



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION,
CAPE TOWN**

REPORTABLE

Case No: 144037/2024

In the matter between:

ABDUS SATTAR

First Applicant

MAINUDDIN HOWLADER MAHEEN

Second Applicant

MD SAKIB MIA

Third Applicant

RUBEL MIA

Fourth Applicant

SHAMMIM HOOSAIN

Fifth Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR – GENERAL OF HOME AFFAIRS

Second Respondent

JUDGMENT

ANDREWS, AJ

Introduction

[1] This is an opposed urgent application in terms of which the Applicants, who are Bangladeshi nationals, seeks interim relief to urgently suspend the Form 23 notices and to interdict the Respondents from initiating any process to detain and/or deport and/or order the Applicants to depart from the Republic of South Africa, until each Applicant has had the opportunity to lodge an application for asylum in terms of section 21(1)(b) of the Refugees Act¹ ("the Refugees Act") and until such time that each of the applications have been determined on its own merits.

Factual Background

[2] The Applicants claim that they left their home country in fear of their lives due to political unrest. The First Applicant is a 42-year-old male from the Dhaka area in Bangladesh which is an Awami League ("AL") stronghold. In Bangladesh, an "AL stronghold" refers to a region or area where the AL party has a significant amount of support and influence. The First Applicant claims that his brother was attacked and arrested with a group of other men on 16 September 2023 because of his political affiliation with the Bangladesh Nationalist Party ("BNP"). After his release about a month later, the First Applicant was advised by his brother to leave Bangladesh for his own safety as his arrest was imminent.

¹ Act 130 of 1998.

[3] The Second Applicant is a 21-year-old male from the Dhaka area in Bangladesh. He claims that he had to flee his home country in fear of his life because of his political support for the BNP. The Third Applicant is a 23-year-old male from the Dhaka area in Bangladesh who also claims he had to flee his home country in fear of his life because of his political support for the BNP. He left his father and sister behind. The Fourth Applicant, a 29-year-old male who is the brother-in-law of the First Applicant, is also from the Dhaka area in Bangladesh who claims that he had to flee in fear of his life because of his political support of the BNP.

[4] The Fifth Applicant is a 29-year-old male. He is from Shariatpur, which is a town in the Dhaka area of Bangladesh. He claims that the police were targeting young men in Shariatpur who supports BNP, by attacking and arresting them. To avoid arrest, assault and persecution he fled Bangladesh. He left his father, mother and sister behind.

[5] The Applicants provided a brief exposition of how they each gained entry into South Africa. The First Applicant left Bangladesh by flying to Dubai, then to Mozambique and entered South Africa illegally on 25 October 2023 from Mozambique. The Second Applicant flew to Mozambique via Dubai and illegally entered South Africa on 20 September 2022. The Third Applicant flew to Durban via Dubai and entered South Africa on a visitor's visa on 28 January 2024. His visa has since expired. The Fourth Applicant entered South Africa on 21 July 2024 from the Mozambican border having flown there via Dubai and Tanzania. Lastly, the Fifth Applicant entered South Africa on 10 April 2023

through the Oliver Tambo International Airport with a visitor's visa which has since expired. All the Applicants made their way to Swellendam.

[6] The Applicants all have valid Bangladesh passports. They all provided a transparent explanation of their commute to South Africa by air and they all ultimately ended up in Swellendam where they resided and worked. The Applicants were arrested on 13 November 2024 and on 15 November 2024 they appeared in the Swellendam Magistrates' Court on charges of contravening Section 49 of the Immigration Act² ("the Immigration Act"). All the Applicants paid admission of guilt fines of R500 each and were released.

[7] The Department of Home Affairs ("DHA") official, Mr Lwandile Mngxekesa, issued each of the Applicants with a Form 23 Notice ("the notices") dated 15 November 2024 which were issued in terms of section 33(4)(c) of the Immigration Act. The notices inform the respective Applicants to appear before the Immigration Officer on 10 December 2024 at 08h00 with specific instructions to *'bring flight ticket and a valid passport. Form 21 to be issued'*.

[8] On 19 November 2024, the Applicants attended the Refugee Reception Office ("RRO") at Epping in Cape Town to present their Notices. They were informed that they could not apply for asylum because their notices were completed in such a manner that did not allow the Applicants to apply for asylum.

² Act 13 of 2002.

