Policy Shifts in the Asylum Process in South Africa Resulting in Hidden Refugees and Asylum Seekers

Fatima Khan* and Megan Lee**

Abstract

Over the past few years, the protection space for asylum seekers in South Africa has steadily shrunk. The South African government has shifted its policies and attitude to exclude rather than accept refugees, and there is a clear move towards confining refugees to the borders of the country. These policy shifts have resulted in an expansive population of hidden and undocumented refugees and asylum seekers in South Africa. This article will analyse recent South African court cases, concerning access to the asylum process, in order to identify and understand the policy shifts adopted by the Department of Home Affairs, as well as the consequences that these policy shifts have had for the undocumented refugees and asylum seekers themselves. This article posits that the South African government, through its restrictive and exclusionary policies, has contributed to the creation of a mass population of hidden or undocumented refugees and asylum seekers, forcing many with prima facie refugee claims to remain in the country unprotected. Through a set of interviews with refugees and asylum seekers in Cape Town, this article presents a first-hand account of the obstacles faced by refugees and asylum seekers in South Africa, including those that force them to remain undocumented in the country.

Keywords Refugee, policy shifts, documentation, irregular migration.

Introduction

In 1991, South Africa signed a basic mandate with the United Nations High Commissioner for Refugees (UNHCR), which permitted the presence of UNHCR field officers in the country to assist with the repatriation of South African exiles who wished to return home following the negotiations to dismantle apartheid. However, it was only in 1993 that the South African government and the UNHCR reached an agreement allowing UNHCR presence for the Mozambican refugees, who had been flowing into South Africa since the outbreak of the civil war in the 1970s (Zieck, 1997). In December 1995, South Africa proceeded to ratify the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa

* University of Cape Town, Law Faculty, Refugee Rights Unit. Email: fatima.khan@uct.ac.za
** University of Cape Town, Law Faculty, Refugee Rights Unit. Email: megan.lee@uct.ac.za

(1969 OAU Convention), and in January 1996, South Africa became a signatory state to the 1951 United Nations Refugee Convention Relating to the Status of Refugees (1951 UN Convention) and its 1967 Protocol. Following the ratification of the international conventions, the South African government embarked on a legislative drafting process that culminated in the passing of the Refugees Act 130 of 1998 (the Refugees Act), which gave effect to South Africa's international obligations and came into force in April 2000, along with the Refugee Regulations (Forms and Procedure) of 2000 (Regulations).

Taking guidance from the international conventions and the Constitution of the Republic of South Africa, 1996 (the Constitution), the South African Refugees Act is based fundamentally on human rights principles and has been described by the UNHCR (2007) as "one of the most advanced and progressive systems of protection in the world today". However, over the past decade, noticeable shifts by the South African government, in both attitude and policy, have resulted in a severe restriction of access to the asylum process, giving rise to a large population of hidden and undocumented refugees and asylum seekers who have consequently become increasingly vulnerable. An examination of these policy shifts illuminates that the Department of Home Affairs (the Department), as the department charged with controlling and managing migration, vehemently believes that the asylum system is being used in bad faith by economic migrants and therefore appears to be deliberately ensuring that all migrants, including refugees and asylum seekers, remain undocumented in an attempt to facilitate their classification as illegal immigrants and subsequent removal from South Africa.

When examining migration policies in general, it is undeniable that states, in the course of exercising sovereignty over their territory, determine what does and does not constitute regular migration. Subsequently, politics and law set the conditions under which people migrate, and it is only once states issue legislation declaring certain categories of people to be illegal immigrants, and introduce technologies, administrations and enforcement procedures to support this legislation, that previously regular migration becomes irregular. Thus, irregular migration is not an independent social phenomenon, but exists in relation to state policies and is a social, political and legal construct. As a form of migration, persons seeking asylum in a country are affected by such migration policies and, when refugees and asylum seekers are undocumented, this places them within the framework of irregular migration. There are two approaches to understanding irregular migration or the reasons behind

migrants, including refugees and asylum seekers, remaining undocumented within a country. First, agency is ascribed to the individual migrant and imputes blame on the individual for violating the law and purposefully remaining undocumented. Second, is the approach adopted in this article, which views governments as the blameworthy party, despite conceding that migrants have various levels of agency and can decide, within reasonable limits, when and where to move.

This article will assess and evaluate the policy shifts in the asylum process introduced by the South African government, and how these shifts have led to an increasingly diminished protection space for refugees and asylum seekers. It will then analyse the case law that has developed as a reaction to these policy shifts, as well as the personal experiences of refugees and asylum seekers in their struggle to access the asylum process in South Africa. The article will focus on four major decisions made by the Department over the years, which clearly reflect this changing policy, namely 1) the denial of access to Refugee Reception Offices (RROs); 2) the closure of certain RROs; 3) the refusal to process asylum applications at a different RRO from the one at which the application was first made; and 4) the refusal to recognise the right to family unity of refugees and asylum seekers.

Research Methodology

This article opted to use a combination of literature and policy analysis, engagement with the South African jurisprudence surrounding refugee law and insight gained through semi-structured interviews with both refugees and asylum seekers, as well as with service providers who assist refugees and asylum seekers within the Western Cape.

