

**THE CHALLENGES ASSOCIATED WITH UPHOLDING THE HUMAN RIGHTS OF
ASYLUM SEEKERS DURING THE REFUGEE STATUS DETERMINATION PROCESS
IN SOUTH AFRICA**

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Submitted in accordance with the requirements for the degree of Masters of Law

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Declaration:

Hereby I, Bernice Nicole Zoutman, with student number, 3366058 declare that ‘The challenges associated with upholding the human rights of asylum seekers during the refugee status determination process in South Africa’ is my own work and that all the sources which I relied on has been acknowledge through reference methods.



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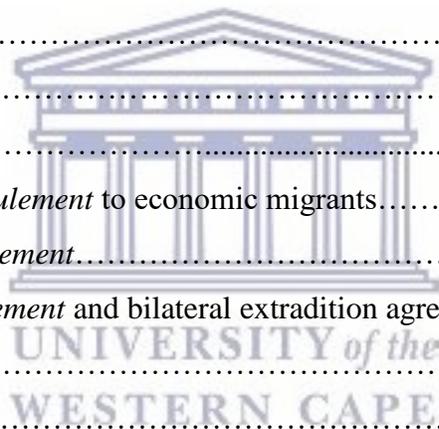
ABSTRACT

Foreign nationals regularly finds themselves seeking refuge in a host country such as South Africa. One would expect that due to comprehensive legislation ranging from national to international level, foreign nationals would be received in conditions appropriate to their circumstances. However, whether that is in fact the case remains to be a matter of great controversy. The main purpose of this study is to determine whether or not the South African refugee status determination process is legally compliant with its obligations under domestic, regional and international human rights law. By focusing on the refugee status determination process it could best be determined whether the process is legally compliant with the applicable legislative provisions by focusing on what occurs during the application for refugee status in practice. The research question will be answered by focusing on domestic, regional and international legislative provisions, case law, journal articles and academic textbooks amongst other sources. The primary legislative obligation that South Africa has towards asylum seekers is to provide protection to those in genuine need thereof, which requires that the country must refrain from violating their human rights. However the study has revealed that even though South Africa portrays a strong will to protect the rights of asylum seekers, the country still has a long way to go before it is actually achieved. Numerous of asylum seekers still finds it challenging to apply for asylum and to simultaneously enjoy constitutionally guaranteed human rights within the territory of South Africa. Research has established that although South Africa aims to ensure that its asylum system complies with its obligations towards asylum seekers under domestic, regional and international human rights law, there however remains multiple of instances where the country is still in violation of multiple human rights of asylum seekers.

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LIST OF ACRONYMS

ACHPR- African Charter on Human and Peoples' Rights

ACRWC- African Charter on the Rights and Welfare of the Child

CAT- Convention against Torture

DHA- Department of Home Affairs

ECHR- European Convention on Human Rights

GBV- Gender-Based Violence

ICC- International Criminal Court

ICCPR- International Covenant on Civil and Political Rights

PAJA- Promotion of Administrative Justice Act

RAB- Refugee Appeal Board

RRO- Refugee Reception Office

RSD- Refugee Status Determination

RSDO- Refugee Status Determination Officer

UDHR- Universal Declaration of Human Rights

SCRA- Standing Committee for Refugee Affairs



CHAPTER 1: THE RESEARCH PROPOSAL

1.1 INTRODUCTION

As a relatively newcomer to the international refugee protection community, South Africa enacted its own progressive piece of domestic refugee legislation in 1998.¹ Regardless of this legislation, the country still finds it difficult to implement refugee law successfully. South Africa signed and ratified both the 1951 United Nations Convention Relating to the Status of Refugees² and the 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa³, in their entirety and committed itself to honour its obligations under international law by enacting the Refugees Act 130 of 1998.⁴ In its international agreements, South Africa has also agreed to the 1967 Protocol Relating to the Status of Refugees and the 1948 United Nations Universal Declaration on Human Rights (UDHR).⁵ The right to seek and enjoy asylum is entrenched in international human rights law, and in particular in Article 14 of the 1948 UDHR.⁶ The 1951 Convention protects people who flee from their country of origin due to a well-founded fear of persecution based on grounds of race, religion, nationality, political opinion or membership of a particular social group.⁷ Despite the provided grounds, South Africa at times still fails to recognise such grounds during an asylum application. On its part, the OAU Refugee Convention broadened the definition in order to include those refugees whose political rights are violated or threatened.

The Refugees Act provides that a person cannot be refused entry or access to South Africa or be forced to leave if he or she complies with the criteria or requirements as laid down in the Act.⁸ However South African officials at the ports of entry sometimes find themselves resorting to pre-

¹ South African Refugees Act 130 of 1998.(Hereafter referred to as the Refugees Act).

² The 1951 United Nations Convention Relating to the Status of Refugees 189 UNTS 150 was adopted on 25 July 1951 in Geneva and entered into force on 22 April 1954. (Hereafter referred to as the 1951 Convention).

³ The 1969 Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa 1001 UNTS 45 was adopted on 10 September 1969 in Addis Ababa and entered into force on 20 June 1974. (Hereafter referred to as the OAU Refugee Convention).

⁴ Refugees Act.

⁵ Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III) of 10. (Hereafter referred to as the UDHR).

⁶ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 516.

⁷ 1951 Convention.

⁸ Refugees Act, section 3.

screening measures and they exercise the discretion that asylum seekers do not have a genuine asylum claim and access to the country is being refused even before an asylum application has been lodged. Section 27 of the Refugees Act provides that refugees and asylum seekers enjoy full protection under the provisions of the Bill of Rights of the South African Constitution under Chapter 2, which entitles them to the same rights as citizens, except for those rights which are specifically reserved for the country's nationals such as the right to vote or be elected for office.⁹ The ability of refugees to successfully integrate into South Africa is severely challenged and compromised.¹⁰ For purposes of this study focus will mainly be on asylum seekers, accepted to be defined as those individuals who are about to or already engaged in the process of applying for asylum. At particular instances reference will be made to refugees as well, refugees are those individuals who has already been granted asylum within the country.

1.2 THE DEFINITION OF THE REFUGEE STATUS DETERMINATION PROCESS

For purposes of this study, the refugee status determination (RSD) process includes the moment at which an asylum seeker enters South Africa until the exhaustion of all remedies such as appeal and review of an asylum application decision. The RSD process will also include a consideration of the principle of *non-refoulement* and the impacts that it has on asylum seekers. By including the principle of *non-refoulement* in the definition and as part of the RSD process, the efficiency and adequacy of the RSD process can be clearly considered especially since the principle is being violated frequently and at some instances without any sufficient ground(s). Although the RSD process consists of multiple aspects, this research will particularly focus on the practices at ports of entry, the confidentiality of the RSD process, the interviews conducted by refugee status determination officers (RSDOs) with asylum seekers, the interpretation and application of law, the nature of decisions reached and its reasons, and gender-based persecution.

Since the study is devoted to the application process for refugee status within South Africa, it will focus on the group of adult asylum seekers, those who are, or is about to engage in the RSD process. Except for a brief discussion of the right to protection which is provided to children in

⁹ The Constitution of the Republic of South Africa, 1996 Chapter 2. (Hereafter referred to as the Constitution).

¹⁰ Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) xxxvi.

terms of the African Charter on the Rights and Welfare of the Child in chapter 2, the study will not include an in depth consideration of the RSD process for children, Although the RSD process provides numerous rights to asylum seekers during the application process, these rights are often violated. Focus will be on the breach of the principle of confidentiality, the incorrect interpretation of concepts such as well-founded fear, persecution and credibility. The nature of decisions reached and the reasons provided therefore will also be considered. The study will also include a consideration of the right to administrative justice, appeal, review and to judicial review. The importance of the right to adequate reasons for reaching a decision and the right of appearance will also be taken into consideration. The study will also include a consideration of the application of the principle of *non-refoulement* to economic migrants present within the country. The violation of the previously mentioned rights leads to consequential human rights violations, therefore the research will further focus on how the right to be free from discrimination and extreme punishment, the right to be free from torture, the right to *non-refoulement* and ultimately the right to life is violated during the application process.

Since the main purpose of the research is to answer the question of whether or not the South African RSD process is legally compliant with its obligations under domestic, regional and international human rights law, by focusing on the previously mentioned aspects of the RSD process it would best determine the answer to such a question. It is particularly during these stages that the most crucial information is being captured in order to establish whether or not a person is eligible to apply for asylum. All of these stages of the RSD process is governed by legislation therefore by considering what is being resorted to in practice it can simultaneously be established whether such practices complies with the international legal framework in order to answer the main research question.

1.3 LITERATURE REVIEW

The central issue that the study will focus on is the challenges associated with upholding the human rights of asylum seekers during the RSD process of South Africa. The implications of these challenges and its impact on the lives of the asylum seekers and refugees will be considered diligently. The challenges that asylum seekers face when they seek sanctuary are in

legal terms challenges to the realisation of human rights, which collectively pose substantial social and humanitarian predicaments.¹¹ As a result of the significance that refugee status holds for an individual and the complex nature of the refugee definition, the assessment of applications for refugee status requires a thorough analysis accompanied by a much needed human rights approach, with regards to the various concepts included in the definition of a refugee.¹² Even though domestic laws and policies should embrace the universal nature of human rights protection without considering an individual's nationality or status, contrary conduct still continue. For instance in South Africa whether people will be granted human rights will depend on their nationality and other related grounds.

South Africa's RSD system is administered by the Department of Home Affairs (DHA).¹³ DHA officials must act within the scope of the Refugees Act and its Regulations.¹⁴ The RSD system is informed by foreign jurisprudence, international norms, guidelines and it is regulated by the requirements of the Promotion of Administrative Justice Act (PAJA)¹⁵, and the South African Constitution. Research on the effectiveness of the administration of the RSD system of South Africa, however, suggests that the majority of RSD decisions are flawed with errors of law, it focus on irrelevant factors, it lacks provision of adequate reasons, and it involves a biased incentive system that encourages the issuing of rejections.¹⁶

In *Kiliko v Minister of Home Affairs* the court held the following:

An asylum seeker remains an illegal foreigner until an asylum seeker permit has been issued. Such a person will be subject to detention, apprehension and deportation in terms of sections 32, 33 and 34 of the Immigration Act. An illegal foreigner may not be employed by anyone as provided for in section 38 and may not receive any training or instruction by any learning institution (section 39).¹⁷

¹¹ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 518.

¹² Khan F 'Well-founded fear' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 35.

