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The right to apply for asylum in South Africa

The Constitutional Court (CC) recently handed down an important judgment which speaks to the right to apply for asylum in South Africa. Over the past several years, we have seen more and more anti-foreign national rhetoric in the public domain, with even high-ranking government officials contributing to the narrative that foreign nationals are the cause of many of South Africa's issues. This has resulted in a continuingly shrinking safe space for foreign nationals who intend on seeking refuge in the country. Given our current socio-political climate, this judgment comes at a critical time where the rights of vulnerable people must be protected, in line with our international and domestic obligations.

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The matter of *Ashebo v Minister of Home Affairs and Others* (CCT 250/22) [2023] ZACC 16 was a direct urgent application to the CC, after the High Court of South Africa, Gauteng Division, Pretoria (High Court) struck the applicant's application from the roll for lack of urgency. The central issue in this case was the applicant's right to apply for asylum in South Africa, after being in the country unlawfully for over a year. The applicant sought an order prohibiting the respondents from deporting him until his status under the Refugees Act 130 of 1998 (Refugees Act) had been lawfully determined; declaring his continued detention unlawful and for him to be immediately released; and that he be entitled to remain in the country for a period of 14 days in order for him to apply for asylum at a Refugee Reception Office (RRO). He sought further relief which required the respondents to accept his application for asylum and issue him with a temporary asylum seeker permit.

Background

The applicant entered the country, clandestinely, on 11 June 2021. He fled his home country (Ethiopia) due to political and religious persecution. On 7 July 2022 he was arrested for entering and residing in the country unlawfully. Despite the applicant advising the detention officer that he was in the country to seek refuge, and that he had tried on numerous occasions to apply for asylum, the detention officer would not accept this and contented that the applicant was only in the country for economic reasons.

In the High Court, the respondents argued that the matter was not urgent, and that the applicant could not claim he was entitled to apply for asylum when he had already been in the country for more than a year. The presiding officer was of the view that the urgency had been self-created and found the applicant's version of events unbelievable, contradictory and inconsistent, and struck the matter from the roll with a costs order against the applicant.

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The CC thus had to decide whether the matter was indeed urgent before it could deal with the merits of the case. In this regard, it considered the consequences of not granting urgency and noted the respondent's argument that the matter was not urgent, and that due course should be followed in the High Court, but it concluded that given that the applicant was awaiting imminent conviction and deportation, the application had to be considered urgent. And even though there was no conviction or deportation date set, the applicant would suffer great prejudice if the matter was not heard urgently, whereas the respondents would not suffer any prejudice if the matter were to be heard.

Intention to apply for asylum

The applicant, in the CC, argued that he should be regulated by the Refugees Act and not the Immigration Act 13 of 2002 (Immigration Act) – this is because section 23 of the Immigration Act requires that any person wanting to apply for asylum must make use of the Refugees Act. The applicant therefore relied on section 2 and section 21(1)(a), read together with Regulation 8(1)(a) and (3) of the Refugees Act – these provisions provide for the application process and envisage two requirements to be met; first, an asylum seeker is required to attend at an RRO within five days to make their application, and second, the application must be made in person. As mentioned before, the applicant tried to apply for asylum before his arrest, however, he was unbale to do so due to the RRO being closed because of the COVID-19 pandemic. At the time the case was heard, he was also unable to make his application in person, due to him being in detention. The applicant further argued that the requirements were irrational, unconstitutional and invalid in his case as they did not facilitate applying for asylum in a meaningful manner and that he should not be in detention as his arrest was not justified under the Immigration Act, the Refugees Act or the Constitution.

Before the matter was heard the respondents withdrew their notice of opposition and filed a notice to abide. The CC thus directed the parties to file written submissions to address whether the applicant was entitled to be released from detention, after expressing an intention to make an application for asylum given the recent judgment of *Shanko v Minister of Home Affairs: Shambu v Minister of Home Affairs: Bogala v Minister of Home Affairs* [2021] ZAGPJHC 857 – this matter concerned three individuals who were held in detention, despite them expressing their intention to apply for asylum. The High Court ordered that all reasonable steps be taken to give effect to the applicants' intention to apply for asylum, but it refused to order their release during the process. *Shanko* was recently overturned by the Full Court of its Division.

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Submissions

In response to the question posed by the CC, the applicant made the following submissions:

- The Constitution, in section 12, guaranteed him both substantive and procedural protection, which requires the state to have sound reasons for depriving him of his freedom and the deprivation must accord with fair procedures and, further, in section 7(2), the state is required to protect, respect and promote the Bill of Rights.
- A case had been made out for refugee status in accordance with Article 31(1) of the 1951 United National Convention relating to the State of Refugees, and his further detention would constitute a penalty in terms of the article.
- The threat of deportation violated the principle of non-refoulment, and his application had not been adjudicated, as is required.
- The CC was required by Regulation 8(4) to come to his rescue and order his release in order for him to apply for asylum.

The respondents in their submission re-iterated that the matter was not urgent and that it should be re-enrolled on the ordinary High Court roll, as there was no evidence that the matter could not be dispensed with timeously under the ordinary court procedures. They further contended that it is necessary that applications for asylum be brought within a reasonable time period after an individual enters a country, to do otherwise would render the Immigration Act an empty vessel, as any foreigner who is detained after being in the country for an extended time, can make assertions that they intend on applying for asylum.

