RefMig

Refugees / Migrants

Refugee Mobility, Recognition and Rights

Refugee Recognition Regime

Country Profile: South Africa

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About RefMig Project

The RefMig project aims to examine the global refugee regime, with a particular focus on the institutionalisation of the refugee/migrant binary globally. The project is divided into two strands: Recognising Refugees and Organisations of Protection. This report falls under the Recognising Refugees strand, which examines the institutional practices that seek to distinguish refugees from migrants. We take a purposefully broad conception of refugee recognition, encompassing not only individual refugee status determination (RSD) but also the institutional processes that determine access to RSD, as well as various forms of group determination. We examine the role of state institutions in this context (bureaucracies, legislatures, and the judiciary), as well as UNHCR's mandate RSD practices, and its handovers to state authorities.

The project lead is Professor Cathryn Costello. During the RefMig project, she held the positions of Andrew W. Mellon Professor of International Refugee and Migration Law, Refugee Studies Centre, University of Oxford and Professor of Fundamental Rights and Co-Director of the Centre for Fundamental Rights at the Hertie School, Berlin. RefMig obtained ethics clearance from the Central University Research Ethics Committee (CUREC) of the University of Oxford (Ref No: R61177/RE001) and the European Research Council.

RefMig Working Papers are available to download at: https://www.refmig.org/working-papers

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All the errors in the report are the responsibility of the author alone. We hope you find the report informative and that it makes a valuable contribution to existing literature on South Africa's refugee recognition regime.

Executive Summary

This report examines South Africa's refugee recognition regime which is typified by an individualised refugee status determination (RSD) system that sets it quite apart from other major refugee-hosting countries in Africa, whose major mode of refugee recognition is group-based. The report focuses on a twenty-year period (1998-2018) highlighting the various areas of contestation within the refugee protection space and South Africa's adherence to its obligations, under both domestic and international law. Although extensive work has been carried out regarding the quality of RSD process in South Africa, gaps are still evident with respect to the refugee recognition institutions and their relational dynamics and how this impacts the refugee recognition regime and refugee protection generally. The report is based on desk research and original fieldwork in South Africa among various elites working in the refugee protection area as well as refugees and asylum seekers in South Africa drawn from three nationalities: Somalis, Ethiopians and Congolese from the Democratic Republic of Congo (DRC). The main findings under we consider the main components of a refugee recognition regime are as follows.

Norms: South Africa is signatory to both the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as well as the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa. The definitions of 'refugee' embodied in both documents are replicated in South Africa's Refugees Act. Recent amendments to the Act have, among others, created expansive exclusions which blur the lines between immigration and refugee law while simultaneously putting in place regulatory requirements that potentially create obstacles to the legal acquisition of refugee status. Nonetheless, South Africa's 1996 Constitution offers rights-protections for all persons in South Africa, save for those rights that are exclusively for citizens. Specifically, it provides for due process in administrative actions for all persons in South Africa and in so doing provides a channel through which asylum seekers and refugees may challenge any rights-infringing state policies, decisions and actions as elaborated in the Promotion of Administrative Justice Act.

Institutions: The asylum function and entire refugee protection mandate falls under the Department of Home Affairs (DHA). RSD is conducted at designated refugee receptions offices, a number of which have been closed over the years, thus limiting geographically proximate options for refugees and asylum seekers. The primary RSD adjudicators, namely RSD officers and their supervisors fall under the same ministerial governance as do the quasi-judicial bodies, the Standing Committee for Refugee Affairs and the Refugee Appeals Authority, which review and oversee the decisions made by the RSDOs. The autonomy and independence of these bodies is however questionable given the mode of financing and appointments. External oversight is mainly undertaken by the judiciary in reviewing decisions of the statutory bodies, including departmental policy decisions, as well as by the Parliament to which the DHA is accountable on matters of finances, policy and general functioning.

The UNHCR though present in South Africa since the end of apartheid only plays an advisory role in RSD, save for matters of resettlement where it may conduct RSD in some exceptional cases. The biggest role it plays is in providing technical or financial assistance on refugee-related matters.

Modes of recognition: Although the Refugees Act provides for both individual RSD as well as group recognition, the former remains the primary mode of recognition. Group recognition, which is premised on ministerial discretion has never been applied since the enactment of the Refugees Act. Nonetheless special dispensations have been issued to nationals of Zimbabwe, Angola and Lesotho, in some instances to ease the pressure on the asylum system, but these dispensations are issued under the Immigration Act and not the Refugees Act.

Quality of the recognition process: The entire RSD system has proven to be largely ineffective and incapable of fairly and efficiently processing applications. All RSD institutions have been subject to judicial scrutiny and the courts have found defects in many of their processes and decisions. In terms of accessibility, the main challenges arise from the five-day timeframe stipulated for asylum seekers to

lodge an application for asylum at designated refugee offices miles away from main border entry points, the reduction of fully-functioning refugee reception centres mainly located in major cities, and the 'nationality day' based system which is not in alignment with permit renewal or application deadlines. The RSD adjudication is noted for, among others, high rejection rates, breaches in procedural standards, extensively long asylum processing periods with some lasting decades, long queues at reception centres, lack of communication, corruption, and a backlog at all levels of adjudication and review. As a result, the RSD process in South Africa is largely considered as unfair or not meeting many of the procedural guarantees of fairness.

Quality of Protection: While recognised refugees may enjoy a degree of security of residence, they are regularly required to renew their permits, failing which they risk becoming illegal immigrants. The situation of asylum seekers is even more precarious. A lot depends on always being in possession of valid and unexpired permits, which is often a challenge due to administrative setbacks. Beyond bureaucratic processes, security of residence is further threatened by recurring episodes of xenophobic violence in which asylum seekers and refugees tend to be the main victims. Although South Africa operates a non-encampment policy, there are plans to establish asylum processing centres that would effectively restrict free movement. With respect to rights to work and study, these have been curtailed by the new amendment to the Refugees Act. The amendment in effect disincentivises potential employers and school administrators from employing or enrolling asylum seekers. Even recognised refugees are not completely safe from these restrictive provisions. Despite constitutional assurances and earlier provisions of the Refugees Act that accorded significant protections to both asylum seekers and refugees, the recent reiterations of the law have cut back on some of these rights and rendered the situation of refugees and particularly asylum seekers in South Africa worryingly precarious.

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Acronyms

ACA	Aliens Control Act
ACMS	African Centre for Migration & Society
AGSA	Auditor General South Africa
APCs	Asylum Processing Centres
ConCourt	Constitutional Court
CSOs	Civil Society Organisations
DG	Director General
DHA	Department for Home Affairs
DRC	Democratic Republic of Congo
DZP	Dispensation for Zimbabwean Project
FGD	Focus Group Discussion
HRW	Human Rights Watch
LHR	Lawyers for Human Rights
NGOs	Non-governmental Organisations
OAU	Organisation of African Unity
PAJA	Promotion of Administrative Justice Act
PMG	Parliamentary Monitoring Group
RAA	Refugee Appeal Authority
RAB	Refugee Appeal Board
RR	Refugee recognition
RRR	Refugee Recognition Regime
RSD	Refugee Status Determination
RSDO	Refugee Status Determination Officer
SA	South Africa
SADC	Southern African Development Community
SAHRC	South Africa Human Rights Commission
SCRA	Standing Committee for Refugee Affairs
UNHCR	United Nations High Commissioner for Refugees
ZEP	Zimbabwe Exemption Permit
ZSP	Zimbabwe Special Dispensation Permit

I. Introduction and background

This report tracks the origins and development of South Africa's refugee recognition regime (RRR). That is the norms, institutions and practices that govern refugee recognition. It explicates and illustrates the interplay among these various components and the impact, direct or indirect, on the quality of the process and refugee protection generally. The report illustrates, and in fact argues, that over the twenty years of its existence, South Africa's (SA) RRR has always been marked by ambivalence. These ambivalences manifest themselves in several ways. Firstly, from a normative and legal implementation lens, there are notable divergences between international and domestic law; between law, policy and practice; and consequently, between the legal guarantees on paper and the lived realities of asylum seekers and refugees. Secondly, from a governance and societal perspective, within the public space, there are frequently recurring contestations involving government institutions, civil society and non-governmental organisations (NGOs), international institutions, SA citizens and refugees.

There is scarce literature discussing asylum or refugee protection in SA in the period prior to the end of SA's apartheid regime in the early 1990s. The asylum tradition in SA seems to have been subsumed into the broader migration and citizenship law discourse. For instance, Jonathan Klaaren, who traces SA's citizenship and nationality laws from 1897, notes that the earliest reference to political asylum was in a 1906 *Immigration Act of the Cape* (one of the four separate colonies of South Africa before it became a Union in 1910). This law exempted from exclusion, on economic grounds, immigrants that were fleeing political or religious persecution.[1] However, he does not delve into refugee protection during this historical period but rather illustrates that for the most part of this period leading up to apartheid and its end in the early 1990s, admission of refugees into South Africa was regulated under the migration control regime. This was just one of the avenues through which outlandish racial segregationist policies were enforced.[2]

Substantial literature on refugee protection in SA is mostly available from the early 1990s, a time marking the transition from the apartheid era to a new democratic dispensation. This was formally ushered in by SA's first democratic elections in 1994. Three years earlier, the United Nations High Commissioner for Refugees (UNHCR) had established itself in South Africa at the invitation of the government. Its mandate was, however, limited to assist, 'in facilitating the process of the voluntary repatriation and reintegration of South African returnees who elect to return home as civilians'.[3] The UNHCR's mandate was later expanded in 1993 to facilitate the voluntary repatriation and integration of Mozambican refugees in SA. It was in this new Agreement that for the first time SA applied the refugee definitions of the 1951 *UN Convention relating to the Status of Refugees* ('1951 Convention') and the 1969 *OAU Convention governing the Specific Aspects of Refugee Problems in Africa* ('1969 OAU Convention'). Although UNHCR's role was to support the extension of protection and services to the specified groups, the actual refugee status determination (RSD) exercise remained vested in the Department of Home Affairs (DHA) which had always been in charge of implementing and overseeing

[1] Immigration Act 30 of 1906 (Cape), section 3 as cited in J Klaaren, *From Prohibited Immigrants to Citizens: The Origins of Citizenship and Nationality in South Africa* (UCT Press 2017) 50.

[2] Some of these laws included the Immigration Regulation Act, 1918, the Immigration Quota Act, 1930, the Aliens Act, 1937, the Aliens Control Act, 1963 (later reiterations in 1973 and 1991); Black Authorities Act, 1957, Black Laws Amendment Act, 1963, Residence in the Republic Act, 1964, Admission to and Residence in the Republic Amendment Act, 1986 were among the host of laws governing immigration and residence in SA. None of these catered to refugees. See also Klaaren, ibid 84-87, 118-135; J Klaaren, 'Historical Overview of Migration Regulation in South Africa' in F Khan (ed), *Immigration Law in South Africa* (Juta 2018) 29-32; H E Reed, 'Moving Across Boundaries: Migration in South Africa, 1950-2000' (2013) 50 (1) *Demography* 71. Reed points out a lack of historical data on migration, particularly with respect to the Black population as one of the challenges of studying migration in South Africa up until the end of apartheid. Further historical insights are provided in A Klotz, *Migration and National Identity in South Africa, 1860-2010* (Cambridge University Press, 2013).

[3] *Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees (UNHCR) governing the Legal Status, Privileges and Immunities of the UNHCR Office and its Personnel in South Africa*, signed on 2 October 1991, Preamble para 1.

SA's citizenship and migration law and policy. Nonetheless, UNHCR assisted and supported the government to set up the first asylum determination procedures.[4]

Soon afterwards, SA acceded to a number of international instruments, among them the 1951 Convention and its 1967 Protocol, and the 1969 OAU Convention.[5] It also promulgated its first democratic Constitution[6] in 1996, which, *inter alia*, contained a progressive bill of rights. It was in the context of this euphoric political moment that SA enacted its first refugee legislation, the *Refugees Act, 1998*, – The Refugees Act and its enabling regulations were intended to disengage refugee protection from the rather ill-suited Aliens Control Act (ACA), whose objectives were clearly antithetical to that purpose. Under the ACA, refugees were treated as exceptions under the 'prohibited persons' provisions.[7] The Refugees Act, therefore, formalised SA's RSD process, and set up distinct structures, portfolios and systems within the DHA that were dedicated to asylum management and refugee recognition.

Since 1998, SA has experienced fluctuating asylum seeker arrivals, mainly from neighbouring states but also from beyond. For instance, in 1998, the number of new asylum applications was 15,035 and they kept fluctuating in thousands and tens of thousands until they peaked at 222,324 in 2009. Fluctuations have continued in 2018-2019, with 2019 witnessing 26,453 asylum applications,[8] more than triple the 8,397 applications made in 2018 (Appendices, Table 1). Although SA is not among the top refugee hosting countries in Africa,[9] its highly individualised asylum process sets it apart from the rest of the African countries. In fact, in 2016, it had 1,096,063 asylum seekers awaiting a decision, the highest number globally.[10] As I later argue, South Africa's refugee recognition regime has become characterised by long asylum waiting periods, high rejection rates of an estimated average of 96%,[11] and increasingly narrowing refugee protection space, strong constitutional and statutory provisions notwithstanding.

This report discusses the evolution of SA's RRR over a twenty-year period (1998-2018) highlighting the various areas of contestation within the refugee protection space and as regards SA's adherence to its obligations, under both domestic and international law. Post-2018, the refugee law has been amended with the enactment of the Refugees Amendment Act, 2017 which came into force in January 2020 when the new refugee regulations were passed. Accordingly, the report shall include commentary on the changes effected by the new amendments and regulations, which moreover have hardly been fully implemented as a result of the COVID-19 pandemic. With the pandemic and its attendant lockdowns, government services were seriously curtailed and so the SA government has, since March 2020 periodically extended all expiring visas and permits through emergency regulations. The latest extension expires on 31 March 2021.[12]

The report is divided into nine sections. Following the introduction, section two reviews the literature on refugee recognition. The scholarly literature is mainly from South African-based scholars from

[4] J Handmaker, 'Who Determines Policy? Promoting the Right of Asylum in South Africa' (1999) 11 *International Journal of Refugee Law* 290, 293-5; J Handmaker, 'No Easy Walk: Advancing Refugee Protection in South Africa (2001) 48 *Africa Today* 91, 93-94.

[5] South Africa acceded to the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa on 15 December 1995, and to the 1951 UN Convention on the Status of Refugees and its 1967 Protocol on 12 January 1996 (without reservations). It acceded to the African Charter on Human and Peoples' Rights on 9 July 1996. It is also party to both the International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, acceded to on 10 December 1998 and 12 January 2015, respectively. It is also party to other thematic conventions e.g. the International Convention on the Elimination of all forms of Racial Discrimination (ICERD), the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Convention against Torture and other Cruel, inhuman or Degrading Treatment or Punishment (CAT), among others.

[6] The Constitution of the Republic of South Africa, 1996 was approved by the Constitutional Court on 4 December 1996. It came into effect on 4 February 1997.

[7] Aliens Control Act (ACA), 1991, section 41.

[8] Statistics on 2019 asylum applications available at https://www.unhcr.org/refugee-statistics/download/?url=QU5i.

[9] According to 2019 reports, South Africa fell behind such countries as Uganda, Sudan, Chad, Ethiopia, Kenya, Cameroon, Egypt, Niger, South Sudan, Rwanda, Tanzania, Democratic Republic of Congo and Algeria. Detailed information is available at https://data.worldbank.org/indicator/SM.POP.REFG accessed on 11 December 2020.

[10] See UNHCR, *Global Trends: Forced Displacement in 2016* (UNHCR, 19 June 2017), Annexes, Table 10.

[11] Amnesty International, *Living in Limbo: Rights of Asylum Seekers Denied* (Amnesty International, 2019) 15. The report cites a 2015 Presentation by the DHA to the Parliamentary Portfolio Committee on Home Affairs.

[12] Information available at http://www.dha.gov.za/index.php/notices/1410-extension-of-validity-of-asylum-seeker-and-refugee-permits-to-31st-of-march-2021.

various disciplines including law, sociology, political sciences and international relations. The review also mentions research studies by NGOs, both national and international. The third section discusses the methodology used for the study, which was mainly desk-based and qualitative field research. Section four sets out the applicable international and domestic norms, that partly comprise SA's RRR. Section five discusses the various modes of refugee recognition applicable in SA. Section six focuses on the institutions that comprise part of SA's RRR. These include both statutory institutions, relevant organs of government, as well as independent institutions and organisations including UNHCR and NGOs. Section seven reviews the quality of the recognition process in terms of accessibility, accuracy and efficiency, and fairness. Section eight assesses the quality of protection that ensues from various statuses in SA's refugee protection regime, specifically protection to asylum seekers and protection to recognised refugees. The last section is a summary conclusion.

II. Literature review

There is a vast scholarly and NGO literature on refugee protection in South Africa. There are general studies on the situation of refugees in South Africa, mainly in the fields of sociology,[13] political science,[14] gender studies,[15] and geography.[16] For the purposes of this report, however, our focus is mainly on those studies that specifically examine and analyse SA's refugee recognition regime or aspects of it.

The drafting of the refugee law and the key contestations have been chronicled and analysed by a number of legal scholars that were involved in the process. As this report illustrates, this literature[17] is significant because it reveals the debates that surrounded and informed the refugee regime and how some of what were considered negative elements then and were strongly rejected have gradually been reinstated. These legal scholars also assessed the RR processes in the early years following the enactment of the law. They highlighted the major administrative challenges and flaws in the system that have persisted since then and in some cases only become more amplified.[18] The scholarship of empirical legal scholar Roni Amit,[19] reinforces these earlier findings and illustrates how the persistent institutional

[13] D Manicom & F Mullagee, 'The Status of Asylum Seekers and Refugees in South Africa: an Independent Overview' (2010) 39 *Africa Insight* 184-197; P Rugunanan & R Smit, 'Seeking Refuge in South Africa: Challenges Facing a Group of Congolese and Burundian Refugees' (2011) 28 *Development Southern Africa* 705-718; R Smit & P Rugunanan, 'From Precarious Lives to Precarious Work: the Dilemma facing Refugees in Gauteng, South Africa' (2014) 24 *South African Review of Sociology* 4-26; A Bloch, 'The Right to Rights: Undocumented Migrants from Zimbabwe Living in South Africa' (2010) 44 *Sociology* 233-250; L Magqibelo et al, 'Challenges Faced by Unaccompanied Minor Refugees in South Africa' (2016) 52 *Social Work* 73-89.

[14] L B Landau (ed), *Exorcising the Demons Within: Xenophobia, Violence and Statecraft in Contemporary South Africa* (Wits University Press 2011); L B Landau, 'Protection and Dignity in Johannesburg: Shortcomings of South Africa's Urban Refugee Policy' (2006) 19 *Journal of Refugee Studies* 308-327; J Crush et al, *The Perfect Storm: The Realities of Xenophobia in Contemporary South Africa* (SAMP 2008); A Betts, *Survival Migration: Failed Governance and the Crisis of Displacement* (Cornell University Press 2013).

