountered in violation of the Aliens Control Act,[22] who has not submitted an application pursuant to sub-regulation 2(1), but <u>indicates an intention to apply for asylum</u> shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application." (Emphasis added.)

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[13] *Minister of Home Affairs v Ruta* [2018] ZASCA 186; 2018 (2) SA 450 (SCA).
[14] *Ruta* above n 9 at para 16.
[15] *Abdi and Another v Minister of Home Affairs and Others* (*Abdi*) [2011] ZASCA 2; 2011 (3) SA 37 (SCA).
[16] *Arse v Minister of Home Affairs and Others* (*Arse*) [2010] ZASCA 9; 2012 (4) SA 544 (SCA).
[17] *Bula and Others v Minister of Home Affairs and Others* (*Bula*) [2011] ZASCA 209; 2012 (4) SA 560 (SCA).
[18] *Ersumo v Minister of Home Affairs and Others* (*Erusmo*) [2012] ZASCA 31; 2012 (4) SA 581 (SCA).
[19] *Ruta* above n 9 at paras 21-2 and 55.
[20] Id at para 18.
[21] Refugees Regulations (Forms and Procedure) 2000 GN R.366 *GG* 21075, 6 April 2000.
[22] The allusion to the 'Aliens Control Act' is to the predecessor of the Immigration Act, enacted in 2002 after the text of the regulations was drafted.

All this while, several amendments to the Refugees Act were being enacted. Extraordinarily, the Amendment Acts 33 of 2008; 12 of 2011; and 11 of 2017 all lay in waiting and eventually came into force only on 1 January 2020. New regulations were also promulgated which took effect on 1 January 2020.[23] The critical amending provisions in the statute and in the regulations are as follows.

[13] Section 4 was amended to add this:

> "An asylum seeker does not qualify for refugee status for the purposes of this Act if a [RSDO] has reason to believe that he or she
> …
>
> (h) having entered the Republic other than through a port of entry ... fails to satisfy a [RSDO] that there are compelling reasons for such entry; or
> (i) has failed to report to the Refugee Reception Office within five days of entry into the Republic … in the absence of compelling reasons… ."

[14] Section 21, which prescribes the procedure for the making of an asylum application, was amended *inter alia* by adding:

> "(1)(a) Upon reporting to the Refugee Reception Office within five days of entry into the Republic, an asylum seeker must be assisted by an officer designated to receive asylum seekers.
> (b) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Status Determination Officer at any Refugee Reception Office … .
> (1A) Prior to an application for asylum, every applicant must submit his or her biometrics or other data, as prescribed, to an immigration officer at a designated port of entry or a Refugee Reception Office.
> (1B) An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act must, be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa.
> …
>
> (2) The Refugee Status Determination Officer must, upon receipt of the application contemplated in subsection (1), deal with such application in terms of section 24.
> …
>
> (4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if –

[23] Refugees Regulations, 2018, GN R.1707 *GG* 42932, 1 January 2020 (New Regulations).

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application [and any statutory review or appeal]; or

(b) such person has been granted asylum."[24]

[15] These additions to sections 4 and 21, must be read with section 2, cited above, which was unaffected by the amendments, and with section 22(1), which reads:

"An asylum seeker whose application in terms of section 21(1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, in the prescribed form, allowing the applicant to sojourn in the Republic temporarily, subject to such conditions as may be imposed, which are not in conflict with the Constitution or international law." (Emphasis added.)

[16] The new Regulation 7, requires that –

'[a]ny person who intends to apply for asylum must declare his or her intention, while at a port of entry, before entering the Republic and provide his or her biometrics and other relevant data … and must be issued with an asylum transit visa contemplated in section 23 of the Immigration Act."

[17] The new Regulation 8, central to this controversy, provided, insofar as is relevant, that:

"(3) Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees.

(4) A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in subregulation (3)." (Emphasis added.)

