

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: No
DATE: 22 July 2024



Case No.:2024-068962

In the matter between:

ASOMANI DAVID BOAMAH

APPLICANT

And

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

THE DIRECTOR GENERAL,

DEPARTMENT OF HOME AFFAIRS

SECOND RESPONDENT

AND

Case no: 2024/070763

In the matter between:

IKE GOODLUCK

(Asylum file ref no: JHBNGA000521010)

APPLICANT

and

THE MINISTER OF HOME AFFAIRS

FIRST RESPONDENT

DIRECTOR GENERAL OF HOME AFFAIRS

SECOND RESPONDENT

DEPUTY DIRECTOR GENERAL OF IMMIGRATION

THIRD RESPONDENT

DEPARTMENT OF HOME AFFAIRS

THE CHIEF DIRECTOR OF DEPORTATION

FOURTH RESPONDENT

DEPARTMENT OF HOME AFFAIRS

THE CHAIRPERSON: STANDING COMMITTEE

FIFTH RESPONDENT

FOR REFUGES AFFAIRS (SCRA)

THE CHIEF MAGISTRATE OF THE DISTRICT COURT
BOKSBURG MAGISTRATE'S COURT
THE HEAD OF NATIONAL PROSECUTING AUTHORITY
PRETORIA HEAD OFFICE (NPA)
THE SENIOR PUBLIC PROSECUTOR
BOKSBURG MAGISTRATES COURT (SPP)
THE ACTING DISTRICT COURT CONTROL PROSECUTOR
BOKSBURG MAGISTRATES COURT
THE HEAD OF PRISON MORDERBEE PRISON

SIXTH RESPONDENT

SEVENTH RESPONDENT

EIGHTH RESPONDENT

NINTH RESPONDENT
TENTH RESPONDENT

Summary: *Lawfulness of detention and/or deportation of asylum seekers in instances where such persons previously held valid temporary permits. Lawful detention per Ashebo v Minister of Home Affairs and Others differentiated from cases where temporary permit can be renewed and where judicial review of refusal still pending.*

JUDGMENT

K STRYDOM, AJ

General principles:

1. Both the applicants, Mr Goodlock ("Goodlock") and Mr Boamah ("Boamah"), have brought urgent applications for interdicts against the various respondents for their release from detention, as well as, inter alia, prohibiting their deportation from the Republic of South Africa.
2. With regards to deportation, in terms of Section 27A of the Refugees Act, 130 of 1998 an asylum seeker is entitled to a formal written recognition as an asylum seeker in the prescribed form, pending finalisation of his or her application for asylum. An asylum seeker is further entitled to remain in the Republic pending the finalisation of his or her application for asylum. "Finalisation" includes "all available remedies, including appeals and judicial review" and, if valid grounds exist (such as "sur place"), any application made subsequent to a dismissal of the initial application.¹
3. In this regard, any contentions that by virtue of their conduct and failure to regularise their visas timeously by availing themselves of the remedies afforded, the Applicants have 'abandoned' their rights in terms of the principle of non-refoulement, have been dealt a decisive blow by the Constitutional Court in the case of *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others*. There the Constitutional Court, in holding that subsections 22(12) and 22(13) of the Refugees Act (which entailed an automatic abandonment of rights in cases of failure to renew visas) inconsistent with the Constitution and invalid, stated that:

¹ *Irakunda and Ano v Director of Asylum Seeker Management : Department of Home Affairs and others* [2024] ZASCA 87 (June 2024) at paras 65 and 71

“[46] The short answer to these assertions is that they cannot justify the automatic abandonment of an asylum application, simply because of a failure to renew a visa. As stated, the consequence of the impugned subsections is that the merits of a claim for asylum are never considered, and the principle of non-refoulement is violated. In any event, the respondents wrongly assume that most asylum seekers have no valid claims to asylum and no interest in pursuing those claims. This assumption violates the core principle of refugee law that asylum seekers must be treated as presumptive refugees until the merits of their claim have been finally determined through a proper process.”

4. It is therefore clear that, until finalisation of an application for asylum, deportation is prohibited.
5. The lawfulness of detention of prospective asylum seekers in terms of the Immigration Act, however, is not as straightforward.
6. In terms of Section 21(4) of the Refugee's Act:

“Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if—

(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such application has been reviewed in terms of section 24A or where the applicant exercised his or her right to appeal in terms of section 24B; or

(b) such person has been granted asylum.”