[15] B Camminga, *Transgender Refugees and the Imagined South Africa: Bodies over Borders and Borders over Bodies* (Palgrave Macmillan 2019); S Memela & B Maharaj, 'Refugees, Violence and Gender: the Case of Women in the Albert Park Area in Durban, South Africa' (2018) 29 *Urban Forum* 429-443.

[16] See for instance, S L Gordon, 'Welcoming Refugees in the Rainbow Nation: Contemporary Attitudes towards Refugees in South Africa' (2016) 35 *African Geographical Review* 1-17; L Elford, 'Human Rights and Refugees: Building a Social Geography of Bare Life in South Africa (2008) 27 *African Geographical Review* 65-79; C W Kihato, 'The City from its Margins: Rethinking Urban Governance through the Everyday Lives of Migrant Women in Johannesburg' (2011) 37 *Social Dynamics* 349-362.

[17] The key literature in this regard includes J Handmaker, L A de la Hunt & J Klaaren (eds), *Perspectives on Refugee Protection in South Africa* (Lawyers for Human Rights 2001); J Handmaker et al (eds), *Advancing Refugee Protection in South Africa* (Berghahn Books 2007); M F Belvedere, *Beyond Xenophobia: Contested Identities and the Politics of Refugees in Post-Apartheid South Africa* (DPhil Dissertation, University of Minnesota 2006); Handmaker, 'No Easy Walk' (n4), Handmaker, 'Who Determines Policy?' (n4); T R Smith, 'The Making of the 1998 Refugees Act: Consultation, Compromise, and Controversy', *Wits Forced Migration Working Paper Series, no.5* (Johannesburg 2003).

[18] Handmaker et al, *Advancing Refugee Protection*, ibid.

[19] R Amit, *No Way In: Barriers to Access, Service and Administrative Justice at South Africa's Refugee Reception Offices* (ACMS Research Report, September 2012); R Amit, *Queue Here for Corruption: Measuring Irregularities in South Africa's Asylum System* (LHR and ACMS, July 2015); R Amit, *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (ACMS Research Report, June 2012); R Amit, 'No Refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) 23

and procedural flaws and breaches have very much become an inherent and defining feature of SA's RRR. The leading contemporary work of legal scholarship, which analyses the interpretation and application of SA's refugee law is Fatima Khan and Tal Schreier's edited book on refugee law in SA.[20] It includes a detailed examination of the institutional processes that determine access to RSD (registration, admissibility processes, etc.) as well as an explanation of the rights of refugees and asylum seekers in SA.

The legal scholarship is further supported by ethnographic and empirical studies, some of which study bureaucratic practices,[21] while the majority study the workings and effects of the system from the perspective of asylum seekers and refugees.[22]

There are also various periodic thematic reports by NGOs and research institutions that provide insights and situational analyses of refugee protection regime in South Africa. Research institutions including the African Centre for Migration & Society (ACMS), and Southern African Migration Programme (SAMP), as well as organisations such as Lawyers for Human Rights (LHR), Corruption Watch, Amnesty International, Human Rights Watch (HRW), Scalabrini Centre, among others, have conducted various thematic researches and presented their findings in reports, a number of which are cited herein.

Although there is a large amount of work that has been done on the quality of the RSD process in SA including the analyses on the shifting law and policies,[23] there are gaps in some key respects. For instance, there is barely any literature or study that examines the refugee recognition institutions and their relational dynamics and how this impacts the RRR and refugee protection generally. Secondly, the judicialization of the RSD process, although a prominent theme within SA's RRR, remains understudied. The South African courts have undeniably played a major role in refugee recognition, and yet there is no work tracing and examining the influence of court decisions in shaping and defining the regime. Ruvi Ziegler's recent study examines how South African Courts apply of international refugee law in their decisions, but does not exactly examine their role in refugee recognition from a broader, longitudinal perspective.[24]

Another significant, yet understudied institution is the UNHCR in South Africa. This report identifies and highlights some scholarly gaps, and possibly opens up a discussion on the same that can be undertaken in more detail or in future studies. More of the relevant literature and any identifiable gaps will be cited in the sections on each of the thematic aspects discussed herein that constitute SA's RRR as defined above.

Overall, this report complements existing studies and in many ways corroborates the literature. It specifically demonstrates that in a period of twenty years, the asylum space in SA appears to be shrinking, especially as the SA government attempts to legitimate practices that researchers, refugee advocates and the SA courts have impugned and found to be in breach of SA's international and constitutional obligations.

International Journal of Refugee Law 458-488; L Landau & R Amit, 'Wither Policy? Southern African Perspectives on Understanding Law, 'Refugee' Policy and Protection' (2014) *Journal of Refugee Studies* Vol 27 No 4, 534-552.

[20] F Khan & T Schreier, *Refugee Law in South Africa* (Juta 2014).

[21] C Hoag, 'Magic of the Populace: an Ethnography of Illegibility in the South African Immigration Bureaucracy' (2010) 33 *Political and Legal Anthropology Review* 6; Belvedere, *Beyond Xenophobia* (n17); D Vigneswaran, 'The Complex Sources of Immigration Control' (2019) *International Migration Review* 1-27.

[22] R Sutton et al, 'Waiting in Liminal Space: Migrants Queueing for Home Affairs in South Africa' (2011) 34 (1 & 2) *Anthropology Southern Africa* 30; D Fassin et al, 'Asylum as a Form of Life: the Politics and Experience of Indeterminacy in South Africa' (2017) 58 *Current Anthropology* 160; L Schockaert et al, 'Behind the Scenes of South Africa's Asylum Procedure: a Qualitative Study on Long-term Asylum-Seekers from the Democratic Republic of Congo' (2020) 0 *Refugee Survey Quarterly* 16; D Vigneswaran, 'A Foot in the Door: Access to Asylum in South Africa' (2008) 25(2) *Refuge* 41-52.

[23] F Khan & M Lee, 'Policy Shifts in the Asylum Process in South Africa resulting in Hidden Refugees and Asylum Seekers' (2018) 4 *African Human Mobility Review* 1205; ACMS & LHR, *Policy Shifts in the South African Asylum System: Evidence and Implications* available at https://www.academia.edu/2449964/Policy_Shifts_in_the_South_African_Asylum_System_Evidence_and_Implications.

[24] R Ziegler, 'Access to Effective Refugee Protection in South Africa: Legislative Commitment, Policy Realities, Judicial Rectifications?' (2020) 10 *Constitutional Court Review* 65-106.

III. Methodology

A large proportion of the information and data used in this report has been gathered through desk-based research. We draw from existing literature on refugee protection in South Africa. For statistical data, we rely on a variety of sources including UNHCR's statistical yearbooks and global trends from which we extracted a dataset of relevant statistics pertaining to SA's recognition rate from 2000-2019[25] (Appendices, Table 1). More recent statistics are from the DHA as presented in its annual reports or as part of its periodic reports to the South African Parliament.

As well as drawing on the existing literature, this report was informed by additional original fieldwork which we carried out in SA from October to December 2019. A follow-up fieldwork trip scheduled for March 2020 was cancelled due to the pandemic and ensuing restrictions.

In total, we conducted 24 semi-structured interviews with asylum seekers and refugees, academicians, researchers, Civil Society Organisations (CSO) officials, legal practitioners, UNHCR staff members, as well as former officials of the DHA. In addition to these formal interviews, the lead researcher had a number of informal conversations with mainly NGO officials, which conversations cannot be cited for ethical reasons, but they nonetheless corroborated available information and individual testimonies. The researcher also took part in a couple of meetings, one was a planning and strategic meeting by CSOs, and the other was the meeting between the CSOs and the DHA, which the researcher attended on invitation by the CSOs. Despite its central role in the RRR, the DHA turned down our research request and so that vital perspective, as much as it would have greatly enhanced this research, is sadly missing. In order to fill in this gap, we have had to rely on existing secondary data.

We interviewed fourteen (14) refugees and asylum seekers of whom ten (10) were recognised refugees and four (4) were asylum seekers. The selection of nationalities to interview was based on the top most recognised nationalities in the preceding five-year period, which provides a more consistent cohort of nationalities.[26] These were the Somalis, Congolese from the Democratic Republic of Congo (DRC), and Ethiopians (see Appendices, Table 2). Tables 3a and 3b in the appendices show the breakdown of interviewees by nationality, gender and age. All interviewees were aged between 18 to 60 years in accordance with the ethics undertaking. The interviewees were identified through community leaders who led us to those willing to take part in the research. It was harder to get women participants especially among the Somali and Ethiopian community. Among the Congolese, women individual interviewees appear disproportionately represented. However, we did hold a small focus group discussion comprised of only Congolese nationals in which women were the majority. There were four women and two men.

Zimbabweans have consistently been among the top five recognised nationalities from 2014 to 2018. Although quite a number are recognised as refugees, their status remains generally contested. Most of the Zimbabweans in SA are considered to be economic migrants, who for lack of alternative avenues resort to the asylum process.[27] We discuss the specific case of the Zimbabweans in more detail further on in the report.

The researcher explained to each participant the purpose of the research and details of data protection and confidentiality in detail. All interviews were conducted upon obtaining the participant's consent.[28] For the Somalis and Ethiopians, we had to employ the services of a field assistant/translator who signed the requisite confidentiality agreements and the lead researcher ensured that the consent given for the interviews was informed. The interviews with asylum seekers and refugees were essential for understanding the real life experiences of seeking asylum in South Africa and the refugees and asylum seekers perceptions of the asylum process.

[25] For 2019 statistics see, UNHCR, *Global Trends: Forced Displacement in 2019* (UNHCR, June 2020) available at https://www.unhcr.org/uk/statistics/unhcrstats/5ee200e37/unhcr-global-trends-2019.html,

[26] The refugee cohorts in SA have changed over the twenty year period. Therefore, we based our selection on those that had been consistently among the top five recognised nationalities in the preceding five year period.

[27] J Crisp & E Kiragu, *Refugee Protection and International Migration: a Review of UNHCR's Role in Malawi, Mozambique and South Africa* (UNHCR Policy Development and Evaluation Service 2010); A Betts, *Survival Migration* (n14) 54-77.

[28] Expert interviews cited in this report are indicated with an 'EL' middle code, to distinguish them from interviews with individual asylum seekers and refugees.

IV. Norms governing refugee recognition

This section sets out the main norms applicable to refugee recognition in SA. These are mainly, the international refugee Conventions, the South African Constitution and the Refugees legislation (both Act and Regulations) as it has evolved over time. We outline the standing of each of these in the domestic legal regime, but more particularly we discuss the refugee definition which sets out those who are considered eligible for refugee status as well as those that are excluded from it. Pertinent domestic norms that relate to aspects of modes of recognition, the status determination process and institutional actors shall be discussed subsequently under the appropriate section.

a) International Conventions

As mentioned, SA is party to both the 1951 Convention and its 1967 Protocol, as well as the 1969 OAU Convention. The latter Convention is a regional complement to the 1951 Convention and contains a few region-specific innovations most notably its expansion of the refugee definition. SA has made no reservations to either instrument, and as such is bound by all their provisions. As shall be elucidated shortly, the SA refugee law reflects the respective definitions of both Conventions.

b) The Constitution

The South African Constitution is the supreme law of the land.[29] It provides an array of civil, economic and social rights, most of which are enjoyed by 'everyone in South Africa', save for those reserved exclusively for citizens (these include political rights). It guarantees due process for everyone whose rights have been infringed upon, most notably under section 33 which provides for just administrative action. The requirements of this section are detailed out in the Promotion of Administrative Justice Act (PAJA)[30] which not only regulates the conduct of officials executing administrative actions, but also sanctions judicial review of administrative decisions and actions. Consequently it is of vital importance in refugee status determination and provides a channel through which asylum seekers and refugees may challenge any rights-infringing state policies, decisions and actions. Section eight of this report looks at the most contested rights for asylum seekers and refugees that have been subject to judicial intervention and interpretation.

The Constitution also lays out the position of international law within the domestic legal regime. Customary international law is considered law in SA 'unless it is inconsistent with the Constitution or an Act of Parliament'.[31] Additionally, while interpreting legislation, section 233 enjoins the courts to 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.[32] Therefore, as far as interpretation of refugee law is concerned, the courts should always adopt an interpretation that is consistent with South Africa's obligations and commitments under the refugee conventions. This point is further underscored in the Refugees Act which expressly stipulates that it [the Act] must be interpreted in accordance with the international refugee Conventions, and the Universal Declaration of Human Rights, among others.[33] Ruvi Ziegler argues that even where they uphold refugees' rights, SA courts tend to ground their decisions in constitutional provisions rather than directly relying on the provisions of the Conventions. He refers to this position as the court's under-utilisation of international refugee law norms.[34] It should be noted that the constitutional obligation to give preference to international law norms in legislative interpretation is categorically laid upon the courts. As mentioned, however, the Refugees Act contains a specific obligation for its interpretation to be in accordance with international human rights law, and international refugee law is particular. This obligation extends to administrative tribunals or adjudicatory bodies, such as the refugee status determination officers, and all those whose work involves interpretation of the Refugees Act and regulations.

[29] Constitution of the Republic of South Africa, 1996, section 2.
[30] The Promotion of Administrative Justice Act (PAJA) 3 of 2000.
[31] Constitution of the Republic of South Africa, section 232.
[32] Ibid, section 233.
[33] Refugees Act, 1998, section 6(1).
[34] Ziegler, 'Access to Effective Refugee Protection' (n24), 106.

c) Refugees Act and Regulations

The development of SA's first refugee legislation went through a series of processes and consultations. It began with a 1996 DHA Draft Refugee Bill which was heavily criticised by civil society actors as well as the independent South African Human Rights Commission (SAHRC). Following this, the government introduced in May 1997, a *Draft Green Paper on International Migration* which contained a section on refugees. At this time, civil society and refugee advocates were better mobilised and organising workshops on refugee protection. This prompted the DHA to constitute a Refugees White Paper Task Team comprising of representatives of the DHA, civil society, UNHCR and SAHRC. The team produced the White Paper that served as a blueprint for the Refugees Bill. The drafting process of the refugee law and the consultations on it highlighted a number of areas that were contested. [35] These shall be mentioned in the following discussion on the provisions of the law. The Bill underwent a series of revisions, and on 5 November 1998 Parliament enacted the *Refugees Act No. 130 of 1998* (the Refugees Act), it obtained presidential assent on 20 November 1998. Implementation of the Act was stalled for more than one year until the passage of the implementing regulations on 1 April 2000 (now repealed refugee regulations). The 1998 Act has undergone some amendments. There were two major amendments in 2008 and 2011, the latter although enacted by Parliament, never came into force. There was also a 2015 amendment which only affected one provision with regard to confidentiality of appeal proceedings before the Refugee Appeals Board. The most recent amendment is the Refugees Amendment Act No. 11 of 2017 ('Refugees Amendment Act'). It came into operation on 1 January 2020 with the passage of new Refugee Regulations, 2019 ('Refugees Regulations, 2019), which also brought into effect the 2008 Amendment Act.

Refugee definition and exclusion

The 1998 Refugees Act contained a number of commendable provisions (some of which are discussed in the section on quality of protection), whose inclusion is generally attributed to the broad stakeholder consultations that preceded it. The following sub-sections discuss some of these key provisions, particularly those that are relevant to refugee definition. Where there have been changes to any of these provisions, we explain both the initial provision and the subsequent changes. We also demonstrate how the provision is applied in practice and, where necessary, how it is interpreted by the courts.

Refugee definition

The South African refugee law contains quite a broad definition of who qualifies for refugee status. The definition combines both the 1951 Convention and the 1969 OAU Convention definitions. In alignment to the former, a person should be recognised as a refugee if '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, is unwilling to return to it.'[36] Going further than the 1951 Convention, the Refugees Act more expansively defines 'particular social group' to include, 'among others, a group of persons of particular gender, sexual orientation, disability, class or caste.'[37]

The Act further defines a refugee in terms of the 1969 OAU Convention as a person who '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.' The term 'disrupting' is specific to the Refugees Act although it does not necessarily have any practical effect.[38]

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[35] For a detailed history on the drafting and passing of Refugees Act, see J Klaaren et al, 'Talking a New Talk: A Legislative History of the Refugees Act 130 of 1998' in Handmaker et al, *Advancing Refugee Protection* (n17) 56; M Barutciski, 'The Development of Refugee Law and Policy in South Africa: a Commentary on the 1997 Green Paper and 1998 White Paper/Draft Bill,' (1998) 10 *International Journal of Refugee Law* 700; Belvedere, *Beyond Xenophobia* (n17) 130-173; Handmaker, 'No Easy Walk' (n4), Handmaker, 'Who Determines Policy?' (n4); T R Smith, 'The Making of the 1998 Refugees Act' (n17).

[36] 1951 Convention, Article 1 as modified by the 1967 Protocol.

[37] Refugees Act, section 2

[38] T Wood, 'Expanding Protection in Africa? Case Studies of the Implementation of the 1969 African Refugee Convention's Expanded Refugee Definition' [2014] *International Journal of Refugee Law* 1, 9.

A dependant of a person who qualifies as a refugee under either of the foregoing definitions equally qualifies for refugee status.[39] 'Dependant' was initially defined to include 'the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family' of an asylum seeker or refugee.[40] With the recent amendment, the scope of dependency has been made more specific if not narrower. A dependant means 'any unmarried minor dependent child, whether born prior to or after the application for asylum, a spouse or any destitute, aged or infirm parent of such asylum seeker or refugee who is dependent on him or her, and who is included by the asylum seeker in the application for asylum or, in the case of a dependent child born after the application for asylum….'[41]

Although this definition does seem relatively broad, its application in practice has tended to be increasingly restrictive. One such restrictive interpretation is whereby a RSDO may consider only the main applicant's claim for refugee status based on the first two definitions and neglecting to consider whether his or her dependants may have an individual claim to asylum. [42] Yet even for previously dependent applicants that try to make their own claim, as is now required under the Refugees Amendment Act, the probability of their application being successful is rather low. Such is especially the case with dependent children of majority age who are no longer considered dependants and have to apply for asylum in their individual capacity. Since it was their parents and not themselves that were persecuted and thus forced to flee, the applicants may find it difficult to make a claim that is considered credible.[43] With regard to spouses, the Refugee Regulations, 2019 require a formal proof of marriage either by presentation of the original certificate of marriage, or an affidavit in lieu thereof.[44]

Exclusion

International refugee law recognises that while some persons may meet the criteria for refugee status, they might be so excluded on specified grounds. The Refugees Act, in line with the Refugee Conventions, sets out grounds upon which an applicant for refugee status may be excluded.

