IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 02/18

In the matter between:

ALEX RUTA Applicant

and

MINISTER OF HOME AFFAIRS Respondent

APPLICANT'S WRITTEN SUBMISSIONS

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INTRODUCTION

1 This application for leave to appeal concerns a critical issue regarding the rights of asylum-seekers in South Africa: *May the immigration officials in the Department of Home Affairs prevent a prospective asylum-seeker from applying for asylum and from having his claim determined by the specialist decision-makers established by the Refugees Act?*[1]

2 Until the judgment of the majority of the SCA in the present matter, the answer to this question was plainly No.

3 In a series of four judgments decided over two years – *Arse*,[2] *Abdi*,[3] *Bula*[4] and *Ersumo*[5] – the SCA had carefully articulated a series of principles regarding the rights of prospective asylum-seekers and the duties of asylum-seekers. Those decisions rightly make clear that immigration officials in the Department could not assume for themselves the ability to prevent an asylum-seeker from applying for asylum. On the contrary, the Department bears a duty to assist asylum-seekers to do so and must then leave it to the specialist decision-makers established by the

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[1] Refugees Act 130 of 1998

[2] *Arse v Minister of Home Affairs and Others* 2012 (4) SA 544 (SCA)

[3] *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA)

[4] *Bula and Others v Minister of Home Affairs and Others* 2012 (4) SA 560 (SCA)

[5] *Ersumo v Minister of Home Affairs and Others* 2012 (4) SA 581 (SCA)

Refugees Act to determine whether the application is well-founded, unfounded, manifestly unfounded or abusive.

4 Yet in the present case, the majority of the SCA failed to follow its own precedents. It held that Mr Ruta "*was not covered by the provisions of the Refugees Act as he failed to apply for asylum"*, that he had entered the country unlawfully and delayed his application and that he could therefore be dealt with in accordance with sections 32 and 34 of the Immigration Act[6] – that is, he could be detained and deported back to Rwanda.

5 For the reasons that follow, we submit that majority of the SCA was incorrect to do so.

5.1 The applicant had unequivocally and repeatedly explained his desire to apply for asylum. He then had to be allowed (and assisted) to do so.

5.2 It was then for the specialist bodies established by the Refugees Act to determine whether his application was well-founded, unfounded or manifestly unfounded.

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[6] Immigration Act 13 of 2002

FACTUAL BACKGROUND

6 Mr Ruta explains the facts giving rise to the present matter in detail in his founding affidavit in the High Court. The response by the Department, in the main, consists of bald denials or hearsay statements.

7 Mr Ruta entered South Africa in December 2014, as an intelligence agent dispatched as such by the Rwandan Government on a mission that he would only later know after arrival in the country. The mission was to assassinate a leader of the exiled opposition party, the Rwanda National Congress ("RNC").[7] He immediately decided against it.[8]

8 Having dissociated himself from this assassination mission, Mr Ruta approached the office of the Directorate for Priority Crimes Investigation ("the Hawks") and alerted them of his position, offering his cooperation in their investigation.[9]

9 Not long thereafter, the Mr Ruta's Johannesburg home, which was assigned to him by a facilitating Rwandan government agent who had received him in South Africa, was attacked by unknown gunmen. This led to the Hawks relocating and placing

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[7] Record, Volume 1, pp 55 to 57, paras 4.1.3 to 4.1.13.

[8] Record, Volume 1, p 57, para 4.1.14.

[9] Record, Volume 1, p 57, paras 4.1.15 and 4.1.16

him at a Pretoria based safe house under the Witness Protection Programme of the National Directorate of Public Prosecutions ("NDPP").[10]

10 It was while under the Witness Protection Programme that Mr Ruta repeatedly made known to the Hawks his desire to apply for asylum, as he had felt that his dissociation from the disclosed assassination mission meant that he could no longer return to Rwanda without risking his safety and, possibly, his life. This request was never met and was instead frustrated by the Hawks.[11]

11 Because the monthly allowances previously given to him by the Witness Protection Programme were insufficient, and on the advice of a Hawks official, Mr Ruta sought employment at a local restaurant to obtain extra funds to complement his monthly Witness Protection Programme allowance. Being undocumented proved to be a hurdle for him to secure this job, until the Hawks official intervened by engaging with the restaurant manager. The restaurant manager arranged a asylum seeker permit for him for identification purposes.[12]

12 It later emerged that the asylum-seeker permit arranged by the restaurant manager was fraudulent. On 19 March 2016, Mr Ruta was arrested and charged with possession of a fraudulent asylum seeker permit, driving an unlicensed motorcycle

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[10] Record, Volume 1, p 58, para 4.1.17

[11] Record, Volume 1, pp 58 to 59, paras 4.1.18 to 4.1.23.

[12] Record, Volume 1, p 59, paras 4.1.24 to 4.1.26

and driving without a driver's license. Subsequently the NDPP removed Mr Ruta from the Witness Protection Programme.[13]

13 During Mr Ruta's criminal trial, he presented a written statement explaining how he had come to be in possession of the fraudulent asylum seeker permit. This resulted in that charge against him being withdrawn. He was only convicted of the remaining charges - driving an unlicensed motorcycle and driving without a driver's license. On 28 July 2016, he was sentenced to three months imprisonment.[14]

14 In August 2016, having served one-third of the sentence, Mr Ruta was meant to be released on parole. However, he was informed that because he was undocumented, the correctional centre could only release the Mr Ruta into the custody of the Department of Home Affairs. The Department in turn made clear that it was intent on deporting him to Rwanda.[15]

15 The Department's firm intent that Mr Ruta should be deported to Rwanda was despite the fact that from at least 15 April 2016, Lawyers for Human Rights had been intervening with the Department, explaining that Mr Ruta could not be deported to Rwanda.

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[13] Record, Volume 1, p 59-60, paras 4.1.27 to 4.1.28

[14] Record, Volume 1, p 59-60, paras 4.1.28 – 4.1.30

[15] Record, Volume 1, p 60, paras 4.1.30 and 4.1.31.

15.1 On 15 April 2016, LHR wrote to the Department's Head of Inspectorate cautioning that Mr Ruta should not, irrespective of the outcome of the criminal proceedings against him, be deported until his protection needs have been investigated in terms of the Refugees Act.[16]

15.2 On 25 April 2016, LHR forwarded the same letter to the Assistant Director: Immigration matters, for the same purpose.[17]

15.3 On 12 September 2016, LHR wrote yet another letter warning the Department that Mr Ruta could be not deported, seeking his immediate release and seeking that he be allowed to apply for asylum.

15.4 Save for an acknowledgment of receipt of the letter by one of the Department's officials, the Department did not heed the warnings.[18] Instead, the Department still kept Mr Ruta in immigration detention, intending to deport him to Rwanda. The Department still refused to allow Mr Ruta to apply for asylum, until it was forced to do so by the order of the High Court.[19]

16 While the High Court upheld Mr Ruta's right to apply for asylum and prevented him being detained or deported pending the outcome of that application, the majority of the SCA disagreed and dismissed Mr Ruta's application.

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[16] Record, Volume 1, pp 87 to 89.

[17] Record, Volume 1, pp. 60 to 61, paras 4.1.32.

[18] Record, Volume 1, pp.90, 91 and 93.

[19] Record, Volume 1, pp 60 to 62, paras 4.1.32 to 4.1.37; See also judgments of Tuchten J on pp 1 to 2, para 2 and pp. 10 to 13.

