

## Conference Paper

Workshop on “Constitutional Rights, Judicial Independence and the Transition to Democracy: Twenty Years of South African Constitutionalism”

### REFUGEES, RIGHTS, & WRONGS -

Observations on the inefficient processing of asylum seeker and refugee applications  
by the Department of Home Affairs.

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1. As at January 2014, the United Nations Refugee Agency estimates that there are approximately over 65 000 refugees and over 230 000 asylum seekers in South Africa<sup>1</sup>. In 2012 it was reported that the Minister of Home Affairs estimated the number of asylum seekers at approximately 78 000 people, whilst the Deputy Minister estimated the number to be at over 85 000<sup>2</sup>. Although the sheer Departmental discrepancy in the numbers could be indication enough that the Department of Home Affairs has no grasp on the situation, one only needs to peruse a court roll to see the frequency and volume of cases brought against the Minister or Director General of Home Affairs to know that there is a problem.

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<sup>1</sup> “**2014 UNHCR country operations profile - South Africa**”, UNHCR The UN Refugee Agency, <http://www.unhcr.org/pages/49e485aa6.html>, as at 25 September 2014

<sup>2</sup> “**Is South Africa the largest recipient of asylum-seekers worldwide? The numbers don’t add up.**” Africa Check – Sorting Facts from fiction, <http://africacheck.org/reports/is-south-africa-the-largest-recipient-of-asylum-seekers-worldwide-the-numbers-dont-add-up/> as at 25 September 2014

2. The author will propose that one of the main problems facing the Department of Home Affairs (“DHA”) in this field, is the Department’s inability to facilitate the efficient processing of refugee and asylum seeker applications resulting in a perpetual stream of litigation, which fails to bring about a change in the Departments’ offending behaviour.
3. The author hopes to portray this by identifying impractical elements of specific sections within the relevant Acts, as well as highlighting the discrepancies between legislation and practice.
4. It is important to note that the implication of “efficient processing” should not be that all applications should be automatically accepted, but rather, that they should be processed correctly, with due regard by decision makers for constitutional principles, particularly around the promotion of just administrative action.
5. It will also be suggested that the “processing” of asylum seekers and refugees does not end once ones’ status as such has been confirmed, but that this extends to the treatment and patterns of integration which people might be subjected to once they have crossed the bureaucratic border.
6. By no measure an expert in the field, the author has, through research, anecdotal experience, and briefs for law clinics and non-governmental organisations, identified several “holes” in both the law, and its implementation.

7. Using *inter alia* the recent judgment from Tsoka J in the matter of *South African Human Rights Commission and 40 Others*<sup>3</sup>, *CoRMSA v President of the Republic of South Africa*<sup>4</sup> as well as recurring Departmental failures identified through legal practice, the author seeks to highlight the impractical approach and attitude of the DHA in meeting its legal and administrative duties, its negligence in giving effect to constitutional provisions, why this is a fundamental problem to solve, and potential short, medium, and long term solutions thereto.
  
8. Having ratified numerous international and regional conventions, expressly making provision in its bill of rights for the majority of rights to extend to “everyone” as opposed to merely “citizens”, and confirming its obligation to the consideration of international law in the interpretation of those rights, South Africa’s Constitution provides a liberal legal framework for those seeking refuge within its’ borders. South Africa’s challenge in relation hereto is translating this framework from paper, to papers.
  
9. The author is sad to have to convey that unfortunately, the problems, and even some of the solutions identified by the author are neither new nor obscure. Having drafted and appeared in scores of refugee and asylum seeker cases, one is able to identify patterns of deficiency, and sometimes even singular factors, which if rectified, would facilitate processing and prevent so much unnecessary litigation and more importantly the violation of rights. These factors can either be procedural i.e. the DHA has failed to comply with or has misapplied procedure; or substantive i.e. the DHA has failed to understand or

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<sup>3</sup> South African Human Rights Commission and 40 Others v Minister of Home Affairs: Naledi Pandor and Four Others 41571/12

<sup>4</sup> Consortium For Refugees and Migrants in South Africa v President of the Republic of South Africa and Others (30123/2011) [2014] ZAGPPHC 753 (26 September 2014)

appreciate the substantive and subjective elements of the asylum seekers situation and application.

10. Numerous Judges, authors, and journalists commenting on this particular field have continuously pointed out the gaping holes in the protection and efficient processing of asylum seekers. That these holes remain unattended to –and even in some instances purposefully ignored- should be one of the greatest causes for concern as it is indicative of an attitude of accountability, and deference of a Government to its Constitution, and therefore, its' people.

### **20 years of South African Constitutionalism.**

11. In an English paper, one might ask what the significance of this particular adjective is? What makes the particularity of the adjective “South African” so fundamental to the description of the constitution? What are the characteristics or distinguishing features of “South African” constitutionalism, as opposed to any other kind, or no kind at all?
12. It is unnecessary and possibly even inappropriate to attempt to explain or expound on such a concept at this specific conference, or attempt to sing the praises of a document the merits of which all are aware, save for its relevance to the particular topic at hand.
13. As articulated in the its' preamble, South Africa's Constitution attempts to provide a just and equitable framework for the society over which it reaches,

whilst being aware of the continuing consequences of historically unjust political and social systems, and a new regional and international role.

14. In its construction, the South African constitution is world renowned for the focus it places not only on civil and political rights, but in recognising that in order to transform the society in which it finds itself, it must also (and in fact does) focus on socio-economic rights<sup>5</sup>. Through the direct process of error and trials, several of these rights have been progressively realised.
15. Provisions within the Constitution are given effect to by, and form the basis of several pieces of legislation. In addition to setting legislative foundational principles, the Constitution is the litmus test by which the implementation of legislation is measured. By this is meant that not only is legislation supposed to be constitutional in theory, but also in practice.
16. As recently described by Professor Cora Hoexter at a lecture on the Enforcement of Official Promise, South Africa's constitution is one which is

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<sup>5</sup> Preamble to the Constitution of South Africa Act 108 of 1996

'We, the people of South Africa,

Recognise the injustices of our past;

Honour those who suffered for justice and freedom in our land;

Respect those who have worked to build and develop our country; and

Believe that South Africa belongs to all who live in it, united in our diversity.

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;

Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;

Improve the quality of life of all citizens and free the potential of each person; and

Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

May God protect our people

‘consciously transformative’, and seeks to create a culture of justification from those who are entrusted with the implementation of its provisions.

