



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 126/25

In the matter between:

SCALABRINI CENTRE OF CAPE TOWN

First Applicant

**TRUSTEES OF THE SCALABRINI
CENTRE OF CAPE TOWN**

Second Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

**DIRECTOR-GENERAL, DEPARTMENT
OF HOME AFFAIRS**

Second Respondent

**CHIEF DIRECTOR OF ASYLUM SEEKER
MANAGEMENT, DEPARTMENT OF
HOME AFFAIRS**

Third Respondent

**REFUGEE APPEALS AUTHORITY
OF SOUTH AFRICA**

Fourth Respondent

**STANDING COMMITTEE FOR
REFUGEE AFFAIRS**

Fifth Respondent

and

HELEN SUZMAN FOUNDATION

First Amicus Curiae

AMNESTY INTERNATIONAL

Second Amicus Curiae

**GLOBAL STRATEGIC LITIGATION
COUNCIL FOR REFUGEE RIGHTS**

Third Amicus Curiae

INTERNATIONAL DETENTION COALITION

Fourth Amicus Curiae

**UNITED NATIONS HIGH COMMISSIONER
FOR REFUGEES**

Fifth Amicus Curiae

Neutral citation: *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* [2026] ZACC 30

Coram: Dambuza J, Kollapen J, Majiedt J, Mhlantla J, Opperman AJ, Rogers J, Savage J and Tshiqi J

Judgment: Majiedt J (unanimous)

Heard on: 12 February 2026

Decided on: 7 July 2026

Summary: Refugees Act 130 of 1998 — asylum applications — principle of non-refoulement — procedural non-compliance cannot bar asylum applications without assessment of merits — abstract constitutional challenge — subordinate legislation in constitutional adjudication

ORDER

On application for confirmation of the order of the High Court of South Africa, Western Cape Division, Cape Town:

1. The order of the High Court of South Africa, Western Cape Division, Cape Town, declaring sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Refugees Act 130 of 1998 inconsistent with the Constitution and invalid, is confirmed.
2. The respondents must, jointly and severally, pay the applicants' costs, including the costs of two counsel.

JUDGMENT

MAJIEDT J (Dambuza J, Kollapen J, Mhlantla J, Opperman AJ, Rogers J, Savage J and Tshiqi J concurring):

Introduction

[1] In this confirmation application, the Court is being asked to confirm the order made by the Full Court of the High Court of South Africa, Western Cape Division, Cape Town (High Court), on 15 May 2025,¹ declaring as inconsistent with the Constitution and invalid:

- (a) Sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Refugees Act;² and
- (b) Regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the Refugee Regulations.³

I shall refer to the impugned sections and impugned regulations collectively as “the impugned provisions”.

[2] It is trite that declarations of invalidity made against regulations do not require confirmation by this Court,⁴ but the first to fifth respondents purported to seek leave to appeal the High Court’s finding that the impugned regulations are unconstitutional and invalid. This purported application for leave to appeal is fatally defective and impacts our assessment regarding the confirmation of invalidity.

¹ *Scalabrini Centre of Cape Town v Minister of Home Affairs* [2025] 3 All SA 827 (WCC) (High Court Part B judgment).

² 130 of 1998.

³ Refugees Regulations GN 1707 GG 42932, 27 December 2019.

⁴ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) (*Dawood*) at para 11; *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2001 (11) BCLR 1168 (CC); 2002 (1) SA 33 (CC) at para 13; *Satchwell v President of Republic of South Africa* [2002] ZACC 18; 2002 (6) SA 1 (CC); 2002 (9) BCLR 986 (CC) at para 2; *Mulowayi v Minister of Home Affairs* [2019] ZACC 1; 2019 (4) BCLR 496 (CC) (*Mulowayi*) at para 27; and *Scalabrini Centre v Minister of Home Affairs* [2023] ZACC 45; 2024 (3) SA 330 (CC); 2024 (4) BCLR 592 (CC) (*Scalabrini I*) at para 26.

[3] The first and second applicants are the Scalabrini Centre of Cape Town and its trustees (collectively, Scalabrini). The first to third respondents are the Minister of Home Affairs (Minister), the Director-General of the Department of Home Affairs (DG) and the Chief Director of Asylum Seeker Management: Department of Home Affairs, who is the primary senior official tasked with the management of asylum seekers.

[4] The fourth and fifth respondents are the Refugee Appeals Authority of South Africa (RAA) and the Standing Committee for Refugee Affairs. All the respondents, to whom I shall sometimes for convenience collectively refer to as “the respondents”, oppose the confirmation application.

[5] The first amicus curiae (friend of the court) is the Helen Suzman Foundation (HSF),⁵ which makes submissions regarding the effect of the impugned provisions on the children of asylum seekers. The second, third and fourth amici curiae are Amnesty International,⁶ the Global Strategic Litigation Council for Refugee Rights⁷ and the International Detention Coalition,⁸ respectively (collectively, the international amici). They made joint submissions on applicable international law instruments. The United Nations High Commissioner for Refugees (UNHCR)⁹ has been admitted as the fifth amicus curiae. All the amici were confined to making written submissions.

⁵ The HSF is an independent and not-for-profit institute in South Africa, promoting constitutional democracy, human rights and the rule of law in South Africa, engaging in research publications, litigation and submissions to the South African Parliament.

⁶ Amnesty International is a global human rights organisation that investigates and campaigns against, amongst others, torture, unfair detention and discrimination, advocating for justice and accountability.

⁷ The Global Strategic Litigation Council for Refugee Rights is an international network of legal experts that coordinates strategic litigation and legal advocacy to strengthen the protection and rights of refugees and displaced people.

⁸ The International Detention Coalition is a global civil society network that works to reduce refugee detention, promoting rights-based policies and community-based alternatives for migrants and refugees.

⁹ The UNHCR is the United Nations agency responsible for protecting refugees, forcibly displaced communities and stateless people, and for coordinating international efforts to provide assistance and pursue solutions such as voluntary repatriation, local integration or resettlement.

Background

[6] Scalabrini launched its application against the impugned provisions in the High Court in April 2024. The first to fifth respondents opposed the application. Scalabrini's claim was brought in two parts. Part B sought the invalidation of the impugned provisions. Part A was brought urgently to suspend the operation of the impugned provisions pending the final resolution of Part B.

[7] In September 2024 Part A of the relief claimed by Scalabrini was granted by the High Court, but the interim interdict it granted was only operational until judgment in Part B was handed down. In May 2025 the High Court in Part B declared the impugned provisions to be unconstitutional, but did not grant any relief in terms of suspending the impugned provisions,¹⁰ which are thus currently in operation.

[8] Before the High Court, the applicants asserted that the impugned provisions have the effect of disbarring foreign nationals who wish to seek asylum in South Africa from doing so if they hold an adverse immigration status solely due to their non-compliance with procedural requirements. This was contended to be an unjustifiable violation of the Constitution and the right of *non-refoulement* (prohibition of forcible expulsion or return) in terms of international customary law and section 2 of the Refugees Act. The application was opposed by the respondents, who also unsuccessfully resisted the applications of the first to fourth amici for their admission.

[9] The High Court noted in its judgment that it appeared from oral argument that Scalabrini's application was an abstract constitutional challenge, but it did not consider this an impediment to deciding it. The High Court discussed the trilogy of cases central

¹⁰ In terms of section 172(2)(b) of the Constitution, a court making an order of constitutional invalidity may grant a temporary interdict or other temporary relief pending the decision of the Constitutional Court.

to this matter: *Ashebo*,¹¹ *Ruta*¹² and *Aboe*.¹³ It then considered the applicants' submission that the asylum application is a three-stage process. On the basis of *Ashebo*, the High Court held that it was in fact a two-stage process.¹⁴

[10] In relation to the interpretation of the impugned provisions, the High Court contrasted the amended section 4 of the Refugees Act with section 21(1B) and regulations 8(3) and (4), which all impose different tests. Regarding whether the impugned provisions pass constitutional muster, the High Court noted, after extensive reasoning, that section 2 of the Refugees Act enshrines the principle of *non-refoulement*, and that the asylum system remains open to all who seek its protection, notwithstanding how or when they entered South Africa. It held that the impugned provisions must be measured, for purposes of constitutionality, against section 2 and how it has been interpreted by this Court, as well as international customary law and the instruments to which South Africa is a signatory.¹⁵ According to the High Court, international instruments and *Ruta* show that “[i]n principle, any person who meets the requirements for refugee status is a refugee even before they are formally recognised as such”.¹⁶

[11] The High Court observed that the section 21(1B) inquiry only requires that—

¹¹ *Ashebo v Minister of Home Affairs* [2023] ZACC 16; 2023 (5) SA 382 (CC); 2024 (2) BCLR 217 (CC).

¹² *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC).

¹³ *Aboe v Minister of Home Affairs* [2021] ZACC 50; 2022 (2) SA 321 (CC); 2022 (4) BCLR 387 (CC).

¹⁴ See the High Court Part B judgment above n 1 at para 36. This process was held to be the following:

“The first stage is to be found in section 21(1B) of the Refugees Act: an illegal foreigner not in possession of a valid 5-day asylum transit visa, irrespective of how that came about, must be interviewed by an immigration officer (not a RSDO) to first ascertain whether valid reasons exist for why the illegal foreigner is not in possession of such visa. The second stage only arises once the illegal foreigner has satisfied the immigration officer that ‘valid reasons’ exist. . . . [T]he immigration officer, on the plain wording of section 21(1B): (a) does not need compelling reasons but only needs to satisfy him or herself of ‘valid reasons’; and (b) the factors to be taken into account in that determination lie solely in his or her discretion without the Refugees Act providing any guidance whatsoever.”

¹⁵ *Id* at para 43.

¹⁶ *Id* at para 45.