The sample of persons selected for the interviews was divided into three different groups, including 1) a group comprised of undocumented refugees and asylum seekers; 2) a group comprised of refugees and asylum seekers who had initially applied for asylum at an RRO outside of Cape Town, and thus whose permits had been issued by an RRO other than the Cape Town RRO; and 3) a group comprised of members of service providers assisting refugees and asylum seekers in the Western Cape. In total, the first two groups had a combined total of forty-four participants and the third group comprised of four different service providers. Refugees and asylum seekers were invited to participate in the research by attending either the UCT Refugee Rights Clinic (the Clinic) or the offices of the service providers participating in the research. The Clinic was easily able to identify appropriate participants for the research,

as they assist and provide legal services to refugees and asylum seekers experiencing these barriers to the asylum system on a daily basis. During the interviews, the asylum seekers and refugees were asked about their experiences and the prejudices that they have suffered as a result of the Department's policy shifts.

Policy Shifts in the South African Asylum Process

Upon implementing the international conventions relating to refugee protection, the South African government opted for a non-encampment policy, which allows asylum seekers to search for employment while they await the adjudication of their asylum application. To facilitate this policy, the Refugees Act made provision for the establishment of as many RROs across the country as is deemed necessary by the Director-General, in order to give effect to the Refugees Act. In essence, this guaranteed refugees and asylum seekers the right to freedom of movement which, along with the non-penalisation of illegal entry, succeeded in creating a liberal and progressive refugee protection mechanism.

However, throughout the past decade there has been increasing discord between the rights legally granted to refugees and asylum seekers in South Africa and the practical implementation and realisation of such rights. According to Landau and Amit (2014), the asylum process appears to be plagued by a "bureaucratic autonomy in which certain departments are actively working to shape the implementation and understanding of policies in ways that are not formally recorded and may violate both domestic and international legislation". The 2012 African National Congress's (ANC) Peace and Stability: Policy Discussion Document (ANC policy document) alarmingly declares that over 95% of asylum applicants are not genuine asylum seekers but rather, economic migrants that have come to South Africa in search of employment and better business opportunities. Such a statement provides overwhelming evidence that the attitudes of those involved in policy and legal development have shifted from a place of inclusion and protection to a desire for mass exclusion. The ANC policy document specifically proposes that, while maintaining the overall policy of non-encampment, high-risk asylum seekers should be "accommodated" (in other words, detained) in secure facilities and that the Department's suggestion to relocate all RROs closer to the borders should be supported.

Following the establishment of an ad hoc Joint Committee on Probing Violence Against Foreign Nationals (Joint Committee) in 2015, whose findings

appeared to reflect the rhetoric that most asylum seekers are in South Africa for economic reasons, the Department undertook to develop the policy on international migration. According to the Department this policy required development in order to reflect the changes within South Africa, the region and the world. As a result, within the subsequent two years, the Department drafted a Green Paper and a White Paper on International Migration (the Green and White Papers), published in 2016 and 2017, respectively. The Green and White Papers both continue to espouse the belief that the majority of applicants within the asylum system are economic migrants, resulting in over 90 percent of all applications being rejected. This is despite the Department's assurance that the principle of "inclusion over exclusion" is applied to the adjudication of asylum applications. The Green and White Papers also focused on the advantages of moving the RROs, or Asylum Seeker Processing Centres (Processing Centres), closer to the borders, with the first of these being envisaged in Lebombo, a town near the border of South Africa and Mozambique.

In the last few years, South Africa has also witnessed the proposal and initial drafting of the Refugees Amendment Act 11 of 2017 (the Refugees Amendment Act), which was signed by the President in December 2017, but at the time of writing had not yet come into force. The draft Refugees Regulations of 2018 (the draft Regulations) have been proposed concurrently with the Refugees Amendment Act, but these too have yet to come into force. A reading of both the Refugees Amendment Act and the draft Regulations make it clear that the Department, together with the South African government, are taking major steps to restrict the protection space for refugees and asylum seekers.

Litigation Surrounding Policy Shifts in the South African Asylum Process

Despite the fact that the law and policy surrounding refugee protection in South Africa has undergone many attempts at amendment, the original Refugees Act and its regulations adopted in 1998 continue to remain in effect. However, the Department continues to implement practices that show an increasingly narrow reading of the Refugees Act, or that indicate an implementation of the amended, more restrictive policies that have yet to be signed into law. In addition, severe maladministration, poor infrastructure, inadequate resource allocation and corruption have caused the South African refugee system to become utterly unequipped to assist the applicants that it was designed to protect, resulting in an increased need to resort to litigation

to ensure the effective protection of refugees and asylum seekers. While the litigation in this sector has been characterised by a case-by-case, reactive response to the challenges faced by asylum seekers and refugees, there is a clear common denominator between the cases, in that the Department deliberately implements practices that limit access to the asylum system. The litigation surrounding access to the asylum process can be categorised as those cases relating first, to the denial of access to RROs; secondly, to the closure of RROs; thirdly, to the refusal to process asylum applications at a RRO that is different from the RRO where the application was first made; and lastly, to the refusal to recognise the right to family unity of refugees and asylum seekers.