7. From the outset it is important to note that in both the present applications, the Applicants are asserting that they have already applied for asylum and have both previously been granted temporary asylum seeker permits in terms of Section 22 of the Refugees Act. Boamah allegedly failed to apply for a renewal of this visa, whilst in Goodluck's case, his asylum application had been refused and was, according to him, subject to judicial review.
8. These facts distinguish the present applications from those premised on a person's expression of an intent to apply for asylum, such as in *Ashebo v Minister of Home Affairs and Others*.² In *Ashebo*, the Constitutional Court confirmed the lawfulness of detention in cases where a prospective asylum seeker has failed to apply an asylum transit visa or has entered the country illegally or failed to report to a RRO within five days. It held that:

“[59] To sum up, the applicant is entitled to an opportunity to be interviewed by an immigration officer to ascertain whether there are valid reasons why he is not in possession of an asylum transit visa. And he must, prior to being permitted to apply for asylum, show good cause for his

² *Ashebo v Minister of Home Affairs and Others* (CCT 250/22) [2023] ZACC 16; 2023 (5) SA 382 (CC); 2024 (2) BCLR 217 (CC) (12 June 2023) (“*Ashebo*”)

illegal entry and stay in the country, as contemplated in the above provisions. Once he passes that hurdle and an application for asylum is lodged, the entitlements and protections provided in sections 22 and 21(4) of the Refugees Act – being issued with an asylum seeker permit that will allow him to remain in the country, without delay, and being shielded from proceedings in respect of his unlawful entry into and presence in the country until his application is finally determined – will be available to him.” [Underlining my own]

9. In *Lembore and Others v Minister of Home Affairs and Others*,³ the Full Court of this division reiterated that:

“[68]..... Ashebo has put this issue beyond doubt that the detention of illegal foreigners in terms of the amendments is not unlawful and remains so until good cause has been shown leading to the triggering of the Refugees Act.” [Underlining my own]

10. In the subsequent leave to appeal judgment,⁴ the Full Court contextualised the lawfulness of detention of asylum seekers:

“[9] The judgment dealt with persons who had not yet shown good cause. In any event, it bears repeating that neither persons who have not shown good cause, nor de-jure or de-facto refugees can be deported after intimating their intention to apply for asylum, or once being granted asylum as in the case of de-facto refugees. However, unlike de-jure and de-facto refugees, for those who have not shown good cause, as the main judgment went to great lengths to explain, there is no protection from detention arising from a contravention of section 49(1) of the Immigration Act.” [Underlining my own]

11. As a general principle, the reliance on *Ashebo* by the Respondents *in casu* to justify the continued detention of the applicants at Lindela is accordingly misplaced. *Ashebo*, as read with *Lebore*, is in fact authority for the converse: *de-jure* and *de-facto* refugees are protected from detention arising from a contravention of section 49(1) of the Immigration Act. Where applications for asylum have already been made, the protections contained in S22 and S21(4) of the Refugee’s Act have already been “triggered”.

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Background

12. The applicant alleges that he fled Ghana and upon his arrival in the Republic around 2019, he applied for asylum, and was issued with an asylum seeker permit bearing file number PTAGH00024021. He only renewed the said asylum seeker permit once, around 2020. He was

³ Judgment handed down on 8 February 2024, Gauteng Division (2023-097427, 2023-097292; 2023-097111; 2023-097076; 2023-100081; 2023-100526).

⁴ *Lembore and Others v Minister Of Home Affairs And Others* (2023/097427) [2024] ZAGPJHC 502 (21 May 2024)

unable to renew his asylum seeker permit due to the covid-19 outbreak. When the Refugee Reception centre re-opened around 2023, he approached the Refugee Reception centre situated in Pretoria, in order to renew the permit, however on each occasion that he had been to the centre he was turned back at the gate without being assisted and advised that access to the centre is through appointment only.

13. In his founding affidavit he further states that:

“I was arrested in Tembisa on the 22nd of February 2024, in Gauteng Province and charged and detained for contravention of the immigration laws of the Republic, notwithstanding the fact that I informed the arresting officers that I am an asylum seeker in the Republic who is in possession of an asylum seeker permit which has expired and I could not renew it due to no fault of my own, and I requested that I be afforded an opportunity to renew same, however my pleas were ignored and I was finally detained Lindela on the 13 of June 2024 for the purpose of deportation.”