THE LEGAL PRINCIPLES

South Africa's treaty obligations

17 The Refugees Act must be understood in light of South Africa's treaty obligations.

18 On 15 December 1995, South Africa acceded to the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa ("OAU Convention"). On 12 January 1996, it acceded to the 1951 UN Convention and 1967 Protocol Relating to the Status of Refugees ("UN Convention and Protocol").

19 In terms of article II(1) of the OAU Convention, as a Member State, South Africa committed itself to "*use its best endeavours consistent with the country's respective legislation to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.*" Further, it has committed not to subject asylum seekers "*to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened*".[20] It has made similar commitments under article 33 of the UN Convention and Protocol.[21]

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[20] Article II(3) of OAU Convention.

[21] Article 33 reads:

"*PROHBITION OF EXPULSION OR RETURN (REFOULEMENT)*

20 In addition, on 29 January 1993 and 10 December 1998, respectively, South Africa signed and ratified the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment ("CAT").[22] Article 3 provides:

> *"1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*
>
> *2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."*

21 The above legal instruments have gained local implementation via the enactments of the Refugees Act in 1998, and the Prevention of Combating and Torture of Persons Act 13 of 2013 ("Anti-Torture Act") in July 2013. We focus on the Refugees Act in what follows because it appears to be dispositive of the issue.

The scheme of the Refugees Act

22 The Refugees Act was enacted in 1998.

23 In accordance with South Africa's international obligations and, in particular, the need to avoid any risk of refoulment, section 2 of the Act contains a wide-ranging

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> *No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*
>
> *The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country I which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*"

[22] http://www.dirco.gov.za/docs/2005pq/pq2_455.htm [Accessed: 1 August 2018].

and far-reaching prohibition on returning someone to a country where they may be subject to persecution on the listed grounds:

> *"Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-*
>
> *(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or*
>
> *(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."*

24 Sections 3 and 4 of the Act hen deal with the qualifications for refugee status and exclusions from refugee status. We return to them insofar as is necessary below.

25 Of greater importance for present purposes are the elaborate mechanisms put in place by the Refugees Act for the assessment and determination of an asylum claim and to ensure that no person is wrongly sent back to face persecution.

26 Section 21 of the Act deals with applications for asylum. It provides that:

26.1 An application for asylum must be made in person to a Refugee Reception Officer at any Refugee Reception Office;[23]

26.2 The Refugee Reception Officer then:[24]

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[23] Section 21(1)

[24] Section 21(2)

26.2.1 must accept the application form from the applicant;

26.2.2 must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard;

26.2.3 may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and

26.2.4 must submit any application received by him or her, together with any information relating to the applicant which he or she may have obtained, to a Refugee Status Determination Officer (RSDO), to be adjudicated in terms of section 24.

27 Section 24 then deals with the powers of the RSDO to hold a hearing and decide on an application for asylum.

27.1 It makes clear that the RSDO may request any information or clarification necessary from an applicant, may consult with the UNHCR and must then make a decision on the application.[25] The RSDO must do so in accordance with section 33 of the Constitution, including ensuring that that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.[26]

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[25] Section 24(1)

[26] Section 24(2)

27.2 Section 24(3) sets out the various decisions that the RSDO may make at the conclusion of the hearing:

> *"The Refugee Status Determination Officer must at the conclusion of the hearing-*
>
> *(a) grant asylum; or*
>
> *(b) reject the application as manifestly unfounded, abusive or fraudulent; or*
>
> *(c) reject the application as unfounded; or*
>
> *(d) refer any question of law to the Standing Committee."*

28 If the RSDO does not grant asylum, the Act builds in internal remedies for the asylum-seeker.

28.1 If the RSDO rejects the application as manifestly unfounded, abusive or fraudulent, then the decision must automatically be reviewed by the Standing Committee on Refugee Affairs.[27] The Standing Committee has wide powers to conduct a further hearing and enquiries[28] and is empowered to confirm or set aside the decision of the RSDO.[29]

28.2 If the RSDO instead merely rejects the application as unfounded, the applicant has a right of appeal to the Refugee Appeal Board.[30] It must hear

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[27] Section 25(1)

[28] Section 25(2)

[29] Section 25(3)

[30] Section 26(1)

the appeal (and has wide powers in doing so)[31] and is empowered to confirm, substitute or set aside the decision of the RSDO.[32]

29 In terms of section 21(4), throughout these processes, the applicant for asylum is protected from deportation and, save for the limited detention power under the Act,[33] is also protected from detention. This Court has, of course, recently explained the critical importance of this protection and held that it extends also to High Court review applications in respect of adverse decisions under the Refugees Act.[34]

30 In our submission, this overview of the statutory scheme reveals that Parliament has – with very good reason – designed our refugee system to with substantial protections for asylum-seekers. These include the following.

30.1 First, the protection of an asylum-seeker does not merely depend on the say-so of one official. Any applicant for asylum has the right to have his asylum adjudicated by at least two separate decision-makers – the RSDO and the body dealing with the internal appeal or review. This applies even to an applicant whose application was regarded by the RSDO as abusive, fraudulent or manifestly unfounded.

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[31] Section 26(3)

[32] Section 26(2)

[33] Sections 23 and 29

[34] *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC)

30.2 Second, the persons adjudicating the applications for asylum are not any departmental officials and certainly not immigration officials. They are specialist refugee officials and, particularly insofar as the Standing Committee and Refugee Appeal Board are concerned, they are appointed on the basis of their expertise and experience.[35]

31 What this makes clear, in our submission, is that there is no basis for immigration officials of the Department of Home Affairs to assume for themselves the power to decide whether an application for asylum is well-founded or not, or even whether it is abusive or manifestly unfounded. The power to make that determination is given to the RSDOs, the Standing Committee and the Refugee Appeal Board. The role of the Department and its immigration officials is merely to enable (and assist) applicants for asylum to bring their applications before the proper decisionmakers.

The principles previously enunciated by the SCA

32 The submissions that we have just made were endorsed by the SCA in a series of four decisions between 2010 and 2012.

33 The first decision – *Arse* – concerned mainly the right not to be detained pending a determination of an asylum claim. However, it helpfully laid out the scheme of the Refugees Act and explained how it interacted with the Refugees Act. The three

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[35] Sections 10(1) anc 13(1)

subsequent decisions – *Abdi*, *Bula* and *Ersumo* – then built on this foundation and clearly articulated a range of principles directly relevant to the present matter.

34 These included the following:

34.1 Once a person claiming asylum indicates a desire to make an application for refugee status, the protection afforded to such persons by the Refugees Act applies to such person.[36]

34.2 The Department's officials are obliged to ensure that, once there is an indication of an intention to apply for asylum, they must assist the person concerned to lodge such an application at a Refugee Reception Office.[37]

34.3 A decision on the bona fides of the asylum application is not made upfront. The Refugee Reception Officer is obliged to see to it that the application is properly completed, to render such assistance as may be necessary and then to ensure that the application together with the relevant information is referred to a RSDO.[38]

34.4 It is for the RSDO to determine the merits of an application for asylum and not for a prior interrogation by a court[39] (or indeed a Departmental official).

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[36] *Ersumo* at para 12

[37] *Abdi* at para 22, *Bula* at para 77

[38] *Bula* at para 77, *Ersumo* at para 12

[39] *Bula* at para 77

34.5 None of this is changed by the fact that the prospective applicant for asylum may be regarded as an illegal foreigner at the time of announcing his intention to apply for asylum, nor by the fact the asylum-seeker may have delayed in bringing his asylum application.[40]

35 We submit that these principles are plainly correct. They are consistent with the language and scheme of the Refugees Act, but also – and critically – are essential for the proper protection of those facing a risk of persecution. As this Court's judgment in *Saidi* makes clear, this is the manner in which the Refugees Act must be interpreted: "*What must carry the day is a meaning that better accords with the purposes of the Refugees Act and is more consonant with the constitutional rights of asylum seekers*."

