

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



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

Case CCT 115/21

In the matter between:

**D.A.** Applicant

and

**MINISTER OF HOME AFFAIRS** First Respondent

**DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS** Second Respondent

**Neutral citation:** *A. v Minister of Home Affairs and Another* [2021] ZACC 50

**Coram:** Zondo ACJ, Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

**Judgments:** Tshiqi J (unanimous)

**Heard on:** 3 August 2021

**Decided on:** 30 December 2021

**Summary:** Refugees Act 130 of 1998 — applicability of provisions of the Refugees Amendment Act 11 of 2017 — date of intention to apply for asylum — principle of non-refoulement

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## **ORDER**

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On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg:

1. Leave for direct appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and is substituted with the following:
  - “a) It is declared that Mr A. is, in terms of section 2 of the Refugees Act 130 of 1998 read with the Refugees Amendment Act 11 of 2017, entitled to remain lawfully in the Republic of South Africa and the respondents are ordered to refrain from deporting him until his status has been determined and finalised.
  - b) The respondents are directed to take all reasonable steps, within 14 days from the date of this order, to give effect to Mr A.’s intention to apply for asylum in terms of section 21(1B) of the Refugees Amendment Act.
  - c) It is declared that the continued detention of Mr A. during the period from 26 August 2020 to 7 February 2021, and during the period from 30 May 2021 to 25 June 2021, was unlawful.”
4. The respondents must pay the applicant’s costs in both the High Court and in this Court, including the costs of two counsel.

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## JUDGMENT

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TSHIQI J (Zondo ACJ, Madlanga J, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Tlaletsi AJ, and Theron J concurring):

### *Introduction*

[1] This is an application for leave to appeal directly to this Court against the order of the High Court of South Africa, Gauteng Local Division, Johannesburg (High Court, Johannesburg).<sup>1</sup> That Court dismissed the applicant's application which sought an order, amongst other things, interdicting the respondents from deporting the applicant until his status under the Refugees Act,<sup>2</sup> alternatively under the Refugees Amendment Act,<sup>3</sup> has been lawfully and finally determined. The applicant also sought an order declaring his continued detention unlawful, and that the respondents be directed to release him. He further sought an order declaring that he is entitled to remain in the Republic of South Africa for a period of 14 days in order to allow him to approach a Refugee Reception Office. He also prayed for an order directing the respondents to accept his asylum application and to issue him with a temporary asylum seeker permit pending finalisation of his application, including the right of review or appeal in terms of Chapter 3 of the Refugees Act and the Promotion of Administrative Justice Act,<sup>4</sup> provided that he applies for such review. At the time of the application, Mr A. was detained at Lindela Repatriation Centre, pending his deportation. On 29 March 2021, the High Court, Johannesburg dismissed Mr A.'s application with costs.

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<sup>1</sup> *Abore v Minister of Home Affairs*, unreported judgment of the High Court of South Africa, Gauteng Local Division, Johannesburg, Case No 12408/2021 (29 March 2021) (High Court judgment).

<sup>2</sup> 130 of 1998.

<sup>3</sup> 11 of 2017.

<sup>4</sup> 3 of 2000.

## *Parties*

[2] The applicant, Mr A., is an illegal foreigner<sup>5</sup> from Ethiopia. He entered South Africa illegally from Zimbabwe. He alleged that he was involved in opposition politics in his country and fled to South Africa owing to a fear of persecution. It is unclear when he entered South Africa. The first respondent is the Minister of Home Affairs, cited in his official capacity as the official responsible for the administration of the Refugees Act. The second respondent is the Director General, Department of Home Affairs, also cited in his official capacity.

## *Background facts*

[3] On 8 June 2020, Mr A. was arrested at Eshowe, KwaZulu-Natal, for unlawfully entering and residing in South Africa, in contravention of the Immigration Act. On 7 July 2020, the Eshowe Magistrates' Court convicted him and sentenced him to 50 days' imprisonment with an option to pay a fine of R1 500. His custodial sentence was to officially end on 25 August 2020. Mr A. alleges that the fine was paid on his behalf, but he was still detained and not released. In his founding affidavit he attached a receipt that shows that the amount was paid, but it is common cause that this evidence was not before the High Court, Johannesburg. On 21 July 2020, the High Court of South Africa, KwaZulu-Natal Local Division, Durban (High Court, Durban), granted an interim order interdicting the respondents from removing Mr A. from its jurisdiction, or deporting him to Ethiopia, pending the return date of 6 August 2020, on which date the application for his release from custody was to be heard.

[4] On 6 August 2020, the rule nisi was extended to afford the respondents an opportunity to file an answering affidavit. On 14 August 2020, by consent between the parties, the rule nisi was extended *sine die* (with no appointed date for resumption).

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<sup>5</sup> Section 1 of the Immigration Act 13 of 2002 defines "illegal foreigner" as "a foreigner who is in the Republic in contravention of [that] Act".