Originally the Act provided for exclusion from refugee status on the following grounds: if one i) had committed a crime against peace, a crime against humanity, a war crime, or crime involving torture;[45] ii) had been guilty of acts contrary to the objects and principles of the UN or the OAU. A person is also excluded from refugee protection if he or she enjoys the protection of another country in which they are a recognised refugee, resident or citizen.[46] In these aspects, the grounds more or less mirror the respective provisions of the 1951 Convention and the 1969 OAU Convention.[47] Yet, with the recent amendments to the Refugees Act, there were two notable additions to the criteria which not only widened the scope of exclusion, but also illustrated a divergence from both refugee Conventions.

The first was that a person could be excluded if they had committed a crime of a non-political nature, which if committed in SA would be punishable by imprisonment. The latter part was a modification to a similar clause in both Conventions both of which refer to *serious non-political crimes*. Hence, the Act expanded the scope of the clause so much that anyone imprisoned for a misdemeanour could be excluded. Relying on the 1951 Convention and commentaries, the High court's previous interpretation of this provision was that crimes with no element of violence or threat of violence did not meet the seriousness threshold required under international law and as such could not lead to exclusion.[48]

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[39] Refugees Act, section 3 (c) as amended.

[40] Ibid, section 2

[41] Refugees Amendment Act, Sections 1 and 21B as amended.

[42] Such restrictive application of the definition is an observation made by the UNHCR office as pointed out by a UNHCR (Pretoria) official in a communication with the author dated 21 April 2021.

[43] Interview SAJ_FD_03. She arrived in SA from the DRC while her son was still quite young, almost ten years ago. When he turned eighteen, he applied for asylum in his own right but during the RSD interview the RSDO insisted on asking him why he had fled his country, as well as castigating his mother for not explaining to her son the reasons for her flight. His application was rejected as manifestly unfounded, abusive or fraudulent.

[44] Refugee Regulations, 2019, reg 2.

[45] The inclusion of 'crimes against torture' is a novelty in the Refugees Act, hence going beyond the provisions of both Refugee Conventions which only provide for the first three crimes.

[46] Refugees Act, Section 4(1).

[47] 1951 Convention, article 1F & 1Eand the 1969 OAU Convention, article 1 (5). Note however, that exclusion on the ground of enjoying the protection of another State is only provided for under the 1951 Convention and not the 1969 OAU Convention.

[48] *Tantoush v Refugee Appeal Board & others* (13182/06) [2007] ZAGPHC 191; 2008 (1) SA 232 (T) (11 September 2007), paras 112-115.

The second additional modification pertains to exclusion on account of one's enjoying the protection of another state, such persons deemed under the 1951 Convention as not in need of international protection.[49] By expanding protection to include residence or acquiring refugee status in another country, the Act overlooks the UNHCR guidance that one 'must be fully protected against deportation or expulsion' from that country.[50] As Ziegler argues, the addition of the criteria of residence 'substantively diverges from the emphasis put in Article 1E of the 1951 Convention on security of residence being *sine qua non* for its application'.[51]

The Refugees Amendment Act, 2017 has expanded upon these grounds with some of the new provisions appearing to reflect the judicial interpretation of what amounts to a crime that would warrant exclusion, while others, contrarily, could be an attempt at circumventing the same. As the law currently stands, one can be excluded from refugee status if they: a) have committed, while in SA, a serious offence that is punishable by imprisonment without an option of a fine, b) have committed an offence in relation to the fraudulent possession of a South African identification document or residence permit, c) are a fugitive from a country where the rule of law is upheld by a recognised judiciary, d) entered SA illegally and have failed to provide satisfactory reasons to the RSDO, and e) failed to report to the RRO within five days of entering SA and there are no compelling reasons such as hospitalisation or institutionalisation.[52]

Most of these added grounds are problematic on a number of levels. Firstly, by penalising illegal entry with exclusion, this provision arguably conflicts with the principle of *non-refoulement* guaranteed under the Act. Excluding asylum seekers for mere infractions of the Immigration Act and subjecting them to deportation, even before their asylum claim is made, let alone adjudicated upon, would most likely amount to a violation of the *non-refoulement* principle. This was the Constitutional Court's (ConCourt) position when it held that '[u]ntil the right to seek asylum is afforded and a proper determination procedure is engaged and completed, the Constitution requires that the principle of *non-refoulement* as articulated in Section 2 of the Refugees Act must prevail. The "shield of *non refoulement*" may be lifted only after a proper determination has been completed.'[53] Consequently, and secondly, the new exclusion grounds may yet again be seen as circumventing a series of judicial decisions that have upheld the right of an illegal foreigner to be accorded the opportunity to apply for asylum once they express an intention to do so, whether they entered the country illegally or are in possession of an expired permit.[54] Thirdly, the new provisions bring asylum seekers and refugees squarely within the rigours of immigration law from which they ought to be protected,[55] thus blurring the lines between immigration law and refugee law.[56] Yet by doing so, it greatly lowers the threshold of exclusion criteria which should be based on acts that are, 'so grave as to render their perpetrators undeserving of international protection as refugees.'[57] Therefore, the added exclusion grounds could only lead to the conclusion, absurd as it may seem, that the South African government equates breaches of its immigration law to the most serious international crimes which warrant exclusion from refugee status. Fourthly, the new exclusion clauses apparently fail to make any exception for refugees *sur place*,[58] That is persons already in SA but cannot

[49] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees* HCP/GIP/03/05 (4 September 2003), para 4.

[50] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (revised February 2019), para 145 .

[51] Ziegler, 'Access to Effective Refugee Protection' (n24), 90.

[52] Refugees Act, section 4 as amended.

[53] *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC 52; 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) (20 December 2018), para 54.

[54] *Abdi v Minister of Home Affairs* [2011] ZASCA 2; 2011 (3) SA 37 (SCA); *Arse v Minister of Home Affairs* [2010] ZASCA 9; 2012 (4) SA 544 (SCA); *Bula v Minister of Home Affairs* [2011] ZASCA 209; 2012 (4) SA 560 (SCA); *Ersumo v Minister of Home Affairs* [2012] ZASCA 31; 2012 (4) SA 581 (SCA); *Ruta* case, ibid.

[55] In the *Ruta* case (n53) para 54, the court rejected the respondent's argument that 'the Immigration Act covers the field of refugee applications or predominates within it'. See also T Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge University Press, 2011) 14. UNHCR, Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees HCP/GIP/03/05 (4 September 2003), para 4.

[56] Moreover the amendment follows the unanimous adoption by the UN General Assembly of the New York Declaration for Refugees and Migrants in December 2016, which re-affirms the importance of international refugee law amidst the international migration framework. Provisions of Refugees Amendment Act that penalise asylum seekers for breaches of the immigration law tend to be a move in the reverse direction from what the country has committed itself to internationally.

[57] UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses* (n49).

[58] Ruta case (n53), para 51.

return to their countries for reasons that would qualify them for refugee status. It thus remains to be seen whether the new added exclusion grounds will stand the constitutional test should matter come up for constitutional interpretation.

Despite a plethora of studies on the South African RSD process, there is hardly any that looks into the practical application of the exclusion clause save where this has come up in a court case.[59] More so, the available statistics do not disaggregate excluded cases from the overall rejected cases.[60]

V. Modes of recognition

The Refugees Act provides for both individual status determination and group recognition. The available literature however focuses on individuated RSD processes which, essentially, are the operative mode of recognition since the enactment of the refugee law.

It is notable that individual processes also apply to recognition under the expanded definition of the 1969 OAU Convention. With respect to SA, in particular, Tamara Wood has demonstrated that even within the individualised process, the expanded definition is rarely applied during the adjudication process, including on review or appeal.[61] This conclusion, however, would seem to be valid mainly for the period following the coming into force of the refugee legislation.

In contrast, in the late 1990s, prior to the Refugees Act coming into force, the DHA was facing strong criticism for relying mainly on objective circumstances in its RSD by 'whitelisting countries' as refugee-producing[62] rather than applying the subjective elements more associated with the 1951 Convention.[63] Determination based on objective circumstances commonly referred to as *prima facie* asylum determination means that individuals from a particular country are more or less guaranteed recognition.[64] The Refugees Act, however contains no reference to the term.

a) Group recognition

In the event of mass influx,[65] the Minister of Home Affairs may declare 'any group or category of persons to be refugees either unconditionally, or subject to such conditions as the Minister may impose in conformity with the Constitution and international law.' The declaration and revocation of the same is by Gazette Notice.[66] This provision has not been effectuated since the enactment of the law.

The only formal refugee group recognition that has taken place in SA was pre-the Refugees Act. It was accorded to Mozambicans under a Tripartite Agreement between the Governments of SA and Mozambique and UNHCR signed in 1993. The agreement dealt with both repatriation for those Mozambicans that wished to return, and the granting of refugee status for those that were not yet ready to return. Those that wished to be recognised had to fit within the criteria which included those who

[59] Khan & Schreier, *Refugee Law* (n20) have a discussion on exclusion in their book, but it is not a systematic examination on how RSDOs apply these clauses.

[60] UNHCR statistics as reported in the annual Global Trends reports only indicate 'rejected cases'. The same applies to DHA statistics.

[61] T Wood, 'Expanding Protection in Africa?' (n38), 10.

[62] Countries considered as refugee-producing then were Angola, Burundi, the DRC, Rwanda, Somalia, and Sudan. See I van Beek, 'Prima Facie Asylum Determination in South Africa: a Description of Policy and Practice' in J Handmaker, L A de la Hunt & J Klaaren (eds), *Perspectives on Refugee Protection* (n17) 14-40, 21.

[63] Van Beek, ibid; T Schreier, 'An Evaluation of South Africa's Application of the OAU Refugee Definition' (2008) 25 *Refuge* 53; Belvedere, *Beyond Xenophobia* (n17) 87-88; Handmaker, 'No Easy Walk' (n4) 94; L A de la Hunt & W Kerfoot, 'Due Process in Asylum Determination in South Africa from a Practitioner's Perspective: Difficulties Encountered in the Interpretation, Application and Administration of the Refugees Act' in Handmaker et al, *Advancing Refugee Protection* (n17) 89, 96.

[64] Van Beek, ibid. The UNHCR defines *prima facie* recognition as that which is based on 'readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum seekers, their country of former habitual residence. A prima facie approach acknowledges that those fleeing these circumstances are at risk of harm that brings them within the applicable refugee definition' – UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status' (24 June 2015) HCR/GIP/15/11, para 1.

[65] Although the term is used in the heading of section 35 which provides for recognition of groups, it is not defined in the Act.

[66] Refugees Act, section 35(1).

resided in specified camps and settlements, those that had previously applied for asylum, and those that had arrived in SA between 1980 and 1985 and could not return to Mozambique because of the security situation (specific details in Appendices, Table 4).[67]

The Mozambicans were the first official refugees in SA recognised under UNHCR's mandate. Theirs is the only group recognition that has been rendered, even before SA acceded to the Refugee Conventions. At the end of 1996, the SA government revoked this recognition, which coincided with the end of the voluntary repatriation programme for Mozambicans handled by UNHCR.[68] The cessation clause granted 'former Mozambican refugees exceptional leave to remain',[69] although their status remained somewhat indeterminate.

In July 1996, the South African government offered citizens of countries in the Southern African Development Community (SADC) an amnesty to apply for permanent residence. In order to be eligible the SADC citizen must have '[lived] in South Africa for five years or more, had no criminal record, and either were involved in economic activity or had a South African spouse or dependant born or residing lawfully in the country'.[70] At the end of 1996, a further amnesty was extended specially to former Mozambican refugees, but it only got implemented three years later for a period of six months.[71] Although these amnesties, particularly the one for SADC citizens were extended as opportunities for regularisation of immigration status, they inevitably benefitted some individuals who would qualify for refugee status under the international law.

In the early years of implementing the Refugees Act, in order to ensure a speedy processing of the cases, the DHA adopted simplified procedures for persons that were from well-known conflict areas at the time. These included persons from Somalia, Angola, DRC, Burundi and Rwanda. While the Minister did not make the section 35 declaration, he gave his tacit approval for this process.[72] Well-meaning though this approach was, it apparently adversely affected those that were not from these countries, most of whom had their applications rejected.[73] In the later years, this practice too appears to have been abandoned and all applicants have to undergo the full RSD process. This shift in practice was clearly evident with the Zimbabweans with whom the term 'influx' was commonly used and yet they were never recognised as refugees, save for some individual cases that had to undergo RSD. Zimbabweans constitute about 5% of the recognised refugees in SA.[74]

Special dispensations under the Immigration Act: the case of the Zimbabweans

Even though section 35 of the Refugees Act has not been utilised by the South African government since the enactment of the Law, the government has since the late 2000s declared some dispensations to categories of foreigners under the Immigration Act. The Act empowers the Minister to 'grant a foreigner or categories of foreigners the right to permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision.'[75] Accordingly, the South

[67] Passport Control Instruction No. 20 of 1994 - Guidelines for Refugees Status Determination of Mozambicans in South Africa (14 April 1994).

[68] J Crush & V Williams, *The Point of No Return: Evaluating the Amnesty for Mozambican Refugees in South Africa*, (2001) No. 6, p. 6, Reports and Papers, SAMP available at https://scholars.wlu.ca/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1063&context=samp. C Dolan, *The Changing Status of Mozambicans in South Africa and the Impact of this on Repatriation to and Re-integration in Mozambique*, (1997), Final Report to Norwegian Refugee Council, Maputo. Additional information and analysis on the situation of Mozambican refugees in SA can be found in T Polzer, 'Adapting to Changing Legal Frameworks: Mozambican Refugees in South Africa' (2007) 19 *International Journal of Refugee Law* 22-50.

[69] Crush & Williams, ibid, 7.

[70] Ibid, 8.

[71] Ibid, 33-34. Contrarily though, in the interim period and while the amnesty was ongoing, deportations of Mozambicans were taking place.

[72] Interview SAC_EL_24.

[73] Van Beek, 'Prima Facie Asylum Determination' (n62) 23 & 32.

[74] According to DHA statistics, as at March 2020, Zimbabweans with refugee status in SA totalled 3,997 – Parliamentary Monitoring Group, 27 May 2020 available at https://pmg.org.za/question_replies/?filter%5Bminister%5D=14.

[75] Immigration Act, 2002, section 31 (2) (b) as amended.

African government has issued dispensations to nationals of Zimbabwe, Angola[76] and Lesotho. [77] The dispensation for Zimbabweans is of more relevance to our discussion, as Zimbabweans are among the top refugee nationalities in SA since 2014 (Appendices, Table 2).

In the late noughties, mainly due to the decline in the political and economic situation in Zimbabwe, many Zimbabweans sought refuge in South Africa. Between 2008 and 2009, Zimbabweans constituted the majority of asylum applicants. The DHA reported that 'approximately 55% of all [asylum] applications arose from Zimbabwean nationals' and that it was 'necessary for the department to implement measures that will distinguish between Zimbabweans and other nationalities.'[78] In April 2009, the government therefore issued the *Special Dispensation for Zimbabwean Nationals* as a response to 'the high inflow of Zimbabweans into South Africa'.[79] The initial dispensation ran for only one year and it not only placed a moratorium on the deportation of Zimbabwean nationals, but also paved the way for a process for the regularisation of their status.[80] Consequently, in May 2010, the government introduced the Documentation of the Zimbabweans Project (DZP) whose implementation ran from September to December 2010. One of the stated objectives of the project, besides status regularisation, was to ease pressure on the asylum system.[81] Applicants for this dispensation could be issued with a business, work or study permit valid for four years. By the deadline of December 2010, the DHA had received 275,762 applications, of which 18% are reported as 'Asylum seeker surrendered'. [82] In 2014, when the DZP permit was about to expire, the government launched the Zimbabwe Special Dispensation Permit (ZSP) for those DZP Permit holders who wished to remain in SA. The permit was valid for three years. Upon its expiry in 2017, holders were given the opportunity to apply for the Zimbabwe Exemption Permit (ZEP) valid for four years until December 2021.

The Zimbabwean situation, including the exodus and response to it, has sparked a debate regarding the parameters of the refugee definition. Their refugeehood is contested, with some scholars arguing that Zimbabweans in SA represent a mixed migration flow,[83] some are moving regularly on a temporary or permanent residence basis as prescribed by law, while some could be escaping political persecution, the precarious economic situation in Zimbabwe, yet others could be moving for other varied reasons. However, since most of those coming into SA do not meet the strict criteria for formal migration, thereby regularizing their status under the Immigration Act, they have resorted to the asylum system as the only available means by which to regularize their status. This is a view that is validated by a number

[76] The Angolan Special Permit was introduced in 2015 to benefit former Angolan refugees who wished to stay on in South Africa upon the expiry of their two-year Angolan Cessation Permits, which they had been issued following cessation of their refugee status in 2013. The ASP is valid for four years from 2017 and entitles the over 1000 Angolan beneficiaries to work and study in SA. Details on the ASP are available at https://www.scalabrini.org.za/news/scalabrini-news/press-release-special-permits-issued-to-angolan-former-refugees-2/.

[77] The Lesotho Special Permit (LSP) was introduced in November 2015 for the benefit of those nationals of Lesotho that were in SA illegally following the socio-economic crisis in their country. In addition to suspending the deportation of Lesotho nationals, those that applied could be provided with a work, study or business permit, as the case may be. When the LSP expired in 2019, previous holders could apply for a new exemption permit valid until December 2023. Details on the LSP and its second extension are available at http://www.dha.gov.za/index.php/immigration-services/lesotho-exemption-permit-lep.

[78] DHA, *Annual Report 2008/09,* 29 available at http://www.dha.gov.za/index.php/about-us/annual-reports.

[79] Parliamentary Monitoring Group (PMG), 'Zimbabwean Documentation Project: briefing by Department of Home Affairs', 19 September 2011 available at https://pmg.org.za/committee-meeting/13428/.

[80] PMG, ibid, 'Presentation on the Documentation of Zimbabweans Project' (Presentation Slides).

[81] Ibid.

[82] Ibid. The term 'asylum seeker surrendered' is not explained, but presumably these are persons that were in the asylum system that opted for the DZP in lieu. According to Roni Amit, although it was not a condition of the Dispensation, many applicants for it who were also asylum seekers, some DHA offices required applicants to forfeit their asylum seeker status before applying for the DZP. See R Amit, *The Zimbabwean Documentation Process: Lesson Learned* (ACMS Research Report, January 2011) 24. If the forfeiture practice was not consistent across all offices, then the figure provided by the DHA may not be a complete representation of all those who might have been under the asylum system.