Denial of Access to the Refugee Reception Offices

In terms of the Refugees Act, all processes required to be performed during an application for asylum, including permit renewal and refugee status determinations (RSD), are carried out at an RRO by the various functionaries designed to adjudicate such applications. As such, RROs are the primary entry point to the refugee system and are essential to the functioning of the system and for accessing the protection it affords. Thus, any restriction of access to the RROs ultimately leads to a restriction of access to the entire asylum process. Roughly a decade after the South African government ratified both the 1951 UN Convention and the 1969 OAU Convention, access to the RROs had reached such an untenable position that it became necessary to institute legal proceedings against the Department, both to prevent unlawful practices and to mandate the Department to take further steps to improve the asylum process.

In *Kiliko and Others v The Minister of Home Affairs and Others* (2739/05) [2008] ZAWCHC 124 (4 March 2008), the applicants chronicled their numerous unsuccessful attempts at gaining access to the Cape Town RRO in order to apply for asylum. Their attempts were futile, despite a number of them sleeping outside the RRO on multiple occasions or arriving there in the early hours of the morning. The applicants observed that only a limited number of individuals could enter the building of the Cape Town RRO per day. Those who were unsuccessful in their efforts to gain access remained undocumented. The applicants asserted that the Department, by restricting access to the RRO, had unreasonably and unlawfully failed to provide them with the necessary facilities and proper opportunities to submit applications to obtain refugee status in South Africa. It was argued that this was a breach of

the duties imposed by the Refugees Act and, furthermore, was in conflict with the Constitution and the canons of international law. Judge Dennis Van Reenen very appropriately stated that:

> *[…] until an asylum seeker obtains an asylum-seeker permit in terms of […] the Refugees Act, he or she remains an illegal foreigner and, as such [this] impact[s] upon […] his or her human dignity and the freedom and security of his or her person.*

Documentation of asylum seekers is a critical element of the refugee system, as the documents are the vehicle by which the individual is able to access all other rights that flow from that status. For this reason, the UNHCR has acknowledged that in almost all countries, foreigners are required to prove their lawful presence in the country, failing which, the individual may be subject to detention and sometimes even to summary expulsion. The UNHCR notes that this situation is particularly serious for a refugee, who could be at risk of being returned to his or her country of origin.

In that context, Judge Van Reenen held that the availability of adequate facilities to receive asylum seekers, expeditiously consider applications and issue asylum seeker permits was mandated by South Africa's international obligations, the Refugees Act and the Constitution. As a result, the Department's failure to introduce adequate and effective measures to address the gradually worsening situation of lack of access to RROs, despite the Refugees Act having been enacted six years prior to the case, resulted in the violation of the fundamental rights of the applicants. The court ordered the Department to put measures into place to ensure access to the Cape Town RRO and to report to the court on the progress thereof.

Furthermore, the case of *Tafira and Others v Ngozwane and Others* (12960/06) [2006] ZAGPHC 136 (12 December 2006) also exposed and criticised policy shifts and new processes implemented by the Department. Faced with high numbers of applications for asylum, both the RROs in Pretoria and Johannesburg devised two new procedures that they believed would regulate the process and prevent long queues from forming and, ultimately, reduce the number of asylum seekers. The first procedure was an appointment system, whereby an asylum seeker approaching the RRO for the first time was not seen by an official, but rather given an appointment slip and allocated a date on which he or she had to return to the office for a consultation. The evidence before the court suggested that such appointments, allocated to asylum seekers, could be anywhere from six months to a year away. The second

procedure introduced was the so-called "pre-screening process", in terms of which the Department sought to filter applicants before the individual even had an opportunity to apply for asylum.

Judge Rabie found that the appointment slips did not provide sufficient legal protection to asylum seekers and therefore determined this procedure to be unlawful and unconstitutional. In reaching this conclusion, Judge Rabie was unconvinced by the Department's argument that staff shortages justified the use of the restrictive policies and accordingly agreed with the finding in *Kiliko,* that the South African government has an obligation to provide proper facilities for applications for asylum. Turning to the 'pre-screening' procedure, Judge Rabie found that, in principle, pre-screening was not unlawful if the aim was to genuinely assist asylum seekers with making their asylum applications, but that the Department could not use it as a means to decide whether it would be better for a person to seek another type of permit. Therefore, in light of all the evidence, the 'pre-screening' procedure was found to impede the asylum application process and was held to constitute a violation of the constitutional rights of the applicants.

The common thread that emerged from these access cases was that any barrier to accessing the RROs, which effectively impedes applications for asylum, constitutes an unlawful measure and cannot be justified by the argument that the administrative burden placed on the Department in catering for asylum seekers requires restrictive procedures. Denying asylum seekers entry into the RROs, and consequently barring access to the asylum process, pushes people to enter and remain in the country without documentation, which falls afoul of the duty of the South African government to provide adequate facilities to receive asylum seekers and process their claims for asylum.