APPLICATION TO THE PRESENT CASE

The intention to apply for asylum

36 In the present case, there is no question that Mr Ruta has indicated an intention to apply for asylum.

36.1 On Mr Ruta's version, he first sought to apply for asylum in March 2015, shortly after the attack on his home and him having entered the Witness Protection Programme, but he was prevented from doing so.[41] The

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[40] *Ersumo* at paras 15-18

[41] Record, Volume 1, pp 58 to 59, paras 4.1.18 to 4.1.23.

Department's denials of these allegations of repeated attempts to apply for asylum are frequently bald and amount to hearsay[42] and Mr Ruta's version that he indicated an intention to apply for asylum must therefore be accepted.

36.2 But even if this is left aside entirely, what is beyond doubt is that during the criminal proceedings faced by Mr Ruta, his attorneys – Lawyers for Human Rights – repeatedly expressed his intention to apply for asylum, for the first time in April 2016. They did so not for purposes of avoiding the criminal trial and sentence but to deal with what was to occur afterwards – that is to prevent Mr Ruta being sent to face persecution in Rwanda.

The delay contention

37 The majority of the SCA, however, apparently left this out of account – solely on the basis of its conclusion that Mr Ruta had unreasonably delayed in seeking to apply for asylum.[43] We submit that it was wrong to do so.

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[42] Record, Volume 2, answering affidavit paras 27-31

[43] Regulation 2(2) provides:

"*Any person who entered the Republic and is encountered in violation of the Aliens Control Act, [now replaced by the Immigration Act] who has not submitted an application pursuant to subregulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."*

38 First, if Mr Ruta's version of the events in March 2015 is accepted, as we submit it ought to be, then his attempted applications during that month were plainly not unreasonably delayed.

38.1 That he only developed an interest and expressed the desire to apply for asylum only about two months after arrival in South Africa, makes no difference.

38.2 The critical point is that he did so reasonably soon after refusing to carry out his assassination task.

38.3 In this regard, the UNHCR Handbook[44] expressly recognises the concept of a "*Refugee sur place*"[45] – someone who becomes a refugee after having left his country of origin. It explains as follows:

> *"A person may become a refugee "sur place" as a result of his own actions, such as associating with refugees already recognized, or expressing his political views in his country of residence. Whether such actions are sufficient to justify a well-founded fear of persecution must be determined by a careful examination of the circumstances. Regard should be had in particular to whether such actions may have come to the notice of the authorities of the person's country of origin and how they are likely to be viewed by those authorities."*[46]

38.4 When Mr Ruta refused to carry out the assassination, it logically attracted an imputation by the Rwandan government that he habours a differing political

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[44] UNHCR Handbook and Guidelines on Procedure and Criteria for Determining Refugee Status

[45] UNHCR Handbook, p 19, para 94.

[46] UNHCR Handbook, p 19, para 96.

opinion potentially sympathetic to the RCN. Of that the UNHCR Guidelines on International Protection No.1[47], states:

> *"32. ... It would include a non-conformist behavior which leads the persecutor to impute a political opinion to him or her. In this case, there is not as such an inherently political or an inherently no-political activity, but the context of the case should determine its nature. . . . .It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face of he or she returned."*

39 Second, even if Mr Ruta's version of the events in March 2015 is rejected, there was no basis for the Department to prevent Mr Ruta from applying for asylum in April 2016, when LHR expressly and repeatedly conveyed his desire to do so.

39.1 This is because delay is <u>not</u> a basis to prevent someone applying for asylum. As the SCA explained in *Ersumo*:

> *"The difficulty with this submission is that it is inconsistent with the emphatic terms of reg 2(2), which was held in Bula to be the starting point of the enquiry. Whilst reg 2(1) says that an application for asylum must be submitted without delay, neither it nor the Refugees Act prescribes a time within which such an application must be made<u>, nor does the Refugees Act suggest that delay in making an application is of itself a ground for refusing an otherwise proper claim for refugee status.</u> The grounds upon which an application for asylum may be refused are set out in s 24(3) of the Refugees Act. They are that the application is 'manifestly unfounded, abusive or fraudulent' or simply 'unfounded'. <u>There is nothing to indicate that a meritorious application may be refused merely on the grounds of delay in making the application.</u>*
>
> *Regulation 2(2) is consistent with this in that it foreshadows that, when the foreigners are encountered by the immigration officer, they will be in*

[47] Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, available at: http://www.unhcr.org/publications/legal/3d58ddef4/guidelines-international-protection-1-gender-related-persecution-context.htm [Accessed: 10 August 2018].

South Africa in violation of the Immigration Act. In other words, they will be illegal foreigners under that Act. No distinction is drawn between one type of illegal presence and another. In other words, it makes no difference whether the individual entered the country and never sought an asylum transit permit, or whether they obtained such a permit and allowed it to lapse by not reporting to a refugees reception office. Nor is there any reference to the duration of the illegal presence, or to any mitigating factors, such as poverty, ignorance of these legal requirements, inability to understand any of South Africa's official languages, and the like. There is also no reference to aggravating factors, for example, that their illegal entry was deliberate and that they have deliberately sought to avoid the attentions of the authorities. Regulation 2(2) applies to any foreigner encountered in South Africa, whose presence in this country is illegal. It says, as this court held in Bula, that any such person who then indicates an intention to apply for asylum must be issued with an asylum transit permit, valid for 14 days, and permitted to apply for asylum.

There is no warrant in all this for the submission that undue delay deprives the asylum seeker of the rights afforded by reg 2(2). In any event counsel had difficulty in identifying what would amount to undue delay…

The proposed limitation is too vague and too dependent on the subjective judgment of the immigration officer in each case to provide a secure basis for determining the rights of asylum seekers. …"[48]

39.2 We submit that the approach in *Ersumo* is quite correct. It is perfectly consistent with the language of the Act and Regulations and with the principle, made clear in *Saidi*, that the provisions must bear a meaning that best promotes the purposes of the Refugees Act and the constitutional rights of asylum-seekers.[49]

39.3 It is also notable that *Ersumo* was decided more than six years ago, in March 2012.

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[48] *Ersumo* at paras 15 - 18 (emphasis added)

[49] *Saidi* at para 26

39.3.1 Since that time Parliament has enacted two sets of amendments to the Refugees Act.[50] Neither of those sets of amendments sought to introduce undue delay as a basis for refusing an application for asylum, still less as a basis to prevent someone applying for asylum.

39.3.2 Nor has the Minister sought to amend Regulation 2(2), despite the central role played by that regulation in the reasoning in *Ersumo*.

39.3.3 The well-known presumption that Parliament "*knows the law*" and the interpretations given by the courts to its enactments[51] must apply with even greater force to the Minister, who is responsible for the administration of the Refugees Act and was a party in *Ersumo.*

39.3.4 In the circumstances, the only conclusion that can be reached is that Parliament and the Minister did not regard the *Ersumo* approach as being wrong or problematic and elected to leave the Regulations and Act as they had been interpreted by the SCA.

40 There is accordingly no basis for the Department to rely on "*delay*" as a basis for it preventing Mr Ruta from applying for asylum.

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[50] Refugees Amendment Act 10 of 2015 and Refugees Amendment Act 11 of 2017 (which has not yet been brought into force).