17. Although included in the interim, but omitted from the final draft of the Constitution, the South African principle of *Ubuntu* sets the tone and foundation for the bill of rights, even if it is not expressly mentioned<sup>6</sup>.
18. South Africa has also constitutionally committed itself to “give effect to relevant international legal instruments<sup>7</sup>”. The international legal instruments to which South Africa has bound itself, include the 1948 Universal Declaration of Human Rights, the 1951 United Nations Convention Relating to Status of Refugees, the 1967 Protocol Relating to Status of Refugees, and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa.
19. Refugee law is a particularly dynamic field of law owing to the fact that its necessity and demand is determined by external factors such as conflict, international relations, and current affairs<sup>8</sup>. As such, even though the South African constitution has been developed through provisions from other countries, Refugee and Immigration legislation needs to be specifically tailored to the dynamics which South Africa may find itself subject to.

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<sup>6</sup> “Reflections on Judicial Views of Ubuntu.” Himonga, C, Taylor M, Pope A. Potchefstroom Electronic Law Journal[2013 per 67 Vol 16 No 5]

<sup>7</sup> Preamble to the Refugee Act 130 of 1998

<sup>8</sup> For example s35 of the Refugee Act provides for the instance of the mass influx of asylum seekers and what is to occur.

20. All of these factors, together with South Africa's regional and international roles, and the fact that South Africa is one of the top five countries receiving the highest amount of asylum applicants in the world<sup>9</sup>, puts it in the position to be able to contribute unique perspectives to the international body of law pertaining to Refugee and Asylum seekers.
21. In an environment of civil war together with all its contributing factors and consequences, South Africa's relative peace and economic and political stability act as a magnetic force to those faced with perpetual injustice. The additional situation with which South African society has to contend, is that those suffering from injustice are found both inside, and outside of its borders.
22. Often blamed on limited resources, the precarious balancing act between the interests of those from within and without its borders is arguably one of the greatest challenges facing South Africa's society in relation to refugees and asylum seekers at the moment. This has manifested itself in sporadic acts of xenophobia by local populations, a dismissal of the credibility of genuine asylum seekers as economic migrants, and a systematic lack of cooperation by various government departments. The horizontal and vertical structures in society have rather formed cross hairs, and those judicially recognised as being particularly vulnerable, are caught, once again, in the firing line.
23. Save for Section 19 of the Bill of Rights which applies specifically to citizens, the remainder of rights in the Bill of Rights apply to "everyone". With respect to

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<sup>9</sup> Amit, R "All Roads Lead to Rejection", ACMS Report, June 2012, pg 16 referencing the UNHCR Statistical Yearbook 2010, pg 43

the particular field of refugees and asylum seekers however, the author would propose that the rights to freedom and movement<sup>10</sup>, the right to freedom and security<sup>11</sup>, and the right to just administrative action<sup>12</sup> are some of the foremost provisions of the Constitution currently being utilised in the realisation of rights for this group of people, and the accountability of the relevant departments.

### The legislative framework

24. The Immigration Act<sup>13</sup>, and Refugee Act<sup>14</sup> are those pieces of legislation which, depending on the reason for entering, facilitate the flow of people in and out of the country, as well as how those people are to be related to, and how they might conduct themselves once within South Africa. The caveat that applies to those entering for refuge and asylum, is that all the aforementioned factors are dependent upon a) actually being able to enter the country, b) declaring themselves to be an asylum seeker, and c) avoiding arrest and detention.
  
25. The primary purpose of the Refugee Act is protection from persecution<sup>15</sup>, and applies to asylum seekers and Refugees. It lays out the rights and procedures which apply to that category of people, whilst the Immigration Act applies to illegal foreigners and carries within it the purposes of national security and population control. The consequences of this important distinction will be elaborated on later in this paper.

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<sup>10</sup> S21 of the Constitution

<sup>11</sup> S12, ibid

<sup>12</sup> S33 ibid

<sup>13</sup> Act 13 of 2002

<sup>14</sup> Act 130 of 1998

<sup>15</sup> Amit, R "All Roads Lead to Rejection", ACMS Report, June 2012, pg 28

26. As previously mentioned, the South African Constitution, through its provisions, seeks to consciously transform society around it through the progressive realisation of rights. Legislation, as a manifestation of the Constitution, cannot be contradictory to the very document from which it is conceived. Therefore, again, not only is legislation supposed to be constitutional in theory, but also in practice. The author will attempt to lay out the “best case scenario” and theoretical procedure of becoming a refugee, and then hopes to contrast this with the actual procedure, thereby highlighting problems both within the theory, and the practical.

### Legislation

27. South Africa receives asylum seekers and refugees from numerous continental neighbours, as well as countries such as Pakistan and China. The first step to becoming a recognised refugee in South Africa, is to declare, or claim to be an asylum seeker. An Asylum seeker is a person who has not yet had formal refugee status conferred upon them.
28. In terms of s3 of the Refugee Act, which follows the provisions of the UN Convention, “a person qualifies for refugee status ... if that person :
- (a) *owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or*
  - (b) *owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is*

*compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or*

*(c) Is a dependant of a person contemplated in paragraph (a) or (b)<sup>16</sup>.*

29. It is important to note that in terms of Chapter 1 of the General Principles and Criteria for the Determination of a Refugee in the UNHCR Handbook, a person is a refugee as soon as they fulfil the aforementioned criteria. *“Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition, but is recognized because he is a refugee.<sup>17</sup>”* The formal recognition and conferring of refugee status upon a person who already meets these requirements is therefore, in terms of international law, merely a procedural step.
30. Upon entering the South Africa, Sections 21 of the Refugee Act and Regulation 2 provide that a person entering the country for the purposes of seeking asylum must make such application in person, to a Refugee Reception Officer (“RRO”) at an Refugee Reception Office, and that such permit is for 14 (fourteen) days only<sup>18</sup>.

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<sup>16</sup> Refugees Act 130 of 1998

<sup>17</sup> Par 28, Chapter 1, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the status of Refugees

<sup>18</sup> *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.*

Regulation 2 of the Refugees Act, sets out that

*(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 Refugee 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.*

*(1) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to subregulation 2(1), but indicates an intention to apply for asylum shall*

31. It is further important to note that in terms of the Immigration Act,
- s23(1) The Director-General may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 (fourteen) days only.*
32. In terms of these sections, an Asylum seeker, declaring themselves to be such (usually to an immigration official and possibly at the border), is entitled to a permit which allows them to make way to one of three Refugee Reception Offices in South Africa in order to submit a formal application for refugee status. This must be done in person by the individual asylum seeker and without delay<sup>19</sup>.
33. Upon arriving at and entering the Refugee Reception Office, an asylum seeker is required to fill out a form setting out the details and reasoning as to why they are applying for Refugee Status, and submit it to a Refugee Reception Officer (“RRO”)
34. Chapter 3 of the Refugee Act sets out the duties which the RRO must carry out with regards to the application. These include that the RRO :
- (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;*

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*be issued with an appropriate permit valid for 14 (fourteen) days within which they must approach a Refugee Reception Office to complete an asylum application.*

<sup>19</sup> Regulation 2.