Closure of Refugee Reception Offices

After the Refugees Act came into force in 2000, RROs were established in Johannesburg, Pretoria, Cape Town, Durban and Port Elizabeth. Furthermore, after witnessing an increase in applications, the Department opened an additional RRO in Musina in 2009 and an interim office in Tshwane in 2010 (Ngwato, 2013). However, between 2011 and 2012, the Department implemented decisions to close the RRO in Johannesburg and re-categorise the RROs in Cape Town and Port Elizabeth as "wind-down" facilities, meaning that they would continue to process existing cases but would not accept any new applications for asylum. Subsequently, the Department also made the decision to close the interim RRO in Tshwane, which left, to date, only three fully-

functional RROs in South Africa. This conduct by the Department marked the dramatic shift in policy regarding the administration of the asylum regime in South Africa. The closure of three RROs across the country indicated the wish by the Department to reduce the overall asylum population in South Africa and to move all refugee services to the borders, an approach which was later confirmed and supported by the 2012 ANC policy document. However, it is a point of concern that the "closure of urban RROs constitutes the implementation of policy before the completion of policy formulation" (Ngwato, 2013).

Given the centrality of the RROs to the asylum process, the decision to close three RROs has significant consequences for refugees and asylum seekers, such as increased difficulty in travelling to an open RRO and limited access to open RROs that become overburdened as a result of the closures. Legal challenges were brought against all the Department's decisions to close the RROs and, in all three cases, the Department lost due to their failure to substantively consult with the Standing Committee for Refugee Affairs (Standing Committee), as required by the Refugees Act, as well as on the grounds of procedural unfairness. In all three of these cases, the various High Courts ordered the Department to reopen the RROs. While further engagement surrounding the Johannesburg RRO took place out of court, the closure of the RROs in Cape Town and Port Elizabeth remained subject to legal challenge for the next few years.

In the case of *Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another* (831/2013) [2015] ZASCA 35; 2015 (3) SA 545 (SCA); [2015] 2 All SA 294 (SCA) (25 March 2015), the Supreme Court of Appeal (SCA) ordered that the RRO in Port Elizabeth be restored by 1 July 2015, including the processing of new application for asylum, on the grounds that the Department's failure to consult with the relevant stakeholders on the decision to close the RRO was arbitrary and unlawful. Despite the order by the SCA, the Department has only recently made strides in this regard and has, at the time of writing, stated that the RRO in Port Elizabeth shall be reopened on 22 October 2018. In the case of *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* (1107/2016) [2017] ZASCA 126; [2017] 4 All SA 686 (SCA); [2018] 4 SA 125 (SCA) (29 September 2017), the SCA once again ordered the Department to reopen the RRO in Cape Town on the grounds that the decision by the Department was unreasonable and unlawful. However, at the time of writing,

the RRO in Cape Town still had not been reopened for processing of new applications for asylum. Additionally, the Department has indicated that it is unlikely that the office will be opened in 2018 and that progress may only be made by April 2019.

'Other Offices'

Closely linked to the closure of various RROs was the decision taken by the Department requiring asylum applicants to complete their entire application process at the RRO at which they first applied for asylum. This practice has surfaced on numerous occasions over the years and, in each instance, has attracted legal challenge. In essence, this policy shift results in a refusal to assist asylum applicants at an RRO other than the RRO of first application. With reference to the Cape Town RRO, where this practice has been particularly prevalent, the Department argued that this approach would assist the office in becoming a "wind-down" facility, in that any backlogs could be addressed and the RRO would not be burdened by either new or secondary applications. In addition to restricting the right to freedom of movement, this practice also placed an enormous financial, economic and social burden on refugees and asylum seekers who were now expected to travel for thousands of kilometres to continue to access their asylum application, including renewing their permits.

Over the years, a number of court applications have been launched in the Western Cape High Court to enforce the rights of asylum seekers to freedom of movement as well as the right to an asylum seeker permit in terms of section 22 of the Refugees Act. Colloquially referred to as 'other offices' cases, the first of these was *Aden and Others v The Minister of Home Affairs and Another* (2000), in which the Department was ordered to renew all permits at any RRO, depending on where the refugees or asylum seekers were living. In 2008, when the practice resurfaced, the matter of *Hirsi and Others v The Minister of Home Affairs and Other*s (2008) was launched to enforce compliance with the *Aden* order. In this matter, an agreement between the applicants and the Department was reached and it was declared that the refusal to renew asylum seeker permits granted at other offices was an unlawful practice. As in *Aden*, the Department was required to immediately renew all asylum seeker permits, irrespective of the RRO by which they were first issued. In 2009, it was once again necessary to approach the court in the matter of *Thomasso v The Minister of Home Affairs* (2009), which also resulted in a settlement agreement to resume services for all asylum seekers in accordance with the

Hirsi order. When the policy again reared its head in 2012, the matter of *Zihalirwa and Others v The Minister of Home Affairs and Others* (2012) was launched, seeking an order declaring the Department to be in contempt of the *Hirsi* order. This time, however, the Department amended its practice slightly by renewing the permits of applicants who were initially documented at other offices but with the proviso that the applicant returned to the office of original application. The Department argued that this practice was not in contravention of the *Hirsi, Aden or Thomasso* orders. The court, constrained by the rule to accept the Respondent's version when disputes of fact arise in motion proceedings, as set out by the case of *Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd.* 1984 (3) SA 623 (A), dismissed the application.