14. The Respondents have provided further clarity regarding what happened after the arrest of the Applicant:

14.1. The Applicant was sentenced and convicted by the Madadeni Magistrate court on 24 April 2024. The learned magistrate ordered that he was: *“Sentenced to undergo 3 (three) months direct imprisonment. Ito Section 34 of the Immigration Act 13/2002 it is ordered that the accused be deported before the expiry of his sentence.”*

14.2. His sentence therefore runs until 23 of July 2024.

14.3. Having served a portion of his sentence, on the 20th of May 2024, he was placed under the correctional supervision (“parole”) of the Department of Home Affairs pending deportation. He is currently being held at Lindela detention facility in Krugersdorp pending such deportation

15. The Respondents assert that the matter, having been brought on severely truncated timeframes, is not urgent. According to this argument, as the Applicant’s sentence runs until the 24th of July 2024, the risk of deportation was not imminent enough to justify the degree of urgency upon which the application was brought. The problem with this assertion lies in the fact that the Magistrate’s order pertinently indicated that he is to be deported *before* the end of his sentence. To my mind, whether correct or not, the implication of such an order is sufficient to reasonably apprehend the imminence of harm.

16. They have also, as a *point in limine*, raised the non-joinder of the Minister of Correctional Services, in view of the fact that the Applicant is currently still subject to correctional supervision. In view of my finding, I do not intend to deal with this objection.

17. In their unsigned answering affidavit (to which the Applicant has replicated), the Respondents had admitted that the Applicant was the holder of an expires temporary asylum permit. However, their signed affidavit, filed later, includes a new paragraph in terms of which the authenticity of the asylum seeker permit attached to the Applicant's founding papers is challenged. They assert that the asylum seeker permit bearing file number PTAGH00024021 was issued to another person. As proof, a screenshot or photo of a screen is attached showing that the permit was issued to a certain Boateng as far back as at least 2014.
18. In his supplementary submissions, counsel for the Applicant drew the Court's attention to the fact that the screenshot attached by the Respondents in fact relates to a permit with file number PTAGHA00024021. Upon personal perusal of the two documents, I am satisfied that the screenshot attached to the answering affidavit, relates to a different file. Accordingly, the assertion of fraud made by the Respondents is blatantly incorrect and stands to be disregarded.
19. As discussed supra, as the Respondent is the holder of an (expired) temporary asylum permit, the protections of Sections 21(4) and 22 of the Refugee's Act would apply and he would be eligible to be released from Lindela and the issuance of a Section 22 asylum permit. However, the fact that he has already been convicted in terms of the Immigration Act and is currently still serving his sentence in that regard, complicates matters somewhat.
20. The Respondents are detaining the Applicant pursuant to the order of the Magistrates' Court, which order is binding until set aside. However, this Court has not been asked to sit as a Court of review or appeal (as the case may be) for purposes of setting aside the conviction and sentencing in this regard. Furthermore, the non-joinder of the Minister of Correction (per the respondents' point *in limine*) as well as the non-joinder of other interested parties such as the NPA and the Magistrate, in any event would have barred this Court from deciding the issue. As such, despite the fact that the detention is unlawful by virtue of the provisions of the Refugee's Act, this Court cannot order the Respondents to contravene a binding order of the Magistrate's Court.
21. I further agree with counsel for the Respondents that the Applicant's papers are far from satisfactory. The founding affidavit failed to provide full details relating to the arrest and conviction. The Applicant, for instance, insists that he was arrested in Tembisa, Gauteng, but fails to explain why he was then brought before a Magistrate in KwaZulu Natal. Most importantly however, despite it being pointed out that there is a binding court order for his detention, the Applicant proffered no argument as to how the Respondents are to disregard such an order. Instead, it pinned its entire case to the mast of the provisions of S21(4) of the Refugee's act. During argument it was submitted that the Respondents should have released the Applicant back into the custody of the Department of Correction for the determination of other correctional

supervision. That might be so, but, having failed to join the Minister of Correction to these proceedings, I decline to make any finding in this regard.

22. Under the circumstances, the Applicant must stand and fall with his stated case. The order I intend to make herein should not be construed to imply that any of the Applicant's legal remedies of review or appeal (relating to the criminal conviction and sentencing) are determined. The order is simply put, the only order the Applicant has left this Court with.

