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Refugee law

A practical guide for legal practitioners



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1 Common acronyms

- 1.1 **DHA:** Department of Home Affairs
- 1.2 **DSD:** Department of Social Development
- 1.3 **IDP:** Internally displaced person
- 1.4 **RAB:** Refugee Appeal Board
- 1.5 **RRO:** Refugee Reception Office
- 1.6 **RSDO:** Refugee status determination officer
- 1.7 **SCRA:** Standing Committee of Refugee Affairs
- 1.8 **TIRRO:** Tshwane Interim Refugee Reception Office
- 1.9 **UNHRC:** United Nations High Commissioner for Refugees

2 Definitions of commonly used terms

- 2.1 **Asylum:** Refugee status recognised in terms of the Refugees Act 130 of 1998 (**the Refugees Act**). It is the legal protection granted by the Government to someone who has left their home country as a refugee.
- 2.2 **Asylum seeker:** An asylum-seeker is someone who claims that he or she is a refugee, but whose claim has not yet been definitively evaluated by the relevant government agencies.
- 2.3 **Economic migrant:** An economic migrant is an individual who leaves their country due to economic hardship. Such an individual does not, on economic grounds alone, qualify for refugee protection.
- 2.4 **Foreigner:** In terms of the Immigration Act 13 of 2002 (**the Immigration Act**) a “foreigner” means an individual who is neither a citizen nor a resident, but is not an illegal foreigner.
- 2.5 **Illegal foreigner:** An illegal foreigner “means a foreigner who is in South Africa in contravention of the Immigration Act and includes a “prohibited person”. Illegal foreigners therefore constitute a limited category of people. An illegal foreigner is either a prohibited person or a person who comes into the country or who tries to enter without any permit or any consent or authorisation.
- 2.6 **Internally displaced person:** Internally displaced persons are persons or groups of persons who have been forced or obliged to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognised State border.” Unlike refugees, IDPs have not crossed an international border to find sanctuary but have remained inside their home countries. Even if they have fled for similar reasons as refugees (armed conflict, generalised violence, human rights violations), IDPs legally remain under the protection of their own government – even though that government might be the cause of their flight.
- 2.7 **Lindela:** The Lindela Repatriation Centre is a detention centre for undocumented migrants. It is situated in Krugersdorp, Gauteng.

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- 2.8 **Migrant:** A migrant is a person who moves from one place to another in order to find work or better living conditions. A migrant is a person who, for reasons other than those contained in the definition of refugee, voluntarily leaves their country in order to take up residence elsewhere.
- 2.9 **Prohibited person:** A prohibited person is someone who, in terms of section 29 of the Immigration Act, does not qualify for a temporary or permanent residence permit because of infection with an infectious disease; anyone against whom a warrant is outstanding or a conviction has been secured in South Africa or a foreign country with which South Africa has regular diplomatic relations in respect of genocide, terrorism, murder, torture, drug trafficking, money laundering or kidnapping; anyone previously deported and not rehabilitated by the Department; a member of or adherent to an association or organisation advocating the practice of racial hatred or social violence; and anyone who is or has been a member of or adherent to an organisation or association utilising crime or terrorism to pursue its end.
- 2.10 **Refugee:** Refugee status is not a status that is granted by states. It is rather recognised by them. A person is a refugee within the meaning of the 1951 Convention (and in the South African context, section 3 of the Refugees Act) as soon as he or she fulfils the criteria contained in the definition. This would occur prior to the time at which their refugee status is formally determined. Recognition of his or her refugee status does not therefore make him or her a refugee but declares them to be one. He or she does not have refugee status because of recognition, but because he or she is a refugee.¹
- 2.11 **Refugee Appeal Board:** The Refugee Appeal Board is the board established by section 12 of the Refugees Act. The RAB responsible to hear and make decisions of failed asylum seekers' applications, wishing to appeal the decision of the RSDO. In terms of section 13 of the Refugees Act, the Board is made up of a chairperson and at least two other members.
- 2.12 **Standing Committee for Refugee Affairs:** The Standing Committee is established by section 9 of the Refugees Act. It is an independent committee which must function without bias and must be independent. It consists of a chairperson and a number of other members as determined by the Minister. The powers and duties of the SCRA, which include amongst other things formulating and implementing procedures for granting asylum and reviewing decisions of RSDOs, are set out in section 11 of the Refugees Act.
- 2.13 **Refugee Reception Office:** A Refugee Reception Office is an office established under section 8(1) of the Refugees Act. It is the office which processes applications for asylum, accepts or rejects such applications and at which asylum seeker permits are renewed. Each RRO must consist of at least one Refugee Reception Officer and one Refugee Status Determination Officer.
- 2.14 **Refugee Reception Officer:** A Refugee Reception Officer is the officer employed by the DHA and who is situated at a Refugee Reception Office. Such an officer is referred to in section 8(2) of the Refugees Act. The Refugee Reception Officer conducts the first interview with the asylum seeker on lodgement of an application for asylum.
- 2.15 **Refugee Status Determination Officer:** The Refugee Status Determination Officer an officer employed by the DHA and who is situated at the Refugee Reception Office. Such an officer is referred to in section 8(2) of the Refugees Act. The RSDO conducts the second interview with an asylum seeker prior to the expiry of his or her section 22 permit. Following an adjudication process, the RSDO makes a decision to grant or reject the application for asylum.
- 2.16 **Section 22 permit:** An asylum seeker permit issued in terms of section 22 of the Refugees Act pending the outcome of an application for asylum in terms of section 21(1) of the Act.
- 2.17 **Section 24 permit:** A permit issued to a formally recognised refugee after asylum is granted by an RSDO.

¹ United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, UN Doc. HCR/ip/4/Eng/Rev.3 (2011) at 28.

- 2.18 **Section 27 certification:** A certification process done by the SCRA, on application by a refugee, to certify that the refugee will remain as such indefinitely. Such certification is required for a refugee to apply for permanent residency.
- 2.19 **Undesirable Persons:** An undesirable person is a foreigner declared undesirable in terms of section 30 of the Immigration Act by the Department of Home Affairs who or is likely to become a public charge; anyone identified as such; anyone who has been judicially declared incompetent; a rehabilitated insolvent; anyone who has been ordered to depart from South Africa; anyone who is a fugitive from justice; and anyone with a previous criminal conviction without the option of a fine for conduct which would be an offence in South Africa.

3 Legal instruments pertinent to refugee law

- 3.1 There are international instruments which deal with the establishment of standards and norms in the field of refugee law.
- 3.2 South Africa's obligations in international law to provide protection to asylum seekers and refugees arise as a result of its signature and ratification of the following agreements and instruments:
- (1) The Basic Agreement between the Government of South Africa and the United Nations High Commissioner for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and its Personnel in South Africa of South Africa, September 1993;
 - (2) The 1951 United Nations Convention Relating to the Status of Refugees² (**the Convention**);
 - (3) The 1967 UN Protocol Relating to the Status of Refugees³ (**the Protocol**);
 - (4) The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa⁴ (**the OAU Convention**).
- 3.3 South African signed and ratified the Convention on 12 January 1996. The Convention consolidates previous international instruments relating to refugees and provides the most comprehensive codification of the rights of refugees at the international level. It provides a universal code for the treatment of refugees uprooted from their countries as a result of persecution, violence conflict, serious human rights violations and other forms of serious harm. The Convention's purpose is to ensure that refugees are assured of the widest possible exercise of their fundamental rights and freedoms.⁵
- 3.4 Simultaneous to the Convention, South Africa signed and ratified the Protocol. The Protocol removed the limitations that the Convention imposed which limited the scope of people to whom the Convention was applicable thereby giving the Convention universal coverage.
- 3.5 The OAU Convention is the regional legal instrument governing refugee protection in Africa. It was adopted on 10 September 1969 at the sixth ordinary session of the Organization of African Unity, now African Union (AU). South Africa ratified the convention on 15 December 1995.
- 3.6 At the time of entering into the above agreement and convention, South Africa did not have any national legislation to give effect to its international obligations. Asylum seekers and refugees were dealt with in terms of the Aliens Control Act 96 of 1991 which provided for the control of the admission of persons to, their residence in, and their departure from, South Africa; and for related

² UN General Assembly "Convention Relating to the Status of Refugees" (1951) 189 *UNTS* 150.

³ UN General Assembly "Protocol Relating to the Status of Refugees" (1967) 606 *UNTS* 267.

⁴ Organisation of African Unity "Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) 1001 *UNTS* 45.

⁵ UN High Commissioner for Refugees *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2011) 1.

matters. No specific provision was made for asylum seekers or refugees in the Aliens Control Act. The Aliens Control Act has subsequently been repealed.

- 3.7 In order to codify its international obligations, South Africa enacted the Refugees Act which entrenched its international obligations into local law. The Refugees Act came into force in April 2000. The purpose of the Act is to give effect to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for related matters. The Act largely corresponds with and emulates provisions of the Convention and the OAU Convention.
- 3.8 Section 6 of the Refugees Act prescribes that the Act must be interpreted and applied with due regard to the Convention, the Protocol, the OAU Convention and the Universal Declaration of Human Rights and any other convention or international agreement to which South Africa is or becomes a party.⁶
- 3.9 The Act is accompanied by the Refugee Regulations (Forms and Procedures), 2000 (**the Regulations**) published under GN R366 in GG 21075 of 6 April 2000 and amended by GN R938 in GG 21573 of 15 September 2000.
- 3.10 The Refugee Appeal Board Rules, 2003 as Amended (**the RAB Rules**) are pertinent to the exercise of the power of the Refugee Appeal Board. The Refugee Appeal Board Rules were published under GN 1330 in GG 25470 of 26 September 2003 as amended by GN 610 in GG 34483 of 22 July 2011.
- 3.11 The Immigration Act 13 of 2002 is also applicable in certain areas of refugee law. This replaced the Aliens Control Act, 76 of 1995. The Immigration Act regulates who, where and when people may enter South Africa as well as deportations.
- 3.12 The Promotion of Administrative Justice Act 3 of 2000 (**PAJA**) is relevant to refugee law specifically in the context of judicial review of applications rejected as unfounded.

4 Non-refoulement: the legal principle underlying refugee law

- 4.1 Refugee law is founded on the principle of non-refoulement, a term stemming from the French word “refouler” which means to “drive back” or to “repel”.⁷ This principle provides that a state is obliged to refrain from forcibly returning a refugee to a state where he or she is likely to suffer persecution or danger to life or unlawful danger to freedom.
- 4.2 This customary international law rule was codified under Article 33(1) of the Convention and provides that no Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where their life or freedom would be threatened on account of their race, religion, nationality, membership of a particular social group or political opinion.
- 4.3 The Court in *Kabuika v Minister of Home Affairs*⁸ recognised that the principle of non-refoulement has become a rule of customary international law. *Makumba v Minister of Home Affairs and Others*⁹ and *Azanian Peoples’ Organisation (AZAPO) and others v President of the Republic of South Africa and other*¹⁰ reaffirmed the application of this customary international law principle in South Africa.
- 4.4 The principle of non-refoulement has been codified into South African law. Section 2 of the Refugees Act provides that:

⁶ Note however that this section will be repealed and replaced by the Refugee Amendment Act 33 of 2008. This has not however come into operation yet.

⁷ GS Goodwin-Gill *The Refugee in International Law* 3 ed (1996) 117.

⁸ 1997 (4) SA 341 (C).

⁹ [2014] ZAWCHC 183.

¹⁰ 1996 (4) SA 671 (CC).

“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.”*

- 4.5 The principle of non-refoulement is an exception to the international law rule which provides that, because of inherent sovereignty, every state is entitled to forbid the entrance of foreigners into its territory or to admit foreigners other than in circumstances it deems fit.
- 4.6 The principle of non-refoulement is not absolute. Article 33(2) of the Convention provides the disclaimer that the benefit of the principle of non-refoulement may not be claimed by a refugee where there are reasonable grounds for regarding the refugee as a danger to the security of the country in which he is, or if that person has been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. This exception to the rule at international level is carried over into the Refugees Act. In section 4 of the Act, exclusions to refugee status are set out. In addition, grounds for cessation of refugee status are set out in section 5 of the Act. These will be discussed hereunder.

5 Who is a refugee?

- 5.1 Section 1 of the Refugees Act, 1998 defines a refugee as *“any person who has been granted asylum in terms of this Act.”*
- 5.2 Refugee status means that a person has the protection of the South African government and cannot be forced to return home until such time as it is deemed safe to go back.
- 5.3 Refugee status is dealt with in section 3 of the Refugees Act. According to the section, 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;*
 - (c) *is a dependant of a person contemplated in paragraph (a) or (b).”*
- 5.4 The UN Convention does not contain a provision similar to that of section 3(b) of the Refugees Act. Its definition focuses on refugees who have a well-founded fear of persecution. Section 3(b) came from the OAU’s Convention which contained an expanded/additional definition of what a refugee is. When South Africa ratified the OAU convention, it adopted the expanded definition into its domestic law.

5.5 In summary, there are three ways for an individual to qualify for refugee status under South African law:

- (1) By virtue of section 3(a) - if a person has a **well-founded fear of persecution** because they belong to a listed category;
- (2) By virtue of section 3(b) – if a person had to leave their country of origin because of external aggression or the public order has been seriously disrupted; or
- (3) By virtue of section 3(c) – as a dependent of someone who is claiming asylum in terms of either or both of these sections.

5.6 Practitioners should also note that reasons for flight of an individual from his or her country of origin often overlap. The reasons often include fear of persecution and serious instability in the country.¹¹ Often however claims for asylum are only made in terms of one or the other category. If the person falls within both categories, it is important that the person should be given the opportunity in the application and interview process to set out all grounds on which they fled and to have these officially recorded at an early stage.¹²

6 Qualifying for asylum in terms of section 3(a):

6.1 A break-down of section 3(a) indicates a multiple and multifaceted number of requirements that have to be met to claim asylum successful in terms of section 3(a):

- (1) The person must have a well-founded fear;
 - (2) Of being persecuted;
 - (3) The persecution is based specific grounds - on the individual's race, tribe, religion, nationality, political opinion or membership of a particular social group;
 - (4) The person is outside the country of his or her nationality;
 - (5) The person is unable or unwilling to avail himself or herself of the protection of that country;
- Or, in the event of statelessness:
- (6) The person does not have a nationality;
 - (7) Being outside the country of his or her former habitual residence the person is unable to or, owing to such fear, unwilling to return to it.

6.2 What is a “well-founded fear”?

- (1) The Refugees Act does not define what a well-founded fear of persecution is. In terms of Regulation 12, each case for asylum has to be decided on a case-by-case basis.
- (2) Because fears are subjective, the UNHCR's Handbook notes that, rather than just making a judgment on the factual situation in the asylum seeker's country of origin,¹³ an evaluation must involve subjectivity. Determination of refugee status requires an evaluation of the applicant's statements in respect of his or her state of mind. In other words, do their statements indicate a fearful state of mind?

¹¹ Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014) 77.

¹² Ibid at 77.

¹³ Supra note 1 at para 37.

- (3) In addition to these subjective elements, there is a requisite qualification that the fear expressed has to be “well-founded”. Accordingly, the fear in the person’s mind has to be supported by what would be an objectively fearful situation.
- (4) Accordingly, when considering whether the person has a “well-founded fear” one has to give consideration to both subjective and an objective elements of fear.¹⁴
- (5) The expression “owing to well-founded fear of being persecuted” indicates a specific motive for fleeing. It automatically makes all other reasons for escape, such as leaving for socio-economic reasons or because of climate change, not applicable to the definition. Other motives may not however be altogether irrelevant to the process of determining refugee status. All circumstances for a person fleeing need to be taken into account to understand a client’s case.
- (6) When evaluating the subjective elements of your client’s case, it is important to make the following assessments:
 - (a) The personality of the asylum seeker – psychological reactions of different individuals may not be the same in identical conditions. For example, one person may have strong political or religious convictions, the disregard of which would make his or her life intolerable; another may have no such strong convictions.¹⁵
 - (b) The credibility of the applicant – this is particularly important where the case is not sufficiently clear from the facts on record. It will be necessary to take into account the personal and family background of the applicant, membership of a particular group, his or her own interpretation of their situation, and personal experiences. In other words, everything needs to be taken into account which may serve to indicate that the predominant motive for their application is fear.¹⁶
 - (c) Note that whilst fear must be reasonable, exaggerated fear may be well-founded if, in all the circumstances of the case, such a state of mind can be regarded as justified.¹⁷
- (7) An evaluation of the applicant’s statement cannot however be considered in the abstract and the objective elements of a case have to be assessed. When evaluating the objective elements of your client’s case, the following evaluations should be made:
 - (a) The conditions in the applicant’s country of origin and the relevant background situation;
 - (b) This requires obtaining knowledge of conditions in the applicant’s country of origin. Such knowledge will also assist in assessing the applicant’s credibility;¹⁸
 - (c) The Applicant’s fear should be considered well-founded if he or she can establish – to a reasonable degree - that their continued stay in their country of origin has become intolerable (for the reasons stated in the section 3 definition), or would for the same reasons be intolerable if they returned there;¹⁹
 - (d) Considerations do not *per se* have to be based on the applicant’s own personal experiences. Considerations that can be taken into account are things such as what happened to his or her friends and relatives or people in his or her own racial or social group. This may indicate a well-founded fear that sooner or later he or she would become a victim of persecution. A person has well-founded fear of being

¹⁴ Ibid at para 38.