On 4 December 2020, it transpired that Mr A. had failed to take any further steps to bring the matter to finality. The respondents set the matter down for hearing on 27 January 2021. On the same day, Mr A.'s attorneys withdrew as attorneys of record. The rule nisi was discharged, and the interim orders lapsed. On 8 February 2021, the respondents applied for a warrant of detention to facilitate the process of deporting Mr A. to Ethiopia in terms of section 34(1) of the Immigration Act. The warrant was accordingly issued by the Eshowe Magistrates' Court for his detention for a period of 30 days, and Mr A. was moved to Lindela Repatriation Centre pending deportation.

[5] Mr A. was not deported immediately after these events, and the respondents applied to the Krugersdorp Magistrates' Court for an order extending his detention for a period of 90 days. The order was granted on 1 March 2021, and the period of extension officially ended on 29 May 2021. On 12 March 2021, Mr A. brought an application in the High Court, Johannesburg, seeking an order preventing his deportation until he had made an asylum application, and requiring the respondents to release him from detention. On 29 March 2021, that Court dismissed the application, and it is this order that is the subject of the matter before this Court.

[6] Before the hearing of this application, Mr A.'s legal representatives gave us an update of what has happened since 29 March 2021. They notified this Court that on 25 June 2021, Mr A. was released from custody. After his release he was instructed by the respondents' officials to leave the Republic of South Africa by 26 July 2021, failing which, he would be arrested and deported. On 15 July 2021, the High Court, Johannesburg issued an order directing the respondents to refrain from arresting and deporting Mr A. pending finalisation of the present application.

## *High Court*

[7] The High Court application which is the subject of the present appeal was opposed by the respondents. The High Court, Johannesburg rejected Mr A.'s submission that his detention was unlawful. It noted that Mr A. was detained in terms of the provisions of the Immigration Act and that there was a court order which extended his detention for 90 days pending his deportation. It concluded that the limitation of his freedom was thus justified in terms of section 36 of the Constitution.

[8] Regarding Mr A.'s right to apply for asylum, the High Court, Johannesburg highlighted that Mr A. gave contradicting versions about the date of his arrival in South Africa. It noted that he informed the police that he arrived on 5 January 2017, but later informed his attorneys that he arrived in December 2019. It accepted the former as his arrival date. The High Court, Johannesburg accepted that it has been held in numerous cases that once an illegal foreigner indicates his or her intention to apply for asylum, he or she is entitled to be given an opportunity to do so by being released from custody and issued with a temporary permit until the determination of the asylum application.<sup>6</sup> However, it held that the principle does not apply if a person indicates his or her intention to apply for asylum after spending many years in South Africa without evincing an intention to do so. Effectively, the Court concluded that the fact that Mr A. delayed after entering the country, before he made it known that he intended to apply for asylum, was a factor militating against him being given the protection under section 2 of the Refugees Act. It held that the long queues at the Refugees Reception Offices cannot be an excuse for not having the relevant documents entitling him to be in the Republic lawfully. The High Court, Johannesburg accordingly dismissed the application with costs.

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<sup>6</sup> *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC); *Ersumo v Minister of Home Affairs* [2012] ZASCA 31; 2012 (4) SA 581 (SCA); *Abdi v Minister of Home Affairs* [2011] ZASCA 2; 2011 (3) SA 37 (SCA); *Bula v Minister of Home Affairs* [2011] ZASCA 209; 2012 (4) SA 560 (SCA); and *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA).

## *This Court*

### *Jurisdiction*

[9] Mr A. submits that his application raises a constitutional issue as it implicates his right to freedom and security of the person contained in section 12 of the Constitution. I accept that Mr A.'s section 12 right is affected. This Court thus has jurisdiction to determine the application.

### *Leave for direct appeal*

[10] Mr A. advances two reasons for approaching this Court directly. First, he submits that this matter is urgent. Second, he could not appeal to the Supreme Court of Appeal on an urgent basis as that Court does not have a procedure for urgent applications. Thus, had he approached the Supreme Court of Appeal, he would probably have been deported before the matter was considered by that Court. For these reasons, he submits that leave to appeal to this Court directly should be granted.

[11] The respondents submit that Mr A. failed to set out exceptional circumstances warranting direct appeal to this Court. They also submit that Mr A.'s submission that the Supreme Court of Appeal does not have a procedure for urgent appeals has no merit. This is because rule 11 of the Rules of the Supreme Court of Appeal and rule 49(18) of the Uniform Rules of Court provide for urgent appeals both in the High Court and the Supreme Court of Appeal. They contend that Mr A. ought to have utilised these procedures before approaching this Court, and further submit that this application is premature and falls to be dismissed.

[12] I am of the view that direct appeal may be granted where the interests of justice, informed by various factors, outweigh the disadvantages of hearing the matter without the benefit of a judgment of the Supreme Court of Appeal. Whilst it is correct that rule 11 of the Rules of the Supreme Court of Appeal and rule 49(18) of the Uniform Rules of

Court provide for urgent appeals in the High Court and the Supreme Court of Appeal, at the time the application was launched this case was manifestly urgent due to Mr A.'s impending deportation. Although the High Court, Durban has since granted an order staying the deportation, that order was granted after the present application had been set down for hearing. At that stage, legal fees and costs had already been incurred towards preparation for the application before this Court.

