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South Africa

Constitutional Court clarifies the position on subsequent asylum applications

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Constitutional Court clarifies the position on subsequent asylum applications

On 12 May 2026, the Constitutional Court delivered judgment in *Director-General, Department of Home Affairs and Others v Irankunda and Another* [2026] ZACC 18 (12 May 2026). The case dealt with the interpretation of various provisions of the Refugees Act 130 of 1998 (Refugees Act) and, in particular, whether the Refugees Act permits failed asylum seekers to submit subsequent asylum applications based on changed circumstances arising after the rejection of an initial application.

The judgment considered the relationship between the statutory framework governing asylum applications, the principle of non-refoulement and South Africa's international law obligations. It also addressed the distinction between first time *sur place* refugee claims and subsequent asylum applications, and the extent to which the Refugees Act accommodates each category of claim.

Factual background and litigation history

The respondents, Burundian nationals, arrived in South Africa between 2008 and 2012 and applied for asylum in terms of the Refugees Act. In accordance with the asylum process, their applications were considered by a Refugee Status Determination Officer (RSDO). The RSDO rejected their applications as *"manifestly unfounded"* in terms of section 24(3)(b) of the Refugees Act. Those decisions were subsequently reviewed and confirmed by the Standing Committee of Refugee Affairs (SCRA). The respondents did not institute review proceedings challenging the rejection of their applications.

Following the deterioration of political conditions in Burundi in 2015, the respondents submitted further asylum applications on the basis that they had become *sur place* refugees due to changed circumstances in their country of origin. The Department of Home Affairs (Department), declined to accept their applications on the basis that the Refugees Act did not permit subsequent asylum applications following the final rejection of an earlier claim.

High Court

On 29 November 2018, the respondents lodged an urgent application in the High Court seeking an order compelling the Department to grant them asylum seeker visas in terms of section 22 of the Refugees Act, pending final relief in the main application, in which they sought to compel the Minister of Home Affairs (Minister) to accept and consider their asylum seeker applications as *sur place* refugees.

The High Court, relying on the case of *Ruta v Miniter of Home Affairs* (Ruta), held that the Immigration Act 13 of 2002 (Immigration Act) did not trump the Refugees Act and that the respondents were entitled to have their asylum seeker applications considered and were thus entitled to the section 22 visas they sought.

In the main application, the High Court dismissed the application, holding that their failure to challenge the rejection of their initial applications through judicial review, coupled with their continued unlawful stay in South Africa, rendered them subject to the Immigration Act. The High Court held that neither the Constitution, the Refugees Act nor international law grants an asylum seeker the right to remain in South Africa while pursuing subsequent asylum applications after a final rejection. The Court found that the principle of non-refoulement applies only until an asylum claim has been finally determined, and distinguished *Ruta* as dealing only with initial asylum applications. The Court further reasoned that allowing asylum seekers to remain in the country pending subsequent applications would undermine section 24(5)(a) of the Refugees Act, as failed applicants could repeatedly avoid the operation of the Immigration Act by indicating an intention to submit further applications.

Supreme Court of Appeal

On appeal, the Supreme Court of Appeal (SCA) held that the Refugees Act does not permit failed asylum seekers to remain in South Africa for the purpose of lodging a subsequent asylum application, unless they are authorised to remain pending a review or appeal, or have another lawful basis to stay in the country.

However, the SCA ultimately ruled in favour of the respondents, holding that a refugee *sur place* claim cannot simply be dismissed because a prior asylum application has already been finalised. The court found that, once such a claim is raised, the authorities are required to consider it and cannot insist that the applicant first return to their country of origin before the claim is determined, nor reject it solely because the initial asylum application had already been finally determined. The SCA accordingly upheld the appeal and directed the Department to accept and determine the respondents' *sur place* applications within 21 days.

Issues before the Constitutional Court

The principal issue before the Constitutional Court was whether the Refugees Act permits a failed asylum seeker to submit a subsequent asylum application after the final rejection of an earlier claim.

