For attention: Mr Sihle Mthiyane

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31 January 2024

Dear Mr Mthiyane

We attach our written submission in response to the invitation for comments on the Submission on the White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa.

We would like to confirm our interest in making oral representations at a later convenient date.

Should you have any queries, it would be appreciated if you could contact me at the following email address: naseema@hsf.org.za.

Yours sincerely

Naseema Fakir

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1. Introduction

1.1. The Department of Home Affairs ("DHA") has presented a most extraordinary proposition in its 'White Paper on Citizenship, Immigration and Refugee Protection: Towards a Complete Overhaul of the Migration System in South Africa' ("White Paper").

1.2. While its title promises a radically new legal framework for migration into South Africa, the White Paper leaves would-be commentors without any guidance about precisely what legislative change the White Paper signals. Only one thing appears to be certain – that South Africa's laws on refugee protection, citizenship and immigration are set to tighten.

1.3. Alongside absent legislative proposals, the White Paper omits a researched analysis of what drives migration to South Africa. Similarly, absent is an engagement with any of government's own statistics on migrant movements across our borders. Thus, the White Paper presents the misguided and unsubstantiated impression that migration to South Africa is not a result of globalising labour markets, climate change or regional political instability.

1.4. Instead, the DHA's analysis of migration to South Africa fixates, myopically, on South Africa's already strict *legal regime* governing refugee protection, immigration and citizenship. The DHA's approach, it seems, is to re-build South Africa's legal framework for citizenship, immigration and refugee protection on the false foundation that migration to South Africa is a phenomenon borne of our local legal framework.

1.5. Moreover, the White Paper does not give due regard to the concerning intensity of xenophobic sentiment in South Africa. As a result, the White Paper does not propose any solutions that would reduce xenophobic sentiment. Indeed, its promise of a large-scale tightening of South Africa's laws on refugee protection, citizenship and immigration is likely to reinforce and invigorate such sentiment.

1.6. The result is a very peculiar call for comment indeed – one that asks the public to give its views on an inscrutable solution to a problem that is poorly defined.

1.7. Yet, South Africans cannot avoid having their say in response to government policy-making so bereft of engagement with the realties it claims to regulate. Policy-making like this cannot be allowed to pass as worthy of the mandate given to government by the South African people.

1.8. Nonetheless, against this backdrop, the Helen Suzman Foundation ("HSF"), submits, in summary that:

1.8.1. the White Paper's opening gambit – a commitment to retreat from South Africa's refugee treaty obligations – will not enable the DHA to avoid giving refugees their rights under the Constitution;

1.8.2. the DHA's proposal to shift South Africa's institutional framework for refugee protection to match the Canadian system misfires in diagnosing the real problem with the DHA's institutions – namely, the DHA's own institutional incapacity;

1.8.3. the DHA's proposal to tighten requirements for obtaining citizenship and visas are a red herring in the South African context because citizenship and visas are already difficult to obtain under current legislation;

1.8.4. the DHA's proposal to strictly adopt the 'first safe country principle' will not relieve South Africa of its obligation to allow asylum seekers safe entry into South Africa and fair process while their asylum applications are processed here.

2. South Africa's Treaty Obligation and Migration Jurisprudence

2.1. The White Paper opens by bemoaning legal precedents that refugees have secured from our courts – in particular the Constitutional Court and the Supreme Court of Appeal – and attributes them to South Africa's unreserved ratification of the 1951 Refugee Convention ('Refugee Convention') and the 1967 Protocol Relating to the Status of Refugees ('Refugee Protocol').

2.2. As an apparent first step towards tightening our framework for refugee protection, the White Paper suggests that South Africa exit the Refugee Convention and the Refugee Protocol and enter them anew – with appropriate reservations. But this is a more complicated process than the DHA presents in the White Paper.

2.2.1. To exit the Refugee Convention and the Refugee Protocol, South Africa would simply have to denounce them in terms of Articles 44 and 9 respectively, by notifying the Secretary-General of the United Nations.[1]

2.2.2. However, domestic law requires more to lawfully exit a treaty. Parliament must first approve the withdrawal from ratified treaties and repeal any domestic implementing legislation.[2] This is a necessary implication of Parliament's role – set out in section 231 (2) of the Constitution – in ratifying treaties in the first place.[3]

2.3. Even if Parliamentary approval is in the offing, Article 42 of the Refugee Convention does not allow states to make reservations against Article 33 thereof, which enshrines the principle of non-refoulement. This is a fundamental norm of refugee law the world over that protects asylum seekers from being sent back to the country from which they have fled, before it is lawfully determined that it is safe to do so.