*(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.*

35. In realisation of these aforementioned duties, additional regulations provide that the RRO's conduct when assisting an asylum seeker must extend to providing adequate interpretation, verbally informing the applicant of the terms and conditions of the permit, and renewing the permit when the applicant returns for this purpose<sup>20</sup>. The regulation pertaining to interpretation is one fundamental to this paper, and will be elaborated on later.
36. Having complied with the duties as set out above, the RRO has to submit the refugee application to a Refugee Status Determination Officer ("RSDO"). Pending the determination of such an application, the RRO must issue a

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<sup>20</sup> 4 (1) A Refugee Reception Officer must: -

1. *ensure that the applicant is provided adequate interpretation according to Regulation 5 and any guidelines established by the Department of Home Affairs;*
2. *issue to the applicant an asylum seeker permit in the prescribed form, which includes notice in writing to appear before a Refugee Status Determination Officer for an interview on a date specified, normally not later than 30 working days after the initial lodging of the application;*
3. *verbally notify the applicant of the conditions of the permit and the requirement of appearing on the return date specified on the permit;*
4. *verbally notify the applicant that the permit may be withdrawn upon failure to comply with the conditions of the permit, subjecting the applicant to detention and other consequences that may result from withdrawal of the permit;*
5. *renew the asylum seeker permit each time the applicant appears as scheduled in the course of the adjudication process.*

temporary asylum seeker permit to the applicant, which must be periodically renewed.

37. Upon receiving the application for asylum, the RSDO can accept it; reject the application as unfounded; reject the application as manifestly unfounded, abusive or fraudulent; or refer a question of law to the standing committee. There is no time frame for the procedure given in the Act.
38. Whilst the legislative procedural framework as set out above might seem simple and straightforward, the actual experiences when encountering the system, are everything but.

#### Application in Practice

39. Many asylum seekers either walk or are transported into South Africa from countries such as the D.R.C, Zimbabwe, Somalia, Ethiopia, the C.A.R, Uganda, Angola, Pakistan and China. The highest number of asylum seekers in South Africa are from Zimbabwe and then the DRC.
40. For the sake of simplicity, there are two scenarios in which an asylum seeker may find themselves having arrived in South Africa. The first involves arriving at a border, whilst the second involves having been transported (usually illegally, by being stowed away on a truck), into one of South Africa's major cities.
41. As previously stated, there are three Refugee Reception Offices in South Africa. There used to be a total of seven. The three offices are the Tshwane Interim Refugee Reception Office [TIRRO], Marabastad, and Musina, and are the only

offices which accept new refugee applications. The other four offices, (some of which were illegally closed by the DHA) are either totally closed, or closed to new asylum seeker applications, merely processing the renewal of old permits.

42. This is where the two aforementioned transportation scenarios become relevant. Should the asylum seeker have entered South Africa at one of its' borders (legally), one would be issued with a s21 permit in order to make ones way to an RRO. If one has entered from Zimbabwe/Musina border, one has the added benefit of proximity to that RRO.
43. If the asylum seeker has been transported into South Africa, he or she has to make their way to the aforementioned RRO's. The important difference between the two is that one asylum seeker already has a document giving them 14 days to be in the country and make way to an RRO; the other is completely undocumented and therefore susceptible to arrest. (It should not however be misconstrued that those wo are in possession of a s21 permit are immune from arrest either)
44. Compounding this is that fact that recently, an amendment to the Immigration Act, gazetted and proclaimed on the 26<sup>th</sup> of May 2014 by the previous Minister of Home Affairs after having consulted the Immigration Regulation Board, has changed the 14 (fourteen) day period mentioned in Section 23 of the Immigration Act, to 5 (five) days.

45. Considering the fact that there are only three RROs open for a country with one of the highest number of asylum seekers in the world<sup>21</sup>; the contraction of the time period afforded to asylum seekers to attempt to even appear and be processed at an already overburdened RRO, places an avoidable and unnecessary obstacle in the pathway of both parties involved.
46. The ease by which it is assumed that someone arriving in a new country who doesn't speak any of the 11 official languages; who may not know anyone in the country, and who knows said country to be hostile towards foreigners, can get to an RRO, is highly overestimated.
47. In addition to this, in terms of the Gazette, the aforementioned amendment only applies to the Immigration Act. One can see how this is going to potentially cause further obstacles in an already problematic system, when one takes into consideration that the fourteen day period mentioned in the Refugees Act has not been amended, and the DHA constantly confuse the legislative regime applicable to asylum seekers and refugees.
48. In practice, asylum seekers are only processed at the Refugee Reception Offices on days specific to their country of origin i.e. all SADC countries are on one day, China and Pakistan for example on another, and DRC, Somalia and Eritrea, on yet another. It can take days of waiting outside the office, to be processed, sometimes even resulting in asylum seekers having to sleep outside overnight in order to be assisted.

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<sup>21</sup> Amit, R "All Roads Lead to Rejection", ACMS Report, June 2012, pg 16 referencing the UNHCR Statistical Yearbook 2010, pg 43

49. It is also important to note that asylum seekers are, at the moment, bound to renew their permits at the RRO where the application was made. The sheer volume of new asylum seekers, together with those coming to renew permits, or come for appeals, collection or information, creates a logistical swamp through which it is almost impossible to wade.
50. Having waited for a chance to enter the RRO, the asylum seeker now has to complete an application form. Apart from unlawful detention, complications in application process are arguably the root basis for, and give rise to a high amount of litigation in this field of law.
51. These complications include misinterpretation and misunderstanding of the asylum seekers application, an ignorance on the part of the RRO or RSDO of the asylum seeker's country-of-origin situation, the legal requirements and presumptions which apply to the asylum seeker process, belligerence and antagonism towards asylum seekers, and governmental policies which are not necessarily in line with the legislation.
52. In order to qualify as an RRO, the DHA's job vacancy website basically states that the requirements are a Grd.12 certificate, knowledge of all relevant Acts and international protocols and conventions, as well as good written and verbal skills<sup>22</sup>.
53. A similar glance at the DHA's job vacancy website will tell you that the only additional requirement for qualifying as an RSDO is "3 year Degree/ Diploma in Law/ International Relations and Public Administration or equivalent

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<sup>22</sup> <http://www.dha.gov.za/index.php/careers/306-refugee-reception-officer-x-1-post-gp>

qualification with 1 years' experience in Refugee matters and/or a Grade 12 certificate with 3 years' experience in Refugee matters<sup>23</sup>.

