South African Refugee Protection System: An Analysis of Refugee Status, Rights and Duties

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1. Background

Refugee law in South Africa exhibits three conspicuous, though interrelated, phases in its evolution. First, under the pre-1994 apartheid legal system, the law regulating refugee affairs was markedly anti-humanitarian and inconsistent with any refugee protection system inspired by international law norms.

At the centre of this pre-constitutional immigration regime was the Aliens Control Act (ACA).[1] Its purpose was to strictly control the admission, residence, work and exist of foreign non-nationals. As its name suggests, the ACA was plainly restrictive of refugee rights and hardly recognised refugee status in the first place. In fact, a large number of persons, who today would qualify as refugees, were classified as 'illegal', 'prohibited' or 'undesirable' 'aliens'. Such undocumented immigrants[2] who failed to fulfil the stringent immigration requirements were denied the common law right of access to court, detained indefinitely and subsequently deported at the pleasure of the Minister of Home Affairs.

Second, during the first five years of constitutional democracy,[3] however, the government began to acknowledge the special needs and status of refugees as required by international conventions and norms. To this end, the immigration department issued a series of regulations under the ACA. These regulations sought to harmonise the immigration law with the country's international law obligations towards the protection of refugees in its territory. In a more ambitious enterprise, Parliament has begun debating a new bill that seeks to repeal

1 No 96 of 1991 (read together with amendments in 1993, 1995 and 1996). For an in-dept exposition of the of the ACA, see *John Baloro*, Immigration and Emigration, in *Joubert et al*, The Law of South Africa (LAWSA), first issue, 1998, Butterworths, Vol. 11 pars 38-68. See also a general discussion of the ACA by *J Handmaker*, Who Determines Policy? Promoting The Right of Asylum in South Africa, (1999) 11 (2) International Journal of Refugee Law, 290-309.

2 In 1997, the number of undocumented immigrants in South Africa was variously estimated at between 2-8 million. See the South African Human Rights Commission Policy Paper No. 3, 1.

3 1994-1999.

the ACA in its entirety and provide for a human-rights based legal framework to deal with matters relating to non-citizens.[4]

Finally, with the enactment of the current Refugee Act[5] in 1998, the government undoubtedly demonstrated its resolve to transform and consolidate all refugee laws and regulations within the framework of human rights. It is for this reason that the Refugee Act establishes a refugee protection system that is deeply rooted in human rights values, norms and standards under international conventions on refugees and underscored by the entrenched Bill of Rights in Chapter 2 of the 1996 Constitution.[6]

The purpose of this paper is to critically examine the impact of human rights norms – both international and domestic – on the new refugee protection system in South Africa. Specifically, the analysis draws into sharp focus the ramifications of the current refugee statute on refugee rights and freedoms. In view of this, the paper is organised under the following sub-themes: (a) Defining Refugee Status; (b) Determination of Refugee Status; and, (c) Rights and Duties of Refugees.

2. Defining Refugee Status

South Africa has ratified the fundamental international and regional instruments regulating relevant aspects of refugee affairs. Of particular significance are the following instruments, which South Africa acceded to on January 12, 1996:

- United Nations Convention Relating to the Status of Refugees (Geneva, 1951);
- Protocol Relating to the Status of Refugees (New York, 1967);
- Organisation of African Unity Convention Governing Specific Aspects of Refugee Problems in Africa (Addis Ababa, 1969).

Prior to accession and incorporation into domestic legislation, South African courts relied on a constitutional provision[7] that made customary international law binding so as to pro-

4 See the draft Immigration Bill published in Government Gazette. No. 22439 of 29 June 2001. As at press time, this bill has not yet been passed.