¹⁵ Ibid at para 39.

¹⁶ Ibid at para 40.

¹⁷ Supra note 1 at 41.

¹⁸ Ibid at 42.

¹⁹ Ibid at 42.

persecuted not only if they have already been the victim of persecution, but also to those who wish to avoid a situation entailing the real risk of persecution;²⁰

- (e) The laws of the country of origin, and particularly the manner in which they are applied will be relevant;
- (f) The applicant's personal circumstances – whether that person is a well-known personality, for example, where the possibility of persecution may be greater than in the case of an ordinary individual – are relevant; and
- (g) In determining a person's personal circumstances, consider:
 - (i) The person's character;
 - (ii) The person's background;
 - (iii) The person's influence;
 - (iv) His or her wealth; and
 - (v) His or her outspokenness.²¹

6.3 Determining a “well-founded fear” for a group of people

- (1) Asylum applications are normally determined on an individual basis. However, there are situations where entire groups have been displaced. As per the UNHCR handbook, each member of the group could be considered individually as refugees. ²²
- (2) Often, assistance is required by such groups on an urgent basis and it is often not possible to determine if each person in the group qualifies for refugee status. The alternative to individual determination is termed “group determination”.²³ In terms of the principle of group determination, each group member is, in the absence of contrary evidence, regarded as a prima facie refugee.²⁴
- (3) Note that such determinations are permitted in terms of section 35 of the Act which deals with reception and accommodation of asylum seekers in the event of mass influx.

6.4 How does one determine what constitutes “persecution”?

- (1) Persecution is neither defined in the Convention nor in the Act. According to the UNHCR's Handbook,²⁵ there is no universally accepted definition of persecution.
- (2) Academics and commentators have however agreed that it is preferable to not define “persecution” and that drafters have perhaps deliberately chosen not to define the term for fear of it being too restrictive. According to Grahl-Madsen, “*the drafters capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.*”²⁶
- (3) Goodwin-Gill and McAdam share this view:

²⁰ Ibid at 45.

²¹ Ibid at 43.

²² Supra note 1 at para 44.

²³ Ibid at para 44.

²⁴ According to Bronee, S. A. “*The History of the Comprehensive Plan of Action in International Journal of Refugee Law*” Vol 5 No 4, pp.535-543, at 536 & 541, this was used in the case of Hungarian refugees who fled the failed revolution in 1956. In Asia, prima facie status was accorded to refugees who fled Vietnam after the fall of Saigon.

²⁵ Published Geneva, January 1992 and reissued Geneva, December 2011

²⁶ A Grahl-Madsen ‘The Status of Refugees in International Law, Volume I’ (1996) as cited by Hugo Storey in ‘What Constitutes Persecution? Towards a Working Definition’ (2014) 26 *International Journal Refugee Law* 2 at 273.

“Persecution is a concept only too readily filled by the latest examples of one person’s inhumanity to another, and little purpose is served by attempting to list all its known measures. Assessments must be made from case to case, taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured.”²⁷

- (4) Persecution therefore has to be interpreted. From article 33 of the UN Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights would also constitute persecution.²⁸ Threats to life and freedom must always be considered to be persecution.
- (5) The UN Convention does not provide a status determination procedure to determine what persecution is. Countries therefore have to formulate their own procedures and be bound by their own legal principles depending on common law and civil law such as the laws of evidence to determine what constitutes a well-founded fear of persecution.

6.5 Elements of persecution

- (1) Whether or not a person has been persecuted is a matter of interpretation. Persecution has to be determined on a case by case basis, taking into consideration the subjective elements of a case and whether other prejudicial actions or threats would amount to persecution. From a subjective point of view, take into account the opinions and feelings of your client. This must be done together with the factual occurrences of persecution against the person.²⁹
- (2) An asylum seeker may not use the term “persecution” expressly. This is not normally part of a refugee’s vocabulary. Usually he or she will not be able to describe his or her experiences in political or legal terms. A “fear of persecution” will therefore often be implicit in his or her story.
- (3) The following has to be taken when interpreting persecution:
 - (a) The ground for the persecution has to be because of a person’s race, tribe, religion, nationality, political opinion or membership of a particular social group;
 - (b) There has to be an act of harm which has to be sufficiently serious;³⁰
 - (c) There has to be a perpetrator of the harm.
- (4) Each of these will be discussed in turn.

6.6 Grounds of persecution

- (1) Section 3(a) of the Refugees Act provides that a well-founded fear of persecution must arise because of a person’s tribe, religion, nationality, political opinion or membership of a particular social group.
- (2) These enumerated grounds constitute a closed list and therefore a refugee claim must fall within this list to be successful for a claim in terms of section 3(a).
- (3) Only “social group” is dealt with in the Refugees Act. The remaining grounds must therefore be interpreted flexibly in order to satisfy South Africa’s international obligations to protect refugees.

²⁷ Ibid at 273.

²⁸ Supra note 1 at para 51.

²⁹ Supra note 1 at para 53.

³⁰ Supra note 11 at 51.

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- (4) Additionally, section 6 of the Refugees Act requires us to turn to international guidelines and foreign law when there is no express judicial interpretation of a concept in the Refugees Act.³¹
- (5) Each ground is examined in turn:
- (a) Race
- (i) Race is not defined in the Refugees Act and there is no South African case law that gives an interpretation of the term. It is also not defined in the Convention.
- (ii) Race (as opposed to nationality) was included in the Convention as a ground of persecution to Jewish victims of Nazism who were persecuted because of their ethnicity. A broad social meaning was given to the term race to include all forms of identifiable ethnicity.³² The notion of race includes not only persons at risk because of a particular racial category but also groups defined by physical, linguistic or cultural distinctiveness such as Jews or Roma.³³ According to Hathaway,³⁴ there is a possibility of an overlap between race and other facts such as religion, nationality or membership of a particular social group.
- (iii) The UNHCR handbook³⁵ provides that race should be very broadly defined. It should include all kinds of ethnic groups that are referred to as “races” in common usage. It can also entail membership of a specific minority social group of common descent.
- (iv) The International Convention on the Elimination of All Forms of Racial Discrimination provides that:
- “[R]acial discrimination shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”*
- (v) Race therefore includes ethnicity, cultural or linguistic distinctness, which often overlap with other grounds.³⁶
- (b) Tribe
- (i) The ground of “tribe” is unique to South Africa’s definition of a refugee.³⁷ This means that a person claiming asylum in South Africa can do so not only because he or she is a member of a particular race or social group but because of membership to a specific tribe too without reference having to be made to a broader reading of either of the former two groups³⁸. It is likely it was included in the Act because of concerns for upholding customary laws and structures in South Africa.³⁹

³¹ Note that section 6 will be repealed by section 7 of the Refugees Amendment Act 33 of 2008. The provision has not yet been put into operation by proclamation.

³² James Hathaway and Michelle Foster *The Law of Refugee Status* 2ed (2014) at 394.

³³ Ibid at 394.

³⁴ Ibid.

³⁵ Supra note 1 at para 67.

³⁶ Supra note 33 at 397.

³⁷ Supra note 11 at 61.

³⁸ Ibid at 63.

³⁹ Ibid at 62.

- (ii) Tribe is not defined in the Refugees Act. There is also no international or South African case authority interpreting the term.
 - (iii) In the customary law context, kinship, genetic links, ethnic and cultural homogeneity have been criteria accepted to identify members of a tribe.⁴⁰
- (c) Religion
 - (i) Although religion is a ground under section 3(a) of the Refugees Act, it is undefined and has not yet been interpreted in South African courts in the context of the Refugees Act.
 - (ii) According to Hathaway, rarely does the ambit of the term “religion” need to be explored. Decision makers generally accept that the applicant’s belief system constitutes “religion” for purposes of the Convention. The same seems to apply in South Africa.
 - (iii) Article 18(1) of the International Covenant on Civil and Political Rights⁴¹ prescribes that everyone has the right to freedom of thought, conscience and religion. This right includes freedom to have or to adopt a religion or belief of their choice, and freedom, either individually or in community with others and in public or private, to manifest their religion or belief in worship, observance, practice and teaching. According to Hathaway, based on this right, freedom of religion encompasses both the right to hold or not to hold any form of theistic, non-theistic or atheistic belief, and to live in accordance with a chosen belief, including participating in, or abstention from, formal worship or other religious acts, expressions of views, and the ordering of personal behaviour.⁴²
 - (iv) Accordingly, religion as a ground for refugee status includes both risk engendered by religious identity, as well as risk precipitated by religious, non-religious or anti-religious expression.⁴³
 - (v) Note that because religious freedom includes the right to believe or *not to believe*, a person is also at risk for being persecuted for religious reasons where the risk follows from what he or she does not believe.⁴⁴
 - (vi) Other than claims grounded in a belief or a refusal to believe, persecution can also be based on behaviour flowing from belief or the absence thereof which encompasses a broad range of acts including formal worship, ceremonial acts, teaching and practices as well as customs such as dietary regulations, wearing of distinctive clothing and the language customary to a religious group. Grounds for religious persecution may therefore fall into other grounds in section 3(a).⁴⁵
- (d) Nationality
 - (i) “Nationality” is also not defined in the Act or the Convention. It has also not yet been interpreted by the courts in the context of the Act.
 - (ii) According to the UNHCR handbook, nationality must be interpreted to mean more than just citizenship. The term can be broad and include membership

⁴⁰ Ibid at 62.

⁴¹ South African signed the ICCPR on 3 October 1994, which came into force on 10 December 1998 and which was ratified on 10 March 1999.

⁴² Supra note 33 at 401.

⁴³ Ibid at 401.

⁴⁴ Ibid at 402.

⁴⁵ Ibid at 403.

of ethnic and linguistic groups. It also overlaps with race and a sense of community.⁴⁶

- (iii) An internationally unprotected person, such as a stateless person, can sometimes also be the object of human rights abuses because they are “foreigners” or “non-nationals”.⁴⁷
 - (iv) According to the UNHCR Handbook, persecutions for reasons of nationality may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances the fact of belonging to such a minority may in itself give rise to a well-founded fear of persecution.⁴⁸
 - (v) Persecution on the ground of nationality may consist of hostile attitudes and measures against persons or national groups where two or more national groups exist within one state. There are cases of persecution of minority groups by majority groups. There are also cases where majority groups have been persecuted by a dominant minority.⁴⁹ Note that in such situations reasons of persecution based on nationality and political opinion often overlap.
- (e) Political opinion
- (i) According to the UNHCR handbook, holding a political opinion different from those of the government is not in itself a ground for claiming asylum. Fear of persecution for holding such opinions is required.⁵⁰
 - (ii) Persecution by reason of political opinion occurs when an individual holds an opinion which is not tolerated by the government or a group that considers the refugee claimant to have political opinions contrary to their agenda.
 - (iii) Note that the Refugees Act refers to political opinion and not activities. This implies that the claimant need not have acted on their opinion; they simply need to hold it. Political opinion may be rightly or wrongly imputed on a person because of their activities or association.⁵¹ However, according to the UNHCR handbook, persecution for political opinion presupposes that such opinions have come to the notice of the authorities or are attributed to them by the government.⁵²
 - (iv) It is also worth noting that the person need not be a high profile member of a political organisation to face persecution on this ground but can be an ordinary member of the public who holds a specific view. The political opinions of a teacher, writer or opposition politician may be more manifest than a person in a lesser exposed position.⁵³
 - (v) Note that the political opinion need not have come to the attention of the persecutor whilst the individual was in the country of origin. Political opinion could have been concealed until outside of the country of origin and the person merely needs to refuse to avail themselves of the protection of his or her government because of fear of persecution. The test for well-founded fear is based on what the consequences will be if a person holding the

⁴⁶ Supra Note 11 at 65.

⁴⁷ Supra note 33 at 397.

⁴⁸ Supra 1 at para 74.

⁴⁹ Apartheid South Africa is an example of the latter.

⁵⁰ Supra note 1 at para 80.

⁵¹ *Canada v Ward* [1993] 2 S.C.R.

⁵² Supra note 1 at para 80.

⁵³ Ibid 1 at para 80.

political beliefs were to return.⁵⁴ Note that persecution can also mean an exposure excessive or arbitrary punishment.⁵⁵

- (vi) In order to differentiate between persecution and a fear of prosecution and punishment, the UNHCR handbook advises that consideration be given to the following elements of a political offender:
 - (A) Personality of the applicant;
 - (B) Political opinion;
 - (C) Motive behind the act;
 - (D) The nature of the act committed;
 - (E) The nature of the prosecution and its motives;
 - (F) The nature of the law on which the prosecution is based.⁵⁶
- (f) Membership of a particular social group
 - (i) “Social group” is the only ground in the definitions. In terms of section 1 of the Act, social group includes a group of persons of a particular gender, sexual orientation, disability, class or caste. This is however not a closed list, signified by the use of the word “includes.”
 - (ii) Gender and sex need to be differentiated. “Gender” refers to the “attitudes, feelings and behaviours that a given culture associates with a person’s biological sex”.⁵⁷ Sex refers to the biological categorisation of male, female, or intersex.⁵⁸ Gender or claims based on one’s sex, whilst usually brought by women, can be brought by men too. Gender claims have included claims such as transgender claims, female genital mutilation and forced marriages.⁵⁹
 - (iii) Sexual orientation has often been used as a ground for claiming asylum successfully. The basis for this ground is that everyone is entitled to live openly as who they are and should not have to conceal their sexuality. Although some countries criminalise homosexuality, persecution is not limited to criminalisation of a particular sexual orientation. Societal disapproval in a cumulative form may also constitute persecution.⁶⁰
 - (iv) The UNHCR recognises that individuals with disabilities are vulnerable to physical, sexual and emotional abuse. A law ordering sterilisation of people with disabilities as was the case in Nazi Germany is an example of where such a claim would succeed.⁶¹
 - (v) Class and caste refers to different social stratification. Class is equated to opportunity whilst caste is ascribed at the time of birth to which the person is bound for life. Past social status may stigmatise individuals and ground a fear of persecution.⁶²

⁵⁴ Ibid at para 83.

⁵⁵ Ibid at para 85.

⁵⁶ Supra note 1 at para 86.

⁵⁷ UNCHR Guidelines on International Protection: Gender-related Persecution within the Context of Article 1A(2) of the 1951 Convention and / or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/02/01 (2002) para 3 as cited on page 69 of Refugee Law in South Africa.

⁵⁸ Supra Note 1 at 69.

⁵⁹ Ibid at 69.

⁶⁰ Ibid at 70.

⁶¹ Ibid at 70.

⁶² Ibid at 71.

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- (vi) According to the UNHCR, mere membership of a particular social group will not normally be sufficient to substantiate a claim for asylum. There may, however, be special circumstances where mere membership can be sufficient ground to fear persecution.

6.7 How far does harm have to go to be considered persecution?

- (1) Not every violation of a person's human rights or discrimination or harassment is serious enough to be considered persecution.⁶³ The use of the word 'persecution' suggests a specific level of harm that a person has to suffer, which harm has to be sufficiently serious.⁶⁴
- (2) A flexible approach should be adopted to identify what persecution is. Acts of harm are not a closed list because there should be scope for different forms of harm 'not imagined' yet.⁶⁵
- (3) It has been accepted that a threat to life and liberty amounts to persecution. Harm does not however have to be a physical act. Persecution can be psychological, emotional or physical. Torture includes mental pain or suffering.⁶⁶ Internationally, the threat of imminent death, the threat of the death of another, forced compliance with religious laws or practices and witnessing of harm to a family member have been considered to be psychological harm.⁶⁷
- (4) Harassment, if cumulatively considered, could amount to persecution as could various cumulative threats to human rights which deny dignity. Discrimination, if it evokes a feeling of apprehension and insecurity with regards to the person's future existence could be recognised as persecution.⁶⁸ Discrimination or harassment, to be considered persecution, has to have an element of relentlessness.⁶⁹
- (5) Persecution need not be sustained or systemic. A single incident affecting an individual's absolute right should suffice.⁷⁰
- (6) Note that it does not have to be the asylum seeker who suffered the physical harm. It may suffice to produce evidence which indicates that the asylum seeker may have suffered the harm because he or she is similarly placed to others who have suffered harm. According to Hathaway, who holds a position accepted by the RAB, an indicator of risk is the experience of those perceived by the authorities to be closely connected to the claimant, including those who share the racial, religious, national, social or political affiliations upon which the claimant bases his or her case.⁷¹

6.8 Does the persecutor have to be the State?

- (1) State involvement is not a prerequisite to persecution. Perpetrators include the state, agents of the state and non-state perpetrators.⁷²
- (2) It is unlikely that an individual will be safe in his or country of origin if the state is the perpetrator. The state should be defined broadly to include the "apparatus of government"⁷³ such as recognised organs of state, the police, the military, intelligence agents and government officials. An individual cannot turn to his persecutor for protection. If an agent of the state persecutes an individual without it being officially sanctioned, the state is the persecutor if the state merely supports or condones the persecution.⁷⁴

⁶³ See RAB reference as cited in footnote 43 on page 53 of Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014).