2.4. As such, the principle of non-refoulement – and its implications for refugee protection – are likely to remain an unavoidable influence over South Africa's refugee protection regime.

2.5. This is an inconvenient truth that the White Paper does not acknowledge when it suggests that exiting the Refugee Convention and the Refugee Protocol can work as a first step towards tightening South Africa's legal regime for protecting refugees.

3. South Africa's Refugee Law and the Courts

3.1. What's more, the White Paper overestimates the role played by the Refugee Convention and the Refugee Protocol in shaping our courts' interpretation of South Africa's legal framework for refugee protection.

3.2. In particular, the DHA lists the following legal principles as apparently fixable errors in South Africa's refugee case law:

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[1] Article 44 of the Refugee Convention states that denunciation 'shall take effect one year from the date upon which the notification to do so is received by the Secretary-General of the United Nations'.
[2] *Democratic Alliance v Minister of International Relations and Cooperation* 2017 (3) SA 212 (GP) para 51.
[3] Ibid.

3.2.1. That citizens and non-citizens alike benefit from the constitutional right to human dignity.[4]

3.2.2. That the right to dignity affords asylum seekers and refugees the right to reside, work, start businesses and study in South Africa.[5]

3.2.3. That refugees ought not to be returned to a country where they are at risk of persecution while they wait for their asylum applications to be finalised.[6]

3.2.4. That unlawful entry into South Africa is not a bar to applying for asylum[7] – nor is a delay in making one's application.[8]

3.3. Overturning these principles will not be as simple as ushering in a new legislative regime for refugee protection and exiting the Refugee Convention and Refugee Protocol. We attach, as 'Annexure A' and 'Annexure B', tables of case law referenced in the White Paper, that grounds much of South Africa's refugee protection case law in the Constitution's own legal principles – and unavoidable commitments of international law.

3.4. In summary, that case law emanates from two principal sources:

3.4.1. First, the principle of non-refoulement, which our courts have found to allow asylum seekers entry into South Africa and to remain here until their applications for refugee status are finally determined.[9]

3.4.2. Second, the constitutional right to dignity, which our courts have found to allow asylum seekers to support themselves through seeking employment and starting businesses.[10]

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[4] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11.
[5] *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143.
[6] *Abdi and Another v Minister of Home Affairs and Others* (734/2010) [2011] ZASCA 2; *Saidi and Others v Minister of Home Affairs and Others* (CCT107/17) [2018] ZACC 9.
[7] *Bula and Others v Minister of Home Affairs and Others (589/11) [2011] ZASCA 209.*
[8] *Ersumo v Minister of Home Affairs and Others* (69/2012) [2012] ZASCA 31.
[9] *Saidi and Others v Minister of Home Affairs and Others* (CCT107/17) [2018] ZACC 9.
[10] *Minister of Home Affairs and Others v Watchenuka and Others* (010/2003) [2003] ZASCA 142; *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143.

3.5. As such, any suggestion in the White Paper that South Africa's refugee law can be radically tightened by simple legislative amendment and exiting the Refugee Convention and the Refugee Protocol is misleading at best.

4. There is no Need to Borrow from the Canadian System

4.1. The White Paper suggests that a shift to Canada's institutional structure for protecting refugees will improve South Africa's own.

4.2. However, the two systems are so closely matched in their institutional design and governing legal frameworks that one is left wondering why the DHA has placed so much weight upon institutional reform at all.