54. In order to receive a temporary asylum seeker permit, the applicant is expected to thoroughly explain their reasons for seeking asylum on said form. Application forms are in English (in fact all the forms, including ones for appeal processes are in English). More often than not the asylum seeker does not speak English, either very well, or at all. Official interpreters are either scarce or non-existent, and the asylum seekers either revert to compatriots to assist them, or informal interpreters who charge a fee in order to assist the asylum seeker.
55. Often the stories are misinterpreted or inaccurately recorded. This has the potential to cause problems later on in the process, for example in appeal hearings. The author has been involved in numerous cases in Court where an asylum seeker's application has been rejected solely because the RSDO has misunderstood the applicant's application due to a lack of, or bad interpretation.
56. The factors for a solution to this problem are all present, but not acted upon. The DHA is aware that it has asylum seekers coming from different parts of the world and in fact goes so far as to designate specific days for their applications to be made. One would think that knowing that asylum seekers from the DRC are hypothetically received on Wednesdays, that one would need French, Kiswahili or Lingala interpreters on that day.

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<sup>23</sup> <http://www.dha.gov.za/index.php/careers/230-refugee-status-determination-officer>

57. In addition to this and as previously mentioned, one of the duties of an RRO, is to make sure that the form is properly completed, and assist the asylum seeker in this regard. Regulation 5 places an even greater emphasis on the issue of interpretation by stating that the DHA “*will provide competent interpretation for the applicant at all stages of the asylum process*” with the proviso that the interpreter will be provided “*where practicable and necessary*”<sup>24</sup>.
58. It is submitted that if it is intrinsic to the duties of the RRO to make sure that forms are properly completed, to make sure that the asylum seeker has fully understood all the forms, and to ensure that all the information has properly

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<sup>24</sup> 5 (1) *Where practicable and necessary, the Department of Home Affairs will provide competent interpretation for the applicant at all stages of the asylum process.*

(2) *When it is not practicable for the Department of Home Affairs to provide an interpreter and interpretation is needed, the applicant will be required to provide an interpreter. The interpreter may not be a representative or employee of the country in which the applicant fears persecution or harm.*

(3) *In cases where sub-regulation 5(2) applies, the applicant will be given at least 7 days advance notice that*

1. *the applicant is required to bring an interpreter to the interview before the Refugee Reception Officer or Refugee Status Determination Officer;*
2. *the interpreter must be competent to translate a language spoken and understood by the applicant, to a language spoken and understood by the Refugee Reception Officer or Refugee Status Determination Officer and visa versa;*
3. *the interpreter cannot be the applicant's attorney or representative, a witness testifying on the applicant's behalf, or a representative or employee of the country in which the applicant fears persecution or harm;*
4. *failure without just cause to provide a competent interpreter may constitute a violation of terms of the asylum seeker permit, but will not prejudice adjudication of the claim to refugee status once interpretation is obtained; and*
5. *any delays caused by failure to provide a competent interpreter, after the 7-days advance notice required by this sub-regulation 5(3) has been given, will not count toward the 1 80-days adjudication period for purposes of eligibility for employment or study authorisation.*

been conveyed in order to equip the RSDO to make a proper decision, then it is always necessary.

59. The concerning part of this regulation is that the following provision states that “*When it is not practicable for the Department of Home Affairs to provide an interpreter and interpretation is needed, the applicant will be required to provide an interpreter.*” (Emphasis added). This burdensome provision then goes on further to state that failure on the part of the asylum seeker fail to provide an interpreter may constitute a violation of his or her permit.<sup>25</sup> Unfortunately, no similar type of sanction seems to be in place for those who actually have the duty to carry out this action.
60. (it would then be suggested that in order to facilitate the realisation of the DHA’s duty, and considering the fact that there is a need for jobs in the country, DHA could provide language studies bursaries [instead of wasting the money on unnecessary litigation] in order to fulfil the need for interpreters. These skilled individuals could then also be used by the Department of International Relations & Cooperation [“DIRCO”])
61. Even in situations where a form has been completed in English, by someone who is fluent in English, an ignorance of the nuances of the individual asylum seeker’s situation, tribal conflict, gender issues, the country-of-origin situation, or a general lack of knowledge on international relations, causes many valid applications to be rejected.

62. The author had the chance to go to the Lindela Repatriation centre with a representative from Lawyers For Human Rights to speak to some of the individuals who were being held there. In a brief interview in fluent English with a gentleman from Uganda, he told us that he had fled Uganda at the age of 15 as he was to be conscripted as a child soldier by the Lords Resistance Army. The gentleman fled to Kenya where he was a recognised refugee. 5 years later fighting broke out between two major political parties headed by Kibaki and Odinga, and the gentleman, fearing for his life, fled to South Africa where he applied for asylum. He is sitting in Lindela because both his asylum seeker application and appeal have been rejected.
63. The DHA's website lists the presence of a Deputy Director General for a Learning Academy and RRO's and RSDO's are, in terms of their qualifications, supposed to have knowledge of international conventions and Acts. When an application is rejected as being manifestly unfounded, the RSDO is obligated to review this decision, and consequently, provide reasons for the rejection.
64. When taking these rejection reasons into consideration In light of the asylum seekers application, it becomes apparent that the RSDO has no understanding of the dynamics of the situation which the asylum seeker is presenting in the application, even when these dynamics form part of the body of general knowledge. In the matter of Van Garderen N.O. v Refugee Appeal Board and Others<sup>26</sup>, the Court found that *"there was a positive duty on the administrative tribunals such as the Refugee Appeal Board to inquire into the human rights*

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<sup>26</sup> Van Garderen N.O v Refugee Appeal Board and Others (TPD Case No 30720/2006

*situation of asylum seekers' country of origin*<sup>27</sup>". Whilst this may in some instances occur, it becomes apparent that the inquiry is insufficient, and the information is out of date, or inapplicable.