23. As to the issue of costs, I am not inclined to grant any cost order. The Respondents, acting pursuant to a valid Court order, that the Applicant did not challenge, could not have released the Applicant from detention even had they agreed that by virtue of Section 21(4) of the Refugee's Act, they had no grounds for detaining him. On the other hand the application was essential to the Applicant in the protection of his Constitutional rights, as well as his rights under the principle of non refoulement.

ORDER

24. I accordingly order as follows:

1. The forms and service provided for in the Rules of this Court are dispensed with where necessary, and this application is heard on urgent basis in terms of Rule 6 (12) (a)

2. The Respondents are directed to release the Applicant from detention at Lindela Repatriation centre under file number 202406130120, once the impediment to such release created by the order for conviction and sentencing of the Magistrate Madadeni Magistrate Court on the 24th of April 2024, ceases to exist; alternatively on the 24th of July 2024; whichever event occurs the earliest.

3. The Respondents are interdicted and restrained from deporting the Applicant until such time that the Applicant status in the Republic of South Africa has been fully and finally determined in terms of the Refugees Act 130 of 1998 and until such time that the Applicant has fully exhausted his review or appeal process in terms of chapter 4 of the Refugees Act and the promotion of Administrative Act of 2000;

4. The Respondents are directed to re-issue the Applicant asylum seeker permit bearing file number PTAGH00024021 in terms of section 22 of the Refugee Act 130 of 1998 within 5 days of service of this order upon them;

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25. By contrast, in the Goodluck matter, the Applicant has applied for relief terms of the Refugee's Act against the first to fifth Respondents ("Home Affairs"), as well as relief aimed at the criminal proceedings instituted against him pursuant to the Immigration Act against the sixth to tenth Respondents ("NPA").

26. Initially the notice of motion was couched as an interim interdict pending the outcome of judicial review proceedings to have the decision to deny the Applicants application for asylum set aside. In broad strokes, the following was sought:

26.1. Against the NPA:

- Reviewing and setting aside the decision/outcome of the representation rendered by an Acting District Court Control Prosecutor; Ms. Maria Fyff, dated 26 June 2021;
- Declaring the decision to be inconsistent with the Refugee Act 130 of 1998, the Immigration Act 13 of 2002, the provision of Promotion of Administrative Justice Act and the Constitution of the Republic of South Africa, 1996;
- That the Applicant immediately be released from detention at Modderbee Prison

26.2. Against Home Affairs:

- Permitting the Applicant to bring the present application without exhausting any further applicable internal remedies as may be found to exist under section 8 of the Immigration Act;
- Interdict against expulsion of deportation

26.3. The applicant also sought an order *“(d)irecting the Applicant to pursue the Review application contemplated in Part B of the Notice of Motion within 30 days of this order, failing which the interim interdict will lapse”*

Background

27. The Applicant had been issued a temporary asylum seeker permit in 2010. During 2021 he was arrested and charged with contravention of section 49(l)(a) of the Immigration Act. He was informed then that his asylum application had been rejected by a Refugee Status Determination Officer. He was then detained at the Boksburg Police Station pending deportation.

28. His erstwhile legal representative then assisted him in lodging a Review application in terms of Rule 53, with the South Gauteng High Court (Johannesburg) under case no: 2021/28198. Home Affairs denies that such an application was ever served on them. The notice of motion attached to the founding affidavit, whilst showing that it was issued by Court, also does not contain proof of such service. The Applicant’s representatives have submitted that they, as the new representatives are not in possession of same.

29. The Applicant then made representation to the Control Senior Public Prosecutor requesting that the charges against him be withdrawn, pending the finalisation of all processes available to him under the Refugee Act. The Magistrate’s Court ordered his release and the charges against him were withdrawn.