⁶⁴ Supra note 11 at 51.

⁶⁵ Anker Law of Asylum in the United States as cited in footnote 30 of page 51 in Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014).

⁶⁶ Ibid at 52.

⁶⁷ Ibid at 52.

⁶⁸ Ibid at 53.

⁶⁹ Ibid at 53.

⁷⁰ Ibid at 54.

⁷¹ Ibid at 54 and 55.

⁷² Ibid at 55.

⁷³ Ibid at 55.

⁷⁴ Ibid at 55.

- (3) Non-state actors can be perpetrators too. The state merely has to have failed in its duty to protect the individual from the perpetrators. All that needs to be proved is an absence of state protection. Question whether or not the applicant's government shows willingness to protect the individual or not and whether or not this willingness was reasonable.⁷⁵

6.9 The asylum seeker needs to be outside his or her country of nationality

- (1) Only a person outside his or her own state and who lacks the protection of a government can qualify as a refugee. An individual can therefore not apply for asylum outside of South Africa at an embassy, for example.
- (2) There is no exception to this rule, internationally or domestically. According to the UNHCR handbook, international protection cannot come into play as long as a person is within the territorial jurisdiction of their home country.⁷⁶ This is because of the principle of sovereignty.
- (3) Note though that this requirement does not mean that an individual has to have left his or her country of origin illegally or on account of a well-founded fear. Refugee status can be requested after having been abroad as a non-refugee, if that person subsequently becomes a refugee. This is called a refugee "sur place".⁷⁷

6.10 The asylum seeker, with a nationality, must be unable or unwilling to avail himself or herself of the protection of that country

- (1) According to the UNHCR handbook, being "unable" to avail oneself of protection implies circumstances beyond the will of the person concerned. Examples of such circumstances include war, civil war, or civil disturbances which prevent a country from extending or providing effective protection. A refusal or denial of protection must be determined on a case by case basis.⁷⁸
- (2) An "unwillingness" suggests a refusal to accept protection of the government in question because a fear precludes him or her from doing so. Where protection is available and there is no ground based on well-founded fear for refusing it, the person is not a refugee in need of international protection.⁷⁹

6.11 The stateless asylum seeker must be unable or unwilling to avail himself or herself of the protection his or her country of former residence

This statement runs parallel to the preceding phrase in section 3(a). Once a person has abandoned a former habitual residence⁸⁰, he or she is usually unable to return. Note, not all stateless persons are refugees. They must be outside their former habitual residence for reasons set out in section 3(a) i.e. they must have suffered or feared they would suffer persecution if they returned to the country of their former residence.

7 Qualifying for asylum in terms of section 3(b)

7.1 A break-down of section 3(b) indicates the requirements that have to be met to claim asylum successfully in terms of this section. A person would be successful who can show that he or she was:

- (1) compelled to leave their place of habitual residence in order to seek refuge elsewhere;

⁷⁵ Ibid at 57.

⁷⁶ Supra note 1 at para 57.

⁷⁷ Ibid at para 57.

⁷⁸ Ibid at para 99.

⁷⁹ Ibid at para 100.

⁸⁰ Ibid at para 101 to 103.

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- (2) because of 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.

7.2 What does “compelled to leave” mean?

- (1) The term “compelled to leave” suggests an inquiry into each asylum seeker’s individual or subjective reasons for flight. Section 3(b) therefore requires an assessment of the person’s specific reasons for flight.
- (2) A particular event that may compel a person to flee may not compel another whose appreciation of the risk of events differ. Consideration therefore has to be given to:
- (a) An analysis of the individual circumstances;
 - (b) Location to the site of disturbance;
 - (c) The nature of the disturbance;
 - (d) The possibility of violence spreading;
 - (e) The credibility of his or her statement; and
 - (f) Any particular factors specific to the asylum seeker such as ethnicity, race, religion, or political affiliation or opinions, or on the basis of fear.⁸¹

7.3 What is a place of habitual residence?

- (1) There has to be a geographical connection between an asylum seeker’s habitual place of residence and the events which caused the person to flee.⁸²
- (2) What constitutes a person’s habitual place of residence is a factual enquiry. It is characterised by elements such as:
- (a) Duration of stay;
 - (b) The person’s attachment to the location (consider family links, social and cultural relations and economic factors); and
 - (c) A person’s intention to habitually reside in the place.⁸³
- (3) The phrase suggests more than a stay for a short duration.⁸⁴

7.4 What is “external aggression, occupation or foreign domination”?

- (1) These terms are not defined in the Refugees Act or in the OAU Convention. In terms of a General Assembly Resolution,⁸⁵ aggression is the use of armed force by an external state against the sovereignty, territorial integrity or political independence of another state. The definition has also been extended to mean the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over and to direct the political or

⁸¹ Edwards “Refugee status determination in Africa” pg 229 as cited in footnote 68 on page 87 of Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014).

⁸² Supra note 1 at 88.

⁸³ Rankin ‘Extending the limits’ 23 as cited in footnote 72 on page 88 of Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014).

⁸⁴ Goodwin-Gill *The Refugee in International Law* (1996) 309 – 310 as cited on in footnote 73 on page 89 of Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014).

⁸⁵ 3314, 29.1 RGA 142, 144 (1974) referred to in footnote 22 on page 79 of Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014).

military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.⁸⁶

- (2) “Occupation” has been defined in the Hague Convention of 1907 as a territory which is placed under the authority of the hostile army. Occupation extends only to the territory where such authority has been exercised or established.⁸⁷
- (3) “Foreign domination” differs from “occupation”. There is no clear definition of foreign domination, but it likely refers to a situation where a foreign power dominates or controls the territory of another state.⁸⁸

7.5 What is “events seriously disturbing public order”?

- (1) Events “seriously disturbing public order” have been referred to as situations of conflict – whether internal or international and whether among non-state actors or between non-state actors and the government – and other situations of violence or threatened violence that disrupt civilian protection of life, freedom or security.⁸⁹
- (2) The acts must be prejudicial to peace and tranquillity of society at large, and not just a particular individual. The disruption of public order must be sufficiently high to justify the granting of asylum. A single “event” of disruption is inadequate. It has to be a series of events, systematic or cumulative in nature to warrant refugee protection.⁹⁰

This section should be interpreted broadly and emphasises a need for a humanitarian approach to be adopted towards refugees.⁹¹

7.6 What constitutes “either a part or the whole of his or her country of origin or nationality”?

Section 3(b) does not require that an asylum seeker exercise an internal flight alternative. The events only need to have occurred in the part of the country of origin where the person habitually resided. This was confirmed by the High Court in *Katabana v Chairperson of the Standing Committee for Refugee Affairs*.⁹²

8 Qualifying for asylum in terms of section 3(c)

- 8.1 The third and final manner in which to qualify for asylum is through section 3(c) as a dependant of an asylum seeker who has accompanied the principle asylum seeker to South Africa.
- 8.2 Section 3(c) of the Act states that: subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person is a dependant of a person contemplated in paragraph (a) and (b).
- 8.3 In the definition section of the Act, dependant is defined as “a spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee”.
- 8.4 Section 33(1) of the Act requires that the principal applicant must submit his or her dependants with their application for asylum. Alternatively, the principal applicant must apply on their behalf if he or she is unable to apply by him or herself.

⁸⁶ Resolution RC/Res.6 adopted at the 13th plenary meeting on 11 June 2011 by consensus as cited in footnote 23 of Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014) 79.

⁸⁷ Hague Convention (IV) entered into force 26 January 2010 as cited in footnote 25 on page 80 of RLSA

⁸⁸ Supra note 11 at 80.

⁸⁹ Ibid at 81 – 83.

⁹⁰ Ibid at 81 – 83.

⁹¹ Ibid at 81.

⁹² Unreported Western Cape High Court 25061/2011 (14 December 2012) as referred to in Fatima Khan and Tal Schreier Refugee Law in South Africa 1 ed (2014) 86.

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- 8.5 Section 16 requires that the Refugee Reception Officer must, at the initial application stage, include each dependant in the application.
- 8.6 Evidence must be provided to the Refugee Reception Office which proves the relationship between the asylum seeker and the dependants. This can be in the form of marriage, birth or baptismal certificates, or travel documents. If the previously mentioned documents cannot be provided then a reasonable explanation must be provided and as to why such documents are not available. Thereafter, the relationship may be established by affidavits or credible sworn statements or genetic evidence.
- 8.7 If there is a change in status of the dependant – such as by marriage or attaining the age of majority – the dependant is permitted to stay in South Africa in accordance with the Act. If a recognised refugee dies or is divorced, every person immediately prior to the death or divorce who was a dependant of a recognised refugee may be permitted to stay in South Africa in accordance with the Act. This is in terms of section 33(2) and (3) of the Act.

9 Disqualification from asylum

- 9.1 Section 4 of the Act sets out grounds of exclusion from refugee status for individuals who are not considered to deserve or be in need of it.
- 9.2 A person does not qualify for refugee status for the purposes of the Refugees Act “if there is reason to believe that he or she -
- (a) *has committed a crime against peace, 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 which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or*
 - (c) *has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or*
 - (d) *enjoys the protection of any other country in which he or she has taken residence.”*
- 9.3 The rationale behind the exclusions of persons undeserving of refugee protection is that refugee status should not be abused to allow an asylum seeker to avoid prosecution for their crimes. The crimes listed under section 4(a) are very serious political crimes.
- 9.4 Section 4(b) lists non-political crimes. This section only applies to crimes committed outside of South Africa. Refugees who commit crimes within South Africa may be expelled under section 28 of the Act. This section states that a refugee may be expelled for committing a non-political crime punishable by imprisonment. It does not indicate the required seriousness of the crime. In *Tantoush v Refugee Appeal Board & Others*,⁹³ it was held that the crime of theft was not sufficiently serious to fall into the categories of crime under s 4(1)(b). This indicates that the crime must be one that would justify a prison sentence without the option of a fine to fall under this section.
- 9.5 Section 4(c) deals with acts committed against the United Nations (UN) or the African Union (AU). Persons who are believed to probably be guilty of committing acts contrary to the objects and principles of the UN or the AU are excluded from refugee protection. This section has not yet been applied in South Africa. Paragraph 17 of the UNHCR provides that this section should only be applied to crimes that could affect international peace and security and for sustained violations of human rights.

⁹³ 2008 (1) SA 232 (T) (Hereinafter “*Tantoush*”).

- 9.6 Section 4(d) deals with persons who do not need refugee protection because they enjoy the protection of another state. Under this section a person who has multiple or dual nationalities or has residence and other protective rights from another country is excluded from refugee protection. However, there are strict guidelines governing the application of this section. These are:
- (1) The asylum seeker must have effective protection available to them;
 - (2) They must have taken residence in the other country of asylum;
 - (3) There must be a reasonable expectation that the asylum seeker's basic human rights will be protected and that he will be allowed re-entry into the country of asylum; and
 - (4) The asylum seeker must not be at risk of deportation in that country.
- 9.7 The asylum seeker bears the burden of proving that he is a refugee and that he is not excluded under section 4 of the Act (regulation 11(1)). The wording of section 4 states that there must be "reason to believe" and this implies that the State must have serious reasons for considering that the applicant has perpetrated the crime. According to the UNHCR guidelines, at paragraph 35, a criminal conviction is not necessary, but the evidence must be clear, convincing and credible.
- 9.8 There are a number of other circumstances or situations which cause displacements of individuals. Such situations include floods, earthquakes, hurricanes, mudslides or the slow-onset of climate change such as desertification or rising sea levels. Severe socio-economic deprivation can also cause people to flee across borders. While some may be escaping persecution, most leave because they lack other options. None of the existing international or regional refugee law instruments address the plight of such people. Accordingly, the lack of food, water, education, health care and a livelihood would not ordinarily sustain a refugee claim on its own.

10 How to apply for asylum

- 10.1 When a person enters South Africa through a port of entry with the intention of claiming asylum, the asylum seeker must declare himself or herself as any asylum seeker at the border.
- 10.2 Upon declaration as an asylum seeker, the border officials ought to provide the asylum seeker with a permit in terms of section 23 of the Immigration Act (a 'transit permit'). These are non-renewable permits valid for 14 days only. After the lapse of the transit permit; and until such time as the asylum seeker applies for asylum at a Refugee Reception Office and receives their section 22 permit, the asylum seeker may still be vulnerable to arrest by the police or immigration officials. It is therefore very important that you advise your client to proceed to a RRO without delay.
- 10.3 The 14 days is intended to allow asylum seeker time to report to the nearest Refugee Reception Office in order to apply for asylum. The application is, in law, a free one.
- 10.4 There are currently three operational Refugee Reception Offices located in Pretoria (Marabastad), Durban (Greyville) and Limpopo (Musina).⁹⁴
- 10.5 Section 21 of the Act governs the application for asylum procedure. It states:
- (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;*

⁹⁴ Note the closure of Crown Mines (Johannesburg) and TIRRO (Pretoria). Note the suspension of the Cape Town and Port Elizabeth RROs.

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- (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.*
- (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 old or older must furnish two recent photographs of himself or herself of such dimensions as may be prescribed.*
- 10.6 Regulation 2 regulates the application for asylum. It states that an application made in terms of section 21 of the Act *must be lodged by the applicant in person at a designated Refugee Reception Office without delay; must be in the form and contain substantially the information prescribed in Annexure 1 to these Regulations; and must be completed in duplicate.*
- 10.7 Note that the acceptance of an asylum application by the RRO is mandatory. An individual claiming asylum cannot be turned away.
- 10.8 In order to apply for asylum, a preliminary interview will be conducted by a Refugee Reception Officer. During this interview, the asylum seeker will be asked questions to establish the identity, nationality, ethnicity, religion and number of dependents. He or she will also be asked about the possession of an identity or travel documents, whether they have ever been to South Africa before, what their level of education and work experience is and whether or not they have done military service. In addition, he or she will also be asked for the reasons why he or she left their country of origin, a description of his or her country and place of residence and the names of the organisations and political parties that he or she has been a member of.⁹⁵
- 10.9 The answers given to the Refugee Reception Officer will be incorporated into a BI-1590 form. This form is entitled “Eligibility Determination Form for Asylum Seekers”. The asylum seeker’s fingerprints and photographs will be taken. A file will be created for the asylum seeker and the individual will receive a case number and a file number. Advise your client to write down these numbers in case of a loss of permit papers or a loss of the file by the RRO.
- 10.10 After the preliminary interview, the asylum seeker will, in terms of section 22(1), be issued with a “section 22” permit (or B1-1692 form). This is a temporary document which legalises the asylum seeker’s stay in South Africa pending the outcome of the asylum seeker’s application. This certificate allows the asylum seeker to sojourn in South Africa, pending the outcome of the asylum application. The certificate is utilised for identity purposes, indicates that the individual is an asylum seeker and sets out the conditions, if any (such as the right to work or study), under which he is permitted to remain in South Africa. See PBO2 for an example of the section 22 permit.
- 10.11 On a designated return date, and in terms of Regulation (1)(c), a second interview will be conducted by a Refugee Status Determination Officer. This interview, termed the “Status Determination Hearing”, will normally take place within 30 days of the asylum application having been complete. During this interview the RSDO will look at the application form containing answers from the first interview and will try to determine whether you qualify for refugee status. The RSDO may ask questions to verify the asylum seeker’s identity and country of origin. More detailed questions will be asked such as geographical locations, languages, cultures, opinion, status in the community and historical events.

⁹⁵ Practitioners ought to stress to clients the importance of sticking to the facts consistently. The answers given in this interview will be considered by the Refugee Status Determination Officer in making a status determination.

- 10.12 Your client has the right to be accompanied by a legal representative and an interpreter at the Status Determination Hearing. The legal representative is not, however, allowed to intervene in the interview; he or she can only observe. The asylum seeker is however allowed to bring witnesses, affidavits from witnesses or any other evidence that could support the claim for asylum. Objective information such as a country report can also be submitted to support a claim. The asylum seeker's section 22 permit will be renewed following the Status Determination Hearing. The RSDO should give the asylum seeker a date on which he or she can return to get a decision on his or her application for asylum.
- 10.13 A section 22 permit is usually valid for a six month period although this time period can vary from one RRO to another. The permit will generally be extended repeatedly throughout the asylum process whilst the application is being adjudicated on. Asylum seeker permits have to be renewed in person at the RRO at which application was made and must be renewed on the same day it expires. The renewal is only valid if it has the departmental stamp affixed to it. In terms of Regulation 7(1)(d) and (4), the renewed permit will specify the time and date when the asylum seeker must return to the RRO. A failure to appear in person on the designated date will result in withdrawal of the asylum seeker permit and subject the applicant to detention pending a decision on the asylum application. The asylum seeker has to show 'just cause' if unable to renew the permit in person on the specified date.