65. Whilst there are numerous examples, some applications are rejected on the basis that
- 65.1. the Applicant's country of origin was stable enough to return to, despite the fact that conflict had erupted,
  - 65.2. An asylum seeker who had been gang raped by soldiers and rebels could have sought the assistance and protection of the government and authorities instead of fleeing the country
  - 65.3. The individual had not personally suffered harm even though members of his family had been tortured.
  - 65.4. The RSDO did not acknowledge gender as constituting a social group for the purposes of the definition of a refugee<sup>28</sup>.
66. The RRO and RSDO's training is therefore highly inadequate in light of the severity of the decisions which they have to make. Again, this is something in which the DHA and the DIRCO can cooperate on, seeing as the Department of International Relations would (or rather should) have the most up to date information on countries and their conflicts. Even then however, the training and education of the Departmental officials would have to be sufficiently sensitive so as accommodate individuals who may genuinely fall within the category of

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<sup>27</sup> LHR Case Handbook, Lawyers for Human Rights and Public Interest IN South Africa 2009 Number 1, pg 12

<sup>28</sup> Amit, R "All Roads Lead to Rejection", ACMS Report, June 2012, pg 33

refugees, but are not subjected to external aggression, i.e. those who fall within subcategory 3(a), but not 3(b), with sensitivities for the trauma which people have suffered, cultural differences, and fear from the asylum seeker, for example expecting a female rape victim to be able to comfortably share her story with a male RSDO.

### Limbo

67. As previously mentioned, having submitted an application, an asylum seeker then receives a temporary asylum seekers permit which has to be periodically renewed. Numerous instances have occurred where an asylum seekers' permit expires whilst he is attempting to renew it, and the asylum seeker is then immediately arrested for having an expired permit under the pretence of "being an illegal foreigner" in terms of the Immigration Act. This is a clear misapplication of the law as the Refugees Act, which is the legislative framework which applies to asylum seekers, makes provisions for what should occur should a permit expire.
68. Another instance is when an asylum seeker's application has been rejected, but this rejection has not been communicated to him (despite legislative requirement) and the asylum seeker is arrested on the basis that his application was rejected and he failed to lodge an appeal or review.
69. In all these instances, the arrests of asylum seekers are illegal, because they are based on the misapprehension that the Immigration Act applies to the Asylum seeker, when it does not. In fact, there is no instance when the Immigration Act should apply to an asylum seeker or refugee, save for those

explicitly mentioned in both Acts, or when all internal remedies within the Refugee Act have been exhausted.

#### Rejection, Appeal, and Review.

70. Upon coming to the RRO to renew one's permit, an asylum seeker may also be informed that his application has been accepted, or rejected. For present purposes, the author will focus on the rejected applicants.
  
71. As previously stated, applications are rejected for a number of reasons. These include misinterpretation of the application, misunderstanding of information, relevant information not being taken into consideration or irrelevant information being taken into consideration, an incorrect "credibility standard" being applied, and even instances where an incorrect burden and standard of proof<sup>29</sup> is applied to the asylum seeker i.e. misapplication of legal principle.
  
72. In terms of the Refugee Act, an asylum seeker whose application has been rejected may appeal the decision to the Refugee Appeal Board ("RAB") within a certain time frame. The document informing the asylum seeker of the appeal process, is in English and often officials force asylum seekers to sign the document without explaining said document, under the threat of arrest. The document being signed is one which states that the asylum seeker will not appeal the matter and in most instances, the asylum seeker is arrested shortly after anyways.

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<sup>29</sup> Amit, R "All Roads Lead to Rejection", ACMS Report, June 2012, pg 8

73. This is in clear violation of the procedural and administrative provisions which the RRO's, RSDO's and DHA officials are supposed to abide by, as the Refugee Act provides for both appeal and review processes for rejected applications, and places a duty on the respective officers to inform the asylum seekers about these processes.
74. Often times when appearing at the appeal hearing, it is alleged that the asylum seeker has changed their story, or added in new information. This potential discrepancy is due to the fact that more often than not at this stage of the application, the asylum seeker has someone who can assist them with interpretation, thereby explaining their story properly. Many applications have been rejected on the basis that the appeal hearing information contradicts the asylum seeker application information, when in fact, it is merely better understood, and better explained. This situation could be prevented through the presence of adequate and qualified interpreters at the initial application stage.
75. The administrative provisions in the Refugee Act are borne out of the Constitutional provision which not only extends the right to just administrative action to citizens, but to everyone – refugees and asylum seekers included.
76. Connected by the Constitution, the Immigration and Refugee Act are the base of a legal triangle, which are connected at the apex by, the author would submit, the most important piece of legislation, particularly in this field – the Promotion of Administrative Justice Act (hereinafter referred to as "PAJA"). This is particular significant of this Act is highlighted by the fact that the greatest

offender, or violator of rights with respect to refugees and asylum seekers, is the State itself.

77. From the first case involving refugees to one of the latest judgments given on the 26<sup>th</sup> of September 2014, the canon of Refugee law is a continuously growing body of testing legislation and the conduct of the State, against the principles of the Constitution.
78. The provisions for review afford refugees and asylum seekers a safeguard and form of protection against those who are constitutionally bound to do so, but who persistently fail in this duty.

#### Arrests and Detention

79. As previously stated, refugees and asylum seekers are protected by the Refugees Act, whilst illegal foreigners are governed by the Immigration Act. The intersection between the two should not be prematurely anticipated.
80. Although there are instances where the arrest and detention of illegal foreigners is permissible and legal, the constant stream of litigation and numerous judgments point to the fact that the elements of legality or illegality are of no consequence or concern to the DHA.
81. A person arrested on the suspicion of being an illegal foreigner, may only be held by the police for a period of 48 hours in order for the police to verify this person's status. This time frame is often ignored and people have been known to have been held at police stations for weeks.

82. Detention at the Lindela repatriation centre is only justifiable on the basis that the person is being detained for the purposes of deportation. That is also the only basis upon which someone, in terms of both the Immigration and Refugee Act, may be detained at Lindela.
83. The aforementioned arrest and detention can be illegal on several bases, for example the person should not be there because:
  - 83.1. The person has expressed their intention to apply for asylum, either before arrest or whilst at Lindela
  - 83.2. they are a recognised refugee
  - 83.3. they are an asylum seeker with a non-expired permit and have been arrested and detained under the Immigration Act when the Refugees Act applies to them,
  - 83.4. their permit has expired and they need to pay a fine in order to renew it
  - 83.5. they are awaiting the outcome of an appeal or review proceeding and are therefore still governed by the Refugees Act.
  - 83.6. they cannot and should not be deported back to their country of origin as this violates the international principle of *non-refoulement* by returning a victim to their persecutor.