5 Act 130 of 1998.

6 Act 108 of 1996.

7 Section 231 of the Constitution of the Republic of South Africa, Act 200 of 1993 (hereinafter referred to as the interim constitution) the terms of which are repeated verbatim in section 232 of the Constitution of the Republic of South Africa, Act 108 of 1996 (hereinafter called the final or 1996 Constitution).

tect refugee rights.[8] Section 232 on the 1996 Constitution provides that the rules of customary international law form part of the law of the country. However the constitution or any Act of Parliament overrides any contrary international law custom.[9] Speaking to the scope of an identical override clause in the interim constitution, the court in *Azanian Peoples' Organisation (Azapo) v T R C*[10] noted that, in effect, the override clause empowers "Parliament to pass a law even if such a law is contrary to the jus cogens. The intention to legislate contrary to the jus cogens would, however, have to be clearly indicated by Parliament in the legislation in question because of the prima facie presumption that Parliament does not intend to act in breach of international law."[11]

Van Nieberk J, in *Kabuika and another v Minister of Home Affairs*,[12] similarly affirmed the binding force of international law customs in upholding the rights of refugees to seek judicial review. Applicants in this case were refugees whose applications for asylum had been rejected. Thereafter they sought domestic remedy by lodging an appeal with the Appeal Board for Refugee Affairs within the immigration department. Again, their appeal was declined. Applicants therefore applied to the High Court for an order to set aside respondents' decision. It was held that the respondents' decision was capricious and incorrect as it was based on a misinterpretation of the circumstances that caused applicants to flee their home country.[13] It seems that misconstruing the personal circumstances of refugees is a common problem among immigration officials.[14] But since it is the asylum seeker who bears the onus of establishing the basis of his or her flight, an arbitrary misinterpretation becomes very fatal to any status determination.

From April 1, 2000 when the Refugee Act became operative, the determination of any application for refugee status, must be guided and informed by the express provisions of this statute. Perhaps it may be pertinent to mention that section 3 of the Refugee Act incorporates and consolidates the two notions of refugeehood as contained in the UN and OAU

8 Until the Refugee Act came into operation in the year 2000, South Africa had no comprehensive refugee legislation.

9 Compare Article 25 of the German Basic Law (GG or Constitution) of 1949. Although Article 25 GG makes the general rules of international law an integral part of federal law, it allows customary international law rules to prevail over municipal law in case of conflict.

10 1996 (4) SA 562 (C).

11 *Ibid*, 574.

12 1997 (4) SA 341 (C) A.

13 *Ibid*, 344

14 See *Mail & Guardian*, February 2-8, 2001. At page 28 the weekly newspaper, under the caption, 'Refugee 'Spy' Refused Asylum', narrates stories of refugees and their efforts to deal with harassment at the hands of corrupt immigration authorities.

refugee conventions alluded to above. In the result, both definitions of refugeehood become useful in any search for a better understanding of the concept under this provision.

3. UN Concept of Refugeehood

Section 3(a) of the Refugee Act provides that a person qualifies for refugee status if that person, "owing to a well-founded fear of being persecuted by reason of his of her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it."

From this definition, at least, four comments flow. First, a refugee is any person who has a well-founded fear of persecution based on one of six specified grounds; namely, race, tribe, religion, nationality, political opinion or membership of a particular social group. Second, a refugee must be outside of his or her country of nationality and be unable or unwilling to be protected by his or her country. However, as Katz[15] rightly suggests, the circumstances triggering the fear of persecution need not necessarily precede the flight of a refugee. As a matter of fact, circumstances causing an apprehension may arise even after a person who ordinarily was not a refugee at a time of leaving his or her country of origin but who later became a refugee while living abroad. Often referred to as 'bootstrap' refugees or refugees *sur place*, such persons become refugees because of a well-founded basis of persecution that only begun to emerge during their absence from their country of origin.

Third, the right to apply for asylum is extended to asylum seekers even when they are in transit. Section 2 of the Refugee Act stipulates that no asylum seeker may be refused entry into the country or returned to any other country where he or she may be subjected to persecution or where his or her life may be threatened.[16] Malan J has recently invoked this provision in granting an interdict that prohibited the Minister of Home Affairs from depor-

15 *Anton Katz*, Refugees, in *John Dugard*, International Law, Juta, 2001, 268-279 at 273.