¹³ De Jager J 'Refugee status determination in South Africa' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 154.

¹⁴ Refugee Regulations (Forms and Procedures) GR 366 GG21075 of April 2000. (Hereafter referred to as the Refugee Regulations)

¹⁵ Promotion of Administrative Justice Act 3 of 2000.

¹⁶ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection '(2011) 23(3) *IJRL* 458,459.

¹⁷ *Kiliko v Minister of Home Affairs* 2006 (4) 114 (c) para 27.

The fact that illegal foreigners as held above are subjected to detentions and arrests can be argued to be unfair since some of these foreigners would have genuine reasons why they are not in possession of an asylum permit. However, individuals are being subjected to detentions and arrests which are being justified by the illegal presence of foreign nationals in the country.

Legislation ensures confidentiality of the application process.¹⁸ Everyone has the right to privacy which prohibits the disclosure of their communications with officials.¹⁹ All interviews must be held in private in order for an asylum seeker to freely disclose his or her asylum case.²⁰ It has been found that in numerous cases individuals were reluctant to give complete details about their circumstances because other individuals overheard their interviews with RSDOs.²¹ Such circumstances could in all probability adversely affect an applicant's case since insufficient information has been given which consequently deprives an applicant of the right to seek asylum indirectly.

In the cases of *Bula*²² and *Erusmo*²³ it has been held that South Africa's refugee reception officers fail to meet the basic procedural obligations that would ensure fair access to the refugee status determination process.²⁴ The failure of DHA to properly accommodate the large numbers of asylum seekers in South Africa in the formal asylum system has led to asylum seekers being left undocumented for months.²⁵ Such measures constitute a contravention of South Africa's domestic, regional and international obligations. It also leads to the violation of human rights of thousands of asylum seekers.

¹⁸ University of Cape Town: Refugee Rights Unit *Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights* (2012) 6.

¹⁹ The Constitution, section 14.

²⁰ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 49.

²¹ African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 63.

²² *Bula v Minister of Home Affairs* 2012 (4) SA 560 (SCA).

²³ *Erusmo v Minister of Home Affairs* 2012 (4) SA 581 (SCA). The Supreme Court of Appeal concluded that the applicant at numerous occasions attempted to apply for asylum at various refugee reception offices in different cities.

²⁴ Kerfoot W & Schreier T 'Application for asylum: Reception' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 140-141.

²⁵ Kerfoot W & Schreier T 'Application for asylum: Reception' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 141.

In theory the Refugees Act gives effect to gender-based persecution by including gender in the definition of a particular social group, allowing gender-based persecution to be a foundation to seek asylum.²⁶ However situations still persists where such claims are being rejected because gender is being overlooked. Status determination decisions regarding gender-based violence probably deliver the most compelling evidence which points into the direction that the South African refugee reception system fails to provide the protection which it was designed to deliver.²⁷

The principle of *non-refoulement* (the right not to be sent back to one's country of origin or nationality where one may still be at risk of persecution) is the cornerstone of international refugee law and it protects individuals from being returned to their country of origin or nationality where their lives might be at risk because of a fear of persecution or harm as held in Article 31 of the 1951 Convention.²⁸ The Refugees Act also incorporates protection against *refoulement*.

Before returning an individual to a country of origin and in order to avoid the violation of *non-refoulement*, officials have to determine whether there has been durable and lasting change in the country of origin.²⁹ Officials would find themselves making the following findings. That there has been durable, truly effective and substantial political significant change, without any valid country information to support such a claim, or that a peace agreement would secure stability.³⁰ In many instances RSDOs would rely on out-dated information of countries which renders their decisions inappropriate. RSDOs continue to resort to such conduct even though they are obligated to ensure that they stay up to date with recent developments in countries and its circumstances as far as reasonably possible in order to assist them in making appropriate considerations.

²⁶ University of Cape Town: Refugee Rights Unit *Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights* (2012) 4.

²⁷ African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 75.

²⁸ Johnson C 'Failed asylum seekers in South Africa: policy and practice' (2015) 1 *AHMR* 205.

²⁹ African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 70.

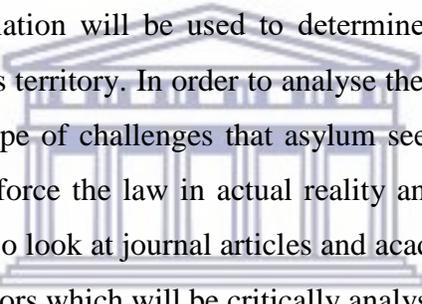
³⁰ African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 71.

1.4 RESEARCH QUESTIONS

The status determination process in South Africa is accompanied with numerous challenges resulting from the ineffective implementation of domestic, regional and international law. The main question that the research will aim to answer is, whether or not the South African refugee status determination process is legally compliant with its obligations under domestic, regional and international human rights law.

1.5 METHODOLOGY

In order to pursue the study, the research will comprise of the following sources to obtain information and data, to substantiate arguments and answering questions posed. Domestic, regional and international legislation will be used to determine South Africa's obligations to asylum seekers present within its territory. In order to analyse the legislative provisions case law will be included to assert the type of challenges that asylum seekers and refugees face, and to determine how courts opt to enforce the law in actual reality and assisting individuals in their difficulties. The research will also look at journal articles and academic textbooks to consider the views and interpretations of authors which will be critically analysed.



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CHAPTER 2: THE INTERNATIONAL AND REGIONAL HUMAN RIGHTS LEGAL FRAMEWORK RELEVANT TO REFUGEE STATUS DETERMINATION

2.1 INTRODUCTION

An asylum seeker is usually defined as a person who has fled his or her country of origin often due to a well-founded fear of persecution on grounds of race, religion, nationality, political opinion or membership of a particular social group³¹ or due to external aggression, occupation, foreign domination or events seriously disturbing public order is compelled to leave his or her place of habitual residence in order to seek refuge in another place outside his or her country.³² The main objective of this chapter is to consider South Africa's obligations in terms of international and regional law that it has towards asylum seekers present within its territory while they are engaged in the RSD process. Such a consideration will include the legal and to a certain extent policy frameworks. The chapter will also, in the context of the RSD process, clarify concepts such as review, gender-based persecution and *non-refoulement*.

2.2 INTERNATIONAL LEGAL FRAMEWORK

With the objective to protect individuals who are subjected to different forms of persecution in their countries of origin, the international legal framework makes provision for such individuals to seek refuge within other countries. The international legal framework contains provisions which, if individuals comply with certain criteria, will serve to provide protection in host countries by enabling them to apply for asylum. Should the compliance with such criteria be present, host countries are obligated to protect these individuals who are considered to be eligible for international protection.

Due to a need to acknowledge and implement basic human rights in order to achieve the protection of people, the UDHR was formulated. One of its provisions which are particularly important to asylum seekers is Article 14 which provides that:

- (a) Everyone has the right to seek and enjoy in other countries asylum from persecution.

³¹ 1951 Convention, Article 1A (2).

³² OAU Refugee Convention, Article 1(2).

- (b) This may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.³³

Since the provisions of the UDHR are applicable to South Africa, the country is obligated to allow foreign individuals to apply for asylum within its territory. The UDHR requires that the right to seek asylum also include the right to enjoy asylum.³⁴ Such a requirement ensures the protection of asylum seekers especially since they are considered to be extremely vulnerable. The vulnerable nature of asylum seekers is owed to the fact that they are foreign nationals who are consequently considered to be unprotected by their countries of origin.³⁵ Regardless of the fact that Article 14(b) does not compel countries to grant asylum and that asylum seekers cannot demand asylum, they should however be enjoying asylum in host countries.³⁶ By allowing asylum seekers to both seek and enjoy asylum would ultimately discharge host countries' obligations to protect asylum seekers even though they are not compelled to grant asylum.

The UDHR, humanitarian law, refugee law, customary international law and international law has led to the adoption of the 1951 Convention which South Africa has ratified. The 1951 Convention is the most fundamental international instrument relating to the protection of foreign nationals which considers a person as a refugee if:

- (1) A person has been considered a refugee under the Arrangements of 12 May 1926 and 30 June 1928, or under the Conventions of 28 October 1933 and 10 February 1938, the Protocol of 14 September 1939 or the Constitution of the International Refugee Organization;
- (2) As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such a fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of habitual residence as a result of such events, is unable or, owing to such a fear, is unwilling to return to it.³⁷

³³ The UDHR, Article 14.

³⁴ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 2.

³⁵ Fortin A 'The meaning of 'protection' in the refugee definition' (2000) 12 *IJRL* 548.

³⁶ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 2.

³⁷ 1951 Convention, Article 1.

One of the grounds for seeking asylum within a host country is that an individual must have suffered some form of persecution in his or her country of origin.³⁸ The 1951 Convention does not provide for a definition of persecution but the UNHCR interpret it to include a threat to life or freedom and other serious human rights violations whether or not intent to cause harm is present.³⁹ According to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status,⁴⁰ individuals may have a well-founded fear of persecution as past victims and as possible future victims.⁴¹ Persecution as such may comprise of a threat to life or freedom and other severe human rights violations including discrimination and extreme punishment,⁴² which means that actual harm which have already occurred is not necessarily required to be present. Therefore even if an individual anticipates that he or she might suffer harm in the future, it would be considered as a form of persecution. The UNHCR is clear that rape and female genital mutilation (FGM) constitutes a form of physical harm which falls under the title of persecution and in addition, the clear inclusion of gender in the definition of membership of a particular social group gives an even clearer basis for identifying rape and FGM as forms of persecution under the provided grounds for asylum.⁴³

As it can be noted in Article 1, the 1951 Convention was originally limited to the scope of persons fleeing events which occurred before 1 January 1951 and only within Europe.⁴⁴ The 1967 Protocol Relating to the Status of Refugees⁴⁵ which is also binding on South Africa had the effect of removing these limitations and gave the 1951 Convention universal coverage while the Convention aims to protect individuals from political or other forms of persecution, such as an

³⁸ Forced Migration Studies Programme Wits University Report *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 24.

³⁹ 1951 Convention, Article 33.

⁴⁰ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV. 1 Reedited Geneva, January 1992. (Hereafter referred to as the UNHCR Handbook).

⁴¹ UNHCR Handbook, para 45.

⁴² UNHCR Handbook para 51-58.

⁴³ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 77.

⁴⁴ 1951 Convention Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) 2.