30. Upon his release from the Boksburg Police Station, the then Head of the Boksburg Regional Office of the Department of Home Affairs issued him with a *“Notice by Immigration Officer to person to appear before Director General”* to approach the Refugee Reception Office for his asylum to be re-issued. He allegedly approached the Refugee Reception Office in Pretoria on multiple occasions from June 2021, however, officials at Marabastad repeatedly informed him that they were waiting for instruction from their legal services to re-issue him with a temporary asylum seeker permit. Despite requests from his legal representatives, he has not been assisted in this regard.
31. The founding affidavit does not pertinently address the ensuing events, however, from the documentation filed, it is evident that at some point during 2022 the applicant had to bring an urgent application before this Court (similar to the present one) for his release from detention and prohibiting his deportation pending the outcome of judicial review proceedings instituted in the Pretoria High Court under case no: 81523/18 . Following written confirmation from Home Affairs, as well as the state attorney that they have had sight of a review application and that therefore he cannot be considered to be an illegal immigrant, the following order was made:
- “2. Pending the final determination of the issues in the Review Application under Case No: 81523/18 before the Pretoria High Court, the Respondents. are directed to release the Applicant from unlawful detention at the Hillbrow Police Station forthwith;*
- 3. The Respondents are interdicted from arresting and departing the Applicant from the until such time when the Applicant has exhausted all the remedies available to him und Refugee Act, 130 of 1998;*
- 4. For purposes to be legal in the Republic pending the outcome of the Review Application case number 81523/18 before the Pretoria High Court, the Applicant is entitled to have his temporary asylum visa/permit renewed in terms of section 22 of the Refugee Act 13 of 1998;*
- 5. The First, Second, Sixth and Seventh Respondents are directed to file the record in the Review Application pending before the Pretoria Provincial Division of the High Court under case number 81523/18 within 15 days of this Order;*
- 8. If the First, Second, Sixth and Seventh Respondents fail to file the record referred to in paragraph hereof, in terms hereof, the Applicant shall exercise his rights in terms of the Uniform Rules of the Honourable Court within 15 days of such failure on the part of the First and Second Respondents;”*
32. Despite confirming that that the temporary permit was not issued and that the record was not provided, the Applicant has failed to indicate any steps taken in terms of the Uniform Rules to enforce his rights in this regard.

33. I pause the chronology to add that it should be immediately apparent, from the case numbers, that the applicant has, in fact, lodged two review applications, one before the Pretoria High Court in 2018 (81523/18) and one before this Court in 2021 (2021/28198). Despite a request from this Court for an explanation as to the status and/or the outcome of the 2018 review application, the applicant has failed to indicate why the 2021 review application was brought.
34. On the 08th of August 2023, he was arrested on suspicion of possession of illicit substance. He appeared before a Presiding Officer at the Goksburg Magistrate Court where he was formally charged. At a later stage, the initial charge of possession of drugs was withdrawn. However, the State decided to lay another charge of contravention of section 49(l)(a) of the Immigration Act 13 of 2002. The State relied on the Department of Home Affairs to determine his legality and in so doing, his bail was allegedly denied based on a Section 212 sworn statement by an official of the Department of Home Affairs.
35. He then made representations to 8th Respondent contending he had been wrongfully charged with contravention in terms section 49(l)(a) of the Immigration Act, 13 of 2002, as he had filed an application for judicial review before this Court under case no: 2021/28198. On the 26th of June 2024, the 8th Respondent informed the Applicant that his representations for withdrawal were unsuccessful. In her reasons for her decision she, *inter alia* states that:
- 35.1. A final decision to reject the Applicant's application for asylum had been made prior to May 2021 "*and as such the time lapse is a consideration that cannot be ignored.*"
- 35.2. In terms of *Ashebo*, the state has a duty to assist Applicants where they have made their intention to apply for asylum known. She acknowledges that this "is not the case in the present matter", but then in any event proceeds to rely on *Ashebo* to justify continued detention.
- 35.3. She also "*....contacted the Registrar of the court telephonically and was informed that no matter under that case number is found in their system under the name of the accused.*"
36. The present application was launched on the 27th of June 2024.

Urgency

37. Home Affairs contends that, as it has not issued a notice to deport, the deportation of the Applicant is not imminent. The NPA made a similar argument.
38. Both sets of Respondents, however, have failed to adequately address the trite principal that in cases where a person's constitutionally entrenched right to freedom and security of person is affected, an application aimed at restoring same would be *prima facie* urgent. Whilst it may be true that deportation is not imminent per se, the continued incarceration of the Applicant constitutes ongoing harm and by virtue thereof is urgent.

39. As to the urgency *vis-à-vis* Home Affairs, I note that his detention is based on their confirmation that he is an illegal foreigner. Ordering the NPA to release him from detention would be ineffectual under circumstances where Home Affairs maintains his illegal status – he would run the risk of simply being arrested and charged again. Seen from this perspective, the joinder of Home Affairs and the relief sought against it, it crucial for this Court to make an effective order.