16 Section 2 provides that 'no person may be refused entry into the republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.'

ting a Congolese, Jacques Katambayi, back to his country.[17] Katambayi was temporarily detained in the transit area of the Johannesburg International Airport when he appealed for asylum in South Africa. Although Katambayi was in transit, the High Court upheld his right to apply for refugee status in South Africa.

Fourth, it is conspicuous from this persecution-based qualification for refugee status in South Africa that membership of a 'tribe' has been added to the original five grounds specified in the 1951 UN definition of a refugee. Arguably, since by definition membership of a racial or social group subsumes tribal elements, the further inclusion of a refugee's tribe in section 3(a) seems superfluous as it adds little or no value to the UN definition. In what smacks of the avoidance of redundancy, section 2(a) of the Refugee Act, which incidentally precedes this provision, purposefully specifies a refugee's membership of a social group as one of the five grounds on which the fear of persecution may be based.[18] From this it is plausible to infer that the term 'social group' embraces a refugee's tribe.

A recent US case law also provides further support for this view. In *Abankwah v INS*,[19] the US Court of Appeal for the second circuit reached the same conclusion that membership of a tribe is embodied in the definition of a social group. Reasoning that a tribe is empirically a subset of a social group was the direct result of the *Abankwah* court's decision to uphold the finding of the US Board of Immigration Appeals in *Re Kasinga*.[20] At the centre of the *Kasinga* case was the asylum application of a teenage Togolese woman who had fled her country for fear that, being a member of the Tchamba-Kunsuntu tribe, she would be forced to undergo the traditional ritual of female genital mutilation (FGM). The immigration board found that the class of uncircumcised girls belonging to that tribe squarely falls within the definition of membership of a particular social group.

In any event, attention may now be drawn to the fact that when the UN formulated this definition during the Cold War, its human rights agenda was confined to the promotion of civil and political rights. For this reason, the UN concept of refugeehood became narrow in its ambit and effect. In fact, the chief object of the UN refugee policy was to encourage

17 See excerpts of this unreported ruling in the *Mail & Guardian,* March 28 - April 4 2002 at 4. Katambayi had fled the war-torn Democratic Republic of Congo after being forced to join the army. He fled to Australia where all his applications and appeals for asylum were declined. The Australian authorities finally decided to deport him. His flight from Australia to Congo had to transit through South Africa. But before the Australian authorities could put him on flight to Congo from the transit area of the Johannesburg International Airport, his lawyers approached the South African High court for an interdict to prevent his deportation by the Australian and South African authorities to Congo.

18 See n 16 above.

19 (1999) 38 ILM 1267.

20 (1996) 35 ILM 1145.

Western countries to provide sanctuary for political refugees fleeing from communist regimes. According to Phuong, the refugee protection system in the entire Western world was merely used as a political instrument to condemn the repressive regimes of the communist world.[21] With the adoption of this UN concept, immigration authorities as well as judicial officials obliged to apply and interpret the legislation may have to steer clear from this obsolete political mission.

At this point it may be useful to ask the question as to who is a refugee in terms of section 3(a)? To put it another way, what factors must influence the determination of refugee status? As a point of departure, it is proposed that the term 'refugee status' would require a broad interpretation given the wider context of our constitutional commitment to promote and protect fundamental human rights and freedoms. In short, the concept of refugeehood must not be limited to the persecution-based definition of the UN refugee regime as originally formulated. Thus any meaningful conception of refugee status in South Africa must strive to embrace any person genuinely at risk of serious human rights violation in his or her place of habitual residence which is outside South Africa and who needs and also deserves protection in South Africa.

Like any other applicant for the benefit of a right, the asylum seeker ordinarily bears the onus of proof of the basis of the fear of persecution. Though the level of fear of persecution that should trigger a flight appears to be based on his or her subjective account, there must be a reasonable risk to fundamental rights relating to any of the enumerated grounds. It must be stressed, however, that the listed grounds are illustrative and not exhaustive – which therefore must allow unspecified but similar grounds of persecution to be considered on a case to case basis. For example, the interpretation clause[22] of the Refugee Act contains an open-ended catalogue which explains that any group of persons belonging to a particular gender, sexual orientation, disability, class or caste falls within the meaning of 'persons' at risk of persecution because of their membership of a specific social group.