11 Status determination

- 11.1 In terms of Regulation 3(1), a status determination (a decision as to whether or not the person qualifies for asylum or not) needs to be made within 180 days after the Status Determination Hearing. Note that the 180 day rule is not usually adhered to. The RSDO can make one of the following determinations:
- 11.2 In terms of section 24(3), the RSDO must make one of the following decisions:
- (1) Granting asylum thereby recognising the person because he or she is a refugee;
 - (2) Rejecting the application as manifestly unfounded, abusive or fraudulent;
 - (3) Rejecting the application as unfounded; or
 - (4) Referring any question of law to the Standing Committee.

12 Granting of asylum

- 12.1 If the RSDO concludes that asylum ought to be granted, formal recognition will be granted in terms of Section 24(3) and Regulation 15(1)(a). The formal written recognition takes the form of the commonly termed "section 24 permit". This permit allows the refugee to remain in South Africa for a specified period and entitles the refugee to full legal protection.
- 12.2 In terms of the Regulation 15(1)(b), once the refugee has been granted asylum, the refugee is entitled to apply for a refugee identity document. The refugee ID is valid for an initial period of 2 years from the date asylum is granted, unless refugee status is withdrawn pursuant to section 36 of the Act within that time period on the grounds of a false application, fraud or ceasing to qualify for refugee status.
- 12.3 Asylum status can be renewed upon expiration of its validity after a review process by a RSDO. To avoid lapses between the date of expiry and any renewal of asylum status, an individual must apply to the SCRA for renewal three months prior to the date of its expiry. The Standing Committee will consider whether he or she will remain a refugee indefinitely or whether refugee status ought to be

withdrawn. If the Standing Committee finds that the individual will remain a refugee for the foreseeable future and that no grounds for withdrawal of refugee status apply, the Refugee Status Determination Officer will renew the refugee identity document which will be valid for period of 2 years.

- 12.4 Cessation and withdrawal of refugee status will be dealt with in section 23 and 24 below.

13 Rejection of asylum applications: “unfounded” vs “manifestly unfounded” claims

- 13.1 Applications can be rejected as “manifestly unfounded” in terms of section 24(3)(b) or “unfounded” in terms of section 24(3)(c). What is the difference?
- 13.2 Section 1 of the Refugees Act defines a ‘manifestly unfounded application’ as an application for asylum made on grounds other than those on which such an application may be made under the Act. i.e. when the refugee does not conform to the legitimate requirements for refugee status in terms of Section 3 of the Act. An example of a manifestly unfounded application is where someone has moved to South Africa as a work-seeker.
- 13.3 An “unfounded application” is not currently defined in the current Refugees Act. It is however defined in the Refugee Amendment Act⁹⁶ (yet to come into force) as “an application made on the grounds contemplated in section 3, but which is without merit.” In other words, the application has been made for reasons allowed in terms of the Act, but there is no proven basis on which the applicant in question is eligible for refugee status. An example of an unfounded application is where the person is unable to establish that their fear of persecution is well-founded.
- 13.4 Section 24(4) prescribes that if an application for asylum is rejected for being manifestly unfounded, abusive or fraudulent; the RSDO is obliged to provide written reasons within five working days after the date of the rejection.⁹⁷ The RSDO must submit a copy of the record of proceedings and a copy of the reasons to the SCRA within 10 working days after the rejection. A failure to do so constitutes a ground for review.⁹⁸
- 13.5 Note that over 90% of applications for asylum are rejected nationwide. The Marabastad RRO is particularly problematic with a 0% acceptance rate in 2015.⁹⁹

14 Reviewing of claims rejected as “manifestly unfounded”, “abusive” or “fraudulent”

- 14.1 In terms of section 24(3)(c) of the Refugees Act, only claims which are rejected as “unfounded” are appealable.
- 14.2 As set out above, “manifestly unfounded” applications are those that do not qualify in terms of section 3 of the Act.
- 14.3 An “abusive” application is defined in section 1 an application for asylum for the purposes of evading criminal or civil proceedings or the consequences thereof or an application after prior applications

⁹⁶ Act 12 of 2011.

⁹⁷ In terms of section 24(4)(b) of the yet-to-be-enforced Refugee Amendment Act, 2008, the RSDO will be obliged to inform the applicant of his or her right to appeal in terms of section 24B.

⁹⁸ *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and others* [2015] 1 All SA 100 (WCC)

⁹⁹ Legal Resources Centre available at http://lrc.org.za/lrcarchive/images/pdf_downloads/Law_Policy_Reform/2016_09_30_LRC_LHR_Submission_Green_Paper_International_Migration_commediaed.pdf, accessed on 29 March 2017.

were refused without any substantial change to the person's personal circumstances or the situation in the person's country of origin.

- 14.4 "Fraudulent" applications, as defined in section 1, are applications for asylum based without reasonable cause on facts, information, documents or representations which the applicant knows to be false and are intended to materially affect the outcome of the application.
- 14.5 A fast track procedure exists for reviewing claims that are considered by RSDOs to be "manifestly unfounded", "abusive" or "fraudulent". This is because such claims are considered to be burdensome to South Africa and detrimental to the interests of those applicants who have good grounds for recognition as refugees.¹⁰⁰
- 14.6 The SCRA is therefore responsible for reviewing claims rejected as manifestly unfounded, abusive or fraudulent, as opposed to allowing the process to be drawn out through appeal and judicial review.
- 14.7 The SCHRA will review and confirm or set aside the decisions made by the RSDO or refer cases back to the RSDO for determination within 14 days. Such reviews are governed by section 25 of the Act and Regulation 13.
- 14.8 In determining whether an application was correctly rejected as manifestly unfounded, abusive or fraudulent, the Standing Committee may: -
- (1) invite the UNHCR representative to make oral or written representations;
 - (2) request attendance of any person who may provide the Committee with information relevant to the determination;
 - (3) make any further enquiry and investigation as it deems appropriate; and
 - (4) request the applicant to appear before the Committee and provide other information deemed necessary.
- 14.9 The Standing Committee may confirm or set aside the decision. It must also decide on questions of law referred to it in terms of section 24(3)(d) of the Act. The SCRA must inform the RSDO concerned of its decision which is in the form, and containing the information prescribed, in Annexure 2 of Regulation 13. Normally, the SCRA informs the RSDO of the decision within 5 days of referral to the Standing Committee
- 14.10 If the Standing Committee sets the decision aside, it will send it back to the Refugee Status Determination Officer with direction for further action. Thereafter, the RSDO must decide the application in terms of the directives.
- 14.11 Note that manifestly unfounded, abusive or fraudulent applications will be reviewed by the Director-General when the Refugee Amendment Act, 2008 comes into force.

15 Appeals of claims rejected as "unfounded"

- 15.1 Applications which are "unfounded" are appealable to the Refugee Appeal Board in terms of section 26 of the Act. Appeals are governed by the Refugee Appeal Board Rules, 2013 (**RAB Rules**).¹⁰¹
- 15.2 If the asylum seeker intends lodging an appeal, a Form RAB(O1) entitled "Notice of Appeal" needs to be lodged.

¹⁰⁰ Supra note 11 at 178.

¹⁰¹ Published under GN 955 in GG 37122 of 6 December 2013.

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- 15.3 In terms of Regulation 14 and RAB Rule 4, the notice of appeal must be lodged within 30 days of receipt of the letter of rejection from the RSDO.¹⁰² The notice of appeal must be lodged in person directly at the designated RRO.
- 15.4 *What to do at the clinic*
- (1) Assisting asylum seekers with appeals is a large portion of refugee clinic work. The first step is to assist with completing the notice of appeal.¹⁰³
 - (2) In terms of Rule 4 of the Refugee Appeal Board Rules, 2013, the notice of appeal must include:
 - (a) The full name, current address, date of birth and nationality of the applicant;
 - (b) An affidavit in which the reasons for appeal are set out and documents or certified copies thereof on which the Appellant seeks to rely (which must be in duplicate);
 - (c) The signature of the appellant – or in the event of the appellant being a minor or someone who lacks capacity – the signature of a guardian or curator acting on behalf of such person.
 - (3) The supporting affidavit, which needs to be annexed to the notice of appeal, needs to set out the appellant's background and the grounds for appeal. The practitioner will need to interview the asylum seeker in order to prepare such an affidavit. Questions along the following lines should be asked:
 - (a) The basic information of the asylum seeker as required in terms of the Rules;
 - (b) Why the asylum seeker left their country of origin;
 - (c) Why the asylum seeker elected to come to South Africa (this often assists with identifying whether a person is an economic migrant);
 - (d) Whether the individual forms part of or has a particular race, tribe, religion, nationality, political opinion or is a member of a particular social group which has caused them to flee (for claims in terms of section 3(a));
 - (e) Whether the person has been persecuted or whether they fear persecution and whether such fear is reasonable;
 - (f) Whether protection against persecution was available and steps taken to avail themselves of such protection; alternatively details of why no protection is available or why the person is unwilling to avail himself or herself of protection;
 - (g) The status of the individual's country of origin (for claims in terms of section 3(b));
 - (4) When the person arrived and
 - (a) How they travelled to RSA;
 - (b) Whether or not the person has any travel or identity documents to confirm their identity and nationality;
 - (c) Whether they have any documents to support their claim (such as newspaper clippings etc.);

¹⁰² Rule 2 states that for purposes of calculating the time frames days mean calendar days including Saturdays, Sundays and Public Holiday. The first day is, however, excluded and the last day is included. The last day is excluded if it falls on a Saturday, Sunday or Public Holiday.

¹⁰³ Such notices are made available to you by ProBono.Org on clinic days.

- (d) Whether there is any fear of return to the individual's country of origin;
 - (e) Whether the person would return to their country of origin if the situation which caused them to flee changes.
- (5) If the person is out of time to lodge their notice of appeal, remember to include a request for condonation with the notice of appeal. In terms of Rule 6 of the RAB Rules, this entails providing a separate affidavit with the notice of appeal which shows good cause for the delay which affidavit must be accompanied by documentary evidence where appropriate.
 - (6) After preparing the notice of appeal, the asylum seeker must lodge the application at the RRO where the letter of rejection was handed to the asylum seeker.
 - (7) It is worth advising the asylum seeker to take an extra copy of the notice of appeal and get the RRO to stamp their copy as proof of lodgement.
 - (8) When the asylum seeker attends at the RRO to renew his or her section 22 permit, he or she will receive a "Notice of Hearing" with the date of hearing.¹⁰⁴

15.5 *Late filings of notice of appeals*

- (1) If the asylum seeker is out of time to file the notice of appeal, the asylum seeker can file an application for condonation setting out good reasons why they are out of time.¹⁰⁵
- (2) The application for condonation takes the form of an affidavit which accompanies the notice of appeal. A request for condonation can either be included in the notice of appeal's supporting affidavit or can be a separate affidavit.
- (3) In terms of Rule 6 of the RAB Rules, the application for condonation must be supported by documentary evidence where appropriate.
- (4) The designated appeal clerk must then refer the condonation affidavit to the Appeal Board within 10 days of receipt.

15.6 *Preparing for the appeal hearing*

- (1) On receipt of a notice of hearing, the practitioner must prepare a power of attorney for signature by the asylum seeker.
- (2) It is also advisable that the practitioner prepare a specific letter of engagement too so as to prevent issues such as scope of work creep for legal services (when there are expectations for contractual or delictual assistance, for example) or to assist if there is a breakdown of the relationship.
- (3) On return of the signed power of attorney, the practitioner must request the full content of the asylum seeker's DHA file. The request is made to the Registrar of the RAB and must be accompanied by the signed power of attorney failing which the request will be rejected.
- (4) On receipt of the file and following further consultation with your client, heads of argument of must be prepared. For citation purposes, note that the parties to the appeal are the appellant and the Department of Home Affairs.
- (5) The following should be dealt with in the heads of argument:

¹⁰⁴ Note that this may take years; especially since appeal hearings are currently suspended.

¹⁰⁵ An example of a successful application for condonation is where an individual had been hospitalised for six months and was unable to get to the RRO to lodge the appeal.

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- (a) The basic information of the appellant (name, age, where they were born, level of education, where their principle place of residence was before fleeing, what their occupation was before fleeing and now etc.)
 - (b) Whether it is an asylum claim in terms of section 3(a) and 3(b) of the Act or both;
 - (c) Setting out the facts and grounds upon which the person qualifies for asylum status;
 - (d) Deal with disputes of facts that may become apparent when perusing the DHA's file sent to you by the RAB;
 - (e) Set out the law;
 - (f) Utilise www.reflaw.org for comparative law;
 - (g) Deal with any credibility issues;
 - (h) Reinforce the Appellant's claim with the most recent independent research on the individual's country of origin. One can, in addition to the general sources, use:
 - (i) Human Rights Watch World Report;
 - (ii) Amnesty International Annual Report;
 - (iii) UNHCR Annual Report;
 - (iv) Independent news reports; or
 - (v) <http://www.refworld.org>.
 - (6) Once completed, the heads must be submitted seven days prior to the hearing and can be sent to the RAB Registrar via email.
 - (7) In addition to his or her legal representative, the appellant is also entitled to be accompanied by an interpreter. Arrangements should therefore be made for an independent, certified interpreter to accompany you and your client to the hearing if your client is not fluent in English.¹⁰⁶ Stress to the interpreter the importance of interpreting verbatim and not to supplement anything the appellant says.

15.7 *The appeal hearing*

- (1) The appellant is entitled to be legal representation at appeals.¹⁰⁷
- (2) Postponements can be requested via the RAB Registrar. The RAB may grant an application for postponement of a hearing upon being satisfied that there is good cause for the postponement. The RAB can also postpone hearings on their own accord.
- (3) In terms of Rule 12 of the RAB Rules, if an appellant fails to attend the hearing and has neither notified the RAB nor given any satisfactory explanation, the RAB will determine the appeal on paper.
- (4) In terms of section 21(5), the confidentiality of asylum applications and the information contained therein must be ensured at all times. Accordingly, Rule 13 prescribed that the RAB hearings are closed proceedings. In *Mail & Guardian Media Ltd and others v Chipu NO and*

¹⁰⁶ Note that, on request, interpreters often agree to a reduced rate if you are working on a pro bono basis and if the asylum seeker is indigent.

¹⁰⁷ Practitioners require right of appearance. Candidate Attorneys are advised to take their Right of Appearance Certificate with them. Attorneys are advised to take their Law Society card with them since the RAB sometimes requests proof.

others,¹⁰⁸ the Constitutional Court declared section 21(5) to be inconsistent with section 16(1) of the Constitution to the extent that it precludes members of the public or the media from attending proceedings of the RAB in all cases and fails to confer a discretion upon the RAB to allow the public and media access to its proceedings in appropriate cases. The Refugees Amendment Act 10 of 2015, which came into effect on 27 September 2015, now gives the Refugee Appeals Authority discretion to allow the public and media access to proceedings.

- (5) It is important to ensure, at the outset of the hearing, that the Board is properly constituted. At least two board members must be present.¹⁰⁹
- (6) The hearing is informal. At the outset, advise the Board of your intention to record the proceedings (in case a review is required at a later stage). You will present the facts and your legal argument to the Board. The Board will then cross examine your client. You will be given an opportunity to re-examine your client.
- (7) The RAB may either on its own volition or at the request of any party to the appeal, subpoena any person to serve as a witness at the hearing. The RAB may require a witness to answer any questions and/or to provide any relevant documentation related to the appeal. This is in terms of Rule 15.
- (8) The asylum seeker will be provided with a letter from the RAB Registrar at the end of the hearing which provides that the asylum seeker is awaiting the outcome of the appeal and requesting the RRO to extend his or her section 22 permit.

15.8 *Hearing results*

- (1) Rule 17 of the RAB Rules prescribe that the Appeal Board must record its decision and convey the decision in writing to the parties to the Appeal.
- (2) In terms of section 26(2) of the Refugees Act, there are three results that the RAB can render following the hearing. These are:
 - (a) Confirming the decision taken by the RSDO;
 - (b) Setting aside the decision taken by the RSDO; and
 - (c) Substituting the RSDO's decision.

16 **Successful appeals**

- 16.1 If an application for asylum is successful, a section 24 permit is issued and the individual, who will be a recognised refugee, will enjoy the full legal protection of South Africa.
- 16.2 The rights and obligations of refugees and their further immigration law options are discussed more fully below.

¹⁰⁸ 2013 (6) SA 367 (CC).

