



# Pro Bono & Human Rights

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## South Africa

No person should be arbitrarily returned to a country to face persecution



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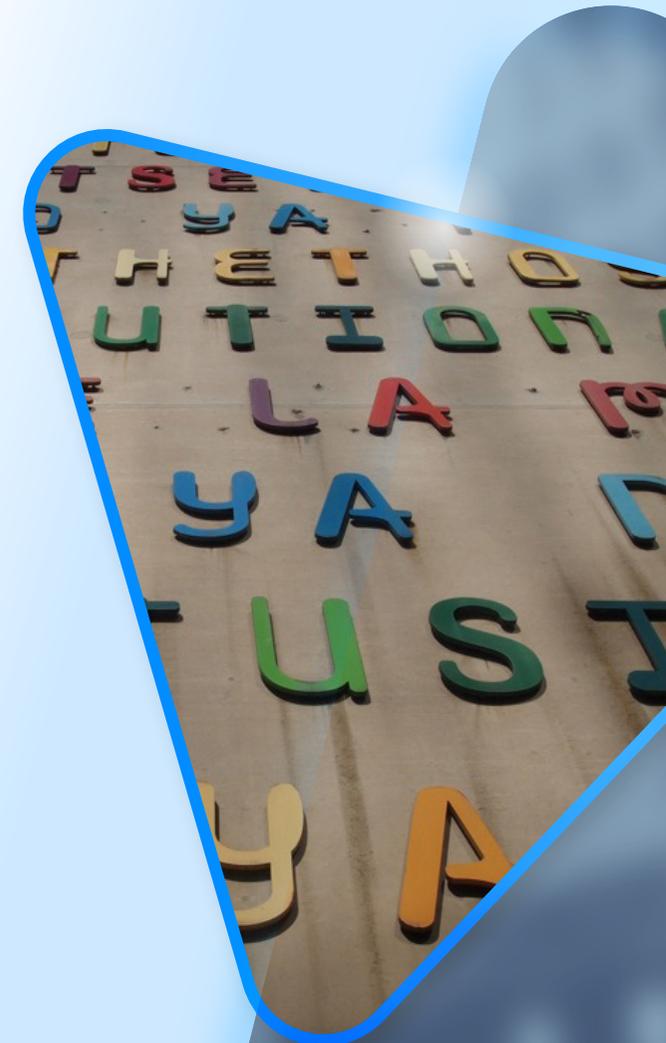
## No person should be arbitrarily returned to a country to face persecution

In recent times the global refugees and forced displacement landscape has gained tremendous attention amid growing global uncertainty and evolving geopolitical dynamics. These issues and the general plight of asylum seekers and refugees has again recently occupied the spotlight at South Africa's apex court. On 12 February 2026, the Constitutional Court heard the matter between *Scalabrini Centre of Cape Town v Minister of Home Affairs CCT 126-25* to adjudicate and pronounce on the constitutionality of various provisions of the amended Refugees Act 130 of 1998 (Act).

The case ascended from the Western Cape Division of the High Court where, in a 15 May 2025 judgment, the court declared various provisions of the Act – sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) and the Act's Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) (challenged provisions) – unconstitutional because they assert that asylum seekers will be denied the right to apply for asylum if they failed to meet certain immigration law requirements and thereby effectively bar them from applying to be recognised as refugees without consideration of the merits of their asylum claim.

### The factual matrix

The Scalabrini Centre of Cape Town and its trustees (the applicants) launched an application in 2024 at the High Court to challenge the constitutional validity of the challenged provisions on the basis that they require asylum seekers and refugees who entered South Africa irregularly or failed to report to a refugee reception office within five days, to satisfy Department of Home Affairs officials that there are "*compelling reasons*" or "*good cause*" for the non-compliance – failing which they are disqualified from applying for refugee status, irrespective of the merits of their asylum claim. Once denied the opportunity to apply, the asylum seeker is vulnerable to arrest, detention and eventually deportation to the country of origin – to almost certainly face persecution and threat to life. Deportation, in such an instance, directly contradicts the principle of non-refoulement, which is protected by more than six international law and regional instruments that are binding on South Africa. As such, the applicants submitted that the central feature of the challenged provisions is that an asylum seeker's ability to seek refugee status (under the Act) is now subordinate to and dependent upon their perceived compliance with South African immigration law (under the Immigration Act 13 of 2002). The applicants contended that this is in principle unlawful and that the challenged provisions all unjustifiably infringe upon the right of non-refoulement enshrined both in international law, various provisions of our Constitution and section 2 of the Act.



The applicants submitted that the respondents have implemented the challenged provisions “so aggressively” that new asylum applications “appear to have declined by 90% or more”. As a result of this, the applicants further submitted, Refugee Reception Offices that historically have overflowed with applicants now stand empty. The applicants submitted that the direct consequence of this has been to deter would-be asylum seekers from seeking asylum, because almost any person who seeks asylum is arrested, prevented from applying for asylum (in terms of the challenged provisions), detained and then either deported or ordered to depart South Africa.