“the immigration officer must ‘ascertain whether valid reasons exist’ as to why ‘an applicant’ is not in possession of an asylum transit visa. The inquiry must thus logically pertain to the failure or inability to have procured one within the legislative scheme of the Refugees Act.”¹⁷

Thus, the impugned provisions do not provide a “safety valve”, but rather a threshold requirement which must be successfully met before the merits of an illegal foreigner’s asylum application can be assessed.¹⁸

[12] Next, the High Court undertook a detailed analysis of the HSF’s submissions (which are substantially the same before this Court) and found them determinative on the constitutionality of the impugned provisions in relation to the rights of children under the Constitution. In brief, that Court held that—

“the effect of the impugned provisions is aggravated by the harm they impose on children: they have the consequence that children of asylum seekers who fail to show ‘valid reasons’ or ‘compelling reasons’ will be deported with their parents, in circumstances where the substantive merits of the asylum application are not assessed at all.”¹⁹

It concluded that “the impugned provisions unjustifiably limit the constitutional rights of children who are illegal foreigners while living in South Africa, depriving them of their most basic rights”.²⁰

[13] It also held that the impugned provisions are not capable of an interpretation that protects the best interests and dignity of children in their own right.²¹ The High Court consequently declared the impugned sections inconsistent with the Constitution and

¹⁷ Id at para 49.

¹⁸ Id at para 51.

¹⁹ Id at para 57.

²⁰ Id.

²¹ Id at para 65.

invalid; declared the impugned regulations unconstitutional and invalid; referred the order to this Court for confirmation; and suspended the declaration of invalidity until the outcome of these confirmation proceedings.²²

[14] Prior to granting the order in its Part B judgment, in September 2024, the High Court²³ considered Scalabrini’s request for an order interdicting and restraining the Minister—

- (a) from deporting or causing any foreign national who has indicated an intention to seek asylum to be deported unless and until their asylum application has been finally rejected on its merits; and
- (b) from implementing the impugned provisions, including not arresting or detaining foreign nationals pursuant to them.

[15] The High Court did not make an order interdicting the respondents from implementing the impugned provisions pending the hearing of the main application.²⁴ The Court did, however, make an interim order interdicting the deportation of foreign

²² Id at para 73. The order in the High Court Part B judgment reads:

- “1. It is declared that sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of [the Refugees Act] are inconsistent with the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and invalid;
- 2. It is declared that regulations 8(1)(c)(i), 8(2), 8(3) and 8(4) of the [Regulations] are inconsistent with the Constitution and invalid;
- 3. In terms of section 172(2)(a) of the Constitution, paragraph 1 of this order is referred for confirmation or otherwise by the Constitutional Court;
- 4. The declaration in paragraph 2 of this order is suspended pending the outcome of the proceedings referred to in paragraph 3 above;
- 5. The interim interdict granted in Part A of this application is discharged;
- 6. The relief sought by the applicants in terms of section 172(2)(b) of the Constitution is refused; and
- 7. The respondents shall pay 80% of the applicants’ costs (including those incurred in respect of Part A) on Scale C (party and party), jointly and severally, the one paying, the others to be absolved, and including the costs of 3 (three) counsel where so employed.”

²³ *Scalabrini Centre of Cape Town v Minister of Home Affairs* [2024] ZAWCHC 263 (High Court Part A judgment).

²⁴ Id at para 53.

nationals who evince an intention to make an application for asylum until their asylum application has been decided on its merits.²⁵

Parties' submissions

Scalabrini

[16] Scalabrini contends that there is no proper leave to appeal application before this Court in respect of the impugned regulations, as the respondents, in purporting to do so, have not complied with this Court's rule 19.²⁶

²⁵ Id at para 57.

²⁶ Rule 19 reads:

- “19. Appeals
- (1) The procedure set out in this rule shall be followed in an application for leave to appeal to the Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court including the Supreme Court of Appeal, and irrespective of whether the President has refused leave or special leave to appeal.
 - (2) A litigant who is aggrieved by the decision of a court and who wishes to appeal against it directly to the Court on a constitutional matter shall, within 15 days of the order against which the appeal is sought to be brought and after giving notice to the other party or parties concerned, lodge with the Registrar an application for leave to appeal: Provided that where the President has refused leave to appeal the period prescribed in this rule shall run from the date of the order refusing leave.
 - (3) An application referred to in subrule (2) shall be signed by the applicant or his or her legal representative and shall contain—
 - (a) the decision against which the appeal is brought and the grounds upon which such decision is disputed;
 - (b) a statement setting out clearly and succinctly the constitutional matter raised in the decision; and any other issues including issues that are alleged to be connected with a decision on the constitutional matter;
 - (c) such supplementary information or argument as the applicant considers necessary to bring to the attention of the Court; and
 - (d) a statement indicating whether the applicant has applied or intends to apply for leave or special leave to appeal to any other court, and if so—
 - (i) which court;
 - (ii) whether such application is conditional upon the application to the Court being refused; and
 - (iii) the outcome of such application, if known at the time of the application to the Court.
 - (4) (a) Within 10 days from the date upon which an application referred to in subrule (2) is lodged, the respondent or respondents may respond thereto in writing, indicating whether or not the application for leave to appeal is being opposed, and if so the grounds for such opposition.

[17] Scalabrini submits that the High Court's declaration of invalidity must be confirmed, because the impugned provisions unjustifiably violate the constitutional rights to life, dignity, equality, freedom and security of the person and freedom of expression. Secondly, they submit that the violations caused by the impugned provisions cannot be justified under section 36 of the Constitution.

[18] In respect of their first main submission, Scalabrini emphasises the right of *non-refoulement* in section 2 of the Refugees Act. They submit that the main shortcoming in all the impugned provisions is that they prevent foreign nationals from seeking asylum in South Africa if they hold an adverse or procedurally irregular immigration status by subjecting asylum seekers to a disbarment regime.

[19] In summary, according to Scalabrini, the impugned provisions make it possible for asylum seekers to be disbarred from the refugee system solely due to their adverse immigration status, without any consideration of the merits of their claim for asylum. This is an unjustifiable violation of the right to *non-refoulement*, the Bill of Rights and international law. In this regard, Scalabrini compares the factual and legal scenario in *Ruta* to the present case.

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- (b) The response shall be signed by the respondent or respondents or his or her or their legal representative.
 - (5)
 - (a) A respondent or respondents wishing to lodge a cross-appeal to the Court on a constitutional matter shall, within 10 days from the date upon which an application in subrule (2) is lodged, lodge with the Registrar an application for leave to cross-appeal.
 - (b) The provisions of these Rules with regard to appeals shall apply, with necessary modifications, to cross-appeals.
 - (6)
 - (a) The Court shall decide whether or not to grant the appellant leave to appeal.
 - (b) Applications for leave to appeal may be dealt with summarily, without receiving oral or written argument other than that contained in the application itself.
 - (c) The Court may order that the application for leave to appeal be set down for argument and direct that the written argument of the parties deal not only with the question whether the application for leave to appeal should be granted, but also with the merits of the dispute. The provisions of rule 20 shall, with necessary modifications, apply to the procedure to be followed in such procedures."

[20] To support its claim of unconstitutionality, Scalabrini uses a wide range of evidence to show that the law is objectively invalid. They submit that hundreds of thousands of people have been affected by the impugned provisions and refer to the nature and extent of the impact as set out in their High Court confirmatory affidavits. They state that the respondents have not denied this. Consequently, they submit that the respondents' argument, relying on *Savoi*,²⁷ that the challenge is abstract, cannot avail them.

[21] In respect of their argument that the violation of the various fundamental rights by the impugned provisions is not justified in terms of section 36 of the Constitution, Scalabrini points out that the respondents have not advanced any legitimate government purpose. An argument that the impugned provisions may incentivise newcomers to comply with South Africa's immigration laws would not bear scrutiny, because asylum seekers are often indigent persons with no knowledge of South African laws. Therefore, they contend that the impugned provisions serve no legitimate public purpose beyond what is already provided for in the Refugees Act. Scalabrini further submits that the nature of the rights concerned, which include the right of *non-refoulement* and those in the Bill of Rights, weigh against any possible limitation that the respondents hope to implement. Furthermore, the nature and extent of the limitation (disbarment and the violation of *non-refoulement*) created by the impugned provisions is excessive.

[22] In relation to irrationality and redundancy of the impugned provisions, Scalabrini points out that this Court has often emphasised that "a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant".²⁸ It argues that the impugned provisions are irrational, because they create a system that provides sole discretion for acceptance or denial to an immigration

²⁷ *Savoi v National Director of Public Prosecutions* [2014] ZACC 5; 2014 (5) SA 317 (CC); 2014 (5) BCLR 606 (CC).

²⁸ *Qwelane v South African Human Rights Commission* [2021] ZACC 22; 2021 (6) SA 579 (CC); 2022 (2) BCLR 129 (CC) (*Qwelane*) at para 153.

officer, allowing such officers to prevent asylum seekers from submitting claims for asylum on the basis of immigration-related procedural errors, thus violating the *non-refoulement* principle. According to Scalabrini, an alternative argument to infer some kind of merits-based assessment of an applicant's claim, is not supported by the text and would in any event be irrational and would also render the impugned provisions redundant.

The respondents

[23] The respondents submit that the impugned provisions are constitutionally sound. The statutory scheme requires a proper balance between the objective of the Immigration Act²⁹ to regulate the influx of foreign nationals and the Refugees Act's commitment to the principle of *non-refoulement*. They argue that this balance is achieved by maintaining an asylum system that remains accessible to those seeking protection, provided that entry into South Africa was for the purpose of applying for asylum.

[24] The respondents contend that Scalabrini's interpretation, by contrast, imposes no limits on foreign nationals, and that refugee status may be claimed at any stage as an absolute entitlement, regardless of unlawful presence. They submit that this approach would undermine effective regulation of migration and erode the state's capacity to exercise sovereign authority over its borders.