[13] Another important factor is the need to provide clarity on the applicability of the principles laid down by this Court in *Ruta*<sup>7</sup> following the amendments to the Refugees Act. 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. The second one, which was not endorsed by the High Court, Johannesburg and which seems to have weighed heavily against Mr A. in this matter, is that a delay by an illegal foreigner in expressing an intention to apply for asylum does not bar him or her from applying for refugee status. As the above principles were established by this Court, it is in the interests of justice that this Court should provide guidance on whether the amendments to the Refugees Act have the effect of changing them. Leave for direct appeal should be granted.

[14] Another important factor is the need to provide clarity on the applicability of the principles laid down by this Court in *Ruta* following the amendments to the Refugees Act. As the above principles were established by this Court, it is in the interests of justice that this Court should provide guidance on whether the amendments have the effect of changing them. Leave for direct appeal should be granted.

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<sup>7</sup> *Ruta* id.



## *Merits*

### *Applicant's submissions*

[15] Mr A. submits that the High Court, Johannesburg erred in holding that he arrived in South Africa on 5 January 2017, despite it being clear from his answering affidavit that he only arrived mid-December 2019. He contends that it was this error that led that Court to the erroneous conclusion that he had been in South Africa for four years without applying for asylum. He further submits that the High Court, Johannesburg erroneously disregarded binding judgments of the Supreme Court of Appeal,<sup>8</sup> which have held that once an illegal foreigner evinces an intention to apply for asylum, that intention automatically entitles him or her to be released and to be afforded an opportunity to apply for asylum.

[16] Regarding the elements of the interdict sought in the High Court, Johannesburg, which was intended to interdict the respondents from deporting him until his status under the Refugees Act has been determined, Mr A. argues that he has met its requirements. Mr A. placed reliance on the old Refugees Act and the old Regulations. Whether he could place reliance on the old Refugees Act and the old Regulations or on the new amendments is one of the issues that arises and this will be resolved below. He submits that he has established a prima facie right, as he is an illegal foreigner who has indicated a desire to apply for asylum. On this basis he must therefore be allowed to do so in terms of sections 2 and 21 of the Refugees Act, as well as regulation 2(2) promulgated under section 38 of the Refugees Act.

[17] He further argues that he is at risk of suffering irreparable harm if the interdict is not granted because his deportation, which was imminent at the time of launching the application, and which will eventuate if the application is not successful in this Court, will lead to the imposition of the death penalty in his country, because of his political

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<sup>8</sup> See the decisions of the Supreme Court of Appeal cited above n 6.

activities. Furthermore, his detention is a continuous harm. According to Mr A., the balance of convenience favours him, as there are multiple processes through which the respondents would be able to arrest him lawfully if his application for asylum is unsuccessful. Finally, Mr A. avers that there are no alternative remedies available to him, as he has already written a formal letter expressing his desire to apply for asylum, and has made the application to the High Court for the present interdictory relief.

### *Respondents' submissions*

[18] The respondents aver that Mr A. entered South Africa either on 5 January 2017 or 5 January 2019 at the latest, and did not take any steps to apply for asylum. The respondents, in an attempt to escape the implications of the legal principles laid down in *Ruta*, submitted that the amendments to the Refugees Act which came into effect on 1 January 2020, and the new Regulations relating thereto, are applicable. They submit that in light of these amendments, the *Ruta* principles no longer apply because Mr A. was arrested and only indicated his intention to apply for asylum after the amendments came into effect.

[19] According to the respondents, the new provisions of the Refugees Act and the new Regulations do not automatically grant an illegal foreigner the right to be afforded an opportunity to apply for asylum once he or she evinces an intention to do so. This, according to the respondents, is because section 21(1B) of the Refugees Amendment Act requires that a person 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. That officer must ascertain whether valid reasons exist as to why that person is not in possession of such a visa. Furthermore, regulation 8(3) requires the illegal foreigner to show good cause for the illegal entry or stay in the Republic before being permitted to apply for asylum. The respondents submit that the new amendments grant the immigration officers and the courts the authority to decide whether valid

reasons exist as to why the illegal foreigner is not in possession of a valid transit visa, before the illegal foreigner may be afforded an opportunity to apply for asylum. They submit that good cause must be shown to the immigration officer for the illegal entry and stay in the Republic.

[20] The submissions, clearly delineated, raise the following issues:

- (a) Whether the amendments to the Refugees Act are applicable to the applicant;
- (b) Whether an illegal foreigner who claims to be a refugee and expresses an intention to apply for asylum should be permitted to apply in terms of the Refugees Act;
- (c) Whether a delay between an illegal foreigner's arrival in South Africa and his or her expression of an intention to apply for asylum bars him or her from applying for refugee status. Put differently, whether it is permissible for an illegal foreigner to arrive and tarry for months, without applying for refugee status, and then, when the law catches up with him or her, insist on the right to apply for asylum; and
- (d) Whether Mr A.'s entire detention period was unlawful or whether the limitation of his freedom was justified in terms of section 36 of the Constitution, as the High Court, Johannesburg concluded.