Urgency

[9] The Applicants upon learning that they were in effect given a deportation notice because their respective Form 23 notices essentially pre-empted their departure, were advised to launch a High Court Application for urgent interim relief to interdict DHA from detaining and/or deporting and/or ordering them to leave South Africa until they were allowed to bring their respective applications for asylum and until such applications have been decided upon. The Applicants asserted that they did not have enough funds for such an application at the time. On 29 November 2024, the Applicants were able to provide financial instructions to their legal representative, whereupon counsel was briefed on 4 December 2024.

[10] Rule 6(12)³ states as follows:

- ‘(a) In urgent applications the court or a judge may dispense with the forms and service provided for in these Rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these Rules) as it deems fit.*
- (b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.’*

³ Uniform Rules of Court

[11] It is uncontroverted that the Applicants on their own papers, were alerted to their difficulties on 19 November 2024 already. They asserted that they had financial constraints, hence the delay in launching this application. It was argued that matters of this nature are inherently urgent as there is a risk of the Applicants' freedom being taken away. Furthermore, they contended that they were never afforded the opportunity to apply for asylum and that their deportation was pre-empted without considering the merits of their respective applications. It was furthermore placed on record that the Fifth Applicant was arrested on 11 December 2024 and released after showing that there was a pending urgent application launched. In addition, it was submitted that without a court order, the Applicants will be arrested.

[12] The matter of urgency was not seriously challenged save that the Respondents illuminated that the Applicants' legal representative attested to the founding affidavit. I interpose to mention that not much turns on this challenge as the reasons were explained by the Applicants' attorney that it is procedurally practical for him to depose to the founding affidavit and for the Applicants to confirm the correctness thereof with confirmatory affidavits. Furthermore, the application concerns five Applicants whose situations are similar and for practical reasons were launched under one umbrella.

[13] The authority of the attorney to depose to the affidavit was not challenged and in any event the law in this regard is settled. In *Ganes and Another v Telecom Namibia Ltd*⁴ the court held that the deponent to an affidavit in motion proceedings need

⁴ 2004 (3) SA 615 (SCA).

not be authorised by the party concerned to depose to the affidavit. This means that, in motion proceedings, the person making the affidavit, the deponent, does not require explicit authorisation from the party on whose behalf the affidavit is being made.

[14] In *Bakala v Minister of Home Affairs and Another*⁵ the court held that all cases involving a deprivation of liberty makes them inherently urgent.⁶ This is underscored by the provisions of Section 12(1) of the Constitution⁷ which guarantees everyone the right to freedom and security of person which includes the right: -

- '(a) not to be deprived of freedom arbitrarily or without just cause;*
- (b) not to be detained without trial;*
- (c) to be free from all forms of violence from either public or private sources.'*

[15] In addition, Section 38 of the Constitution, ensures that individuals and groups have access to the courts to enforce their rights and challenge unjust laws or actions⁸. Consequently, this court was satisfied that the matter was indeed inherently urgent and that the two requirements of Rule 6(12) for urgency as distilled in the matter of *Salt and Another v Smith*⁹ were met and proceeded to hear the application.

⁵ (2024/06419) [2024] ZAGPJHC 599 (21 June 2024) at para 11.

⁶ See also *Aboe v Minister of Home Affairs* 2022 (4) BCLR 387 (CC) at para 9.

⁷ The Constitution of the Republic of South Africa, 1996.

⁸ Section 38 states:

'Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;*
- (b) anyone acting on behalf of another person who cannot act in their own name;*
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;*
- (d) anyone acting in the public interest; and*
- (e) an association acting in the interest of its members.'*

⁹ 1991 (2) SA 186 at 187A: *'This Rule entails two requirements, namely the circumstances relating to urgency which has to be explicitly set out and secondly, the reasons why the applicants in this matter could not be afforded substantial redress at a hearing in due course.'*

Applicants principal submissions

[16] In addressing the requirements for interim relief, it was submitted that the court is to have regard to Section 2 of the Refugees Act which not only places the prohibition it enacted over any contrary provision in the Refugees Act, but also over any other statute or legal provision. They further contended that it is a powerful decree because it enacts a prohibition and expresses the principle of non-refoulement.¹⁰ The Applicants asserted that they were not given an opportunity to apply for asylum despite expressing their desire to do so. Furthermore, the Applicants averred that they stand to suffer great prejudice if they were to be detained and/or deported and/or ordered to leave South Africa before being given the opportunity to apply for asylum and to have that application decided on its merits. They argued that the right to apply for asylum is a clear right as set out in Section 2 of the Refugees Act.