⁴⁵ '1967 Protocol Relating to the Status of Refugees A/RES/2198 (1966)' available at <http://www.refworld.org/docid/3ae6b3ae4.html> (accessed 17 July 2017).

individual being subjected to torture, cruel or unusual treatment or a risk of being exposed to such treatment.⁴⁶

If an individual is recognised as an asylum seeker, he or she is accepted to be under the protection of the host country, which is obligated to provide such an individual with basic human rights as contained in the 1951 Convention.⁴⁷ The 1951 Convention also prohibits State Parties from penalising foreign nationals if they entered the country illegally or for their presence in the country if they are seeking asylum or are about to do so.⁴⁸ This would mean that if the individual entered the country with the aim of applying for asylum, such an individual should be recognised as an asylum seeker and enjoy the protection of the host country regardless of the fact that the individual has entered the country illegally. Regardless of asylum seekers' right to seek and enjoy asylum, it remains important to appreciate the fact that the 1951 Convention does not obligate State Parties to grant asylum to individuals who do not qualify for refugee status.⁴⁹ This takes into account the provision that an individual will only be considered as a genuine asylum seeker if he or she complies with the definition of a refugee as contained in Article 1 of the 1951 Convention.

Although the 1951 Convention obligates South Africa to provide protection to those individuals who are eligible for refugee status, there are a number of groups that are excluded from enjoying such protection. Article 1C provides that the definition of a refugee does not apply to individuals who voluntarily avail themselves to countries of origin, who have lost nationality but who re-acquired nationality voluntarily, who have acquired nationality and protection of another country and whose circumstances in the country of origin have improved and who can return to the country of origin.⁵⁰ An individual is not allowed to enjoy the protection of two countries at the same time, therefore in order for an individual to enjoy protection of a host country; protection of the country of origin must be absent. Therefore, if an individual voluntarily re-avail him or

⁴⁶ Willie N, Mfubu P 'Responsibility sharing: Towards a unified refugee protection framework in Africa' (2016) 2 *AHMR* 545.

⁴⁷ Jacobsen K 'Refugees and asylum seekers in urban areas: A livelihoods perspective' (2006) 19 *Journal of Refugee Studies* 276.

⁴⁸ 1951 Convention, Article 31(1).

⁴⁹ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 5.

⁵⁰ 1951 Convention, Article 1C.

herself to the protection of his or her country of origin, he or she may not enjoy protection in a host country.

Those individuals who receives assistance from the United Nations⁵¹ and who are recognised as having nationality rights in a host country,⁵² are also excluded from enjoying refugee protection. Article 1E refers to when competent authorities of a country within which an individual has taken up residence recognise that such an individual has the rights and obligations which are attached to the possession of such a country's nationality.⁵³ Individuals are excluded from enjoying protection if there are serious reasons suggesting that an individual has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments; or has committed a serious non-political crime outside the country of refuge prior to his admission to the country as an asylum seeker; or have been guilty of acts contrary to the purposes and principles of the United Nations.⁵⁴ Such individuals are considered to be perpetrators and therefore not in need of protection but who rather have to be brought before a court of law and being sentenced accordingly.

In an attempt to assist and guide government officials involved in the RSD process, the UNHCR Handbook was developed by the United Nations. Even though the UNHCR Handbook lacks the status of law, it is regarded as an authoritative statement of the RSD process.⁵⁵ The UNHCR Handbook breaks down and explains the different parts of the definition of a refugee as set out in the 1951 Convention and the 1967 Protocol. It is clear that in order for State Parties to implement the provisions of the 1951 Convention and the 1967 Protocol, asylum seekers have to be identified, and such identification refers to the RSD process.⁵⁶ However, the UNHCR Handbook does not indicate the kind of procedures that has to be adopted for the RSD process; therefore it is up to the State Parties to determine an effective and appropriate procedure while having regard for its respective constitutional and administrative structures.⁵⁷ The UNHCR however makes provision for procedural standards in its Procedural Standards for Refugee Status Determination

⁵¹ 1951 Convention, Article 1D.

⁵² 1951 Convention, Article 1E.

⁵³ 1951 Convention, Article 1E.

⁵⁴ 1951 Convention, Article 1F.

⁵⁵ *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T). See also *Van Garderen NO v The Refugee Appeal Board* (2007) case no 30720/2006.

⁵⁶ UNHCR Handbook, para 189.

⁵⁷ UNHCR Handbook, para 189.

under the UNHCR's Mandate. The UNHCR require that an adequate standard should be present at the reception of asylum seekers within a host country, that applicants be registered for the RSD process, that asylum seekers be issued with the required documents, that interviews be scheduled and conducted, that legal representation be present where it is required and possible, RSDOs must prepare written RSD decisions, provision must be made for the appeal and review of decisions and to inform applicants of the outcomes of their applications and their right to challenge an unsuccessful outcome.⁵⁸ Confidentiality should be present at all times during the RSD process and the RSD procedures must be considered in a gender and age sensitive manner.⁵⁹ Recent evaluations indicate that these standards have not been achieved consistently and a need to adopt a more harmonised approach to the development and implementation of the UNHCR's RSD procedures to enhance their quality, fairness and integrity has been emphasised.⁶⁰

The UNHCR Handbook provides that those individuals who are compelled to leave their country of origin because of international or armed conflict are not usually considered to be asylum seekers; however exceptions are made for asylum seekers fleeing ethnic or religious conflicts.⁶¹ Even though the 1951 Convention do not specifically provide for gender-based persecution as a ground for asylum, gender refers to the social perceptions of roles, attributes and behaviour that society regard as appropriate for men and women.⁶² The only manner in which a gender-based claim can be dealt with is under membership of a particular social group.⁶³

The 1951 Convention contains numerous safeguards against the expulsion of asylum seekers; therefore the principle of *non-refoulement* is so fundamental that it does not permit any reservations or derogations to it.⁶⁴ The principle of *non-refoulement*⁶⁵ prevents a host country from returning an asylum seeker against his or her will in any manner to a territory where he or

⁵⁸ Procedural Standards for Refugee Status Determination under UNHCR's Mandate 3.

⁵⁹ Procedural Standards for Refugee Status Determination under UNHCR's Mandate 3.

⁶⁰ Procedural Standards for Refugee Status Determination under UNHCR's Mandate 2.

⁶¹ UNHCR Handbook, para 164.

⁶² World Health Organization 'Gender, women and health' available at <http://www.who.int/qender/whatisgender/en/> (accessed 20 November 2017).

⁶³ UNHCR 'Guidance notes on refugee claims relating to sexual orientation and gender identity' available at <http://www.unhcr.org/refworld/docid/48abd5660.html> (accessed 20 November 2017).

⁶⁴ 1951 Convention Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) 3.

⁶⁵ 1951 Convention, Article 33(1).

she fears threats to life and freedom.⁶⁶ Such territory does not only refer to an asylum seeker's country of origin but also to any other country where a person has reason to fear threats of persecution.⁶⁷ The principle of *non-refoulement* does not entail the right to be granted asylum in a host country.⁶⁸ It merely means that if a host country does not approve an asylum application, the country must adopt a measure which does not result in the return of an asylum seeker, whether directly or indirectly, to a place where his or her life or freedom might be in danger based on grounds of race, nationality, religion, membership of a particular social group or political opinion.⁶⁹

However, regardless of the prohibition of returning an asylum seeker to a possible threatening territory, there are exceptions to the principle of *non-refoulement*. An asylum seeker may be returned to his or her country of origin or any other threatening territory if there are reasonable grounds upon which such an individual is considered as a danger to the security of the country within which he or she is present, or if he or she has been convicted by a final judgment of a particularly serious crime and constituting a danger to the community of the host country.⁷⁰ It however remains important to acknowledge the fact that even if an individual satisfy the criteria of a person not regarded as eligible for the principle of *non-refoulement* in terms of Article 33(2), the return of such an individual will still be prohibited if such a return would place an asylum seeker's life and freedom under threat and exposing him or her to a substantial risk of torture.

Seeking and providing durable solutions, also known as shared responsibility between State Parties which ends the sequence of displacement and *refoulement*, and allowing refugees to enjoy normal lives, is essential elements in international protection.⁷¹ Resettlement, voluntary repatriation to the country of origin, and local integration in the host country granting asylum all

⁶⁶ 1951 Convention Introductory note by the Office of the United Nations High Commissioner for Refugees (UNHCR) 3.

⁶⁷ UNHCR 'Note on non-refoulement (EC/SCP/2), 1997' available at <http://www.refworld.org/docid/438c6d972.html> (accessed 20 November 2017). See also Weis P *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (1995) 341.

⁶⁸ Weis P *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis* (1995) 342.

⁶⁹ Lauterpacht E, Bethlehem D 'The scope and content of the principle of *non-refoulement*: Opinion' in Feller E, Türk V and Nicholson F (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) 76.

⁷⁰ 1951 Convention, Article 33(2).

⁷¹ UNHCR 'Frequently asked questions about resettlement February (2017)' available at www.unhcr.org/fregeuntly-asked-questions.html (accessed 07 February 2018).

forms part of durable solutions.⁷² Resettlement refers to the process which involves the selection and transfer of refugees from one host country where they have sought protection to a third country which have agreed to admit them as refugees with permanent residence status.⁷³ In comparison with resettlement and local integration, voluntary repatriation is considered as the most desirable durable solution for asylum seekers and is defined as the return of refugees and asylum seekers to their countries of origin based upon a free and informed decision, in and to conditions of safety and dignity, and with the full restoration of national protection.⁷⁴ Local integration involves the ability of asylum seekers and refugees to adapt to the society of the host country without having to sacrifice their own cultural identities, and it requires that the communities be welcoming and responsive to asylum seekers and that public institutions are able to satisfy the needs of a diverse population.⁷⁵ It is important that all of these durable solutions be considered by host countries, to determine the most appropriate one to be implemented in respective circumstances, in order to assist asylum seekers with international protection and to avoid the implementation of *refoulement* of asylum seekers.

2.3 THE REGIONAL LEGAL FRAMEWORK

On the regional level the OAU Convention to which South Africa is a State Party, is the most important instrument relating to matters involving asylum seekers.⁷⁶ The OAU Convention require State Parties to grant asylum by emphasising that they should engage in activities that are consistent with their respective legislation to receive asylum seekers and to secure the settlement of those asylum seekers who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.⁷⁷ The rights of asylum seekers have further been strengthened

⁷² UNHCR 'Frequently asked questions about resettlement February (2017)' available at www.unhcr.org/fregeuntly-asked-questions.html (accessed 07 February 2018).