[83] T Polzer, 'Responding to Zimbabwean Migration in South Africa: Evaluating Options' (2008) 15 *South African Journal of International Affairs*, 1, 5-6; N de Jager & C Musuva 'The Influx of Zimbabweans into South Africa: a Crisis of Governance that Spills Over' (2016) 8, *Africa Review*,15, 26.

of researchers,[84] as well as the DHA[85] and UNHCR.[86] Despite the humanitarian and economic crisis in Zimbabwe that has not abated since the late 2000s, the DHA did not exploit the possibility of recognizing Zimbabwean asylum seekers under the expanded OAU definition, on the basis of which events in Zimbabwe could be interpreted as 'events seriously disturbing or disrupting public order'. The DHA rather assessed their claims based on the narrower definition of the 1951 Convention. This resulted in many rejections by asylum claimants, with the DHA mostly insisting that Zimbabweans in the asylum system were 'economic migrants.' Even of those that went through the asylum system, owing to the inefficiencies of it, many have been in the asylum limbo for years.[87]

While the dispensations provided an alternative documentation pathway to those who sought to regularize their status, including some that applied for asylum, its eligibility requirements excluded a large proportion of Zimbabweans. The documentation required such as a Zimbabwean passport, proof of employment or business, and proof of enrollment in an educational institution, relaxed as they were, could still not be provided by a large proportion of targeted Zimbabweans. Furthermore, for those that had to forfeit their asylum status, it was not clear whether they could re-enter the process if their DZP application was rejected,[88] or upon expiry of the DZP permits. More of concern, however, is that former asylum seekers were removed from the protection against *refoulement* under the Refugees Act and brought fully under the aegis of the Immigration Act under which their status can be easily revoked.

Unlike the earlier amnesties for Mozambicans and SADC nationals, the recent dispensations or exemptions expressly disentitle the holder of the right to apply for permanent residence regardless of the period spent in SA. Despite the use of the word 'permanent' within the statutory provision under which they are implemented, they are in fact temporary permits. Perhaps less so than refugee status through which one could obtain permanent residence.

b) Individual status determination

The Refugee regulations require that an applicant for asylum, and any dependant contemplated as such, must report in person before a RSD officer for a hearing.[89] Yet the process involves a number of actors and institutions each with a specific role. The details of the process are explained further in sections that follow.

VI. Institutions

Administratively, the asylum function and entire refugee protection mandate has always been nested within the DHA,[90] whose mandate is primarily twofold. The 'civic services' oversees all civic registrations, the population register and identification, and then the 'migration management' under which asylum management falls. The Refugees Act 1998 spells out the various offices and bodies involved in RSD. These can be divided into the frontline offices, the DHA top management and the semi-autonomous quasi-judicial bodies. Yet the oversight function which is also crucial for refugee recognition extends beyond these executive bodies. The judicial and legislative arms of government also play significant oversight roles in refugee recognition and management.

[84] J Crush et al, *The Third Wave: Mixed Migration from Zimbabwe to South Africa*, Migration Policy Series No. 59, (SAMP 2012) 23-24; G Mthembu-Salter et al, *Counting the Cost of Securitising South Africa's Immigration Regime*, Migrating out of Poverty Research Programme Consortium Working Paper 20, August 2014, 6-7; A Betts, *Survival Migration* (n14) 55.

[85] T. Polzer, 'Silence and Fragmentation: South African Responses to Zimbabwean Migration' in J Crush and D Tevera (eds), *Zimbabwe's Exodus: Crisis, Migration, Survival* (SAMP and IDRC, 2010) pp. 377-99; R Amit, *No Way In* (n19) 28.

[86] Crisp & Kiragu, *Refugee Protection* (n27) para 94; A Betts and E Kaytaz, *National and International Responses to the Zimbabwean Exodus: Implications for the Refugee Protection Regime*, Research Paper No. 175, UNHCR, Geneva, 2009, 10.

[87] D Fassin et al, 'Asylum as a Form of Life' (n22).

[88] R Amit, *The Zimbabwean Documentation Process* (n82).

[89] Refugee Regulations 2019, reg 8(1)(a) read together with reg 8(12).

[90] Klaaren, et al 'Talking a New Talk' (n35) p. 56.

a) Frontline offices

The Refugee Reception Office (RRO): Initially there were RROs in various provinces of the country: Port Elizabeth (Eastern Cape); Cape Town (Western Cape), Durban (Kwazulu Natal); and Musina (Limpopo). The Gauteng province was served by the office in Marabastad and an interim office at Tshwane (TIRRO) established in 2010, both in Pretoria, while Johannesburg had the Crown Mines office which had been opened following the successive closures of the offices at Rosettenville and Braamfontein. The Crowns Mines office was closed *circa* 2012. The TIRRO was also closed as it was only temporary. Presently there are three fully functional offices (Marabastad, Musina and Durban). The DHA had ordered the closure of the Port Elizabeth (PE) and Cape Town offices but these have been ordered to re-open following successful court action. While the PE office is re-opened, by end was receiving new applications by early 2020. For the Cape Town one, the DHA is still looking for suitable premises,[91] although it operates out of temporary premises dealing with pending applications and permit renewals.[92]

A RRO has at least these four key officers: the refugee reception officer, the refugee status determination officer (RSDO), the RSDO Manager, and the Centre Manager. The refugee reception officer registers the asylum claim, that is conducts a registration interview and inputs the applicant's responses into a web-based form (DHA BI 1590). The officer then takes the applicant's photograph and fingerprints, prints out the registration form for the applicant's signature. The application is registered in the database as a physical file is also created.

Of all officers at a RRO, it is the RSDO whose role is clearly spelt out in the law.[93] The RSDO conducts the initial adjudication on an asylum claim. He or she conducts the interview, following which they may grant asylum or reject an application on specified grounds. The law authorises the RSDO to include any conditions or issue instructions in respect to one's asylum visa, [94] a function that used to be exclusively exercised by the Standing Committee for Refugee Affairs (SCRA).

The RSDO is under the direct supervision of an RSDO manager, whose role is not statutory. He or she performs the efficiency and quality checks on RSDOs' performance and decisions.

In charge of the RRO is the RRO manager or centre manager whose role is primarily administrative and managerial. Although not primarily involved in adjudication, the manager has a statutory function to refer an abandoned application to the SCRA for endorsement.[95]

b) DHA Management

The Director General (DG): The DG is also the chief administrative officer or accounting officer of the DHA. He or she is deputised by chief directors, one of whom is of the Chief Director of Asylum Seeker Management. The DG's role has been expanded under the new amendment, and it includes: establishing and dis-establishing RROs, designation of officers as RSDOs, designation of administrative staff of the SCRA, enforcing and implementing crime prevention and integrity measures, and designation of places where specified categories of asylum seekers should lodge applications.[96] The DG also has powers to withdraw an asylum seeker visa for specified reasons, and also to revoke an asylum seekers right to work in case they fail to provide proof of employment after six months.[97]

The Minister for Home Affairs: The minister is responsible for the administration of the Act.[98] Specifically he or she has the powers to issue a cessation order, to appoint members of both the SCRA and the Refugee Appeals Authority (RAA), to order the removal of a refugee or asylum seeker on

[91] This update on the status of the PE and Cape Town offices was provided during the meeting of the CSOs with the DHA, DHA Headquarters, Pretoria, 28 November 2019.
[92] James (Jay) G. Johnson, 'Constructing and Contesting State-urban Borders: Litigation over Refugee Reception Offices in post-apartheid South African Cities'(2020) *Journal of Ethnic and Migration Studies*, 1-18, 10.
[93] Refugees Act, section 8(2) as amended.
[94] Ibid, sections 21(1)(b), 24(2) & (3), and 12(2)(d) as amended.
[95] Refugee Regulations, 2019, reg 9(1).
[96] Refugees Act, sections 8, 9H, 20A, 21(1C) as amended.
[97] Ibid, sections 22(5) & (11) as amended.
[98] Ibid, section 6(2).

grounds of national security, national interest or public order,[99] and, as mentioned earlier, to make a declaration for group recognition.

c) Quasi-judicial bodies

The Standing Committee for Refugee Affairs (SCRA): The SCRA is a multi-functional body with adjudicatory, administrative, supervisory and advisory roles. First and foremost, it reviews any decision by the RSDO rejecting an application as 'manifestly unfounded, abusive or fraudulent'[100]. Secondly, it determines the conditions and period pertaining to an asylum seeker's permission to work or study while awaiting the outcome of his or her application. Relatedly, it can determine sectors within which asylum seekers may not work or study. Thirdly, it monitors and supervises all decisions taken by RSDOs and, 'may approve, disapprove or refer any such decision back to the Refugee Reception Office with recommendations as to how the matter must be dealt with'; specifically decisions granting asylum or rejecting a claim as unfounded[101]. Fourthly, it advises the Minister or DG on any matter referred to it by either official, including training for staff. Under the regulations, the SCRA also has powers to withdraw the refugee status of any person that has been involved in political activity while in SA, to withdraw one's status where it was obtained fraudulently or was erroneously granted or in case of cessation, and to endorse an abandoned application, and to provide certification for persons who would remain refugees indefinitely and who wish to apply for an immigration permit.[102] SCRA members are appointed by the Minister for a five-year term, renewable. The law does not set the composition of the SCRA, but it has previously been a three-person team and is currently an eight-person committee albeit with some vacancies.[103]

An applicant whose case is subject to review by the SCRA will have 14 days within which to make written submissions to the SCRA. It is on these submissions that the SCRA bases its decisions. When deciding cases, it need not have a full quorum. An applicant aggrieved by the SCRA's decision may apply for judicial review.

Refugee Appeals Authority (RAA- formerly the Refugee Appeal Board or 'RAB'): This is an exclusively appellate body unlike the SCRA. The functions of the Authority are: to hear and determine any question of law referred to it in terms of the Act, to hear and determine any appeal lodged after being rejected by the RSDO as unfounded, and to advise the Minister or SCRA on any matter referred to it by either body.[104] In deciding on an appeal, the RAA may confirm, set aside or substitute a decision by the RSDO.[105] Members of the RAA are appointed by the Minister who may appoint such number having regard to the volume of its work. A member serves for not more than five years and is eligible for reappointment.[106] As the RAB, it was constituted of five members of whom only one had to have a legal qualification, and in hearing an appeal it had to have a quorum of three members. The new law requires that all members have a legal qualification and that an appeal may be heard by one member or such number as the chairperson of the RAA may decide.[107] Unlike the SCRA decision-making, the applicant may appear before the RAA for an oral hearing. A party aggrieved by the RAA's decision may apply for judicial review.

d) The courts

The South African courts exercise judicial review of decisions of administrative bodies in terms of Section 33 of the Constitution on the right to just administrative action. This constitutional provision is elaborated upon in the Promotion of Administrative Justice Act (PAJA). Accordingly, the court reviews decisions of the RSDO, the DHA as a whole, the SCRA and the RAA. Upon its review of RSD decisions, if it finds a violation of the PAJA, the court may substitute the decisions of administrative

[99] Ibid, sections 5(1)(h), 8B(1) & (2), 9B & 9F, and 28(1) & (2).
[100] Refugees Amendment Act, 2017, sections 9C (1) (c) & 24A (1).
[101] Refugees Amendment Act, 2017, ibid.
[102] Refugee Regulations, 2019, regs. 4(3), 9 & 23. See also Refugees Act, section 27(c).
[103] By March 2021, there were four vacancies on the SCRA, hence here were only four active members- See Portfolio Committee on Home Affairs, 'Refugee bodies on their work & challenges concerning Refugees & Asylum Seekers; with Minister & Deputy Minister' available at https://pmg.org.za/committee-meeting/32404/.
[104] Ibid, section 14 (1).
[105] Ibid, section 24B (2) as amended.
[106] Refugees Act, section 8B & 8D.
[107] Ibid, sections 8B & 8C. Since the new law came into force, the current composition of the RAA is not yet clear.

officers. There have therefore been occasions whereby the court has recognised previously rejected asylum seekers as refugees and ordered the DHA to issue them with the relevant documents.[108]

Its intervention is not limited to only adjudicatory decisions but extends to policy decisions as well. As we shall see further on, the court has overturned some policy decisions such as the closure of some RROs, departmental directives that are deemed to infringe upon the rights and dignity of asylum seekers and refugees. Most of the cases cited in this report demonstrate that it is mainly through the judicial process that most of the inefficiencies, unfairness and irregularities within the asylum management system have been exposed.[109]

For purposes of judicial review, the court of first instance is the High Court, whose decisions are appealable to the Supreme Court of Appeal as a final appellate Court. However, on all constitutional matters, the final court of appeal is the ConCourt. The discussion in the subsequent sections shall further illustrate the significant and crucial role of SA courts in its RRR.

e) The National Parliament

The role of the Parliament is not adjudicatory in nature and so, strictly speaking, it has no role in RSD. However, it is the body to which the DHA is accountable, and it has more recently, at the urging and lobbying of CSOs, taken greater interest in the asylum system.[110] Specialised Parliamentary Committees, particularly the Portfolio Committee on Home Affairs, usually require the DHA to provide asylum and refugee related data and information. Through this accountability process, the DHA has been put to task to report on its implementation of some of the court decisions. Hence, the role of parliament is quite significant insofar as it lends a measure of transparency and accountability to a system that would for all intents and purposes be highly opaque.

f) The role of UNHCR

UNHCR was the first UN organisation to establish itself in SA following the end of apartheid *vide* a Basic Agreement signed between UNHCR and the government. UNHCR's role therein was to facilitate the repatriation and reintegration of South African returnees.[111] In 1993, the two parties signed a new agreement which brought the Mozambican refugees in SA within the remit of UNHCR.[112] UNHCR, however, only provided assistance and support to the government which handled the RSD process. It can be said that UNHCR has never had a foremost and direct role in RSD in SA, save for its mandate RSD.

Under the Refugees Act, UNHCR's role in RSD is basically consultative depending on the discretion of the adjudicator. The RSDO may consult with it and invite it to provide some information on specified matters, while both the SCRA and the RAB may invite it to make oral or written representations in any matter before them. Apparently, UNHCR has not been consulted much by the first instance decision makers. According to one of our interviewees who worked in the asylum system, the hesitation by

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[108] PAJA, section 8 (c). Relevant cases include, *Tantoush v RAB* (n48); *FNM v Refugee Appeal Board & others*, (71738/2016) [2018] ZAGPPHC 532; [2018] 4 All SA 228 (GP); *Harerimana v Chairperson, Refugee Appeal Board and others*, 10972/2013) [2013] ZAWCHC 209; 2014 (5) SA 550 (WCC) (11 December 2013); *O N v Chairperson, Standing Committee for Refugee Affairs*, (15376/16) [2017] ZAWCHC 57 (16 May 2017); *FAM v Minister of Home Affairs & others*, (6871/2013) [2014] ZAGPPHC 649 (22 August 2014); *Bolanga v RSDO & others*, (5027/2012) [2015]ZAKZDHC 13 (24 February 2015); *Mayongo v Refugee Appeal Board & others*, (16491/06) [2007] ZAGPHC 17 (4 April 2007); *Akanakimana v Chairperson, SCRA & others*, (10970/13) [2015] ZAWCHC 17 (18 February 2015); *Katsshingu v Chairperson, Standing Committee for Refugee Affairs & others*, (19726/2010) [2011] ZAWCHC 480 (2 November 2011).

[109] Litigation on asylum claims is considerably high relative to other court cases against the DHA. In 2016/17, 1900 asylum litigation cases were brought against DHA, accounting for about 49% of the entire litigation case load against the DHA. PMG, Home Affairs Portfolio Committee meeting notes, Litigation against Department of Home Affairs, 7 November 2017, cited in A Mbiyozo, *Aligning South Africa's Migration Policies with its African Vision*, ISS Policy Brief 117, October 2018 available at https://issafrica.org/research/policy-brief.

[110] Refugee advocates remarked upon the improved engagement with Parliament in 2019, in which they urged the Parliament to put specific questions to the DHA - Planning and Strategic Meeting of the Civil Society Coalition, Johannesburg, 7 November 2019.

[111] *Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commissioner for Refugees* 2 October 1991 (n3) - sections 2 & 6.

[112] 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 the Republic of South Africa*, Sept. 1993. See also M Zieck, *UNHCR and Voluntary Repatriation of Refugees: A Legal Analysis* (Martinus Nijhoff 1997) 340-1.

decision makers to consult UNHCR was partly because the latter was generally regarded as 'pro-refugee'.[113]

Even then, the DHA views the UNHCR as a strategic partner whom it calls upon for technical or financial assistance on refugee-related matters. For instance, UNHCR has funded at least two backlog projects, the first one was launched in the early 2000s to process applications that were pending at the time the Regulations came into force. The second project was implemented in 2006 with the objective of clearing the backlog that had accumulated since the end of the first project.[114] More recently, in March 2021, the DHA and UNHCR signed an agreement on 'eliminating the backlog in the asylum seeker system' over a period of four years.[115]

UNHCR, however, conducts mandate RSD purely for purposes of resettlement.[116] This might be for an asylum seeker (including dependants) who have not been recognised as refugees by the SA government. However, some recognised refugees may also be resettled. From 1998 to 2018, 5,256 refugees have been resettled from South Africa. The highest 1,433 was resettled in 2016.[117] The SA resettlement figures for the twenty-year period are a little less than the average number of refugees resettled from Kenya per year over the same period.[118]

In terms of its wider role in SA, UNHCR is guided by its policy on refugee protection and solutions in urban areas, in which its role is synopsized as 'to preserve and expand the amount of protection space available to them and to the humanitarian organizations that are providing such refugees with access to protection, solutions and assistance'.[119]

Accordingly, UNHCR in SA mainly works through NGO partners and some government institutions to provide services to asylum seekers and refugees. These include provision of material assistance, which tends to be for a limited time only, and social support services. It also funds NGOs that offer legal assistance to refugees, but in some rare cases, it has instituted litigation directly on behalf of refugees.[120]

UNHCR's present vision is to work on asylum systems building, currently focussed on dealing with the RAA backlog and preventing a new backlog from forming. The backlog reduction was one of the SA government's formal pledges under the Global Refugee Forum.[121] In line with the objectives of the Global Refugee Compact, UNHCR works with the UN Country Team to align work plans towards the Sustainable Development Goals (SDGs) including Goal 16, promoting justice and building effective, accountable and inclusive institutions. This would partly involve providing continuous training for DHA officials.[122]

Before we turn to the next section, it is worth looking at some of the issues that may affect the functioning of the statutory institutions, specifically the SCRA and the RAB which, though meant to be functioning with a higher degree of independence, are very much embedded within the DHA.

g) Assessing the level of institutional autonomy and interaction

The Refugees Act stipulates for the independence of both the RAB/A and SCRA in the exercise of their functions.[123] However, the relationship between the DHA management and the RSD quasi-judicial

[113] Interview SAC_EL_24.

[114] Handmaker, J, 'Starting with a Clean Slate? Efforts to Deal with Asylum Application Backlogs in South Africa' in Handmaker et al (eds), *Advancing Refugee Protection* (n17) 117.

[115] http://www.dha.gov.za/index.php/statements-speeches/1422-address-by-the-minister-of-home-affairs-dr-aaron-motsoaledi-at-the-signing-ceremony-of-a-partnership-with-the-united-nation-high-commissioner-for-refugees-to-eliminate-a-backlog-in-the-asylum-seeker-system.