4.3. In terms of South Africa's institutional arrangements:

4.3.1. Section 8 of the Refugees Act establishes as many Refugee Reception Offices ("RRO") as the Director-General of Home Affairs deems necessary to further the Refugees Act's purposes. In terms of section 22 of the Refugee Act, an applicant for asylum must first make their application at an RRO,[11] where a Refugee Status Determination Officer ("RSDO") decides to grant or reject that application.[12]

4.3.2. Section 9 of the Act establishes a Standing Committee for Refugee Affairs ("SCRA"), which is obliged to review decisions of an RSDO when they find that an application for asylum is "manifestly unfounded, abusive or fraudulent" – and has a discretion to review any other decision by a RSDO in respect of refusing asylum.[13] The SCRA, among other things, also determines the period and conditions of work and study which an asylum seeker is subject while sojourning in South Africa.[14]

4.3.3. Section 8A of the Refugee Act establishes a Refugee Appeals Authority ("RAA"), which hears appeals against decisions of the RSDO to decline asylum on the grounds that the application is unfounded.[15]

[11] Section 21 of the Refugee Act.
[12] Section 23(3) of the Refugee Act.
[13] Section 24A(1) of the Refugees Act.
[14] Section 9C(b) of the Refugees Act.
[15] Section 24B(1) of the Refugees Act.

4.3.4. Final decisions of the SCRA and RAA are then subject to judicial review in terms of the Promotion of Administrative Justice Act 3 of 2000.

4.4. We attach as 'Annexure C', a detailed picture of how an asylum application is made and processed in South Africa.

4.5. The only significant difference between the two institutional structures is that the SCRA's Canadian analogue, the Immigration, Refugees and Citizenship Canada ("IRCC"), has less oversight over first instance decisions to refuse asylum.

4.6. Instead of revealing why South Africa's institutional structure falls into error, the DHA blames its current poor decision-making on underqualified staff and promises to hire stronger candidates in the future.

4.7. While HSF welcomes better staffed institutions within the DHA's structures, the White Paper conspicuously ignores the backlogs crippling South Africa's refugee system and provides no solution for how those will be reduced.

4.8. In a presentation to Parliament in March 2023, the RAA reported that their backlog alone stood at 133 582 applications for appeal. The White Paper does not mention this as part of the problem which it needs to solve nor does the DHA's annual report disclose figures of backlogs at its RROs or at the SCRA.

5. The White Paper's Proposed Reforms to the Citizenship Act

5.1. The Citizenship Act allows three pathways to citizenship: by birth; by descent and by naturalisation:

5.2. Citizenship by birth accrues to anyone –

5.2.1. who was a citizen immediately prior to the Citizenship Act being passed;

5.2.2. born, in or outside of South Africa, to one or more South African parents; or

5.2.3. born in South Africa and who does not meet the requirements above but nonetheless has no citizenship or nationality of any other country or no right to such citizenship or nationality – and whose birth has been registered.[16]

5.3. Citizenship by descent accrues to anyone adopted by a South African citizen and whose birth has been registered.

5.4. Citizenship by naturalisation accrues to anyone –

5.4.1. who was a citizen by naturalisation immediately prior to the Citizenship Act; and

5.4.2. who is born in South Africa to parents who are not citizens; or parents who have not been granted permanent residence, if upon reaching the age of majority they have lived in SA from birth until achieving majority – and their birth has been registered.

5.5. Achieving citizenship by naturalisation is clearly the most relevant pathway for those concerned with citizenship accruing to South Africa's migrant populations. However, its requirements are manifestly so burdensome that it is hardly likely that South Africa's citizenship by naturalisation laws act as an incentive to migrate here.

5.6. The Citizenship Act requires that one be born in South Africa to be considered for citizenship via naturalisation. Moreover, those born to migrant parents in South Africa still must wait eighteen long years living in South Africa to qualify as a naturalised citizen. To the extent that the White Paper implies that migrants not born in South Africa have a pathway to citizenship,[17] it is misleading.

5.7. Indeed, on the White Paper's own statistics, just over 150 000 people living in South Africa have achieved citizenship by naturalisation.[18]

5.8. It is, therefore, simply ill-informed to suggest that South Africa's citizenship laws are incentives for migration into South Africa.

[16] Registration here refers to registration in terms of the Births and Death Registration Act, 1992 Act 51 of 1992.
[17] White Paper para 81.3.
[18] White Paper para 81.6.

5.9. Moreover, the White Paper does not review the case law generated from litigation under the Citizenship Act. As such, commentors have no insight into the jurisprudential consequences of repealing the Citizenship Act.