¹⁰⁹ In terms of s 13 (1) read with s 15 (5) the RAB must consist of a chairperson and at least two other members, appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly. At least one of the members of the Appeal Board must be legally qualified. Section 12 (3) of the Act provides that the RAB must function without bias and must be independent. Not only is it required to be impartial in its decision making, but, in addition, it must be structurally independent. For years, the RAB consisted only of one member. Section 15 provides that RAB meetings must be convened by the chairperson and the majority of members constitute a quorum; thus at least two persons have to be present, at a minimum. Further, the decision must be taken by a majority of votes. Manifestly, it is required that RAB sit with its full complement of members (or at the very least, two). Decisions taken from hearings where only one appeal board member is present are therefore legally invalid because the board is not properly constituted. Such decisions can be set aside on review. The composition of the board was challenged in *AOL v Minister of Home Affairs and others* 2006 (2) SA 8 (D) and *Harerimana v Chairperson of the Refugee Appeal Board and Others* (10972/2013) [2013] ZAWCHC 209; 2014 (5) SA 550 (WCC) (11 December 2013).

17 Rejection of appeals

- 17.1 After the RAB renders its decision, the RAB becomes *functus officio* and it has no further powers in relation to the application
- 17.2 Following rejection of the appeal, the appellant ceases to qualify for asylum and asylum seeker status can be withdrawn. In terms of section 36(3), a person who has had his recognition withdrawn may be arrested, detained and deported in terms of the Immigration Act. Detention and deportation will be discussed in further detail below.
- 17.3 Judicial review is the last remedy following failed appeals. This is only to be invoked if there are grounds to subject the administrators' actions to judicial review.

18 Judicial review

18.1 *What is judicial review?*

Judicial review refers to the power of the courts to scrutinise and set aside administrative decisions or rules on the basis of recognised grounds of review.

18.2 *The right of asylum seekers and refugees to judicial review*

- (1) Asylum seekers are accorded the same Constitutional rights in terms of the Bill of Rights, save for those constitutional rights specifically accorded to citizens.
- (2) Included in their rights is the right to administrative justice in terms of section 33 of the Constitution which prescribes that everyone has the right to just administrative action. To protect a right to fair administrative justice means to ensure that any administrative action of an organ of state when exercising its public power or performing a public function is lawful, reasonable and procedurally fair.
- (3) The right to just administrative action is mainly given effect to through the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The purpose behind the act was to promote an efficient administration and good governance and create a culture of accountability.
- (4) Section 6 of PAJA provides for situations where administrative action is deemed to be unlawful. If it is unlawful, it can be subject to judicial review.

19 What is administrative action

- 19.1 Administrative action is defined in section 1 of PAJA as any decision taken, or any failure to take a decision, by an organ of state, when exercising a public power or performing a public function in terms of any legislation, or a natural or juristic person other than an organ of state when exercising a public power or performing the rights of any person, which has a direct, external legal effect and adversely affects the rights of any person.
- 19.2 Often in administration law, practitioners have to apply interpretations as to whether or not something is an administrative action as defined in section 1 of PAJA. In *Tantoush v Refugee Appeal Board*,¹¹⁰ however, the court confirmed that decisions made by the RSDOs and the RAB constitute administrative action subject to PAJA.

¹¹⁰ Supra note 92 at para 64.

- 19.3 Since PAJA applies to asylum seekers, all asylum seekers in making an application for asylum have the right to have the application dealt with in a reasonable, rational and fair manner.
- 19.4 The fact that section 33 of the Constitution and PAJA apply to asylum seekers is in line with international law, and specifically with the requirements of article 25(1) of the UN Convention where each state party to the Convention is required to arrange an administrative mechanism by which to facilitate the exercise of the rights by all refugees living in its territory.
- 19.5 Despite the protection accorded in terms of section 33 of the Constitution and PAJA, asylum seekers and refugees are often subject to unfair administrative policies and practices in obtaining asylum status. We therefore need to invoke the principles of PAJA to protect their rights.
- 19.6 Asylum seekers are entitled to their rights in terms of section 3 of PAJA. These rights are:
- (1) Adequate notice of the nature and purpose of the proposed decision;
 - (2) A reasonable opportunity to make representations;
 - (3) A clear statement of the administrative action;
 - (4) Adequate notice of any right of review or internal appeal; and
 - (5) Adequate notice of the right to request reasons.
- 19.7 These rights are relevant to decisions taken by the Refugee Status Determinations Officers, the Refugee Appeal Board and the Standing Committee for Refugee Affairs.

20 Grounds for review

- 20.1 There have been a number of grounds relied upon in review applications brought by asylum seekers who have had their application rejected where the rejections were upheld by the Standing Committee or Appeal Board.
- 20.2 Note that grounds for review often overlap.
- 20.3 The grounds include:
- (1) *The right to written reasons*
 - (a) Section 3(5) provides for the right to written reasons for a decision taken that would adversely affect a refugee or asylum seeker.
 - (b) In terms of section 5(1) of PAJA, if an asylum seeker or refugee's rights are adversely affected, they have the right to request reasons within 90 days of that decision having been taken for written reasons why it was made.
 - (c) Section 5(2) of PAJA requires the administrator to give adequate reasons in writing for the action taken within 90 days of such request.
 - (d) A failure to deliver reasons within 90 days will, in terms of section 5(3), mean that the administrative action was taken without good reason, in the absence of proof to the contrary.

(2) *Procedural fairness*

- (a) The lack of procedural fairness forms the basis for many of the review applications before the court on behalf of refugees whose claims have been rejected.
- (b) Authorities have to comply with the legislation. Where they have failed to act in terms of the legislation or regulations on a procedural level, the decision can be challenged on the grounds of a lack of procedural fairness and legality as well.
- (c) Examples of failing to comply with procedural fairness include:
 - (i) Where an applicant was not afforded the services of adequate interpretation nor informed of the right that they could bring an interpreter;
 - (ii) Failure to give notice of the right to make representations before the standing committee;
 - (iii) Failure to give proper notice of the right to a hearing;
 - (iv) Failure to give an applicant an opportunity to consider or respond to information relied on by the authorities;
 - (v) Failing to give the applicant an opportunity to deal with material evidence.
- (d) See *Tantoush v Refugee Appeal Board and Others*,¹¹¹ which was a review based on procedural unfairness and material errors of fact and law.

(3) *Decisions take in bad faith or arbitrarily or capriciously*

- (a) This is a ground in terms of section 6(2)(vi) of PAJA.
- (b) An adverse decision when an applicant refuses to pay a bribe or accede to demands for sexual favours is an example of decisions taken in bad faith.

(4) *The decision was materially affected by an error of law*

- (a) In *Tantoush*, the Appeal board failed to appreciate the nature of the discretion it has to reconsider a decision by the RRO. In addition, the decision related to the standard of proof in deciding whether the applicant had a well-founded fear of persecution. The normal civil standard i.e. that the applicant was required to prove a real risk on a balance of probabilities is not correct. The appropriate standard is one of “a reasonable possibility of persecution”.
- (b) Also see *Katabana v Chairperson of the Standing Committee for Refugee Affairs* for a decision materially affected by an error of law.¹¹²

(5) *The decision was taken because irrelevant considerations were taken into account or relevant considerations were not considered*

- (a) This is in the context of poorly researched decisions – where the RRO failed to take into account up-to-date and relevant information. This forms the ground of review in many review applications when reviewing an RSDO’s decision not revised on appeal.

¹¹¹ Supra note 92.

¹¹² 2013 JDR 1046 (WCC).

- (b) A failure to take into account up to date and relevant information related to countries of origin or information relating to a specific individual has been accepted as a ground for review.
- (c) Focusing on irrelevant information rather than the substance of the application is also a ground for review.
- (d) See also *Deo Gracias Katshingu v Chairperson of the Standing Committee for Refugee Affairs and others*.¹¹³
- (6) *The decision was so unreasonable that no reasonable decision maker would have made such a decision*
 - (a) In *Katshingu*, the court found that a failure to take into consideration the latest information was an indication of the decision maker's failure to apply his mind. The decision could therefore not be said to be rational.
 - (b) Also see *Katabana v Chairperson* regarding a decision taken by the RSDO which could not be rationally related to the facts before it.
- (7) *Where the decision maker was biased or reasonably suspected of bias or acted under the unauthorised or unwarranted dictates of another person or where the decision was taken for an ulterior motive or purpose*
 - (a) Evidence of bias against the Applicant by the RSDO was accepted as a ground for review in *Tantoush*.¹¹⁴ The RSDO was suspected of having followed the will of Interpol and the SAPS in its rejection.
 - (b) These are factual issues.
- (8) *Lack of jurisdiction*
 - (a) In *AOL*,¹¹⁵ the court found that there was absence of proof that it was the RSDO who had taken the decision (being the only person who is entitled to make this decision) to reject the application. The RAB therefore didn't have jurisdiction to hear the appeal.
- (9) *The composition of the RAB*
 - (a) In terms of section 13 of the Refugees Act, the Appeal Board must consist of three individuals – the chairperson and two others appointed by the Minister. One of these individuals must be legally qualified.
 - (b) In *Dorcasse v Minister of Home Affairs and others*,¹¹⁶ the court was requested to review a rejected appeal decision which appeal was heard by a single member of the RAB. Whilst section 13 of that provision was repealed by the Refugees Amendment Act 2008, the new Act had not yet taken effect at the time of the applicant's appeal. The purported decision of the Refugee Appeal Board was therefore ultra vires and null and void.
- (10) *The failure of the investigator and other procedural irregularities*
 - (a) In this regard see *Radjabu v Chairperson of the Standing Committee for Refugee Affairs and others*.¹¹⁷

¹¹³ 19726/2010 [2011] ZAWCHC (2 November 2011).

¹¹⁴ Supra note 92.

¹¹⁵ *AOL v Minister of Home Affairs and Others* 2006 (2) SA 8 (D).

¹¹⁶ [2012] 4 All SA 659 (GSJ).

¹¹⁷ [2015] 1 All SA 100 (WCC).

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- (b) The Court considered various irregularities in the handling of an application for asylum status. The proceedings before the status determination officer were unlawful because a proper interpreter was not used, because the RSDO did not effectively undertake the inquisitorial role that the statute contemplates, because he did not have regard to the information set out in the application form and thus he did not take obviously relevant considerations into account. The SCRA also failed to make further enquiries and investigate the matter. Its decision to uphold the determination of the refugee status determination officer without such further investigation was one that a reasonable decision-maker could not have made. The decisions made by the RSDO and the SCRA were therefore set aside. The application for asylum was remitted to be considered afresh by a different RSDO.

21 Procedure for judicial review

- 21.1 The procedure is governed by section 7 of PAJA. Proceedings for judicial review must be instituted without unreasonable delay and not later than 180 days after:
- (1) All internal remedies have been exhausted; or
 - (2) If no internal remedies exist, when the person became aware of or reasonably should have been aware of the administrative action and the reasons for it (or might reasonably have been expected to have become aware of the action and the reasons).
- 21.2 Judicial review must be instituted in a High Court. The rules for judicial review are therefore governed by the High Court Rules.

22 Available remedies

- 22.1 Section 8 of PAJA provides for remedies that can be ordered pursuant to the judicial review. These are:
- (1) Directing the administrator to give reasons; or to act in a manner the court or tribunal requires;
 - (2) Prohibiting the administrator from acting in a particular manner;
 - (3) Setting aside the administrative action; and
 - (4) Remitting the matter for reconsideration by the administrator, with or without directions; or
 - (5) In exceptional cases –
 - (a) substituting or varying the administrative action.
 - (b) correcting a defect resulting from the administrative action; or
 - (c) directing the administrator or any other party to the proceedings to pay compensation;
 - (d) the rights of the parties in respect of any matter to which the administrative action relates;
 - (e) granting a temporary interdict or other temporary relief.

- 22.2 The most common remedy available for unlawful administrative action is the reviewing and setting aside of the decision of the initial decision makers.
- 22.3 The review court can make a decision that is just and equitable including remitting the matter for reconsideration with or without directions.
- 22.4 The court can also substitute a decision in exceptional circumstance e.g. there is serious unreasonableness, serious and material errors of fact, issues such as credibility of a witness fall within the realm of an appeal. The courts have shown a willingness to substitute its own decision for that of the RAB. The primary considerations which justify a court not remitting the decision back to the decision maker are:
- (1) Fairness and practicality – see *Gauteng Gambling Board v Silver Star Development Limited*.¹¹⁸
 - (2) Where the end result is a foregone conclusion (such as where the facts are not in issue or where the issue has to be determined on a point of law). In this regard see *Hartman v Chairman, Board for Religious Objection*.¹¹⁹
 - (3) Where further delay would cause unjustifiable prejudice:
 - (a) *Katabana v Chairperson of the Standing Committee for Refugee Affairs*;¹²⁰
 - (b) *Deo Gracias Katshingu v Chairperson of the Standing Committee for Refugee Affairs*;¹²¹
 - (c) *Ruyobeza v Minister of Home Affairs*.¹²²
 - (4) Where the court is as well qualified as the original authority to make the decision. In this regard see *Foodcorp (Pty) Ltd v Deputy Director-General: DEAT: Branch Marine and Coastal Development*.¹²³ Note however that a court will not make a decision if it does not have the expert knowledge of the initial decision maker. In instances where a court has had up to date information before it and credibility has not been an issue, the courts have substituted their own decisions and granted refugee status.
 - (5) Where the initial decision maker has exhibited bias or shown incompetence. In cases of suspected bias or incompetence, a court deems it unfair for the decision to be sent back to the same decision maker. In this regard see the following cases:
 - (a) *Tantoush*;
 - (b) *Katsshingu*;
 - (c) *University of the Western Cape v MEC for Health and Social Services*.¹²⁴

23 Cessation of refugee status

- 23.1 There are certain circumstances where refugee status properly and legitimately ceases. This is because refugee status is only meant to be temporary.

¹¹⁸ 2005 (4) SA 67 (SCA).

¹¹⁹ 1987 (1) SA 922 (O).

¹²⁰ Western Cape High Court unreported judgment no 25061/2011 of 14 December 2012.

¹²¹ 19726/10 (2011) ZAWCHC 480 (unreported)

¹²² (2003) (5) SA 51 (c) 65D – 65H.

¹²³ 2006 (2) SA 199 (C).

¹²⁴ 1998 (3) SA 124 (C) 131.

23.2 In terms of section 5 of the Refugees Act, a person ceases to qualify if:

- (1) Section 5(1)(a): *A person voluntarily re-avails him or herself the protection of the country of origin:*
 - (a) This demonstrates that the person is no longer in need of international protection;
 - (b) In terms of the UNHCR handbook, the refugee must act voluntarily, must intend his action to re-avail him or herself of the country of origin's protection and the refugee must actually obtain such protection;¹²⁵
 - (c) Note the South African government bears the burden of proof if seeking to impose cessation on this basis and an inquiry is required.¹²⁶
- (2) Section 5(1)(b): *Having lost his or her nationalist, a person voluntarily or formally reacquires it:*
 - (a) A purposeful intention must exist on the part of the refugee to re-acquire citizenship and needs to be demonstrated through a formal act;
 - (b) This does not apply to people who have retained their citizenship to their country of origin whilst having sought asylum in South Africa nor does it apply to individuals who have been stateless since birth;
 - (c) This is indicated through a voluntary normalisation of relations between the individual and the country of origin.¹²⁷
- (3) Section 5(1)(c): *A person becomes a citizen of the Republic or another country and enjoys the protection of his or her new country of nationality:*
 - (a) This pertains to situations where a person would receive citizenship through the operation of law, through marriage, for example, or naturalisation in South Africa or a new country other than the refugee's country of origin;
 - (b) The UNHCR advises that the new citizenship must be effective and create a genuine link between the state and the person. The refugee must be willing and able to avail himself or herself of the protection of the new country of nationality.¹²⁸
- (4) Section 5(1)(d): *A person voluntarily re-establishes himself or herself in his or her country of origin:*
 - (a) This involves the actual return and re-establishment in the country of origin for the purpose of resettling or permanent residence;
 - (b) The decision to return as well as the decision to remain must be voluntary;¹²⁹
 - (c) This does not apply to short clandestine returns to an individual's country of origin (to see family or a return for a political reason) whilst the person continues to reside in South Africa as a refugee.¹³⁰
- (5) Section 5(1)(e): *A person can no longer continue to refuse to avail himself or herself of the protection of country of origin because the circumstances in connection to refugee status*

¹²⁵ Supra note 1 at 119.

¹²⁶ Supra note 11 at 117.

¹²⁷ Supra note 11 at 119

¹²⁸ Supra note 1 at 17.

¹²⁹ Supra note 1 at 20.

¹³⁰ Supra note 11 at 121.

have ceased to exist and no other circumstances have arisen which justify continued recognition as a refugee:

- (a) This section is different from the other sections in 5(1) which applies where protection is no longer required or where ties to a country of origin have been voluntarily restored. It applies where cessation is no longer justified due to a change in circumstances. It is not dependant on the refugee's consent.¹³¹
- (b) An example of where an individual can no longer refuse to avail himself or herself of the protection of his or her country of origin is where governments have signed repatriation agreements (such as that signed by Angola, South Africa and the UNHCR which ceases to provide international protection to Angolans following peace and stability in their country of origin).
- (c) Refugees affected by section 5(1)(e) can however apply for exemption in terms of section 5(2) if they are able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality. The need for medical care has been recognised as a valid ground for such an exemption.