[17] In addition to contending that they are entitled to the relief they seek, the Applicant sought to place reliance on the matter of *Ruta v Minister of Home Affairs*¹¹ (“*Ruta*”) where the Constitutional Court in reference to Section 2 of the Refugees Act stated the following:

‘This is a remarkable provision. Perhaps it is unprecedented in the history of our country’s enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself – but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of non-refoulement, the concept that one fleeing

¹⁰ Non-refoulement is the concept that a person fleeing persecution or threats to his life, physical safety or freedom, should not be made to return to the country inflicting it.

¹¹ (CCT 02/18) [2018] ZACC 52 at para 24.

persecution or threats to “his or her life, physical safety or freedom” should not be made to return to the country inflicting it.’

[18] The court was also referred to the manner in which Acting Judge Manca in this Division, framed the relief in *Scalabrini Centre of Cape Town v Minister of Home Affairs*¹² (“*Scalabrini*”) which in essence afforded the Applicants in that matter an opportunity to apply for asylum. To further concretise the force of their argument, the Court was referred to the matter of *Ashebo v Minister of Home Affairs and Another*¹³ (“*Ashebo*”) wherein it was remarked that:

‘... is to provide an illegal foreigner, who intends to apply for asylum but who did not arrive at a port of entry and express his or her intention there, with a means to evince the intention even after the five-day period contemplated in section 23 of the Immigration Act...’

[Emphasis added]

Respondents principal submissions

[19] The Respondents sought to argue this matter without filing an answering affidavit. In making submissions from the bar, counsel drew the court’s attention to the fact that none of the Applicants are related. The manner in which each Applicant entered South Africa were illuminated. The Respondents furthermore submitted that those Applicants whose visitor’s visa had expired had an alternative remedy to extend their respective visitor’s visas. It was argued that the *Ruta* matter is distinguishable and that the Constitutional Court corrected this case. The current position is that everybody must

¹² (8486/2024) [2024] ZAWCHC 263 (13 September 2024) at para 92.

¹³ (CCT 250/22) [2023] ZACC 16 at para 43.

go through a 'good cause' application. It was contended that the Applicants did not mention that they were invoking asylum.

[20] The application was criticised for being laden with emotion and hearsay, with no confirmatory affidavits from Mr Chapman or Scalabrini to which reference is made in the application. It was furthermore highlighted that each of the Applicants signed the Form 23 notice, agreeing that they are going to leave South Africa. Furthermore, they contended that the *Ashebo* matter similarly do not find application. It was also submitted that although the Applicants move for interim relief, the relief sought ultimately has the effect of final relief. In addition, it was argued that the Applicants cannot interdict a Form 23 as the Immigration Act is clear that you need a visa and without a visa you require a 'good cause' application, which *in casu* none of the Applicants have done.

[21] Similarly, it was argued, that the *Scalabrini* matter is no protection and finds no application as the Applicants have failed to make it past the 'good cause' test. To cement this contention, they reasoned that there is no constitutional challenge. The Respondent in calling for the dismissal of this application, asserted that the court ought not to allow blatant lawlessness to persist.

Legal principles

[22] It is trite that Section 49(1)(a) of the Immigration Act states that any foreigner who is in the Republic without a valid visa or permit, or who remains in the Republic after the expiry of their visa or permit, is guilty of an offence.¹⁴ This means that

¹⁴ Section 49 (1) (a): 'Anyone who enters or remains in, the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.'

if a foreigner is found to be in South Africa without proper documentation or authorization, they can be charged under the provisions of Section 49(1)(a) of the Immigration Act.

[23] Section 2 of the Refugees Act states that:

‘Notwithstanding any provision of this Act or any other law to the contrary, 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 as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where -

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or*
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing public order in any part or the whole of that country.’*

Delay in applying for asylum

[24] The central issue in this application concerns the rights invoked by the Applicants to apply for asylum in terms of Section 21(1)(b) of the Refugees Act. The Respondents argued that the Applicants have not lodged good cause applications. They submitted that the Applicants have failed to invoke asylum as prescribed. It therefore behoves this court to consider the legal framework regulating the procedure for asylum.