[18] Also important for present purposes is that the previous set of regulations dating from 2000[25] were repealed in their entirety[26] and the above-quoted regulation 2 was not re-enacted in the new regulations.

[19] After 2020, the question of the effect of the amendments to the Refugees Act and its regulations reached the Constitutional Court in *Abore v Minister of*

[24] This paragraph (b) is retained from the version before amendment.

[25] See n 21 above.

[26] See regulation 24 of the New Regulations, n 23 above.

Home Affairs and Another.[27] The Constitutional Court granted direct access from a decision of the High Court which had refused to release Mr Abore from detention pending the processing of an application for asylum. That direct access was granted, *inter alia*, because it was held to be necessary to clarify the effect of the 2020 amendments.

[20] In *Abore* it was declared that the amendments did not compromise the *dicta* in *Ruta*. It was remarked that:

> "The relevant broad principles laid down by this Court were, firstly, that once an illegal foreigner who claims to be a refugee expresses an intention to apply for asylum, he or she must be permitted to apply for such status in terms of the Refugees Act."[28]

[21] On the effect of the new addition to section 21 in the form of section 21(1B), the court stated that:

> "Section 21(1B) of the Refugees Amendment Act imposes its own requirements which seem to be aimed at eliciting more information from an illegal foreigner. It provides that a person who may not be in possession of an asylum transit visa, contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why that person is not in possession of such visa. It is not clear at what stage the interview envisaged in section 21(1B) should be conducted. However, it seems that the requirement in regulation 8(3) that the applicant for asylum should show good cause for his or her illegal entry or stay in the Republic prior to them being permitted to apply for asylum, means that this must be done during the interview. It also seems that the applicant for asylum must furnish good reasons why he or she is not in possession of an asylum transit visa before he or she is allowed to make an application for asylum. In addition, regulation 8(4) empowers a judicial officer to require any foreigner appearing before court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub-regulation (3). If regulations 8(3) and (4) are read with section 21(1B), it appears that good cause which is required to be shown refers to the reasons that must be given on why the applicant for asylum does not have an asylum transit visa."[29] (Emphasis added.)

[22] The Constitutional Court then went on to deal with the contention that the non-refoulement principle had been compromised or qualified by the amendments. This notion was rejected. The court held:

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[27] *Abore v Minister of Home Affairs and Another* [2021] ZACC 50; 2022 (2) SA 321 (CC); 2022 (4) BCLR 387 (CC) (*Abore*).
[28] Id at para 13.
[29] Id at para 29.

"In a nutshell, this court in *Ruta* highlighted that our country adopted Article 33 of the 1951 Convention, which guarantees the right to seek and enjoy in other countries asylum from persecution. It also clarified that Parliament decided to enforce the Convention in the country through section 2 of the Refugees Act. Section 2 captures the fundamental principle of *non-refoulement*. As this court reasoned, the 1951 Convention protects both what it calls "*de facto* refugees" (those who have not yet had their refugee status confirmed under domestic law), or asylum seekers, and "*de jure* refugees" (those whose status has been determined as refugees). The protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure. This means that the right to seek asylum should be made available to every illegal foreigner who evinces an intention to apply for asylum, and a proper determination procedure should be embarked upon and completed. The "shield of *non refoulement*" may only be lifted after that process has been completed.

The starting point in determining whether the amendments have an effect on the above principles is an interpretation of section 2 of the Refugees Act. …

Section 2 has not been amended. The language used in section 2 shows that its provisions apply notwithstanding any other provision of the Refugees Act or any other law to the contrary. … This means that in the event that there is another provision in the amendments that contains a contrary provision, section 2 would prevail. …

As section 2 is still applicable, the principle of *non-refoulement* as aptly stated by this court in *Ruta* is still applicable and protects Mr Abore from deportation until his refugee status has been finally determined."[30] (Emphasis added.)