⁷³ UNHCR's 'Resettlement handbook' available at www.unhcr.org/resettlementhandbook (accessed 07 February 2018).

⁷⁴ Carciotto S 'Angolan refugees in South Africa: alternatives to permanent repatriation?' (2016) 2 *AHMR* 363.

⁷⁵ 'Global consultations on international protection' EC/GC/02/5 available at <http://www.refworl.org/docid/3d62695d4.html> (accessed 07 February 2018).

⁷⁶ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 7.

⁷⁷ OAU Refugee Convention, Article 2, 2(1).

by the African Charter on Human and Peoples' Rights⁷⁸ (ACHPR) which South Africa also adopted. The 1951 Convention including its definition of a refugee does not adequately, if at all, take into account individuals who flee war or generalised violence.⁷⁹ The definition has been criticised to be too narrow and that it did not capture the situation that many African asylum seekers face at present times. The 1951 Convention's definition of a refugee reflects the experiences of the preceding thirty years, especially during the Second World War and regardless of the improvements of the 1967 Protocol, the definition remains relatively narrow.⁸⁰ As a result of the inadequate definition of a refugee, an increasing share of current conflicts and persecutions are not even covered by the 1951 Convention.⁸¹ Owing to the restrictive definition of a refugee in the 1951 Convention the drafters of the OAU Convention opted for a broader definition of a refugee in order to present a definition that include a consideration of the actual situation that asylum seekers face. South Africa specifically adopted the OAU Convention to fill the gaps in international refugee protection.⁸²

The OAU Convention broadened the definition of a refugee and it takes into account the situations of asylum seekers that were, at that time, unique to Africa.⁸³ The OAU Convention aimed to provide durable solutions to protect and assist the high numbers of internally displaced people because of on-going conflict and to provide durable solutions to the African refugee problem.⁸⁴ The OAU Refugee Convention is substantially similar to the definition of a refugee in the 1951 Convention. In addition to the 1951 Convention's definition in Article 1A (2) as it had been referred to previously, Article 1(2) of the OAU Convention provides that the term refugee shall apply to:

(2) Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or whole of his country of origin or nationality, is compelled to leave

⁷⁸ African Charter on Human and Peoples' Rights CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982). (Hereafter referred to as the ACHPR).

⁷⁹ Willie N, Mfubu P 'Responsibility sharing: Towards a unified refugee protection framework in Africa' (2016) 2 *AHMR* 545.

⁸⁰ Quinn E 'The Refugee Convention sixty years on: relevant or redundant?' (2011) 68 *Working Notes* 20.

⁸¹ Quinn E 'The Refugee Convention sixty years on: relevant or redundant?' (2011) 68 *Working Notes* 20.

⁸² Okoth-Obbo G 'Thirty years on: A legal review of the 1969 OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa' (2001) 20 *Refugee Survey Quarterly* 79.

⁸³ Willie N, Mfubu P 'Responsibility sharing: Towards a unified refugee protection framework in Africa' (2016) 2 *AHMR* 545.

⁸⁴ Willie N, Mfubu P 'Responsibility sharing: Towards a unified refugee protection framework in Africa' (2016) 2 *AHMR* 545.

his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality.⁸⁵

After incorporating Article 1A(2) of the 1951 Convention in the definition of a refugee the OAU Convention took the definition further by including more grounds which includes those individuals who flee their countries of origin because of general instability, in order to broaden the scope of people who may be recognised as genuine asylum seekers. Since individuals flee their countries of origin especially due to circumstances of conflict, the RSD process is based on objective evidence and information on events within the country of origin.⁸⁶ Such an approach enhances the chances of individuals qualifying for refugee status since it takes into account the overall circumstances within host countries. However, if no such evidence is available for consideration by South Africa, this could be misinterpreted that the country is at peace and that no conflict of any kind exist. The OAU Convention was enacted for host countries in order to set a standard for the treatment of asylum seekers within its territories and it does not address events which occurred in the countries of origin.⁸⁷ States themselves have the primary responsibility to ensure the protection of its nationals within their own country or in second or third countries in which they are forced to seek refuge, therefore it is obvious that those individuals who are displaced but still in their home countries (internally displaced people) are not protected by the OAU Convention, since it only cover asylum seekers and refugees within Africa.⁸⁸ There is however other instruments which protect internally displaced people such as the Kampala Convention, formally known as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa⁸⁹ which came into force in 2012.

On its part, the ACHPR provides that every individual has the right, when persecuted, to seek and obtain asylum in other countries in accordance with the laws of those countries and international conventions⁹⁰. The ACHPR also place an obligation on a host country such as

⁸⁵ OAU Refugee Convention, Article 1(2).

⁸⁶ Willie N, Mfubu P 'Responsibility sharing: Towards a unified refugee protection framework in Africa' (2016) 2 *AHMR* 545.

⁸⁷ Okello JOM 'The 1969 OAU Convention and the continuing challenge for the African Union' (2014) 48 *Forced Migration Review* 70.

⁸⁸ Report from the UNHCR *OAU Convention remains a key plank of refugee protection in Africa after 40 years* (2009).

⁸⁹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) Date of Adoption: 23 October 2009. (Hereafter referred to as the Kampala Convention).

⁹⁰ ACHPR, Article 12(3).

South Africa to ensure that asylum seekers enjoy the right of asylum but also to ensure that they do not take part in subversive activities against their countries of origin or any other State Party to the ACHPR.⁹¹ It can be noted that distinct from provisions previously mentioned, that the ACHPR do not only require State Parties to provide asylum seekers an opportunity to seek and enjoy asylum but that States are also obligated to ensure the protection of other countries by preventing asylum seekers from engaging in subversive activities.

The African Charter on the Rights and Welfare of the Child (ACRWC)⁹² as another regional instrument also guarantees the protection of unaccompanied and separated foreign children who are in need of protection. The ACRWC sets out the rights of children, with emphasis particularly placed on the universal norms and principles for the status and protection of children, with non-discrimination and the best interest of the child being supreme.⁹³ Similarly the ACRWC also provides for family tracing and the reunification of the child with his or her family and should it be impossible whether permanently or temporarily, that child will be entitled to the same rights as the national children of a host country.⁹⁴ The ACRWC also provides that special protection be provided to secure the rights of unaccompanied, undocumented foreign children.⁹⁵ Since the RSD process of children will not be included in the research, this brief consideration of the ACRWC will suffice for the purposes of taking into account an instrument which guarantees the right of children to protection which ultimately means that these previously mentioned children have the right to apply for asylum.

Internally displaced people have not yet crossed an international border to find safety, unlike refugees; internally displaced people are fleeing from their homes but within their own countries.⁹⁶ Internally displaced people are not considered as refugees and asylum seekers since they continue to enjoy the protection of their governments. However there are instruments such as the Kampala Convention which is the first international treaty to address the matter of

⁹¹ ACHPR, Article 23(2).

⁹² Organization of African Unity, African Charter on the Rights and Welfare of the Child, 11 July 1990, CAB/LEG/24.9/49 (1990). (Hereafter referred to as the ACRWC).

⁹³ Schreier T University of Cape Town: Refugee Rights Unit *Critical Challenges to Protecting Unaccompanied and Separated Foreign Children in Western Cape: Lessons Learned at the UCT Refugee Rights Unit* (2011) 7.

⁹⁴ ACRWC, Article 23(3).

⁹⁵ ACRWC, Article 25.

⁹⁶ UNHCR 'Internally displaced people' www.unhcr.org/internally-displaced-people.html (accessed 08 February 2018).

protection and assistance of internally displaced people. The Kampala Convention builds on the 1998 Guiding Principles on Internal Displacement,⁹⁷ which address the rights and needs of internally displaced people at every stage from the prevention to the resolution of displacement, and have been widely endorsed by institutions such as the General Assembly, the Security Council and the Human Rights Council.⁹⁸ Since the Kampala Convention together with its Guiding Principles are mainly concerned with the protection of internally displaced people by preventing and ending displacement it will not be considered throughout the research which particularly focus on asylum seekers and the RSD process within South Africa.

2.4 ADDITIONAL HUMAN RIGHTS ISSUES RELEVANT TO THE STATUS DETERMINATION PROCESS

2.4.1 The right to review

Other than an asylum application being rejected as unfounded, it could also be rejected as manifestly unfounded, which is when an asylum application is lodged on grounds not included in the refugee definition such as economic related reasons. Such an application is often referred to as an abusive or fraudulent asylum application. Manifestly unfounded asylum applications are automatically sent to the Standing Committee for Refugee Affairs (SCRA) in order to be reviewed.⁹⁹ Although an applicant does not appear before the SCRA, he or she has the right to make written representations within fourteen days, unless the SCRA invites an applicant to appear before it.¹⁰⁰ The written representations consist of reasons explaining why an applicant fled from his or her country of origin or nationality.

⁹⁷ E.S.C. Res. 1998/53, U.N. Doc. E/CN.4/1998/53/Add.2, Annex, available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/d2e008c61b70263ec125661e0036f36e> (accessed 08 February 2018).

⁹⁸ Asplet M, Bradley M 'Strengthened protection for internally displaced persons in Africa: The Kampala Convention comes into force (2012)' available at <http://www.brookings.edu/articles/strengthened-protection-for-internally-displaced--persons--in--South-Africa-the-Kampala-convention-comes-into-force/> (accessed 08 February 2018).

⁹⁹ Refugees Act, section 25(1).

¹⁰⁰ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 180.

The SCRA must carry out its functions without any bias, while acting completely independent.¹⁰¹ It is required that the members of the SCRA be appointed for a period of five years and there is a limitation on the Minister's authority to remove such members from office in order to further support the independence of the SCRA.¹⁰² Despite the requirement of independence, DHA officials continue to be appointed as members of the SCRA.¹⁰³ In *Watchenuka v Minister of Home Affairs*¹⁰⁴ it was held that a committee consisting of employees of the DHA can hardly be a source of independent advice, or constitute an independent review tribunal.¹⁰⁵

The Refugees Act authorises the SCRA to review a decision of an asylum application that is considered as manifestly unfounded under section 24(3) (b).¹⁰⁶ The Refugees Act provides that an abusive asylum application is an asylum application made:

- (a) With the purpose of defeating or evading criminal or civil proceedings or consequences thereof; or
- (b) After the refusal of one or more prior applications without any substantial changes having occurred in the applicant's personal circumstances or in the situation of his or her country of origin.¹⁰⁷

A fraudulent application is considered as an application based without reasonable cause of facts, informal documents or representations which the applicant knows to be false and which false information, documents or representations are intended to materially affect the outcome of the application.¹⁰⁸ For an automatic review to be facilitated, a RSDO have to provide written reasons for his or her decision, with the record of the proceedings to the SCRA within ten working days from the day on which an asylum application was rejected as manifestly unfounded.¹⁰⁹ After receiving the reasons for a rejection in terms of section 24(3) (b) the applicant will be given a notice stating that before a decision is reached, the SCRA may-

- (a) Invite the UNHCR representative to make oral or written representations;

¹⁰¹ Refugees Act, section 9(2).

