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

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

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

SIGNATURE DATE: 2 May 2024

In the matter between:

Case No. 2024/021421

E[...] S[...] Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS Second Respondent

LINDELA REPATRIATION CENTRE Third Respondent

and the matter between:

Case No. 2024/025071

M[...] M[...]
(Detainee No. 202402130088) Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS Second Respondent

LINDELA REPATRIATION CENTRE Third Respondent

and the matter between:

Case No. 2024/025073

F[...] R[...]
(Detainee No. 202402130113) Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS Second Respondent

LINDELA REPATRIATION CENTRE Third Respondent

Summary

Applications for release from immigration detention – rights of asylum seekers present in South Africa without a valid visa – approach to lawfulness of detention where an asylum seeker has intimated an intention to apply for asylum but has not been afforded a good cause interview under Regulation 8 (3) of the Refugee Regulations, 2018 (GN R1707 GG 42932 (1 January 2020)).

JUDGMENT

WILSON J:

1 The applicants in each of these three cases, Mr. S[...], Mr. M[...] and Mr. R[...], are foreign nationals seeking asylum in South Africa. They have each presented themselves at the Pretoria Refugee Reception Office with the intent to apply for asylum, but have been turned away. Mr. M[...] and Mr. R[...] say that they were told that nationals from their country of origin do not qualify for asylum at all. Mr. S[...] was told that access to the office was by appointment only.

The applicants' detention and release

2 Each of the applicants was subsequently arrested and detained under the Immigration Act 13 of 2002. They were charged and convicted under section 49 of the Act for being present in South Africa without a valid visa. Each of them apparently served a short prison sentence before being sent to the Lindela Repatriation Centre for deportation. Each of the applicants then placed an application for their release on my urgent roll for the week of 12 March 2024.

3 Mr. M[...] and Mr. R[...] initially sought an order for their immediate release. They then moderated that relief to a prayer for an order interdicting and restraining the first and second respondents, the Minister and the Director-General, from deporting them, and an order directing the respondents to afford them an interview, during which they could show good cause for entering or remaining in South Africa without a valid visa. This interview is provided for under section 21 (1B) of the Refugees Act 130 of 1998, read with Regulation 8 (3) of the Refugee Regulations, 2018 (GN R1707 GG 42932 (1 January 2020)). Under Regulation 8 (3), an asylum seeker who has entered or is found in South Africa without a valid visa must show good cause for being without one before they are permitted to apply for asylum. Mr. S[...] applied for an order interdicting and restraining his deportation pending being afforded such a good cause interview, which the respondents were required to take "all necessary steps" to arrange within 10 days. Mr.

S[...] asked to be released in the event that the respondents did not take those steps.

4 I granted the orders substantially as prayed for. I postponed each application to 28 March 2024, with a direction that, on that date, the respondents would have to show why the applicants should not be released. The basis of that order was that, if a good cause interview had not been arranged by that date, then the applicants' detention would likely have become unlawful. This is the effect of the decision of the Constitutional Court in *Ashebo v Minister of Home Affairs* 2023 (5) SA 382 (CC) ("*Ashebo*") (see especially paragraph 58). In *Ashebo*, the Constitutional Court held that an asylum seeker found in South Africa without a valid visa can be detained pending a good cause interview under Regulation 8 (3), but that the asylum seeker's detention becomes unlawful if such an interview is not organised within a reasonable time.

5 When the matter was called again on 28 March 2024, the respondents did not appear, despite having been served with my 12 March 2024 order. However, none of the applicants had filed any further papers indicating whether a good cause interview had been arranged. Accordingly, I postponed the application again, to 15 April 2024. I directed that an affidavit be filed setting out whether a good cause interview had been arranged. I gave the respondents a further opportunity to justify the applicants' detention.

6 Despite proper service of my order, the respondents once again failed to appear on 15 April 2024. Each of the applicants had, however, filed affidavits

confirming that none of them had been afforded a good cause interview. Accordingly, in the absence of any justification at all for the applicants' ongoing detention, I ordered that each of the applicants be immediately released. I directed the first and second respondents in each case to pay the applicants' costs. I indicated at the time that I would give my reasons for making these orders in due course. These are my reasons.