[51] *Chirwa v Transnet Ltd* 2008 (4) SA 367 (CC) at para 50, citing R v Padsha 1923 AD 281 at 312, cited for example in; Road Accident Fund v Monjane 2010 (3) SA 641 (SCA) at para 12

The exclusion contention

41 The remaining contention of the Department is that it was entitled to preclude Mr Ruta applying for asylum because he falls within the exclusion contained in section 4(1)(b) of the Refugees Act. That contention is without merit for two reasons.

42 First, the question of whether Mr Ruta fell within the exclusion clause is one of the very matters that will have to be decided by the RSDO that deals with his application (and if needs be the Standing Committee or Refugee Appeal Board). As the SCA explained in *Bula*:

> *"As is abundantly clear the scheme of the Act is that it is for the RSDO to determine the merits of an application for asylum and not for a prior interrogation by a court."*[52]

42.1 An RSDO dealing with an application for asylum must first determine whether an applicant meets the test for asylum set out in section 3 of the Act.

42.2 If so, the RSDO must then deal with whether the applicant is nevertheless excluded on one of the exclusion grounds in section 4 of the Act.

42.3 This is simply not a matter that the Department's immigration officials can determine, nor even the courts, in advance the RSDO dealing with it.

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[52] *Bula* at para 77

43 Second, and in any event, the contention that Mr Ruta falls within section 4(1)(b) is unsustainable.

43.1 Section 4(1)(b) provides that a person does not qualify for refugee if there is reason to believe that he "*has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment*".

43.2 The UNHCR Guidelines on International Protections No. 5[53] take a similar approach:

> *"2. ... The exclusion clauses must be applied "scrupulously to protect the integrity of the institution of asylum as is recognised by UNHCR's Executive Committee in Conclusion No. 82 (XLVIII), 1997. At the same time, given the possible serious consequences of exclusion, it is important to apply them with great caution and only after a full assessment of the individual circumstances of the case. The exclusion clauses should, therefore, always be interpreted in a restrictive manner."*[54]

43.3 In the present case, far from reading section 4(1)(b) as this Court's jurisprudence and the UNHCR Guidelines require, the Department seeks to read it expansively – to go beyond both its wording and the wording of the relevant international instruments.

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[53] UN High Commissioner for Refugees (UNHCR): *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at:

http://www.refworld.org/docid/3f5857684.html [accessed 10 August 2018].

[54] Emphasis added

43.4 It is quite plain that section 4(1)(b) refers to offences committed outside South Africa, prior to admission to the Republic and that this has no applicant to Mr Ruta.

43.5 As Mocumie JA explained in her dissenting judgment:

> *"To my mind the contentions made on behalf of the appellant on the interpretation to be applied on section 4(1)(b) are plainly unsustainable. They fly in the face of the plain language of section 4 which unambiguously provides that only offences committed outside the Republic and before entry into the Republic would disqualify an asylum seeker. Suffice to say that to hold otherwise would result in an absurdity. The legislature could never have contemplated such absurdity. The respondent had committed no offence outside the Republic."*[55]

44 The section 4(1)(b) contention therefore cannot assist the Department.

CONCLUSION

45 We therefore submit that the approach of the majority of the SCA is not sustainable.

46 In the circumstances:

46.1 Leave to appeal should be granted against the SCA judgment;

46.2 The appeal should be upheld and the SCA order should be replaced with an order dismissing the appeal of the Department;

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[55] Judgment at para 56

46.3 The Department should be directed to pay the costs in the SCA and this Court, including the costs of two counsel where two were employed.

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10 August 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 02/18

In the matter between:

ALEX RUTA *Applicant*

and

MINISTER OF HOME AFFAIRS *Respondent*

APPLICANT'S PRACTICE NOTE

THE NATURE OF THE PROCEEDINGS

This is an application for leave to appeal against a decision of the Supreme Court of Appeal. It concerns the interpretation of provisions of the Refugees Act 130 of 1998 and Regulations promulgated under it.

ISSUES TO BE ARGUED

- *The scheme and of objects of the Refugees Act*
- *The delay contention*
- *The exclusion contention*

PORTIONS OF THE RECORD NECESSARY FOR DETERMINATION OF MATTER

The whole record.

ESTIMATED DURATION OF ORAL ARGUMENT

One day.

SUMMARY OF ARGUMENT

This application for leave to appeal concerns a critical issue regarding the rights of asylum-seekers in South Africa: *May the immigration officials in the Department of Home Affairs prevent a prospective asylum-seeker from applying for asylum and from having his claim determined by the specialist decision-makers established by the Refugees Act?*[56]

Until the judgment of the majority of the SCA in the present matter, the answer to this question was plainly No.

In a series of four judgments decided over two years the SCA had carefully articulated a series of principles regarding the rights of prospective asylum-seekers and the duties of asylum-seekers. Those decisions rightly make clear that immigration officials in the

[56] Refugees Act 130 of 1998

Department could not assume for themselves the ability to prevent an asylum-seeker from applying for asylum.

In the present case:

- The applicant had unequivocally and repeatedly explained his desire to apply for asylum. He then had to be allowed (and assisted) to do so.

- It was then for the specialist bodies established by the Refugees Act to determine whether his application was well-founded, unfounded or manifestly unfounded.

- In the circumstances, neither the delay contention nor the exclusion contention justified the Department preventing the applicant from applying for asylum.

AUTHORITIES ON WHICH PARTICULAR RELIANCE WILL BE PLACED

- Bula and Others v Minister of Home Affairs and Others *2012 (4) SA 560 (SCA)*
- Ersumo v Minister of Home Affairs and Others *2012 (4) SA 581 (SCA)*
- Mail and Guardian Media Ltd and Others v Chipu N.O. and Others *2013 (6) SA 367 (CC)*
- Saidi and Others v Minister of Home Affairs and Others *2018 (4) SA 333 (CC)*

Steven Budlender

Lesirela Letsebe

Counsel for the Applicant

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN

CCT CASE NO: 02/18
SCA CASE NO: 30/2017
NGHC CASE NO: 79430/16

In the matter between:

ALEX RUTA Applicant

and

THE MINISTER OF HOME AFFAIRS Respondent

RESPONDENT'S HEADS OF ARGUMENT

INTRODUCTION:

1.

The Applicant, a Rwandan national, initially sought, effectively, six different forms of relief in his notice of motion issued on 11th October 2016 in the Court *a quo*.[1] The most important prayer sought by the Applicant related to his immediate release from his detention by the Respondent. The application was brought on an urgent basis.

[1] See Record, pp 46 – 47

2.

There are a multiplicity of issues arising from the facts presented in this matter, which may be summed up as follows:

2.1. Whether or not Section 4(1)(b) of the Refugees Act may be applied to the facts *in casu*.

2.2. The applicability of the principles set forth in ***Kumah and Others v The Minister of Home Affairs***[2] to the facts at hand.

2.3. The non-applicability of the judgment of ***Bula and Others v The Minister of Home Affairs and Others***[3] and similar Supreme Court of Appeal judgments to the facts at hand.

2.4. Whether or not a person founded in possession of one or more fraudulent temporary asylum seeker permits in terms of Section 22 of the Refugees Act may be said to be entitled, upon confrontation with such documentation in his/her possession, as an illegal foreigner under the Immigration Act, thereafter, to:

2.4.1. say that he now wishes to apply for asylum; and/or

[2] [2016] 4 All SA 96 (GJ) and 2018 (2) SA 510 (GJ)

[3] 2012 (4) SA 560 (SCA)

2.4.2. invoke the protection of Section 21(4)(a) of the Refugees Act (that no proceedings may be instituted or continued against him which pertain to his/her unlawful entry and/or presence in the Republic of South Africa, pending a decision on his/her Section 21 asylum application).