23.3 In terms of section 5(3), if a person ceases to qualify for refugee status, it may be withdrawn in terms of section 36 of the Refugees Act.

24 Withdrawal of refugee status

24.1 Refugee status can be withdrawn.

24.2 Refugee status can be voluntary withdrawn by the person who applied for it.

24.3 Non-voluntary withdrawal is governed by section 36 of the Refugees Act. Withdrawal may be done if:

- (1) The person has been recognised as a refugee erroneously on an application which contains materially incorrect or false information;
- (2) Or was recognised due to fraud, forgery, false or misleading representation of a material or substantial nature in relation to the application;
- (3) Or if such person ceases to qualify in terms of section 5 of the Refugees Act.

24.4 If the Standing Committee however determines that grounds for withdrawal of refugee status apply pursuant to section 36 of the Act, the Standing Committee will issue a notice of intent to withdraw refugee status. This is done in terms of section 36(1)(a) and regulation 17(1). This notice sets out the Standing Committee's intent to withdraw refugee status, identifies the reasons for withdrawal and notifies the refugee of a right to make written submissions to the Standing Committee within 30 days of the date of the notice. A failure to respond within the prescribed period of time or if the response the response fails to overcome the reasons provided for withdrawal, the refugee status may be withdrawn in terms of regulation 17(3).

24.5 If refugee status is withdrawn, the person will be dealt with as a prohibited person in terms of the Immigration Act (note the Refugees Act still makes reference to the Aliens Control Act, 1991). The person may be arrested and detained in terms of regulation 17(3) and section 36(3) of the Refugees Act.

¹³¹ Supra note 11 at 123.

25 Arrest & deportation

- 25.1 After a) an application for asylum has been finally rejected, b) the time period to file an appeal has lapsed and no appeal has been pursued, c) an appeal was unsuccessful, or d) if grounds existed for review, the review process was unsuccessful, the DOHA may withdraw an individual's asylum seeker permit. The DOHA may likewise withdraw a refugee's permit if the individual ceases to qualify for that permit. At this stage, the individual becomes subject to the Immigration Act.
- 25.2 The individual will be issued with a Notice of Deportation by the DOHA. This notice, which is often referred to as a "must leave", informs the individual that he or she has to leave South Africa. It instructs the individual to present himself or herself, together with his or her dependants, to an Immigration Officer at the Refugee Reception Office within 30 days from the date of the Notice. The purpose of this 30-day grace period is to allow individuals to tie up their personal affairs in South Africa.
- 25.3 In terms of the "must leave" notice, the person and his dependants can elect to leave voluntarily or they will be deported. Should an individual choose to leave voluntarily, that individual must produce a bus or plane ticket and must provide proof that they are leaving, in order to be allowed to return voluntarily.
- 25.4 If the individual does not leave voluntarily, the person will be arrested and detained at the Lindela Repatriation Centre pending deportation. Deportation is defined in the Immigration Act as the action or procedure aimed at causing an illegal foreigner to leave South Africa in terms of the Immigration Act.
- 25.5 Section 34(1) of the Immigration Act deals with the arrest, detention and deportation:
- (1) An immigration officer does not need a warrant to arrest an illegal foreigner;
 - (2) The individual may be detained pending the deportation;
 - (3) The individual must be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;
 - (4) The individual may at any time request any officer attending to him or her that their detention for the purpose of deportation be confirmed by warrant of a court, which, if not issued within 48 hours of such request, must result in the immediate release of such foreigner;
 - (5) The individual must be informed of his or her rights upon arrest and, when possible, practicable and available, this must be done in a language that he or she understands;
 - (6) The person may not be held in detention for longer than 30 calendar days without a warrant of a court which, on good and reasonable grounds, may extend such detention for an adequate period not exceeding 90 calendar days;
 - (7) The person must be held in detention in compliance with minimum prescribed standards protecting his or her dignity and relevant human rights; and
 - (8) The Director-General may order a foreigner who is subject to deportation to deposit a sum sufficient to cover in whole or in part the expenses relating to his or her deportation, detention, maintenance and custody and an officer may in the prescribed manner enforce payment of the deposit. Failure to pay is an offence and the person can be subjected to a fine not exceeding R20 000 or to imprisonment not exceeding 12 months.
- 25.6 Note that after 120 days in detention has lapsed, the arrest is unlawful. A Magistrate cannot extend a detention period beyond 120 days.

- 25.7 It is common for people to be detained at Lindela for lengthy periods of time. Lindela is also notorious for human rights violations.¹³²
- 25.8 If a person is deported, that person will be listed as a “Prohibited Person” in terms of the Immigration Act and will not be permitted lawful entry into the country for a period of 5 years or until rehabilitation. There may also be penalties imposed by the country of origin.

26 Constitutional rights of asylum seekers and refugees

26.1 General

- (1) Section 27(c) of the Refugees Act provides that refugees enjoy the full legal protection of the Bill of Rights and the Constitution as a whole. The exception to this is the right to vote and the right to form a political party.
- (2) This was confirmed in *Union of Refugee Women v Director: Private Security Industry Regulatory Authority*¹³³ where the court held that all foreigners inside the country are entitled to all of the fundamental rights entrenched in the Bill of Rights except those expressly limited to South African citizens.
- (3) In the case of *Lawyers for Human Rights and Other v Minister of Home Affairs and others*¹³⁴ the court looked at the difference between “foreigners” and “illegal foreigners” and held that even foreigners who have entered the country illegally are protected by the Bill of Rights. The right to dignity is especially important in the context of refugee law.

26.2 Right to freedom of movement

- (1) Unlike many other countries which compel asylum seekers and refugees to stay in refugee camps whilst seeking refuge, asylum seekers and refugees in South Africa have the right to live freely amongst South Africa’s local residents and to move freely throughout the country. They can live wherever they choose and can integrate themselves within local communities.
- (2) The right to freedom of movement is conditional on such individuals having either a section 22 or section 24 permit which legalises their presence in South Africa.¹³⁵
- (3) The one disadvantage to this right to freedom of movement is that asylum seekers and refugees have to find their own means of survival including accommodation, education for themselves and their dependents and have to find some form of income or employment. Consequently they are in a vulnerable situation and in many cases they are exposed to abuse.¹³⁶
- (4) Practitioners must be aware of the Green Paper on International Migration which was introduced by the Minister of Home Affairs on 24 June 2016 which, amongst other things, sets out the Government’s intention to establish secure administrative detention centres for asylum seekers whilst awaiting final adjudication of their refugee claims. Only ‘low risk asylum seekers’ would, if the policy is implemented, have the right to enter and leave the facility under specific conditions and be released ‘into the care of national or international organisations and family or community members’ subject to unspecified conditions. Vulnerable groups would also be subjected to detention. This is contrary to South Africa’s policy of non-encampment and is being heavily contested by civil society groups.

¹³² South African Human Rights Commission ‘Baseline investigative report’ available at <https://www.sahrc.org.za/home/21/files/Gauteng%20-%20Investigative%20Report%20-%20Lindela%20-%201%20September%202014.pdf>, accessed on 29 March 2017.

¹³³ 2007 (4) SA 395 (CC).

¹³⁴ 2004 (4) SA 125 (CC).

¹³⁵ Difficulties for asylum seekers arise if they choose to live in a different location from the RRO at which they applied for asylum. This is because the individual will have to sporadically return to the RRO to renew his or her permit. Practitioners working at the refugee clinic will therefore receive requests to assist with the transfer of files from one RRO to one closer to where the individual has chosen to settle. RROs are generally uncooperative with requests for the transfer of files and a court order to compel transfer may be required.

¹³⁶ Jesuits South Africa ‘Jesuit Refugee Service’ available at <https://sj.org.za/jesuit-refugee-services/>, accessed on 29 March 2017.

26.3 Access to state services – health care

- (1) The Constitution and section 27(g) of the Refugees Act provide that asylum seekers and refugees are entitled to the same basic health services which the inhabitants of South Africa are entitled to and receive. This includes the right to basic health care including reproductive health care and the right to not be denied emergency treatment. Asylum seekers and refugees are also entitled to get free ARV treatment for HIV/AIDS at public hospitals.
- (2) Free basic health services ought to be provided by public hospitals subject to the asylum seeker or refugee providing the hospital with a valid section 22 or section 24 permit. In the event that your client has not as yet had an opportunity to apply for asylum, hospitals have been known to provide the individual with the required health services on the presentation of a letter from a legal practitioner or NGO which sets out the individual's intention to apply for asylum.¹³⁷
- (3) Practitioners working at the refugee clinic will encounter asylum seekers or refugees who have been refused the health care to which they are entitled. This is because hospital workers do not always know that refugees and asylum seekers are entitled to receive these services. They may not recognise the permits as a valid form of documentation.¹³⁸
- (4) Practitioners should take note of the Department of Health's circular dated 19 September 2007 which notifies provincial health managers of asylum seekers' and refugees' rights to health care. A copy of the circular is annexed marked J.
- (5) It is useful for practitioners to note which state health care providers are "friendly" to asylum seekers so clients can be directed accordingly. Practitioners are advised to report state health care providers that are "unfriendly" to asylum seekers or refugees to the Department of Health, the South African Human Rights Commission or the Office of the Public Protector.

26.4 Access to education

- (1) Access to education is dealt with under Article 22 of the Convention which stipulates that contracting states must accord to refugees the same treatment that is accorded to nationals with respect to elementary education.
- (2) Section 27(g) of the Refugees Act entrenches this international obligation. All children are entitled to basic primary education, irrespective of their nationality and documentation status. Children who are documented as asylum seekers or refugees are therefore entitled to access the same basic primary education as South African children. Basic education usually means grade 1 to 9 for children between the ages of seven and fifteen.
- (3) If the child of an asylum seeker needs to be admitted to a school and the child is undocumented, admission must be allowed subject to the parent or caregiver being able to show that they are in the process of arranging the relevant documentation to legitimise their stay in South Africa. If no documents are forthcoming after three months post-admission, the School Governing Body and the Department of Education must liaise with the Department of Home Affairs and with the parents or caregivers to ensure that the child obtains documentation to remain legally in South Africa.¹³⁹
- (4) Asylum seekers and refugees can apply for exemptions from school fees if they are unable to afford these. Exemption requests may be made to any public school, by submitting proof of

¹³⁷ Note however that the Gauteng Department of Health guideline entitled "Non-SA citizens (foreign patients) Guidelines" states that hospital should demand full, up-front payments from patients without permits or refugee documents, or who are asylum seekers. These guidelines have been implemented at the Helen Joseph, South Rand, Charlotte Maxeke, and Rahima Moosa Mother and Child hospitals. This means that patients, who cannot prove they are living in South Africa legally, will have to pay in full for their treatment. See <http://www.sabc.co.za/news/a/2812de0042a6fc8bb517ff56d5ffbd92/Refugees-and-asylums-seekers-puzzled-by-new-health-guidelines-20142201>.

¹³⁸ Lawyers for Human Rights 'Refugee Survival Guide' 1 ed 27.

¹³⁹ ProBono.org 'Rights and Duties of Asylum Seekers and Refugees in South Africa' available at http://www.probono.org.za/Manuals/Refugee-Manual/2015_Asylum_seeker_guide_Rights_and_Duties_of_asylum_seekers.pdf, accessed on 20 March 2017.

monthly income and expenses, which would determine whether they qualify for exemption under a financial means test. Applications for exemption from school fees must be made directly to the school by the parent or caregiver.

- (5) There is no requirement for asylum seekers or refugees to produce any documents to enrol children into state schools. The children of asylum seekers or refugees may obtain provisional acceptance and be permitted a grace period in order to produce birth certificates, asylum permits, study permits etc.
- (6) The admission of undocumented children to public schools must be allowed on the condition that the parent(s) or caregiver is in the process of arranging the relevant documentation to regularise their stay in South Africa. If after three months, no documentation has been obtained, the School Governing Body, in consultation with the District Officials, must liaise with the relevant authorities and parents to ensure that the child obtains documentation to remain legally in South Africa. The documentation options for children vary depending on their circumstances and are linked to the documentation status of their parent(s) or caregiver.
- (7) Contact the Department of Education if your clients' encounter difficulties with enrolling minor children at school.

26.5 Social grants

- (1) Article 23 of the Convention provides that contracting states must accord refugees lawfully staying in their territory the same treatment with respect to public relief and assistance as is accorded to their nationals.
- (2) Section 27(1)(c) of the Constitution provides that everyone has the right to access social security including if they are unable to support themselves and their dependants, appropriate social assistance.
- (3) Although the Refugees Act does not specifically mention the right of asylum seekers and refugees to social services, the Constitution and the Bill of Rights provide those rights to anyone lawfully in the country. Securing these rights without documents can be problematic.
- (4) Only recognised refugees are eligible to access social grants through the South African Social Security Agency (**SASSA**). The grants that refugees are entitled to include:
 - (a) Disability grants – disabled refugees are able to receive disability grants on an equal basis to South African citizens. This was following the decision in *Scalabrini Centre v Minister of Development*.¹⁴⁰
 - (b) Foster care grants – formal refugees who foster children by court order can apply to the Department of Social Development for a foster care grant;
 - (c) Child support grant;
 - (d) Care dependency grant;
 - (e) Foster child grant;
 - (f) Old age grant.
- (5) Refugees do not qualify for the war veteran grant.

¹⁴⁰ 2013 (3) SA 531 (WCC).

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- (6) In order to obtain the grant, refugees must submit a copy of their refugee identity document (or a receipt as proof of application for identity document made). A copy of the renewed document must be submitted to SASSA in case of expiration. The grant is only available for as long as the individual retains formal refugee status.
 - (7) Grants have not however been extended by SASSA to asylum seekers due to their “temporary” status. This is despite the fact that asylum seekers can remain as such for decades in South Africa and the fact that there is no valid reason for denying the rights to anyone lawfully here as an asylum seeker. The exception to this rule is the Social Relief of Distress Grant. Whilst this is generally limited to citizens and refugees only, the government has on occasion granted food vouchers to asylum seekers in times of emergency.¹⁴¹ One such occasion was following the 2008 xenophobic attacks.

26.6 *Right to a passport*

- (1) Refugees are entitled to “passports” which permit them to travel. Passports issued to refugees are also called “travel documents”. Refugees are entitled to apply for travel documents in terms of section 31 of the Refugees Act. Note that the right to apply for a travel document does not extend to asylum seekers.
- (2) Travel documents are issued by the DOHA. This is because generally refugees are unable to obtain documents for travel purposes from their countries of origin.
- (3) According to the regulations to the South African Passports and Travel Documents Act 1994:¹⁴²

(2) [a] document for travel purposes may be issued to any person who is lawfully resident in the Republic, and who -

does not have the citizenship of another country; or

has been granted permanent residence in the Republic and is unable to obtain a passport from the country of which he or she is a citizen; or

has been granted refugee status in the Republic.
- (4) The validity period of South African travel documents varies, but does not exceed five years. Generally, however, the travel document will be valid for the same period as the person's refugee status.

26.7 *Bank accounts*

- (1) Asylum seekers and refugees are entitled to have access to banking services. This includes being able to open and maintain a bank account. There is no duty on banks to assist foreign nationals to open an account, however.
- (2) In order to open an individual bank account, the individual will require the following documents:
 - (a) A valid identity document being a valid RSA identity book, a foreign passport or a valid section 22 or 24 permit;
 - (b) Proof of residential address;
 - (c) Proof of income.

¹⁴¹ Supra note 231 at 21.

¹⁴² Regulation R353 of 1998.