Following on very quickly from the *Zihalirwa* case was the launching of *Abdulaahi and 205 Others v The Director General of Home Affairs and Others 7705/2013*. What started out as 206 applicants grew into 1232 by the time judgement was handed down in February 2015. The relief in this instance was an urgent interim interdict directing the Department to extend the permits of the listed applicants and not to deny extending the permits at the Cape Town RRO until such time as the legal dispute challenging the closure of the Cape Town RRO had finally been resolved. The applicants submitted that if the interdict was not granted, they would suffer irreparable harm as they would need to abandon their lives in Cape Town and relocate to places closer to the operational RROs. The Department opposed the relief sought by the applicants by focusing on the administrative burden that would result if an applicant did not visit the RRO at which their file was kept. The Department vigorously argued that, by moving to Cape Town, the applicants were attempting to abuse the refugee system in that they were trying to evade the processing of their asylum applications, an argument that clearly indicates an attitude and mind-set of the Department at this point in time.

Judge Steyn noted that it would be more convenient, cost effective and practical for the files to be transferred to the place where the asylum seeker resides rather than for the asylum seeker to travel repeatedly to the original RRO where his or her file is kept. The Department, however, indicated that the Cape Town RRO would only consider application for the transfer of a file in exceptional circumstances and on a case-by-case basis. The Department argued that the court could not competently order the transfer of all files, as this would have an impact on the allocation of public funds, thereby infringing the doctrine of the separation of powers. Ultimately, Judge Steyn found that:

> *[…] the effect of the closure decision of the Cape Town refugee reception office is that the applicants/asylum seekers will be compelled to leave the Cape Town area where they have established their homes. This result impacts on their right to dignity and to property and to just administrative action, in terms of the provisions of the Constitution. It is irrational, unjustifiable and inequitable that the Department grant [asylum seeker] permits to [Cape Town] asylum seekers but not to non-[Cape Town] asylum seekers. It would be inhumane to force them to leave Cape Town, prior to finality being reached on the closure decision.*

Ultimately, the court held that the applicants must be able to access services at the Cape Town RRO but limited the right of access to services only to the applicants listed in the case. Therefore, this necessitated the launching of *Nbaya and Others v Director General of Home Affairs and Others* 6534/15 in the Western Cape High Court, which dealt with the same legal challenge as the *Abdulaahi* matter but extended the relief to the entire class of persons in this situation.

Infringement of the Right to Family Unity and Reunification

South African law recognises the right to family unity and allows those who are married to, or dependent on, refugees to remain in the country by obtaining derivative refugee status in terms of section 3(c) of the Refugees Act. In the past, the Department has given effect to this law by employing a policy referred to as "family joining". Recognised refugees were able to "join" their dependents and/or spouses to their files, and the dependents or spouses would acquire derivative refugee status by virtue of that relationship. The spouse or dependent was required only to prove that he or she was a dependant or spouse of a recognised refugee and once this was established the person would be granted derivative refugee status. However, in 2014, officials in the Department indicated informally that a new policy concerning family joining had been adopted and that, as a result, derivative refugee status would only be granted to spouses if they were married to the refugee before either of them arrived in South Africa, and provided that the refugee declared the marriage at the first stage of the asylum application. This policy is based on a fundamental misconception of the law, particularly section 3(c) of the Refugees Act, and its application to refugee families. The Department interprets section 3(c) of the Refugees Act to apply only to families that pre-existed the refugee-producing event. This policy represents a narrow interpretation of refugee law and the right to family unity and succeeds in

excluding undeclared families formed before refuge was sought in South Africa, families formed in South Africa and families formed remotely, or by 'proxy', in terms of customary or traditional law.

Families formed before seeking refuge in South Africa should have the full benefit of the 1983 UNHCR Guidelines on the Reunification of Refugee Families (the Reunification Guidelines), which support the reunification of "nuclear" families, including husbands, wives, dependent unmarried children and other dependent family members including parents and/or relatives who were living within the family unit in the country of origin. The Reunification Guidelines also provide that the absence of documentary evidence, for example marriage and/or birth certificates, "should not *per se* be considered as an impediment". Furthermore, within its definition of a 'dependent', the Refugees Act does not require that the dependency existed before a refugee sought asylum in South Africa and, therefore, there appears to be no proper legal foundation for the Department's interpretation. While in South Africa, some refugees prefer to enter into marriages remotely, or 'by proxy', in terms of their customary or traditional laws. These marriages take place after the refugee has been granted refugee status in South Africa and, negotiations are conducted between the families in the country of origin, after which the 'proxy spouse' travels to South Africa to join the refugee. The Reunification Guidelines expressly recognise customary marriages and even polygamous marriages "validly contracted in the country of origin". South African law emphasises respect for customary and traditional law and, as such, such marriages must accordingly be recognised. If the proxy spouse is dependent on the refugee, they fulfil the section 3(c) refugee definition, and policies refusing to recognise their status as a refugee are in conflict with the clear provisions of the Refugees Act.