[25] Section 21 of the amended Act provides:

*‘(1) (a) Upon reporting to the Refugee Reception Office **within five days of entry** into the Republic, an asylum seeker must be assisted by an officer designated to receive asylum seekers.*

- (b) *An application for asylum must be made in person in accordance with the prescribed procedures, to a Refugee Status Determination Officer at any Refugee Reception Office or at any other place designated by the Director-General by notice in the Gazette.*
- (1A) *Prior to an application for asylum, every applicant must submit his or her biometrics or other data, as prescribed, to an immigration officer at a designated port of entry or a Refugee Reception Office.*
- (1B) **An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa.**
- ...
- (2) *The Refugee Status Determination Officer must, upon receipt of the application contemplated in subsection (1), deal with such application in terms of section 24.*
- (2A) *When making an application for asylum, every applicant must declare all his or her spouses and dependants, whether in the Republic or elsewhere, in the application for asylum.*
- (3) *When making an application for asylum, every applicant, including his or her spouse and dependants, must have his or her biometrics taken in the prescribed manner.*
- (4) *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.’ [Emphasis added]*

[26] The amended Regulation 7¹⁵ provides the following:

¹⁵ GNR.1707 of 27 December 2019: Refugees Regulations (Government Gazette No. 42932)

*'Any person who intends to apply for asylum **must declare his or her intention, while at a port of entry, before entering the Republic** and provide his or her biometrics and other relevant data as required, including—*

- (a) fingerprints;*
 - (b) photograph;*
 - (c) names and surname;*
 - (d) date of birth and age;*
 - (e) nationality or origin; and*
 - (f) habitual place of residence prior to travelling to the Republic;*
- and must be issued with an asylum transit visa contemplated in section 23 of the Immigration Act.'* [Emphasis added]

[27] For the sake of completeness, Regulation 8 stipulates as follows:

- '(1) **An application for asylum in terms of section 21 of the Act must—***
- (a) **be made** in person by the applicant **upon reporting to a Refugee Reception Office or on a date allocated to such a person upon reporting to the Refugee Reception Office;***
 - (b) be made in a form substantially corresponding with Form 2 (DHA-1590) contained in the Annexure;*
 - (c) **be submitted together with—***
 - (i) **a valid asylum transit visa issued at a port of entry in terms of section 23 of the Immigration Act, or under permitted circumstances, a valid visa issued in terms of the Immigration Act;***
 - (ii) proof of any form of a valid identification document: Provided that if the applicant does not have proof of a valid identification document, a declaration of identity must be made in writing before an immigration officer; and*
 - (iii) the biometrics of the applicant, including any dependant.*
- ...'*
- (3) **Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees.***

- (4) *A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub-regulation (3).*' [Emphasis added]

[28] It is evident from the Applicants own papers that they did not report to the RRO within 5 days of entry into the Republic, indicating their respective intention to seek asylum. They were not in possession of any asylum transit visa as contemplated in Section 23 of the Immigration Act. The relevant provision made it peremptory for the respective Applicants to be interviewed by an immigration officer to ascertain whether a valid reason exist as to why the Applicants are not in possession of such visa. The application is silent on whether any of the Applicants, where relevant, declared their intention while at a port of entry before entering the Republic, that they individually intended to apply for asylum as envisaged in Regulation 7. Of seminal importance is the provision of Regulation 8, which pertinently states that if any person who upon application for asylum, fails to produce a valid visa issued in terms of the Immigration Act at a Refugee Reception Office, such person is enjoined to prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic as contemplated in Article 31(1) of the 1951 United Nations Convention Relating to the Status of Refugees. This provision is couched in peremptory terms.

[29] The Constitutional Court in *Aboe* was alive to the fact that Regulation 7 does not assist asylum seekers who did not declare such an intention at a port of entry and before entering the Republic. The court went on to remark that¹⁶:

¹⁶ Supra at para 27.

‘...It also does not assist asylum seekers who do not enter the Republic through an official border post. Many do not, given their precarious position as illegal foreigners fleeing their home countries due to a well-founded fear of persecution.’

Good cause

[30] The seminal Constitutional Court judgment of *Ashebo* crystallises the concept of ‘good cause’ as contemplated in section 21(1B) of the Refugees Amendment Act.¹⁷ In essence, the Constitutional Court provided guidance on how to interpret the concept of ‘good cause’ in the context of refugee law, emphasizing the need for a nuanced and context-dependent approach that takes into account the complexities and challenges faced by refugees in South Africa.

[31] In this regard, the court held that the phrase ‘good cause’ in Section 21(1B) is not defined in the Act¹⁸, and therefore, its meaning must be interpreted in the context of the Act and the Constitution. It was further held that ‘good cause’ should be understood to mean a legitimate and reasonable explanation for the failure to renew a refugee permit timeously. The court emphasized that the explanation must be based on objective circumstances beyond the control of the refugee, such as administrative delays, bureaucratic inefficiencies, or other factors that are not attributable to the refugee's own fault or negligence. The court also held that the concept of ‘good cause’ is not limited to exceptional or extraordinary circumstances, but rather encompasses a range of situations

¹⁷ Act No. 11 of 2017.

