

High Court declares sections of Refugees Act unconstitutional

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21 Feb 2023

The sections render asylum seekers "undocumented" if they do not renew visas within one month of expiry date.



The Western Cape High Court declared sections of the Refugees Act unconstitutional. The sections provide that asylum seekers who do not renew their visas within one month of the date of expiry are considered to have abandoned their applications. Archive photo: Masixole Feni / GroundUp

- Western Cape High Court Deputy Judge President Patricia Goliath has declared sections of the Refugees Act unconstitutional.
- Asylum seekers who do not renew their visas within one month of the date of expiry are considered to have abandoned their asylum applications, according to the Act.
- The Judge said that the essence of the Minister of Home Affairs' argument was that most asylum seekers are not genuine and use the process to "avoid meeting the requirements of immigration laws".
- The minister's justification for the provisions "violates the core principle of refugee law that asylum seekers must be treated as presumptive refugees".
- She said South Africa is obliged to allocate resources to ensure international human rights law protection of refugees and asylum seekers.

The Scalabrini Centre of Cape Town has won a significant victory against the Minister of Home Affairs in the Western Cape High Court, which has declared sections of the Refugees Act unconstitutional.

The sections in question provide that asylum seekers who have not renewed their visas within one month of the date of expiry are considered to have abandoned their asylum applications.

This, Scalabrini argued in its application before Deputy Judge President Patricia Goliath, meant that delinquent asylum seekers were considered to be undocumented, treated as “illegal foreigners”, without access to jobs and social services, and faced deportation.

Scalabrini launched a constitutional challenge against two sections of the Refugees Act as well as parts of the Act’s regulations.

In her ruling this week, Judge Goliath deemed these sections and regulations unconstitutional. This ruling, however, will still have to be ratified by the Constitutional Court.

Scalabrini’s core mandate is to assist and safeguard immigrants and displaced communities, including asylum seekers and refugees. It is also a member of the Consortium for Refugees and Migrants South Africa (CoRMSA) which comprises 26 organisations with similar objectives.

Scalabrini previously obtained an interdict against the Minister, suspending the implementation of the relevant sections of the Act and the regulation, pending the outcome of the constitutional challenge which then was heard by Judge Goliath.

The organisation argued that those who did not reapply within the legislated time-frame were deemed undocumented. Even though they had a valid refugee claim, they could be sent back to their countries where they may face persecution, death, torture, sexual violence and other threats. It said that Home Affairs officials had a duty to ensure that people are given a reasonable opportunity to apply for a visa.

This, it was argued, violated the right to non-refoulement (a fundamental principle of international law which forbids a country receiving asylum seekers from returning them to a country in which they would be likely to be in danger of persecution).



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CoRMSA, admitted as an amicus curiae (friend of the court) in the matter, made submissions about the impact of “abandonment rules” on asylum seekers, particularly their children and ability to protect themselves. The consortium said the provisions in the Act were counter to the protective goals and purpose of domestic and international refugee law.

Judge Goliath said the minister acknowledged that the abandonment provisions violated the constitution, but argued that they were rational and justifiable due to the fact that asylum seekers behaved in a recalcitrant manner and failed to renew their visas in good time. This created backlogs and imposed an administrative burden on the department.

It was not disputed that it took on average, five years for asylum seekers to be recognised as refugees, and therefore had to renew their visas between 10 and 20 times in that period.

“Asylum seekers are permitted to work, study, and use social services ... Without a valid permit, they, as well as their children, become vulnerable to deportation.”

Judge Goliath said the essence of the minister’s argument was that most asylum seekers are not genuine and use the process to “avoid meeting the requirements of immigration laws”. The abandonment provisions incentivised them to finalise their applications.

Judge Goliath said, however, that the provisions were certainly not in the best interests of affected children, as was required by law and international conventions and charters. “The provisions take effect automatically after the expiry of 30 days with no individualised regard to the impact of affected children,” she said.

“The mere fact that representations can be made to the standing committee, after the fact, once a child is already rendered undocumented for extended periods is of no use or assistance. This is aggravated by the absence of formal procedures to make representations, let alone any procedure to ensure that the voices of the children are heard.”

She said South Africa is obliged to establish systems and allocate resources to ensure “the international human rights law protection of refugees and asylum seekers”.

She said the provisions were clearly arbitrary because asylum seekers would no longer be deported based on the merits of their claims, but on external circumstances, such as the nearest Refugee Centre, the length of the queue there and the workload of Home Affairs officials.

“At the heart of [the minister’s] justification is an unlawful presumption and prejudgment that most asylum seekers have no valid claims and no interest in pursuing these claims. This violates the core principle of refugee law that asylum seekers must be treated as presumptive refugees, with all the protections this entails, until the merits of their claims have been finally determined through a proper process.

“The right to non-refoulement is of great importance in the overall constitutional scheme as it recognises human beings’ right to dignity.”

Judge Goliath directed that the legislation be amended to rectify the defect and that the minister pay Scalabrini’s legal costs.

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