- 83.7. They have been detained longer than the maximum period of 120 days, without the DHA having obtained the relevant authorisation to do so.
84. These are only a few examples of why the arrests and detentions are illegal. They are often the result of DHA officials not understanding when the Immigration Act applies to a person, and when the Refugee Act applies.
85. S29 of the Refugee Act provides restrictions on the detention of refugees and asylum seekers, and specifies that a decision to extend the detention of an asylum seeker or refugee must be reviewed by a Judge of the High Court after a 30 day period. (It is assumed that a review of the detention would consider reasons for the detention).
86. Regulations to the Immigration Act, which is what the DHA would submit is what applies, provide that the decision to extend a warrant for detention for the purposes of deportation can be confirmed (as opposed to reviewed, and therefore considered) by a magistrate, and can extend the period of detention over 90 days. Although the Magistrate's confirmation is hardly ever sought, the distinction between the two processes is important to take into consideration – a review requires consideration of reasons and promotes accountability, whilst the other is literally a rubber stamping procedure, confirming a foregone conclusion.
87. DHA officials state that they hold asylum seekers and refugees as detainees for such long periods of time, because verifying their status with the Refugee Reception Offices is a lengthy process (and files go missing, as they always

do). The problem with this argument is that Immigration Officials therefore admit that they are arresting people whose status is unconfirmed i.e. people who are not necessarily illegal foreigners, for if they status was confirmed as illegal, there would be no need to verify anything.

88. This practice is in contradiction to the 2009 SCA judgment given in Ulde v Minister of Home Affairs<sup>30</sup> which stated that “immigration officials must exercise discretion when detaining those persons suspected of being illegal foreigners”. This judgment placed a duty on immigration officers to justify why a person was being detained under the Immigration Act<sup>31</sup>. Unfortunately, compliance with this judgment is scarce, if not non-existent.
89. In addition thereto it is reported that as Lindela is being run by the Department of Home Affairs, “it has access to the Department of Home Affairs online movement control system (including fingerprint recognition), but does not appear to be connected to the DHA’s asylum records which would allow it to verify a potential detainees status before admitting a person to the facility.”
90. If these two systems were linked, the verification process would be a simple procedure, and would maintain the independence and purposes of both the Refugee and Immigration Acts by not detaining those who should not be there<sup>32</sup>.

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<sup>30</sup> Ulde v Minister of Home Affairs and Another (2009) 3 All SA 332 SCA

<sup>31</sup> LHR Case Handbook, Lawyers for Human Rights and Public Interest in South Africa 2009 Number 1, pg 5

<sup>32</sup> Monitoring Immigration Detention in South Africa”, Layers for Human Rights, September 2012, pg 18

## Legal Remedies

91. Whether intentionally or by ignorance, the misapplication of the Immigration Act to refugees and asylum seekers in the instance where the Refugee Act should instead apply, causes a great deal of aggravation to the protection and efficient processing of asylum seeker and refugee applicants. In addition thereto, this confusion and misapplication, together with the continuous violation of rights by the DHA results in a heavy stream of litigation and a high number of orders (including preventable costs orders) against the Respondents.
  
92. Although many legal remedies are utilised by practitioners in order to protect refugee and asylum seekers, or to bring about the realisation and enforcement of various rights, litigation for the purpose of this paper will focus on three main avenues:
  - 92.1. Urgent applications against the DHA for the release of illegally detained individuals. Although the release of the individual is of primary importance these applications also seek declaratory orders of the illegality of the detention, as well as provisions ordering the DHA to assist the asylum seeker in lodging his or her application for asylum (should they have been arrested prior to being able to do so)
  
  - 92.2. Review applications against the DHA for an unreasonable delay in coming to or conveying a decision, or review of a rejected refugee application.

- 92.3. Contempt applications against the DHA for failure to carry out a court order, for example, failing to come to a decision within a certain time frame, or to give someone documentation despite being entitled to it.
93. In the urgent applications, the matters more often than not settle before being heard, and the detainee is released.
94. In review applications which the author has been involved with, Judges tend to grant orders for example, reverting the decision to grant refugee status back to the RSDO, despite being legislatively empowered to make such a decision in review proceedings. It is suspected that this may be due to apprehensions of overstepping the bounds of the separation of powers.
95. Contempt applications seem to be highly effective – the threat of imprisonment brings a number of DHA officials to Court seeking to comply with whatever is needed in order to prevent their Minister being sent to jail. The only problem with this type of application is that it is a lengthy procedure.
96. All matters brought against the DHA are defended by the department despite an awareness of the illegality of their conduct as articulated by numerous orders, adverse costs orders, and a track record of strongly worded judgments against them.
97. It is unclear as to whether these matters are defended solely on the basis of opposing costs orders sought, but costs orders are more often than not, granted against the DHA, in instances where they could have been avoided altogether. (It may be interesting to note that private firms are realising the ‘slam dunk’

nature of winning matters against the DHA, and are now also representing asylum seekers in order to benefit from the costs orders).

98. Should it become apparent that the DHA refuses to change its behaviour, an alternative avenue available to legal practitioners in this field, might be to consider litigation in the forum of the African Court on Human and People's Rights, particularly seeing as Article 12(3) confirms the rights of every individual to seek asylum.
99. The author feels it is fundamental to point out that even if one were to take a conservative and strict approach to refugee and asylum seekers, the fact that a Government Department has little interest in conducting itself legally should be a great cause for concern, as this conduct impedes "the realisation of a constitutional order."<sup>33</sup>
100. As so perfectly articulated:
- "Beyond compromising the rights of refugees and asylum seekers, the existence of a government department that flouts the legislation which it is obligated to implement has serious implications for the rule of law, good governance, and service delivery."<sup>34</sup>*
101. One then has to ask, if a government department's illegal and unconstitutional conduct is neither deterred by judgment, nor by costs order; if the executive branch cannot be "checked" and kept accountable or in balance by the judiciary,

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<sup>33</sup> "20 years of Democracy in South Africa and the impact of the Constitution since 1994", Advocate, Vol 27 No. 2 August 2014 pg 31

<sup>34</sup> Amit, R "All Roads Lead to Rejection", ACMS Report, June 2012, pg 7

and if a Government Department continuously acts in contradiction to the Constitution which empowers it, how does one change the offending behaviour?