[25] The respondents provide six reasons why the application must fail:

- (a) First, the application is hypothetical and abstract in nature, inasmuch as no concrete facts are established to challenge the legislative framework.³⁰
- (b) Second, the respondents contend that there was a long delay in bringing the High Court application, which is not only unreasonable but also has all the hallmarks of opportunism. They argue that the alleged uneven

²⁹ 13 of 2002.

³⁰ The respondents place reliance on *Savoi* above n 27 at para 13.

implementation of the impugned provisions at certain Refugee Reception Offices (RROs) must be addressed by way of administrative law review proceedings, rather than through mounting an abstract constitutional challenge to the legislative framework itself. This argument was not pressed at the hearing.

- (c) Third, they contend that this Court has already in *Ashebo* provided an interpretation of the impugned provisions that is constitutionally compliant and which does not violate the principle of *non-refoulement*.³¹
- (d) Fourth, the respondents submit that the impugned provisions do not operate as a disbarment or an absolute disqualification from the asylum system, but instead establish a safety valve through a condonation mechanism. Where an asylum seeker is not in possession of a valid asylum transit visa issued at a port of entry, holds no other valid visa or where such visa has expired, the Refugees Act requires that the person be interviewed by an immigration officer to determine whether valid reasons or good cause exists for that non-compliance. If the immigration officer accepts the explanation provided, the application is received, and the ordinary consequences follow, including the issuing of an asylum seeker visa pending final determination. They also invoke regulation 8(4) to support the argument that there is adequate judicial oversight.³²
- (e) Fifth, the respondents submit that, even if the impugned provisions limit constitutional rights, the limitation is justified under section 36 of the Constitution. They contend that the limitation serves an important purpose, namely to regulate unlawful entry, obtain information from persons without lawful status and permit condonation where appropriate, rather than to exclude asylum seekers. The relationship between the limitation and its purpose is direct and rational, as the provisions create a

³¹ The respondents place reliance on *Ashebo* above n 11 at para 59.

³² The respondents argue that regulation 8(4) provides that, where such a person appears before a judicial officer in anticipation of deportation, the claim to seek asylum may be reasserted and the court is required to determine independently whether good cause exists.

structured process to address non-compliance while remaining consistent with the principle of *non-refoulement*, as previously recognised in *Ashebo*. The argument is that the applicants incorrectly characterise the provisions as punitive, whereas their true function is facilitative. Thus, given the nature of the right relied upon, the extent of the limitation and the absence of reasonable less restrictive means to achieve the same ends, the limitation is justified.

- (f) Lastly, the respondents reject the applicants' claim that the impugned provisions are irrational or redundant. They argue that the applicants' case rests on a mistaken premise that asylum seekers must be immune from immigration consequences, a position inconsistent with this Court's reasoning in *Ashebo*, which they say confirmed that the provisions accord with, rather than undermine, *non-refoulement*. The respondents further deny that there is duplication in the provisions, explaining that sections 4(1)(f) and 21(1B) address different factual situations and operate at different stages of the statutory scheme.

HSF

[26] The HSF supports confirmation of the order of constitutional invalidity. The main thrust of the HSF's submissions is to highlight that the impugned provisions' harmful and negative impact on children amounts to untenable violations of those children's constitutional rights. In terms of section 21B(2A) of the Refugees Act, a child's asylum claim is tied to their parents and, consequently, if a parent cannot meet the good cause requirement, neither can their child.

[27] The HSF submits that, in the circumstances, the impugned provisions violate the constitutional and international law rights of children by violating the principle of *non-refoulement* and failing to give paramount consideration to the best interests of the child. They submit that it is unconstitutional that the children of asylum seekers will be returned to their country of origin if their parents have not complied with the procedural rules with which those entering the country for the purposes of seeking asylum must

comply, without any assessment of the merits of the children's asylum claims, no matter how strong.

[28] In summary, the HSF submits:

- (a) Children of asylum seekers face a “double harm” under the legislative scheme created by the impugned provisions.
- (b) It is unjust and a breach of the constitutional rights of children of asylum seekers to prevent them from applying for asylum due to actions outside their control. The HSF argues that children are to be heard in all matters concerning their interests, before actions are taken that have an adverse effect on their rights. As the legislative scheme currently operates, there is no scope for children to be considered or treated as applicants and individuals in their own right.
- (c) The impugned provisions are not in the best interests of the child and are an unjustifiable limitation of the child's constitutional rights. Relying on section 28(2) of the Constitution, the HSF argues that the impugned provisions are not capable of an interpretation that protects the best interests and dignity of children, and that subject to their submissions on the limitations clause, the impugned provisions must be struck down simply as a means of protecting children.
- (d) The impugned provisions are not compliant with international law and the principle of *non-refoulement*.
- (e) The impugned provisions conflict with other domestic legislation.

International amici

[29] The international amici also support Scalabrini's case, and focus their submissions on the importance of international law and the various international instruments to which South Africa is party, and which impose obligations on the State's conduct in relation to the issues under consideration. They submit that South Africa is

a party to at least six treaties that impose the obligation of *non-refoulement* in various forms:

- (a) The Convention Relating to the Status of Refugees³³ (1951 Refugee Convention) acceded to by South Africa in 1996. *Non-refoulement* is provided for in Article 33(1), and the application of that Article is not dependent on the lawful residence of a refugee in the territory.
- (b) The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa³⁴ (OAU Convention) acceded to by South Africa in 1996, with Article 2(3),³⁵ applying to any “person”, and not only to refugees or asylum seekers.
- (c) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,³⁶ which South Africa ratified in 1998, imposes a specific prohibition against *refoulement* where there is a risk of torture.
- (d) The International Convention for the Protection of All Persons from Enforced Disappearance,³⁷ acceded to by South Africa in 2024. Article 16(1) prohibits a State from returning people to countries where they may be subjected to enforced disappearance.
- (e) The International Covenant on Civil and Political Rights,³⁸ which South Africa ratified in 1998, protects the rights to life in Article 6 and freedom and security of the person in Article 7.

³³ Convention Relating to the Status of Refugees, 28 July 1951.

³⁴ Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969.

³⁵ It reads:

“No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.”

³⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

³⁷ International Convention for the Protection of All Persons from Enforced Disappearance, 20 December 2006.

³⁸ International Covenant on Civil and Political Rights, 16 December 1966.

- (f) Lastly, the African Charter on Human and Peoples' Rights,³⁹ acceded to by South Africa in 1996. Principles 20(3) and (4) of the African Guiding Principles Commission on the Human Rights of All Migrants, Refugees and Asylum Seekers⁴⁰ interprets the Convention to preclude the return of an individual to a country where they may face the real risk of irreparable harm to any fundamental right.

[30] These amici submit that the principle of *non-refoulement* is central to the protection of refugees and asylum seekers, both in South Africa and internationally. They argue that, collectively, these treaties impose a broad and strict obligation on South Africa not to extradite, deport or otherwise transfer any person to any country or jurisdiction where they would be at real risk of persecution, or other serious human rights violations.

[31] The amici submit further that *non-refoulement* is not only a treaty obligation, but also a fundamental principle of customary international law and international human rights and refugee law binding in South Africa under section 232 of the Constitution. In sum, they submit that it applies not only to refugees and asylum seekers, but to all people in a country. It prohibits return or transfer if there is a real risk of persecution or other serious human rights violations.

UNHCR

[32] The UNHCR sets out the interpretative framework and points out that section 1A of the Refugees Act obliges South African courts to interpret the Act in a manner consistent with the 1951 Refugee Convention, the 1967 Protocol Relating to the Status

³⁹ African Charter on Human and Peoples' Rights, 27 June 1981.

⁴⁰ African Commission on Human and People's Rights *African Guiding Principles on the Human Rights of All Migrants, Refugees and Asylum Seekers*, 20 October 2023.

of Refugees,⁴¹ the 1969 OAU Convention, the Universal Declaration of Human Rights⁴² and “any other relevant conventions or international agreements to which the Republic is or becomes a party”.⁴³ It also refers to this Court’s ability to seek guidance in foreign law.⁴⁴

[33] The UNHCR explains that the prohibition against *refoulement* is recognised as a norm of customary international law and applies to all persons, regardless of their legal status or mode of entry. Another important point made by the UNHCR is that a person is a refugee within the meaning of the 1951 Refugee Convention as soon as they fulfil the criteria contained in the definition. Therefore, the prohibition against *refoulement* applies to all refugees, including those who have not, as yet, formally been recognised as such (for example, asylum seekers whose status has not yet been determined). Accordingly, States are obliged not to return or expel an asylum seeker to their country of origin pending a final determination of their refugee status.

[34] The UNHCR emphasises that Article 31(1) of the 1951 Refugee Convention,⁴⁵ concerning non-penalisation for illegal entry, is central to the object and purpose of that Convention. It lays emphasis on the fact that Article 31(1) is a protective, and not an exclusionary, provision. The UNHCR makes submissions further on the meaning of the words “directly”, “without delay” and “good cause”, and points out that the requirements for non-penalisation, “directness”, “promptness” and “good cause” are cumulative.

⁴¹ Protocol Relating to the Status of Refugees, 4 October 1967.

⁴² Universal Declaration of Human Rights, 10 December 1948.

⁴³ Refugees Act above n 2 at section 1A.

⁴⁴ Section 39(1)(c) of the Constitution.

⁴⁵ Article 31(1) provides:

“The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

[35] In relation to penalties, as referred to in Article 31(1), the UNHCR submits that the term should be interpreted broadly, referring to any criminal or administrative measure (for example, detention or discriminatory treatment) imposed by the State, on account of irregular entry or presence, that is unfavourable to the refugee. The plain meaning of “penalty”, which is “loss, disability, or disadvantage” inflicted for breach of a law or rule, supports this interpretation and is consistent with the approach of the UN Human Rights Committee and leading scholars in international refugee law. According to the UNHCR, penalties prohibited by Article 31(1) include limitations on freedom of movement. It says that subsections 4(1)(h) and (i) of the Refugees Act operate as penalties. These sections disadvantage refugees by disqualifying them from enjoying protection on account of their irregular entry or presence, thereby violating Article 31(1), the right to seek asylum and the principle of *non-refoulement*.