6. The White Paper's Proposed Reforms to the Immigration Act

6.1. The White Paper makes the following proposals for changes to South Africa's immigration regime:

6.1.1. A new preamble to the Immigration Act that emphasizes "security considerations"; "interdepartmental coordination" and "border monitoring".[19]

6.1.2. Establishing an interdepartmental 'Advisory Board' whose powers and functions are not specified.[20]

6.1.3. Tightening procedures and strengthening monitoring capacity for detecting fraudulent issuing of visas, identity documents, marriage certificates and passports.[21]

6.1.4. New legislation "to strengthen the powers of immigration officers and Inspectorate and provision of compulsory training."[22]

6.1.5. Establishing dedicated immigration courts to adjudicate reviews of decisions made by the DHA and its structures, as well as a digital system to track cases.[23]

6.1.6. The establishment of an "Immigration Division" that is dedicated to granting visas and hearing appeals. The status quo of leaving this function with the DG and the Minister is described as "untenable'.[24]

6.2. While these proposals are not concerning on their face, the White Paper's omission of the immense backlog plaguing the DHA's visa system again gives the impression that

[19] White Paper para 93.1.
[20] White Paper para 93.4 – 93.6. The White Paper describes its composition as comprising of members from: "the Departments of Trade, Industry and Competition; Tourism; Education; International Relations and Cooperation; Defense and Military Veterans as well as representatives of SAPS, SARS and organised labour.
[21] White Paper para 99 to 101.
[22] White Paper para 104.
[23] White Paper para 107 – 111.
[24] White Paper para 115.

proposals for institutional reform are being used to distract from the DHA's current dysfunction.

6.3. In response to a question from parliament in November last year, the Minster revealed that the DHA is facing a backlog in processing temporary residency visas of roughly 74 309 and a backlog of 43 944.[25]

6.4. Moreover, the White Paper does not review the case law generated from litigation under the Immigration Act. As such, commentors have no insight into the jurisprudential consequences of repealing the Immigration Act.

7. The White Paper's Proposal to Follow the 'First Safe Country' Principle

7.1. The White Paper proposes that the first safe country principle "must be strictly applied".[26] The essence of the principle is that if a refugee has passed through a 'safe country' before they enter South Africa, then South Africa should retain the right to return that refugee back to that safe country.

7.2. While there is nothing in international refugee law that prevents countries from adopting some form of the first safe country principle, international law does not require states to do so.[27] Moreover, it is unlikely that any state will ever be lawfully allowed to implement the first safe country principle without significant safeguards that protect individual refugees.[28]

7.3. Once again, the principle of non-refoulement provides a crucial constraint on how strictly South Africa could adopt and enforce the first safe country principle. To comply with principle of non-refoulement, South Africa would still have to allow refugees entry into South Africa and a fair process to apply for asylum here that properly assesses whether their return to an allegedly safe country would not, indirectly, result in their return to the conditions from which they fed in to first place.[29]

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[25] https://businesstech.co.za/news/government/736329/massive-visa-backlog-in-south-africa-gets-even-worse-and-is-nowhere-near-being-cleared/
[26] White Paper para 122.7.
[27] Migration Issue Brief 7, 'The First Safe Country Principle in Law and Practice', prepared by Roni Amit for the 'African Centre for Migration and Society' (June 2011) Available here.
[28] Ibid.
[29] Ibid.

7.4. In other words, simply because an asylum seeker has travelled through an apparently safe country *en route* to South Africa, this will not be sufficient to deny them full access to South Africa's asylum application process.[30]

7.5. Instead of seeking to strictly apply the first safe country principle, South Africa should rather make use of a ready-made burden sharing mechanism in the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa 1969 ("OAU Convention").

7.6. A notable feature of the OAU Convention is the specific mention of burden sharing under Article II (4) which states that:

> *Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum*".

7.7. The OAU Convention's approach to burden sharing should be a reference point for South Africa, instead of seeking to escape its obligations towards asylum seekers by strictly adopting and enforcing the first safe country principle.

8. Conclusion

8.1. In this submission, HSF has pointed out that the White Paper fails at the threshold for sound government policy making because it provides an inscrutable solution to a problem that is poorly defined.

8.2. Where the White Paper bemoans South Africa's legal regime for refugee protection, it fails to recognise basic legal realities that prevent largescale tightening of our refugee laws. The principle of non-refoulement and the Constitution's own rights prevent South Africa from meaningfully departing from the framework for refugee protection which we already have.