[23] On this basis, the Court concluded as follows:

"Mr Abore has indicated his intention to apply for asylum. He has not yet been afforded an opportunity to do so. His refugee status has not been finally considered nor determined. Until this happens, the principle of *non refoulement* protects him. The delay in indicating his intention is of no moment as stated in *Ruta*. The amendments do not affect his eligibility to be afforded this protection irrespective of whether he arrived in the country before or after the Refugees Act was amended, nor do they deprive him of the entitlement to be granted an interview envisaged in regulations 8(3) and (4), read with section 21(1B)."[31]

[24] The Court in *Abore* was not required to squarely address the question before this Court, i.e. the lawfulness of detention under the Immigration Act before the actual submission of an application for asylum. However, obliquely, it made findings consistent with the proposition that no lawful ground existed to detain an illegal foreigner whilst the process of deciding whether good cause existed

[30] Id at paras 42-5.

[31] Id at para 48.

for the absence of an appropriate visa and an asylum application, was yet to be completed by a decision to grant it or refuse it.[32]

[25] What therefore remains for this court to decide is whether the amendments allow for detention of an illegal foreigner in circumstances where prior thereto and for the reasons set out in *Ruta*, the Refugees Act did not so allow.

The Judgment a quo

[26] That part of the judgment in the court *a quo* which is challenged on appeal answered the question thus:

> "[33] On what is before me the applicants were detained in terms of the Immigration Act and their further detention has been authorised by a Court. There was no suggestion that the existing warrants for their detention were deficient in any respect and leaving aside their intimation to apply for asylum, there is nothing unlawful about their detention.
>
> [34] What the applicants say is that once they make an election to apply for asylum they are entitled to their release in order to present themselves to a Refugee Reception Office and that the refusal by the respondents to release them renders their current detention unlawful.
>
> [35] The ordinary procedure that would have followed had the applicants reported at a port of entry and intimated an intention to apply for asylum would have been the issuing of an asylum transit visa that would have allowed them to enter the country and thereafter present themselves to a Refugee Reception office. None of the applicants followed this route and the consequence of that is that they do not have a valid immigration visa (transit asylum or otherwise). They were accordingly at risk of being arrested and this is what occurred.
>
> [36] They would, if their applications for asylum are submitted be entitled to the issuing of a Section 22 permit to allow them to remain in South Africa until the finalisation of their applications. The provisions of Section 22 however only come into operation once an application for asylum has been submitted which has not occurred in the case of the applicants.
>
> [37] In addition, the protection in Section 21(4) that no proceedings may be instituted or continued against someone who has entered the country illegally if such a

[32] Id at paras 49-51. The Constitutional Court at paragraphs 38 and 39 also referred to the judgment that forms the subject matter of the present appeal. It summarised the effect of the judgment as follows:

> "The High Court in *Abraham* concluded that the amendments do not bar an aspirant asylum seeker in the same position as Mr Abore from applying for asylum, but that they create different procedures and entitlements for them. The Court held further that this interpretation of the amendments is consistent with both the letter and spirit of the 1951 Convention. It then concluded that the applicants in that matter were entitled to the opportunity to show good cause and, if successful, to submit their applications for asylum."

person has either applied for asylum or has been granted asylum is also not triggered as there is for now, no application for asylum.

[38] The detention of the applicants is therefore not unlawful and nor have they demonstrated any entitlement to their release, they may well do so at a later stage but that is of no consequence now.

[39] The new regulations signal a departure from the situation that existed before it and in particular the entitlement to apply for asylum in cases of illegal entry is dependant now upon good cause being shown. That being so it cannot be said that an asylum seeker who enters South Africa illegally and is in lawful immigration detention can automatically trigger his or her release if an intimation is given that he or she wishes to apply for asylum. To do so would ignore the scheme of the new system, would undermine the requirement of good cause and would not allow for harmony between the Immigration Act and the Refugees Act.

[40] In this regard it is necessary to record that the 2000 regulations were markedly different in so far as they related to the right not to be detained even in the case of those who entered South Africa illegally. It provided as follows: -
2 (2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to sub-regulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application.