The Respondent's submissions

40. Home Affairs contends that this Court does not have jurisdiction to decide the matter as that would constitute interference with the ongoing criminal proceedings before the Boksburg Magistrate Court. In the answering affidavit it argues that: *"...this is not a bail appeal or review application for the court to even be amenable to release the Applicant on bail. Besides no case has been made out to show that the decision of the Magistrate to deny the Applicant bail was wrong."*

41. Having denied receipt of the judicial review application, it submitted that even if such an application does exist, it does not bar criminal prosecution under section 49(1) (a). In its heads of argument it postulates the following:

"If the court finds that jurisdiction has been engaged, it should answer the question of what becomes of section 49(1)(a) of the Immigration Act and 65 of the CPA. This will mean that illegal foreigners cannot longer be criminally prosecuted for contravention of the law and if denied bail there would be no need to appeal, they can simply run to the urgent court and hide behind the principle of non-refoulment."

42. It is obvious that Home Affairs submissions are by and large based on the assumption that the Applicant is an illegal foreigner.

43. The NPA, for their part, have, in their supplementary submissions, conceded that 'lawful detention' per *Ashebo* does not apply to the Applicant. Despite this acknowledgement they seemingly seek to apply the dictum in *Ashebo* relating to cases where a good cause interview (to determine whether a person is a *bona fide* asylum seeker) has not been held, to cases where a finding on the *bona fides* of the asylum application has already been made, arguing that: *"The detention of persons alleged to be illegal in the country pending their good cause interviews, asylum application process, appeals and review applications is not unlawful."* [Underlining my own]. This is a distortion of the finding in *Ashebo* and is not founded in law.

44. On a slightly sounder footing, they further argued that the Applicant has failed to prove that he has brought an application for judicial review and that *"(t)he mere indication that Mr Goodlock has previously or intends to bring a review application does not automatically trigger the protections in Section 2 of the Refugees Act until he in fact brings such an application and*

ensures that he is granted an extension of his asylum permit in terms of section 22 of the Refugees Act.”

Evaluation

45. Home Affairs’ challenge to this Court’s jurisdiction is erroneously based on the assumption that the Applicant seeks to set aside the Magistrate’s decision to not grant bail. The decision to be reviewed is in fact the NPA’s decision to proceed with criminal prosecution. Whilst such a review is excluded in terms of Section 1(ff) PAJA, such a review may still be brought under the principle of legality. Although such reviews provide a more limited basis of review than PAJA, they can be brought on, inter alia, grounds of irrationality and on the basis that the decision-maker did not act in accordance with the empowering statute.⁵ Save for the questions regarding the launching of the judicial review application (elucidated below), from the 8th Respondent’s reasons it is clear that the refusal to withdraw criminal proceedings was based on an incorrect interpretation of S21(4) of the Refugees Act and lawfulness of detention per *Ashebo*.
46. To my mind, the central issue for determination is whether the Applicant has brought an application for judicial review and, if not, whether his expressed intention to do so, triggers the protections afforded to refugees in terms of Section 21(4) of the Refugees Act. Differently put, if Home Affairs’ contention that the Applicant is currently an illegal foreigner is correct, his continued detention in terms of the Immigration Act would be lawful. Naturally the converse would render the detention and criminal prosecution unlawful.
47. Section 24 (5) of the Refugee’s Act provides that:
- “(a)An asylum seeker whose application for asylum has been rejected in terms of subsection (3)(b) and confirmed by the Standing Committee in terms of section 24A (2), must be dealt with as an illegal foreigner in terms of section 32 of the Immigration Act.*
- (b)An asylum seeker whose application for asylum has been rejected in terms of subsection (3)(c), must be dealt with in terms of the Immigration Act, unless he or she lodges an appeal in terms of section 24B(1).”*
48. It is beyond the scope of this judgment to make a finding on whether or not the applicant had or should have exhausted the internal remedies provided for in Sections 24A or 24B. The Court tasked with deciding any judicial review will make a determination in this regard. As stated supra, the only present considerations are whether the protections of the Refugee’s Act have been triggered.