2.5. Whether or not a failure to comply with Regulation 2(1) of the Refugee Act's regulations, namely, a failure to apply for asylum under Section 21 of the Refugees Act "*without delay*" is possible in the light of the judgments of ***Bula and Others*** (supra).

2.6. In the event of the answer to the preceding question being in the affirmative, what time frame would be applicable to the term "*without delay*"?

PRELIMINARY ISSUE:

3.

The proceedings before the Supreme Court of Appeal took place on 7th November 2017.

4.

Unbeknown to counsel for both sets of parties, the record which was presented before the Supreme Court of Appeal did not include the replying affidavit.

5.

The argument proceeded on the basis as though a replying affidavit was in fact not filed. This is factually incorrect.

6.

On 8th November 2017 a letter was addressed by the Applicant's attorney to the Registrar of the Supreme Court of Appeal bringing to the attention of the Registrar the existence of the replying affidavit and attaching to such covering letter a copy thereof for the benefit of the judges before whom argument was presented on the previous day. A copy of such letter is attached hereto marked annexure "**A**".

7.

The Department of Home Affairs' legal representatives immediately responded to Lawyer's for Human Rights' letter dated 8th November 2017, by way of a covering letter of 9th November 2017, a copy of which is attached hereto marked annexure "**B**" and from which it will appear that it was indeed both parties who laboured

under the mistaken belief that a replying affidavit had not been filed before the Court *a quo*.

8.

To the extent that the record which presents itself before the Constitutional Court is now complete, the Respondent records, to the extent that it is necessary to do so, that he has no objection whatsoever to the replying affidavit forming part of the record.

FACTUAL SUMMARY AND CHRONOLOGY:

9.

The Applicant avers that he was a soldier of the Rwanda Patriotic Front from 1992, in which he became a lieutenant in Military Intelligence in 1998.[4]

10.

During 2000, the Applicant became an agent for the National Security Services ("NSS") in Rwanda.[5]

[4] See Record, p 55, paras 4.1.1 and 4.1.2

[5] See Record, p 55, para 4.1.3

11.

In October 2014, the Applicant received instructions to engage with members of the exiled Rwandan National Congress ("RNC") in South Africa and, to this end, received a passport and documentation facilitating his travel to the Republic of South Africa.[6]

12.

In December 2014 the Applicant entered the Republic of South Africa without a visa and not through a port of entry. This is in breach of the Immigration Act.[7]

13.

Shortly after his arrival in the Republic of South Africa, an agent assigned by the Rwandan Government gave the Applicant instructions to meet and "*befriend*" specific members of the RNC. The Applicant was then moved to a house in Regent Park and was given a budget for accommodation and living expenses.[8]

14.

[6] See Record, p 55, para 4.1.5

[7] See Record, p 56, paras 4.1.7 – 4.1.9, read with Sections 9(1) and 9(3) of the Immigration Act, No 13 of 2002 ("the Immigration Act")

[8] See Record, p 56, para 4.1.10

In January 2015, the Applicant met one Harmsa, a Rwandan national, who introduced him to RNC members.[9]

15.

During the first week of February 2015, the Applicant avers that he met with his (still unnamed) NSS agent and provided the latter with a progress report,[10] where after the NSS agent wished to arrange a firearm for the Applicant whereupon the Applicant "*realised*" that he was required to assassinate someone whose identity was not known to him. The Applicant avers that he could not do so as RNC members were from his tribe and leader thereof had promoted him to the rank of lieutenant as previously stated.[11]

16.

At the beginning of 2015, the Applicant avers that he approached the Directorate for Priority Crime Investigation (Hawks) for assistance.[12]

17.

[9] See Record, p 56, para 4.1.11

[10] See Record, 57, para 4.1.12

[11] See Record, p 57, para 4.1.13

[12] See Record, p 57, para 4.1.16

A few weeks thereafter, the Applicant's house in Regent Park was fired at and he was then, at his request, placed under a Hawks Witness Protection Programme.[13]

18.

In the beginning of March 2015, the Applicant was taken to the Refugee Reception Office ("RRO") in Marabastad but the system was down. He was then to return thereto on 25th March 2015.[14]

19.

Instead, on 25th March 2015, the Applicant was moved to Durban for three months under the same Witness Protection Programme, and that he could apply for asylum in Durban.[15]

20.

By the end of June 2015, the Applicant was returned to Pretoria[16] where he then found a job at a pizzeria, where he then secured a fraudulent Section 22 temporary asylum seeker's permit and after which he purchased a motorcycle.[17]

21.

[13] See Record, p 58, para 4.1.17

[14] See Record, p 58, para 4.1.18

[15] See Record, p 58, para 4.1.19

[16] See Record, p 58, para 4.1.21

[17] See Record, p 59, paras 4.1.24 – 4.1.26

On 22nd December 2015 the NPA decided to terminate the Applicant's protection under the Witness Protection Programme and after which the Applicant was required to be handed over to SAPS and thereafter to the Department of Home Affairs with his passport, for purposes of deportation.[18]

22.

Before this could happen, however, the Applicant, on 19th March 2016, was arrested for being in possession of a fraudulent Section 22 permit, for driving a motor vehicle without a valid licence and for being an illegal foreigner.[19]

23.

On 4th April 2016, a statement in terms of Section 212 of the Criminal Procedure Act by one Sam Langa confirmed that there was no trace of the Applicant to be found on the Department of Home Affairs' Movement Control System, such fact indicating that the Applicant's entry into the Republic of South Africa was not through a port of entry and was thus in contravention of Section 49(1)(a) of the Immigration Act.[20]

24.

[18] See Record, pp 171 – 172 (Vol 2)

[19] See Record, p 58, para 4.1.27

[20] See Record, p 175

On 11th April 2016, Mr Borcherds of the NPA informs the Applicant by letter that he is being discharged from the Witness Protection Programme.[21]

25.

On 15th April 2016, the Applicant's attorneys request that the Applicant not be deported irrespective of the outcome of the criminal proceedings.[22]

26.

On 28th July 2016, after a number of prior postponements, the Applicant is found guilty as charged and sentenced to six months imprisonment, which he served.[23]

DELAYS BY APPLICANT IN SEEKING ASYLUM

27.

From the above chronological setting out, the following delays in applying for asylum become apparent:

27.1. From December 2014 to February 2015, over a period of at least two

[21] See Record, p 181 (Vol 2)

[22] See Record, p 89, para 11

[23] See Record, p 70

months, no attempt is made to apply for asylum.

27.2. From 25th March 2015 to June 2015, over a period of at least three months, there is still no attempt made to apply for asylum.

27.3. From June 2015 to March 2016, a period of approximately nine months passes, with no further attempt to make any application for asylum.

27.4. For the full duration of the Applicant's court appearances, from 22nd March 2016 to 28th July 2016, being a period of more than four months, the Applicant again makes no attempt to apply for asylum. This will become relevant hereinlater.

SOUTH AFRICAN LEGISLATIVE FRAMEWORK:

28.

Regulation 2(1) of the Regulations to the Refugees Act, No 130 of 1998 ("the Refugees Act"), determines that an intended applicant for asylum in terms of Section 21 of the Refugees Act, is required to lodge such an application:

28.1. "***In person***", at a designated RRO; and

28.2. "***Without delay***". (own emphasis)

29.