[36] The UNHCR contends that the impugned provisions are at variance with the object and purpose of the 1951 Refugee Convention. It claims that these provisions effectively make the right to seek asylum and enjoy protection from *refoulement* conditional upon compliance with immigration procedures, even though the formal immigration requirements in the Refugee Act have no bearing on the substance of a claim for asylum. Consequently, refugees are unable to access the rights to which they are entitled under the 1951 Refugee Convention and the impugned provisions are unconstitutional.

Issues

[37] This Court must decide—

- (a) jurisdiction and leave to appeal;
- (b) whether there is a compliant application for leave to appeal against the High Court’s finding that the impugned regulations are unconstitutional;
- (c) if the answer to (b) above is in the negative, what impact that has on the assessment of the constitutionality of the impugned sections of the Refugees Act, that is, its impact on the question whether the declaration should be confirmed;

- (d) the constitutionality of the impugned provisions;
- (e) remedy; and
- (f) costs.

Jurisdiction and leave to appeal

[38] This matter involves the confirmation of the High Court’s declaration of constitutional invalidity of the impugned sections of the Refugees Act. Therefore, it engages this Court’s constitutional jurisdiction. The alleged unjustifiable violation of the right to *non-refoulement* raises issues of public interest. Thus, the interests of justice warrant leave to appeal being granted.

Purported application for leave to appeal against the High Court’s declarator that the impugned regulations are unconstitutional

[39] As stated, a declaration of invalidity of regulations by a lower court does not require this Court’s imprimatur by way of confirmation, as is required by section 172(2)(a) of the Constitution in respect of declarations of constitutional invalidity by the High Court (or a court of similar status) of an Act of Parliament, a provincial Act or any conduct of the President (section 172(2)(a) matters). This is trite law, borne out by the long line of cases cited above.⁴⁶ The rationale for this well-established principle is that regulations are a species of subordinate legislation (also sometimes referred to as “secondary legislation” or “delegated legislation”), that is, legislation not enacted by Parliament.⁴⁷ In *Afribusiness*,⁴⁸ this Court explained the role of regulations thus:

“Ordinarily, the purpose served by regulations is to make an Act of Parliament work. The Act itself sets the norm or provides the framework on the subject-matter legislated

⁴⁶ See cases cited in n 4 above.

⁴⁷ *Smit v Minister of Justice and Correctional Services* [2020] ZACC 29; 2021 (1) SACR 482 (CC); 2021 (3) BCLR 219 (CC) at para 35 and *NU Africa Duty Free Shops (Pty) Ltd v Minister of Finance* [2023] ZACC 31; 2023 (12) BCLR 1419 (CC); 2024 (1) SA 567 (CC) at para 78.

⁴⁸ *Minister of Finance v Afribusiness NPC* [2022] ZACC 4; 2022 (4) SA 362 (CC); 2022 (9) BCLR 1108 (CC).

upon. Regulations provide the sort of detail that is best left by Parliament to a functionary, usually the Minister responsible for the administration of the Act, to look beyond the framework and – in minute detail – to ascertain what is necessary to achieve the object of the Act or to make the Act work.”⁴⁹

[40] This Court in *Mpumalanga Petitions Bill*⁵⁰ enunciated the scope of subordinate legislation and, in particular, regulations:

“Regulations are a category of subordinate legislation framed and implemented by a functionary or body other than the legislature for the purpose of implementing valid legislation. Such functionaries are usually Members of the Executive branch of government, but not invariably so. A Legislature has the power to delegate the power to make regulations to functionaries when such regulations are necessary to supplement the primary legislation.”⁵¹

[41] Rule 19(1) of the Constitutional Court Rules applies in all matters that reach this Court, other than section 172(2)(a) matters. That rule must be read with rule 16.⁵²

⁴⁹ Id at para 103.

⁵⁰ *Constitutionality of the Mpumalanga Petitions Bill 2000* [2001] ZACC 10; 2001 (11) BCLR 1126 (CC); 2002 (1) SA 447 (CC).

⁵¹ Id at para 19.

⁵² Rule 16 provides:

“16. Confirmation of an order of constitutional invalidity

- (1) The Registrar of a Court which has made an order of constitutional invalidity as contemplated in section 172 of the Constitution shall, within 15 days of such order, lodge with the Registrar of the Court a copy of such order.
- (2) A person or organ of State entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge a notice of appeal with the Registrar and a copy thereof with the Registrar of the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.
- (3) The appellant shall in such notice of appeal set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against and the order it is contended ought to have been made.
- (4) A person or organ of State entitled to do so and desirous of applying for the confirmation of an order in terms of section 172(2)(d) of the Constitution shall, within 15 days of the making of such order, lodge an application for such confirmation with the Registrar and a copy thereof with the Registrar of

Leave to appeal the High Court's declaration that the impugned regulations are constitutionally invalid is therefore plainly regulated by rule 19(1). The respondents were therefore required to comply with rule 19(2) and ancillary provisions by lodging with the Registrar of this Court an application for leave to appeal directly to this Court within 15 days of the order of the High Court, after giving notice to the other party or parties concerned. Rule 19(3) provides what an application for leave to appeal contemplated in rule 19(2) should contain. Again, this principle of procedure is well-settled.

[42] In *City of Cape Town*,⁵³ which concerned a declaration of invalidity of section 29(8) of the National Building Regulations and Building Standards Act,⁵⁴ the applicant's counter-application in respect of the City's advertising by-law was dismissed in the High Court. In the subsequent confirmation proceedings, this Court held:

"In respect of the appeal, section 172(2)(d) of the Constitution provides that '[a]ny person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity'. To the extent that the Independent Outdoor Media's appeal arises from the High Court's order of constitutional invalidity, it is properly before this Court. Therefore, those elements relating to the Independent Outdoor Media's counter-application and supplementary challenges, for example, *which are discrete from the confirmation orders, should have been brought by means of an application for leave to appeal. Those elements are not properly before this Court.*"⁵⁵ (Emphasis added.)

the Court which made the order, whereupon the matter shall be disposed of in accordance with directions given by the Chief Justice.

- (5) If no notice or application as contemplated in subrules (2) and (4), respectively, has been lodged within the time prescribed, the matter of the confirmation of the order of invalidity shall be disposed of in accordance with directions given by the Chief Justice."

⁵³ *City of Cape Town v Independent Outdoor Media (Pty) Ltd* [2023] ZACC 17; 2024 (1) SA 309; 2024 (4) BCLR 483 (CC).

⁵⁴ 103 of 1977.

⁵⁵ *City of Cape Town* above n 53 at para 18.

[43] The High Court in *Mulowayi*⁵⁶ declared regulation 3(2)(a) of the Regulations on the South African Citizenship Act⁵⁷ invalid. The High Court suspended the declaration of invalidity pending confirmation by this Court. The applicants in this Court sought confirmation of the declaration of invalidity, alternatively, leave to appeal against the suspension.

[44] This Court held that declarations of invalidity concerning regulations do not require confirmation, as regulations are subordinate legislation. The application for confirmation was therefore refused as superfluous. This Court held:

“It is trite that declarations of invalidity in respect of regulations are not subject to confirmation by this Court. However, a party can still appeal to this Court against orders of constitutional invalidity concerning regulations. Section 172(2)(a) of the Constitution provides that an order invalidating an Act of Parliament, a provincial Act, or any conduct of the President made by the High Court has no force unless it is confirmed by this Court. This constitutional provision is silent about a declaration of invalidity concerning a regulation promulgated by a Minister in terms of an Act of Parliament. . . . Therefore, the application for confirmation of the order of invalidity must fail.”⁵⁸

[45] The jurisprudence of this Court is therefore clear that there is a stark procedural distinction between challenges to primary and subordinate legislation. If a party wishes to challenge or vary a declaration of invalidity concerning regulations, it must invoke this Court’s appellate jurisdiction by seeking leave to appeal under rule 19. It is common cause that in this instance the respondents failed to comply with rule 19(2) at all. Instead of lodging an application in terms of rule 19(2), read with rule 19(3), the respondents simply gave notice to oppose in a document dated 7 August 2025, in

⁵⁶ *Mulowayi* above n 4.

⁵⁷ Regulations on the South African Citizenship Act GN 1122 GG 36054, 28 December 2012. Regulation 3(2)(a) prescribed a period of 10 years’ permanent residency for naturalisation, whereas section 5(1)(c) of the South African Citizenship Act 88 of 1995 prescribed a five-year period.

⁵⁸ *Mulowayi* above n 4 at paras 27-9.

response to Scalabrini's notice that it will be seeking confirmation of the High Court's order of invalidity. The notice was accompanied by a founding affidavit deposed to by the second respondent, the DG, Mr Livhuwani Tommy Makhode. The respondents also filed applications in terms of rule 16(2) and section 172(2)(d).

[46] Neither of these two bases for the application bears scrutiny. It must be reiterated that it is trite that declarations of invalidity made against regulations do not require confirmation by this Court.⁵⁹ Rule 16(2) and section 172(2)(d) of the Constitution, purportedly relied upon by the respondents, do not apply at all in relation to the regulations, as those provisions only concern confirmation of the declaration of invalidity of Acts of Parliament or provincial Acts. The respondents should have proceeded in terms of rule 19, which concerns applications for leave to appeal. They could not simply, as it were, piggyback on Scalabrini's confirmation application. But, alas, that is not the only defect in their papers.

[47] The purported application is also substantially out of time. The High Court handed down its judgment on 15 May 2025. In terms of rule 16(2) the respondents had to lodge their application for leave to appeal in this Court within 15 days, that is, by 5 June 2025. As stated, they only did so on 7 August 2025 by way of service of a notice of intention to oppose Scalabrini's confirmation application. They are more than two months out of time. This elementary mistake is exacerbated by the absence of a condonation application and any explanation for this non-compliance. Not a word regarding condonation is mentioned in the notice of motion, nor in the second respondent's affidavit.