[21] In *Ruta*, this Court has already answered in the affirmative the question of whether an illegal foreigner who claims to be an asylum seeker and expresses an intention to apply for asylum should be permitted to apply in terms of the Refugees Act. It has already held further that the delay on the part of an asylum seeker in expressing an intention to apply for asylum is of no moment. Ordinarily, a complete answer to these questions would be that this Court has already determined these questions in *Ruta* and that there is no basis to deal with them further. But the respondents submit that the

amendments to the Refugees Act and the new Regulations that came into effect on 1 January 2020 have changed the law, such that the principles laid down by this Court in *Ruta* are not applicable. The respondents also contend that the amendments are applicable to Mr A. and that he should not be afforded an opportunity to apply for asylum. The submission that the amendments have the effect that Mr A. is not entitled to be afforded an opportunity to apply for asylum necessitates that this Court examines the relevant provisions of the old Refugees Act together with the amendments and their effect, if any, on the principles laid down in *Ruta*.

### *The Refugees Act and the relevant amendments*

[22] It is useful to consider the extent of the legislative changes that have occurred. Section 21(2) of the old Refugees Act was amended by the Refugees Amendment Act while regulation 2(2) has been repealed in its entirety. Section 2, which was the main basis on which this Court laid down the principles relating to *non-refoulement* in *Ruta*,<sup>9</sup> has not been amended. Section 21 of the old Refugees Act provided:

- “(1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office.
- (2) The Refugee Reception Officer concerned—
  - (a) must accept the application form from the applicant;
  - (b) must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard;
  - (c) may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and
  - (d) must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of section 24.

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<sup>9</sup> In *Ruta* above n 6 at para 24, this Court described *non-refoulement* as “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”.

- (3) When making an application for asylum, every applicant must have his or her fingerprints or other prints taken in the prescribed manner and every applicant who is 16 years or older must furnish two recent photographs of himself or herself of such dimensions as may be prescribed.”

Regulation 2 of the old Regulations provided:

- “(1) An application for asylum in terms of section 21 of the Act—
- (a) must be lodged by the applicant in person at a designated Refugees Reception Office without delay;
  - (b) must be in the form and contain substantially the information prescribed in Annexure 1 to these regulations; and
  - (c) must be completed in duplicate.
- (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.”

[23] Accordingly, the old regulation 2(2) gave an aspirant asylum seeker an “automatic” right to apply for asylum. In *Bula*,<sup>10</sup> the Supreme Court of Appeal held that this regulation meant that once there is an indication by an individual that he or she intends to apply for asylum, that individual is entitled to be issued with an appropriate permit valid for 14 days within which he or she must approach the Refugee Reception Office to complete an application for asylum. Read with section 22 of the old Refugees Act, once that intention was asserted, that individual was also entitled to be freed subject to further provisions of the Refugees Act.

[24] Section 21 of the amended Act now provides:

- “(1) (a) Upon reporting to the Refugee Reception Office within five days of entry

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<sup>10</sup> *Bula* above n 6.

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 or at any other place designated by the Director-General by notice in the Gazette.
- (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.
- (2A) When making an application for asylum, every applicant must declare all his or her spouses and dependants, whether in the Republic or elsewhere, in the application for asylum.
- (3) When making an application for asylum, every applicant, including his or her spouse and dependants, must have his or her biometrics taken in the prescribed manner.
- (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—
  - (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such application has been reviewed in terms of section 24A or where the applicant exercised his or her right to appeal in terms of section 24B; or
  - (b) such person has been granted asylum.”

[25] Regulation 7 of the new Regulations provides:

“Any 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 as required, including—

- (a) fingerprints;
- (b) photograph;
- (c) names and surname;
- (d) date of birth and age;
- (e) nationality or origin; and
- (f) habitual place of residence prior to travelling to the Republic;

and must be issued with an asylum transit visa contemplated in section 23 of the Immigration Act.”

[26] While regulation 8 in relevant part provides:

“(1) An application for asylum in terms of section 21 of the Act must—

- (a) be made in person by the applicant upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office;
- (b) be made in a form substantially corresponding with Form 2 (DHA-1590) contained in the Annexure;
- (c) be submitted together with—
  - (i) a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted circumstances, a valid visa issued in terms of the Immigration Act;
  - (ii) proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and
  - (iii) the biometrics of the applicant, including any dependant.

...

(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 sub-regulation (3).”

[27] The new Regulations, in particular regulation 7 which deals with asylum transit visas, and regulation 8 which deals with applications for asylum, are more stringent than the previous Regulations, in particular regulation 2(2) which has since been repealed. Regulation 7 provides that a person must declare his or her intention to apply for asylum at a port of entry before entering the Republic and must be issued with an asylum transit visa which is valid for five days. The problem with regulation 7 is that it does not assist asylum seekers in the position of Mr A., who did not declare such an intention at a port of entry and before entering the Republic. It also does not assist asylum seekers who do not enter the Republic through an official border post. Many do not, given their precarious position as illegal foreigners fleeing their home countries due to a well-founded fear of persecution.