The lawfulness of asylum seeker detention

7 Until fairly recently, the rule was that South Africa does not place asylum seekers in detention. If an asylum seeker was arrested for being unlawfully in the country, they had only to indicate that they wished to apply for asylum, having not yet been given an opportunity to do so. At that point they had to be released immediately, and afforded the opportunity to apply for asylum under the Refugees Act. The theory underlying this rule was that arrest and detention as an illegal foreigner under the Immigration Act could not survive an asylum seeker's intimation that they wished to apply for asylum, since the entitlement to asylum must be dealt with under the Refugees Act, which does not authorise the detention of those seeking refugee status. This was the nett effect of a series of Supreme Court of Appeal and Constitutional Court decisions culminating in *Arbore v Minister of Home Affairs* 2022 (2) SA 221 (CC). (See also *Abraham v Minister of Home Affairs* 2023 (5) SA 178 (GJ) ("*Abraham*"), especially paragraphs 36.1 to 36.3).

8 It is easy to see why this was the approach. Asylum seekers are not always able to apply for refugee status at the time they enter South Africa. It has to be assumed that any genuine asylum seeker is in fear for their safety, often

without official documents from their country of origin, frequently in the process of fleeing persecution without being able to make arrangements for their arrival at their country of final destination, and hardly trusting of official authority of any sort. For these reasons, an asylum seeker will often cross the border clandestinely. Once in South Africa, they are confronted with a severely limited number of refugee reception offices (five by my count), and they often face barriers of access to those offices of the nature each of the applicants has experienced in this case. The commitment not to detain those who wish to apply for asylum was a humane recognition of the fact that detention for the purposes of deportation, or in response to the contravention of immigration rules, should only follow once it has been established that an application for asylum is genuinely without merit.

9 On 1 January 2020, however, section 21 (1B) of the Refugees Act came into force. That provision requires that an aspirant asylum seeker present in South Africa without a valid visa "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". Section 21 (1B) must be read with Regulation 8 (3) of the Refugee Regulations, which provides that an aspirant asylum seeker who does not possess a valid visa must "prior to being permitted to apply for asylum show good cause for his or her illegal entry or stay in the Republic" (my emphasis).

10 In *Ashebo* the Constitutional Court held that the "hard-headed and practical" implication of this rule change was that an asylum seeker arrested for failing to produce a valid visa may lawfully be detained under the Immigration Act

until such time as they have shown good cause for being in South Africa without one, even if they immediately indicate that they wish to apply for asylum. That detention may subsequently become unlawful, however, if the immigration authorities do not take reasonable and prompt steps to allow an aspirant asylum seeker to show such good cause, and if there is no other basis on which the detention can be justified.

The effect of the decision in *Ashebo*

11 In deciding *Ashebo*, the Constitutional Court declined to follow the decision of the full court in *Abraham*, which concluded that the amendments to the Refugees Act and Regulations do not fundamentally alter the legal consequences of intimating an intention to apply for asylum: viz. that asylum claims are dealt with under the Refugees Act, which does not authorise the detention of asylum seekers, rather than under the Immigration Act, which does. The court in *Abraham* held that the necessary implication is that an asylum seeker may not be detained, even if they have yet to show "good cause" for being present in South Africa without a visa. The "good cause" interview is part and parcel of the asylum process, during which the state has no general right to detain an asylum seeker (see *Abraham*, paragraph 31).

12 The Constitutional Court's rejection of the approach taken in *Abraham* appears to have been animated by concerns about releasing an asylum seeker who had not yet shown that they are entitled to apply for asylum, because they had not yet shown good cause for being present in South Africa without a visa. The problem, the court reasoned, was that the aspirant

asylum seeker would be "allowed to remain at large on their mere say-so that they intend to seek asylum. That person would remain undocumented and there would be absolutely no means of checking whether they indeed promptly applied for asylum. There would be nothing to stop them from making the same claim to the next immigration officer who encounters them, thus repeatedly preventing their detention" (*Ashebo*, paragraph 58).

13 The Constitutional Court's apparent fear that asylum seekers may secure their freedom through multiple acts of bad faith is not borne out in the cases before me. The applicants have already tried to apply for asylum at least once. They have been prevented from doing so by administrative obstacles that strike me as both irrational and unlawful. I cannot think of a lawful or rational basis upon which nationals of a particular country could be prevented from applying for asylum, no matter what their individual circumstances. But this is what Mr. R[...] and Mr. M[...] say happened to them. Nor can it be rational or lawful to turn an asylum seeker away because they have not made an appointment, which is what Mr. S[...] says happened to him. Those fleeing persecution will seldom be able to arrange an asylum interview with the authorities in their country of destination in advance.

14 Having been denied the right to demonstrate their entitlement to asylum, the applicants were arrested, and their detention was extended while the respondents sat back and took no steps whatsoever to facilitate a good cause interview.