[30] Ibid.

8.3. Moreover, the White Papers' calls for institutional reform, while laudable when considered on their own, distract from the DHA's backlogs and incapacity – neither of which are addressed in any detail in the White Paper.

Annexure A - Principal Cases Regulating An Asylum Seeker's Entry into South Africa

All the case law below relies on the principle of non-refoulement, a fundamental norm of refugee law the world over that protects asylum seekers and refugees from being sent back to the country from which they have fled persecution – before a determination that it is safe to do so. This is an aspect of the Refugee Convention from which South Africa cannot make a reservation – even if it is able to withdraw and re-enter. As such, the White Paper's call for reforming South African refugee protection law is unlikely to avoid all that follows from the principle non-refoulement.

Case	**Salient Facts**	**Legal Principles**
Abdi and Another v Minister of Home Affairs and Others (734/2010) [2011] ZASCA 2	This case involved two Somali nationals – Mr Dhiblawe, who had received refugee status in South Africa; and Mr Abdi, who was waiting for his asylum application to be finalised.[1] They had initially fled Somalia for South Africa, fearing political persecution.[2] They then left for Namibia because of rising xenophobic tensions in South Africa.[3] Namibian	The SCA held that the principle of non-refoulement meant that Mr Abdi and Mr Dhiblawe could not be denied entry into South Africa and instead be sent back to Somalia.[7] For Mr Abdi, because his asylum application had yet to be determined.[8] For Mr Dhiblawe, because he had in fact been granted refugee status and nothing suggested that the

[1] *Abdi and Another v Minister of Home Affairs and Others* (734/2010) [2011] ZASCA 2 ("*Abdi SCA*") para 5.
[2] *Abdi SCA* paras 6 and 13.
[3] *Abdi SCA* para 6.
[7] *Abdi SCA* paras 26, 27 and 31.
[8] *Abdi SCA* para 38.

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Annexure A - Principal Cases Regulating An Asylum Seeker's Entry into South Africa

Case	Salient Facts	Legal Principles
	authorities arrested Mr Abdi and Mr Dhiblawe and decided to deport them to Somalia via Johannesburg.[4] On arrival in Johannesburg, Mr Abdi and Mr Dhiblawe were held at an "Inadmissible Facility" located at O.R Tambo International Airport.[5] While held there, they challenged their deportation and sought a readmission into South Africa.[6]	conditions which caused him to flee Somalia had improved.[9]
Bula and Others v Minister of Home Affairs and Others (589/11) [2011] ZASCA 209.	In this case, nineteen Ethiopian migrants walked to South Africa to escape political persecution as members of their home country's opposition political party.[10] Soon after they arrived in South Africa, and before they had applied for	The SCA held that the principle of non-refoulement, codified in section 2 of the Refugees Act, implied that asylum seekers could not be refused entry into the country.[12] If South Africa were to turn away asylum seekers

[4] *Abdi SCA* paras 6 and 7.
[5] *Abdi SCA* paras 4 and 5.
[6] *Abdi SCA* paras 5, 7, 9 and 11.
[9] *Abdi SCA* para 38.
[10] *Bula and Others v Minister of Home Affairs and Others (589/11) [2011] ZASCA 209* ("*Bula SCA*") *paras 5-6.*
[12] *Bula SCA* para 59.

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Annexure A - Principal Cases Regulating An Asylum Seeker's Entry into South Africa

Case	Salient Facts	Legal Principles
	asylum, they were arrested as illegal migrants and detained awaiting deportation.[11]	before their applications for asylum have been determined, then this would risk sending them back to face the conditions from which they fled – in other words, it would risk breaching the principle of non-refoulement.[13] Moreover, the SCA pointed out that Regulation 2(2) under the Refugees Act provides that asylum seekers who enter the country illegally must be given fourteen days, after they have been encountered by authorities, to approach a Refugee Reception Office and make an application for asylum.[14] In terms of Regulation 2(2), once would be applicants make their intention to apply for asylum, they ought to be allowed entry into South Africa and fourteen

[11] *Bula SCA* paras 5 and 6.
[13] *Bula SCA* para 59.
[14] *Bula SCA* para 78.