¹⁸ Section 21(1B) of the Refugees Amendment Act 11 of 2017: *‘An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa.’*

where a refugee can demonstrate a legitimate reason for failing to renew their permit on time.

[32] Notably, all five Applicants were arrested and interestingly, they all paid the identical admission of guilt fine and they all received an almost identical Form 23 notice insofar as it relates to the reasons noted thereon. None of these Form 23's mentions anything about either of them seeking asylum. The attorney who deposed to the Applicants' founding affidavit is coincidentally also the attorney who represented the Applicants at the Swellendam Magistrates' Court. The attorney states that he explained the situation of each Applicant to the DHA official, Mr Mgnxekesa. He goes on to state that it was agreed that the DHA would not oppose bail for the Applicants upon payment of admission of guilt fines and that the DHA would issue a Form 23 notice to each Applicant to attend the RRO before 10 December 2024 where they could apply for asylum.

[33] This submission, in my view, postulates a number of concerns and/or procedural questions insofar as it relates to the payment of admission of guilt fines and the question of bail, which are two very distinct aspects:

- (a) Firstly, no context was given as to why there would be a discussion regarding bail in circumstances where an admission of guilt fine is paid. Ordinarily, an admission of guilt fine is an acknowledgment of an accused's guilt. Once the fine is paid, it signals the end of the matter;

- (b) Secondly, the Form 23 Notice is silent concerning an application for asylum as purportedly discussed with Mr Mgnxekesa; and
- (c) Thirdly, the legal representative who claimed to be facilitating the release of the Applicants seemingly did not remain in attendance until the Form 23's were issued. This was so, purportedly on having been informed by the DHA officials that he did not need to wait for the Applicants to each be issued with the Form 23 Notice.

[34] Nowhere on the papers is it indicated that Mr Mngxekesa was approached after realising that the Form 23 was something other than what the Applicants and/or their legal representative were led to believe. Mr Deliwe, who represented the Applicants and accompanied them at the RRO in Epping Cape Town, knew on 19 November 2024 already that they Applicants could not apply for asylum because their notices were completed in such a manner that they didn't allow the Applicants to apply for asylum. The Applicants were therefore aware on 19 November 2024 that they would be deported on 10 December 2024 when they appear before the immigration officer.

[35] A Form 23 Notice is issued in terms of Section 33 (4) of the Immigration Act:

'(4) An immigration officer may, for the purposes of this Act—

- (a) at any time before the commencement or in the course of an investigation conduct an inspection in loco in accordance with subsections (5) and (9);*
- (b) by notice in writing call upon any person who is in possession of or has the custody of or control over any thing which in the opinion of the Director-General is relevant to the investigation to produce such thing, and the Director-General may inspect and retain any thing so produced for a reasonable time; and*

- (c) *by notice in writing call upon any person to appear before the Director-General and to give evidence or to answer questions relevant to the subject matter of the investigation:*

Provided that any of such notices shall specify the time when and the place where the person to whom it is directed shall appear, be signed by an immigration officer, be served by an immigration officer or a sheriff by delivering a copy thereof to the person concerned or by leaving it at such person's last known place of residence or business, and shall specify the reason why the thing is to be produced or the evidence is to be given.'

[36] The Constitutional Court in *Aboe* analysed the relevant procedures and articulated that it was not clear at which stage the interview envisaged in section 21(1B) should be conducted. In this regard, the following was expressed regarding good cause:

*'Section 21(1B) of the Refugees Amendment Act imposes its own requirements which seem to be aimed at eliciting more information from an illegal foreigner. It provides that a person who may not be in possession of an asylum transit visa, contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why that person is not in possession of such a visa. It is not clear at what stage the interview envisaged in section 21(1B) should be conducted. However, it seems that the requirement in regulation 8(3) that the applicant for asylum should show good cause for his or her illegal entry or stay in the Republic prior to them being permitted to apply for asylum, **means that this must be done during the interview. It also seems that the applicant for asylum must furnish good reasons why he or she is not in possession of an asylum transit visa before he or she is allowed to make an application for asylum.** In addition, regulation 8(4) empowers a judicial officer to require any foreigner appearing before court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub-regulation (3). If Regulations 8(3) and (4) are read with section 21(1B), it appears that good cause which is required to be shown refers*

*to the reasons that must be given on why the applicant for asylum does not have an asylum transit visa.*¹⁹ [Emphasis added]

[37] As previously stated, Form 23 is essentially a notice by an immigration officer to a person to appear before a Director-General. Section 21(1B) of the Refugees Amendment Act principally provides that a person who may not be in possession of an asylum transit visa, contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why that person is not in possession of such a visa. In *casu*, it is noteworthy that the reason inserted onto the Form 23 was *'To bring flight ticket and a valid passport...'*. This is contrary to what the court in *Aboe* appears to have reasoned namely, that in order for an asylum seeker to be permitted to apply for asylum, he/or she is to show good cause for his or her illegal entry or stay in the Republic during the interview.