Despite this argument for a broad interpretation of refugee status, an asylum seeker may be deemed not deserving refugee status if there are justifiable reasons for believing that he or she has committed a crime against peace, a war crime, a crime against humanity or any other serious non-political crime under international law.[23] Nonetheless, two provisos have

21 *Catherine Phuong*, Internally Displaced Persons and Refugees: Conceptual Differences and Similarities, (June 2000) Netherlands Quarterly of Human Rights 18(2) 215 at 222. See also *Jeffrey Dillman*, International Refugee and Asylum Law, (1991) Howard Law Journal, 51-56 especially at 56 for a discussion of the shortcomings of the UN definition of refugeehood.

22 Section 1.

23 Section 4 of the Refugee Act. With the international condemnation of the terrorist attack in New York and Washington on September 11, 2001, acts of terrorism would equally be regarded as

to be factored into any consideration to refuse an application for asylum by a person suspected of committing a serious crime under international law.

First, the international convention dealing with non-refoulement of refugees proscribes deportation under certain circumstances.[24] According to this binding principle of international law, no refugee should be returned to a state in which he or she is likely to face persecution. In fact, the cumulative authority of this principle and the Constitutional Court ruling in the *Mohamed*[25] case is that South Africa is prohibited from expelling a refugee where a refusal of a refugee status may result in the expulsion of the refugee to a jurisdiction where he or she is likely to face a death penalty sentence or to be subjected to torture or any other cruel, degrading, or inhuman punishment.

In this classical refoulement case of Mohamed, applicants had been accused of involvement in the twin bombings of US embassy buildings in Kenya and Tanzania. Over 4585 were injured and 223 were killed in those terrorist attacks. Before their applications for refugee status were finally considered, South African immigration officials handed over these fugitive criminals to US agents who removed them to stand trial in the US. In an appeal from a High Court decision, the Constitutional Court was invited to determine the constitutional validity of the deportation of these asylum seekers. The unanimous court ruled that the removal of applicants was unlawful because

In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment.[26]

Regrettably this landmark declaration by the supreme Constitutional Court was nothing more than a Pyrrhic victory for the fugitives since by the time the decision was handed down they had already been whisked away to face criminal indictment in the US. On 18 October 2001, the Manhattan Federal Court in New York indeed imposed mandatory life sentences without parole on Mohamed and two others for their involvement in the Dar es Salam bombings. But the constitutional import of this celebrated declaration should serve as a wake up call for Parliament to consider enacting national legislation that enables courts in the country to exercise universal jurisdiction in line with The Princeton Principles on

prime crimes that may encourage states to refuse asylum to persons suspected of supporting, harbouring, funding or committing such acts.

24 Article 33 of the UN Convention Relating to the Status of Refugees earlier referred to in § 2 above.

25 2001 (7) BCLR 685 (CC).

26 *Ibid*, par 49.

Universal Jurisdiction.[27] Perhaps asserting universal jurisdiction in a case like this would have averted this academic exercise by the court. In other words, any appropriate South African court would have directly tried the accused for the alleged terrorist acts and thereby preempted the hollow declaratory opinion arising out of this refoulement case.

Second, section 28(2) of the Refugee Act expressly subjects a ministerial discretion to expel a refugee to the discipline of section 33 of the Constitution and international law. Section 33 of the Constitution provides every person with the right to administrative justice. There are two core elements of this right to administrative justice which any person, including a refugee, may claim. One, every person is guaranteed the right to administrative action that is lawful, reasonable and procedurally fair. Two, any person whose rights have been adversely affected by an administrative action or decision is entitled to reasons that can provide a plausible justification for the decision.