Even if the Refugees Act were to be interpreted so as to restrict the definition of 'dependant' to persons dependent on the refugee before he or she sought asylum, deporting a failed asylum seeker who is married to a refugee breaks up the family, thus infringing its members' constitutional right to dignity, which encompass the right to form a family and to cohabit with one's spouse, as enshrined in the case of *Dawood and Another v Minister of Home Affairs* 2000 (3) SA 936 (CC). The Department's new policy on refugee families has resulted in thousands of refugee families remaining undocumented. Many family members now live in the country without proper documentation, fearing

arrest, detention and possible deportation. These are individuals with a *prima facie* refugee claim who ought to be documented in terms of the Refugees Act.

In *Scalabrini v Minister of Home Affairs and Others* 2016 (WCD) unreported case no. 5242/16, the court held that families should be joined irrespective of whether the recognised refugee declared their existence when making the application for refugee status and regardless of when they were married. The court further ordered the Department to draft a standard operating procedure that can facilitate the 'family joining' process. The Department adopted a standard operating procedure that includes, amongst others, the requirement that all applicants for family joining must undergo DNA-testing, which essentially excludes those who cannot afford this expensive procedure. The standard operating procedure also failed to create a procedure for providing dependants with interim protection while applications for family joining are being processed, thereby making it wholly inadequate. Due to the Department's failure to implement a satisfactory standard operating procedure, the applicants have been forced to approach the court for further relief. This matter has been set down for December 2018.

Research Findings and Analysis

Through a set of interviews with refugees and asylum seekers, as well as various human rights service providers, we determined that the South African government's refugee policy shifts are contributing to the large number of undocumented and unprotected refugees and asylum seekers in South Africa. By restricting access to the asylum process and placing undue obstacles before individuals wishing to apply for asylum, or even regularise their existing permits, the Department is attempting to deter applicants from the asylum system and often leaves them with no choice but to 'go underground' and remain in South Africa undocumented and hidden from authorities.

The first policy shift detailed how physically inaccessible the asylum process in South Africa can be for both new applicants and existing asylum seekers and refugees. Despite the fact that human rights lawyers have successfully litigated in this matter, there has been little to no real change in practice. Asylum seekers still detail stories about being turned away from the RROs without assistance. The participants in this article revealed that these access problems are a nationwide problem. Some of the participants stated that they are currently undocumented because, after having tried to extend their expired permits on numerous occasions but being turned away without being assisted, they were left with no choice but to give up and return home without a valid

permit. New asylum seekers explained that they had attempted to obtain asylum seeker permits from RROs in Musina or Durban but that they could not gain entry to the building; participants stated that they slept outside the office on numerous occasions in order to be the first clients serviced at the RRO. They stated that, after sleeping outside the RRO and waiting in the queue for hours, the security guard at the entrance of the building refused to allow them to enter the building. Some stated that they waited more than a week before finally giving up. New applicants stated that they waited days and sometimes months before receiving their asylum seeker permits.

The lack of access to RROs for asylum seekers and new applicants means that people are forced to live for protracted periods of time without valid asylum permits. The access cases demonstrate that the Department has failed in providing adequate facilities, systems and processes to receive and issue asylum seeker permits. This failure is compounded by poor queue management, corruption and general maladministration. The closure of the Cape Town RRO and the refusal to assist new arrivals or persons who obtained their asylum documents from offices outside of Cape Town resulted in a number of our participants being undocumented or in possession of expired permits. This is because up until the 2012 closure of the Cape Town RRO, asylum seekers who applied at offices other than the Cape Town RRO were able to extend, process and have their files transferred to Cape Town. Similarly, new applications for asylum were also received in Cape Town prior to the closure. Even after the closure of the Cape Town RRO, there were periods of time when asylum seekers who obtained their permits at offices other than the Cape Town RRO were able to obtain extensions, due to the numerous legal challenges that were brought against the Department. This created a legitimate expectation for newcomers applying for asylum and asylum seekers who applied at offices other than the Cape Town RRO that they could obtain and extend their permits in Cape Town. Furthermore, South Africa has a non-encampment policy, which allows for the freedom of movement. As such, asylum seekers and newcomers seeking asylum are permitted to reside anywhere in South Africa, including in Cape Town.

Asylum seekers in South Africa are issued with an asylum seeker permit on arrival. The permits can be valid for a period of anywhere between one and six months, depending on what stage of the application the asylum seeker is in. These timeframes were created when the drafters of the legislature envisioned that the application process would finally be adjudicated within

180 days of the application being made. However, in reality, the finalisation of asylum applications often takes more than ten years, during which period the applicant is expected to renew their permit every one to six months. For applicants who initially obtained their asylum seeker permits outside of Cape Town, this means that they are expected to travel at least twice a year to an RRO that is over 1400 kilometres away from Cape Town. Applicants often spend over R 1,500 on transportation and, due to corruption and maladministration, are often not assisted or are unable to gain access to the RRO on the date of arrival. When access is eventually granted, there is no guarantee that an asylum seeker will be assisted on the same day and they are often informed to return on another day or given an appointment for a date that is weeks after the expiration date of the permit. This results in the need to acquire accommodation and thereby incurs more financial costs.