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Annexure A - Principal Cases Regulating An Asylum Seeker's Entry into South Africa

Case	Salient Facts	Legal Principles
		days in which to make their application for asylum at a Refugee Reception Office.[15] Pending the outcome of that application, section 22(1) of the Refugee Act requires that applicant be issued with an asylum seeker permit that allows them sojourn in South Africa on a temporary basis.
Ersumo v Minister of Home Affairs and Others (69/2012) [2012] ZASCA 31	Mr Ersumo, a Somalian national, escaped captivity in his home country and fled to South Africa after being tortured.[16] He entered South Africa in May of 2011 and was given an asylum transit permit in terms of section 23(1) of the Refugee Act, which gave him fourteen days to approach a Refugee Reception Office to apply for asylum.[17]	Ordinarily, only persons who have made an application for asylum are protected from deportation by section 21(4) of the Refugees Act.[22] However, applying its finding in *Bula*, the SCA held that Mr Ersumo could not be deprived of an

[15] *Bula SCA* at para 66.
[16] *Ersumo v Minister of Home Affairs and Others* (69/2012) [2012] ZASCA 31 ("*Ersumo SCA*") paras 1.
[17] *Ersumo SCA* para 1 and 2.
[22] *Ersumo SCA* para 10.

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Annexure A - Principal Cases Regulating An Asylum Seeker's Entry into South Africa

Case	Salient Facts	Legal Principles
	He was not able to make the application in time due to administrative difficulties at the Refugee Reception Office in Pretoria and, thereafter, because he was mugged of all his papers.[18] He then travelled to Cape Town to have his application processed there but again failed because of slow administrative procedures.[19] He was ultimately arrested without having applied for asylum and was detained in Johannesburg pending deportation.[20] Mr Ersumo challenged his deportation in the High Court, where he was unsuccessful, and then appealed to the SCA.[21]	opportunity to apply for asylum because Regulation 2(2) entitled him to do so.[23] In addition, the SCA held that the Refugee Act, in section 24(3), sets out the reasons for which an application for asylum can be rejected – and does not list delay as one of them.[24] This stands to reason as delay on its own does nothing to show that the conditions from which an asylum seeker have fled have improved.

[18] *Ersumo SCA* para 3.
[19] *Ersumo SCA* para 4.
[20] *Ersumo SCA* paras 1 and 4.
[21] *Ersumo SCA* para 1.
[23] *Ersumo SCA* paras 11, 12, 13 and 16.
[24] *Ersumo SCA* paras 15 and 17.

Annexure A - Principal Cases Regulating An Asylum Seeker's Entry into South Africa

Case	Salient Facts	Legal Principles
Ruta v Minister of Home Affairs (CCT02/18) [2018] ZACC 52	In this case, Mr Ruta, a Rwandan national, entered South Africa illegally after fearing political persecution. Over a year later, he was arrested for traffic violations – without having applied for asylum.[25] While in prison, Home Affairs tried to deport him and he successfully challenged the decision at the High Court, then lost at the SCA and then appealed to the Constitutional Court.[26]	At issue in this case was the effect of Mr Ruta's delay on his entitlement to apply for refugee status.[27] The Constitutional Court held that SCA's precedents in *Ersumo*[28] and *Abdi*[29] ought to have been applied here, rendering Mr Ruta's delay as irrelevant to his entitlement to apply for asylum.[30] Further, the Constitutional Court reiterated the principle of non-refoulement as the fundamental principle of refugee protection law.[31] While the Constitutional Court was not express in this regard, its reasoning strongly suggests that the principle of non-refoulement implies that delay on its own could never show that conditions have improved at a

[25] *Ruta v Minister of Home Affairs* (CCT02/18) [2018] ZACC ("*Ruta CC*") 52 para 1.
[26] *Ruta CC* para 1.
[27] *Ruta CC* para 3.
[28] *Ersumo v Minister of Home Affairs and Others* (69/2012) [2012] ZASCA 31
[29] *Abdi and Another v Minister of Home Affairs and Others* (734/2010) [2011] ZASCA 2
[30] *Ruta CC* para 16.
[31] *Ruta CC* para 26.