The respondents, in opposing the application, argued that the applicants’ constitutional invalidity challenge was abstract in that their application, amongst other things, did not cite any affected individuals as parties to the proceedings. However, the applicants countered this argument by demonstrating that since the implementation of the challenged provisions, the refugee system in the country has effectively been closed to almost all newcomers and that “already hundreds (if not thousands) have been denied their rights to the protection of refugee law in South Africa”. In addition, the applicants had annexed affidavits, deposed to by affected individuals, to the application (although the individuals were not cited as parties to the matter).

Three international organisations, Amnesty International, the Global Strategic Litigation Council for Refugees and the International Detention Coalition, sought our assistance to apply for admission as *amici curiae* and were admitted to make both written and oral submissions to the court in the matter – as did the Helen Suzman Foundation.

### The salient legal issues

Where it concerns issues relating to the protection of asylum seekers and refugees, the South African Constitution and international law unequivocally promote, protect and uphold the principle of non-refoulement (the prohibition against returning refugees to countries where they will face persecution or serious human rights violations) enshrined in Article 33 of the United Nations’ 1951 Refugee Convention (which South Africa acceded to in 1996) (Convention) and which is the central protection for refugees and asylum seekers, both in South Africa and internationally.

Section 2 of the Act, which is modelled on Article 33 of the Convention, provides that “notwithstanding any provisions of this Act or any other law to the contrary no person may be refused entry into the Republic, expelled, extradited or returned to any other country” if as result of such refusal, expulsion, extradition, return or other measure, such a person would be compelled to return or remain in a country where they would inevitably face persecution and threat to life.

This section trumps any other statutory provision relating to the protection of refugees as it clearly provides that the prohibition on refoulement applies “notwithstanding any provision of this Act or any other law to the contrary”. The applicants hence submitted not only that the challenged provisions are unconstitutional and irrational, but that the challenged regulations are *ultra vires* section 2 and fall to be reviewed and set aside.



Further, Article 31 of the Convention provides that a member state shall not impose penalties on asylum seekers/refugees:

*"[O]n account of their illegal entry or presence, coming directly from a territory where their life or freedom was threatened or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."*

The respondents interpreted Article 31 and the reference in that article to "penalties" to mean that asylum seekers or refugees who cannot show "good cause" may be disqualified from applying for asylum. They also attempted to argue that the constitutional invalidity challenge was moot as the Constitutional Court, so the argument went, had already pronounced in the previous matter of *Ashebo v Minister of Home Affairs and Others* (CCT) [2024] (2) BCLR 217 (CC) (12 June 2023) that the challenged provisions meet constitutional muster. However, the applicants pointed out that the reference in *Ashebo* to the constitutionality of the challenged provisions was merely a remark in passing, by one of the justices, and not a pronouncement as the issues before the court in that matter did not involve a constitutional invalidity challenge.

In relation to the Article 31 argument by the respondents, the international organisations (Amnesty International, the Global Strategic Litigation Council for Refugees, and the International Detention Coalition) compellingly demonstrated using Article

33 of the Convention and other relevant international law instruments and comparative law authorities that the interpretation of "penalty" by the respondents was incorrect and misguided. They added that the reference to "penalty" in Article 31 could never be read to permit the violation of the principle of non-refoulement – but rather that it must be read together with South Africa's other international obligations, not as an excuse to violate them.

After a careful consideration and weighing up all the issues the full bench of the High Court, on 15 May 2025, declared the challenged provisions inconsistent with the Constitution and suspended its declaration of invalidity of the regulations pending a confirmation of invalidity of the challenged provisions of the Act by the Constitutional Court.

### **The legal issues before the Constitutional Court**

On 12 February 2026 the Constitutional Court heard the confirmation application. From the outset, counsel for the applicants raised various technical arguments in which he argued that the respondents had failed to properly respond to the confirmation application and had failed to properly lodge an appeal against the High Court's finding that the regulations were unconstitutional. He argued, in particular, that this meant that there was no challenge before the Constitutional Court to the High Court's finding that the provisions of the regulations in issue were unconstitutional.



## Pro Bono & Human Rights

Much of the argument and debate before the court on the merits concerned the status of the *dicta* made by the court in *Ashebo* regarding the constitutional validity of the impugned provisions.

Our clients, Amnesty International, the Global Strategic Litigation Council for Refugees, the International Detention Coalition and the Helen Suzman Foundation, were again all admitted to make submissions as *amici curiae* before the Constitutional Court, as was the United Nations High Commission for Refugees.

The applicants (and the *amici curiae*) made compelling submissions to demonstrate that the impugned provisions serve no legitimate government purpose other than to bar deserving asylum seekers and have the chilling effect of arbitrarily denying deserving asylum seekers access to asylum and are thus in contravention of the Constitution and at odds with South Africa's international law obligations.

After hearing arguments by counsel the Constitutional Court reserved judgment.

### Conclusion

This case is not only important because it brings to the fore the plight of refugees but also because it affords the Constitutional Court the opportunity to re-affirm the principle of non-refoulement, other constitutional principles and the binding nature of the state's commitment to its international law obligations – amid growing uncertainty in the global landscape and evolving geopolitical dynamics.

The impact of the impugned provisions cannot be overstated. If unchecked, their continued application will likely result in an increase in returning deserving asylum seekers to danger, an increase in undocumented asylum seekers and heightened vulnerability to gross human rights violations which could include threat to life and death.

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