¹⁰² Refugees Amendment Act 33 of 2008, section 16 and 17. However instead of appointing members in terms of the Refugees Act, they are currently appointed on contract.

¹⁰³ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 176.

¹⁰⁴ *Watchenuka v Minister of Home Affairs* 2003(1) SA 619(C).

¹⁰⁵ *Watchenuka v Minister of Home Affairs* 2003(1) SA 619(C) 626F-627G.

¹⁰⁶ Refugees Act, section 25(1).

¹⁰⁷ Refugees Act, section 1(i).

¹⁰⁸ Refugees Act, section 1(xi).

¹⁰⁹ Refugees Act, section 24(4)(b).

- (b) Request the attendance of any person who is in a position to provide it with information relevant to the matter being dealt with;
- (c) On its own accord make such further enquiry and investigation in the matter being dealt with as it may deem appropriate; and
- (d) Request the applicant to appear before it to provide such other information as it deem necessary.¹¹⁰

While reviewing an asylum application decision, the SCRA may confirm or set aside the decision made in terms of the section 24(3) (b).¹¹¹ Regulation 13(2) on its part provides that when a decision is set aside, the SCRA will send it back to the RSDO accompanied with direction for further action.¹¹²

2.4.2 Gender-based persecution as a ground for asylum

States have both a negative obligation towards asylum seekers to refrain from violating their human rights and a positive obligation to respect and protect such rights.¹¹³ Gender-related persecution has no legal meaning *per se* but it is used to include a variety of claims in which gender is a relevant consideration in the determination of refugee status.¹¹⁴ However, the concept remains vague and it can cover a range of violations against both male and female applicants.¹¹⁵ The development of gender asylum law requires a human rights framework.¹¹⁶ From a human rights perspective, although the 1951 Convention does not specifically exclude women's experiences, it indirectly does so through its definition of a refugee which fails to specifically mention gender as a ground for an asylum application; and due to the failure of RSDOs to

¹¹⁰ Refugees Act, section 25(2).

¹¹¹ Refugees Act, section 25(3)(a).

¹¹² Refugee Regulations, 13(2).

¹¹³ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 16.

¹¹⁴ UNHCR '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' http://www.justice.gov/eoir/vll/benchbook/resources/unhcr_guidelines_gender.pdf (accessed 11 April 2018).

¹¹⁵ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 18.

¹¹⁶ Anker DE 'Refugee law, gender, and the human rights paradigm' (2002) *Harvard Human Rights Journal* 15.

include the gender-related claims of women into the interpretation of the grounds contained in the 1951 Convention.¹¹⁷

During recent years there has been prominent progress on issues of gender and human rights in standard-setting and to a certain degree application of such standards through international and domestic legislation, jurisprudence and in institutional programming as well as development.¹¹⁸ Some international and regional human rights bodies now go further than merely including women into vulnerable groups by integrating women's experiences and perspectives into recommendations for structural changes which are required to provide the full enjoyment of human rights by women and girls.¹¹⁹ However, although women are the most vulnerable group pertaining to gender-based persecution, it is important to note that men are also victims of gender-based persecution.

Gender-based persecution can take different forms, including sexual violence and having transgressed to social mores of society.¹²⁰ The UNHCR and the Parliamentary Assembly of the European Council have requested States to recognise the gender dimension of asylum claims.¹²¹ In theory the Refugees Act gives effect thereto since South Africa became the first country to clearly provide that gender-based persecution which was initially included under membership of a particular social group is a sufficient ground for an asylum claim.¹²² Due to amendments specific provision is now made for gender as a ground for claiming asylum. A national study done a few years ago considered the extent to which South Africa complied with its aim of achieving a gender-equal asylum system and the type of claims that were lodged on the ground of gender-based persecution.¹²³ The research established that RSDOs were unsure of what

¹¹⁷ Kelly N 'Gender related persecution: Assessing the asylum claims of women' (1993) 26(3) *International Law Journal*.

¹¹⁸ Fariior S 'Human rights advocacy on gender issues: Challenges and opportunities' (2009) *Journal of Human Rights Practice* 83.

¹¹⁹ Fariior S 'Human rights advocacy on gender issues: Challenges and opportunities' (2009) *Journal of Human Rights Practice* 83.

¹²⁰ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 74.

¹²¹ UNHCR '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' http://www.justice.gov/eoir/vll/benchbook/resources/unhcr_guidelines_gender.pdf (accessed 11 April 2018).

¹²² Refugees Act, section 3(a).

¹²³ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017).

amounts to gender-based persecution and the inclusion of gender into the grounds of asylum has been held to be the method which will reduce uncertainty and increase the status of gender in the Refugees Act, leading to more recognition of gender-based persecution cases.¹²⁴ Although such progress and competency is claimed in theory, whether that is indeed the case in reality is a matter of great controversy.

Status determination decisions regarding gender-based violence probably deliver the most compelling evidence that the South African refugee reception system fails to provide the protection which it was designed to deliver and it also at times overlooks other forms of gender-based persecution.¹²⁵ Since the RSDO is critical about the preservation of the main objective of the asylum system which is to provide the necessary protection, it should be able to consider the matter in a gender sensitive manner.¹²⁶ Regardless thereof there has been a situation where a Kenyan woman who fled FGM which were imposed on her because of her membership to a particular tribe, her asylum claim was rejected and the RSDO failed to take into account that the applicant were subjected to the custom as a female and that this formed the basis of being persecuted as a member of a particular social group.¹²⁷

Rejecting such a claim cannot be substantiated with any sufficient reason since the claim can be based on both gender-based persecution and membership of a particular tribe. The Refugees Act specifically provides for tribe as a ground of persecution, which should be sufficient as a ground for an asylum claim. Therefore, should a RSDO argue that he or she rejected the claim based on gender-based persecution; membership of a particular tribe still remain as an additional ground. It can be argued that the RSDO had no valid reason for the rejection of the claim and that he or she discriminated against the applicant based on gender. The review of gender-based claims

¹²⁴ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017).

¹²⁵ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 75.

¹²⁶ Moodley Y University of Cape Town: Refugee Rights Unit *Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights* (2012) 7. South Africa experiences great legislation implementation challenges when it comes to status determination claims, especially of those fleeing based on the grounds of sexual orientation.

¹²⁷ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 74, 76-77 RSDOs are unsuccessful in registering a series of abuses which target women. These abuses mostly involved rape and sexual assault which is used both as a method of individual persecution and as a weapon of war.

brought to light that RSDOs continuously fail to acknowledge grounds of gender-based persecution which entitles applicants to refugee status.¹²⁸ RSDOs are required to be well acquainted with the law, be in a position to apply it positively and to be well aware of updated information of countries of origin at all times,¹²⁹ in order to make appropriate conclusions. However, decision making by RSDOs about gender-based persecution claims were found to be erratic and varying, which were exacerbated by reliance on country reports which usually contained insufficient information on gender-based persecution.¹³⁰

Gender-based persecution consists of two facets, one being gender-related persecution which is when a woman is persecuted as a woman and gender-specific persecution is when a woman is persecuted because she is a woman. Research have established that RSDOs were often unaware of the existence of the UNHCR guidelines on handling gender-based persecution claims and at numerous occasions RSDOs lacks knowledge of what exactly amounts to gender-based persecution.¹³¹ If RSDOs do not know what amounts to gender-based persecution, it becomes even easier to overlook thousands of genuine gender-based asylum claims and a failure on the part of the host country to protect such individuals. Instead of considering women's claims individually, RSDOs resorts to decision making which is based on whether a country was considered to be safe or unsafe.¹³² South Africa's asylum system continue to consider gendered harm as mainly personal and official distinction between when war arise and peace begins remains to be defined as gendered political or personal.¹³³ When gendered harm (gender-based persecution) is personal it is accepted that a country is at peace and when it is political, a country

¹²⁸ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 79.

¹²⁹ Moodley Y University of Cape Town: *Refugee Rights Unit Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights* (2012) 4.

¹³⁰ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017).

¹³¹ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017). Not being aware of an extremely significant instrument aimed at assisting state parties in improving their asylum system, specifically the aspects related to gender-related persecution can hold serious implications for a country's asylum system. Refugee Status Determination Officers who lacks knowledge of what exactly constitutes gender-based persecution is also severely problematic since it could serve as a point of departure for misconduct which will follow.

¹³² Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017).

¹³³ Middleton J *Barriers to Protection: Gender-Related Persecution and Asylum in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2009) 38.

would be considered to be at war. This would suggest that if a country is not at war it would be considered to be safe regardless of the fact that even though a country is not at actual war there are multiple on-going events which continue to put the lives of many individuals at risk.

Different forms of gender-based persecution are not treated the same and frequently no clear reasons are therefore provided, for instance cases of FGM are at most occasions unsuccessful while cases of rape are only successful if it occurred during war or by armed forces.¹³⁴ A distinction of whether rape occurred during war or not creates and perpetuates the myth that persecutory rape can only happen during war, and as a consequence the majority of rape cases are being denied and made out to be insignificant.¹³⁵ RSDOs resort to such classifications of rape even though the UNHCR is clear that rape constitutes a form of physical harm which falls under the title of persecution and in addition, the clear inclusion of gender in the definition of a particular social group in South Africa's Refugees Act gives an even clearer basis for identifying rape as persecution under the provided grounds for asylum.¹³⁶ Domestic violence and sexual orientation as a basis for asylum is constantly denied and reasons provided therefore reveal that RSDOs and the Refugee Appeal Board (RAB) have a tendency to consider domestic violence and rape as normal and other types of violence as more unfamiliar.¹³⁷

The UNHCR 2012 Guidelines¹³⁸ provides that interviewers and those making decisions are encouraged to be objective and non-judgmental.¹³⁹ However interviews with asylum seekers establish that the interviewing process did not produce an environment for them to feel completely free to discuss gender-based persecution, many women did not have an opportunity to have an interview in private, and they felt ashamed to discuss Gender-Based Violence (GBV)

¹³⁴ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017).