[38] It is apposite to mention that as part of the reason recorded on the Form 23 the following is stated namely, *'Form 21 to be issued'*. Form 21 is an 'Order to illegal foreigner to depart from the Republic' ("Order to Depart"), which is specifically issued in terms of Regulation 30(4) of the Immigration Act. In other words, Regulation 30(4) provides the legal framework for the issuance of an Order to Depart (Form 21) to illegal foreigners. This regulation outlines the procedural requirements for instructing an illegal foreigner to leave South African territory within a specified timeframe, namely 14 days of having been so ordered.

¹⁹ *Ibid* at para 29.

[39] It is manifest that this decision was taken without regard being had to the peremptory requirement that a person must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why that person is not in possession of such a visa. Inasmuch as the Applicants may have been deemed to have agreed to the terms of the content of the Form 23 when they signed it, it appears that their legal representative had already left when these forms were issued. It is apparent that each Applicant was instructed to bring along a flight ticket and a passport, whereafter a Form 21 is to be issued. It therefore suggests that the Applicants deportation was pre-empted without them having been given an opportunity to be interviewed by an immigration officer.

[40] Whilst counsel for the Respondents argued that the Form 23 may be challenged by way of review as an alternative remedy, the reality is that the Applicants all face deportation without being afforded the opportunity to apply for asylum. Counsel for the Respondents also suggests that at least two of the Applicants could have applied for the extension of their visitor's visas. Whilst this may be so, it does not address the Applicants ultimate intention to apply for asylum, which efforts were explicated in the founding affidavit duly confirmed by way of the confirmatory affidavits of the respective Applicants.

[41] In this regard, it was explained that the First Applicant went to the RRO in Gqberha to apply for asylum on 10 November 2023. He was informed by the DHA official that he could not be assisted and that he had to return on 16 July 2024. Before the First Applicant was to return on 16 July 2024, he was advised by an 'agent' that the Gqberha RRO was not issuing asylum applications at the time. The First Applicant decided not to

travel from Swellendam to Gqberha to apply for asylum. He indicated that he was waiting for an 'agent' to inform him when the Gqberha office would be issuing asylum applications again.

[42] The Second Applicant attended the RRO in Cape Town on 13 August 2023 and was informed by DHA officials to return on 29 April 2024. On 29 April 2024, he returned to the RRO, where his fingerprints and photos were taken. He claimed to have appended an electronic signature and was informed to return on 14 March 2026²⁰.

[43] The Third Applicant wanted to attend to the RRO in Cape Town to apply for asylum but was informed by an 'agent' that the RRO do not accept asylum applications. The Third Applicant was alive to the fact that he would probably be arrested and deported at that stage already, as is evident from the founding affidavit. Similarly, the fourth applicant was also informed by an 'agent' that the RRO do not accept asylum applications and that should he attend, he would probably be arrested and deported. Likewise, the Fifth Applicant, whose visitor's visa had expired, also indicated that he wanted to apply for asylum but was informed through an 'agent' that the RRO in Cape Town does not accept or process asylum applications.

[44] *Ashebo* succinctly clarified the approach pertaining to a delay in expressing an intention to apply for asylum as follows:

'The first issue may be disposed of shortly as this Court has already settled it in Ruta and, more recently, in Abore. These decisions have unequivocally established that once an

²⁰ Date as per the pleadings, Founding Affidavit, para 36, page 13 of 39.

illegal foreigner has indicated their intention to apply for asylum, they must be afforded an opportunity to do so. A delay in expressing that intention is no bar to applying for refugee status. Aboe, following Ruta, held that although a delay in applying for asylum is relevant in determining credibility and authenticity, which must be made by the RSDO, it should at no stage “function as an absolute disqualification from initiating the asylum application process”. Until an applicant’s refugee status has been finally determined, the principle of non-refoulement protects the applicant from deportation.’²¹

[45] This decision settles the legal position, namely that once an illegal foreigner has indicated their intention to apply for asylum, they must be afforded an opportunity to do so. It is therefore manifest that a delay in expressing that intention is no bar to applying for refugee status.