Woolman rightly argues that since the Constitution "employs 'person' instead of the more restrictive 'citizen', we can assume that the right in question protects both citizen and alien alike."[28] It seems plausible to infer from the above opinion that refugees are entitled to written reasons in situations where an adverse decision might be taken against them. As the discussion below makes clear, the Refugee Act explicitly reiterates this constitutional entitlement to reasons as one of those refugee rights.

To give full effect to these twin rights to administrative justice contained in section 33 of the Constitution, Parliament has enacted the Promotion of Administrative Justice Act

27 Published by the Programme in Law and Politics Affairs of the University of Princeton (2000). In a ground breaking development, a court in Belgium has recently asserted universal jurisdiction over the Minister of Foreign Affairs of the Democratic Republic of Congo. See in this regard, The Princeton Principles, 55 n 32. While this handbook is not a treaty and therefore lacks a binding force, it nonetheless provides a persuasive guide to courts and lawmakers confronted with issues of universal jurisdiction. Undoubtedly, the restatement of these principles from customary international law represents, once again, the influential contributions that scholars and experts in international law can make to the development and analysis of positive law.

28 *Stuart Woolman*, Application, in *Matthew Chaskalson et al*, Constitutional Law, Juta, 1996, § 10.2(a). It is noteworthy that this state of the law finally clears the confusion as to whether refugees are bearers of administrative justice rights. Under the interim constitution, the administrative justice clause was subjected to two conflicting interpretations with regard to refugees. On one hand, the courts in *Xu and Tsang v Minister, Binneslande Sake* 1995(1) SA 185(T) and *Parek v Minister of Home Affairs* 1996(2) SA 710(D) concluded that refugees were not entitled to the constitutional right to written reasons. This position was rejected in a critique by *Obeng Mireku*, Speaking With the Voice of an Oracle and the Administrative Justice Clause: Incompatibility in Action, (1995) SA Public Law 211-215. However, an imaginative and correct interpretation of refugee rights to written reasons appears in decisions such as *Van Huyssteen v Minister for Environmental Affairs* 1996(1) SA 283 (CC) and *Foulds v Minister of Home Affairs* 1996(4) SA 137 (WLD).

(AJA).[29] The AJA also aims at promoting an efficient, accountable, open and transparent administration. It seeks to achieve these goals by prescribing rules and guidelines binding on all public administrators in their decision-making. Moreover, it requires administrators to give written reasons for their decisions. Furthermore, it provides members of the public the right to challenge administrative decisions in court.

Bearing in mind these two restrictions on the ministerial authority to remove a refugee, this paper argues that the discretion to reject an asylum application must be interpreted narrowly. On this note of caution, this analysis turns its focus on section 3(b) of the Refugee Act. It may be reiterated that it is this subsection which replicates the OAU definition of refugeehood.

4. OAU Concept of Refugeehood

Section 3(b) provides that a person qualifies for refugee status if that person, "owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere."

Formulated many years after the UN definition, the OAU conception of refugeehood is rather broader than its predecessor. It looks beyond political persecution by emphasising the failure of a state to protect the asylum seeker from either public disorder or external aggression, occupation et cetera. Notably, it suggests that any refugee protection system that adopts this formulation may not be confined to the protection of social and economic rights to refugees. Thus it encourages a more holistic human rights approach to the practical challenges and dilemmas of refugees in Africa and the rest of the developing world.

With the incorporation of this definition into section 3(b) of the Refugee Act, the South African conception of refugeehood overcomes the limitations of the persecution-based formulation in section 3(a). Finally, section 3(c) provides that persons who are dependants of refugees also qualify for refugee status. Dependants of refugees are their minor children and spouses.