¹³⁵ Lonsway KA, Fitzgerald LF 'Rape Myths' (1994) available at <https://www.journals.sagepub.com> (accessed 17 July 2017).

¹³⁶ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 77.

¹³⁷ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017).

¹³⁸ UNHCR 'Guidelines on international protection No. 9: Claims to refugee status based on sexual orientation and/or gender identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/12/09 23 October 2012' available at <http://www.refworld.org/docid/50348afc2.html> (accessed 17 July 2017). (Hereafter referred to as the UNHCR 2012 Guidelines)

¹³⁹ UNHCR 2012 Guidelines, para 60 (ii)(iii).

in public especially since RSDOs considered GBV as normal.¹⁴⁰ If RSDOs consider gender-based violence as normal, it is clearly not considered as a crime, which will render it impossible to protect such victims. Women seem to be suffering great inequality as opposed to men when an asylum claim is considered since many rules and formalities put in place, are not implemented adequately. Many individuals do not trust interpreters to keep the information which they provide confidential and they fear that such information would be relayed to members of their communities and that they would be stigmatised; a great number of individuals also do not even know that GBV is a ground for an asylum application and therefore they leave information thereof out during interviews since they consider it irrelevant.¹⁴¹ Despite improvements in the recognition of gender-based persecution, international refugee law is still far from achieving an adequate recognition of specificity of women's experiences of persecution.¹⁴² Regardless of the multiple challenges faced by the asylum system, RSDOs portrays a strong will to understand gender-based persecution better and to consider such claims more fairly.¹⁴³

Even though women are persecuted for the same reasons as men, women's experiences are often different from those of men.¹⁴⁴ The UNHCR motivates State Parties to ensure that their asylum application legislation and procedures are sensitive, therefore South Africa were the first developing country to include gender-based persecution as a ground for asylum and distinguished itself as a country committed to women's rights and gender-equality.¹⁴⁵ However as in the past, DHA are still considered to be characterised by arbitrary and administrative incompetence and uninformed decision making.¹⁴⁶ It has been found that DHA officials harass women if they do not have proper documentation, even if they were not informed of what

¹⁴⁰ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017).

¹⁴¹ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017).

¹⁴² Krivenko EY 'Muslim women's claims to refugee status within the context of the child custody upon divorce under Islamic law' (2010) 22 *IJRL* 49.

¹⁴³ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 17 July 2017) Measures were also implemented to make the asylum system one which is more equitable, such as ensuring that pregnant women or women with young children be assisted first or wait in a separate area which is more suitable to their needs; these positive initiations are all aimed at achieving a more equitable system.

¹⁴⁴ Kirk L 'International refugee law and human rights' available at <https://www.iarlj.org.za> (accessed 17 July 2017).

¹⁴⁵ Memela S *Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area* (unpublished LLM thesis, School of Agriculture, Earth and Environmental Sciences, 2014) 32.

¹⁴⁶ Landau LB and Jacobsen K 'Refugees in the New Johannesburg' (2004) 19 *Forced Migration Review* 44-46.

documentation were exactly required of them.¹⁴⁷ Officials usually assumed that husbands were accompanied by their wives and that they have had the same experiences,¹⁴⁸ officials would fail to consider women's claims separately and to acknowledge the fact that they faced diverse persecution and are entitled to individual refugee status. Family refugee status would render women completely dependent on their husbands which increase the domestic violence rate,¹⁴⁹ leaving women being subjected to such violence with no chance of escape since they are in need of refugee status.

Numerous corruption activities are being resorted to by DHA officials, such as files going missing and officials accepting bribes in order to grant women legal status.¹⁵⁰ Regardless of DHA implementing internal anti-corruption programmes to address corruption, little progress has been made. Female asylum seekers with gender-based persecution as a ground for asylum were often rejected,¹⁵¹ even though the International Criminal Court (ICC) and South African law recognises that gender-based claims includes sexual slavery, rape, forced pregnancy and other different forms of sexual violence.¹⁵² An urgent need exist for training programmes to ensure that DHA staff understands refugee legislation,¹⁵³ in order to do away with misinterpretations and misapplications leading to numerous human rights violations of asylum seekers.

The 1991 UNHCR Guidelines on the Protection of Refugee Women,¹⁵⁴ which aims to relief the challenges that women refugees face, defined women refugees (including asylum seekers) as a

¹⁴⁷ Memela S *Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area* (unpublished LLM thesis, School of Agriculture, Earth and Environmental Sciences, 2014) 38.

¹⁴⁸ Valji N, De la Hunt A and Moffett H 'Where are the women? Gender discrimination in refugee policies and practice' (2003) 55 *Agenda* 61.

¹⁴⁹ Memela S *Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area* (unpublished LLM thesis, School of Agriculture, Earth and Environmental Sciences, 2014) 38.

¹⁵⁰ Sigsworth R, Ngwane C and Pino A 'The gendered nature of xenophobia in South Africa' available at www.csvr.org.za/publications/1576-the-gendered-nature-of-xenophobia-in-south-africa (accessed 17 July 2017).

¹⁵¹ Middleton J *Barriers to Protection: Gender-Related Persecution and Asylum in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2009)32.

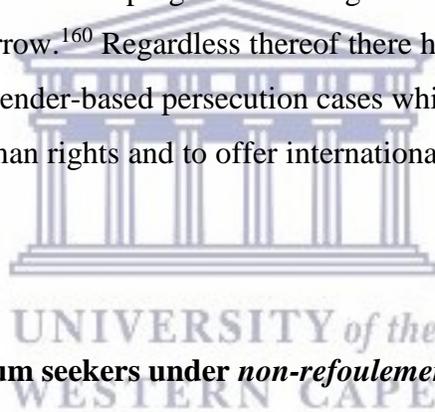
¹⁵² Valji N, De la Hunt A and Moffett H 'Where are the women? Gender discrimination in refugee policies and practice' (2003) 55 *Agenda* 61.

¹⁵³ Davids YD, Lefko-Everett K and Williams V 'The quality of migration services delivery in South Africa' in Crush J (ed) *Southern African Migration Project* (2005) available at <http://www.africaportal.org/documents> (accessed 08 February 2018).

¹⁵⁴ UNHCR 'Guidelines on protection of refugee women 1991' available at <http://www.refworld.org/docid/3ae6b9910.html> (accessed 17 July 2017).

vulnerable group whose physical security were at risk during and after their journey to a host country.¹⁵⁵ Therefore it aimed to achieve the protection of women asylum seekers/refugees by promoting the allocation of resources and the use of appropriate strategies to ensure access to equitable protection and assistance and that specific problems that they face would be adequately addressed.¹⁵⁶ An application for asylum by women is important for their protection and assistance; however they face great difficulties as soon as they reveal gender-based persecution as a ground for an asylum claim.¹⁵⁷ Even though gender-based persecution is understood as a possible ground for asylum, the manner in which decisions are made is frequently arbitrary and erratic.¹⁵⁸ Inadequate decision making by DHA officials are primarily owed to reasons such as lack of training and South African authorities failing to provide clear guidelines to asylum officials on gender-related persecution.¹⁵⁹

Although South African refugee law is progressive and generous, the implementation thereof appears to be restrictive and narrow.¹⁶⁰ Regardless thereof there have been significant changes in international jurisprudence on gender-based persecution cases which South Africa has to adopt in order to keep on promoting human rights and to offer international protection to those in genuine need thereof.¹⁶¹



2.4.3 The duty to protect asylum seekers under *non-refoulement*

Refoulement of an asylum seeker can either be directly or indirectly. It is considered as direct when an asylum seeker is deported to his or her country of origin or nationality, and indirectly

¹⁵⁵ Memela S *Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area* (unpublished LLM thesis, School of Agriculture, Earth and Environmental Sciences, 2014) 26.

¹⁵⁶ Kirk L 'International Refugee Law and Human Rights' available at <https://www.iarlj.org.za> (accessed 17 July 2017).

¹⁵⁷ Memela S *Vulnerabilities of African Female Refugees in South Africa: A Case Study of Albert Park Area* (unpublished LLM thesis, School of Agriculture, Earth and Environmental Sciences, 2014) 26.

¹⁵⁸ Middleton J *Barriers to Protection: Gender-Related Persecution and Asylum in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2009) 32.

¹⁵⁹ Middleton J *Barriers to Protection: Gender-Related Persecution and Asylum in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2009) 32.

¹⁶⁰ Government Communication and Information System 'South African government information' available at <http://www.info.gov.za/documents/constitution/index.htm> (accessed 26 July 2017).

¹⁶¹ Moodley Y University of Cape Town: Refugee Rights Unit *Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights* (2012) 4.

when receiving individuals in an undesirable environment which forces them to return to their countries of origin.¹⁶² Since Article 33 of the 1951 Convention formally codified the principle of *non-refoulement*, South Africa undertook an obligation to ensure that it is also prevented to relocate individuals to countries other than their countries of origin if they would be exposed to serious harm and threats which puts their lives at risk.¹⁶³ The duty to uphold the principle of *non-refoulement* ensures the dignity and integrity of individuals who are at risk of persecution.¹⁶⁴ Before implementing the principle there is a need to consider the facts and circumstances of each individual before reaching a conclusion.¹⁶⁵

The OAU Refugee Convention provides that:

No person shall be subjected by a State Party 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 under threat for reasons set out in Article I, paragraphs 1 and 2.¹⁶⁶

The prohibition of *refoulement* contained in the OAU Convention is without qualification, which is a remarkable shift from the 1951 Convention which provides an exception to the prohibition of *refoulement* by stating that *non-refoulement* will not apply when an individual is a danger to the security of the country.¹⁶⁷ However, such an exception and proper application thereof would ensure that the national asylum system is not abused by individuals who are involved in terrorist activities.¹⁶⁸ Yet, it is crucial that for the efforts aimed at preventing terrorism to be employed in a manner which takes full account of international human rights obligations while upholding the values on which democratic societies are founded.¹⁶⁹

The Refugees Act protects asylum seekers and refugees against *refoulement* by providing that:

¹⁶² Clayton G *Immigration and Asylum Law* 3rd ed (2008) 409.

¹⁶³ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 73.

¹⁶⁴ Goodwin-Gill G 'International and national responses to challenges of mass forced displacement' in Handmaker J, de la Hunt L and Klaaren J (eds) *Advancing Refugee Protection in South Africa* (2007) 12-13.

¹⁶⁵ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 74.

¹⁶⁶ OAU Refugee Convention, Article II (3).