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Annexure A - Principal Cases Regulating An Asylum Seeker's Entry into South Africa

Case	Salient Facts	Legal Principles
		would-be applicant's country of origin. That can only be determined through the asylum application process itself.
Gavrić v Refugee Status Determination Officer, Cape Town and Others (CCT217/16) [2018] ZACC 38	Mr Gavrić sought refugee status in South Africa after fleeing Serbia to escape a 35-year sentence for murdering Zeljo Ražnatović, an erstwhile military leader turned organised criminal.[32] Mr Gavrić entered South Africa in 2007 but only applied for refugee status in 2012, after he was arrested for possessing drugs and fraudulent documents.[33] The application was rejected on the grounds that Mr Garvić committed crimes that section 4(1)(b) of the Refugees Act states should preclude an application for asylum.[34]	The Constitutional Court held that section 4(1)(b) of the Refugees Act is constitutional because the principle of non-refoulement is the overriding norm of the Refugee Act.[35] This means that even in the case of possible exclusion under section 4(1)(b), the risk of continued persecution will remain relevant when a decision is taken regarding whether to extradite an asylum seeker to face prosecution.[36]

[32] *Gavrić v Refugee Status Determination Officer, Cape Town and Others* (CCT217/16) [2018] ZACC 38 ("*Gavrić CC*") paras 1, 5 and 8.
[33] *Gavrić CC* paras 9 and 10.
[34] *Gavrić CC* paras 10 and 11.
[35] *Gavrić CC* paras 26, 27 and 31.
[36] *Gavrić CC* paras 28 and 39.

Annexure B - Principal Cases Regulating An Asylum Seeker's and/or Refugee's Life in South Africa.

Once an asylum seeker has entered South Africa and applied for – or has been granted refugee status – the question becomes: 'What sort of life ought they to lead while they are here?' The protection which our courts have given asylum seekers and refugees in this regard does not flow from international treaty law *per se* but from rights that the Constitution grants to citizens and non-citizens alike. Thus, the White Paper's implication that these rights can be avoided without a constitutional amendment is misleading.

Case	**Salient Facts**	**Legal Principles**
Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development (CCT 13/03, CCT 12/03) [2004] ZACC 11.	This case involved a constitutional challenge to the Social Assistance Act 59 of 1992 to the extent that it reserved social grants for citizens.[1] All applicants in this case were permanent residents.[2] The challenge succeeded in the High Couty and was confirmed by the Constitutional Court,	The Constitutional Court held that, as a general proposition, the Constitution's plain text in extending socio-economic rights to "everyone" prevented state action that categorically denied access thereto on the basis that a would-be recipient was not a citizen.[3]

[1] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC ("*Khosa CC*") 11. para 1.
[2] *Khosa CC* para 2.
[3] *Khosa CC* para 47.

Annexure B - Principal Cases Regulating An Asylum Seeker's and/or Refugee's Life in South Africa.

Case	Salient Facts	Legal Principles
Saidi and Others v Minister of Home Affairs and Others (CCT107/17) [2018] ZACC 9.	This case involved asylum seekers who were granted temporary permits that allowed them to sojourn in South Africa while their applications for asylum were processed.[4] The application process took a long time, which meant that the applicants' permits needed to be extended a few times.[5] The applications for asylum were ultimately rejected and the applicant's internal reviews under in terms of the Refugees Act failed as well.[6] The applicants then instituted a judicial review under the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").[7] The Cape Town Refugee	The Constitutional Court held that the principle of non-refoulement not only empowered the Acting Manager to extend the applicants' permits until their PAJA review was finalised – but it obliged them to do so.[13] This is because if extending the applicants' permits was left to the Acting Manager's discretion, it would risk the applicants being returned to an unsafe country of origin.[14]

[4] *Saidi and Others v Minister of Home Affairs and Others* (CCT107/17) [2018] ZACC 9 ("*Saidi CC*") para 2.
[5] *Saidi CC* para 2.
[6] *Saidi CC* para 3.
[7] *Saidi CC* para 3.
[13] *Saidi CC* para 40.
[14] *Saidi CC* para 40.

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Case	Salient Facts	Legal Principles
	Reception Office had historically extended temporary permits pending a finalized PAJA review, but an incoming Acting Manager changed things after they decided that they did not have the power to extend temporary permits once the Refugee Act's internal appeals had been exhausted.[8] In response, the applicants launched High Court action to compel the Acting Manager to extend their permits pending a finalised PAJA review.[9] The High Court partly agreed – finding that the Acting Manger was empowered to extend the temporary permits but was not obliged to.[10] All parties appeal to the	

[8] *Saidi CC* para 4.
[9] *Saidi CC* para 5.
[10] *Saidi CC* para 5.