⁵ *National Director of Public Prosecutions and Others v Freedom Under Law* (67/2014) [2014] ZASCA 58; 2014 (4) SA 298 (SCA); 2014 (2) SACR 107 (SCA); [2014] 4 All SA 147 (SCA) (17 April 2014) at para 29

49. In this regard, the Supreme Court of Appeal, in *Irankunda*⁶ recently held as follows:

[76] *Therefore, the suggestion that one can without more, submit one application after the other when the previous one has been finally determined, is not what the Refugees Act contemplates. For such applicants, the period between the final rejection of their asylum and their departure, is regulated by the Immigration Act. Without any permit to remain in the country, such applicants are regarded as illegal foreigners as defined in the Immigration Act. Section 32 of the Immigration Act provides that ‘any illegal foreigner shall depart unless authorised by the Department to remain in the Republic’.*

[77] *Thus, a failed asylum applicant can only remain in the country on either of the following bases: (a) that the final determination of their asylum application is pending; (b) that he or she has authorisation by the Department to remain in the country; or (c) that there is some other lawful basis to remain in the country. This is the essence of the rule of law – a foundational value of our Constitution.*

[78] *Applied to the present case, one should bear in mind the following. The appellants have neither applied to review the decisions to reject their initial asylum applications nor do they have authorisation from the Department to remain in the country. Ordinarily, that rendered them illegal foreigners under the Immigration Act, as they had no legal basis to remain in the country.*

50. “Review” in this context references internal review per S 24A or S24B. Although Inyankunda dealt with the situation where new asylum applications were brought on the basis of a change in the circumstances in the applicants’ home countries (“sur place”), the following caution expressed by the SCA against abuse, is appropriate in the present circumstances:

[82] *These conclusions must be understood to be subject to some cautionary observations. First, a sur place claim is not validly made by reformulating a claim that has already been finally determined. Second, a sur place claim must set out a proper evidential basis for the claim. What circumstances have changed, the evidence of that change, and their specific consequences for the applicant must be set out in the application. Absent this content, an application may be summarily rejected. Third, there is much scope for abuse, in which sur place claims are made, sometimes on a repeated basis, without proper foundation, to extend protections for lengthy periods of time. This should not be tolerated. And the Department should develop expedited procedures to bring to finality sur place claims that facially have no basis.*

51. Having regard to this pronouncement, the position seems to be that the Applicant would be regarded as an illegal foreigner and be dealt with in terms of the Immigration Act, until such time as he has filed an application for judicial review. The mere expression of intention to file such

⁶ *Irankunda and Another v Director of Asylum Seeker Management: Department of Home Affairs and Others* (821/2022) [2024] ZASCA 87 (5 June 2024)

an application would not trigger the provisions of the Refugee's Act. To a certain extent, this tallies with the reasoning in cases such as *Ashebo* and *Lebore*: an asylum seekers' expression of an intention to avail himself of the protections afforded him under the Refugee's Act, does not automatically entitle him to such protection. As opposed to cases where Home Affairs has not completed the asylum process (as in for instance *Boamah supra*), here the Applicant's status has already been finally determined. Some form of action is required that would bring him within the framework of the Refugees Act.

52. The question therefore is whether the Applicant *in casu* has in fact launched judicial review proceedings. The Respondents deny service of the 2021 application brought in this Court. The 8th Respondent, in her reasons, specifically indicates that no such application exists.
53. Furthermore, whilst it is accepted that such proceedings were launched in 2018 in the Pretoria High Court, the filing of the second 2021 review application, coupled with the failure to definitively indicate the status of the 2018 application, places into question whether the 2018 judicial review application is still extant.
54. On a conspectus of the admitted facts before me, I therefore cannot find that the Applicant has brought a judicial review application. Until the existence of such an application has been conclusively established (by proving service thereof on the Respondents) or, alternatively, until an application for review in terms of Section 24 (5)(b) (if applicable) of the Refugee's Act or an application for judicial review is brought, the Applicant remains an illegal immigrant and subject to criminal proceedings per the Immigration Act.
55. The respondents, correctly, bemoaned the potential abuse of process by the applicant. This was not the first time he had relied on a judicial review application to be released from detention. Pursuant to the previous court order he took no action to bring the 2018 application to finality. From the prayers per the notice of motion as well as the amended draft order submitted by the applicant's representatives, it seems as if they are alive to this potential abuse. In both documents, the applicant has prayed for order imposing a legal duty on himself to bring the judicial review application to finality. In the latest permutation of the draft order it reads as follows:

"The Applicant is ordered to set down the review application under case number 2021/26198 within five(5) months from the date of serving the application on the First to Fifth Respondent, failing which the applicant shall ipso facto be barred from relying on "pending review" should he be detained for contravening any provision of the Immigration laws in future."
56. At the request of this court, the respondents have also uploaded an alternative draft order (in the event that the application is not dismissed), containing a similar provision.