¹⁶⁷ Ncumisa W, Mfubu P 'Responsibility sharing: Towards a unified refugee protection framework in Africa' (2016) 2 *AHMR* 548. See also note 71 above.

¹⁶⁸ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 522.

¹⁶⁹ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 522.

Notwithstanding any provisions 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 subjected to any other similar measure, if as a result of such refusal, expulsion, extradition, return or other measures, such a 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, gender, tribe, 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 whole of that country.¹⁷⁰

In order to determine whether there is a real risk of an asylum seeker being persecuted if he or she should be returned to the country of origin, the Status Determination Committee must consider the facts of the application objectively and should such a risk be present, the host country must refrain from returning such an asylum seeker to a country of origin.¹⁷¹ The failure to perform such thorough consideration of the facts at hand would result into the country breaching its international obligations in terms of *non-refoulement*.¹⁷² Regardless of the principle of *non-refoulement*, there is a general principle in immigration law that a State has the discretion to decide who may enter and stay in its territory, but refugee law provides for an exception to this rule.¹⁷³ This however applies to asylum seekers who want to enter the country without the necessary documentation, and who also has the right to apply for refugee status, refusing to grant access to such individuals is unlawful.¹⁷⁴ The principle of *non-refoulement* has been argued to have developed in a rule of customary international law and is therefore binding on all States.¹⁷⁵ Therefore violation of the principle through means such as deportation, rejection at frontiers and

¹⁷⁰ Refugees Amendment Act 33 of 2008, section 2.

¹⁷¹ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 75.

¹⁷² Goodwin-Gill G 'Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalisation, detention and protection' in Feller E, Türk V and Nicholson F (eds) *Refugee Protection in International Law: UNHCR's Global Consultation on International Protection* (2003) 217.

¹⁷³ Goudappel ANJF, Raulus HS 'The future of asylum in European Union? Proposal, problems and interaction with the international human rights standards' in Goudappel ANJF and Raulus HS (eds) *The Future in the European Union* (2011) 1.

¹⁷⁴ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 75.

¹⁷⁵ Supaat DI 'Escaping the principle of *non-refoulement*' (2013) 2 *International Journal of Business, Economics and Law* 87.

restrictive application of the law should be avoided by States at all times.¹⁷⁶ However, there has been counter arguments stating that the principle has not reached customary status and that such status will not be reached easily since it goes against States' ability to retain control over its territories.¹⁷⁷ It has been further argued that the principle will obligate States to receive foreign nationals into their territories and remove the power of States to determine who may or may not enter their territories.¹⁷⁸

2.5 CONCLUSION

This chapter focussed on the international and regional legal framework related to the RSD process in South Africa, including the review process and the duty to protect asylum seekers under the principle of *non-refoulement*. The legal framework consists of three aspects, the international, regional and domestic framework (which for practical reasons will be discussed in the following chapter). Although the contents of the instruments of each legal framework differ at instances, they share the basic principle of providing asylum seekers with the protection that they seek in host countries. However, as it has been revealed, there are multiple definitions of who qualifies to be recognised as a refugee.

The point of departure in considering the definition of a refugee is the 1951 Convention which provides the criteria with which a foreign national has to comply with in order to be considered as a refugee. Initially the 1951 Convention were very restrictively applied. However, the limitations which it contained were removed at a later stage for the benefit of asylum seekers. The OAU Convention contains the same definition of a refugee as the 1951 Convention but the instrument adds to the definition to make it broader. The definition includes more grounds on which an asylum seeker can rely in order to qualify as a refugee. Unlike the more general definition in the 1951 Convention, the OAU Convention takes into account the personal circumstances that African asylum seekers face. The development of its frameworks portrays the strong will of South Africa to provide protection to asylum seekers present within its territory.

¹⁷⁶ Kelley N 'International refugee protection challenges and opportunities' (2007) 19 *Int'l J. Refugee L.*

¹⁷⁷ Supaat DI 'Escaping the principle of *non-refoulement*' (2013) 2 *International Journal of Business, Economics and Law* 87.

¹⁷⁸ Hailbronner K 'Non-refoulement and 'humanitarian' refugees: Customary international law or wishful legal thinking?' (1986) 26 *Va. J. Int'l L.*, 857.

The main objective of considering the legal framework of South Africa related to refugee status determination is to determine what the obligations of the country are towards asylum seekers. Should a claim for asylum be rejected as manifestly unfounded, an applicant has the right to review such a decision. Such a review will be considered by the SCRA which will either uphold or set aside a negative asylum decision. To ensure fair service to asylum applicants, the SCRA must carry out its functions without any bias while acting completely independent.

Gender-based persecution is one of the grounds for asylum which is regularly overlooked or misunderstood. RSDOs fail to properly comprehend what constitutes gender-based persecution which amounts to asylum applications being rejected. Before gender-based persecution has been recognised separately, RSDOs often failed to recognise that it is included under membership of a particular social group. Gender-based persecution probably delivers the most compelling evidence which discloses that the South African refugee reception system fails to provide the protection which it aims to deliver.

The chapter also considered the requirements with which the country has to comply with in order to discharge its obligations towards asylum seekers. Although legislation does not compel South Africa to grant asylum to all applicants, the country is required to receive asylum seekers in an environment which provides sufficient protection and allow them to apply for asylum within its territory. Each and every asylum application must be considered adequately and fairly in order to ensure fair procedures to applicants. The country undertook, by being a State Party to numerous instruments to provide protection to all asylum seekers within its territory. In order to fulfil this duty, the country has to apply the principle of *non-refoulement* in order to ensure that no asylum seeker be returned to his or her country of origin or any other country where his or her life might be under threat. The country must also refrain from returning an asylum seeker to his or her country of origin before the RSD process has been finalised. The RSD process will only be finalised once all the remedies has been exhausted.

CHAPTER 3: THE DOMESTIC LEGAL FRAMEWORK AND THE REFUGEE STATUS DETERMINATION PROCESS IN SOUTH AFRICA

3.1 INTRODUCTION

As a consequence of being a State Party to numerous international instruments, South Africa undertook to fulfil and comply with its international and regional obligations which originate from such instruments. In addition South Africa also confers obligations on itself at the domestic level through its national legislation which provides for the protection of foreign nationals which includes asylum seekers.

The RSD process is the formal adjudicative process which allows an individual to lodge a refugee claim to a RSDO who can grant refugee status within the host state.¹⁷⁹ South Africa's RSD system is administered by the DHA.¹⁸⁰ The DHA officials must act within the scope of the Refugees Act and its Regulations. Upon entering South Africa, the transit permit which is supposed to be issued by officials at the ports of entry, allows asylum seekers to reach a Refugee Reception Office (RRO) within five days from the day of issuance in order to lodge an asylum claim.¹⁸¹ After an asylum application has been filed, a Refugee Reception Officer will give the applicant an asylum seeker permit (section 22 permit), which must be renewed every three months, while the final outcome of the asylum application is pending.¹⁸² Regulation 3(1) provides that an asylum claim must be adjudicated within 180 days by the DHA,¹⁸³ and according to the rules on just administrative action provided for in the Constitution.¹⁸⁴

Since the chapter specifically focuses on the RSD process of South Africa, the country's domestic legal framework will first be considered in order to determine its obligations in that regard. This chapter will consider the South African RSD process by focusing on the practices which occurs at the South African ports of entry. Focus will also be directed on the

¹⁷⁹ De Jager J 'Refugee status determination in South Africa' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 153.

¹⁸⁰ De Jager J 'Refugee status determination in South Africa' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 154.

¹⁸¹ Consortium for Refugees and Migrants in South Africa *Protecting Refugees, Asylum Seekers and Immigrants in South Africa* Johannesburg 18 June 2008 available at www.cormsa.org.za (accessed 12 July 2017) 35.

¹⁸² McKnight J 'Through the fear: A study of xenophobia in South Africa's refugee system' (2008) 2 *JIMS* 26.

¹⁸³ Refugee Regulation 3 (1).

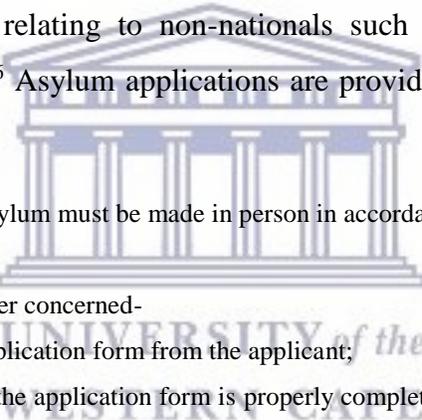
¹⁸⁴ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 12 July 2017).

confidentiality of the RSD process, the nature of the interviews conducted by RSDOs, the interpretation and application of the law, and the nature of decisions reached along with the reasons provided therefore.

3.2 DOMESTIC LEGAL FRAMEWORK

In order to fulfil its international obligations towards asylum seekers present within its territory, South Africa had to enact numerous of its own legal instruments to govern matters involving asylum seekers.

South Africa has enacted the Refugees Act which regulates matters involving refugees and asylum seekers. The Refugees Act and the Immigration Act¹⁸⁵ are the essential South African instruments regulating matters relating to non-nationals such as their entry, stay and their documentation in the country.¹⁸⁶ Asylum applications are provided for under section 21 and 22 of the Refugees Act:

- 
- 21(1) An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Office
 - (2) The Refugee Reception Officer concerned-
 - a) must accept the application form from the applicant;
 - b) must see to it that the application form is properly completed, and, where necessary, must assist the applicant in this regard;
 - c) may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application; and
 - d) must submit any application received by him or her, together with any information relating to the application which he or she may have obtained, to a Refugee Status Determination Officer, to deal with it in terms of section 24.
 - (3) When making an application for asylum, every applicant must have his or her fingerprints or other prints taken in the prescribed manner and every applicant who is 16 years old or older must furnish two recent photographs of himself or herself of such dimensions as may be prescribed.

¹⁸⁵ Immigration Act 13 of 2002.

¹⁸⁶ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 10. See also Nathwani N *Refugees and Human Rights: Rethinking Refugee Law* (2003) 7 2. Immigration law is however ruled by the principle of sovereignty, which means that each state is free to create and implement its own immigration policies; and refugee law on its part consists of multiple international obligations deriving from international human rights law.