The need to travel also has harsh implications on an asylum seeker's employment prospects and opportunities. Most asylum seekers are either unemployed or precariously employed in the informal sector. Thus, they are subjected to various exploitative labour practices and experience a lack of job security. Some of our participants indicated that they could not travel to their office of application because the journey is too long and would result in them being absent from work for an extended period of time, which will likely lead to a dismissal. Other participants stated that even if they are not dismissed, missing a day of work means that they will not be paid their entire salary and will not be able to fund the trip to the office of application. Therefore, some asylum seekers are confronted with the difficult obstacle of having to choose between their livelihoods and regularising their stay in South Africa. Those who are self-employed as vendors or small-scale entrepreneurs also experience financial difficulties in that they are forced to close their businesses while travelling. Other applicants reported that they lost their employment once their permit expired and were unable to travel over 1400 kilometres to their office of application. Furthermore, once an asylum seeker's permit has expired, their bank accounts are closed, preventing them from accessing what little funds they may have had.

Families face even greater obstacles as all family members have to travel to the office of application in order to renew their permits. Children and scholars lose out on schooling time during this period and families who are unable to afford the travel and accommodation costs face the possibility of having their children ejected from school due to lack of documentation. Female-headed

households experience even greater financial and other burdens, as the single parent has to find financial means to travel with her children to the office of application. Female applicants reported having slept outside the RRO with their children for days, waiting to be assisted as they could not afford private accommodation. Furthermore, most of these women work as entrepreneurs, selling fruits and vegetables in stalls or hairdressing near taxi ranks, and they only earn money if they are at work. This means that they lose their income for all of the days that they are not working. Female-headed households also voiced concerns about safety and, in particular, xenophobic related attacks.

Other participants voiced that, even if they finally raise the money to travel to their office of application to renew their permit, often by the time they reach the RRO their permit has lapsed. In terms of section 37 of Refugees Act, allowing your permit to lapse without just cause is a punishable offence and asylum seekers are first referred to a police station where a charge is laid against them. An asylum seeker is then required to appear in the Magistrates Court to provide evidence and justification for why their asylum seeker permit has expired and often face being found guilty of an offence and being sentenced to a fine of between R500 and R5000, ultimately resulting in a criminal record. Participants cited this as an additional issue that prevented them from attempting to regularise their stay even after they had collected the means to travel to their office of application.

The requirement to travel over 1400 kilometres to their office of application, often with an already expired permit, compounded the fear that refugees and asylum seekers had of being arrested and, possibly, deported back to a country where they faced potential persecution. This fear results in thousands of asylum seekers remaining in Cape Town without valid asylum permits. In the *Abdulaahi* case alone, over 1000 applicants came forward indicating that they were unable to extend their permits as they could not travel to their office of application. Cases such as this depict a situation in which asylum seekers are seeking to regularise their stay in South Africa but are prevented from doing so by government policies that place extraneous socio-economic hurdles on them. By making it difficult for asylum seekers to access the asylum process and by placing so many procedural and bureaucratic hurdles on them, the Department creates a situation in which a number of asylum seekers are forced to remain undocumented.

New asylum seekers entering South Africa travel to Cape Town for various reasons and do so without knowing that they cannot make new applications

at the Cape Town RRO. Often these individuals do not have the financial means or knowledge of how to travel to other provinces. One of the service providers interviewed stated that the number of undocumented persons seeking their services grew from 2% in 2012 to 17% in 2013 and 19% in 2014. In May 2015, the Scalabrini Centre, a human rights organisation, conducted an advocacy programme in which it contacted 857 newcomers by short message service (SMS) to come to the Scalabrini Centre for an update on the court case. In total, 223 new asylum seekers reported to the Scalabrini Centre and were given updates on the court case as well as information on the open RROs around the country.

During the sessions, 156 individuals completed questionnaires regarding their experiences in Cape Town as undocumented asylum seekers and future plans regarding their asylum applications. The results indicated that financial problems are the main obstacles to applying for asylum at other RROs and that roughly only 29% are planning to apply for asylum at an RRO outside of Cape Town. When asked why they have not applied for asylum at another RRO, 84 participants stated financial constraints as the reason for remaining undocumented and 50 individuals, out of the 156, stated that they would rather wait for the Cape Town RRO to be opened. Another 2 stated travel issues as the main obstacle and a further 2 stated that health issues hindered them from travelling. When asked if they planned on travelling to other RROs in order to apply for asylum, 109 participants stated they did not, while only 44 of the 156 were willing to travel. The service providers interviewed expressed that they are frequently approached by rejected asylum-seekers whose family lives are threatened by their imminent deportation. In such cases they have written to the Department, asking that families not be separated, and pointing out that South African and international law recognises the family as "the fundamental unit of society", that the UNHCR policy promotes the reunification of refugee families and that South Africa's Refugees Act includes the recognition of a dependent of a recognised refugee. The result of this policy shift in 'family joining' cases is that large numbers of refugee spouses or dependent children remain undocumented. Rather than return to their countries of origin, most of these applicants opt to join the cohort of undocumented migrants, rather than abandon their families. They, therefore, live in South Africa as undocumented migrants. The Department also refuses to document children born from these parents. Many participants stated that their spouses' asylum applications were rejected despite being married to recognised refugees. After attempting to correct this error, the

families simply gave up and continued to live without documentation. Additionality, if the undocumented spouses, who are women, give birth to children in South Africa, the Department refuses to document these children because one of the parents is undocumented. This is despite the fact that the child is born in South Africa to a refugee parent.