[41] There is no similar provision in the current regulations and it must therefore follow that the detention of the applicants under the Immigration Act continues to endure and is not interrupted by the mere intimation of the applicants of their intention to apply for asylum but will be so interrupted once they apply for asylum and are issued with permits in terms of Section 22." (Emphasis added.)

[27] Plainly, the judgment addressed the question of detention on the premise that amended regulations 8 (3) and (4) are valid and consistent with section 2 of the Refugees Act. The function of these regulations, read with the amendments to the Refugees Act, in terms of the court's reasoning, is to privilege a detention in terms of section 34 of the Immigration Act until a written application, in terms of section 22 of the Refugees Act, is actually handed to the RSDO. No provision in the Refugees Act authorises detention of an illegal foreigner during this period between evincing an intention to seek asylum and formally applying to the RSDO. Therefore, the continued lawfulness of a section 34 detention is dependent on the trigger for the application of the Refugees Act being deferred beyond an expression of a desire to seek asylum, to the moment when an application is formally lodged. Moreover, an official of the State in the form of

an immigration officer[33] (or a judicial officer)[34] is vested with the power to interrogate an illegal foreigner about 'good cause' for illegal entry or stay, and, if that official is dissatisfied with the explanation, permission to make an application for asylum may be blocked, notwithstanding that an intention to seek asylum was evinced. This would have the result that the Refugees Act never becomes applicable. The consequence, in turn, is that the illegal foreigner can be lawfully deported despite the express desire, meritorious or not, to seek asylum.[35]

[28] The first difficulty that these regulations encounter, is that they do not speak to any provision in the Refugees Act which confers a power on a state official or on a judicial officer or court, to block an application for asylum from being lodged.[36] That means they would be manifestly *ultra vires*, if that is their proper meaning. A regulation cannot introduce a substantive requirement that cannot be sourced in the statute.[37] It appears that the validity of this interpretation of the regulations as seeking to achieve such an outcome, was not argued in the court *a quo*. Accordingly, the Court was wrong to rely on this interpretation.

[29] The second difficulty, at a purely practical level, is that the ostensible aim of the regulation in creating a two-step approach is an attempt to envelop an illegal foreigner in a procedural strait jacket by contriving the notion that an explanation for an illegal entry or stay can meaningfully be distinguished from an explanation why asylum is sought. This is artificial and exists only in the imagination of the drafter of the regulation. This much is clear from the fact that the new, additional criteria <u>for asylum</u> in section 4(1)(h) and (i) of the Refugees Act envisage the enquiry into good cause for illegal entry or stay taking place

[33] Regulation 8(3).

[34] Regulation 8(4).

[35] See section 34(1). Deportation may even be obligatory, on this interpretation, having regard to the words "… shall … deport him or her… ."

[36] The regulation making power under the Refugees Act is section 38. It gives no such express power. It does give the power to make regulations on "any other matter which is necessary or expedient to prescribe in order that the objects of this Act may be achieved". The objects of the Act are essentially to give effect to South Africa's international obligations under the relevant Convention, and this interpretation could not be considered consistent with that object. The correct interpretation of section 21(1B) in this regard is dealt with below.

[37] *Kent NO v South African Railways and Another* 1946 AD 398 at 405; *Van Heerden and Others NNO v Queen's Hotel (Pty) Ltd and Others* 1973 (2) SA 14 (RA); *S v Van der Horst and Others* 1991 (1) SA 552 (C) at 556C; *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC) at para 38.

as part and parcel of the RSDO's enquiry as to whether or not an asylum seeker qualifies for refugee status, not as a separate, preceding enquiry.

[30] The third difficulty is that the *dicta* in *Abore*, cited above, affirms that whatever the trigger for the invocation of the Refugees Act might be, it must still be wholly consistent with section 2. The Constitutional Court said specifically that if any of the amendments were at odds with section 2, the latter would prevail.[38] That must mean that no power can be conferred on a state official or a court or judicial officer to block the making of an application for asylum, as is suggested in the court's interpretation of the regulations.