15 I cannot say whether the failure to organise a good cause interview in the applicants' cases is part of a wider pattern of behaviour on the respondents'

part, or whether the facts of this case are an unusual exception to an otherwise well-oiled immigration machine, which regularly organises prompt and fair good cause interviews. It is at least possible, however, that the fundamental problem is not that dishonest asylum seekers may be set free without valid documents, but that the respondents lack the capacity or the will to process asylum seekers' claims promptly and fairly, even when ordered to do so by the High Court. The dispiriting implication of this is that the amendments to the Refugees Act and its regulations have done little to improve the efficiency of the refugee system, while at the same time making aspirant asylum seekers more vulnerable to official neglect and arbitrary detention.

16 The respondents' failure to organise good cause interviews in these cases also raises the possibility that, without court intervention, the applicants would have been returned to their country of origin without having had their asylum claims considered – all on the basis that they were found in South Africa without a valid visa and were never given an opportunity to justify this.

17 That would obviously be in breach of South Africa's international obligations, entrenched in section 2 of the Refugees Act, not to "*refoule*" an asylum seeker by returning them to a country where they may be subjected to persecution on account of their race, religion, nationality, political opinion or membership of a particular social group. If an asylum seeker is deported without any consideration of their asylum claim, there is clearly an unacceptable risk of refoulement.

The proper approach in applications for an asylum seeker's release

18 If the respondents' approach to this case is part of a wider pattern of behaviour, then it seems to me that potentially large numbers of asylum seekers may be refouled, in breach of the Refugees Act and international law, while they wait in detention for a good cause interview that never takes place.

19 In these circumstances, it is in my view incumbent upon a court faced with an application for an asylum seeker's release to take positive steps to establish whether there is a lawful basis for the applicant's detention, and whether there is a risk of refoulement if the asylum seeker is being held pending deportation.

20 Given that the law as it currently stands requires that the respondents be afforded an opportunity to organise a good cause interview, a two-stage approach seems appropriate.

21 The first stage is to establish whether a good cause interview has taken place. There are three possibilities. The first is that there has been a good cause interview, at which an immigration officer has determined whether good cause has been shown. In that event, the court is bound by the outcome of the interview, unless a review of the immigration officer's decision is properly before it. If good cause has been shown, detention must end. If it has not been shown, detention will continue, assuming it is consistent with the rules governing detention under the Immigration Act.

22 The second possibility is that there has been no good cause interview, despite the immigration authorities having had a reasonable period in which

to organise one. In that event, release must follow on the decision in *Ashebo*.

23 The third possibility is that there has been no good cause interview, but the immigration authorities have not yet had a reasonable opportunity to organise one. In that event, a court's oversight moves to the second stage.

24 The second stage is to postpone the application for release for a reasonable but definite period, during which the immigration authorities are afforded an opportunity to organise a good cause interview.

25 On the return day, the court will release the applicant on the basis set out in paragraph 58 of *Ashebo* if no good cause interview has taken place. If a good cause interview has taken place and good cause has been found, release must also follow, if it has not happened already.

26 In the event that a good cause interview has taken place, but no good cause has been found, detention continues subject to the Immigration Act, but it may be appropriate to make an order to protect the applicant's rights if the outcome of the interview is to be challenged by appeal or review. This may include an order to protect the applicant from deportation pending any appeal or review. Where the applicant's detention can no longer be justified under the Immigration Act, an order for release pending appeal or review may also be appropriate. However, not yet having been confronted with a case in which the respondents have organised a good cause interview, I prefer not to specify more closely the circumstances in which any order whether for release, further detention, or otherwise, should be made.

27 It seems to me that this approach is consistent with what is said in *Lembore v Minister of Home Affairs* [2024] 2 All SA 113 (GJ) at paragraphs 85 and 86, in which a full court explored the consequences of the decision in *Ashebo* and its impact on the lawfulness of detaining asylum seekers who have not yet had a good cause interview.

28 In the cases of Mr. S[...], Mr. M[...] and Mr. R[...], no good cause interview had been arranged even though the respondents had every opportunity to do so. Once it had been established that the delay in organising the interview in each of the applicants' cases was not reasonable, I was bound to order the applicants' release.

29 It was for these reasons that I made my orders of 15 April 2024.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal InforM[...]on Institute. The date for hand-down is deemed to be 2 May 2024.

HEARD ON:	12 and 28 March 2024; 15 April 2024
DECIDED ON:	15 April 2024
REASONS:	2 May 2024
For the Applicant in case no. 2024/021421:	P Maluleke Instructed by Maladzhi & Sibuyi
For the Applicant in case nos. 2024/025071 and 2024/025073:	I Nwakodo Instructed by Tony Okorie Attorneys
For the Respondents:	No appearance