The Department argued that the Refugees Act does not create a right for unsuccessful asylum seekers to submit subsequent asylum applications after their original claims have been finally rejected. While accepting that South African law recognises first-time refugee *sur place* claims, the Department contended that the Refugees Act makes no provision for a new asylum application based on new facts arising after the initial application is rejected. Once an asylum application has been finally determined the asylum seeker must instead be dealt with under the Immigration Act. The Department further argued that requiring an asylum seeker to return to the country from which they fled would not violate the international law principle of non-refoulement. It also cautioned that permitting repeated applications based on *sur place* claims would undermine the integrity and finality of the asylum system and create a risk of abuse through endless re-applications.

The respondents, in turn, argued that they were both refugees *sur place* and re-applicants, as conditions in Burundi had materially changed after the rejection of their initial asylum claims. They contended that the rejection of an initial claim does not extinguish a person's entitlement to protection under the principle of non-refoulement, which they characterised as a substantive right protecting individuals from return to countries where they face persecution. Relying on section 1 of the Refugees Act, which defines an *"abusive application"* as an application made after a previous rejection without a substantial change in circumstances, the respondents argued that the Act implicitly recognises the possibility of subsequent

asylum applications, where there has been a material change in circumstances or country conditions. They further contended that a person's status as an "*illegal foreigner*" under the Immigration Act does not bar or disqualify a person from seeking asylum protection.

The Scalabrini Centre of Cape Town and its trustees, admitted as *amicus curiae*, emphasised the centrality of the principle of non-refoulement in both international refugee law and South Africa's constitutional framework. They argued that refugee status is afforded to a person not because they comply with the criteria of a specific country but because they are deemed so under the 1951 Refugee Convention. Accordingly, even individuals whose asylum claims were previously rejected may still qualify as *de facto* refugees where circumstances subsequently change. The *amici* supported the recognition of both first-time *sur place* claims and subsequent applications based on materially changed personal or country circumstances that give rise to a renewed risk of persecution or refoulement.

The majority judgment

In the majority judgment, penned by Kollapen J, the Constitutional Court upheld the Department's appeal and concluded that the Refugees Act does not create a right for failed asylum seekers to submit subsequent asylum applications following the rejection of an earlier claim.

A central feature of the majority's reasoning was the distinction drawn between:

- first-time *sur place* applications; and
- subsequent applications made after the rejection of an earlier asylum claim.

The court recognised that a refugee *sur place* is a person who was not a refugee when leaving their country of origin, but who subsequently becomes one as a result of changed personal or country conditions arising after departure.

The majority held that *sur place* applications remain first-time asylum claims and therefore fall to be assessed within the ordinary refugee protection framework. However, the court emphasised that subsequent applications made after the rejection of an earlier claim stand on materially different footing and raise distinct procedural and institutional considerations.

The majority reasoned that subsequent applications implicate concerns relating to the finality of administrative decision-making, the prevention of repetitive or abusive claims, and the integrity and efficiency of the asylum system. In this regard, the court noted that subsequent applications are treated differently in comparative jurisdictions and are ordinarily regulated through dedicated legislative or procedural frameworks setting out specific eligibility criteria and processes.

In its interpretation of the Refugees Act, the majority held that the Act is silent on the right to make subsequent applications and if such right existed, there would have been a clear framework outlining the process to exercise said right. The court noted that neither section 21 of the Refugees Act nor the statutory definitions expressly provide for subsequent applications. The majority reasoned that if the legislature intended to create such a right, one would expect the Act to contain a clear procedural mechanism governing how subsequent applications are to be assessed and processed. The court was also critical of the SCA's reliance on international law as the source of a right to submit subsequent applications without engaging in an interpretive exercise of the provisions of the Refugees Act. Applying the established unitary approach to statutory interpretation, which considers text, context and purpose, the majority concluded that the Refugees Act does not expressly or implicitly recognise a right to submit subsequent asylum applications.

While acknowledging the foundational importance of the principle of non-refoulement in both domestic and international refugee law, the majority held that the principle could not itself create a procedural right not otherwise provided for in the legislation. The court further observed that if international law obligations were understood to require a mechanism for subsequent applications that is absent from the current legislative scheme, the appropriate remedy may lie in legislative reform or constitutional challenge rather than judicial interpretation alone.