[28] Regulation 8, which provides for the asylum application process, does not alleviate the plight of individuals who do not possess an asylum transit visa. Instead, regulation 8(3) requires that any person who, upon application for asylum at a Refugee Reception Office, fails 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.<sup>11</sup> That Article provides that 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,<sup>12</sup> enter or are present in their territory without

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<sup>11</sup> Convention Relating to the Status of Refugees, 28 July 1951 (1951 Convention).

<sup>12</sup> Article 1 of the 1951 Convention mirrors section 3 of the Refugees Act. It reads:



authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

[29] 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 a 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.

[30] Section 4(1) of the Refugees Act has also been amended to introduce certain grounds of disqualification of illegal foreigners who fail to provide the information

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“For the purposes of the present Convention, the term “refugee” shall apply to any person who:

...

(2)As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

envisaged in section 21(1B) and regulation 8(3). These amendments are to be found in section 4(1)(h) and (i). Section 4(1) and (2) as a whole now provide:

- “(1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she—
- (a) has committed a crime against peace, a crime involving torture, as defined in the Prevention and Combating of Torture of Persons Act 13 of 2013, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
  - (b) has committed a crime outside the Republic, which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment without the option of a fine; or
  - (c) has been guilty of acts contrary to the objects and principles of the United Nations or the African Union; or
  - (d) enjoys the protection of any other country in which he or she is a recognised refugee, resident or citizen; or
  - (e) has committed a crime in the Republic, which is listed in Schedule 2 of the Criminal Law Amendment Act 105 of 1997, or which is punishable by imprisonment without the option of a fine; or
  - (f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or
  - (g) is a fugitive from justice in another country where the rule of law is upheld by a recognised judiciary; or
  - (h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer 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 as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on

a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum.

- (2) For the purposes of subsection (1)(c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations or the African Union.”

[31] Before dealing with whether the new amendments have the effect that Mr A. is barred from relying on the *non-refoulement* principle, it is helpful to first consider whether his application should be determined in terms of the new amendments. Mr A. gave contradictory versions on the date of his arrival in the Republic. The High Court, Johannesburg noted that he had informed the respondents’ officials that he had arrived on 5 January 2017, but later informed his attorneys that had he arrived in December 2019. The Court accepted the former as his arrival date.<sup>13</sup> In his application for leave to appeal to this Court he stated that he arrived in December 2019. In their answering affidavit, the respondents stated that Mr A. had earlier, in one of the applications he had brought in one of the High Courts, stated that he entered the Republic in 2017. As already stated, the catalyst to the dispute around Mr A.’s asylum status was his arrest on 8 June 2020 in Eshowe, KwaZulu-Natal, whilst he was already in the country. The respondents argue that as the amendments to the Refugees Act and the new Regulations came into effect on 1 January 2020, before Mr A. evinced an intention to apply for asylum, they are applicable in his case.

[32] The context in which it must be considered whether it is the old or the new regime that is applicable to Mr A. is that, often, asylum seekers who enter the country illegally and those who do not enter the country through the designated ports of entry are not truthful about the manner in which they arrived and the date of their arrival. It is not unusual for such asylum seekers to enter the country through illegal means and to be found in possession of falsified documents. This is likely a result of their vulnerability, and it is the reason that a separate regime applies to asylum seekers as opposed to other

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<sup>13</sup> High Court judgment above n 1 at para 9.

illegal foreigners. In *Ruta*, it was common cause that the permits found in Mr Ruta's possession were false and that there was an extensive delay before he evinced an intention to apply for asylum.<sup>14</sup> In *Ersumo*,<sup>15</sup> the Supreme Court of Appeal said that even if one were to accept that Mr Ersumo's story about his attempts to obtain refugee status upon reaching South Africa was untrue, that did not mean that he did not wish to apply for refugee status. Irrespective of such untruths, the Supreme Court of Appeal held, under the old regulation 2(2), that he was entitled to be issued with an appropriate permit – clearly an asylum transit permit in terms of section 23(1) of the Immigration Act – valid for 14 days within which he was to approach a Refugee Reception Office in order to complete an asylum application. If, during that process, the application was found to be manifestly unfounded, abusive or fraudulent, the asylum seeker permit could be withdrawn and he would then be subject to detention in terms of section 23 of the Refugees Act.<sup>16</sup>

[33] These complexities, which inevitably characterise these sorts of applications for asylum, make it impossible to determine the date on which an asylum seeker entered the country. It was against this background that this Court in *Ruta* held that it does not matter when an asylum seeker arrived; they must be allowed to make an application for asylum.<sup>17</sup> When it is known on which date an applicant evinced an intention to apply for asylum, it is that date that is used to determine which legislative regime is applicable to determine his or her application for asylum. In this case, as there are no official documents that verify, with certainty, the date and manner in which Mr A. entered the country, except an immigration interview questionnaire that was completed by an immigration officer in 2021, when Mr A. was already in the Republic, a date that can be objectively ascertainable is the date of his arrest. This is the date on which it can be

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<sup>14</sup> *Ruta* above n 6 at para 19.