In terms of Section 9 of the Immigration Act, No 13 of 2002 (“the Immigration Act”), no person is permitted to enter or depart from the Republic of South Africa other than at a port of entry. Furthermore, such entry or departure shall not occur unless such person is in possession of a valid passport.

30.

In terms of Section 9(4) of the Immigration Act, a foreigner who is not a holder of a permanent residence permit contemplated in Section 29, may only enter South Africa if he is in possession of a valid passport which is still valid for a prescribed period and is issued with a valid visa as set out in the Immigration Act.

31.

An important instrument of protection to asylum seekers, is found in Section 23 of the Immigration Act in terms of which a person who, at a port of entry, claims to be an asylum seeker, may be issued with an asylum transit visa valid for a period of five days only, in order for such person to travel to the nearest RRO in order to apply for asylum in terms of Section 21 of the Refugees Act.

32.

Importantly, in terms of Section 23(2), a failure to comply with the above five-day period and "*Despite anything contained in any other law …*", the holder of such asylum transit visa *"… shall become an illegal foreigner and shall be dealt with in accordance with this act*".

ISSUES ON APPEAL:

FIRST ISSUE: THE APPLICABILITY OF SECTION 4(1)(b) OF THE REFUGEES ACT

33.

It is respectfully contended that a proper reading of Section 4(1) of the Refugees Act, in its entirety, relates to the commission, by potential asylum seekers, of the offences which are tabulated in Section 4(1) of the Refugees Act. These offences fall into four broad categories and are all of a serious nature.

34.

It is further respectfully stated that it was the intention of the legislation concerned that such offences should have occurred **prior to** the potential asylum seeker entering into the Republic of South Africa. It is thus aimed at the past conduct of an individual prior to his entry into the Republic of South Africa.

35.

However, to have committed such offences **after entry** into the Republic of South Africa, even before the person concerned has indicated a desire to apply for asylum, places an even greater burden on such person to show why he should, under such circumstances, have the benefit of a host country, South Africa, thereafter still consider his application for asylum.

36.

It is therefore respectfully concluded that the commission of an offence falling into any of the four categories tabulated in Section 4 of the Refugees Act, whilst **inside** the Republic of South Africa, constitutes an even greater exclusion of the individual concerned from the asylum process in terms of South African law.

37.

It should also be pointed out that Section 4(1)(b) of the Refugees Act simply speaks of the person concerned having committed a crime. It does not require a conviction.

38.

Although the Applicant was found to be in possession of at least two fraudulent Section 22 permits,[24] and although it appears as though he was convicted in respect of one such document under the Identification Act, No 68 of 1997, whilst such should rather have occurred under the common law offence of fraud, alternatively, the statutory offences under Section 37(a) of the Refugees Act, or Section 49(1)(a), alternatively Section 49(8) of the Immigration Act, such conduct nevertheless remains within the parameters of Section 4(1)(b) of the Refugees Act, and, accordingly, the exclusion from refugee status for the Applicant remains in place.

39.

Furthermore, it is respectfully contended that it will serve no purpose, when faced with a Section 4 scenario, for immigration officials to entertain asylum applications under Sections 21 and 22 of the Refugees Act.

40.

It is not coincidental that Section 4's exclusionary clauses in the Refugees Act, already appear at the commencement of the act, further justifying the reasonable inference that such persons become automatically excluded from even commencing with an asylum application. Furthermore, it would serve no purpose for an asylum application to be commenced with under circumstances where a

[24] See Record, p 120, para 33 (Vol 2)

RRO, alternatively, a Refugee Status Determination Officer ("RSDO") is, from the outset, aware of an asylum applicant's conduct falling within the categories set out under Section 4 of the Refugees Act. It serves no purpose to allow a process to be commenced with or to be continued with (the Section 21 application) where the results thereof would constitute a foregone conclusion.

SECOND ISSUE: THE APPLICABILITY OF THE PRINCIPLES SET FORTH IN THE *KUMAH* JUDGMENT TO THE FACTS AT HAND

41.

In ***Kumah and Others*** (supra), the Honourable Satchwell J concluded as follows:

> "*[17] Any party seeking relief in terms of … any … legislation must satisfy the court as to jurisdiction, locus standi, applicability of legislation in general and specific provisions thereof. An application which seeks the protection of and the implementation of the Refugees Act is no different*."

42.

The Court there also considered the findings in the judgments of ***Bula and Others*** (supra) and ***Ersumo v The Minister of Home Affairs***[25] where the SCA made it clear that the factual basis justifying and entitling resort to the provisions of the Refugees Act, must be placed before Court.

[25] 2012 (4) SA 581 (SCA)

43.

The Applicant fails to indicate why he has a well-founded fear of being persecuted by reason of his race, tribe, religion, nationality, political opinion or membership of a particular social group and why he is unable to avail himself of the protection of his country of nationality – the requirement to establish such a factual basis having been emphasised by Justice Satchwell.

44.

In a similar vein, the Applicant *in casu* fails to indicate any event(s) seriously disturbing the public order in either part or whole of his country of origin which compelled him to leave his place of residence in order to seek refuge in the Republic of South Africa.

45.

The Applicant fails to provide sufficient information in support of an allegation of a well-founded fear, both subjectively and objectively. The Applicant does not provide any names or details that would place any RSDO in a position to verify the factual basis giving rise to his subjective fear. In his replying affidavit[26] the Applicant claims to have done so when he applied for the Witness Protection

[26] See Record, p 199, para 38 (Vol 2)

Programme, but a perusal of the witness protection application[27] makes it clear that no such particulars were provided.

46.

46.1. More importantly, the Applicant fails to provide any reasons as to why he neglected to make the necessary asylum application when he had an abundance of time available in order to do so. Even when he had a motor cycle in his possession as a mode of transport, he nevertheless still persisted in his failure to do so. Instead, the Applicant takes the position that the witness protection officials had a duty to assist him. On his own version (although disputed by the Respondent) he was taken to a RRO and was, if such allegations are true, therefore familiar with the venue at which to make such application and was also aware of the fact that he was required to do so in person. Despite having a month to do so, he failed to apply for asylum.

46.2. Furthermore, the following material contradictions in the Applicant's version of events surrounding his asylum application attempts at Marabastad, cannot go unnoticed:

46.2.1. in paragraph 4.1.18 of the founding affidavit,[28] the Applicant is referring to only <u>one</u> attendance at this RRO; and

[27] See Record, pp 146 – 161 (Vol 2)
[28] See Record, p 58

46.2.2. in paragraph 28 of his replying affidavit,[29] however, he now avers that he was taken to Marabastad on <u>three</u> occasions.

46.3. The Respondent's denial of the Applicant's allegations to the effect that he was taken to an RRO in order to apply for asylum must, accordingly, be upheld.

47.

The fact that the Applicant fails to deal with this important aspect of the factual situation preceding his arrest and also fails to establish a factual background on a granular level supporting his claim that he should be dealt with within the realms of the Refugees Act, should cause the application to fail. This should also be in accordance with the Court's decision in the ***Kumah*** matter.

THIRD ISSUE: THE NON-APPLICABILITY OF THE *BULA* AND SIMILAR JUDGMENTS

48.