Against this background, the majority concluded that the statutory scheme, properly interpreted, does not permit failed asylum seekers to submit subsequent asylum applications following the final rejection of an earlier claim, and the SCA's order was accordingly set aside.

The minority judgment

In the minority judgment, Nicholls AJ and Rogers J would have dismissed the appeal and substantially endorsed the approach adopted by the SCA. The minority emphasised the central importance of the principle of non-refoulement within both international refugee law and South Africa's constitutional framework, noting that the principle protects fundamental rights including dignity, freedom and security of the person, and life itself. The minority reasoned that South Africa's obligations under the Constitution and international refugee instruments supports an interpretation of the Refugees Act that permits subsequent asylum applications where materially changed circumstances give rise to a renewed fear of persecution.

The minority further held that section 21 of the Refugees Act does not expressly bar a second or subsequent application. In their view, the definition of an *"abusive application"* in section 1 of the Refugees Act, necessarily contemplates the possibility of subsequent applications. The minority therefore disagreed with the majority's interpretation of the legislation, reading its provisions together and in light of the constitutional and international law principles underpinning refugee protection.

The minority also rejected the majority's reliance on the doctrine of *functus officio*. They accepted that, once an RSDO has finally determined an asylum application, that decision-maker ordinarily lacks authority to revisit the same decision. However, they held that this principle does not preclude consideration of a subsequent application founded on genuinely new facts or materially changed circumstances arising after the initial determination. In such instances, the subsequent application would constitute a distinct claim rather than an impermissible reconsideration of the earlier decision.

While acknowledging the majority's concerns regarding the potential abuse of the asylum system and the administrative burden posed by repetitive applications, the minority took the view that these concerns could be managed through the existing statutory mechanisms dealing with abusive applications. In their view, the possibility of abuse did not justify an interpretation that would prevent the consideration of legitimate claims based on new risks of persecution or refoulment.

Significance of the judgment

The judgment represents an important development in South African refugee law and clarifies that, on the Constitutional Court's interpretation of the Refugees Act in its current form, failed asylum seekers do not have a statutory right to submit subsequent asylum applications following the finalisation of an earlier claim. In doing so, the Court placed significant emphasis on the structure, finality and integrity of the asylum system established under the Refugees Act.

The decision is particularly significant for the distinction it draws between first-time refugee *sur place* claims and subsequent applications. The majority treated this distinction as central both to the interpretation of the Refugees Act and to the broader administration of the asylum system. While the court recognised that changed personal or country circumstances may arise after an asylum seeker has left their country of origin, it held that the Refugees Act does not currently create a legislative framework regulating subsequent applications based on such changes.

At a broader level, the majority and minority judgments reflect differing approaches to statutory interpretation, particularly regarding the extent to which international law and the principle of non-refoulement should inform the interpretation of domestic legislation. While the majority emphasised the text, structure and procedural framework of the Refugees Act, the minority adopted a more expansive interpretation informed by the protective purpose underlying refugee law and South Africa's international obligations. In this regard, the minority placed greater emphasis on the substantive human rights dimension of non-refoulement and the risks associated with returning individuals to countries where they may face persecution or serious harm.

The judgment also underscores the ongoing constitutional tension between effective immigration administration and the protection of vulnerable individuals seeking international protection. Although the majority ultimately rejected the existence of a statutory right to submit subsequent applications, both judgments reaffirmed the central importance of the principle of non-refoulement within South African law and acknowledged South Africa's obligations under both domestic and international refugee law frameworks.

Conclusion

The judgment leaves open important questions regarding the future development of South Africa's refugee protection framework. While the Constitutional Court concluded that the Refugees Act, as presently drafted, does not provide for subsequent asylum applications following a final rejection, the judgment highlights the complex legal and policy considerations that arise where conditions in an asylum seeker's country of origin materially change after the conclusion of the asylum process.

The differing approaches adopted by the majority and minority judgments illustrate the ongoing debate regarding how South African courts should reconcile the procedural structure of the Refugees Act with the protective objectives underpinning refugee law and the principle of non-refoulement. In this respect, the judgment is likely to inform future litigation, policy discussions and possible legislative reform concerning the treatment of subsequent asylum claims and the broader operation of South Africa's asylum system.

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