[31] The fourth difficulty is this. In respect of regulation 8(3), the Constitutional Court in *Abore* understood the enquiry for good cause in section 21(1B) to be a part of the information gathering process about asylum, rather than the rigidly distinct enquiry contemplated by the judgment subject to appeal.[39] Regulation 8(3) alludes to article 31(1) of the 1951 Convention. The text suggests that the good cause required is related to either the "illegal entry" or to the "[illegal] stay in South Africa". Presumably, it is in respect of the latter issues that the reference to article 31(1) is made, in order to incorporate, by reference, the criteria that the "life or freedom [of the refugee] was threatened in the sense of article 1". Article 1 of the 1951 Convention, in turn, elaborates extensively on the criteria.[40] At a textual level, how that phrase can be reconciled with the phrase that the good cause be shown "prior to being permitted to apply for asylum" is obscure. If it is reconcilable, it must mean that the collection of the relevant information, as regards 'good cause' cannot be a condition precedent to an application for asylum, but merely the first phase of the interview which seamlessly leads to a finalisation of the application in the prescribed form, because then the pertinent information is to hand. This injunction could be read back to section 21(1B) as a source, if it bears that meaning. If the phrase "prior to being permitted to apply for asylum" cannot bear this meaning, then it

[38] *Abore* above n 29 at para 44.
[39] Id at para 29.
[40] See the discussion of the relevant provisions of the Convention below.

must be treated as *pro non scripto*[41] on account of its being in conflict with the overriding provisions of section 2.

[32] The fifth difficulty with the court's interpretation is that there is no source in the statute to found the power (and obligation) given to a court or judicial officer by regulation 8(4) to decide good cause, on pain of which the opportunity to apply for asylum may be forfeited. It cannot be reconciled with the statute in terms of which it was purportedly made. Moreover, in *Ruta*[42] it was recognised that the RSDO is vested with the exclusive power to decide applications for asylum. On this basis it is *ultra vires*. To the extent that it seeks to place limitations on the right to seek asylum, it is in conflict with section 2 and stands to be treated as *pro non scripto*.

[33] The sixth difficulty is that, as a general rule a regulation may not be used in the interpretation of a statute.[43] Still less can the repeal of a regulation be used in the interpretation of a statute. For this reason, no reliance can be placed on the repeal of the old regulation 2 to arrive at a conclusion that the application of the Refugees Act is, consequent upon the amendments, delayed until the formal handing in of an application for refugee status.

The 1951 Convention

[34] An examination of the Commentary on the 1951 Convention by the expert roundtable organised by the UN High Commissioner for Refugees and the Graduate Institute of International Studies, Geneva, on 8-9 November 2001, offers useful perspectives on article 31. The text of article 31 seems to provide for a delay in making application for asylum to be a seriously negative factor, an aspect largely absent from the South African law. On the authority of *Ruta*, delay does not bar an application, though it might be relevant to an assessment

[41] As if not written.
[42] *Ruta* above n 9 at para 44.
[43] *Secretary, Judicial Commission of Inquiry into Allegations of State Capture v Zuma* [2021] ZACC 2; 2021 (5) SA 1 (CC); 2021 (5) BCLR 542 (CC) at para 107; *Road Accident Fund v Masindi* [2018] ZASCA 94; 2018 (6) SA 481 (SCA) at para 9.

of the merits of an application. The non-binding conclusions include several perspectives:[44]

34.1 At para 10(e) it is opined that “having a well -founded fear of persecution is recognised in itself as ‘good cause’ for illegal entry”, a notion that resonates with the view taken by this court, as expressed above, in relation to the artificiality of a bifurcated interrogation of the illegal foreigner.