[48] There is one of only two possibilities: either the respondents do not know that they are badly out of time, or they do not care that they are out of time, and do not see any need to afford this Court an explanation for their laxity and non-compliance or to

⁵⁹ See [2] and cases cited in n 4 above.

apply for condonation. In either instance, this is completely unacceptable and deserving of strong deprecation. And yet, that is not the end of the respondents' travails.

[49] For the sake of brevity, I merely list without explication the myriad further errors in the respondents' purported leave to appeal application:

- (a) In their papers, the respondents call themselves "appellants" who have filed an application for leave to appeal under rule 16(2). But that rule does not make provision for the filing of an application, it merely provides for a party to "lodge a notice of appeal". That is all that is required in an appeal against an order falling within the scope of section 172(1)(a).
- (b) Curiously and inexplicably, the respondents say that they are serving their papers on the sixth to ninth respondents, but there are no such respondents. One can only assume that this is an erroneous reference to the amici who are cited as sixth to ninth respondents in Scalabrini's confirmation application.
- (c) The respondents purportedly seek to appeal the order of the High Court striking down the impugned regulations as constitutionally invalid. As stated, they should have done so utilising rule 19. And yet, notwithstanding the limited ambit of their purported application, they seek relief encompassing the setting aside of all the orders of the High Court, including those which they have not properly placed before this Court.

[50] All this Babelic confusion is a lamentable display of remarkable gross ineptitude and egregious laxity on the part of the respondents. This matter has been handled procedurally in an atrocious fashion. Recently, in *Ex parte Minister of Home Affairs*,⁶⁰ this Court issued a stern reprimand to this very Department whose Minister and officials

⁶⁰ *Ex parte Minister of Home Affairs* [2023] ZACC 34; 2024 (1) BCLR 70 (CC); 2024 (2) SA 58 (CC).

are the respondents in this case. Punitive costs orders were made against the Minister, DG and the legal representatives.⁶¹

[51] In *Kirland*,⁶² this Court observed:

“[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.”⁶³

[52] As will appear, the lack of an application for leave to appeal, properly brought in terms of rule 19(1), has direct implications for the assessment of the constitutionality of section 21(1B). That is because, absent an appeal, the regulations that have been struck down by the High Court must be treated as *pro non scripto* (as if they had not been written). That striking down order remains extant, although it has been suspended by the High Court.⁶⁴ But, in the absence of a proper appeal against the order of the Court that the regulations are invalid, and, given this Court’s lack of authority to confirm their invalidation, there was no basis to suspend the finding of invalidity. Only the order declaring the provisions of the Act unconstitutional is suspended. The order invalidating the regulations, which does not require our confirmation, remains in effect.

[53] What is before us, then, is only the constitutionality of the impugned statutory provisions, that is, sections 4(1)(f), 4(1)(h) and 4(1)(i), and 21(1B). But, as will be discussed, the now-defunct regulations do play some role in the evaluation.

⁶¹ Id at paras 110-4.

⁶² *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC).

⁶³ Id at para 82.

⁶⁴ See paragraph 4 of the High Court Part B judgment’s order above n 22, which suspends the declaration of invalidity of the regulations pending the outcome of these confirmation proceedings.

The abstract nature of the challenge

[54] The respondents contend that this is an abstract challenge, unmoored in facts that present a live dispute. They advanced the same argument before the High Court, which, although it agreed that the matter was an abstract challenge,⁶⁵ nonetheless adjudicated the matter on an objective basis.⁶⁶ I disagree with the finding that this is an abstract challenge. Scalabrini placed before the High Court extensive direct evidence from affected persons, experts and community stakeholders. That evidence is a firm base for an unconstitutionality claim.

[55] Our courts are reluctant to hear abstract challenges, because that would require courts “to peer into the future, and, in doing so, . . . stretch the limits of judicial competence”.⁶⁷ The possibility that legislation may prove unconstitutional in the future is ordinarily insufficient to render a challenge justiciable, unless rights are threatened or imminent or inevitable harm is shown.⁶⁸

[56] But, even if this can be categorised as an abstract challenge, Skweyiya J observed in his separate judgment in *Phaswane*⁶⁹ that the Constitution specifically provides for courts to engage in abstract review of constitutional issues in rare instances, including facial constitutional challenges to legislation brought before a competent court.⁷⁰ Consequently, these challenges can be brought under the broad standing provisions of section 38 of the Constitution which empowers courts to grant appropriate relief when constitutional rights have been threatened.⁷¹

⁶⁵ See the High Court Part B judgment above n 1 at paras 25 and 72.

⁶⁶ Id at para 72.

⁶⁷ *Savoi* above n 27 at para 13.

⁶⁸ *Solidarity Trade Union v Minister of Health* [2026] ZACC 19 at para 43 and *Esau v Minister of Co-Operative Governance and Traditional Affairs* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) at para 47.

⁶⁹ *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development* [2009] ZACC 8; 2009 (2) SACR 130 (CC); 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC).

⁷⁰ Id at para 223.

⁷¹ Id.

[57] This Court has entertained abstract challenges in appropriate circumstances. This is because legislation, once enacted, assumes a constitutional character and is susceptible to constitutional scrutiny, irrespective of whether it is in operation.⁷² That scrutiny permits a statute to be declared invalid to the extent of its inconsistency with the Constitution,⁷³ even where the statute has not as yet been brought into operation.

[58] In *Ferreira*,⁷⁴ this Court held that constitutional challenges are objectively determined, and are not dependent upon the subjective circumstances of an individual. It stated:

“[T]he enquiry is an objective one. A statute is either valid or ‘of no force and effect to the extent of the inconsistency’. The subjective positions in which parties to a dispute may find themselves cannot have a bearing on the status of the provisions of a statute under attack. The Constitutional Court, or any other competent court for that matter, ought not to restrict its enquiry to the position of one of the parties to a dispute in order to determine the validity of a law. The consequence of such a (subjective) approach would be to recognise the validity of a statute in respect of one litigant, only to deny it to another. Besides resulting in a denial of equal protection of the law, considerations of legal certainty, being a central consideration in a constitutional state, militate against the adoption of the subjective approach.”⁷⁵

[59] In an abstract challenge, Scalabrini bears a heavy burden and must show that on every possible interpretation, the impugned sections are unconstitutional. What matters then is not the implementation of those provisions and their effect, but their meaning. Internal design is an indicator to help determine whether the legislation provides

⁷² *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at para 62 and *South African Iron and Steel Institute v Speaker, National Assembly* [2023] ZACC 18; 2023 (10) BCLR 1232 (CC); 2026 (2) SA 368 (CC) at para 50.

⁷³ *New National Party v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) (*New National Party*) at para 22.

⁷⁴ *Ferreira v Levin N.O.*; *Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) BCLR 1 (CC); 1996 (1) SA 984 (CC).

⁷⁵ *Id* at para 26.

constitutionally adequate guidance. Thus, even in an abstract challenge, this Court must consider whether the impugned sections furnish adequate guidance to those who must implement them, or whether they permit the limitation of rights through unguided or open-ended discretion:

“It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.”⁷⁶

[60] For the reasons that follow, the impugned sections are constitutionally deficient in these respects:

- (a) First, section 21(1B) does not pass constitutional muster on its face, as contemplated in *Savoi*.⁷⁷ The fatal shortcoming is one of irrationality, that is to say there is no legitimate government purpose served in the disbarment on antecedent procedural grounds as sanctioned.
- (b) Second, sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) confer discretionary power without setting out sufficient criteria or factors to guide their exercise, rendering them too unclear and vague to be capable of preventing an unjustifiable limitation of rights, as contemplated in *Dawood*.⁷⁸

⁷⁶ *Dawood* above n 4 at para 54.

⁷⁷ *Savoi* above n 27 at para 13.

⁷⁸ *Dawood* above n 4.

- (c) Third, the operation of section 4 excludes a merits-based assessment of the danger an asylum seeker faces in their country of origin, with the result that the impugned sections violate the principle of *non-refoulement*.

The statutory scheme: the asylum process before the amendment of the Refugees Act

[61] The asylum process, as it is intended to operate, commences at a designated port of entry into South Africa, where a foreign national must claim asylum and may obtain an asylum transit visa issued under section 23 of the Immigration Act, valid for five days.⁷⁹ The purpose of the visa is to enable travel to the nearest RRO.

[62] Before the impugned sections were introduced through amendments to the Refugees Act and its regulations, which came into force on 1 January 2020, delay and irregular entry did not carry the same consequences. The application process was relatively straightforward. An individual who presented themselves at an RRO was permitted to lodge an asylum application and was issued with a section 22 visa pending final determination of the claim on its merits. Delay was treated by the Refugee Status Determination Officer (RSDO) as relevant to credibility and authenticity, but it was not decisive; in other words, it did not operate as an automatic bar to accessing the asylum process. In short, prior to the amendments, any person who reached an RRO could enter the asylum system regardless of whether they had initially reported themselves at a port of entry and regardless of whether and for how long they had been in South Africa

⁷⁹ Section 23 reads:

“23. Asylum transit visa

- (1) The Director-General may, subject to the prescribed procedure under which an asylum transit visa may be granted, issue an asylum transit visa to a person who at a port of entry claims to be an asylum seeker, valid for a period of five days only, to travel to the nearest RRO in order to apply for asylum.
- (2) Despite anything contained in any other law, when the visa contemplated in subsection (1) expires before the holder reports in person at a RRO in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act No. 130 of 1998), the holder of that visa shall become an illegal foreigner and be dealt with in accordance with this Act.”

illegally. The new provisions and regulations, however, fundamentally altered this position with a number of attendant complications.

The present statutory scheme

[63] The impugned sections read:

“4. Exclusion from refugee status

- (1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a RSDO has reason to believe that he or she—

...