- (3) The problem for asylum seekers and refugees is that banks normally require that someone opening a bank account has a green South African identity document.
- (4) In *Consortium for Refugees and Migrants in South Africa v ABSA Bank Limited*¹⁴³ the right of asylum seekers and refugees to access bank services was challenged, and although the matter was eventually settled, the court held that asylum seekers and refugee permits can be used as identification documents for refugees and asylum seekers wishing to open a bank account. However, in terms of FICA Public Compliance Communication No. 03A,¹⁴⁴ banks have to verify such permits with the RRO within a 48 hour period before a bank account can be opened. Once the account is open, asylum seekers and refugees can thereafter rely on their permits to operate their account.¹⁴⁵
- (5) People Against Suffering Oppression and Poverty (**PASSOP**) states that First National Bank Limited (**FNB**) is the only bank that will open accounts for refugees and asylum seekers at the moment (February 2017).¹⁴⁶

26.8 Labour rights

- (1) *The right to work*
 - (a) Article 17 of the Convention prescribes that a Contracting State must accord to refugees lawfully staying in their territory the most favourable treatment accorded to nationals of a foreign country in the same circumstances as regards the right to engage in wage-earning employment.
 - (b) Section 27(f) of the Refugees Act provides that refugees are entitled to seek employment. The right of a refugee to work is not expressly marked on the section 24 permit. Employers often do not understand the permit or this right, and refugees in practice often find it difficult to secure gainful employment.
 - (c) The right to seek employment in terms of section 27(f) is not extended expressly to asylum seekers. However in *Watchenuka*, the court confirmed that both asylum seekers and refugees have the right to work.
- (2) *The right to self-employment*
 - (a) Article 18 of the Convention prescribes that a Contracting States must accord to a refugee lawfully in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, as regards the right to engage for his own account in agriculture, industry, handicrafts and commerce and to establish commercial and industrial companies
 - (b) The Refugees Act and the section 22 and 24 permits do not expressly include the right to seek self-employment. However, even if employment is not taken to include self-employment, both refugees and asylum seekers have the right to dignity in terms of the Constitution, and, according to LHR's "Making a Living", "*one's dignity finds expression in the opportunity to work and earn a living, which includes the right to self-employment.*"¹⁴⁷
 - (c) In *Somali Association of South Africa and others v Limpopo Department of Economic Development, Environment and Tourism and others*,¹⁴⁸ the court dealt

¹⁴³ *Consortium for Refugees and Migrants in South Africa v ABSA Bank Limited* SGNC case no 34220/2010.

¹⁴⁴ (PCC 03A)

¹⁴⁵ Lawyers for Human Rights 'Making a living: A trader's manual for refugees and asylum seekers' (1 ed).

¹⁴⁶ PASSOP 'How to open a bank account' available at <http://www.passop.co.za/your-rights/how-to-open-a-bank-account>, accessed on 20 February 2017.

¹⁴⁷ Supra note 139.

¹⁴⁸ [2014] 4 All SA 600 (SCA).

with the rights of refugees and asylum seekers lawfully present in South Africa to earn a living by way of self-employment in the form of trading in “spaza” or tuck-shops. The court found that there was no blanket prohibition against asylum seekers and refugees seeking employment or self-employment, either in terms of section 22 of the Constitution or any other applicable legislation. As the right to dignity was implicated where persons would be rendered indigent and starving, such right would advance the case for granting of licence to trade.

(3) *The right to work as a professional*

- (a) Article 19 further stipulates that a Contracting State must accord to refugees lawfully staying in their territory, who hold diplomas recognised by the competent authorities of that state, and who are desirous of practising a liberal profession, treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.
- (b) Asylum seekers and refugees have the right to seek employment in their professional area of qualification.
- (c) Despite the fact that refugees and asylum seekers bring with them skills sets which could contribute to the economy, asylum seekers and refugees are often unable to work as professionals in South Africa.
- (d) The inaccessibility of the professional job market is often as a result of the inability of some employers and professional councils to distinguish between the Refugees Act and the Immigration Act. It is also a result of being precluded (in fact not law) from registering with the professional councils.¹⁴⁹

(4) *The right to fair labour practices*

- (a) Article 24 of the Convention stipulates that Contracting States must accord to refugees lawfully staying in their territory the same treatment that is accorded to nationals in terms of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age of employment, apprenticeship and training, women’s work and the work of young persons, and the enjoyment of the benefits of collective bargaining.
- (b) It also includes social security in respect of employment injury and occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to national laws or regulations, is covered by a social security scheme, subject to various contribution conditions.
- (c) Asylum seekers and refugees are protected by South Africa’s labour laws. These laws include:
 - (i) Employment Equity Act (**EEA**);¹⁵⁰
 - (ii) Labour Relations Act (**LRA**);¹⁵¹
 - (iii) Basic Conditions of Employment Act (**BCEA**);¹⁵²
 - (iv) Unemployment Insurance Act (**UIA**);¹⁵³ and

¹⁴⁹ Callixte Kavuro ‘Refugees and asylum seekers: Barriers to accessing South Africa’s labour market’ available at http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S2077-49072015000100012, accessed on 29 March 2017.

¹⁵⁰ 55 of 1998.

¹⁵¹ 66 of 1995.

¹⁵² 75 of 1997.

¹⁵³ Act 63 of 2001.

- (v) Compensation for Occupational Injuries and Diseases Act (**COIDA**).¹⁵⁴
- (d) The EEA, ensures that no employer can discriminate against an asylum seeker or refugee because of their status. The LRA includes protection of the individual from unfair labour practices and dismissals and the BCEA specifies the minimum working standard, which includes issues of leave, hours of work and the like.¹⁵⁵
- (e) Asylum seekers and refugees are entitled to apply for benefits from the Unemployment Insurance Fund, in terms of the UIA, if regular contributions to the fund have been made by the individual, if application is made within 12 months of the termination of the contract of employment and if the person possesses a valid permit.
- (f) Asylum seekers and refugees may apply for benefits in terms of COIDA if injured at work or if an occupational disease is contract during the course and scope of his or her employment. The asylum seeker must have employed for a period of 12 months and his or her employer must register the individual with the Department of Labour. Note, however, that COIDA cover currently does not extend to domestic worker, of local or foreign nationality.

26.9 *The right to property*

- (1) Asylum seekers and refugees are free to purchase and own property in South Africa.¹⁵⁶ Financial institutions are not however obliged to give asylum seekers or refugees' mortgage bonds. Such individuals often find it difficult to obtain bonds because of issues relating to credit records and identity documents.
- (2) Asylum seekers and refugees are also free to enter into lease agreements in respect of immovable property. Such individuals are however often discriminated against in the housing market.
- (3) The law protects refugees and asylum seekers from unlawful evictions. The Prevention of Illegal Eviction from unlawful Occupation of Land Act (**PIE**) applies to evictions.
- (4) Refugees do not however have any rights in respect of land claims or housing or housing subsidies provided by the state.¹⁵⁷

26.10 *The right to marry*

- (1) Asylum seekers and refugees are entitled to marry, enter into civil unions, or become partners as the "spouse" of a South African citizen or permanent resident. In such instances, they are afforded the right to apply to have their residency as a foreign spouse recognised under the Immigration Act.
- (2) According to immigration expert Craig Smith, "*it cannot be argued that it is always a case of 'convenience' since the very stages of adjudication that take an inordinate amount of time provide many asylum seekers and refugees with the social environment to become party to serious relationships as any other human being would experience going to any other country for such long periods of time.*"¹⁵⁸

26.11 *The right to register births*

¹⁵⁴ 130 of 1993.

¹⁵⁵ Supra note 132 at 5.

¹⁵⁶ ProBono.org 'Rights and Duties of Asylum Seekers and Refugees in South Africa' available at http://www.probono.org.za/Manuals/RefugeeManual/2015_Asymylum_seeker_guide_Rights_and_Duties_of_asylum_seekers.pdf, accessed on 29 March 2017.

¹⁵⁷ Ibid.

¹⁵⁸ Craig Smith & Associates 'An asylum seekers long walk to freedom – From asylum seeker, refugee to resident of South Africa' available at <http://www.migrationlawyers.co.za/from-asylum-seeker-refugee-to-resident-of-south-africa>, accessed on 29 March 2017.

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- (1) It is important that all babies born in South Africa are registered within 30 days of their birth regardless of whether they are born to citizens or foreigners.
 - (2) Children born to foreigners in South Africa retain the nationality of the parents.
 - (3) Registration of a birth by an asylum seeker or refugee is done by presentation of a section 22 or section 24 permit together with the baby's clinic card or hospital certificate. Thereafter, an unabridged birth certificate will be issued by the DHA. The baby needs to be joined to the asylum seeker or refugee's file at the RRO on receipt of the unabridged birth certificate.
 - (4) The absence of documents of the parents can frustrate attempts to register a birth.

27 Obligations on refugees

- 27.1 Article 2 of the Convention provides that every refugee has duties to the country in which they find themselves, which require, in particular, that they conform with its laws as well as to measures taken for the maintenance of public order.
- 27.2 The duties imposed on asylum seekers and refugees are governed by section 34 of the Refugees Act which imposes the following two obligations on asylum seekers and refugees:
- (1) To abide by the laws of South Africa; and
 - (2) To keep their documentation updated and to ensure that their stay in South Africa remains legal which requires attendance at the RRO on the date on which the permit expires in order to renew their permit.

28 Permanent residency & citizenship

- 28.1 A recognised refugee is entitled to apply for permanent residency after five years of continued refugee status and residency in South Africa, in terms of section 27 of the Refugees Act.
- 28.2 In order to be able to apply for permanent residency, however, the SCRA has to certify that the refugee will remain a recognised refugee indefinitely. Certification is done on application.
- 28.3 Applications to the SCRA for certification need to be made on the prescribed forms. Copies of all refugee permits and the first letter of recognition must accompany the prescribed form. Certification is done in terms of section 27(c) of the Refugees Act and Regulation 15(4)(a).
- 28.4 In terms of Regulation 15(5), the SCRA has the discretion to certify that a refugee will remain a refugee indefinitely even if country conditions have fundamentally changed or are likely to fundamentally change in the foreseeable future. This is if compelling reasons exist - which arise out of previous persecutions - for refusing to return the country of persecution.
- 28.5 If no response is received to the application for certification from the SCRA via email or fax after the lapse of an unreasonable period of time,¹⁵⁹ you can apply to court for an order to compel the SCRA to make a decision in terms of PAJA.
- 28.6 Certifications are usually issued to nationals of Somalia and Ethiopia. However, refugees from Angola, Rwanda, Burundi and Congo-Brazzaville are advised against making such applications because this could result in a withdrawal of refugee status.¹⁶⁰

¹⁵⁹ Note that case law suggests that a failure to respond within 90 days has been considered to be an unreasonable delay.

¹⁶⁰ This is because the government considers the circumstances in connection with which these nationals were recognised as refugees to have ceased to exist.

- 28.7 If certification is granted, the individual may apply for permanent residency. Applications for permanent residency in South Africa are considered in terms of Section 27 (Residency-on-Other-Grounds Permits) of the Immigration Act, and read with Regulation 23 of the Immigration Regulations.
- 28.8 According to the DHA in deciding whether to grant Permanent Residency Permits, emphasis is placed on immigrants who are in a position to make a meaningful contribution to broadening the economic base of South Africa.¹⁶¹ Applications are made online to the DHA via <http://www.vfsglobal.com/dha/southafrica/>.
- 28.9 Note that even if a refugee has successfully been certified for permanent residency by the SCRA, permanent residency applications for refugees are rarely successful.
- 28.10 In the event of a successful permanent residency application, and after five years of permanent residency in South Africa, the individual may apply for citizenship. Such application is made based on the prescribed requirements detailed in the Immigration Act and its regulations.

29 Unaccompanied minors

29.1 Introduction

- (1) An unaccompanied minor is a person under the age of eighteen who has been separated from both parents and relatives and is not being cared for by an adult who, by law or custom, is responsible for doing so.¹⁶² Separated children, by contrast, are children accompanied by an adult relative other than their parents, legal guardians or customary primary care-giver.
- (2) Children sometimes flee their country of origin unaccompanied by a parent, guardian or care giver because of fear of persecution or harm. Some flee conflict, forced soldiering, harmful cultural practices, natural disasters or abusive domestic situations. Some flee for socio-economic reasons such as poverty and some children are trafficked. Sometimes children are separated from their families or care givers during flight or they are abandoned on route or on arrival in the South Africa. Sometimes children are sent to live with relatives in South Africa if their parents have died. Some are sent to South Africa for better opportunities. Some arrive with their parents and are then abandoned.
- (3) Accordingly, not all foreign children are refugees because children migrate for various reasons often for socio-economic reasons and because of family circumstances. Whether a child will have a refugee claim depends on their circumstances for leaving their country of origin.
- (4) The applicable instruments when dealing with unaccompanied minors and separated children are the:
 - (a) UN Convention of the Rights of the Child (**CRC**);
 - (b) African Convention on the Rights and Welfare of the Child (**ACRWC**);
 - (c) Constitution;
 - (d) Children's Act; and
 - (e) Refugees Act.

¹⁶¹ In terms of granting Permanent Residency Permits, emphasis is placed on immigrants who are in a position to make a meaningful contribution to broadening the economic base of South Africa.

¹⁶² As defined in UNHCR Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum February 1997

29.2 Steps when encountering an unaccompanied or separated child

- (1) The first step to take is to get protection for the child and ensure the child's best interests are protected. The child must be taken to the DSD so that the child's situation can be assessed by a social worker. It is not permitted to detain such children for being undocumented and having breached the Immigration Act. In this regard see *Centre for Child Law v Minister of Home Affairs* 2005 (6) SA 50 (T) where, on review, it was ordered that several unaccompanied minors being held in Lindela for lengthy periods were to be released and placed in a child and youth safety facility.
- (2) Thereafter, the child must then be brought before a Children's Court so that the court can determine the course of action that is in the child's best interests. A children's court enquiry should be opened for each child brought before it. Unaccompanied foreign children are assumed to be in need of care. Unaccompanied minors must be dealt with in terms of section 9 of the Children's Act.
- (3) If necessary, the child should be removed temporarily to a place of safety pending full assessment of the case.
- (4) A designated social worker must compile an assessment report within 90 days following removal of the child to temporary safe care, or the opening of the inquiry.
- (5) If the child is found to be in need of care and protection, the Children's Court may confirm the placement of the child in alternative care.
- (6) If the child is in the care of an adult, the social worker must investigate the living conditions and determine that the child is not in need of care. This assessment report must be reviewed by the Children's Court before the matter is finalised. The social worker must assist the child in other appropriate ways such as assisting with rehabilitation or reunification.
- (7) Social workers should assist with reunification through International Social Services, International Organisation for Migration or International Community of the Red Cross. Note though that children cannot be repatriated if it appears that there is a risk of abuse or it is not in their best interest.
- (8) Social workers must also assist with obtaining the correct documentation, especially before the child obtains the age of majority so that they are not only dealt with in terms of the Immigration Act which could lead to issues such as stateliness.

29.3 Refugee claims for children

- (1) In terms of the UN Convention of the Rights of the Child, to which South Africa is a party, State Parties must take appropriate measures to ensure that a child, who is seeking refugee status or is considered a refugee, whether accompanied or unaccompanied, must receive the appropriate protection and humanitarian assistance.
- (2) Section 32 of the Refugees Act entrenches the UN Convention obligation into domestic law. The section provides that any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act¹⁶³ must forthwith be brought before the Children's Court for the district in which he or she was found. The Refugees Act provides that a child contemplated in subsection (1) must be assisted in applying for asylum in terms of this Act.
- (3) Children can therefore not apply for asylum on their own. The Children's Court, following receipt of the social worker's assessment, may therefore order that the child be assisted to apply for asylum. This assistance is provided by a social worker. In *Centre for Child Law v*

¹⁶³ Act 74 of 1983; replaced by the Children's Act, 2005.

*Minister of Home Affairs*¹⁶⁴, it was declared that all unaccompanied children who find themselves in South Africa illegally should have legal representation appointed to them by the State. A social worker will therefore normally seek out a legal expert to assist with an application for asylum.

29.4 *The RRO interview process*

- (1) Interviews at the RRO and with the RSDO must be done in a child friendly manner, and as set out above, with the child being legally represented.
- (2) When questioning a child during the interview process, the RSDO must take into account a child's capacity to reflect on past events and abilities to express themselves. It must also be borne in mind by the RSDO that children are not always able to articulate and motivate their fears. In *Van Garderen NO v RAB*¹⁶⁵ a rejected application for asylum by three unaccompanied minors under 16 was overturned because the applicants had been prejudiced by a failure to provide them with professional assistance to articulate and motivate their fears. They ought to have been provided with assistance from someone conversant with child mentality at RSDO stage.

29.5 *Difficulties with claims for unaccompanied minors*

- (1) The Refugees Act provides little guidance about procedure for assisting unaccompanied minors and the regulations do not offer much assistance either. Unaccompanied children seeking asylum in South Africa therefore often face a number of difficulties in getting into the system and getting the care they need.
- (2) Many obstacles exist because of a lack of detailed regulations or guidance notes. In 2011, the DOHA compiled draft regulations which attempted to elaborate on the procedure of dealing with unaccompanied minors. These have yet to come into force.

30 **Long-term durable solutions for refugees**

30.1 *Introduction*

- (1) Refugee status is intended to be a temporary status but in reality it can take years before it is safe for displaced populations to return home, or to find a new place to live. Durable solutions are therefore required to assist refugees in rebuilding their lives and in helping these individuals live in dignity and peace. According to the UNHCR, three durable solutions for refugees exist. These are:
 - (a) Voluntary repatriation;
 - (b) Resettlement; and
 - (c) Local integration.

30.2 *Voluntary repatriation*

- (1) Voluntary repatriation, where and when feasible, is the first of the long-term durable solutions for refugees. Voluntary repatriation must be voluntary, free from coercion and based on objective information.¹⁶⁶

¹⁶⁴ 2005 (6) SA 50 (T) para 29.

¹⁶⁵ (2007) case no 30720/2006.