[116] Interview with UNHCR official, Pretoria, 4 December 2019.

[117] Statistics obtained from UNHCR Global Trends Reports 1998-2018.

[118] Resettlement figures from Kenya from 1998-2018 total up to 112,045 averaging approximately 5,602 refugees resettled from Kenya per year.

[119] UNHCR, *UNHCR Policy on Refugee Protection and Solutions in Urban Areas*, September 2009, available at https://www.refworld.org/docid/4ab8e7f72.html.

[120] One such case was *Abdi v Minister of Home Affairs* (n51). The court proceedings were initiated by a UNHCR Protection Officer seeking an urgent interdiction against the respondents that were in the process of repatriating the appellants, one an asylum seeker and the other a refugee, who at that point in time were detained at an airport holding facility. See also Khan & Schreier, *Refugee Law* (n20) xli.

[121] The entire list of SA's pledges are available at https://globalcompactrefugees.org/channel/pledges-contributions.

[122] Interview with UNHCR official, 4 December 2019.

[123] Refugees Act, section 9A as amended and section 12 (3).

bodies is not totally devoid of friction and challenges, which casts doubt on the latter's supposed autonomy. Firstly, both SCRA and RAB/A members are appointed by the Minister, who may appoint persons that will not oppose him or her. In one of our interviews, the then SCRA was described as a 'more or less a rubberstamp' and not really exercising its independence within the DHA.[124] Although the RAB, in the view of some, enjoys more 'marginal independence than SCRA',[125] at certain points in time, some RAB members have been described as 'weak'.[126] Secondly, both bodies are financially reliant on the DHA. According to one interviewee, there was a fundamental omission in the Refugees Act relating to a recommendation that would have enabled the implementation of the Act to be directly financed by the treasury[127]. This omission led to a situation whereby both SCRA and RAB/A are allocated only a small percentage of the entire DHA budget for all their operations. Thirdly, and as a direct result of lack of independent funding, both bodies rely on the DHA personnel to carry out their administrative functions, including getting access to files and sending communication to the applicants,[128] among others. This lack of dedicated personnel has particularly affected the RAB's ability to ensure that the applicants are properly served in time for their hearings or that they do indeed get their decisions. It would seem that their staff feel more answerable to the DHA top management than to the bodies to which they are deployed. In this respect, a former RAB member bemoaned the careless handling of their decisions by RSDOs; they would find some of the decisions lying on the floors of the RSDOs' offices, and some of them were not even relayed to the applicants.[129] Fourthly, both bodies are represented by the same DHA legal team during court proceedings. Actually, in one of the judicial review cases, the judge lambasted the RAB for having its independence compromised when it appeared to be defending the conduct of one of its co-respondents, the DHA, that had been a party in the hearing before it[130]. Fifthly, the fact that both bodies are situated within the DHA and for a while the RAB, especially, was hearing cases within the RROs, blurs any apparent semblance of independence.

Regarding the relationship between the SCRA and the RAB/A, the law provides that questions of law may be referred to the RAB/A, but it is hard to ascertain how often this has been done. Additionally, it is not clear why it was found necessary to have two bodies with a quasi-judicial role over matters that could have been handled by one body. Hence, it is unfathomable why applications rejected as manifestly unfounded, fraudulent or frivolous are not appealable to RAB/A, but are reviewable by SCRA. This bifurcation of processes not only adds onto the SCRA's administrative and supervisory workload, but has also led to a split in the inadequate resources that could have been invested in one quasi-judicial body.

Although the DHA has developed a White Paper on Home Affairs,[131] which sets out a strategy for an efficiently and humanely managed asylum system, it is silent on plans to streamline and bolster the effectiveness and smooth functioning of the core RSD institutions.

As we shall see in the following section, the entire RSD system has proven to be largely ineffective and incapable of fairly and efficiently processing applications. All RSD institutions have been subject to court processes and the courts have found defects in many of their processes. The DHA as a whole is subject to a multitude of court processes over various issues, but most of them migration-related.[132] There are many cases in which the DHA's actions have been found to be *ultra vires*, but the DHA has not been quick to remedy the transgression. There is no consistent monitoring of its adherence to court decisions, with the exception of a few prominent public interest cases. On occasion, the Parliamentary Portfolio Committee on Home Affairs has required the DHA to report on the progress of implementation of some cases, but these would only be the cases brought to the parliament's attention.

[124] Interview SAJ_EL_18.
[125] Interview SAJ_EL_18.
[126] Smith, 'The Making of the South African Refugees Act' (n17), 22.
[127] Interview SAC_EL_24.
[128] Handmaker, 'Starting with a Clean Slate?' (n114) 127.
[129] Interview SAC-EL_24.
[130] *Tantoush v Refugee Appeal Board* (n48) para 87.
[131] DHA, *White Paper on Home Affairs* (2019) available at http://www.dha.gov.za/images/PDFs/UPDATEDdhawhitepaper2019.pdf.
[132] For instance, by early November 2019, the entire DHA litigation caseload stood at 3,333, having gone done by 373 cases since 2018 - DHA, *Litigation Case Management System*, 'Presentation to the Portfolio Committee', 5 November 2019. The statistics provided do not disaggregate the various actions, hence one cannot tell the percentage rate of cases brought by or on behalf of asylum seekers and refugees.

VII. Quality of the recognition process

We assess the quality based on these four elements: accessibility of RSD procedures and processes, accuracy of the process and decisions, efficiency of the process and procedural fairness. As mentioned earlier, the quality of the recognition process in SA has been a subject of many research studies and reports, including those by NGOs and independent government agencies such as the Office of the Public Protector and the South African Human Rights Commission (SAHRC). This literature is also complemented by the myriad judicial decisions that further shed a light into the quality of the process. Given that we could not access the RSD decision makers, nor examine any case files to provide deeper insight into the decision-making process, the subsequent discussion particularly on accuracy and fairness of the process may thus seem lopsided or not giving the complete picture in some respects. In addition to our own research findings, we have relied on prior empirical research and court decisions to inform our assessment of the quality of the recognition process.

a) Accessibility

Under the Refugees Amendment Act an asylum seeker shall present himself or herself to a RRO within five days (previously 14 days) of entering the country.[133] Most RROs are located in major cities; Pretoria, Durban, Port Elizabeth and Cape Town (once it re-opens) - quite a distance from the border areas in the North East through which many asylum seekers gain entry into SA. Only the Musina office in the Limpopo Province is close to the border with Zimbabwe. Yet asylum seekers' access to RROs has always been fraught with challenges, some of which have resulted in some applicants abandoning their applications and choosing to remain undocumented.[134] We discuss some of the access-related challenges below.

Long queues: there are numerous reports and media images of long queues of applicants that have become synonymous with RROs. Asylum seekers have been forced to withstand all manner of weather and threats to person and property in order to preserve their places in the queue and gain access into the RRO building, which may take days in some instances.[135]Asylum seekers and refugees, as well as other migrants that opt to use the asylum system to regularise their status, have to endure this gruelling experience in order to validate their status and avoid the risk of arrest, detention and possible deportation.[136]

Closure of RROs: Initially, there were seven RROs, but since 2011 when a series of closures was instituted, there are now three fully functional ones. Following successful litigation challenging these closures, the various courts ordered the DHA to re-open these offices, a process that has considerably dragged on for years much in contempt of the court orders. [137] The RRO in Port Elizabeth (PE) was re-opened in early 2019, apparently with trimmed down provision of services according to the clients. With regard to the Cape Town office, the DHA claims to be in the process of finding a suitable office location in conjunction with the Department of Public Works.[138] The situation has possibly been exacerbated by the new legal requirement that asylum seekers must renew their visas at the RRO where they first applied.[139] The reduced options have meant that all asylum seekers and refugees converge at the operational RROs which has resulted in some people not being able to access the required service

[133] Refugees Act, section 4 (i) I & section 21 (1) (a) as amended.
[134] D Fassin et al, 'Asylum as a Form of Life' (n22).
[135] Amit, *No Way In* (n19) 41-44.
[136] R Sutton et al, 'Waiting in Liminal Space' (n22) 31-33.
[137] *Somali Association for South Africa v Minister of Home Affairs* 2012 (5) SA 634 (ECP); *Scalabrini Centre v Minister of Home Affairs* 2013 (3) SA 531 (WCC); *Minister of Home Affairs & others v Scalabrini Centre & others* 2013 (6) SA 421 (SCA). For a further discussion of these cases see F Khan & M Lee, 'Policy Shifts' (n23) 1212-14. For further commentary on closures see also J Crush et al, *Rendering South Africa Undesirable: A Critique of Refugee and Informal Sector Policy*, SAMP Migration Policy Series No. 79 (SAMP 2017) 7-8.
[138] CSOs meeting with DHA officials (n91).
[139] The requirement that permits are renewed at offices where the initial application was made was being intermittently implemented by the DHA over a number of years. It was challenged in court and in a number of cases the court led that the practice was unlawful. For a further discussion on the cases, see F Khan & M Lee, 'Policy Shifts' (n23) 1214-5.

on the appointed day and time.[140] This has also greatly disadvantaged those persons that have to travel very long distances in order to renew a permit, a process that may not necessarily be accomplished in a single day. Some RROs have, in attempt to manage the demand, revived the system of appointments.

Appointments system: time and again, RROs have resorted to giving applicant appointment slips to return on specific days which may be months ahead. Adjudicating upon this matter, the court held that the appointment system was unlawful as it lacked a legal basis. Besides, the slips provided no form of protection to the applicant but only exposed them to the risk of arrest, detention and possible deportation.[141] Notwithstanding the court decision, the practice has, if not persisted, been reinstituted. Some of our interviewees and NGOs reported that some RROs were offering appointment slips, in some instances for one year.[142]

Nationality days: the DHA operates a system whereby only specified nationalities are tended to on specific days.[143] This system was introduced for purposes of efficiency and to enable the RROs to arrange for interpreter services in advance, particularly when the DHA introduced a call-centre interpretation service. The 'nationality day' system has however had adverse effects on accessibility since one cannot be served outside the appointed nationality day even if their permits or visas expire before then. Even though the DHA has strictly adhered to the nationality days, it has not taken any measures to protect those persons that cannot timeously renew or apply for their documents thus exposing them to the risk of facing arrest and detention as 'illegal immigrants'.

Financial costs: the services rendered to asylum seekers and refugees are officially free of charge ad yet there are a lot of hidden costs involved. Attending RROs or DHA offices involves travel costs and in some cases accommodation costs, especially for those that have to travel long distances. For those who may have failed to renew their permits on time, they incur a penalty of about ninety (90) US dollars for late renewal.[144]

Bribery and Corruption: The DHA has been subject to serious and persistent corruption allegations.[145] Corruption poses a serious barrier to access in many ways. Some asylum seekers and refugees only managed to gain entry into the RRO by bribing the security officers to enable them jump the queue. RRO staff themselves are not above bribery and may, in some cases, only issue positive decisions to those that pay for them.[146] All our interviewees attested to the prevalence of corruption within the asylum system, which is no secret at all. One of them stated, '[i]f you do not pay, even the guy that reads out the permits that are ready, he does not give you your document'.[147]

The DHA has on occasion referred to it as a 'systemic' problem and has instituted a number of mechanisms to try to stem it, including the establishment of a Counter Corruption and Security unit.[148] The Refugees Amendment Act explicitly sets out to 'provide for integrity measures to combat fraud and corruption among staff members at Refugee Reception Offices', and entails provisions to this end.[149] It remains to be seen if this law will prove effective where previous measures have failed.

b) Accuracy

The Refugee Regulations offer some guidance to RSDOs for ensuring accuracy during the RSD hearing. The RSDO must inform asylum seekers of the procedure to be followed and that the interview will be

[140] This point was emphatically made by one of our interviewees- SAJ_MS_05.
[141] *Tafira & others v Ngozwane & others,* (12960/06) [2006] ZAGPHC 136 (12 December 2006); *Ersumo v Minister of Home Affairs* (n54).
[142] Interview SAJD_EL_20; CSOs Meeting with DHA officials (n91).
[143] Details are available at http://www.dha.gov.za/index.php/immigration-services/schedule-for-asylum-seekers.
[144] One of our interviewees narrated that he had failed to renew his permit for about two years simply because he could not afford the costs involved. He only renewed it after he had collected sufficient money to cover his costs including travel from Johannesburg to Cape Town, accommodation, the penalties and the bribes, all of which came up to total of about 1,200 USD - Interview SAJ_MS_04.
[145] Amit, *Queue Here for Corruption* (n19); Corruption Watch, *Asylum at a Price: How Corruption Impacts those Seeking Legal Protection in South Africa* (Corruption Watch, November 2016) available at https://www.corruptionwatch.org.za/cw-exposes-widespread-corruption-at-home-affairs/; Lawyers for Human Rights, *Costly Protection: Corruption in South Africa's Asylum System* (LHR, 2020).
[146] Ibid.
[147] Interview SAJ_MS_04.
[148] DHA, *White Paper on Home Affairs* (n131) 14.
[149] Refugees Amendment Act, section 20A; Refugee Regulations, 2019, reg 6.

recorded. The RSDO must also, 'test any claim made by an applicant against any information, evidence, research or documents' at their disposal.[150] Where interpretation is required, it should be by a qualified interpreter.[151] These provisions of the Refugees Act are supplemented by those of the PAJA which lays out reasons for which an administrative action or decision may be rendered unlawful and these include: i) the decision was materially influenced by an error of law; ii) it was taken for a reason not authorised by the empowering provision; iii) irrelevant considerations were taken into account; iv) relevant considerations were not taken into account; or v) the decision was taken in bad faith, or capriciously or arbitrarily. Regarding evidentiary assessment, the law does not contain any stipulation on standard of proof in RSD, but the court has adjudged the requisite standard to be 'one of "a reasonable possibility of persecution"'.[152]

Breach of procedural standards: Existing empirical studies[153] have highlighted the many flaws in RSD decisions that flout the accuracy standards. These include errors of law, reference to the wrong claimant or country and, applying the civil law 'balance of probabilities' standard that is considered higher than the credibility assessment that accords the applicant the benefit of the doubt[154] in asylum cases. Research findings have demonstrated numerous instances of inaccurate assessment of country conditions, failure of a RSDO to apply his or her mind, thus making capricious or arbitrary decisions, failure to take into account relevant considerations, or conversely taking into account irrelevant considerations.[155]

The quasi-judicial bodies have also been found to fall foul of the accuracy standards, as a number of court decisions demonstrate. Specifically, and just by way of illustration, the court has found failure by the decision-maker to consider relevant considerations where they failed to assess an application under the expanded refugee definition,[156] failure to apply the appropriate standard of proof,[157] among other procedural irregularities. Furthermore, in the course of our research, some legal aid NGOs expressed concerns over some incidents of what, in their observation, appeared like 'copy and paste' RSD decisions, a practice that Roni Amit also identified in her research.[158]

High rejection rates: Save for the years 2002-2005, the number of rejected cases in SA's asylum adjudication has always been higher than the recognised or positive decisions (Appendices, Table 1). In 2019, Amnesty International reported that the rejection rate in South Africa, based on RSD outcomes from 2011 to 2015, was 96%.[159] In our interviews, refugees anecdotally revealed that all new applications (at least in 2019) were being rejected[160] as 'manifestly unfounded, abusive or fraudulent' which meant that the caseload at SCRA was increasing. The high rejection rates at the first instance are further borne out by the build-up of the case backlog at both the SCRA and the RAB, which in the case of the latter is alarmingly high as we shall see shortly.

The persistent lack of accuracy may not be objectively explained without a first-hand assessment of the bureaucratic practices and RSD first instance decisions. Our various interlocutors, however proffered a range of opinions on the matter based on their individual experiences. For refugees and asylum seekers possible explanations ranged from a lack of respect and undignified treatment RSDOs usually mete out, corruption, to a mere manifestation of the lack of training and professionalism of officials at RROs.[161]

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[150] Refugee Regulations, 2019, reg 14(3-6).

[151] This requirement is included in the Application for Asylum Form annexed to the Regulations, 2019.

[152] *Tantoush v RAB & others* (n48) para 97. This standard is premised on the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* (2003) para 196-7.

[153] Amit, *All Roads Lead to Rejection* (n19); Amit, 'No Refuge' (n19).

[154] UNHCR, *Note on Burden and Standard of Proof in Refugee Claims*, 16 December 1998, paras 8, 11-12, available at: https://www.refworld.org/docid/3ae6b3338.html.

[155] Amit, *All Roads Lead to Rejection*, (n19), 31-94; Amit, 'No Refuge' (n19), 464-487.

[156] *FNM v Refugee Appeal Board & others* (n108), *O N v The Chairperson of the Standing Committee for Refugee Affairs*, (n108); *FAM v Minister of Home Affairs and others*, (n108); *Akanakimana v The Chairperson of the SCRA and others*, (n108); *Katabana v The Chairperson of the Standing Committee for Refugee Affairs*, Case No. 25061/2011 of 14 December 2012 (WC).

[157] *Van Gardaren NO v Refugee Appeal Board*, TPD Case No 30720/2006, 19 June 2006; *Tantoush v Refugee Appeal Board & others* (n48).

[158] This point was raised by CSOs in a meeting with DHA officials (n91) who in response requested CSOs to adduce hard evidence rather than make mere allegations. It also came up in a phone interview SAJD_EL_20. See also R Amit, *All Roads Lead to Rejection* (n19), 59.

[159] Amnesty International, *Living in Limbo* (n11) 15.

[160] World Bank statistics likewise indicate a zero percent increase in refugee recognition rates in SA between 2018 and 2019 - see macrotrends.net/countries/ZAF/south-africa/refugee-statistics.

[161] Interviews SAJ_MD_01, SAJ_MD_02, Focus Group Discussion (FGD), Johannesburg, 15 November 2019.