Minor children are children under the age of 18. In order to qualify as a refugee under this subsection, a child must not only be below this statutory age but must prove that he or she is dependent on an adult guardian. By implication, therefore, children under the age of 18 cannot directly apply for refugee status in their own capacity. The stark reality, however, is

[29] Act 3 of 2000.

that in the pandemonium of war, civil strife or natural disaster, children are often separated from their parents or guardians.[30] Section 32 of the Refugee Act seems to address the plight of unaccompanied children and mentally disabled persons. It prescribes that any child who appears to qualify for refugee status and who is found in circumstances that clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act 74 of 1983, must be brought immediately before a special children's court. Given the fact that unaccompanied or separated child asylum-seekers are in a more vulnerable position than those accompanied by their parents, the South African Law Commission has proposed that any relevant immigration official must actually regard an unaccompanied child asylum-seeker as a child in need of care and refer such a child first to social services who, in turn, must make immediate arrangements for the child to appear in the children's court.[31] Similarly, the statute instructs refugee receiving officials to assist any mentally disabled person who ordinarily qualifies for refugee status in applying for asylum.

Unlike the legal capacity of minor children, the status of spouses of refugees has somehow received judicial attention. At issue in *National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs*[32] was the constitutionality of the immigration law that facilitated the immigration into South Africa of the spouses of permanent South African residents but denied the same benefits to gays and lesbians in permanent same-sex life partnerships with permanent South African residents. Delivering the unanimous decision of the Constitutional Court, Ackerman J reasoned that the constitutional commitment to equality and non-discrimination demands that a same-sex spouse receive "the same protection and enjoys the same concern from the law and from society generally as do marriages recognised by law."[33]

Thus spouses of refugees who qualify as dependants under section 3(c) cover spouses in terms of heterogeneous marriages as well as same-sex life partnerships. It may be important to explain that the three grounds on which a refugee status may be granted in South Africa as stipulated in section 3 of the Refugee Act alternate with each other. Accordingly, an asylum seeker may base his or her application on any one of these subsections or a combination of them.

30 See *Mail & Guardian,* February 8-14 2002 where on page 32 it is reported that between August 1994-2001 alone, a total of 1822 unaccompanied minors applied for refugee status in South Africa. Section 28(1)(b) of the Constitution enjoins the state to provide a suitable alternative care for such children who have been separated from their natural family environment.

31 See South African Law Commission Discussion Paper 103 (Project 110) Review of the Child Care Act Chapter 22 and Executive Summary pages xci-xcii.

32 2000 (1) BCLR 39 (CC).

33 *Ibid*, par 82.

Speaking generally, an asylum seeker may found an application on the UN criteria in section 3(a) if he or she had fled from persecution. On the other hand, an applicant may base a claim on the OAU definition in section 3(b) if he or she is seeking refuge as a result of civil strife in his or her place of habitual residence. Finally, an applicant may indirectly qualify as a refugee if he or she is a dependant on a principal applicant for refugee status as referred to above.

It may also be observed that victims of poverty and other social or environmental catastrophe may be excluded from any of the three criteria spelt out in section 3 of the Refugee Act. If that is the case then economic migrants or persons seeking the proverbial 'greener pastures' in South Africa are definitely cast out from the refugee conception under the statute.

5. Determination of Refugee Status

In terms of the Refugee Act, the procedure for determining refugee status is based on an integrated three-tier structure comprising:
- a preliminary interview;
- an initial determination;
- a determination of appeal.

To set the determination process in motion, an asylum seeker must submit a duly completed application form to a refugee reception office. Section 21 of the Refugee Act confers a discretion on the Refugee Reception Officer (RRO), who receives the application, to conduct a preliminary interview of the applicant. The main purpose of this first interview is to enable the RRO verify the information supplied by the applicant in response to the questionnaire on eligibility so as to prepare a complete dossier on the applicant. At this exploratory stage, it is premature for the merits of the application to be considered. Indeed, all that the RRO is required to do is to issue an Asylum Seeker Permit that allows the applicant to reside temporarily in the country.[34]

Consideration of the merits of the application only begins at the second level of the procedure. This first decision-making phase is based on the case file of the applicant as prepared by the RRO. Guided mainly by applicant's case file, the Refugee Status Determination Officer (RSDO) interviews the applicant. At the close of the hearing, the RSDO must make an initial decision on the eligibility of the applicant for refugee status.[35] In other words, the

