

Pro Bono & Human Rights



10 July 2026

South Africa

Constitutional Court confirms that no person should be arbitrarily returned to a country to face persecution



For more insight into our expertise and services

Constitutional Court confirms that no person should be arbitrarily returned to a country to face persecution

On 7 July 2026, the Constitutional Court handed down judgment in *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others CCT 126-25* which was an application for confirmation of an order of the High Court of South Africa, Western Cape Division, Cape Town (High Court), declaring certain provisions of the Refugees Act 130 of 1998 (Refugees Act) unconstitutional and invalid.

The matter concerns access to the asylum system and whether asylum seekers may be prevented from having their claims determined on the merits because of procedural non-compliance with various provisions of the Immigration Act 13 of 2002.

Brief factual matrix

The Scalabrini Centre of Cape Town and its trustees (the applicants) launched an application in 2024 at the High Court challenging the constitutional validity of sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) as well as Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) to the Refugees Act (challenged provisions), all of which were introduced by way of an amendment to the Refugees Act and Regulations which came into force on 1 January 2020.

The challenged provisions require asylum seekers and refugees who entered South Africa irregularly, other than through an official port of entry or who were not in possession of an asylum transit visa 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 were disqualified from applying for refugee status, irrespective of the merits of their asylum claim. Once denied the opportunity to apply, the asylum seeker was vulnerable to arrest, detention, and eventually deportation to the country of origin – to almost certainly face persecution and threat to life.



Prior to the introduction of these amendments, the asylum application process was relatively straightforward and irregular entry and delay in applying for asylum did not prevent an asylum seeker from applying for asylum. These were instead factors which could be taken into account in assessing the credibility of an applicant and the validity of their claim for asylum during the adjudication and determination of their claim on the merits.

The applicants argued that these provisions bar affected asylum seekers from applying to be recognised as refugees without consideration of the merits of their asylum claim, rendering their ability to seek refugee status subordinate to and dependent upon their perceived compliance with South African immigration law. The applicants contended that this is in principle unlawful and that the challenged provisions all unjustifiably infringe upon the right of non-refoulement enshrined in international law, principles of our Constitution and section 2 of the Refugees Act.

The respondents (being the Minister of Home Affairs, the Director-General of Home Affairs, the Chief Director of Asylum Seeker Management in the Department of Home Affairs, the Refugee Appeals

Authority of South Africa and the Standing Committee for Refugee Affairs) opposed the application.

The High Court upheld the constitutional challenge. It held that the challenged provisions prevent affected asylum seekers from accessing a merits-based determination of their claims, and that the provisions are particularly harmful to children. It therefore declared the challenged provisions and regulations unconstitutional and invalid.

At the Constitutional Court

The matter came before the Constitutional Court for confirmation of the High Court's order of constitutional invalidity. In the confirmation application the applicants maintained that the challenged provisions create a disbarment regime which results in asylum seekers being excluded from the asylum system solely because of procedural non-compliance, without any assessment of the merits of their claims. The applicants (and *amici curiae* parties including Amnesty International, the Global Strategic Litigation Council for Refugees, the International Detention Coalition, the Helen Suzman Foundation and UNHCR) submitted that this violates the principle of non-refoulement, the Bill of Rights and international law.

The respondents, in opposing the confirmation application contended that the challenged provisions do not operate as a disbarment or an absolute disqualification from the asylum system but instead established a safety valve through a condonation mechanism; and that the statutory scheme requires a proper balance between the objectives of the Immigration Act and Refugees Act's commitment to the principle of non-refoulement.

In a unanimous judgment the Constitutional Court confirmed the High Court's declaration of constitutional invalidity. Rejecting the respondents' argument that the provisions do not disbar asylum seekers but merely act as a safety valve, the court held that the challenged provisions operate as procedural filters which allow asylum seekers to be disqualified from refugee status because of immigration-related procedural non-compliance before their claims are assessed on the merits.



The court held that this is inconsistent with the principle of non-refoulement. That principle protects asylum seekers against being returned to a country where they may face persecution or serious harm, unless and until their claims have been finally rejected after a proper merits-based process. It also confirmed that this protection applies before formal recognition as a refugee, because a person may in substance be a refugee even before that status has been formally determined.

Relying on a previous judgment, the court held further that procedural non-compliance, even when serious, cannot justify disbarment from the asylum system without a merits-based assessment. The challenged provisions bear no resemblance to the limited exceptions to non-refoulement recognised in international refugee law, such as where a refugee poses a danger to the security of the host state or to the community.

It also went on to find that the provisions create multiple, vague and confusing standards imposed at different stages of the process before different officials, which permit an arbitrary exercise of public power and subject vulnerable asylum seekers to additional bureaucratic processes without clear standards, guidance or consequences. The provisions therefore fail on rationality and are unconstitutional for this reason as well.

Finally, the court also held that the challenged provisions have serious consequences for children. Holding that where a child's asylum claim is tied to that of a parent, the child may be excluded from the asylum system because of the parent's procedural non-compliance. This occurs without an individual assessment of the child's circumstances and without proper regard to the child's best interests, contrary to the dictates of section 28 of the Constitution.

For all these reasons, the court held that the challenged provisions are indeed inconsistent with the Constitution and invalid.

Concluding remarks

The judgment is important, not only as a landmark judicial precedent which re-affirms the rights of refugees and the inviolability of the principle of non-refoulement. On a more symbolic level, it confirmed the Constitutional Court's unwavering commitment to constitutional principles and the rule of law even in the face of a challenging political, economic and social climate in which a heated national discourse on issues of migration is unfolding.

Jacque Cassette and Gift Xaba



OUR TEAM

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



Jacquie Cassette

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



Patrick Kauta

Managing Partner | Namibia
T +264 833 730 100
M +264 811 447 777
E patrick.kauta@cdhlegal.com



Elgene Lutshiti

Director:
Pro Bono & Human Rights
T +27 (0)11 562 1863
E elgene.lutshiti@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



Lauriene Maingi

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

BBBEE STATUS: LEVEL ONE CONTRIBUTOR

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.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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

ONGWEDIVA

Shop No. 94, Oshana Mall, Ongwediva, Namibia
T +264 (0) 81 287 8330 E cdhnamibia@cdhlegal.com

STELLENBOSCH

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

WINDHOEK

2nd Floor, 4@Steps - East Tower, Hilltop Estate, Kleine Kuppe, Windhoek.
PO Box 97115, Maerua Mall, Windhoek, Namibia, 10020
T +264 833 730 100 E cdhnamibia@cdhlegal.com

©2026 16027/JUL