The NGOs tended to draw similar inferences but highlighted in particular the recalcitrance of the DHA, a department that they can only meaningfully engage with through litigation.[162] Even when the DHA often acts in contempt of court decisions. Both NGOs and refugees also mentioned institutional xenophobia, suggesting that the inaccuracies upon which rejections are based are in most cases wilful. A former senior DHA official could not however, dismiss the role of political or executive influence coupled with the timidity of RSDOs to contravene superior orders.[163] Another was quite emphatic that the problem was one of poor management which was partially a result of recruitment of unqualified personnel, as technical know-how is sacrificed for know-who. Consequently, some people are placed in key managerial and supervisory positions that they cannot effectively perform.[164]

The historical underpinnings of the asylum management unit under the aegis of the ACA, might provide additional insights. Even though the ACA was repealed in 2002, its influence appears to permeate the bureaucracy's operations and general attitude towards asylum seekers and refugees. This hypothesis is confirmed in the findings of a research survey in its observation that, 'many of those staffing the reception offices do not view their role as one of providing a progressive system of protection for people fleeing persecution….Rather, many officers operate as gatekeepers aiming to keep out what is perceived as an influx of migrants seeking to exploit the opportunities in South Africa'.[165]

c) Efficiency

In 2007-2009, the DHA embarked on implementation of a 'Turn-around Strategy', an attempt to transform the Department into a client-oriented service. One of its hallmarks of its success would be reduced turnaround times in service delivery.[166] According to the DHA, there was 'significant investment in governance, systems, service culture, security and training' which 'produced positive results that restored confidence in the DHA and greatly improved staff values, morale and skills'.[167] Yet this success appears not to have equally filtered through into migration management generally, and least of all to the asylum management function.[168] According to Belvedere, however, the South African asylum processing function seems to have always operated with insufficient infrastructural, human and financial resources.[169] Therefore when demand for asylum increased, the RROs could not effectively cope and tended to refer to the increased asylum applications as 'an influx'. In one of its decisions the court taking cognisance of this fact stated:

> It seems to be clear that the department has too few officers in the field and an ever increasing backlog exists in respect of applications for asylum. Why more personnel have not been appointed is not clear … but what is clear, is that the present compliment of staff cannot deal with the numbers of applicants for asylum.[170]

One possible inference from this indictment is that the individualised RSD has put enormous strain and discretion on RSDOs who besides being too few, may also lack the necessary skills and knowledge to effectively execute their functions. Yet according to the White Paper on Home Affairs, there is no indication that the DHA plans to invest more resources into asylum management. The lack of sufficient resources could be but only one of several factors that impact on the efficiency of the asylum process which manifests itself in multiple dimensions.

Dealing with the queues: the DHA has over the years produced a number of strategies and plans aimed at improving efficiency and services delivery. These include broader organisational interventions such

[162] Interviews SAJ_EL_22, SAJ_EL_19, SAP_EL_21, SAJ_EL 18.
[163] Interview SAC_EL_24. An ethnographic study has also found that RSDOs tend to be fearful of contradicting their bosses even when they think they issue contradictory directives- C Hoag, 'The Magic of the Populace' (n21) 13.
[164] Interview SAJ_EL_16.
[165] Forced Migration Studies Programme (FMSP), *National Survey of the Refugee Reception and Status Determination System in South Africa*, Migrant Rights Monitoring Programme Research Report (February 2009) 52.
[166] A Segatti, C Hoag, and D Vigneswaran, 'Can Organisations Learn without Political Leadership? The Case of Public Sector Reform among South African Home Affairs Officials' (2012) 4 No. 128 *Politique Africaine* 121, 130-2.
[167] DHA, *White Paper on Home Affairs*, (n131).
[168] Segatti et al, 'Can Organisations Learn?' (n166), 129-130,141. Reporting on its 2014/15 expenditure, the DHA spent a total of ZAR7.224 billion of which ZAR4.553 billion allocated to civic services while the Immigration services only received ZAR721 million. Of this only ZAR56 million was spent on asylum management – Corruption Watch, *Asylum at a Price* (n145) 25.
[169] Belvedere, *Beyond Xenophobia* (n17) 148.
[170] *Tafira & others v Ngozwane & others* (n141).

as the Turn-around Strategy, the War on Queues, 2018, and the recent White Papers on Immigration and Home Affairs. However, most of the noticeable improvements have been made on the civics services side rather than the immigration services and least of all the asylum management directorate. There have been a few exceptions. Asylum seekers and refugees concurred that the most notable improvement within asylum processing was the introduction of the automated permit renewal system. Once one gets into the RRO, they are required to sign in by thumb-print and sooner rather than later, they will receive their renewed permit.[171] Notwithstanding this system, long queues are a continuing concern at RROs.

Asylum processing periods: excruciatingly long asylum processing periods continue to be the hallmark of SA's RSD regime. The law previously provided for a 180-day period within which applications for asylum would be adjudicated.[172] This time-frame has been systematically breached with some asylum seekers holding that status for more than ten years, which may or may not include the time within which one is awaiting either a review or an appeal hearing following an initial rejection decision.[173] In an attempt to address this challenge, the DHA at one point adopted a system of single-day adjudications, requiring RSDOs to issue ten decisions in a day. This efficiency measure however, as pointed out by Roni Amit, was at the expense of accuracy and fairness aspects of the process.[174]

Consequently, asylum seekers in SA more often than not live a life of precarity, some even making the difficult decision to abandon their applications altogether, opting instead to stay on in a situation of irregularity. Didier Fassin and colleagues have discerningly described this state, prevalent among many asylum seekers, as a 'form of life'.[175] Under the 2019 regulations, any reference to the total adjudication time-frame has been omitted.

Lack of communication: All asylum seekers and refugees that we interviewed stated that they never received any communication on the status of their cases, not even when their appointed interviews were postponed. They relied on constant follow-up at the RRO whenever they went to renew their permits. There have also been instances where decisions on applications or appeals have not been communicated to the applicant who may only get to know of the status, if not fortuitously, then through legal intervention. At times this has occurred at the point of deportation from the Lindela detention centre.[176]

Backlogs: there is no official definition of what constitutes a backlog, but as a working definition, we can say that these are applications that have not been conclusively adjudicated upon within the stipulated time-frames. In 2000, when the Refugees Act came into force, the DHA had a backlog of slightly over 27,000 cases awaiting first instance decision, and about 4000 pending appeal.[177] The law took cognisance of this fact and included a transitional provision on backlog clearance.[178] Even though backlog projects were implemented then, as earlier mentioned, the problem has since escalated.

According to the Auditor General's report of November 2019, the SCRA backlog was at 40,326 cases, while the RAB backlog was much higher at 147,794 cases. It forecasted that, at their respective current capacities, it would take the SCRA about a year to clear its backlog while the RAB would need 68 years if it did not take on any new cases.[179] By March 2021, the appeals backlog stood at 124,000 active cases and 29,967 inactive cases, while the SCRA had 28,549 RSDO decisions pending review.[180] The total

[171] FGD, 15 November 2019. This opinion is also reflected in L Schockaert et al, 'Behind the Scenes' (n22) 16.
[172] Repealed Refugee Regulations, reg. 3(1).
[173] Some applicants have had to approach various oversight bodies to compel the RSD institutions to process their claims in a timely manner- *MT v RAB & others*, SAHRC Investigative Report Ref. No. GP/1415/0433, 4 August 2017; *Katabana v Chairperson of the SCRA* (n156).
[174] Amit, 'No Refuge' (n19) 459-460.
[175] D Fassin et al, 'Asylum as a Form of Life' (n22) 160.
[176] R Amit, *Breaking the Law, Breaking the Bank: The Cost of Home Affairs' Illegal Detention Practices* (ACMS Research Report, September 2012) 41-45; LHR, *Monitoring Policy, Litigious and Legislative Shifts in Immigration Detention in South Africa* (LHR, May 2020) 32.
[177] Handmaker, 'Starting with a Clean Slate' (n114) 117.
[178] Repealed Refugee Regulations, reg 19.
[179] Auditor-General SA (AGSA), *Follow-up Performance Audit of the Immigration Process for Illegal Immigrants at the Department of Home Affairs* (AGSA, November 2019), 11 available at http://www.agsa.co.za/Reporting/SpecialAuditReports/PerformanceAuditReporting.aspx.
[180] Portfolio Committee on Home Affairs, 'Refugee Bodies on their Work & Challenges (n103).

number of active asylum visas as at 1 January 2020 was 188,296, that is, both new and pending applications,[181] including those under appeal or review.

The DHA remains optimistic that with the new amendments to the law which allow for flexible appointments to both the SCRA and RAA, and eases quorum requirements when deciding cases, both bodies are better poised to deal with the caseload more efficiently.[182] Particularly for the RAA, this ambition has been bolstered by the recently signed DHA-UNHCR agreement aimed at eliminating its backlog.[183]

d) Fairness

Section 33(1) of the Constitution on the right to lawful, reasonable and procedurally fair administrative action, that is expounded upon in the PAJA establishes the standard for fairness upon which RSD decisions are adjudged. The PAJA recognises that fair administrative procedure will depend on the circumstances of each case, but it also sets some guidelines or benchmarks that administrative officers should adhere to. It requires that the person affected by the administrative action should be given notice of the nature and purpose of the proposed action, they should be given a reasonable opportunity to make representations, they should be provided with a clear statement of the administrative action, adequate notice of any right of review or internal appeal, and adequate notice of the right to request reasons for the action. In addition, the administrator has the discretion to give a person an opportunity to obtain assistance including legal representation, to present and dispute information and arguments, and to appear in person.[184]

The refugee regulations, 2019 restate these provisions. Accordingly, the RSD hearing has to be conducted in person, and the RSDO is required to inform the applicant of the procedure to be followed before the commencement of any hearing. The RDSO has the discretion to require further information, evidence or clarification from the applicant or 'any other relevant person, body or source'.[185] The law specifically enjoins RSDOs to have due regard to the constitutional right to just and fair administrative action. This obligation extends to both the SCRA and the RAB.

Explanation of the procedure: RSDOs do not seem to adhere to this practice consistently or uniformly. In her research, Roni Amit reported that 43% of her respondents had been offered an explanation of the RSD procedure. [186] In our own research, none of the asylum seekers or refugees that we interviewed mentioned being offered an explanation of the RSD process at any one point.[187] Some of them at the time of making their application could hardly speak or understand English. They therefore relied on interpreters, who in some cases were not staff of the RRO, but were acting as brokers or middlemen, or they relied on fellow asylum seekers whom they thought were more proficient in the language. Consequently, many asylum seekers go through the process rather unconsciously and without adequate preparation.

Opportunity to prepare for the interview: the idiosyncrasies in SA's asylum system militate against one's right to adequately prepare for their interview. Interviews rarely take place on the first scheduled date, but rather on a chance random day on which an asylum seeker would normally expect to have their permit renewed but they are instead invited for an interview. This may occur years later. Considering the length of time it takes to secure an interview, asylum seekers are unlikely to request a rescheduling in order to adequately prepare. There is a suspicion among asylum seekers and refugees that it is only those that bribe officers at the RRO that will have their interviews on the scheduled date.[188]

Making representations during the interview: virtually all our interviewees could not remember the details of the interviews,[189] beside the general observation that the questions asked were similar to the

[181] PMG, *Questions and Answers,* 18 March 2020 available at https://pmg.org.za/.
[182] Address by Minister for Home Affairs on 8 March 2021 (n115).
[183] Address by the Minister, ibid.
[184] PAJA, section 3 (1-3).
[185] Refugee Regulations, 2019, reg 14 (5).
[186] Amit, *No Way In* (n19) 47-48.
[187] Interviews SAJ_MD_01, SAJ_MD_02, SAJ_FD_03, SAJ_MS_04, SAJ_MS_05, SAJ_MS_06, SAJ_FS_07, SAJ_FS_08, SAJ_ME_09, SAJ_ME_10, SAJ_FE_11, SAJ_FE_12, SAJ_ME_13, SAJ_MD_14.
[188] Interview, SAJ_ME_09.
[189] See interviewees (n187). This could probably be due to the fact that several years had passed since their interviews. The most recent arrival of all our interviewees had been in SA for seven years.

ones in the application form. Most interviews are based on the information provided by the applicant in their application form. But given the length of time that may pass before the interview is conducted, some applicants may not have a clear recollection of what they stated in the form, of which they do not retain a copy. It is even harder for those applicants that were initially assisted by an interpreter to fill in the form, some have claimed that what was in the form is not what they told the interpreter.[190] The representations that applicants may then make in the interview may contain some obvious discrepancies and inconsistencies which may jeopardise their claim. Interviews, despite some of the flaws in the process, are certainly the norm, and yet at least two of our interviewees testified that they were rejected without ever being interviewed.[191]

Notice of the right to appeal: the rejection letter usually entails a statement to the effect that one may appeal to the RAB or await an automatic review by the SCRA. However, there is no further information provided and applicants often rely on each other for advice on how to proceed. The appeal once written out is submitted at the RRO where the rejection letter was issued and no acknowledgement of receipt is provided. Applicants will have to keep renewing their asylum seeker permits and it is usually in the course of that process that they get to know the dates of their appeal hearings, unless they have managed to obtain the services of lawyers to do the follow-up.

Reasons for an action: refugees that we interviewed conceded that they hardly ever ask for reasons for actions by RRO and DHA officials. This is not because they would prefer to remain blissfully ignorant, but because of the disrespectful, rude and even cruel treatment that they often experience at these offices.[192] Yet some of the refugees were of the view that the problem was less systemic and more to do with individual staff members. The general impression, however was that refugees and asylum seekers have been so greatly disempowered within that bureaucratic space that they accept any decision without question.

Save for one person who deemed the RSD process to be fair, on account that she did not encounter many bureaucratic obstacles in getting recognition as a dependant spouse, the rest of the asylum seekers and refugees that we interviewed were of the view that the RSD process was unfair citing mainly reasons mentioned earlier including the queuing, the length of time the process takes, the lack of communication, the mistreatment most of them experience at the RROs, the short duration of permits, the corruption, among others. Some of them admitted to feeling stressed just at the mere thought of having to appear at the RRO/DHA. For most of them, the asylum process in SA seems to induce a measure of trauma additional to what they previously experienced in their country of origin or *en route* in the search for protection.[193]

It is rather difficult to understand why the South African RSD bureaucracy works the way that it does without engaging with it directly. Overall, as is the common conclusion in the scholarship, the SA RSD process is 'seriously dysfunctional'[194] in spite of a relatively strong legal framework. The extent and effect of this dysfunction has been well-articulated by a High Court judge, stating that,

> It is plain that there is a systematic dysfunctionality in the relevant branch of the Department of Home Affairs, which has resulted in its persistent failure or inability over a period of several years, and notwithstanding repeated judicial admonitions, to comply with its legal obligations in matters in which its decisions are taken on judicial review. The consequences prejudice not only the proper administration of justice, but also the effective administration of the Refugees Act. Courts are frequently called upon to make, and … frequently do make substitutive decisions

[190] One interviewee was so sure that what the interpreter had written was definitely not what he had told him. Interview SAJ_ME_13. See also Amit, *No Way In* (n19) 12, 50; Amit, *All Road Lead to Rejection* (n19) 42.

[191] Rejection or decision without an interview though not so frequent is not uncommon. Amit, *No Way In*, ibid 59.

[192] Almost all refugee and asylum seeker interviewees' narratives concurred that the abuse starts right from the security guards at the gate right up to some senior officials in the RRO. One interviewee recounted being made to stand for hours while she was heavily pregnant and when she asked for a seat, the officer rudely retorted, whether it was he who had made her pregnant. Another one whose wallet was stolen in full view of the security guards at the DHA was mocked at that that is the risk asylum seekers took in coming to SA. Others testified to occasions when they experienced either verbal or physical abuse or both.

[193] See also L Schockaert, 'Behind the Scenes' (n22).

[194] Crisp & Kiragu, *Refugee Protection* (n27) para 94.

determining the refugee status of applicants in judicial review matters. This might be just and equitable in given cases, but it is far from ideal.[195]

VIII. Quality of protection

Besides the principle of *non-refoulement* which applies to both asylum seekers and refugees, most of the rights or entitlements enumerated in the Act expressly apply to refugees, i.e. persons who have been granted asylum in terms of the Act.[196] These include the enjoyment of full legal protection, the right to remain in SA, to seek employment, entitlement to basic health services and basic primary education on the same standing as nationals, entitlement to formal written recognition, an identity document, a South African travel document upon application, and to apply for an immigration permit after a continuous period of stay where one is considered to be in a protracted refugee situation. Additionally, refugees are entitled to the rights set out in the Constitution, except those that are expressly limited to South African citizens.[197]

The rights guaranteed in the Constitution, which apply to all persons residing in SA have proven to be the one assured avenue for upholding the rights of refugees and asylum seekers in SA. Indisputably, refugee protection has been largely bolstered by court's interpretation and application of the constitutional provisions, particularly the bill of rights.

a) Security of Residence/Residency Rights

Under the Refugees Act, '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 that person claims asylum or may qualify for refugee status. [198] Additional to the protection from *refoulement* or rather as a guarantee of it, security of residence for refugees or asylum seekers in SA is essentially about being in possession of valid documentation at all times in all places. Lack of valid documentation including an expired permit or visa, regardless of when it expired or the circumstances of its expiration, renders one an 'illegal immigrant' liable to arrest, detention and deportation. It is no surprise then that refugees and asylum seekers will do all they can to ensure their documents are always up-to-date unless the system fails them which it has in most cases done.

Asylum transit visa: an asylum seeker should be given a five-day asylum transit visa at a port of entry once they declare their intention to seek asylum. Initially, the law provided for a 14-day asylum transit permit.[199] Presently, one is expected to report to a RRO within five days of entering the country and obtain an asylum seeker visa. Failure to do so, one risks becoming an 'illegal foreigner' and is liable to deportation should his or her five-day permit expire before applying for asylum.[200] Given the well-documented challenges that asylum seekers face in accessing RROs, the five-day limitation is not only largely impractical, but also lends support to the popular claim that South African refugee policy is increasingly directed at 'limiting access to its asylum regime'.[201]

Some of our interviewees that had entered into SA irregularly, either through the border with Zimbabwe (Beitbridge) or Mozambique (Lebombo), testified that upon entry and being apprehended by the Immigration police they were given an asylum transit visa valid for 14 days (as it then was) to enable

[195] *Kenneth Tshiyombo v The Members of the Refugee Appeal Board and others*, Case No. 13131/2015, 2016 (4) SA 469 (WCC) para 14.

[196] Refugees Act, sections 27 & 1(xv).

[197] Although the Refugees Act does not mention the exception for rights reserved for citizens, the Constitutional Court of South Africa has unequivocally stated that the Constitution explicitly confines certain rights to citizens, otherwise all rights contained therein accrue to everyone in SA- *Union of Refugee Women and Others v Director: Private Security Industry Regulatory Authority and Others*, Case CCT 39/06, SA: Constitutional Court, 12 December 2006, para 46; *Lawyers for Human Rights & Another v Minister of Home Affairs & Another*, 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC), para 27.

[198] Refugees Act, section 2, see also *Ruta v Minister of Home Affairs* (n53) para 30.

[199] Immigration Act, 2002, section 23, initially provided for an asylum transit permit valid for 14 days. This section was amended by Act No. 13 of 2011 reducing the 14 day validity period to five days. The amendment came into effect on 26 May 2014; Refugees Regulations, 2019, reg 7.

[200] Immigration Act, 2002, section 23 (2).