34.2 The concept of ‘penalties’ which a signatory may not impose on a refugee would include imprisonment but seemingly might not include administrative detention.[45] Victor J thought otherwise in *Mafadi and Another v Minister of Home Affairs and Another.*[46] However, in that case, Victor J also recognised that Article 31(2) relating to restrictions on movements could apply to administrative detention.

34.3 The commentary on administrative detention remarks that it “must be related to a recognised object or purpose” proportional to the end sought to be achieved and is deemed to be legitimate provided the periods are minimised and are not maintained where asylum procedures are protracted.[47]

[35] These perceived attributes of the Convention drawn from the deliberations of the expert panel are consistent with the view articulated by this Court about the application of the Refugees Act, whose function is to apply the Convention in domestic law.

Conclusions

[36] Accordingly, the law may be summed up as follows:

36.1 The lawfulness of detention under section 34 of the Immigration Act is extinguished when the applicability of the Refugees Act is triggered.

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[44] Cambridge University Press, *Summary Conclusions: Article 31 of the 1951 Convention* (*Summary Conclusions*), June 2003, available at: https://www.refworld.org/docid/470a33b20.html [accessed 9 March 2023].
[45] Id at 10 (g)-(h).
[46] [2021] ZAGPJHC 141.
[47] Summary Conclusions above n 46 at 11 (a) and (d).

36.2 The Refugees Act is triggered by an intimation of a desire to apply for asylum by an illegal foreigner, not by a formal application being submitted.

36.3 An illegal foreigner in detention under section 34 is entitled to be released from detention at once when an intimation to apply for asylum is expressed.

36.4 Regulation 8(3) must be read to mean that the enquiry into good cause is a part of the overall enquiry to facilitate an application for asylum and does not mean that there is any condition precedent that must be satisfied before making an application for asylum.

36.5 Regulation 8(4) is *ultra vires* and must be read *pro non scripto*.

[37] It follows that the appeal must be upheld.

Costs

[38] The three applicants were released long ago and the case was moot in relation to their personal interests. The matter was heard because the public interest required the clarification of the effect of the amendments to the Refugees Act and its regulations.[48]

[39] Because the matter was therefore conducted by the applicants wholly in the public interest and they have been vindicated in having done so, accordingly, on the basis of the principle in *Biowatch* [49] that success in such a matter warrants the award of costs there should be such an order. The relevant costs order shall include all costs from inception of the application, and where relevant, also include the costs of two counsel.

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[48] See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22. The appeal was initially opposed on the basis of mootness, but during argument counsel for the respondents indicated that it would be of assistance to the respondents if clarity in the form of a declarator was provided on the issue.

[49] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

THE ORDER

(1) The appeal is upheld.

(2) The order of the court *a quo* is substituted with the declaratory relief in paragraph 3 below.

(3) It is declared that:

(a) The lawfulness of detention under section 34 of the Immigration Act is extinguished when the applicability of the Refugees Act is triggered.

(b) The Refugees Act is triggered by the expression of a desire to apply for asylum by an illegal foreigner, not by a formal application being submitted.

(c) An illegal foreigner in detention under section 34 is entitled to be released from detention immediately, once an intention to apply for asylum is expressed.

(d) Regulation 8(3) must be read to mean that the enquiry into good cause is a part of the overall enquiry to facilitate an application for asylum and does not mean that there is any condition precedent that must be satisfied before making an application for asylum.

The respondents shall bear the costs of the applicants including the costs of two counsel where so employed.

(4) The costs order shall include the costs of the initial applications, the applications for leave to appeal, the costs of the application to waive security and the costs of the appeal and shall be on the scale as between party and party.

Sutherland DJP, Wilson J and Dodson AJ

Heard: **16 February 2023**

Judgment: **14 March 2023**

For the Appellants:

I: Adv T Lipschitz
Instructed by Buthelezi Attorneys

A & J: Adv S Vobi, with him, Adv S Mazaba and Adv A Nase
Instructed by Buthelezi attorneys

For the Respondents: Adv T Mlambo with Adv M Mpakanyane
Instructed by the State Attorney