The CC's considerations

The CC therefore in turn had two critical issues to consider, the first is the time afforded to an illegal foreigner to apply for asylum and the second, is whether an illegal foreigner is entitled to be released from detention, after expressing an intention to seek asylum while awaiting deportation until their application has been finalised.

As to the first issue, the CC already considered the issue in two other CC cases, namely: *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) and *Abore v Minister of Home Affairs and Another* (CCT 115/21) [2021] ZACC 50; 2022 (4) BCLR 387 (CC); 2022 (2) SA 321 (CC) (30 December 2021). In both these matters the CC established that once an illegal foreigner has indicated their intention to apply for asylum, they must be afforded an opportunity to do so and further, that a delay in expressing that intention does not bar the individual from applying. It held that even though a delay in applying for asylum is significant in determining an individual's credibility and authenticity, it does not "*function as an absolute disqualification from initiating the asylum application process*". Thus, until an applicant's application has been finally adjudicated, the principle of non-refoulement protects the applicant from deportation.

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In considering the second issue, the CC analysed the current legislative framework, which was amended after *Ruta* was handed down. It specifically looked at the extent to which the provisions relating to the asylum process have been amended. An important consideration was the fact that the previous regulations made provision for an illegal foreigner, who intended on applying for asylum, to be temporarily released pending the making of the application – this does not exist in the current framework. Instead, the amended Regulation 7, which deals with asylum transit visas, imposes more stringent conditions and requires that the individual declare their intention to apply for asylum at the port of entry. Once they have expressed their intention, their biometrics must be provided, together with other relevant data, and only then would they be eligible to be issued with an asylum transit visa for five days. Similarly, Regulation 8 is also quite strict as it requires a person who does not have an asylum transit visa to show good cause, when attending at an RRO, for entering the country illegally. The CC concluded that the combined effect of the amended provisions is to provide an illegal foreigner who intends on applying for asylum but who did not arrive at a port of entry and express their interest there, with a method to demonstrate the intention even after the five-day period. The CC held that this applied to the applicant's case, the applicant admittedly entered the country illegally and when he tried to apply for asylum, the RROs were closed due to the COVID-19 pandemic. "*These facts form a basis for him to show good cause as required by law. The door is not closed to an application for asylum.*"

While the CC concluded that the current legal framework allows individuals to apply for asylum without an asylum transit visa, it still had to determine whether it is lawful to detain an illegal foreigner during the process of establishing whether there was good cause and where an actual application for asylum is yet to occur.

The CC noted that while an illegal foreigner is still entitled to apply for asylum, it does not negate the fact that they have contravened the Immigration Act – in this regard it is important to establish under which provision the individual was charged. Sections 34 and 49 of the Immigration Act both regulate illegal entry and stay by non-South African citizens, however, they each have a distinct purpose. Section 34 is generally used for deportation purposes, whereas section 49 criminalises certain conduct.

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The question that arose, irrespective of the charge, was whether the applicant's expression of an intention to apply for asylum entitled him to be released from detention. To this, the CC answered, no. The CC determined that if they were to accept the applicant's argument that he was entitled to be released pending his asylum application, it would create a practical challenge that would result in any illegal foreigner in immigration detention having to be released once they've declared their intention to apply for asylum – this was not a tenable situation. There is therefore no automatic right which entitles an illegal immigrant to be released from prison once they have declared their intention to apply for asylum – however, where the individual does express such an intention while in detention, the Department of Home Affairs must take all reasonable steps to facilitate the process of the application being made.

The CC accordingly upheld the appeal and the application for leave to direct appeal and ordered the applicant to not be deported until he has had an opportunity to show good cause in terms of the Refugees Act, and if good cause is shown, until his application for asylum has been finally determined. The respondents were ordered to take all reasonable steps, within 14 days, to allow the applicant to apply for asylum, failing which, the applicant is to be released from detention unless he may lawfully be detained under the Criminal Procedure Act 51 of 1977.

Elgene Roos

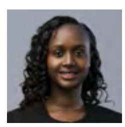
OUR TEAM

For more information about our Pro Bono & Human Rights practice and services in South Africa and Kenya, please contact:

Jacquie Cassette
Practice Head & Director:
Pro Bono & Human Rights
T +27 (0)11 562 1036
E jacquie.cassette@cdhlegal.com

Brigitta Mangale
Director:
Pro Bono & Human Rights
T +27 (0)21 481 6495
E brigitta.mangale@cdhlegal.com

Gift Xaba
Senior Associate:
Pro Bono & Human Rights
T +27 (0)11 562 1089
E gift.xaba@cdhlegal.com



Clarice Wambua
Partner | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E clarice.wambua@cdhlegal.com

Elgene Roos
Senior Associate:
Pro Bono & Human Rights
T +27 (0)11 562 1863
E elgene.roos@cdhlegal.com

Lauriene Maingi
Associate | Kenya
T +254 731 086 649
+254 204 409 918
+254 710 560 114
E lauriene.maingi@cdhlegal.com

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa.
Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

NAIROBI
Merchant Square, 3rd floor, Block D, Riverside Drive, Nairobi, Kenya. P.O. Box 22602-00505, Nairobi, Kenya.
T +254 731 086 649 | +254 204 409 918 | +254 710 560 114
E cdhkenya@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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