[201] Khan & Lee, 'Policy Shifts' (n23) 1223.

them to approach a RRO to make their asylum application.[202] However, the practice was not uniform and not every potential asylum seeker got the 14-day permit. Yet, even those with valid transit permits may, not for lack of trying, fail to gain access to a RRO before the transit permit expires. The common practice of arresting and detaining with the object of deportation of asylum seekers with expired permits is one that human rights NGOs and the courts have persistently pushed back against with some measure of success.[203]

Asylum Seeker Visa (previously 'asylum seeker permit'): any one that makes an application for asylum 'is entitled to be issued with an asylum seeker visa' pending the adjudication of their claim.[204] Previously the law shielded an asylum seeker whose entry or stay in SA was illegal against any proceedings until they had exhausted their rights of review or appeal.[205] The Refugees Amendment Act makes it mandatory for an asylum seeker to present their application with an asylum transit visa unless they can show good cause for their illegal entry or stay.[206] This provision makes reference to article 31(1) of the 1951 Convention which has been widely interpreted to protect an asylum seeker for any breaches of a host state's domestic laws.[207] The language of the Refugees Act, contrarily tends to be exclusionary and effectively shifts the burden of proof onto the applicant, a standard that would seem much higher than that required by international law.

The law does not specify the validity period for an asylum seeker visa. But the permit/visa ominously indicates when the visa expires.[208] While the previous position was that the refugee reception officer would issue a permit subject to conditions determined by the Standing Committee,[209] the new provision simply states that the permit may be extended from time to time for such period as may be required.[210] This discretionary power has resulted into erratic practices whereby the validity duration could range anywhere from one to six months.

The shift in terminology from 'permit' to 'visa' also strongly suggests a move to further curtail the rights and status of asylum seekers. 'Visa' denotes temporariness or shortness of one's stay relating mainly to the right to enter and travel within or through the host country. 'Permit' on the other hand denotes an assured longer-term residency and attendant rights, even if it is usually fixed term. Thus, the asylum seeker visa emphasises the precariousness of the status of asylum seekers in SA. This is by no means abated by the fact that one's visa will be considered as abandoned if they fail to renew it within one month of its expiry. Such an applicant is barred from re-applying for asylum thus becoming 'an illegal foreigner' pursuant to the Immigration Act.[211] Additionally an asylum seeker visa may be withdrawn if the asylum seeker contravenes any condition endorsed on it[212].

Certificate of recognition of refugee status: An asylum seeker whose application is successful receives a formal recognition of refugee status.[213] The certificate is valid for four years and is renewable upon one making an application for renewal ninety (90) days prior to its expiry[214].

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[202] In her research, Amit similarly found that just over one third of their interviewees had not been handed a 14-day asylum transit permit at the border – R Amit, *No Way In* (n19) 35. See also, LHR, *Monitoring Policy* (n176) 32-5.

[203] See Concourt decision in *Ruta v Minister of Home* (n53).

[204] Refugees Act, section 22 (1) as amended. A template of the asylum seeker visa is appended to the Refugee Regulations, 2019 available at https://www.gov.za/documents/refugees-act-regulations-27-dec-2019-0000.

[205] Refugees Act, 1998, section 21 (4) prior to the amendment.

[206] Refugee Regulations, 2019, reg 8 (1) (c) (i) & 8 (3).

[207] G Goodwin-Gill, 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, Detention and Protection' in E Feller et al, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press 2003) 187, 193-196.

[208] Asylum Seeker Permit/Visa contains this standard paragraph. "The holder of the visa shall without expenses to the state, leave the Republic on or before ------- or such later date as duly authorized by a Refugees Status Determination Officer if his/ her application for asylum has been rejected."

[209] Refugees Act, section 22 (1) as it was, read together with the repealed Refugee Regulations, reg 7 (1) (b).

[210] Refugees Act, section 22 (4) as amended.

[211] Refugees Act, section 22(12) & (13), as amended. The constitutionality of these provisions has been challenged in *Scalabrini Centre Cape Town and another v Minister of Home Affairs and others*, Case 5441/2020. Following an urgent application, the High Court in November 2020, issued an interim interdict against the DHA restraining it from implementing these provisions until it has disposed of the main suit that challenges the constitutionality of the same.

[212] Ibid, section 22 (5).

[213] Refugees Act, section 27 (a). A template of the certificate of recognition is appended to the Refugee Regulations, 2019 available at https://www.gov.za/documents/refugees-act-regulations-27-dec-2019-0000.

[214] Refugee Regulations, 2019, reg 17 4).

Of late, however, recognised refugees have reported that in some cases their permits are renewed for periods shorter than four years. Some have been given extensions for six months or less, or one year, without any explanation. In a meeting the author attended, a DHA official explained that the reason for this practice, at her RRO, was based on the failure of refugees to comply with a 90-day provision within which they had to apply for renewal before the permit expired. The short extensions were therefore meant to give the SCRA time to assess one's application.[215] This practice was put in place before the new law came into force, even though it seemed to be contrary to the law as it then was. The old provision required a 90-day application period prior to renewal of the identity document, and not the recognition certificate.[216] Thus the explanation provided by the DHA raised even more questions, such as why the practice was not being implemented uniformly but was applied selectively and randomly, or on what basis the decision was made to shorten the validity of the refugee certificates, or why the time for consideration by the SCRA had been doubled from 90 days to six months. At the meeting it was resolved that the DHA needs to adopt a uniform approach on the validity period of extensions to refugee permits. While the 2019 regulations have attempted to clarify the position, this is yet another illustration of the government's legitimation of previously irregular bureaucratic practices.

Refugee ID: A recognised refugee and his or her dependants equally recognised are entitled to an identity document.[217] The ID should be applied for immediately upon being granted refugee status. In our research, refugees reported that even when they adhere to this requirement, they will not always receive their IDs in good time. Some reported that they received their IDs when they were about to expire despite frequent and periodic follow-up with the DHA.[218] Others simply gave up on following up and relied on their refugee certificate as proof of status and to access services.[219]

The ID functions as an instrument for socio-economic inclusion, enabling access to health services, employment, social grants, opening of bank accounts and conducting ordinary business transactions. Yet the ID has in some cases tended to have an exclusionary effect. In this vein, the government has been criticised strongly for deliberately issuing refugees with IDs that are visibly distinct from those of citizens in its attempt to preserve a stark insider-outsider binary, while claiming to mitigate the risk of fraud and corruption on the part of refugees.[220] Additionally, the DHA considers its role in refugee protection as limited to issuing documents and not extending to wider integrational aspects. Thus, it has hardly taken any steps to ensure that all relevant services providers are familiar with the various refugee documents. A number of our interviewees attested to some of the difficulties that they encounter in accessing services, particularly in health facilities where some of the staff do not recognise the refugee ID, as it is unlike any of the IDs that they are familiar with, and which have been publicly displayed in all health facilities. Some refugees reported that they had lost out on job opportunities, house rentals, among others, the moment they presented their refugee ID. The South African refugee ID has turned out to be a double-edged document.[221]

Immigration permit: a refugee is entitled to apply for an immigration or residence permit if they have held that status for a period of ten years. Previously it was five years.[222] The five-year period was initially included after an intense debate on temporary protection that had initially been proposed in the 1997 Green Paper. The proposal on temporary protection was an attempt to preclude options for permanent immigration by refugees so as to make the idea of refugee protection more appealing to the government. This proposal was strongly rejected by NGOs and UNHCR who ensured that permanent residence became available particularly to those in protracted situations.[223] The catch, however, was that the five (now ten) year period runs from the time when one was formally recognised as a refugee and not from the time one has been legally resident in the country. Therefore, the years one has spent as an asylum seeker are insignificant.

[215] CSOs Meeting with DHA (n91).
[216] Repealed Refugee Regulations, reg. 15 (3).
[217] Refugees Act, section 30; Refugee Regulations, 2019, reg. 18.
[218] Interviews SAJ_MD_02, SAJ_MS_05, SAJ_MS_06.
[219] Interview SAJ_FE_12.
[220] Belvedere, *Beyond Xenophobia* (n17), 146-7, M F Belvedere, 'Insiders but Outsiders: the Struggle for the Inclusion of Asylum Seekers and Refugees in South Africa' (2007) 24 *Refuge* 62-3.
[221] See also Khan & Schreier, *Refugee Law* (n20) 14.
[222] Refugees Act, section 27(c), as amended.
[223] Handmaker, 'No Easy Walk' (n4) 97-100; Belvedere, *Beyond Xenophobia* (n17) 134-9.

In order to qualify for permanent residence, one has to apply to the SCRA which shall assess if one will remain a refugee indefinitely and then issue a certificate to that effect. Without the SCRA certificate, one cannot apply for permanent residence.

Obtaining a SCRA certificate is yet another process fraught with challenges. The application for the certificate is made at the RRO, where many of them tend to get stuck. Many applicants who have tried to follow up their applications at the SCRA have often been told that their application was never received even if it has been pending for years[224]. Yet another and more technical challenge is the literal interpretation that the SCRA has oft given to the requirement that 'one will remain a refugee indefinitely'. As a result, refugees have found it virtually impossible to prove that the indefiniteness of their status which has led to rejection of their applications. Fatima Khan critically analyses the SCRA's literal interpretation, arguing that it 'has had the effect of making permanent residence unavailable to refugees'.[225]

Those who get the certification encounter yet another hurdle, applying for permanent residence. The application for the permanent residence is made through the visa facilitation service (VFS), who then transmit the application to the relevant directorate of the DHA. It is at this stage that the process seems to come to a stand-still and only those that can afford the services of a lawyer may probably succeed[226]. Some have been waiting for years on end for their permanent residence status with no response whatsoever on the progress. The DHA's failure to process permanent residence applications was the subject of a recent court case in which the Supreme Court of Appeal described the DHA's behaviour as 'unconscionable', 'disgraceful', and 'sloth on a grand scale'[227].

All in all, it may be said that the original intentions in the Refugees Act demonstrated a desire for stronger refugee protection in terms of assuring their security of residence. Subsequent laws, however, (with a few exceptions such as the extension of the validity of the refugee permits from two to four years) and departmental directives and practices have incrementally attempted to roll back on this right, rendering security of residence more illusory than actual. The situation is further exacerbated by the unabatedly recurring xenophobic violence of which asylum seekers and refugees are the foremost targets and victims.[228] This state of affairs supports the conclusion that refugeehood in SA has become increasingly and threateningly precarious both in the present and in the foreseeable future.[229]

b) Freedom of movement

The Refugees Act does not contain any provision that would be interpreted as restricting the freedom of movement and residence of asylum seekers and refugees in SA. Such restriction is only envisaged in situations of asylum seekers and refugees arriving on a large scale, in which case the Minister may designate 'areas, centres or places for the temporary reception and accommodation of asylum seekers or refugees[230].

Despite its non-encampment policy, the South African government has over the years demonstrated an inclination towards limiting freedom of movement and residence particularly for asylum seekers. The

[224] Among the refugees we interviewed that had applied for the SCRA certificate they had been awaiting a response for long periods ranging from eight months (SAJ_MD_02) to five years (SAJ_MS_04, SAJ_MS_05). In March 2021, SCRA reported a backlog of 6,231 pending certification applications - https://pmg.org.za/committee-meeting/32404/.

[225] F Khan, 'Has South Africa Committed in Good Faith to Article 34 of the UN Refugee Convention, which calls for the Naturalisation of Refugees?' (2019) 23 *Law, Democracy and Development*, 68-99.

[226] Ibid. The DHA has previously imposed conditions on refugees' eligibility for a permanent residence permit such as requiring that a refugee applicant should be in possession of a valid passport, and that one had to give up their refugee status when applying for permanent residence. This Departmental Directive was withdrawn following a court case that found the entire Directive to be unconstitutional – *Moustapha Dabone & others v The Minister of Home Affairs & another*, Case No: 7526/03, Western Cape High Court, Judgement of 11 November 2003.

[227] *The Director General of the Department of Home Affairs & others v De Saude Attorneys & another*, (1211/2017) [2019] ZASCA 46 (29 March 2019). The Supreme Court upheld the judgment in which the DHA was ordered to determine and deliver decisions on some 473 cases that were the subject of the case, of these 94 were applications for permanent residence.

[228] Human Rights Watch (HRW), *"They Have Robbed me of my Life": Xenophobic Violence against Non-Nationals in South Africa* (HRW September 2020) available at https://www.hrw.org/report/2020/09/17/they-have-robbed-me-my-life/xenophobic-violence-against-non-nationals-south. There is a lot of scholarly literature on xenophobic violence in SA, most notable is the multidisciplinary edited volume- L B Landau (ed), *Exorcising the Demons Within* (n14).

[229] J Crush et al, *Rendering South Africa Undesirable* (n137) 9.

[230] Refugees Act, section 35(2).

first such distinct attempt was in 1999, before the Act came into effect, when the DHA released a "Discussion Document" that proposed the establishment of "Reception Centres", where asylum seekers would have to stay as their applications were being processed. This proposal was vociferously rejected by refugee rights defenders on grounds of breach of human rights of asylum seekers as well as for economic and efficiency-related impracticalities.[231] The idea has strongly resurfaced in the White Paper on International Migration, 2017 under the euphemism of 'Asylum Processing Centres' (APCs) where asylum seekers will be profiled and accommodated during their status determination.[232] While this move has not yet acquired legislative endorsement, the Department has frequently, if not consistently, implemented policies suggestive of pushing the processing of asylum claims, and perhaps the overall handling of refugee permits to offices closer to the borders.[233] The DHA's tactics have included the closure of refugee receptions offices (RROs) in major cities, Port Elizabeth and Cape Town, which also happen to be farthest from the North Eastern Border where many migrants enter SA.

The DHA has steadily applied its policy requiring asylum seekers and refugees to renew their permits at the office where they first lodged their application. Despite several court challenges, all of which were in favour of the applicants,[234] the DHA has finally legitimated this requirement under the new amendment, effectively undercutting the judicial edicts. The general effect of these provisions is that asylum seekers, especially, are forced to stay and reside close to the offices where they first made their application, which effectively constrains their freedom of movement and residence. The general trend seems to be in tandem with the DHA's already professed desire to establish APCs.

c) Right to work and study for asylum seekers

When the Refugees Act was enacted, it provided for the right to seek employment, albeit for refugees and not asylum seekers whose conditions of sojourn as their claim was being determined would be subject to regulations made by the minister.[235] Consequently, the now repealed regulations stipulated that an asylum seeker could only apply to the SCRA for work and study authorisation if his or her application was not adjudicated within the statutory 180 days.[236] In other words, for at least six months, an asylum seeker had no right to work or study in SA, a condition that was endorsed on the asylum seeker permits. This was challenged in a landmark case in which various courts concurred that the prohibition of the right to work and study was unconstitutional, not least for violating one's right to human dignity.[237]

Although the DHA was initially recalcitrant, it subsequently revoked the prohibition and replaced it with an endorsement that an asylum seeker has the right to work and study in SA. Yet the actualisation of the right is still fraught with challenges. These include: non-recognition of the asylum seeker permit by would-be employers; the short duration of the permit and the need to frequently renew it which makes employment of an asylum seeker rather untenable;[238] the government policy on non-employment

[231] Handmaker, 'No Easy Walk' (n4) 102-103. A comprehensive analysis on the legitimacy of the proposed reception centres can be found in F Jenkins & L A de la Hunt, 'Detaining Asylum-seekers: Perspectives on Proposed Reception Centres for Asylum-seekers in South Africa', in Handmaker et al, *Advancing Refugee Protection* (n17) 167-185.

[232] DHA, *White Paper on International Migration, 2017*, 61.

[233] The African National Congress Peace and Stability Policy Discussion Document, 2012 had earlier suggested the relocation of RROs closer to the borders.

[234] These cases are briefly discussed in F Khan & M Lee 'Policy Shifts' (n23) 1214-16, and they include *Aden & others v The Minister of Home Affairs and Another,* unreported, Case No. 9179/00 (Western Cape High Court)*; Hirsi & Others v The Minister of Home Affairs & another,* unreported, Case No. 16863/08 (Western Cape High Court)*; Thomasso v The Minister of Home Affairs,* unreported, Case No. 10598/09 (Western Cape High Court)*; Zihalirwa & others v The Minister of Home Affairs and others,* unreported, Case No. 20988/12 (Western Cape High Court); *Abdulaahi & 205 others v The Director General of Home Affairs and others,* unreported, Case No. 7705/2013 (Western Cape High Court).

[235] Refugees Act, section 31(1) (e).

[236] Repealed Refugee Regulations, reg. 3(3).

[237] *MM Watchenuka & Cape Town Refugee Forum v The Minister of Home Affairs, the Director General of Home Affairs & The Chairperson of the Standing Committee for Refugee Affairs,* Case Number 1486/02, High Court of SA, Cape of Good Hope Provincial Division, 12 November 2002); *Minister of Home Affairs & Others vs. MM Watchenuka & Cape Town Refugee Centre,* Case No. 10/03, Supreme Court of Appeal, Judgement, 28 November 2003. See also *Somali Association of South Africa & Others v Limpopo Department of Economic Development Environment and Tourism & Others* (48/2014) [2014] ZASCA 143; 2015 (1) SA 151 (SCA); [2014] 4 All SA 600 (SCA) (26 September 2014).

[238] FGD, Johannesburg, 15 November 2019, participants explained that the Department of Labour penalises any employer who has any "undocumented person" in their employ. The term "undocumented" is widely applied to include those whose permits have expired, even though they are in the process of renewal. Therefore, given that asylum seekers are often given permits with short durations coupled with the problems that they encounter in accessing RROs to renew their permits, most

of foreigners save for those that fall within specific categories provided for under the Immigration Act; and the hostile attitude towards foreigners whom the nationals blame for taking away their jobs. Recognised refugees often face similar challenges thus rendering the right to employment largely hollow. Consequently, most refugees and asylum seekers have no choice but to find means of survival through the informal sector, a space that they are also being increasingly squeezed out of,[239] not least owing to the xenophobic violence of which refugees are the usual and targeted victims.

The recent Amendment rescinds the progress that has been made in asserting the right to work for asylum seekers by placing such cumbersome and, perhaps, impossible conditions especially for newly arrived asylum seekers, but also for long-standing asylum seekers that have no stable form of employment. It provides that an asylum seeker will first be assessed as to whether he or she can sustain themselves and their dependants for a period of four months. Where they are found to be unable, they may be offered shelter and basic necessities by UNHCR or other charitable organisations.[240] The right to work will not be endorsed on the visa of someone who can sustain themselves, or who is receiving assistance from the UNHCR or other charitable organisations, or for any one who in seeking to renew their endorsement of the right to work fails to provide a letter of employment soon or after making the application.[241] The law imposes an obligation on an employer of an asylum seeker to provide a letter of employment within 14 days from the date on which the asylum seeker took up employment.[242]

The new law does away with the automatic right to work for asylum seekers and makes it almost impossible for one to get that endorsement if they are new arrivals, unless they are considerably well-off. The obligation it places on employers, especially given the short duration of asylum seeker permits, serves as a disincentive to employ asylum seekers. The threshold has also been raised for long-standing asylum seekers who do not have a stable job or are working in the informal sector, and will in most cases not meet the new criteria for having the right to work is endorsed on their permits. Furthermore, the law empowers the DG to revoke any endorsement if the asylum seeker does not have proof of employment six months after receipt of the endorsement.[243]

The same concerns may be raised regarding the limitation on the right to study, which is no longer automatic and in the event that an asylum seeker is permitted to study, the educational institution should furnish the department with a letter of enrolment within 14 days of enrolling the asylum seeker.[244] Consequently, the educational institutions given this additional responsibility will be hesitant to enrol asylum seekers.