[34] Section 22(1).
[35] Section 24(3).

application for refugee status may be granted, rejected or referred to the Standing Committee for an opinion on any question of law.[36]

An application may be rejected for two reasons. Depending on the reason for a rejection, the asylum seeker may resort to any one of two available redress mechanisms. In the first place, an application may be declined if it is manifestly unfounded, abusive or fraudulent. Any such decision automatically triggers the review competence of the Standing Committee.[37] Since this review power of the Standing Committee is self-activated, the applicant need not initiate this redress mechanism. On the contrary, an application may also be rejected because it is unfounded. An applicant aggrieved by such a decision may lodge an appeal with the Appeal Board.[38] Unlike the review process, which the Standing Committee must initiate on its own motion, an appeal before the Appeal Board may only be initiated when an applicant actually launches it.

6. Rights and Duties of Refugees

In keeping with the constitutional commitment to promote and protect human rights of any person, Chapter 5 of the Act sets out general and specific rights as well as obligations flowing from refugee status.

a. Refugee Rights

With regard to general rights, section 27 of the Act provides for a cluster of basic entitlements to every refugee. First, any refugee is entitled to a formal written recognition of refugee status in the prescribed form. Second, a refugee enjoys full legal protection including the right to residence and the enjoyment of the entrenched constitutional rights contained in the Bill of Rights.

Third, every refugee is also entitled to apply for an immigration permit after an uninterrupted residence of five years if the Standing Committee certifies that such a refugee will remain a refugee indefinitely. An immigration permit formally grants the right of permanent residence to a foreign non-national. Apart from those rights, privileges and duties which a

36 *Ibid.*

37 Section 25(1) read together with section 24(3)(b).

38 Section 26(1)

law or the Constitution explicitly ascribes to citizenship, the holder of a permanent residence permit is entitled to all the rights, privileges, duties and obligations of a citizen.[39]

Fourth, a refugee is entitled to an identity document as well as a South African travel document. Fifth, any refugee has the right to seek employment. Finally, every refugee is entitled to the same basic health services and basic primary education available to all other inhabitants of the country.

Section 28 makes provision for specific rights of refugees should the need arise for them to be expelled from South Africa. It regulates, inter alia, the processes of refugee detention and removal. Besides, it spells out safeguards against the abuse of the power of removal.

A refugee may be removed from the country exclusively on the order of the Minister of Home Affairs.[40] It follows, therefore, that apart from this minister, any removal order authorised by any other government official becomes unlawful and invalid. This ministerial discretion to order removal is not unfettered. It is subject to three limitations.

One, a removal must be ordered with due regard to the refugee's rights to administrative action[41] as well as the rights of the refugee under international law. Two, a refugee may be removed only on grounds of either national security or public order. Three, before any order of removal is effected, the refugee concerned must be given a reasonable time to obtain approval from any receiving country of his or her choice.[42]

Similarly, section 29 of the Refugee Act provides for the detention of a refugee pending a removal but imposes restrictions on this power. Prior to the coming into effect of this statutory provision, unduly long periods of incarceration of refugees were often condemned by the courts. For instance, in *Johnson v Minister of Home Affairs*[43] Chetty J poignantly noted that prolonged detentions (in this case amounting to 14 months without trial) violate core refugee rights such as human dignity, personal freedom and security.