- (f) has committed an offence in relation to the fraudulent possession, acquisition or presentation of a South African identity card, passport, travel document, temporary residence visa or permanent residence permit; or

...

- (h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a RSDO that there are compelling reasons for such entry; or

- (i) has failed to report to the RRO within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum.”

And:

“21. Application for asylum

...

- (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.”

[64] The impugned regulations provide:

“8. Application for asylum

- (1) An application for asylum in terms of section 21 of the Act must—
 - ...
 - (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;
 - ...
- (2) Any person who submits a visa other than an asylum transit visa issued in terms of section 23 of the Immigration Act must provide proof of change of circumstances in the period between the date of issue of the visa and the date of application for asylum.
- (3) Any person who upon application for asylum fails at a[n] RRO 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).”

[65] It is necessary to highlight three features of this process which complicate matters:

- (a) First, section 21(1B) provides that where an applicant is not in possession of an asylum transit visa contemplated in section 23 of the Immigration Act, the applicant must be interviewed by an immigration

officer to ascertain whether “valid reasons” exist for not being in possession of such a visa. Remarkably, however, the section does not attach any consequences to the outcome of this interview.

- (b) The second procedure is governed by regulation 8(3). If, upon applying for asylum at an RRO, the foreign national fails to produce a valid visa issued in terms of the Immigration Act, they must show “good cause” for their illegal entry or stay before being permitted to apply for asylum. All of the parties in this matter agree that the consequence of an unsatisfactory outcome in the interview in the first procedure is to be found in regulation 8(3). We need not decide whether this is so, but if it is not so, then there is no other legislative provision explaining the consequence of an unsatisfactory outcome in the first procedure.
- (c) Thirdly, once the applicant is properly before a RSDO at the RRO, the impugned sections in section 4 – the exclusions from refugee status – apply. In terms of section 4(1), an asylum seeker does not qualify for refugee status if the officer has reason to believe that they have committed an offence in relation to travel or sojourn documents (section 4(1)(f)), or cannot provide “compelling reasons” for crossing the border other than through a designated port of entry (section 4(1)(h)); or cannot provide “compelling reasons” for failure to report to an RRO within five days of entry (section 4(1)(i)).

[66] There are numerous difficulties with these three procedures. But before delving into them, it is necessary to briefly consider what role the now-defunct regulations play in the constitutionality assessment of the impugned sections. As stated, absent an appeal, they should be treated as *pro non scripto*. But they still have a limited role to play in the constitutionality assessment. This analysis of course is cognisant of the earlier exposition of regulations as subordinate legislation.

The role of the now-defunct regulations in assessing the constitutionality of section 21(1B)

[67] The first point to be made is that it is well settled that our courts do not permit the use of regulations to interpret primary legislation.⁸⁰ In *Marshall*,⁸¹ this Court stated that “the content of a regulation made under the powers derived from a statute may not be relied upon as an aid to the construction of the statute itself”.⁸² That principle reflects a rule of hierarchy: regulations derive their force from the Act and cannot amend, contradict, narrow or expand Parliament’s clear grant of power. To permit a regulation to curtail or reshape a statutory provision would invert that hierarchy and allow the proverbial tail to wag the dog.

[68] However, while it is “generally impermissible” to reverse this hierarchy,⁸³ it may be permissible, in appropriate and limited circumstances, to consider regulations in order to illuminate how a legislative scheme is designed to function in practice. In *Detody*,⁸⁴ Innes CJ held that, in statutory interpretation, it is “proper also to pay some regard” to how legislation has been administered.⁸⁵ Regulations may, for example, operate as a form of contemporaneous exposition,⁸⁶ or as a persuasive explanatory source, particularly where they were promulgated to give procedural or operational effect to a statutory framework enacted at the same time. In such instances, the regulation is not relied upon to determine the meaning of the statute or to introduce a limitation that the statute itself does not contain. Rather, it may be considered as part of the broader legislative context in which the statute operates, assisting in

⁸⁰ *Trustco Group International (Pty) Ltd v Vodacom (Pty) Ltd* [2016] ZASCA 56; 2017 (5) SA 283 (SCA) (*Trustco*) at para 14 referencing *Rossouw v FirstRand Bank Ltd* [2010] ZASCA 130; 2010 (6) SA 439 (SCA); [2011] 2 All SA 56 (SCA) (*Rossouw*) at para 24. See also *Clinch v Lieb* 1939 TPD 118 at 125 and *Hamilton-Brown v Chief Registrar of Deeds* 1968 (4) SA 735 (T) at 737.

⁸¹ *Marshall N.O. v Commissioner, South African Revenue Service* [2018] ZACC 11; 2018 (7) BCLR 830 (CC); 2019 (6) SA 246 (CC).

⁸² *Id* at para 4.

⁸³ *Id* and *Rossouw* above n 80 at para 24.

⁸⁴ *R v Detody* 1926 AD 198.

⁸⁵ *Id* at 202-3.

⁸⁶ *Devenish Devenish on Interpretation: Statutory Interpretation* (Juta and Co Ltd, Cape Town 2024) vol 1 at 201.

understanding how the scheme was intended to work in practice. The reliance on regulations as contemporary exposition or otherwise persuasive authority is particularly appropriate where the primary legislation is ambiguous and where there is “room for interpretation in the language of the provision”⁸⁷ – as is the case in section 21(1B).

[69] The Supreme Court of Appeal’s decision in *Trustco* provides a useful illustration of the rule that subordinate legislation cannot curtail powers clearly conferred by primary legislation. There, section 16(2) of the Patents Act⁸⁸ conferred a broad remedial discretion on the Registrar to extend time periods “either before or after” expiry, unless “otherwise expressly provided”.⁸⁹ A regulation was invoked to treat an application deemed as abandoned, thereby extinguishing the Registrar’s discretion. The Supreme Court of Appeal rejected that approach because the regulation was being used to curtail a power clearly and expressly granted by the Act.⁹⁰ That would have allowed subordinate legislation to override primary legislation, reversing the hierarchy between them.

[70] The position here is different. What is being postulated is not to rely on regulation 8(3) to override, restrict or contradict section 21(1B). Nor is the regulation invoked to diminish a clear statutory discretion or to introduce a limitation absent from the Act. Rather, the Act and the regulations were enacted as components of a single procedural framework governing access to the asylum system. Section 21(1B) creates the interview stage, but leaves its timing and practical consequence undefined.

[71] Regulation 8(3), promulgated under the Act’s empowering provisions, supplies the operational detail that gives that statutory stage practical effect. In this context, the

⁸⁷ *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* [1998] ZASCA 59; [1998] 4 All SA 269 (A); 1998 (4) SA 860 (SCA) at 870E-F.

⁸⁸ 57 of 1978.

⁸⁹ *Trustco* above n 80 at para 7.

⁹⁰ *Id* at para 16.

regulation does not dictate the meaning of the Act; it merely shines the light on how Parliament's scheme functions in practice.

[72] The distinction is therefore one of direction and effect. It is generally impermissible to use subordinate legislation to interpret the text of a statutory provision, or to cut down or contradict a power clearly conferred by the statute. But it is permissible to consider regulations contextually where they flesh out procedures contemplated by the Act and operate consistently within its framework – as part of the purposive inquiry. In the present instance, regulation 8(3) does not displace section 21(1B) – it explicates the statutory interview as the mechanism through which the “valid reasons” inquiry is conducted before access to the asylum process is granted. The regulation does not dictate the meaning of the Act; it clarifies how the statutory interview functions in the overall asylum process. That use is consistent with hierarchy and does not invert it.

[73] This approach is consonant with this Court's recent pronouncements regarding the interaction between regulation 8(3) and section 21(1B) in *Abore* and *Ashebo*.⁹¹ This provides a further reason why the present matter is distinguishable from *Marshall* and *Trustco*. By taking into account the role of regulation 8(3) in analysing the operation of section 21(1B), this Court would simply be acting consistently with its recent interpretations of that provision and would not be using the regulations to determine or alter the meaning of the Act. In *Abore*, this Court noted a clear connection between the two provisions and observed:

“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*

⁹¹ *Ashebo* above n 11 and *Abore* above n 13.

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.”⁹² (Emphasis added.)

[74] I agree with this reasoning that the regulation does not merely play an informational role, but rather serves as a precondition to accessing the asylum application process. *Abore* supports the textual connection between the consequence of deportation and the interview in section 21(1B) that—

“it appears that good cause which is required to be shown refers to the [valid] reasons that must be given [to the immigration officer under section 21(1B)] on why the applicant for asylum does not have an asylum transit visa.”⁹³

[75] The same approach appears from *Ashebo*:

“It is clear, therefore, that the combined effect of the amended provisions in sections 4(1)(h) and (i) and 21(1B) of the Refugees Amendment Act and regulations 7 and 8(3) 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.”⁹⁴

[76] In these two cases, this Court has thus framed the interpretive inquiry in a manner that resists a piecemeal reading of section 21(1B) and treats the regulation and the section as forming part of a single, integrated scheme, using the regulation to clarify the focus of the good cause inquiry within the statutory process. That is a permissible use of regulation 8(3), even though it has been struck down by the High Court. I refer to

⁹² *Abore* above n 13 at para 29.

⁹³ *Id.*

⁹⁴ *Ashebo* above n 11 at para 43.

regulation 8(3) only as contextual material that assists in understanding how the interview contemplated in section 21(1B) operates within the broader asylum process. We are not concerned now with the validity of regulation 8, but with its factual content that is relevant in understanding the function of section 21(1B). Regulation 8 was promulgated to come into force simultaneously with the amendments to the Act, including section 21(1B). And this Court has previously found that section 21(1B) operates in a workable manner only when read with the regulations. This approach accords with jurisprudence elsewhere.