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Case	Salient Facts	Legal Principles
	SCA, only to receive much of the same outcome.[11] Then came an appeal to the Constitutional Court.[12]	
Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142	This case involved a Zimbabwean national who fled her home country with her disabled son, fearing political persecution. She applied for asylum and was issued with a permit under section 22(1) of the Refugee Act, but it was subject to the conditions that she and her son be prevented from working or studying in South Africa.[15]	The SCA held that a general prohibition on work and study as a condition to an asylum permit was contrary to the Bill of Rights.[17] The SCA held so because the right to work is a component of the right to dignity – which is held by citizens and non-citizens alike.[18] Notably, the SCA held that the right to dignity does not extend to allow for every applicant for asylum to undertake employment,[19] but given that asylum seekers having nothing but their own labour to support

[11] *Saidi CC* para 6.
[12] *Saidi CC* para 7.
[15] *Minister of Home Affairs and Others v Watchenuka and Others (010/2003) [2003] ZASCA 142* ("*Watchenuka SCA*") at para 1.
[17] *Watchenuka SCA* para 24.
[18] *Watchenuka SCA* para 27.
[19] *Watchenuka SCA* para 31.

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Case	Salient Facts	Legal Principles
	She challenged these conditions as unconstitutional. She won at the High Court and the Minister of Home Affairs then appealed to the SCA.[16]	themselves while waiting for a finalised application, it would be contrary to the right to dignity to force them into a life of crime or dependence on charity while the state discharged its duties in terms of the Refugee Act.[20]
Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others (48/2014) [2014] ZASCA 143	This case was precipitated by 'Operation Hardstick', an initiative conducted by the Limpopo police that ostensibly sought to enforce license requirements for small businesses.[21] Among its consequences was the confiscation of property used by asylum	The SCA followed its dictum in *Watchenuka* and held that it would be contrary to the Bill of Rights to prevent asylum seekers and refugees from starting small businesses to support themselves.[23]

[16] *Watchenuka SCA* para 14.
[20] *Watchenuka SCA* para 32.
[21] *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others* (48/2014) [2014] ZASCA 143 ("*Somali Association SCA*") para 3.
[23] *Somali Association SCA* para 43.

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Annexure B - Principal Cases Regulating An Asylum Seeker's and/or Refugee's Life in South Africa.

Case	Salient Facts	Legal Principles
	seekers and refugees which they used to operate their business.[22] While there were no formal laws or regulations in effect that prevented foreign nationals from operating small businesses, the way in which the application process for license was administered strongly suggested otherwise. This moved the Somali Association of South Africa to seek an order declaring that they were entitled to the requisite licenses. They were initially unsuccessful in High Court and then appealed to the SCA.	
Union of Refugee Women and Others v Director, Private Security Industry	This case involved a constitutional challenge to section 23(1)(a) of the Private Security Industry Regulation Act 56 of 2001 ('Security Act'), which	The Constitutional Court assumed, without deciding, that the Security Act's differentiation between citizens and non-citizens was discrimination – but ultimately

[22] *Somali Association SCA* para 4.

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Annexure B - Principal Cases Regulating An Asylum Seeker's and/or Refugee's Life in South Africa.

Case	Salient Facts	Legal Principles
Regulatory Authority and Others (CCT 39/06) [2006] ZACC 23	limited licences to provide private security services to citizens.[24] The challenge was initially unsuccessful in the High Court and the applicants then appealed directly to the Constitutional Court.[25]	held that it was not unfair.[26] This is because the right of a refugee to seek employment in South Africa is not unlimited.[27] And, unlike *Watchenuka*, this case did not involve a blanket ban on asylum seekers seeking employment.[28]

[24] *Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others* (CCT 39/06) [2006] ZACC 23 ("*Union of Refugee Women CC*") para 26
[25] *Union of Refugee Women CC* para 19
[26] *Union of Refugee Women CC* para 45 – 54.
[27] Ibid.
[28] Ibid.

Annexure C

South African Asylum Seeker Process