<sup>15</sup> *Ersumo* above n 6 at para 13.

<sup>16</sup> *Id.*

<sup>17</sup> *Ruta* above n 6 at para 56.

ascertained, with certainty, that he was in the country and on which he coincidentally indicated his intention to apply for asylum.

[34] There is no evidence that Mr A. took any steps, before 1 January 2020, to avail himself of a right to apply for asylum. He alleges that he visited the Refugee Reception Office in January and February 2020, but that because there were extremely long queues he was not assisted. This, in any event, allegedly occurred after 1 January 2020. In the application that Mr A. brought before the High Court, Durban, he said he only arrived in South Africa in March 2020, and that he was unable to visit the Refugee Reception Office because it was closed due to the Covid-19 lockdown. I will thus accept that the date which should be used in order to determine which legal regime is applicable to Mr A. is the date of his arrest. As already stated, this is the date on which he clearly evinced an intention to apply for asylum. The new amendments are therefore applicable to Mr A., as he was arrested after they came into effect and as he evinced an intention to apply for asylum when they were already in operation.

[35] The new provisions were considered in the unreported case of *Mwale*.<sup>18</sup> The applicant in that case, Ms Mwale, a Zambian national, intimated for the first time before a Magistrate, in an application to confirm her detention for purposes of deportation, that she wanted to apply for asylum.<sup>19</sup> Ms Mwale had been convicted of being in possession of fraudulent documents and had served a prison sentence for that offence.

[36] The Magistrate held that Ms Mwale was a prohibited person in terms of section 29 of the Immigration Act and confirmed her detention for the purpose of deportation. Ms Mwale brought an urgent application in the High Court of South Africa, Eastern Cape

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<sup>18</sup> *Esther Mwale v Minister of Home Affairs*, unreported judgment of the High Court of South Africa, Eastern Cape Local Division, Port Elizabeth, Case No 1982/2020 (22 September 2020) (*Mwale*).

<sup>19</sup> *Id* at para 14.

Local Division, Port Elizabeth, seeking, inter alia, to be released from detention and to be permitted to apply for asylum. The Court, seeking to rely on *Bula*<sup>20</sup> held as follows:

“Regulation 2(2) which ought to have been the starting point as indicated by Navsa JA above, has since been repealed and there are no similar provisions in the new Regulations. In fact, in terms of regulation 7 of the new Regulations, an individual must declare his or her intention to apply for asylum, while at a port of entry before entering the Republic and not when he is ‘encountered’ in violation of the Immigration Act. Further once he or she avers such an intention to apply for asylum, he or she must provide his biometrics and other relevant data as required and only then he or she would be entitled to be issued with an asylum transit visa for five days.

Reverting to the first issue raised by the applicant, clearly from the scheme of the Refugees Act, immigration officers have a role to play prior to a prospective asylum seeker submitting her asylum application to the Refugee Status Determination Officer. I say this because of my interpretation of the provisions of section 21(1B) of the Refugees Act, which reads:

‘(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.’

Such interview must be conducted by an immigration officer before an asylum seeker could be permitted to apply for asylum and the individual concerned must show good cause for his or her illegal entry or stay in the Republic.

So the answer to the first point of argument raised by the applicant is that, immigration officers are empowered in terms of section 21(1B) of the Refugees Act and regulation 8(3) of the new Regulations to interview an applicant to ascertain whether valid reasons exist as to why such an applicant is not in possession of the asylum transit visa and an applicant has a duty to show good cause for her illegal entry or stay in the Republic. . . . Argument advanced on her behalf by Mr Menti, was that, all what was required of the applicant was merely to assert an intention to apply for asylum, and once she has done so at any stage, she was entitled to be released from detention and to be allowed to apply for

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<sup>20</sup> *Bula* above n 6 at para 72.

asylum. This argument is not sustainable having regard to the provisions of section 21(1B) of the Refugees Act and Regulations 7 and 8(3) of the new Regulations.”<sup>21</sup>

[37] Effectively, the High Court concluded that since regulation 2(2) has been repealed and having regard to the legislative amendments, all judgments upon which Ms Mwale placed reliance were of no assistance to her.<sup>22</sup> In addition, the Court found Ms Mwale’s contention that she is not barred from asserting an intention to apply for asylum, despite the confirmation of the warrant by the Magistrate, to be unsustainable on the proper and current interpretation of the amendments to the Refugees Act and the new Regulations.<sup>23</sup> The Court dismissed the application on this ground and other grounds not relevant for the purposes of this application.<sup>24</sup>

[38] Recently in *Abraham*, the High Court held that:

“What is clear from the Act and the Regulations is that while an aspirant asylum seeker is required to indicate an intention to do so at a port of entry, the Act and the Regulations provide a clear mechanism for someone who has not arrived at a port of entry to be able to nevertheless have opportunity to declare such an intention a later stage and thereupon be afforded the opportunity to apply for asylum.

Section 4(1)(h) and (i) which deals with the exclusion from refugee status both provide for an asylum seeker to advance compelling reasons to either the Refugee Reception Office or the Refugee Status Determination Officer for the failure to either having entered the country illegally or to report to a Refugee Reception Office within 5 days.