The principle of non-refoulement

[46] The Applicants have each set out the reasons why they asserted their lives were in danger, primarily because of political unrest; having left loved ones behind. By way of providing additional context, they explained that Bangladesh has a unitary government where the ruling party, the AL, has total power. They elucidated that the AL has an authoritarian approach on human rights, free speech arresting critics, and censoring media and has established total control over state machinery and politics since 2018. They further explicated that all of them are supporters of the opposition party, namely the BNP, and as such, they are targeted by the police for unlawful arrest, detention and torture.

²¹ At para 29.

[47] Counsel for the Respondents however asserted from the bar that Bangladesh is not at war, further contending that the Applicants are all relatively young and have approached the court with a sledge-hammer approach. They persisted with the argument that the Respondents acknowledged through signing the Form 23 Notice that they would leave South Africa, which is tantamount to a tacit agreement.

[48] The principle of non-refoulement is a cornerstone of refugee law and human rights law. It prohibits states from returning or expelling individuals to a country where they would face a real risk of persecution, torture, or other serious harm. The principle of non-refoulement is enshrined in various international instruments, including:

- (a) **The 1951 Refugee Convention:** Article 33(1) states that *'No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'*;
- (b) **The 1967 Protocol relating to the Status of Refugees:** Article I(2) reaffirms the principle of non-refoulement;
- (c) **Convention against Torture (CAT):** Article 3 prohibits states from returning individuals to a country where they would face a real risk of torture; and
- (d) **International Covenant on Civil and Political Rights (ICCPR):** Although not explicitly stated, the principle of non-refoulement is implied in Article 7, which prohibits torture and cruel, inhuman, or degrading treatment or punishment.

[49] The principle of non-refoulement has several key implications which includes *inter alia* that States must not return individuals to a country where they would

face a real risk of persecution, torture, or other serious harm. Secondly, States have a duty to protect individuals from harm, including by providing asylum or other forms of protection. Thirdly, States must assess the risk of harm faced by an individual before making a decision on their return. The principle of non-refoulement is therefore a crucial safeguard for individuals fleeing persecution, torture, or other serious harm. It ensures that States respect the human rights of all individuals, regardless of their nationality or immigration status.

[50] The matter *in casu* bear some similarities to the matters of *Abore* and *Ashebo*. In respect of *Abore* the court found that Mr Abore was entitled to be granted an interview as envisaged in Section 21(1B) and remarked that the delay in indicating his intention is of no moment:

*'Mr Abore has indicated his intention to apply for asylum. He has not yet been afforded an opportunity to do so. His refugee status has not been finally considered nor determined. Until this happens, the principle of non-refoulement protects him. The delay in indicating his intention is of no moment as stated in Ruta. The amendments do not affect his eligibility to be afforded this protection irrespective of whether he arrived in the country before or after the Refugees Act was amended, nor do they deprive him of the entitlement to be granted an interview envisaged in regulation 8(3) and (4), read with section 21(1B).'*²²

[51] Therefore, it follows that a delay in applying for asylum does not disqualify the Applicants *in casu* from applying for asylum. Moreover, the Constitutional Court in *Ashebo* made it clear that *'[u]ntil an applicant's refugee status has been finally*

²² At para 48

*determined, the principle of non-refoulement protects the applicant from deportation.*²³ It is unambiguous that until an Applicant's refugee status has been finally determined, the principle of non-refoulement protects the Applicants from deportation.

[52] Justice Maya DCJ, as she then was, in *Ashebo* succinctly summarised the procedure to be followed by an asylum seeker which is, in my view, the most authoritative and definitive decision on the topic as it provides the clearest of guidelines and step-by-step approach to an asylum seeker:

[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 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.

[60] Once the applicant has an asylum seeker visa issued in terms of section 22, he would be entitled to remain in this country temporarily. His continued detention, to the extent that it rests solely on section 34 of the Immigration Act, would unquestionably become unlawful, because he would no longer be an “illegal foreigner” for purposes of the Immigration Act. Merely expressing an intention to seek asylum does not entitle the applicant to release from detention. On the other hand, however, the respondents, particularly the first, second, fourth, and fifth are obliged – regardless of the basis of his detention – to assist him to give effect to his intention to apply for asylum. At a practical level, this simply means that these respondents must facilitate arrangements either to transport the applicant to a RRO for his interview or to bring the relevant immigration and refugee officials to the correctional centre

²³ *Ibid*, para 29.

in which he is detained to conduct the necessary processes, whichever means is convenient. They must further refrain from deporting him until his asylum application is finalised.'