57. I am of the view that such an order would not be contrary to the findings in *Scalabrini supra*. Whereas, in *Scalabrini*, the assumed abandonment of a right to judicial processes was unilaterally imposed on immigrants, *in casu*, the deemed abandonment is proposed and agreed to by the applicant himself.

58. In the second to fourth paragraphs of their joint alternative draft order, the respondents have proposed that the order should read:

“2. The detention and continued detention of the Applicant, is declared lawful.

3. The Applicant must be immediately released from the Tenth Respondent's correctional detention facility.

4. The Applicant is ordered to attend his next court hearing on 11 July 2024 and all other subsequent dates if any, before Sixth Respondent in order for this order to be given effect to by the Sixth Respondent.”

59. As already discussed, the question of lawfulness of detention is dependent on the existence of the application for judicial review. The order made will therefore, save for the aforementioned paragraphs, by and large, reflect the wording of the alternative draft of the Respondents.

Costs

60. In view of the uncertainties regarding the status of the judicial review application – upon which the application hinged – I am disinclined to award costs to either party.

Order

61. As a result, the following order is made:

1. It is declared that the Applicant's detention remains lawful until service of the review application (notice of motion & founding affidavit) under case number 21/26198, alternatively a new review application, on the First to Fifth Respondent and Seventh to Ninth Respondent and State Attorney.
2. Once service per paragraph 1 hereof has taken place, the continued detention of the Applicant shall be unlawful by virtue of the provisions of S24(1) of the Refugees Act 130 of 1998 and the Applicant shall be entitled to be immediately released from the Tenth Respondent's correctional detention facility.
3. Once service per paragraph 1 hereof has taken place, the seventh to ninth Respondents shall review the decision to continue criminal proceedings against the Applicant having due regard to s 21(4)(a) of the Refugees Act which bars the institution of any criminal proceedings for the contravention of s 49(1)(a) of the Immigration Act 13 of 2002 and inform the Applicant of the decision in this regard within 30 days.

4. 5. The First to Fifth Respondent are directed to re-issue the Applicant a temporary asylum seeker permit bearing file number JHBNGA000521010 within 10 days of service per paragraph 1 hereof, which permit must be served by the Applicant on the Seventh to Ninth Respondents and on the Office of the State Attorney by hand and email, for the attention of the State Attorney Ms. Zeenat Sahib (ZSahib@justice.gov.za) and Jonathan Selamolela (JoSelamolela@justice.gov.za)
5. The Respondents are interdicted and restrained from deporting the Applicant until such time the Applicant has fully exhausted his review or appeal process in terms of chapter 4 of the Refugees Act 130 of 1998 and/or the finalisation of judicial review proceedings contemplated in paragraph 1 hereof.
6. The applicant is ordered to set down the review application served per paragraph 1 hereof within five(5) months from the date of serving the application on the First to Fifth Respondent, failing which the applicant shall *ipso facto* be barred from relying on such pending review proceedings to invoke the provisions of the Refugees Act, 130 of 1998, should he be arrested and detained for contravening any provision of the law after the lapse of said five month period.


K STRYDOM

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Judgment reserved: 05 July 2024

Judgement delivered: 22 July 2024

Appearances in case number 2024-068962

Applicant's Legal representatives:

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Adv A M Mafanele
Instructed by: Maladzhi and Sibuyi Attorneys

Respondent's Legal representatives:

Counsel Adv Nomkhosi
Instructed by: The State Attorney (Ms Sahib Zeenat)

Appearances in case number 2024/070763

Applicant's Legal representatives:

Counsel Adv A M Mafanele
Instructed by: Tandoh Desmond Attorneys

Respondent's Legal representatives:

Counsel for 1st -5th Respondents: Adv V J Chabane
Counsel for 7th - 9th Respondents: Adv P Jara
Instructed by: The State Attorney (Ms Sahib Zeenat)