[77] In England, although subordinate legislation cannot dictate or override the meaning of primary legislation, it may serve as an interpretative aid when both were designed to function as part of a single legislative scheme. It was expressed thus in *Wathen-Fayed*:

“[I]n appropriate cases subordinate legislation may be taken into account as persuasive authority as to the meaning of the primary statute. This is most likely to be so where it is broadly contemporaneous with the primary statute and is part of a single legislative scheme.”⁹⁵

[78] With this aspect out of the way, what bears consideration next is the crux of the case, the constitutionality of the impugned sections. I propose dealing first with sections 4(1)(f), 4(1)(h) and 4(1)(i). Then I will consider section 21(1B) in two parts, first by making reference to the previous interpretation of the now defunct regulations for a proper understanding of the framework within which section 21(1B) functions. Then, the section will be examined facially, that is, as it stands without those regulations.

⁹⁵ *Wathen-Fayed v Secretary of State for Housing, Communities and Local Government* [2025] UKSC 32 at para 58, citing *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 397; *R v McCool* [2018] UKSC 23 at para 105; and *R (PACCAR Inc) v Competition Appeal Tribunal* [2023] UKSC 28 at para 44.

Constitutionality of sections 4(1)(f), 4(1)(h) and 4(1)(i)

[79] These provisions have the joint effect that, once an application for asylum has been lodged, certain forms of procedural non-compliance may result in disqualification from refugee status. These provisions operate as procedural filters.⁹⁶ They bear no resemblance in kind or gravity to the accepted and narrowly circumscribed exceptions to *non-refoulement*. Article 33 of the 1951 Refugee Convention permits a departure from *non-refoulement* only where there are reasonable grounds to regard a refugee as (a) a danger to the security of the host State; or (b) a danger to the community, having been convicted of a particularly serious crime.

[80] Thus, an applicant is excluded from a merits-based determination and is exposed to removal. In that respect, the provisions directly implicate the principle of *non-refoulement*. In this regard, it bears emphasis that all asylum seekers are protected by the principle of *non-refoulement*, and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure on the merits.⁹⁷

[81] In *Scalabrini I*,⁹⁸ a case with analogous facts and issues, this Court set its face firmly against the disbarment of asylum seekers from seeking refugee status by reason only of procedural missteps, no matter how severe. This Court regarded that as unconstitutional and an infringement of the *non-refoulement* principle:

“The impugned subsections fly in the face of the prohibition contained in section 2 of the Act. The effect of section 2 is to ‘permit any person to enter and to remain in this country for the purpose of seeking asylum from persecution’ on account of the factors listed in subsections (a) and (b). It is then that the obligation not to return (*refouler*) an asylum seeker arises.

⁹⁶ Section 4(1)(f) is directed at the prevention of document fraud and identity theft in the asylum-seeking process. Section 4(1)(h) aims to discourage unlawful immigration through borders by providing that entry can only be through designated ports of entry. Section 4(1)(i) has as its objective that asylum claims are made promptly after entrance into the Republic.

⁹⁷ *Ruta* above n 12 at para 29.

⁹⁸ *Scalabrini I* above n 4.

The impugned subsections . . . disregard the protection of asylum seekers from *refoulement*: those who do not renew their visas timeously are deemed to have abandoned their asylum applications, and they may be expelled or returned to the countries from which they fled. . . . [I]n those countries they may face torture, imprisonment, sexual violence and other forms of persecution, even death. *And this, without any consideration of the merits of their claim for asylum.*”⁹⁹ (Emphasis added.)

[82] The respondents’ reliance on *Ruta*, *Abore* and *Ashebo* is misplaced. Both *Ruta* (decided prior to the 2020 amendments) and *Abore* (decided after the 2020 amendments) confirmed the inviolability of *non-refoulement* and that only a merits-based assessment can warrant the return of an asylum seeker to his or her country of origin. And *Ashebo* is distinguishable on both the facts and the law – that case concerned detention at the first phase of an asylum application, that is, in respect of persons who have yet to make an application for asylum at an RRO. Conversely, this case concerns the second and third phases, that is, persons who visit an RRO but are not permitted to access asylum or receive refugee status, simply on the basis of disbarment by virtue of the impugned sections, before a merits-based assessment.

[83] Equally misconceived is the respondents’ reliance on this *obiter dictum* (comment in passing) in *Ashebo*:

“In my view, these provisions do not offend the principle of *non-refoulement* embodied in section 2 of the Refugees Act. Their effect is by no means out of kilter with Article 31 of the [1951 Refugee] Convention, the fount of section 2. Rather, they accord with its import because it too does not provide an asylum seeker with unrestricted indemnity from penalties. The Article provides that a contracting state may not impose penalties on refugees on account of their illegal entry or presence in the country provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”¹⁰⁰

⁹⁹ Id at paras 33-4. This Court cited *G v G* [2021] UKSC 9 at para 81. The same point was made by this Court earlier in *Ruta* above n 12 at para 54: “The ‘shield of *non-refoulement*’ may be lifted only after a proper determination [of the merits of the application for asylum] has been completed.”

¹⁰⁰ *Ashebo* above n 11 at para 44.

[84] The Court was not condoning non-compliance with the *non-refoulement* principle at all, and it expressly refrained from giving an opinion on the constitutionality of the impugned sections, stating:

“The applicant challenged the constitutionality of section 21(1) of the Refugees Amendment Act in his written submissions. But no claim at all was made for such relief during the hearing and accordingly I say no more about this submission. *Neither do I venture any opinion on the constitutionality or otherwise of any of the amendments to the Refugees Act and the new Regulations thereto as no substantial constitutional attack has been launched against them.*”¹⁰¹ (Emphasis added.)

Constitutionality of section 21(1B)

The first approach

[85] This analysis starts with an assessment of the section that considers the now-defunct regulations, the approach which I prefer. When section 21(1B) is read together with regulation 8(3), the practical effect of that section is plainly to prevent an asylum seeker from proceeding to a merits-based determination. This Court’s approach in *Abore* and *Ashebo* is that the operation of section 21(1B) and the consequences flowing from regulation 8(3) are inextricably linked. Regulation 8(3) thus fleshes out and gives effect to the purpose of section 21(1B) and is the only mechanism that makes section 21(1B) a workable provision.

[86] On that approach, it is evident that section 21(1B), read with regulation 8(3), establishes two distinct thresholds. Section 21(1B) requires an applicant to show *valid reasons* to the immigration officer for not being in possession of an asylum transit visa. Regulation 8(3) requires *good cause* to be shown (and, in passing, it must be added, it is not clear to whom this has to be shown) for illegal entry or stay.

[87] Both in practice and as a matter of logical inference, there appears to be a measure of consensus that the regulation 8(3) inquiry is conducted by an immigration

¹⁰¹ Id at fn 30.

officer and is functionally linked to the interview contemplated in section 21(1B). But the regulation itself is entirely silent on who must conduct that inquiry. On its face, it could equally be understood as falling within the remit of an RSDO at an RRO, or another official, for that matter. This demonstrates starkly the absence of clear legislative guidance as to both the identity of the decision-maker and the content of the inquiry, and thus reinforces the conclusion that the scheme confers unguided discretion and is impermissibly vague.

[88] In addition to the above, sections 4(1)(h) and 4(1)(i) in turn require *compelling reasons* to be shown for entering the Republic other than through a designated port of entry or for failing to report to an RRO within five days of entry. The outcome of all of this is the absurdity that an asylum seeker may have to face the same questions two or three times, and show “good cause” or “valid reasons” to one (or perhaps two) officials, but “compelling reasons” to another. It is self-evidently, inherently problematic that different thresholds are applied to what is, in substance, the same inquiry. The use of multiple and escalating standards creates uncertainty as to which test applies, when it applies and by whom it must be applied, thereby rendering the scheme internally inconsistent and unpredictable in its operation.

[89] Moreover, none of the tests is accompanied by meaningful statutory guidance as to the factors or criteria that must be satisfied for the threshold to be met. At no point are the words “good cause”, “valid reasons” or “compelling reasons” defined. The only provision that offers any indication of content is section 4(1)(i), which states that compelling reasons, for a failure to report to an RRO within five days, may include hospitalisation, institutionalisation or any other compelling reason. However, even this guidance is inadequate because it is circular, non-exhaustive and provides no principled framework for decision-making. It also offers no assistance in distinguishing between acceptable and unacceptable explanations. More importantly, the “compelling reasons” test in section 4(1)(h), the “valid reasons” test in section 21(1B) and the “good cause” test in regulation 8(3) have no guidance whatsoever, creating a real risk of arbitrary and inconsistent decision-making.

[90] The inevitable consequence of the absence of criteria or factors to inform these tests is the conferral of unjustifiably broad discretion on decision-makers. An RSDO is vested with the sole discretion in terms of section 4(1)(f) to form a reason to believe that a foreigner has committed an offence relating to unlawful documentation, and to determine whether compelling reasons are absent for the purposes of section 4(1)(h) or (i). The only guidance provided as to how this discretion is to be exercised appears in section 4(1)(i) (which does allow for the impermissibly vague “any other compelling reason”). As stated, this guidance is minimal and circular.

[91] The position is even worse in relation to the interview conducted by an immigration officer under section 21(1B), where, as the High Court correctly noted, the factors to be taken into account in that determination lie solely within the discretion of the immigration officer, without any guidance whatsoever in the Refugees Act.¹⁰² There is also no guidance in the Immigration Act or the Immigration Regulations.

[92] As this Court held in *Dawood*—

“if broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision”.¹⁰³

It follows that section 21(1B) read with regulation 8(3) confers a broad and unguided discretion, and fails to ensure that limitations of rights occur only in a manner that is rational, predictable and constitutionally justifiable.

[93] The next fatal constitutional defect is that section 21(1B) read with regulation 8(3) is irrational. It does not serve any legitimate government purpose.

¹⁰² See the High Court Part B judgment above n 1 at para 36.

¹⁰³ *Dawood* above n 4 at para 47.