While the rights of recognised refugees seem unaffected by the new amendments, the work environment still remains largely unwelcoming and in some ways outright hostile to them. Most employers do not recognise refugee permits. Even if they did, owing to their limited validity period, which has become more uncertain in more recent years, they may rather not be saddled with an employee whose status tends to be indeterminate.

In a nutshell, three observations may be made of the restrictions on the rights to work and study for asylum seekers: one, is that it will definitely serve as a disincentive for employing asylum seekers or enrolling them or their children in schools; two, they blatantly jettison the court's decisions that have over the years upheld the asylum seekers' rights to work and study, and three, they diverge from the very international laws that the Refugees Act claims to uphold.[245]

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may not be able to hold onto a job once the permit expires. Employers too, excepting the exploitative ones, will want a dependable employee and not one that is always asking for time or days off to go have their permit renewed.

[239] See also J Crush et al, *Rendering South Africa Undesirable* (n137) 11.

[240] Refugees Amendment Act, 2017, section 22 (6 & 7) as amended.

[241] Ibid, section 22 (8) as amended.

[242] An employer who fails to comply is liable to pay a fine of not more than ZAR 20,000 (about USD 1400) - ibid, section 22 (9 & 10) as amended.

[243] Ibid, section 22 (11) as amended.

[244] Ibid. Educational institutions that fail to comply with the law are liable to pay a fine not exceeding ZAR 20,000 (about USD1400).

[245] Refugees Act, section 6 provides that the Act must be interpreted and applied with due regard to 1951 Convention and its 1967 Protocol, the 1969 OAU Convention, the Universal Declaration of Human Rights, and any other convention or international agreement to which the Republic is or becomes a party.

IX. Role of NGOs/CSOs and independent institutions

There a few yet dedicated pro-migrant NGOs/CSOs and independent institutions, such as the SAHRC have played a prominent role in advocating refugee protection in SA. They were strongly involved in the processes leading up to the enactment of the Refugees Act. Their representatives were part of the drafting team. Lawyers for Human Rights participated in the earlier backlog projects (in the 2000s) in conjunction with the DHA and UNHCR. In terms of refugee recognition, besides general advocacy work, NGOs have been more involved in legal mobilisation. Additional to instituting public interest litigation on asylum and refugee matters,[246] a number of NGOs provide legal assistance to individual asylum-seekers and refugees with respect to their application processes. They advise on asylum claims, and provide assistance and representation at the appeal and judicial review stages. Many asylum seekers and refugees have been saved from deportation through the timely intervention of NGOs. Generally speaking, NGOs play a mediatory role. They call on the government to account for its policies towards asylum seekers and refugees, engaging all arms of government, particularly the judiciary though litigation, and increasingly the national parliament, which has recently given them greater audience.[247] They also represent refugees' interests against stronger private and business interests that constantly try to push out or exclude migrants from economic and social sectors.[248] NGOs/CSOs also play a vital role in providing some much needed social and humanitarian assistance. Despite the multi-faceted role NGOs and CSOs play, their ability to positively influence government policy towards refugees and migrants generally remains in question.[249] One CSO official opined that NGOs lack of traction was down to the fact that 'government representatives have learnt to speak our language, but we have not learnt theirs'.[250] Consequently, the courts remain the vital interface through which NGOs and CSOs may hold the government to account.

X. Conclusion

South Africa's RRR developed out of a desire to separate the management and protection of refugees from the ill-suited provisions of the ACA, under whose aegis they fell. While normative progress was made with the passage of the Refugees Act, 1998 backed by a progressive and favourable bill of rights in the then newly promulgated Constitution, the bureaucracy and entire administrative machinery did not necessarily follow suit. This has resulted in divergences in law and practice, often to the disadvantage of the asylum seekers and refugees, with the courts, moved mainly by civil society and refugees' rights advocates, stepping in as guardians of the legal and constitutional protections accorded to asylum seekers and refugees. The Refugees Amendment Act and regulations 2019 for the most part legitimate bureaucratic policies and practices that have previously been found to be unlawful by the South African courts. Not only do they restrict access to the asylum process in many ways, but also curtail a number of other rights for refugees such as the freedom of association, which although not discussed in this report is of no less significance. Although the amendments to the Refugees Act contain some positive elements such as the new crime prevention and integrity measures, and the flexibility in the capacity of the membership of the quasi-judicial bodies, for the most part they engender a hostile environment for asylum seekers and refugees. The current pandemic and ensuing lockdowns hampered the full operation of the law and asylum management. Consequently, all expiring permits have been

[246] J Handmaker, 'Public Interest Litigation for Refugees in South Africa and its Potential for Structural Change' (2011) *South African Journal of Human Rights* Vol.27 Issue 1, 65-81.

[247] Opening remarks by chairperson of Planning and Strategic Meeting of the Civil Society Coalition, Johannesburg, 7 November 2019.

[248] For instance, some of the RROs such as the Crown Mines and the Cape Town were closed through lobbying of businesses and other commercial actors. For a long time, banks were not opening accounts for refugees and it took serious lobbying by migrant organisations and NGOs to relax the provisions of the restrictive Financial Intelligence Centre Act and the banks' stance on opening bank accounts for refugees. Crush et al provide further illustrations of how refugees and asylum seekers are systematically being pushed out of the informal sector, Crush et al 'Rendering South Africa Undesirable' (n137) 11-20.

[249] For the role of migrant organisations specifically, see T Polzer and A Segatti, 'From Defending Migrant Rights to New Political Subjectivities: Gauteng Migrants' Organisations after May 2008' in L B Landau, *Exorcising the Demons Within* (n14) 200-225.

[250] Interview SAJ_EL_19.

periodically extended with the latest extension running until June 2021. The court, too, has suspended the application of some of the offending clauses, specifically the abandonment provisions. However, if the DHA does not make necessary changes to deal with the demand once the extensions expire and full services resume, previous practice has shown that it is the asylum seekers and refugees that ultimately pay the price for the DHA's failings.

Finally, there is the possible danger that the new laws could be a step towards completely subordinating refugee protection to the country's migration management priorities and agenda, almost as it was before the enactment of the refugee law and under auspices of the ACA. Recent developments, reveal that the government has initiated a process that would culminate into 'the drafting of a single legislation for managing international migration and refugee protection'.[251] Perhaps this process, if broadly consultative and involving all relevant stakeholders, could result into better protection for asylum seekers and refugees.

Yet, the situation as it currently appears is best articulated in the discerning words of one refugee:

> They do not want refugees now, no foreigners. Those who are here should hate going to the DHA, and those who are not here are discouraged from coming.[252]

[251] This was stated in two calls of expression of interest for service providers to draft policy discussion papers, one on refugee protection, and the other on international migration. The calls were advertised in July 2020.
[252] Interview SAJ_MS_06.

XI. Appendices

Table 1: Asylum applications and refugee status determination by country/territory of asylum and level in the procedure 1998-2018
(Source: UNHCR Global Trends Reports 1998-2018)

Year	Procedure		Pending start of the year	Applied during the year	Decisions during the year					Pending end of the year	Protection indicators			
					Positive						Recognition rates		O/w. closed rate	Change pending cases (%)
	App.	Dec.	Total		Convention status	Complem. status	Rejected	Other w. closed	Total	Total	Ref. status	Total		
1998	G		21791	15035	1664	-	14459	128	16251	20207	10.2	10.2	n/a	n/a
1999	G	V	20210	13160	6200	-	7930	1970	16090	17330	43.9	43.9	n/a	-14.3
2000	G		17325	3132	-	552	4767	-	5319	15138	0.0	10.0	n/a	-13.0
2001	G	AR	9673	-	-	-	3116	-	3116	6557	0.0	0.0	n/a	-32.0
	G	FI	15138	4294	3597	-	9673	1302	14572	4860	27.0	27.0	n/a	-68.0
2002	G		4860	55426	4786	-	1675	1374	7835	52451	74.0	74.0	n/a	979.0
2003	G		52451	35920	3280	-	1006	-	4286	84085	77.0	77.0	n/a	60.0
2004	G	FI	84085	32565	1255	0	329	0	1584	115224	79.2	79.2	n/a	37.0
2005	G	FI	115224	28522	2186	0	1272	193	3651	140095	63.2	63.2	n/a	21.6
2006	G	FI	28938	53361	796	0	4546	0	5342	49275	14.9	14.9	n/a	70.3
	G	BL	111157	0	4674	0	24651	0	29325	81832	15.9	15.9	n/a	-26.4
2007	G	FI	49,275	45,637	1,734	--	4,145	--	5,879	89,033	29.5	29.5	0.0	80.7
	G	BL	81,832	--	--	--	--	--	--	81,832	--	--	--	0.00
2008	G	BL	89,033	--	--	--	--	--	--	89,033	--	--	--	0.0
	G	FI	--	207,206	7,049	--	62,065	--	69,114	138,092	10.2	10.2	0.0	--
2009	G	FI	138,092	222,324	4,567	--	46,055	173	50,795	171,702	9.0	9.0	0.3	24.3
	G	BL	89,033	--	--	--	--	--	--	138,092	--	--	--	55.1

2010	G	FI	171,702	180,637	10,083	--	66,988	--	77,071	171,702	13.1	13.1	0.0	0.0
2011	G	FI	--	106,904	6,803	--	37,150	--	43,953	63,026	15.5	15.5	0.0	--
	G	AR	170,702	--	--	--	--	--	156,342	--	--	--	--	-8.4
2012	G	FI	66,303	82,067	6,226	--	57,002	7	63,235	85,024	9.8	9.8	0.0	28.2
	G	JR	68,740	30,149	1,676	--	38,628	--	40,304	58,585	4.2	4.2	0.0	-14.8
	G	AR	87,602	4,972	48	--	1,260	81	1,389	86,833	3.7	3.7	5.8	-0.9
2013	G	AR	86,833	9,315	106	--	2,604	1,546	4,256	91,892	3.9	3.9	36.3	5.8
	G	FI	85,024	70,010	7,286	--	60,955	--	68,241	86,793	10.7	10.7	0.0	2.1
	G	JR	58,585	--	--	--	--	--	--	58,585	--	--	--	0.0
2014	G	AR	322,611	14,310	68	--	24,554	2,995	27,617	309,304	0.3	0.3	10.8	-4.1
	G	FI	158,455	71,914	9,230	--	66,445	58	75,733	154,636	12.2	12.2	0.1	-2.4
2015	G	AR	581,945	58,372	118	--	18,254	4,845	23,217	617,100	0.6	0.6	21.0	6.0
	G	FI	477,444	62,159	2,499	--	58,141	--	60,640	478,963	4.1	4.1	0.0	0.0
2016	G	AR	617,100	--	65	--	855	616,180	617,100	--	7.1	7.1	100.0	-100.0
	G	FI	478,963	35,378	3,157	--	38,084	254,801	296,042	218,299	7.7	7.7	86.0	-54.0
2017	G	AR	186,431	--	21	--	461	38,112	38,594	188,120	4.4	4.4	98.8	0.9
	G	FI	31,868	24,174	2,267	--	25,713	--	27,980	3,213	8.1	8.1	0.0	-89.9
2018*	G	AR	188,120	7,750	26	--	92	14,366	14,484	181,386	22.0	22.0	99.2	-3.6
	G	FI	3,213	8,397	631	--	8,162	--	8,793	2,817	7.2	7.2	0.0	-12.3
2019*	G	AR			59	--	53	22,122	22,234					
	G	FI			1,835	--	22,063	20	23,918					

Notes:
2013 - Figures refer to the end of 2012. No data on applications registered or decision taken during 2013 are available.
2018 - Figures refer to the mid of 2018.
2019 - Change in UNHCR statistical information hence some of the information as presented in earlier tables does not appear in the 2019 table.

Type of application: N=New; R=Repeat/reopened; A=Appeal/administrative review; J=Court.
Data refers to number of cases (C) or persons (P): App. = Applications; Dec. = Decisions taken during the year.
T=Type: G=Government; U=UNHCR; J=Government and UNHCR jointly.
L=Level: NA=New Applications; FI=First instance decisions; AR=Administrative Review decisions; RA=Repeat/reopened applications; BL=Backlog procedure
JR=Judicial Review; SP=Subsidiary protection; FA=First instance and appeal; TP=Temporary protection; TA=Temporary asylum.

Protection indicators (calculated by UNHCR):
Refugee status recognition rate: Recognized divided by total of Recognized, Other positive and Rejected * 100%.
Total recognition rate: Recognized plus Other positive divided by total of Recognized, Other positive and Rejected * 100%.
Otherwise closed rate: Otherwise closed divided by Total no. of decisions * 100%.
Change in pending cases: Cases pending as at 31 December minus Cases pending as at 1 January divided by Cases pending as at 1 January * 100%.

Table 2: Refugees and people in a refugee-like situation, excluding asylum-seekers, in South Africa and changes by origin (2006-2018)
(Source: UNHCR Global Trends Reports)

		Population start of year		**Major increases**			**Major decreases during year**				**Population end of year**	
Year	**Origin**	***Total***	***of whom UNHCR Assisted:***	**Spontaneous arrivals**			**Voluntary**		**Resettlement**		***Total***	***of whom UNHCR assisted:***
				Group /Prima facie recognition	*Temporary protection*	*Individual Recognition*	*Total*	*of whom UNHCR assisted:*	*Total*	*of whom UNHCR assisted:*		
2006	DRC		2,215	--	--	204	36	36	37	37		2,361
	Somalia	7,548	444	--	--	275	--	--	5	5	7,818	1,032
	Angola	5,764	254	--	--	--	17	17	--	--	5,759	347
2007	DRC		2,361	--	--	380	14	14	11	11		3,369
	Somalia	7,818	1,032	--	--	747	10	10	--	--	8,554	1,041
	Angola	5,759	347	--	--	--	10	10	--	--	5,752	410
2008	DRC		3,369	--	--	--	159	159	19	19		--
	Somalia	8,554	1,041	--	--	--	3	3	8	8	8,543	--
	Angola	5,752	410	--	--	--	1	1	--	--	5,751	--
2009	DRC		--	--	--	779	14	14	56	56		--
	Somalia	8,543	--	--	--	1,213	--	--	38	38	9,718	--
	Angola	5,751	--	--	--	7	--	--	--	--	5,758	--
2010	Somalia	9,718	--	--	--	5,563	--	--	95	95		--
	DRC		--	--	--	1,317	15	15	52	52		--
	Angola	5,758	--	--	--	50	--	--	--	--	5,808	--
2011	Somalia		--	--	--	--	--	--	--	--		--
	DRC		--	--	--	--	12	12	--	--		--

2012	Somalia		--	--	--	3,058	--	--	380	380		1,871
	DRC		--	--	--	522	8	8	101	101		1,402
	Ethiopia	3,398	--	--	--	2,163	--	--	23	23	5,538	580
2013	Somalia		1,871	--	--	3,583	--	--	629	629		4,163
	DRC		1,402	--	--	1,144	12	12	101	101		2,845
	Ethiopia	5,538	580	--	--	2,059	--	--	15	15	7,582	1,516
2014	Somalia		4,163	--	--	2,918	--	--	848	848		4,013
	DRC		2,845	--	--	2,363	--	--	161	161		3,013
	Ethiopia	7,582	1,516	--	--	3,045	--	--	23	23		1,883
	Zimbabwe	--	--	--	--	16	--	--	--	--	6,217	622
2015	Somalia		4,013	--	--	629	--	--	483	483		4,146
	DRC		3,013	--	--	696	--	--	112	112		3,258
	Ethiopia		1,883	--	--	1,011	--	--	29	29		2,032
	Congo,	6,035	604	--	--	191	--	--	--	--	6,566	657
	Zimbabwe	6,217	622	--	--	5	--	--	6	6	6,358	636
2016	Somalia		4,146	--	--	1,169	--	--	1,042	1,042		--
	DRC		3,258	--	--	1,130	6	6	317	317		--
	Ethiopia		2,032	--	--	323	--	--	38	38		--
	Congo,	6,566	657	--	--	196	--	--	--	--	5,394	--
	Zimbabwe	6,358	636	--	--	73	--	--	15	15	4,596	--
2017	Somalia		-	-	-	733	-	-	-	-		-
	DRC		-	-	-	980	*	*	-	-		-
	Ethiopia		-	-	-	360	-	-	-	-		-
	Congo,	5,394	-	-	-	42	-	-	-	-	5,261	-
	Zimbabwe	4,596	-	-	-	14	-	-	-	-	4,558	-
2018	Somalia		-	-	-	136	-	-	-	-		-
	DRC		-	-	-	282	-	-	62	*62*		-
	Ethiopia		-	-	-	168	-	-	*	*		-
	Congo,	5,261	-	-	-	12	-	-	-	-	5,273	-
	Zimbabwe	4,558	-	-	-	*	-	-	-	-	4,561	-

Notes:

1. Disaggregated statistics by country of origin earlier than 2006 not provided.
2. From 2013 backwards, the refugee population is included in the table if it is 5000 or more, while from 2014 forwards the refugee population is included if the number is 1000 or more.

Table 3: Refugee and Asylum Seeker Interviewees

Table 3a: Breakdown by Nationality and Gender

Nationality	**Male**	**Female**
DRC (4)	3	1
Ethiopia (5)	3	2
Somalia (5)	3	2
Total (14)	**9**	**5**

Table 3b: Breakdown by Age

18-25	1
26-35	5
36-45	5
46-60	3
Total	**14**

Table 4: Passport Control Instruction No. 20 of 1994 - Guidelines for Refugees Status Determination of Mozambicans in South Africa (14 April 1994).

1. Mozambican Nationals resident in camps and settlements in the KaNgwane, Gazankulu and Bophuthatswana (Winterveldt) should be presumed to be refugees under UNHCR's Mandate as they evidently left Mozambique for refugee related reasons. (Group Status Determination).

2. ….. Mozambicans living in mixed settlements in Lebowa, Kwandabele, Venda and Kwa-Zulu could benefit from similar evaluation and be considered as refugees. (Group Status Determination).

3. Mozambicans who have close family ties with members residing in any of the above camps or settlements could, on the basis of the unity principle, be recognized as refugees. (Group Status Determination).

4. Mozambicans who sought asylum in South Africa from Mozambique during the period January 1985 - 1992 could be considered as refugees. (Group Status Determination).

5. Mozambicans who-'arrived in South Africa between 1980 and 1985 and claim that they were unable to return to Mozambique for security related reasons could be considered as refugees sur place and should be examined on an individual basis.

6. Mozambicans who arrived in SA after January 1993 cannot be presumed to be refugees and should have their claim to refugee status examined individually and on the basis of the refugee definition as embodied in Section 3 of the Basic Agreement.

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