In addition, Regulation 8(3) also provides for an asylum seeker to show good cause before being entitled to apply for asylum for their illegal entry or stay in the country.”<sup>25</sup>

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<sup>21</sup> *Mwale* above n 18 at paras 25-8.

<sup>22</sup> *Id* at para 30.

<sup>23</sup> *Id* at paras 28-30.

<sup>24</sup> *Id* at para 35.

<sup>25</sup> *Shanko Abraham v Minister of Home Affairs*, unreported judgment of the Gauteng High Court, Gauteng Local Division, Johannesburg, Case No 32620/2021, 32621/2021, 32622/2021 (26 July 2021) (*Abraham*) at paras 24-6.

[39] The High Court in *Abraham* concluded that the amendments do not bar an aspirant asylum seeker in the same position as Mr A. from applying for asylum, but that they create different procedures and entitlements for them.<sup>26</sup> The Court held further that this interpretation of the amendments is consistent with both the letter and spirit of the 1951 Convention.<sup>27</sup> 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.<sup>28</sup>

[40] In my view, the High Court in *Mwale* erred in holding that since regulation 2(2) has been repealed and, having regard to the legislative amendments, all judgments upon which Ms Mwale placed reliance were of no assistance to her. On the other hand, the High Court in *Abraham*, was correct in concluding that the amendments did not deprive the applicants of the entitlement to be granted an interview with a view to ultimately granting them an opportunity to apply for asylum. In order to illustrate why I reach this conclusion, it is helpful to generously repeat the principles laid down by this Court in *Ruta* and then illustrate why the amendments have not taken away the shield of *non-refoulement* to aspirant asylum seekers in the position of Mr A.. In *Ruta*, this Court first referred to earlier decisions of the Supreme Court of Appeal<sup>29</sup> and then said:

“To find the answer we must start with section 2 of the Refugees Act:

‘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—

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<sup>26</sup> Id at para 27.

<sup>27</sup> Id.

<sup>28</sup> Id at para 31.

<sup>29</sup> See the decisions of the Supreme Court of Appeal cited above n 6.



- (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.’

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>30</sup>

[41] The Court then contextualised the Refugees Act and explained its relevance in our country and its significance internationally:

“It is a noble principle – one our country, for deep-going reasons springing from persecution of its own people, has emphatically embraced. The provenance of section 2 of the Refugees Act lies in the Universal Declaration of Human Rights (Universal Declaration), which guarantees ‘the right to seek and to enjoy in other countries asylum from persecution’. The year in which the Universal Declaration was adopted is of anguished significance to our country, for in 1948 the apartheid government came to power. Its mission was to formalise and systematise, with often vindictive cruelty, existing racial subordination, humiliation and exclusion. From then, as apartheid became more vicious and obdurate, our country began to produce a rich flood of its own refugees from persecution, impelled to take shelter in all parts of the world, but especially in other parts of Africa. That history looms tellingly over any understanding we seek to reach of the Refugees Act.

The principle of protecting refugees from persecution was elaborated three years after the Universal Declaration, in Article 33 of the Convention Relating to the Status of Refugees

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<sup>30</sup> *Ruta* above n 6 at paras 23-4.

of 1951 (1951 Convention). This gave substance to Article 14 of the Universal Declaration. The 1951 Convention defined ‘refugees’, while codifying *non-refoulement*. South Africa as a constitutional democracy became a State Party to the 1951 Convention and its 1967 Protocol when it acceded to both of them on 12 January 1996 – which it did without reservation. In doing so, South Africa embraced the principle of *non-refoulement* as it has developed since 1951. The principle has been a cornerstone of the international law regime on refugees. It has also become a deeply-lodged part of customary international law and is considered part of international human rights law. As refugees put agonising pressure on national authorities and on national ideologies in Europe, North America, and elsewhere, the response to these principles of African countries, including our own, is of profound importance.”<sup>31</sup>

[42] 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.<sup>32</sup> The “shield of *non-refoulement*” may only be lifted after that process has been completed.<sup>33</sup>

[43] 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. In order to focus

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<sup>31</sup> Id at paras 25-6.

<sup>32</sup> Id at paras 27-9.

<sup>33</sup> Id at para 54.

on the interpretative exercise, it is helpful to quote the section fully, although it is referred to in the quotation from *Ruta* above. 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.”

[44] 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 if there are any other provisions in the Refugees Act that provide anything contrary to section 2, the latter prevails over such provisions. The same applies to 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. This is probably one of the reasons that this Court described it as a remarkable and unprecedented provision. This Court correctly said that “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”.<sup>34</sup>

[45] 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 A. from deportation until his refugee status has been finally determined. This then takes me to the conclusion by the High

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<sup>34</sup> Id at para 24.

Court, Johannesburg that the delay in evincing an intention to apply for asylum deprived Mr A. of protection under the *non-refoulement* principle.