Resonating the decision in Johnson's case, section 29(1) proclaims that no person may be detained for a longer period than it is reasonable and justifiable. In addition, it stipulates that any detention exceeding one month must be submitted for judicial review. Since this provision mentions 'person' rather than 'refugee', it is contended by this paper that the

39 Clause 20 of the Immigration Bill reinforces this position.

40 Section 28(2).

41 See n 29 above.

42 Section 28(5).

43 1997 (2) SA (CPD) 432 at 437.

benefit of this right ought not be limited to refugees per se but should include even asylum seekers whose applications have been declined for whatever reason. Simply put, a generous interpretation of the term 'person' should not exclude any class of asylum seekers and refugees.

b. Duties of Refugees

Section 34 of the Refugee Act states: "A refugee must abide by the laws of the Republic." In this short simple sentence, the Refugee Act seems to balance the conferment of refugee rights with a corresponding duty to obey the laws of the land. By so doing it creates not only rights flowing from refugee status but also obligations for each refugee to show loyalty to the laws of the country. Since the 1996 Constitution is oriented towards federalism, a refugee therefore becomes subject to both provincial and national laws depending on the province in which a refugee resides.

Nevertheless, the failure of anyone of the nine provincial governments to adopt a charter of rights different from what is contained in the national Constitution has contributed to the nationalisation of human rights norms across the country.[44] Which is why the province of residence of any person including a refugee becomes irrelevant in so far as the enjoyment of rights is concerned.

7. Conclusion

This paper has highlighted a few salient features of the South Africa refugee law that may be summarised at this stage. In the first place, the current refugee legislation clearly demonstrates a conceptual shift in the immigration law of the country. As the brief historical overview illustrates, the Refugee Act deconstructs the previous repressive refugee regime and supplants it with one based on a culture of human rights. Second, and flowing from the above, the emerging jurisprudence on immigration and refugee matters seems to comply with international law norms and standards.

Third, refugee law in the country operates not in isolation. Instead, refugee law must be perceived as one tapestry of the constitutional commitment to advance the fundamental

[44] For an explanation of factors contributing to the nationalisation of human rights norms in South Africa, see *Obeng Mireku* Constitutional Review in Federalised Systems of Government, Nomos Verlag, Baden-Baden, 2000, especially at 145-146. Of all the nine provinces, it is only the Western Cape that has adopted a provincial constitution; namely, the Constitution of the Western Cape, 1997.

rights of every person within the territory of South Africa. Besides a few minor exceptions,[45] the Bill of Rights actually confers rights almost inclusively on all persons. Foreign non-nationals including refugees residing in the country are undoubtedly bearers of most constitutional rights to the same extent as citizens.

Fourth, the entire corpus of refugee law is also subject to the foundational values of the Constitution. In the result, any interpretation of refugee law or rights must promote the animating values of human dignity, equality and freedom that underlie an open and democratic society.[46]

Finally, the Refugee Act symbolises a stark and purposeful blend of international law and domestic law. Most importantly, this harmony fits well into the grand constitutional scheme that instructs all courts to consider international law when interpreting constitutional rights and freedoms.[47] For example, the Constitutional Court in the *Dawood*[48] case demonstrated its resolve to embark on an excursus to domesticate international law even if the a Constitution is silent on the fundamental rights it has been asked to protect. Although the Constitution contains no express provision protecting the rights to family life or the right of spouses to cohabit, the Constitutional Court concluded in this case that the duties imposed by international human rights law to protect these rights are by definition embodied in the constitutional value of human dignity enshrined in section 10 of the Constitution.[49] From this, O'Regan J, who wrote the unanimous opinion of the court, concluded that any legislation that significantly impairs the ability of spouses to cohabit unlawfully limits the right to dignity of married persons.[50]

45 Apart from sections 19, 20 and 22 of the Constitution that restrict citizen, political and occupational rights to citizens only, virtually all persons are entitled to the benefits of all other rights.

46 Section 39(1)(a) of the Constitution.

47 Section 39(1)(b) of the Constitution.

48 *Dawood and another v Minister of Home Affairs; Shalabi and another v Home Affairs; Thomas and another v Minister of Home Affairs* 2000 (8) BCLR 837 (CC).

49 *Ibid,* par 28. The court specifically invoked the obligation on South Africa to respect and protect marriage and family life as contained in Article 16 of the Universal Declaration of Human Rights, Article 23 of the International Covenant on Civil and Political Rights as well as Article 18 of the African Charter on Human and Peoples' Rights all of which have been ratified.

50 *Ibid,* par 37.