The facts in the ***Bula*** judgment as well as those in the ***Ersumo*** judgment[30] are markedly different from the facts which presented themselves *in casu*. Unlike the situations which presented themselves in these two SCA judgments, the

[29] See Record, p 197 (Vol 2)

[30] See *Bula and Others v The Minister of Home Affairs and Others* (supra)

See also *Ersumo v Minster of Home Affairs and Others* (supra)

Applicant *in casu* had:

48.1. Committed offences which fell under Section 4(1) of the Refugees Act; and

48.2. Committed them whilst inside the Republic of South Africa; and

48.3. Committed them even before the Applicant had applied for asylum; and

48.4. As regards the fraudulent Section 22 permit, the Applicant had intended to create the impression that he had **already** applied for asylum; and

48.5. The Applicant *in casu* has not fled from his country of origin in order to establish political persecution.

49.

By having been in possession of at least two different fraudulent Section 22 permits, the Applicant was in fact, it is submitted, precluded from wishing to, after being exposed, apply for asylum. Indeed, the further submission in this regard is that the Applicant *in casu* had, through such conduct, surrendered or waived any entitlement to, thereafter, apply for asylum.

50.

It is furthermore submitted that to hold otherwise would render the provisions of the Refugees Act, when viewed in its totality, nugatory and would allow for a *Carte Blance* abuse of the very legislation that, ironically, was intended to protect asylum seekers.

51.

The Applicant averred that if the South African government succeeds in deporting him back to Rwanda, he would "*… face certain death*".[31]

52.

The Applicant also avers that he, in 1998, was promoted to the rank of lieutenant in the Rwandan government's Division of Military Intelligence. [32]

53.

The Applicant continued by alleging that the purpose of his travel to the Republic of South Africa was in order to "*… engage with the Rwandan National Congress*

[31] See Record, p 54, para 3.4.1

[32] See Record, p 55, para 4.1.2

…"[33] and that he did not know what he "*… was coming to do in South Africa …*"[34] and that, two days after his entry into the Republic of South Africa, the Applicant was given the names of people in the Rwandan National Congress party and was instructed to *"… find a channel of reaching and befriending the identified RNC party members*."[35]

54.

After befriending those persons who appear to have been on a list given to him, the Applicant then "*went back to the NSS agent …*[36] who then informed the Applicant that there was a need to arrange for a weapon for the Applicant.[37] It is only at this stage that the Applicant avers that he "*… started to panic and distanced himself from the agent as [he] did not want to kill anyone from the RNC party.*"[38]

55.

[33] See Record, p 55, para 4.1.5

[34] See Record, pp 55 – 56, para 4.1.5

[35] See Record, p 56, para 4.1.10

[36] See Record, p 57, para 4.1.12

[37] See Record, p 57, para 4.1.13

[38] See Record, p 60, para 4.1.13

The Applicant also avers that the Respondent "*refused to acknowledge the danger that awaits [him] if [he] were deported to Rwanda as planned*."[39]

56.

The very sparse total sum of the "*danger*" awaiting the Applicant who is described by the Respondent's officials as being an assassin is to be found in paragraphs 51 and 55 as stated above. Furthermore, these statements constitute nothing more than legal conclusions arrived at without any factual basis therefore having been presented.

57.

An analysis of the aforegoing shows that there is no underlying factual basis presented by the Applicant for the perceived danger that he was in. No detail whatsoever is given as to the source or identity of the perceived danger.

58.

The above runs contrary to judicial dicta which demands that Applicants in similar matters present a factual basis justifying an entitlement to judicial resort and to reliance upon the provisions of the Immigration Act/Refugees Act before Court.[40]

59.

[39] See Record, p 15, para 4.1.31

[40] See *Kumah* (supra) at para [18]

No factual basis whatsoever was placed before the Court *a quo*. There was thus no "*… sufficient material to indicate that the applicant might have had a valid claim for refugee status.*"[41]

60.

A further important rationale behind the basic facts being required to be placed before Court was to be found in paragraph 20 of the ***Kumah*** judgment (supra) where the Court there held that it was necessary for a court to be satisfied that the application before it was one which could invoke the consideration of an application of the provisions of the Refugees Act. The Court also continued as follows:

> "*[20] … Absent fundamental and necessary averments, it is difficult to know* ***on what basis*** *any court could rely upon the Refugees Act for determination of the application and the disputes before it*."[42] (own emphasis)

61.

Accordingly, the Applicant has not indicated or shown a "*well-founded*" fear of being "*persecuted by reason of his race, tribe, religion, nationality, political opinion or membership of a particular social group*" and that, accordingly, the Applicant's application could not bring him within the protective umbrella provided for under Section 3 of the Refugees Act. This fact is underscored by the

[41] See *Kumah* (supra) at para [19]

[42] See *Kumah* (supra) at para [20]

Respondent's (uncontested) allegation to the effect that there was no extradition request by the Rwandan government.[43]

62.

In concluding, the Respondent respectfully submits that the conduct of the Applicant throughout is such as to indicate an intention quite contrary to the purpose and intent of the Refugees Act, namely, to provide protection to persons who feel persecution in their countries of nationality or countries of origin. Indeed, the conduct of the Applicant indicates to the contrary, namely, to abuse the provisions of the Witness Protection Programme in a host country in order to provide the necessary ruse from which to have completed his mission as an assassin in the Republic of South Africa and that he had never intended applying for asylum in the first instance.

FOURTH ISSUE: WHETHER OR NOT A PERSON FOUND IN POSSESSION OF ONE OR MORE FRAUDULENT TEMPORARY ASYLUM SEEKER PERMITS IN TERMS OF SECTION 22 OF THE REFUGEES ACT, MAY BE SAID TO BE CAPABLE OF, UPON CONFRONTATION (OR, THEREAFTER) AS AN ILLEGAL FOREIGNER UNDER THE IMMIGRATION ACT, SAYING THAT HE NOW WISHES TO APPLY FOR ASYLUM AND WISHING TO INVOKE THE PROTECTION OF SECTION 21(4)(a) OF THE REFUGEES ACT

63.

[43] See Record, p 109, para 6.19 (Vol 2)

At the time of the Applicant's arrest, the Applicant, by being in possession of a fraudulent Section 22 permit, positively attempted to create the impression that he was indeed the holder of a Section 22 temporary asylum seeker permit and, by logical extension, that he had already applied for asylum. When, however, it was discovered that the Section 22 permit that he was attempting to rely upon, was fraudulent, it is respectfully contended, that the Applicant in fact created a "*mutually exclusive*" scenario in that he cannot be said to have alleged that he wished to apply for asylum. To the contrary, the misrepresentation that the Applicant made to the officials concerned at the time of his arrest was that he was in fact already in the asylum/refugee system and that he had already applied for asylum.

64.

In the premises aforesaid, there is no credibility that may be afforded to the Applicant's allegations to the effect that he indicated to the officials involved in his arrest, that he wished to apply for asylum. For this reason alone, the Applicant's application ought not to have succeeded.

FIFTH ISSUE: WHETHER OR NOT A FAILURE TO COMPLY WITH REGULATION 2(1) OF THE IMMIGRATION ACT'S REGULATIONS, NAMELY, THE OBLIGATION TO APPLY FOR ASYLUM "*WITHOUT DELAY*" SHOULD

BE OVERLOOKED IN THE LIGHT OF THE SCA JUDGMENTS IN *BULA* AND *ERSUMO*

65.

The aforegoing question is expounded upon with reference to case law decided in the Commonwealth. Before doing so, it is apt to recall paragraph 36 of the ***Kumah*** judgment where Justice Satchwell recorded as follows:

> "*… the Supreme Court of Appeal does not appear to interpret the legislation or regulation as to allow an indefinite and unlimited period for an illegal foreigner to seek to invoke the protection of the Refugees Act until it finally suits him to do so.*"

This is reference to the ***Ersumo*** and ***Bula*** judgments.

66.