102. In a similar matter where litigants were acting against a Government Department, the Minister's car was attached in order to settle a debt owed by it, and the debt was immediately paid<sup>35</sup>.
103. One might then submit that the solution is to seek adverse costs orders against the Minister and or Directors General in their personal capacity, (*de bonis propriis*) seeing as the Minister and Director General are the parties designated to implement the administration of the relevant acts, and that they continue to do so male fides, without due care, and unreasonably<sup>36</sup>.
104. The problem with an application for costs de bonis propriis is the risk of the potential backlash which a hostile Department may then unleash on an already vulnerable group of people. This is something which would have to be carefully considered by all stakeholders involved, so as to not counteract the years of strategic litigation.
105. In one of the most recent judgments of *South African Human Rights Commission and 40 Others v Minister of Home Affairs and 4 others*<sup>37</sup>, Tsoka J

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<sup>35</sup> "Motshekga's car seized over teachers' pay, Oct 1 2014, <http://www.bdlive.co.za/national/education/2014/10/01/motshekgas-car-seized-over-teachers-pay>

<sup>36</sup> Appendix E12, Erasmus Superior Court Practice, Loggerenburg & Farlam, pg 27-30

<sup>37</sup> ***South African Human Rights Commission and Others v Minister of Home Affairs and Others (41571/12) [2014] ZAGPJHC 198***

gave a scathing judgment against the DHA for its temerity, and audacious behaviour in relation to its duties and the complete disregard it has for the law, procedural requirements, and the constitution.

106. The case involved the illegal detention of over forty applicants, in which the applicants sought the release of the detainees, as well as orders of unlawfulness for the detention, as well as an order stating that the Respondents (the DHA) had acted in contravention of the Immigration Act for failure to abide by legislative procedures.
107. Tsoka J reemphasised that the Legislature and Executive's powers are conferred on them by law<sup>38</sup> and as such, they cannot act outside of that scope. Whilst the respondents protested that the orders amounted to "an over-regulation of the executive<sup>39</sup>", the Judge quite simply stated that "it cannot be left to the Respondents to comply with the provision of the Act and to act accordingly<sup>40</sup>"
108. In this judgment, Tsoka J recognised the need for a cooperative governance approach to dealing with certain elements of the dilemma which the DHA

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<sup>38</sup> Ibid Par 38 In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* [1998] ZACC 17; 1999 (1) SA 374 (CC) at para [58] the court, stating that local government shall regulate its affairs within the law, stated the above stated principle thus –

"[58] It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by the law ..."

<sup>39</sup> Op Cit 29 par 43

<sup>40</sup> Ibid par 44.

continuously finds itself, by asking “why political pressure could not be exerted on the relevant embassies to cooperate”<sup>41</sup>.

109. In its appeal of Tsoka’s judgment the Department exuded an attitude of denial, and predominantly relied on the principle of the separation of powers, stating that the Court was overstepping its’ boundaries by giving the executive directives on how to administer its functions. The Department has however now abandoned the appeal, which may be indicative of a change in attitude.
110. If one is trying to find the root cause for negative behaviour which persists despite sanctions from the judiciary, one may then have to take a further step back and look at who is carrying out the conduct, and what is governing their conduct if not the constitution and legislation. The author proposes that a perusal of policy guidelines of the ruling party in relation to this field, may be able to shed some light as to why the department behaves the way it does, as currently, it seems like there is “little political will to address these abuses systematically.”<sup>42</sup>
111. Having changed its name from the Aliens Control Act to the Refugee Act, one could propose that this is indicative of a positive shift in the mentality and policy of the Government (and the people who elected it) towards those who seek refuge in South Africa. The author would suggest that although this might have been the case when the Refugee Act first came into existence, the attitude, as indicated by both Departmental practice, and policy, has changed. And not for the better.

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<sup>41</sup> Op Cit 29 at par 37.

<sup>42</sup> “Monitoring Immigration Detention in South Africa”, Layers for Human Rights, September 2012, pg 10

112. Whilst previous partisan policies in respect of Refugees and asylum seekers used to focus on South Africa's continental role, and the indebtedness and recognition of assistance which its neighbours afforded South African's fleeing from the tyrannical Apartheid regime, the language in ANC policies on immigration and refugees has become increasingly hostile and defensive, continuously making mention of threats to security. Additionally these policies are indicative of a lack of "political will to address these abuses systematically."<sup>43</sup>
113. Recommendations from the 4<sup>th</sup> National Policy Conference in June 2012 noted an attitude that asylum seekers are in fact economic migrants, and pose "both an economic and security threat to the country<sup>44</sup>". It recommended policies for centres for asylum seekers, as well as awareness programmes to combat xenophobia, but nothing to address the conduct of the DHA with respect to Refugees.
114. The ANC policy discussion document from March 2012 states that the regulation of asylum seekers and refugees falls within the mandate of the Immigration Act, which has a markedly different purpose to that of the Refugees Act.
115. Whilst accepting the importance of regional integration and its humanitarian obligations, the policy discussion document once again disputes the sincerity

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<sup>44</sup> Recommendations from the 4<sup>th</sup> ANC National Policy Conference in June 2012, pg 14, [http://www.anc.org.za/docs/pol/2012/policy\\_conferencev.pdf](http://www.anc.org.za/docs/pol/2012/policy_conferencev.pdf)

of asylum seekers and states that they are “rather looking for work or business opportunities.”<sup>45</sup>

116. Whether due to the regional or national economic environment, the alleged limited nature of resources and the security thereof is often touted as a reason to be hostile towards those seeking to enter the country. It is important to note that both asylum seekers and refugees are entitled to work on their permits and access basic health and education services. It would be contradictory to the idea of providing people with asylum, whilst not allowing them the basic opportunity to be self-sustaining.
117. The fact that Refugees and asylum seekers are entitled to earn a livelihood, and in fact pursue it, should not be misconstrued as negating the genuine nature of their application for asylum, and to do so is to misunderstand the nature and definition of being a refugee. Additionally this does not take into account what one should do with a potentially highly skilled genuine asylum seeker.
118. The overall tone of the policy document is defensive, and albeit not yet gazetted this hostile attitude has also manifested itself in onerous amendments to the Refugees Act<sup>46</sup>
119. In addition to Departmental ignorance, and hostile policies, Judges retard the process of giving effect to the rights of refugees, by for example misapplying the burden of proof applicable to asylum seekers in the refugee application

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<sup>45</sup> ANC Policy Discussion Document March 2012, “Positioning Home Affairs to be the Backbone of Security, Service Delivery, and the Developmental State.” Pg 5, <http://www.anc.org.za/docs/discus/2012/peacev.pdf>

<sup>46</sup> Refugees Amendment Act 2008, and Refugees Amendment Act 2011

process as determined by international conventions, failing to take into account precedents set by higher courts such as the Constitutional Court or the SCA, dismissing the inherent urgency of matters in which a refugee or asylum seeker is being arbitrarily detained, and failing to consider the purpose of the Refugee Act.