Therefore, it is clear to see how the Department's policy shifts create the preconditions for refugees and asylum seekers to become undocumented and fall into a state of irregular migration. In all of the cases discussed above, the South African government promulgated policies designed to restrict certain kinds of migration and to confine asylum seekers to the borders of the country. In attempting to achieve these goals it has made access to the asylum process almost impossible for those living in Cape Town, forcing them to remain undocumented. All of the applicants attempted to regularise their stay in South Africa, but it was the policies and practices of the Department, making it impossible for both new and existing refugees and asylum seekers to access the RROs, which drove them to become undocumented.

Conclusion

South Africa has undertaken to receive refugees and to act as a host state, obligations that stem from the 1951 UN Convention and the 1969 AOU Convention. However, the narrow reading of the Refugees Act, which is designed to give effect to refugee protection, and the various policy shifts that we have witnessed over the last few years, shows an aversion to the obligations that the government undertook to honour. The cases outlined above clearly show the successive policy shifts the Department has undertaken in relation to the implementation of their international obligations. The Department has implemented policies and practices at RROs throughout South Africa that have been aimed at limiting access to the asylum regime. Despite the courts finding, on numerous occasions, that the Department has a duty to provide an effective asylum system for the processing of applications, the Department has continued to make decisions that refuse to uphold these duties. The Cape Town RRO has been closed for new applications for asylum since 30 June 2012 and, despite successful litigation that continued for over five years, the office remains wilfully closed. Simultaneously the drive by the Department to force applicants to return to "their office of application" and to re-characterise existing RROs as "wind-down" temporary facilities, has further decreased the protection space for refugees and asylum seekers in South Africa.

By restricting access to the asylum process and placing greater obstacles on refugees and asylum seekers, the South African government has driven refugees and asylum seekers to remain undocumented. Furthermore, the restrictive policy shifts have had the consequences of forcing individuals who ought to be documented as refugees to remain undocumented. It is clear, however, that this type of irregular migration could be avoided through the implementation of laws and policies that protect refugees and uphold international human rights. Therefore, we call on the South African government to improve its political discourse, laws and the implementation thereof, so that at least the irregularity of asylum seekers and refugees can be avoided by addressing the shortcomings, inefficiencies and irrationalities in the asylum seeker process.

References

Abdulaahi and 205 Others v The Director-General of the Department of Home Affairs and Others, unreported, Case No. 7705/2013 (Western Cape High Court).

Ad Hoc Joint Committee on Probing Violence Against Foreign Nationals. 2015. Report of the Ad Hoc Joint Committee on Probing Violence Against Foreign Nationals. From <https://bit.ly/2NXDG77>

Aden and Others v The Minister of Home Affairs and Another, unreported, Case No. 9179/00 (Western Cape High Court).

African National Congress. 2012. Peace and Stability: Policy Discussion Document. From <https://bit.ly/2SeWSRp > (Retrieved October 12, 2018).

Dawood and Another v Minister of Home Affairs, 2000 (3) SA 936 (CC).

Department of Home Affairs, *Green Paper on International Migration* (Pretoria: 21 June 2016); Department of Home Affairs, *White Paper on International Migration for South Africa* (Pretoria, July 2017).

Draft Refugees Regulations, 2018 and draft Rules of the Standing Committee for Refugee Affairs, Government Gazette No 644, (29 June 2018), draft Regulation 11(4).

Hirsi and Others v The Minister of Home Affairs and Others, unreported, Case No. 16863/08 (Western Cape High Court).

Kiliko and Others v The Minister of Home Affairs and Others, 2006 (4) SA 114 (C).

Landau, L.B. and Amit, R. 2014. Wither policy? Southern African perspectives on understanding law, 'refugee' policy and protection. *Journal of Refugee Studies*, 27.

Minister of Home Affairs and Others v Somali Association of South Africa Eastern Cape (SASA EC) and Another, 2015 (3) SA 545 (SCA).

Nbaya and Others v Director General of Home Affairs and Others 6534/15.

Ngwato, T.P. 2013. *Policy Shifts in the South African Asylum System: Evidence and Implications.* African Centre for Migration and Society (ACMS) and Lawyers for Human Rights (LHR).

Plascon-Evans Paints Ltd. v Van Riebeeck Paints (Pty) Ltd., 1984 (3) SA 623 (A).

Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others, 2018 (4) SA 125 (SCA).

Scalabrini v Minister of Home Affairs and Others, 2016 (WCD), unreported, Case No. 5242/16.

Tafira and Others v Ngozwane and Others, 12 December 2006, unreported, Case No. 12960/06.

Thomasso and Others v The Minister of Home Affairs and Others, unreported, Case No. 10598/09 (Western Cape High Court).

UNHCR. 2007. UNHCR chief commends Pretoria's refugee policy, pledges cooperation. From <https://bit.ly/2yRt0kT> (Retrieved September 28, 2015).

Zieck, Marjoleine. 1997. *UNHCR and voluntary repatriation of refugees: a legal analysis.* Martinus Nijhoff Publishers.

Zihalirwa and Others v The Minister of Home Affairs and Others, unreported, Case No. 20988/12 (Western Cape High Court).