There is no justifiable basis why asylum seekers should be disbarred from applying based on procedural missteps. The only basis advanced by the respondents is that this is a “safety valve”. The argument is that the provisions do not impose an absolute bar to the asylum system, but instead allow for condonation through specified mechanisms.

[94] That rationale is ill-conceived. Any condonation or appellate process, whether before a court, the RAA or another body, remains confined to assessing procedural non-compliance, rather than the merits of the asylum claim. In addition, the amended scheme introduces arbitrary distinctions that did not exist prior to the amendments.

[95] In practical terms, an applicant who reaches an RSDO and is found to lack compelling reasons for delayed reporting is formally excluded under section 4 and is entitled to written reasons and a right of appeal to the RAA. By contrast, where the same issue arises earlier before an immigration officer under section 21(1B), the applicant is prevented from entering the asylum process altogether, typically without written reasons and without any right of appeal, despite the inquiry being substantively identical. The High Court cannot be faulted in holding that, instead of a safety valve, the impugned provisions constitute a threshold requirement which must be successfully met before the merits of an illegal foreigner’s asylum application can be assessed.¹⁰⁴

[96] There was some argument advanced by the respondents that section 21(1B) read with regulation 8 must be understood as a merits-based assessment under a new guise. That argument is singularly unpersuasive – the other ordinary procedures for adjudicating an asylum seeker’s application already take into account delay in making an asylum application in assessing the authenticity and credibility of the asylum claim. Interpreting section 21(1B) read with regulation 8 as the respondents submit would render them redundant. It is a well-settled canon of construction of a statute that it ought

¹⁰⁴ See the High Court Part B judgment above n 1 at para 51.

to be construed in a fashion that, “if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant”.¹⁰⁵

[97] Lastly, apart from opacity, absurdity, unconstrained and unguided discretion and irrationality, section 21(1B) also infringes the *non-refoulement* principle. Nothing needs to be added to what has already been explicated in respect of section 4(1)(f), 4(1)(h) and 4(1)(i). That infringement, too, renders section 21(1B) unconstitutional. This would be so even if section 21(1B) contained more detailed prescriptions as to how the assessments in question were to be made.

The second approach

[98] I turn to the second approach, which disregards the impact of the regulations and considers section 21(1B) in isolation. The problem is that section 21(1B), on its own, is meaningless, and therefore irrational. It serves no discernible purpose at all. The section, absent the regulations, has no legal consequence.

[99] This Court, in *South African Liquor Traders’ Association*¹⁰⁶ considered whether the definition of “shebeen” in the Gauteng Liquor Act¹⁰⁷ was unconstitutionally vague because it limited sales to less than ten cases of beer without specifying the time period within which those sales had to occur, making it impossible to determine which unlicensed liquor traders qualified as shebeens. This Court commented:

“The absence of a stipulated period from the definition renders the definition vague. Furthermore, there is nothing in the rest of the Act which assists in any way in providing a meaning to the definition. Its meaning cannot therefore be ascertained with any precision. It is simply not clear which unlicensed liquor traders will fall within the definition and which without.

¹⁰⁵ *S v Weinberg* 1979 (3) SA 89 (A) at 98E, cited with approval in *Qwelane* above n 28 at para 153.

¹⁰⁶ *South African Liquor Traders’ Association v Chairperson, Gauteng Liquor Board* [2006] ZACC 7; 2009 (1) SA 565 (CC); 2006 (8) BCLR 901 (CC).

¹⁰⁷ 2 of 2003.

As this Court has held, impermissibly vague laws and legal provisions violate the rule of law, a founding value of our Constitution.”¹⁰⁸ (Footnotes omitted.)

[100] As this Court stated in *Opperman*,¹⁰⁹ when assessing whether “section 89(5)(c) [of the National Credit Act] has a clear meaning, or is perhaps so vague that it may be constitutionally void”,¹¹⁰ it commented:

“A court must try to give a reasonable meaning to the text enacted by the Legislature. I am unable to endorse an interpretation that renders section 89(5)(c) inoperative and meaningless. . . . This Court has previously rejected an interpretation that would render a provision ineffective and nugatory, even if it results in constitutional compliance. It is not the most plausible interpretation for the provision, if a plausible one at all.”¹¹¹ (Footnotes omitted.)

[101] Therefore, section 21(1B), in mandating an interview to establish “valid reasons”, without saying what validity entails, is vague, and confers an unguided discretion on immigration officers.

[102] It also provides no consequence for having, or not having, valid reasons for not being in possession of a transit visa. This cannot be said to be advancing a legitimate purpose. It subjects vulnerable asylum seekers to yet another bureaucratic step in the process to allow them to apply for refugee status, with no clear parameters for the officials applying it, and, further, no consequence once they have done so. This is an arbitrary exercise of state power.

[103] Absent the regulations one cannot rely on this Court’s previous interpretation of the section, which necessarily included the regulations. The purpose of section 21(1B) must stand or fall on its own terms. A provision that is so open-ended that regulations

¹⁰⁸ *South African Liquor Traders’ Association* above n 106 at paras 26-7.

¹⁰⁹ *National Credit Regulator v Opperman* [2012] ZACC 29; 2013 (2) SA 1 (CC); 2013 (2) BCLR 170 (CC).

¹¹⁰ *Id* at para 25.

¹¹¹ *Id* at para 41.

may effectively determine both its purpose and its constitutionality is further evidence of its irrationality. The purpose of primary legislation cannot fluctuate according to the content of later regulations. That indeterminacy thwarts the claim that the section is constitutionally sound on its face.

[104] This indeterminacy has grave constitutional implications. Reliance on future or variable regulations engages rule of law concerns, including legality, certainty and the separation of powers. That undermines the respondents' claim that the section is constitutionally sound on its face.

[105] Consequently, the actions taken by immigration officers in terms of the section are incapable of rational justification, and without regulations the section cannot operate independently. It is trite that the exercise of public power must be lawful, within the bounds of the empowering provision and rationally related to the purpose for which the power was conferred.¹¹² The assessment of rationality is an objective one, and the question is not what Parliament subjectively believed the purpose of the provision was, but whether it is objectively capable of advancing a legitimate purpose.¹¹³

[106] The compelling conclusion is that section 21(1B) permits the arbitrary exercise of power that is connected to no legitimate government purpose and therefore fails on rationality, and is unconstitutional.

Conclusion on unconstitutionality and remedy

[107] The impugned sections prevent asylum seekers from accessing a merits-based assessment of their claims on the basis of procedural non-compliance. Section 4(1)(f),

¹¹² *S v Makwanyane* [1995] ZACC 3; 1995 (2) SACR 1 (CC); 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 156; *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 24; *New National Party* above n 73 at paras 19 and 24; *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) (*Pharmaceutical Manufacturers*) at paras 85 and 90; *United Democratic Movement v President of South Africa (No 2)* [2002] ZACC 21; 2002 (11) BCLR 1179; 2003 1 SA 495 (CC) at para 55; and *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC) at paras 74-9.

¹¹³ *Pharmaceutical Manufacturers* id at para 90.

(h) and (i) have the effect of disqualifying applicants from refugee status before their claims are substantively assessed, violating the principle of *non-refoulement* and the cluster of fundamental rights at the heart of *non-refoulement* protection, including the rights of children. The legislative scheme is further complicated by multiple, confusing and inconsistent thresholds, and these overlapping standards, governing essentially the same inquiry, provide no meaningful guidance as to their content or application.

[108] In addition, section 21(1B) is unconstitutional when considered with, and without, the now-invalid regulations as interpreted by this Court's previous jurisprudence. It forms part of a legislative framework preventing asylum seekers from entering the asylum process and obtaining a determination on the merits of their claims. When considered in isolation, it becomes vague and functionally ineffective, mandating an interview to determine whether "valid reasons" exist for the absence of an asylum transit visa, but providing no criteria for that determination, no guidance to officials and no clear legal consequence flowing from the outcome of the interview. In either case, the provision fails to advance a legitimate governmental purpose and permits the arbitrary exercise of public power.

[109] In summary: sections 4(1)(f), 4(1)(h) and 4(1)(i) and 21(1B) are unconstitutional and the High Court's order must be confirmed. Scalabrini correctly pointed out before us that the respondents did not seek an order of suspension of the declaration of invalidity and a reading-in order, if we were minded to confirm the High Court's order.

Costs

[110] As explained, the respondents litigated exceptionally poorly in this case in relation to leave to appeal the High Court's striking down of the regulations. They must pay the costs, and it must be said that this case came close to a consideration of a punitive costs order, similar to that in *Ex parte Minister of Home Affairs*.¹¹⁴ The gross

¹¹⁴ *Ex parte Minister of Home Affairs* above n 60.

laxity and disturbing ineptitude in this case are matters of grave concern and should not be repeated.

[111] There is a further matter of concern, over and above the myriad procedural shortcomings, that exacerbates the respondents' already lamentable conduct. In advancing their submissions on the merits during the hearing, the respondents' counsel made sweeping and unsupported assertions regarding Afghan and Bangladeshi nationals' involvement in human trafficking in South Africa.¹¹⁵ Advancing such claims, particularly in the absence of any evidentiary foundation, not only undermined the integrity of the state's case, but also introduced rhetoric that risks being perceived as xenophobic or racially charged. This is not inconsequential – submissions of this nature, when advanced before this Court, carry the potential to shape broader societal narratives about refugees and may adversely affect the protection of their rights. While the state is entitled to pursue legitimate interests in immigration control, that cannot justify reliance on unsubstantiated and prejudicial characterisations. This, too, is deserving of strong deprecation.

[112] I make the following order:

1. The order of the High Court of South Africa, Western Cape Division, Cape Town, declaring sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Refugees Act 130 of 1998 inconsistent with the Constitution and invalid, is confirmed.
2. The respondents must, jointly and severally, pay the applicants' costs, including the costs of two counsel.

¹¹⁵ Reference was made during oral argument to a "kidnapping industry" allegedly run by these foreign nationals.

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