The logical consequence of an interpretation that does not allow for "*an unlimited period*" as described above, is that once a period that would qualify as one that evidently denotes a claim for asylum **when it suits him to do so** as opposed to when a well-founded fear exists of persecution, that such a person would be eligible for deportation, as they do not meet the criteria of the Refugees Act.

67.

This conclusion is further supported when Section 23 of the Immigration Act is considered which, as already stated, provides for an asylum transit visa, valid for only five days, within which an asylum seeker, entering the Republic of South Africa through a port of entry, is required to travel to the nearest RRO in order to apply for asylum under Section 21 of the Refugees Act.

68.

By doing so, effectively, an asylum seeker who is provided with an asylum transit visa and delays for longer than the permitted five-day period within which to apply for asylum, will default to the status of an illegal foreigner, as is provided for under Section 23(2) of the Immigration Act, and may therefore be lawfully deported.

69.

Given the few days that is permitted to make such an application, it follows that an inordinate length of delay in the Applicant’s application, should disqualify from making such an application.

70.

It is perhaps apt, at this point, to consider foreign legislation:

CANADA:

70.1. The Canadian Supreme Court has determined that both subjective and objective components pertiaining to credibility must be met.[44]

70.2. X (Re), 2013 CanLII 99428 (CA IRB):[45]

70.2.1. This appeal served before the Immigration and Refugee Board of Canada.

70.2.2. At paragraph [10] the Board found that the determinant issue is one of credibility, specifically subjective fear in this matter.

70.2.3. The board, at paragraph [26], found that "*Failing to apply for refugee status or asylum where you could have is, in this case, fatal to his claim as it is relevant to an assessment of his subjective fear … if the claimant had a genuine fear of persecution or harm in his homeland, it would be reasonable to expect him to vigorously pursue all available options to ensure his safety and permanent status …*"

[44] ***Canada (Attorney General) v Ward*** 1993 CanLII 105 (SCC)

[45] http://canlii.ca/t/gkhvv

70.2.4. In paragraph [11] the Board continues as follows:

> *"Subjective fear is a necessary component of having a well founded fear of persecution. A lack of the subjective element is in itself sufficient for a claim to fail according to several cases. The Supreme Court of Canada has established that both the subjective and objective components must be met.*"

70.3. *In* ***Ortiz Garzon v Canada (Minister of Citizenship and Immigration)***,[46] the Court made the following finding on facts where an asylum seeker in Canada had not made serious attempts to apply for asylum in the United States during the one and a half years that he lived there:

> "*[30] … the Board's finding that there was a serious lack of effort on the part of the Applicant to apply for asylum is reasonable … Serious efforts require more than having a friend enquire about the asylum process.*"

70.4. ***Meija v Canada (Minister of Citizenship and Immigration)***[47] added as follows:

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[46] 2011 FC 299 (CanLII) at para [30]

[47] 2011 FC 851 (CanLII) at paras [14] and [15]

"*[14] Delay points to a lack of subjective fear of persecution or negates a well-founded fear of persecution. This is based on the rationale that somebody who is truly fearful would claim refugee status at their first available opportunity.*"

70.5. *In* ***Jeune v Canada (Minister of Citizenship and Immigration)***,[48] the Court added the following:

70.5.1. "*… the applicant's failure to claim asylum at his first opportunity further undermined his credibility.*"

70.6. *In* ***Garavito Olaya v Canada (Minister of Citizenship and Immigration)***,[49] Justice O'Keefe, at paragraph [54], found that absent a satisfactory explanation for the delay, such delay can be fatal to the Applicant's claim.

70.7. In ***X(Re)***,[50] the Board considered three Federal Court judgments and applied them with approval in finding that a delay in making a claim has a direct bearing on the credibility of the claim for asylum.

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[48] 2009 FC 835 (CanLII) at para [15]

[49] 2012 FC 913 (CanLII), as quoted in para [14] of the judgment of ***Kaddoura v Canada (Minister of Citizenship and Immigration)*** 2016 FC 1101 (CanLII)

[50] 2017 CanLII 144260 (CA IRB) at paras [22] – [24]

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70.8. In the judgment of ***Minister Immigration and Multicultural and Indigenous Affairs v QAAH of 2004***,[51] the Australian High Court here confirmed that whether a well-founded fear of persecution exists, should be established as at the time of making the application. It therefore follows that even if a fear existed at some time in the past, the objective existence thereof needs to be evaluated at the point of application.

FURTHER CONSIDERATIONS:

71.

The Applicant received a passport and visas for Zambia, Zimbabwe and Mozambique before his departure from Rwanda. As a well established agent of the Rwandan National Security Services, it apparently raised no questions in his mind as to why, if his destination was intended to be South Africa, no South African visa was applied for or provided. It seems logical that this could only be because his presence had to remain hidden from the South African government. Clearly the Rwandan government knew that he was coming to South Africa and that he had to acquaint himself with members of the RNC.

72.

[51] [2006] HCA 53 (15 November 2006)

The Applicant deliberately entered the Republic of South Africa not through a designated port of entry as is required, but at some undisclosed place. By doing so, the Applicant contravened the Immigration Act.

73.

73.1. Furthermore, the facts indicate that the Applicant contravened the terms of his Witness Protection Programme and that he fraudulently secured more than one fraudulent Section 22 permit and that he was prepared to drive a motorcycle without a valid driver's licence.

73.2. Such conduct also contravenes Article III of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which reads as follows:

"*1. Every refugee has duties to the country in which he finds himself, which require in particular that he conforms with its laws and regulations …*"

74.

The Applicant also avers that he fears for his life because he failed to assassinate the Rwandan refugee in South Africa. He fails to provide any factual

basis for this fear, other than an alleged shooting incident aimed at the house he was staying at. There is no explanation as to why he thought the incident, if it did occur, was perpetrated by the Rwandan government. Furthermore, the Applicant fails to describe any factual basis that would allude to a collapse of the legal system in Rwanda, to the extent that it cannot afford him the necessary protection when he returns home. The Constitution is the supreme law of Rwanda and he does not provide any facts that point to a collapse of that constitutional order.

CONCLUSION:

75.

75.1. Although refugees are entitled to protection under international and local instruments aimed at securing their temporary shelter and protection, asylum seekers also have a concomitant obligation, namely, to comply with the laws of the host country. *In casu*, such laws determined that the Applicant was obliged to apply for asylum without delay. He deliberately failed to do so.

75.2. To the contrary, the Applicant committed a number of criminal offences after his entry into the Republic of South Africa, thus indicating a scant regard for the laws of his host country. In line with the Universal Declaration of Human Rights, someone who acts in contravention with

the purposes and principles of the Charter, may not apply for asylum. It is submitted that the Applicant did not act in accordance with the laws of the Republic of South Africa and is therefore not entitled to seek asylum.

76.

It is furthermore submitted that every asylum seeker's position in delaying an application for asylum needs to be evaluated on a case-by-case basis in order to determine whether such a delay was reasonable. There is no reason why such a judgment call should not be made by immigration officials or by officials appointed under the Refugees Act.

77.

Where an unreasonable delay has been identified, it should follow that the same consequences that attach to a delay in following the issue of an asylum transit visa, should apply. The asylum seeker should thus revert to becoming an illegal foreigner and be subjected to deportation and that there should be no further status assessment by an RSDO.

78.

In the premises:

78.1. Leave to appeal should be refused with costs, alternatively

78.2. In the event of leave to appeal being granted, that the appeal should be dismissed with costs.

DATED AT PRETORIA ON THIS THE 29TH DAY OF AUGUST 2018.

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Pretoria