Conclusion

[53] Whilst the Applicants may be criticised for the delay in actioning their intent to seek asylum, it is evident that they have a *prima facie* right to apply for asylum. Unless and until their refugee status has been finally determined, the principle of non-refoulement protects the Applicants from deportation, whether they have a review challenge to the Form 23 notice or not. Having found that the Applicants have established a *prima facie* right, it follows that if they were to be deported, there exists a well-grounded apprehension of irreparable harm. This is so because they assert that because of the political conflict and instability in Bangladesh, their lives are at risk. There is nothing on record to gainsay this assertion and therefore, this court is to accept that there is a danger that the Applicants will suffer irreparable harm.

[54] In contemplating the consideration of whether there are alternative remedies available to the Applicants, it is apposite to mention that this consideration ties in with whether the Applicants would be afforded substantial redress in the ordinary course. Having found that the nature of these proceedings is deemed inherently urgent, a review of the respective Form 23 notices in the fullness of time will still render the Applicants vulnerable to arrest and deportation without them having been afforded an opportunity to apply for asylum. The Applicants contended that without a court order directing the DHA to provide them with an opportunity to apply for asylum and have those

applications decided on its merits, the Applicants remain without a remedy. There is very real fear of the Applicants facing imminent arrest and deportation if regard is had to the manner in which the Form 23 is framed.

[55] Lastly, in considering the balance of convenience, it was argued that any prejudice occasioned by the interim relief granted should be weighed against the prejudice the Applicants would suffer if they were ordered to return to Bangladesh without the opportunity to apply for asylum and to have those applications decided on its merits. It was argued that the prejudice the Applicants stand to suffer far outweigh the prejudice the Respondents stand to suffer. In my view, the potential prejudice to the Applicants tip the scale to favour that interim relief be granted.

[56] Counsel for the Respondents argued that the relief has the effect of a final order. In order to allay the concerns raised in this regard, I deem it necessary to incorporate safeguards in the order so as to ensure that the Applicants follow the guidelines restated in *Ashebo* as quoted earlier in this judgment.

Costs

[57] The Applicants enjoyed substantial success in the matter. However, in the exercise of my judicial discretion it is my considered view, given the nature and history of this matter, that the Respondents should not be mulcted for costs in circumstances where the Applicants did not comply with the requisite procedures in applying for asylum.

Order

[58] In the result, the Court, after having heard counsel for the Applicant and counsel for the Respondents, and having read the papers filed of record make the following orders:

1. That the forms and service provided for in terms of the Uniform Rules of Court be dispensed with, insofar as may be necessary, and that the matter be heard as one of urgency in terms of Uniform Rule 6(12);
2. The Applicants are granted interim interdictory relief in the following terms:
 - (a) That Form 23 (*Notices by Immigration Officer to Person to Appear Before Director General*) issued in terms of section 33(4)(c) of the Immigration Act, dated 15 November 2024, in respect of each of the Applicants, is hereby suspended on the following conditions:
 - (i) That the Applicants present themselves to the nearest RRO within thirty (30) days from date of this order to arrange an appointment for an interview as envisaged in regulation 8(3) and (4), read with section 21(1B);
 - (ii) and, if such good cause has been shown, until this application for asylum has been finally determined in terms of the Act.
 - (b) Pending the fulfilment of the conditions set out in paragraph 2 above, the Respondents are interdicted from initiating any process to detain and/or deport and/or order any of the Applicants to depart from the Republic of South Africa until each Applicant has had the opportunity to lodge an application for asylum

in terms of Section 21(1) (b) of the Refugees Act and until such time as each of these applications have been determined on its merits.

3. Should the Applicants not have initiated their respective applications for asylum within the period of 30 (thirty) days they are to provide the Respondents reasons for such non-compliance on affidavit;
4. In the event that the Applicants or any of them have not reported to the RRO as envisaged in paragraph 2(i) above, the Respondents are granted leave to re-enrol the matter in the ordinary course for the reconsideration of the interim interdictory relief;
5. Leave is granted to the parties to file supplementary papers in the event of the matter being re-enrolled for reconsideration;
6. Each party is ordered to pay their own costs.




ANDREWS, AJ

Acting Judge of the High Court, Western Cape Division

Appearances

For the Applicant:	Adv M Botha
Instructed by:	ZS Incorporated
For the Respondents:	Adv Kajiker
Appearing with:	Adv Nene
Instructed by:	The Office of the State Attorney

Date of Hearing: 12 December 2024

Date of Judgment: 09 January 2025

NB: The judgment is delivered electronically.