[46] The High Court, Johannesburg, in criticising Mr A. for the delay in indicating his intention to apply for asylum, said the following:

“I do not agree with Mr Vobi that it is sufficient for the applicant to merely indicate his intention to apply for asylum and that should entitle him to be released irrespective of the period he has spent in the Republic before his encounter with the authorities. It cannot be right that the applicant would break the law of the Republic and when it catches up with him, the mere saying that he intends applying for asylum should suffice to secure his release. I hold the view that that was not the intention of the authorities or judgments referred to above and upon which the applicant purports to rely. The applicant, in my view, should take the Court into his confidence and make full disclosure, not of his persecution in his country, but what his endeavours were from the moment he entered the Republic until his arrest, to obtain the correct documents and/or to inform the authorities of his presence in the Republic. The applicant has dismally failed in this regard.

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It is my respectful view that the applicant is not approaching this Court with clean hands since he has been living in the Republic for four years without the necessary documentation. It is therefore not open to the applicant to demand that he be afforded the protection of the law because that would be tantamount to rewarding him for breaking the law. The inescapable conclusion is therefore that the application falls to be dismissed.”<sup>35</sup>

[47] In *Ruta*, this Court said that although a delay in applying for asylum is highly relevant insofar as it is a crucial factor in determining credibility and authenticity, which must be made by the Refugee Status Determination Officer, it should at no stage “function as an absolute disqualification from initiating the asylum application process”.<sup>36</sup> In finding against Mr A. on the basis that the delay before he evinced an intention to apply for asylum was a bar to him being afforded an opportunity to exercise his rights

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<sup>35</sup> High Court judgment above n 1 at paras 11 and 13.

<sup>36</sup> *Ruta* above n 6 at para 56.

under the Refugees Act, the High Court, Johannesburg ignored *Ruta* and thus erred in law. Furthermore, the amendments have no bearing on the *ratio* laid down in *Ruta* regarding the approach to be adopted when dealing with a delay.

[48] Mr A. 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 regulation 8(3) and (4), read with section 21(1B).

#### *Lawfulness of the detention*

[49] It is not in dispute that on 7 July 2020, the same day on which Mr A. was sentenced, the fine that was imposed was paid. Therefore, he should not have been kept in custody after this, because the police who were tasked with implementing the order of Eshowe Magistrates' Court knew that he paid the fine and that they could not legally detain him. In his founding affidavit in this Court, Mr A. attached proof of payment of the fine in the amount of R1 500. However, the proof of payment was not brought to the High Court's attention and that Court could not have known that the fine had been paid. It is not clear why this crucial evidence was not brought to the attention of the High Court, Johannesburg, and there was no application brought in this Court for leave to introduce new evidence. For the purposes of this appeal, I will therefore simply state that his 50-day custodial sentence ended on 25 August 2020.

[50] In an attempt to explain why Mr A. was not released after 25 August 2020, the respondents sought to rely on the interim order of the High Court, Durban, issued on

21 July 2020 interdicting the respondents from removing Mr A. from that Court's jurisdiction, or deporting him to Ethiopia, pending the return date of 6 August 2020. Such reliance is flawed. The order did not justify a further detention. The interim order was primarily aimed at staying Mr A.'s deportation.

[51] Mr A. was kept in custody unlawfully from 26 August 2020 to 7 February 2021, since, on 8 February 2021, the Eshowe Magistrates' Court issued a warrant for his detention for a period of 30 days. On 1 March 2021, a Magistrate in Krugersdorp granted an order in favour of the respondents, extending Mr A.'s detention for a period of 90 days. This period officially ended on 29 May 2021. Regardless of what this Court thinks of the warrant of detention and the order of the Magistrate in Krugersdorp authorising the extension of Mr A.'s detention, the legal basis of his detention for these periods were court orders. Mr A. did not challenge the extension of his detention. The court order is valid and must be obeyed until set aside. For these reasons, Mr A.'s detention between 26 August 2020 and 7 February 2021 was unlawful. Mr A. was only released from custody on 25 June 2021. As his period of detention was extended on 1 March 2021 by the Magistrate in Krugersdorp for a period of 90 days, and as this period ended on 29 May 2021, this means that his continuous detention from 30 May 2021 until 25 June 2021, when he was released, was also unlawful.

#### *Costs*

[52] There is no reason why the usual costs order should not be made.

#### *Order*

[53] I make the following order:

1. Leave for direct appeal is granted.
2. The appeal is upheld.

3. The order of the High Court is set aside and is substituted with the following:
  - “a) It is declared that Mr A. is, in terms of section 2 of the Refugees Act 130 of 1998 read with the Refugees Amendment Act 11 of 2017, entitled to remain lawfully in the Republic of South Africa and the respondents are ordered to refrain from deporting him until his status has been determined and finalised.
  - b) The respondents are directed to take all reasonable steps, within 14 days from the date of this order, to give effect to Mr A.’s intention to apply for asylum in terms of section 21(1B) of the Refugees Amendment Act.
  - c) It is declared that the continued detention of Mr A. during the period from 26 August 2020 to 7 February 2021, and during the period from 30 May 2021 to 25 June 2021, was unlawful.”
3. The respondents must pay the applicant’s costs in both the High Court and in this Court, including the costs of two counsel.

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