120. An example of such judgment is that of *CoRMSA v President of the Republic of South Africa and others*<sup>47</sup>. In this matter, CoRMSA sought a review of the DHA's decision to grant refugee status to a former Rwandese national accused of war crimes. This is in direct contradiction of the Refugees Act as well as international conventions pertaining to the matter. Despite this, the decision was confirmed by the Judge.
121. In addition to this, the Judge failed to mention (and therefore the inference is a failure to consider) the Constitutional Court judgment of *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others*<sup>48</sup> which dealt with a similar situation before the court, and even incorrectly applied principles enunciated therein. Additionally the Judge failed to consider the purposes of certain provisions of the Refugee Act, such as confidentiality, which may have been being abused, and therefore bringing the Refugee and asylum seeker process into disrepute.

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<sup>47</sup> *Consortium For Refugees and Migrants in South Africa v President of the Republic of South Africa and Others* (30123/2011) [2014] ZAGPPHC 753 (26 September 2014)

<sup>48</sup> *Mail and Guardian Media Ltd and Others v Chipu N.O. and Others* (CCT 136/12) [2013] ZACC 32; 2013 (11) BCLR 1259 (CC); 2013 (6) SA 367 (CC)

### Social integration

122. As previously mentioned, the efficient processing of asylum seekers and refugees does not only stop once that person has received their formal recognition, but also goes on to make sure that this vulnerable group of people is able to enforce the rights they have been granted, and integrate into the society in which they now find themselves.
123. Governmental policies to increase education, anti-xenophobia campaigns, and general knowledge information about different conflicts and current affairs on the continent, might be able to ease the hostile local environment which asylum seekers and refugees often find themselves.
124. This is of course on condition that the Government policies themselves, from every department, do not perpetuate false ideas about the credibility of asylum seekers, and are not in contradiction to the Refugee Act or the Constitution.
125. A recent article on the ability of asylum seekers and refugees to access basic healthcare mentioned that health workers would soon be obliged to report illegal foreigners to the relevant authority<sup>49</sup>. This is problematic as it could cause people to be rejected or prevented from accessing life-saving medical attention, and creates a focus on a person's legality in an instance when a person is in dire need of a focus on their health care. Additionally, the only officers which are empowered to pronounce on the legal or illegal status of foreigners, are

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<sup>49</sup> "REFUGEES: OUT OF THE FRYING PAN AND INTO THE FIRE OF SOUTH AFRICA'S HEALTHCARE SYSTEM"  
[HTTP://WWW.DAILYMAVERICK.CO.ZA/ARTICLE/2014-10-16-REFUGEES-OUT-OF-THE-FRYING-PAN-AND-INTO-THE-FIRE-OF-SOUTH-AFRICAS-HEALTHCARE-SYSTEM](http://www.dailymaverick.co.za/article/2014-10-16-refugees-out-of-the-rying-pan-and-into-the-fire-of-south-africas-healthcare-system), 16 OCTOBER 2014

immigration officials. Health care professionals who might not be trained on the nuances of the law and procedures may report someone as illegal when the person merely doesn't have their papers with them at the time thereby exposing the person to arrest and detention.

### Solutions and Resolutions

126. The author would submit that the problems within this field of law are, more than anything, frustrating, solely due to the fact that by the simple application of basic reason, most of the problems can be solved.
127. Short term solutions which would facilitate better processing include translated information posters at Refugee Reception Offices explaining initial, appeal, and review procedures. This information would then equip the prospective asylum seeker with how to go about the application process, by for example, knowing how much information and what level of detail to give.
128. In addition thereto, the role of qualified, patient and compassionate interpreters and RRO's cannot be understated. Many asylum seekers come from traumatic situations and are then forced to recount their experiences to people whom they don't know, and cannot adequately explain themselves to due to the language barrier.
129. Due to permits and files getting stolen or lost, the frequent destruction of permits by police officers, and the alleged lengthy time that verification takes whilst someone is being detained; an archive of copies of asylum seekers permits'

housed at the offices of non-governmental organisations or law clinics such as Lawyers for Human Rights, the Wits Law Clinic, the Legal Resources Centre, CoRMSA or other similar organisations, would provide an additional bureaucratic safe guard to the situation.

130. The adequate and continuous training of RRO's and RSDO's in current affairs should be a priority, as well as the training of additional RRO's and RSDO's in order to lessen the workload and increase the amount of applications which can be processed. Obviously an increase in the amount of Refugee Reception Offices would be complimentary to this.
131. Although far more long term, cooperative governance elements involving engaging the Department of International Relations to intervene in conflicts and potentially avert crises which result in an influx of Refugees, might also be a solution.
132. The resolution of the problems within this field are fundamental to South African's endeavours of using the provisions of the constitution to progressively transform South African society. Additionally, they are fundamental to South Africa's role and position in the region and the continent, and future bilateral relations between countries.
133. The holding accountable of a government whose conduct is expected to comply with the rule of law based on the constitution, cannot be underestimated.
134. The transformation of South African society through the framework of the constitution is by no means a complete, stagnant or easy process. Whilst it may be said that the legislature and judiciary are bringing about social

transformation through the development of Constitutionally compliant legislation and the judicial enforcement thereof, to have an executive branch that has so little regard for its empowering document, for the law which its' legislature has developed, orders which its' judiciary gives, and whose conduct is dilatory to the fulfilment of a constitutionally transformed society, is tantamount to the paralysis and regression of that society.

135. “We as a nation have chosen to walk the path of the advancement of human rights. By adopting the Constitution we committed ourselves not to do certain things...This path that we, as a country, have chosen for ourselves is not an easy one. Some of the consequences that may result from our choice are part of the price that we must be prepared to pay as a nation for the advancement of human rights and the creation of the kind of society and world that we may ultimately achieve if we abide by the constitutional values that now underpin our new society since the end of apartheid.<sup>50</sup>”

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<sup>50</sup> Minister of Home Affairs and Others v Tsebe and Others; Minister of Justice and Constitutional Development and Another v Tsebe and Others [2012 \(5\) SA 467](#) CC, par 67 & 68