¹⁶⁶ United Nations High Commissioner for Refugees 'Solutions for refugees chapter 7' available at - <http://www.unhcr.org/50a4c17f9.pdf>, accessed on 29 March 2017.

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- (2) Refugees electing to return home voluntarily require physical and legal support. They also require support to ensure their material safety and the protection of their dignity. The return needs to be sustainable and there needs to be full restoration of national protection as the ultimate end.¹⁶⁷
 - (3) To ensure that voluntary repatriation is successful, it requires the involvement of various stakeholders, including the returnees, host and origin countries, the UNHCR, other international organisations, and partner NGOs. Returnees require information and education, documentation and financial support. They also require legal aid, family reunification assistance, guarantees for amnesties, the provision of housing, property restitution and involvement in reintegration projects.¹⁶⁸
 - (4) Successful local integration projects by the UNHCR include helping hundreds of thousands of people to return home to countries like Angola and Somalia. Other examples include voluntary repatriation projects in Mauritania, the Great Lakes Region, Afghanistan, Tajikistan and Sri Lanka.¹⁶⁹

30.3 *Resettlement of refugees*

- (1) The second long-term durable solution for refugees is resettlement. This is an option for those who cannot return to their country of origin, either because of continued conflict, wars or persecution yet cannot continue to remain in his or her country of first asylum for various reasons.
- (2) Resettlement, which is only done in exceptional circumstances, is the selection and assisted transfer of a refugee, and his or her dependants, from a country which initially granted asylum to the individual to a third state that has agreed to admit them – as refugees - and ultimately to grant them permanent settlement elsewhere.¹⁷⁰ Note that countries are not obliged to receive refugees for resettlement and therefore only a limited number offer resettlement on a permanent basis.
- (3) The resettlement status provides guarantees against refoulement. It also provides the refugee with legal and physical protection, including access to civil, political, economic, social and cultural rights similar to those enjoyed by nationals. Furthermore, it provides the opportunity to eventually naturalise as a citizen in the resettled country.¹⁷¹
- (4) The function of resettlement is three-fold. Firstly, it is a tool to provide international protection and to meet the specific needs of individual refugees whose life, liberty, safety, health or other fundamental rights are at risk in the country where they have sought refuge. Secondly, it is a durable solution for larger numbers or groups of refugees, alongside the other durable solutions of voluntary repatriation and local integration. Thirdly, it can be a tangible expression of international solidarity and a responsibility-sharing mechanism, allowing states to help share responsibility for refugee protection, and reduce problems impacting the country of asylum.¹⁷²
- (5) A key player in the resettlement process is the UNHCR. The process is facilitated through the UNHCR which is mandated to deal with resettlement in terms of its empowering Statute and the UN General Assembly Resolutions. It is the UNHCR which at the outset identifies the refugees in need of resettlement. Resettlement can however only be achieved through the collaboration of various partners. Such partners include resettlement states, international organisations and non-governmental organisations. International

¹⁶⁷ Ibid at 191.

¹⁶⁸ United Nations High Commissioner for Refugees 'Voluntary Repatriation' available at <http://www.unhcr.org/pages/49c3646cfe.html>, accessed on 29 March 2017.

¹⁶⁹ United Nations High Commissioner for Refugees 'Solutions for refugees chapter 7' available at - <http://www.unhcr.org/50a4c17f9.pdf>, accessed on 29 March 2017.

¹⁷⁰ United Nations High Commissioner for Refugees 'UNHCR Resettlement Handbook' available at <http://www.unhcr.org/46f7c0ee2.html>, accessed on 29 March 2017.

¹⁷¹ Ibid at 11.

¹⁷² Ibid at 11.

organisations and non-governmental organisations also assist with identification, pre-departure needs and post-resettlement integration.

- (6) The procedure to apply for asylum is set out in the UNHCR Resettlement Handbook and Standard Operating Procedures. Application must be made to a UNHCR office. This involves completing a Resettlement Registration Form (RRF). All referrals must be made in writing and should contain basic biodata, the reason for the referral, the immediacy of the need, steps already taken to address the need and the family composition.¹⁷³ In assessing whether the person qualifies for resettlement, the UNHCR will determine whether the person is a refugee and will assess all the prospects for a durable solutions to identify the most appropriate solution. Urgent cases will be prioritised based on the individual and the urgency of their individual need. Because resettlement requires capacity within UNHCR as well as within the resettlement country, the process can take over a year to complete.¹⁷⁴
- (7) According to the UNHCR Resettlement Handbook,¹⁷⁵ there are several criteria for resettlement such as a person's legal and physical protection needs,¹⁷⁶ whether the person is a survivor of violence and torture,¹⁷⁷ where a refugee has specific medical needs,¹⁷⁸ if the refugee is a woman, child or adolescent at risk,¹⁷⁹ for purposes of family reunification,¹⁸⁰ if the refugee has a disability,¹⁸¹ if the refugee is lesbian, gay, bisexual, transgender or intersex,¹⁸² or if there is no foreseeable alternative durable solution available for the individual.¹⁸³
- (8) In the first 11 months of 2016, UNHCR submitted the files of over 145,500 refugees for consideration by resettlement countries. By nationality, the main beneficiaries of UNHCR-facilitated resettlement programmes during this period were refugees from the Syrian Arab Republic (71,600), the Democratic Republic of the Congo (20,400), Iraq (11,000) and Somalia (9,600).¹⁸⁴

30.4 Local integration

- (1) The third long-term durable solution is local integration into the host country - for those where repatriation is not an option because the individual is unable to return home. Local integration is a legal, economic and socio-cultural process aimed at providing the refugee with the permanent right to stay in the country of asylum, including, in some situations, as a naturalised citizen.
- (2) Local integration follows the formal granting of refugee status, whether on an individual or prima facie basis, and assistance to settle in order for the refugee to live independently within the community. The UN Convention envisages a framework for refugee protection that is conducive to local integration in countries of asylum. The logic of the Convention framework is that, with the passage of time, refugees should be able to enjoy a wider range of

¹⁷³ Ibid at 11.

¹⁷⁴ Ibid at 11.

¹⁷⁵ Ibid at 37.

¹⁷⁶ This includes, for example, a threat of refoulement in the country of refuge.

¹⁷⁷ Where repatriation or the conditions of asylum could result in further traumatization and/or heightened risk; in particular life-saving treatment that is unavailable in the country of refuge; or where appropriate treatment is not available

¹⁷⁸ In the instance where, for example, life-saving treatment that is unavailable in the country of refuge

¹⁷⁹ In so far as women are concerned, where for example the country of origin is unable to protect them from serious, life-threatening health and protection issues arising out of sexual and gender-based violence. In so far as children and adolescents are concerned, where the minor is in a situation of heightened risk such as when they are unaccompanied, stateless or disabled for example, the "best interests of the child" determination will be used in support of resettlement.

¹⁸⁰ Refugee flight often results in family dispersal and resettlement can be the only means to reunite refugee family members who, owing to refugee flight or displacement, are separated by borders or entire continents.

¹⁸¹ Refugees who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others and who are at increased risk of discrimination, exploitation and violence, and may also encounter serious barriers in accessing essential protection services.

¹⁸² LGBTI minorities may be subject to serious human rights abuses and may become targets of hate crimes and face serious violation of their fundamental rights, including executions, imprisonment and sexual and gender-based violence.

¹⁸³ This is generally only relevant when other solutions are not feasible in the foreseeable future, when resettlement can be used strategically, and / or when it can open possibilities for comprehensive solutions.

¹⁸⁴ United Nations High Commissioner for Refugees 'Resettlement' available at <http://www.unhcr.org/resettlement.html>, accessed on 29 March 2017.

rights, as their ties with the hosting State grow stronger. In this sense, the UN Convention gives refugees a solid basis on which they can progressively reclaim their social and economic independence in order to proceed with their lives. These include the right to freedom of movement, access to the labour market, education, health care and other social services.

- (3) Local integration within the host community is often a complex process which places considerable demands on both the individual and the receiving society. However, it also has benefits, allowing refugees to contribute socially and economically to the host society.
- (4) The UN Convention provides for facilitated naturalisation procedures in the country of asylum. Often the process is done incrementally by the host country such as granting permanent residency before being permitted to apply for citizenship.
- (5) The procedures require the involvement of a number of actors – including the participation of the host country, NGOs and the UNHCR. Over the past decade, 1.1 million refugees around the world have become citizens in their country of asylum.

31 Family reunification

- (1) According to the UNHCR Guidelines on Reunification of Refugee Families,¹⁸⁵ the circumstances in which refugees leave their country of origin frequently involve the separation of families. Many refugees are forced to leave family members behind in their country of origin or families become separated during flight. Such separation invariably leads to hardship and sometimes to tragic consequences. It may also create serious obstacles to a refugee's integration in a new homeland. Refugees often then seek reunification once granted refugee status in the asylum state.
- (2) One of the UNHCR's roles is to promote family reunification between husband and wife, parents and children, reunification of unaccompanied minor children with their parents and siblings and other dependent members of a family unit. This role is supported by the principle, set forth in both the Universal Declaration of Human Rights of 1948 and the United Nations Covenant on Civil and Political Rights of 1966 that "*the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*" The principle is recognised internationally as being significant for refugees.¹⁸⁶
- (3) Is South Africa obliged to facilitate the reunification of families? There is no express legislated provision in domestic law. The Refugees Act, however, refers to dependants of recognised refugees and their rights and obligations. It does not proscribe a method for bringing dependants of refugees across South Africa's borders. There is no existing policy or implementation procedure developed by the government even though arguably the right to family unity and the concomitant right to family reunification exist in principle for refugees in South Africa.

¹⁸⁵ Office of the United Nations High commissioner for refugees Geneva; UNHCR guidelines on reunification of refugee families (July 1983)

¹⁸⁶ United Nations High Commissioner for Refugees 'UNHCR Guidelines on Reunification of Refugee Families (July 1983)' available at <http://www.unhcr.org/3bd0378f4.pdf>, accessed on 31 March 2017.

32 Statelessness

- 32.1 A person normally acquires a nationality automatically at the time of birth – either through the parent, the country of birth or through an application process.
- 32.2 A person can however be stateless. A “stateless person” is a person who is not considered as a national by any State under the operation of its law.¹⁸⁷ A stateless person is therefore someone who does not have the nationality of any country. There are at least 10 million people around the world who are denied a nationality.¹⁸⁸ Stateless people are profoundly vulnerable and face a number of practical problems in their everyday lives because of this status.
- 32.3 According to the UN,¹⁸⁹ there are a number of causes of statelessness. Statelessness can arise because of gaps in nationality laws, if people move from the countries where they were born (if that country does not permit nationality based on birth alone and if the country of origin does not allow a parent to pass on nationality through family ties), because of discriminatory rules setting out who can and who cannot pass on their nationality or through ethnicity and race, through the emergence of new states and changes in borders or through the loss or deprivation of nationality.
- 32.4 The UN Convention relating to the Status of Stateless Person, 1954, of which South Africa is not a signatory, purports to provide important minimum standards of treatment for a stateless person. It requires that stateless persons have the same rights as citizens with respect to freedom of religion and education of their children. For a number of other rights, such as the right of association, the right to employment and to housing, it provides that stateless persons are to enjoy, at a minimum, the same treatment as other non-nationals. The Convention upholds the right to freedom of movement for stateless persons lawfully in the territory, and requires States to provide them with identity papers and travel documents. The Convention also prohibits the expulsion of stateless persons who are lawfully on the territory of a State Party. Because protection as a stateless person is not a substitute for possession of a nationality, the Convention requires that States facilitate the assimilation and naturalization of stateless persons.
- 32.5 South Africa has a high number of asylum-seekers, of which a number are stateless individuals. Despite South Africa not being a signatory to the convention, stateless persons are offered protection in South Africa through the Refugees Act, which provides that a person qualifies for refugee status for the purposes of the Act 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).
- 32.6 Case law on statelessness
- (1) The case of *Minister of Home Affairs and others v DGLR and another*¹⁹⁰ dealt with section 2(2) of the Citizenship Act, 1995 which states that no person shall be a South African citizen if, at the time of his or her birth, one of his or her parents (b) had not been lawfully admitted

¹⁸⁷ Article 1(1) of the 1961 Convention on the Reduction of Statelessness;

¹⁸⁸ United Nations High Commissioner for Refugees ‘Ending Statelessness’ available at <http://www.unhcr.org/stateless-people.html>, accessed on 27 July 2016.

¹⁸⁹ Ibid.

¹⁹⁰ case number 1051/2015 SCA.

to the Republic for permanent residence therein, and his or her parent was not a South African citizen.

- (2) The case dealt with an 8 year old stateless child who was born in South Africa, but could not qualify for South African citizenship because she was born before her parents had acquired permanent residency in South Africa. Her parents were of Cuban decent but were registered as permanent immigrants in Cuba which effectively barred her from acquiring Cuban citizenship (i.e. a foreign child of a Cuban national).
- (3) The lower court declared the child to be a South African citizen, a decision which the DHA appealed. The DHA subsequently withdrew its appeal and entered into an agreement with the parties, in terms of which the child was declared to be South African; that the child would be issued with a South African citizen ID number and birth certificate and that the Minister would make regulations to section 2(2) within 18 months in order to allow other stateless children to apply for citizenship.¹⁹¹ Whether there will be compliance within this time frame is to be seen.

33 Amendments to the Refugees Act

33.1 Practitioners must be aware of the following amendments to the Refugees Act:

- (1) Refugees Amendment Act 33 of 2008;
- (2) Refugees Amendment Act 12 of 2011;
- (3) Refugees Amendment Act 10 of 2015; and

33.2 *Refugees Amendment Act 33 of 2008*

- (1) This amendment is yet to come into effect. The proposed amendments to the Refugees Act include:
 - (a) The addition of a number of definitions to the Refugees Act;
 - (b) Section 3 has been broadened as follows:
 - (i) Section 3(a) will include gender as a listed ground on which a person can have a well-founded fear of being persecuted;
 - (ii) Section 3(c) will include the word 'spouse' in addition to a 'dependant' meaning that a spouse of a refugee qualifies an for refugee status (despite these individuals already being included in the current definition of dependant).¹⁹²
 - (c) The category of who qualifies for refugee status has been narrowed. The phrase 'or disrupting' public order has been deleted from terms of section 3(b) which will only allow events "seriously disturbing" public order.
- (2) The Bill also seeks to align the Act with departmental and governmental policies on refugee matters. The amendment seeks to dissolve the Standing Committee for Refugee Affairs and the Refugee Appeal Board, replacing both with the Refugee Appeals Authority.
- (3) This amendment also attempts align the Refugees Act with the Children's Act:

¹⁹¹ The problem with Section 2(2) of the Citizenship Act was that it did not provide for an application to apply for citizenship.

¹⁹² Section 3(c).

- (a) In the Refugees Act, the court would assist the child in applying for asylum. However, the 2008 Amendment Act offers more protection to the child because any unaccompanied child who is found under circumstances that clearly indicate that he or she is an asylum seeker and a child in need of care contemplated in the Children's Act must be issued with an asylum seeker permit in terms of section 22. The section also places an obligation on the court to deal with the child in terms of the Children's Act, 2005 as a whole;¹⁹³ and
- (b) An obligation is added that any refugee whose child is born in South Africa must, within one month of the birth of his or her child, register such a child as a dependant at any Refugee Reception Office.
- (4) There is an increased obligation to extend asylum permits while asylum seekers await the outcome of their application for asylum. The RSDO must, pending the decision on the asylum application, from time to time extend the period for which a permit has been issued.¹⁹⁴
- (5) The RSDO must have due regard to PAJA when considering an application and ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.¹⁹⁵
- (6) If an application is rejected as unfounded or manifestly unfounded the RSDO must inform the applicant of their right to appeal.¹⁹⁶ If the applicant does not lodge an appeal they must be dealt with in terms of the Immigration Act.¹⁹⁷

33.3 *Refugees Amendment Act 12 of 2011*

- (1) This amendment is also yet to come into effect. It appears that it will come into effect immediately after the commencement of the Refugees Amendment Act, 2008.
- (2) This amendment provides for the difference between a “manifestly unfounded application” and an “unfounded application”. According to the amendment, a manifestly unfounded application is an application which is not based on any of the grounds in the Refugees Act. These applications will automatically be reviewed by the Director-General, which, in turn, means that no appeal is needed. An unfounded application is an application that is based on the grounds mentioned in the Refugees Act but which is without merit. These applications are dealt with by the Refugees Appeal Authority.

33.4 *Refugees Amendment Act 10 of 2015*

- (1) This amendment came into effect on 27 September 2015.
- (2) The main change which the amendment brought about is that the Refugees Act gives the Refugee Appeals Authority discretion to allow the public and media access to proceedings.

¹⁹³ Section 21A.

¹⁹⁴ Section 22(3). The (1998 Act used, “may”)

¹⁹⁵ Section 24(2).

¹⁹⁶ Section 24(4).

¹⁹⁷ Section 24(5).

34 Notes

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