(5) The confidentiality of asylum applications and the information contained therein must be ensured at all times.¹⁸⁷

The Refugees Act and its Regulations is the primary source of law which ensures the safety, well-being and dignity of asylum seekers and refugees.¹⁸⁸ These two instruments contains specific procedures which needs to be adhered to during the RSD process, and it makes provision for a four stage RSD process which is the preliminary interview, the hearing, a referral to the Director-General in particular circumstances and appeals considered by the RAB.¹⁸⁹ The preliminary interaction takes place with a Refugee Reception Officer, the hearing is completed before the Status Determination Committee, the referral which is known as the automatic review is made to the Director-General or as previously called the Standing Committee in certain instances and the appeal is heard by the RAB with some exceptions.¹⁹⁰ The Act provides for the reception of individuals in the country, asylum applications and recognition of refugee status.¹⁹¹ The Act does not specifically place an obligation on the government of South Africa to receive asylum seekers in its territory.¹⁹² Despite such a determination, the Act requires in section 21(1) that a person be granted an opportunity to make an application in person, therefore South Africa is obligated to receive that person and to assist him or her with the processing of an asylum application.¹⁹³

The mandatory nature of the right to access the RSD process in South Africa has been underscored in *Abdi v Minister of Home Affairs*.¹⁹⁴ The court held that the provisions of the Refugees Act clearly prohibits the prevention of access to South Africa of a person who has been forced to flee his or her country due to any circumstances identified in section 2 of the Act.¹⁹⁵ However, the requirement of having to apply in person is qualified by Regulation 2(2) of the Act

¹⁸⁷ Refugees Act, section (1), (3) and (5).

¹⁸⁸ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 10.

¹⁸⁹ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 29 50.

¹⁹⁰ Refugees Amendment Act 33 of 2008, section 8A.

¹⁹¹ Refugees Act, section 1.

¹⁹² Kerfoot W & Schreier T 'Application for asylum: Reception' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 138.

¹⁹³ Refugees Act, section 21(1). See also Kerfoot W & Schreier T 'Application for asylum: Reception' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 138.

¹⁹⁴ *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA).

¹⁹⁵ *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA), para 22.

by providing that an application must be lodged by the applicant in person at a designated RRO without delay.¹⁹⁶ Although delay has been expressly prohibited it continues to surface during the RSD process due to reasons such as asylum seekers' lack of access to the RROs.¹⁹⁷

Section 22(1) of the Refugees Act provides that the Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum seeker permit in the prescribed form.¹⁹⁸ The Act further provides that a Refugee Reception Officer may from time to time extend the period for which a permit is valid in terms of section 22(1), or amend the conditions of a permit.¹⁹⁹ Section 22 does not give a Refugee Reception Officer the discretion to refuse to issue an asylum seeker with a permit. Under the Basic Agreement²⁰⁰ that has been reached between South Africa and the UNHCR in 1993 which formed the basis of the refugee definition until the Refugees Act came into force; South Africa has agreed to abide by the definitions contained in the 1951 Convention during the RSD process.²⁰¹ Therefore South Africa is obligated to apply the definition of a refugee as it is required to do and in a manner that will ensure asylum seekers of a fair RSD process. Apart from the previously discussed national regulatory instruments, the Immigration Act is also one of the national instruments which regulate the entry, the stay and the documentation of foreign nationals present within the territory of South Africa.²⁰² The Immigration Act is governed by the principle of sovereignty which means that the State is free to enact and implement its own migration policies.²⁰³

¹⁹⁶ Refugee Regulation 2(2).

¹⁹⁷ Kerfoot W & Schreier T 'Application for asylum: Reception' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 139.

¹⁹⁸ Refugees Act, section 22(1).

¹⁹⁹ Refugees Act, section 22(3).

²⁰⁰ The Basic Agreement Between the Government of the Republic of South Africa and the United Nations High Commission for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and its Personnel in the Republic of South Africa September 1993.

²⁰¹ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 176. See also The Basic Agreement between the Government of the Republic of South Africa and the United Nations High Commission for Refugees Concerning the Presence, Role, Legal Status, Immunities and Privileges of the UNHCR and its Personnel in the Republic of South Africa September 1993.

²⁰² Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 10.

²⁰³ Nathwani N *Refugees and Human Rights: Rethinking Refugee Law* (2003) 7 2.

The Refugees Act is rather progressive since both the 1951 Convention and the OAU Convention is included therein.²⁰⁴ The Act provides the following:

3. Subject to Chapter 3, a person qualifies for refugee status for the purposes of the Act if that person-
- (a) owing to a well-founded fear of being persecuted by reason of his or her, gender, race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such a fear, unwilling to return to it; or
 - (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either part or whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
 - (c) is a spouse or dependant of a person contemplated in paragraph (a) or (b).²⁰⁵

Section 3(a) contains a definition of a refugee which is similar to that of Article 1A (2) of the 1951 Convention except for the fact that the provision includes gender and tribe as additional grounds on which to base asylum claims. By making specific provision for lodging an asylum claim under gender as a ground, applicants no longer have to rely on membership of a particular social group on which applicants had to base their gender-based asylum claims in the past. Section 3 (b) on its part is similar to Article 1(2) of the OAU Convention without including additional grounds, while section 3(c) contains further grounds which both the 1951 Convention and the OAU Convention lacks. Section 3(c) makes provision for an entirely different group of people who may apply for asylum. The provision includes the dependants of an applicant as contemplated in subsections (a) and (b) such as children, husbands or wives.²⁰⁶ The Refugees Act is considered to take the definition of a refugee even further than both the 1951 Convention and the OAU Convention since it expands the definition considerably.

The South African Constitution is exceedingly liberal and generous with its provision of rights and entitlements of nationals and non-nationals.²⁰⁷ South Africa portrays a strong will to protect

²⁰⁴ 'Country report: Refugee status determination in South Africa' available at www.lhr.org.za (accessed 22 November 2017).

²⁰⁵ Refugees Amendment Act 33 of 2008, section 3(a), (b) and (c).

²⁰⁶ Refugees Amendment Act 33 of 2008, section 3(c).

²⁰⁷ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 10.

asylum seekers within its borders and at its frontiers.²⁰⁸ In *Lawyers for Human Rights v Minister of Home Affairs*²⁰⁹ the court confirmed that the Bill of Rights contained in Chapter 2 of the Constitution protects everyone present in the country, including illegal foreign nationals and asylum seekers.²¹⁰ Asylum seekers are legally entitled to a standard of treatment in their host countries which consists of fundamental human and refugee-specific rights.²¹¹ Whether it is a national or a non-national, everyone present within South Africa has the right to basic treatment and respect.²¹² The ultimate aim of the Constitution is to provide asylum seekers with most of the constitutional rights except for those rights which are particularly reserved for South African citizens. The Constitution in section 33 also obliges all administrators such as the DHA officials, who exercise public authority to act lawfully and reasonably, to follow fair procedures and to give written reasons when the rights of an individual in a subordinate position are negatively affected.²¹³

It is important that all DHA officials respect asylum seekers' rights under PAJA.²¹⁴ It is also important to note that fairness and effectiveness of the RSD process is fundamental to effective refugee protection.²¹⁵ The South African policy on international migration is set out in the new proposed 2017 White Paper on International Migration²¹⁶ containing much of the 1999 White Paper's content²¹⁷ which is implemented through the Immigration Act and partly through the Refugees Act. The new proposed White Paper consists of a much broader and relevant framework.²¹⁸ However the 1999 White Paper on International Migration currently still set out the policy on international migration and its standards perpetuates irregular migration which

²⁰⁸ Jenkins F, de la Hunt L 'Detaining asylum seekers: Perspectives on proposed reception centres for asylum seekers in South Africa' in Handmaker J, de la Hunt L and Klaaren J(eds) *Advancing Refugee Protection in South Africa* (2008) 2 180.

²⁰⁹ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).

²¹⁰ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC) 151.

²¹¹ Sachs A 'From a refugee to a refugee judge' in Simeon JC (ed) *Critical Issues in International Refugee Law* (2010) 51. See also Refugees Act, section 27A.

²¹² Goodwin-Gill G 'The principle of international refugee law' in Jeleff S (ed) *Asylum* (1995)2 21-22.

²¹³ The Constitution, section 33.

²¹⁴ Promotion of Administrative Justice Act 3 of 2000.

²¹⁵ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 52.

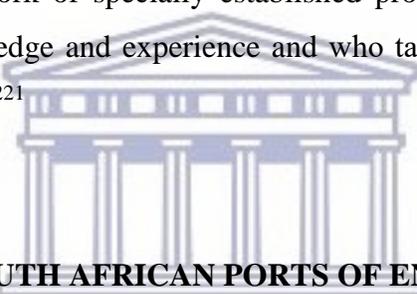
²¹⁶ White Paper on International Migration for South Africa July 2017.

²¹⁷ 1999 White Paper on International Migration.

²¹⁸ White Paper on International Migration for South Africa July 2017.

results in unacceptable levels of corruption and human rights abuses.²¹⁹ Since South Africa is a sovereign State it reserves the right to determine who will be allowed within its territory and under what conditions it will occur, therefore the new White Paper upholds the country's sovereign right to determine the admission and residence conditions for foreign nationals which is in line with the country's national interests.²²⁰

Although a country's legal framework is structured by international, regional and domestic instruments it is the domestic instruments which forms the crux of the RSD process. However each country must ensure that its domestic legislation complies with international legislation. Therefore host countries should take into account that it is important that an asylum application be considered within a framework of specially established procedures by qualified personnel possessing the necessary knowledge and experience and who takes into account an applicant's particular difficulties and needs.²²¹



3.3 PRACTICES AT THE SOUTH AFRICAN PORTS OF ENTRY

The right to seek and enjoy asylum within South Africa as provided for in the Refugees Act amongst other instruments, is of no effect if an asylum seeker do not have access to apply for asylum within the country.²²² The Refugees Act provides that a person cannot be refused entry or access to South Africa or be forced to leave if he or she complies with the criteria or requirements, which allows one to apply for asylum, as laid down in the Act.²²³ South African

²¹⁹ White Paper on International Migration for South Africa July 2017.

²²⁰ White Paper on International Migration for South Africa July 2017.

²²¹ UNHCR Handbook, para 190.

²²² Kerfoot W & Schreier T 'Application for asylum: Reception' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 137. Article II (l) of the 1969 OAU Convention provides that member states shall use their best endeavours which are consistent with their domestic legislations to receive refugees.

²²³ Refugees Act, section 3. According to the Refugees Act a person cannot be denied entry to South Africa or be compelled to leave if:

- (a) because of a well-founded fear of being persecuted on the grounds of his or her race, tribe, religion, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or not having a nationality and being outside his or her country of former habitual residence which render him or her unable or, owing to such fear, unwilling to return to it; or

legislation requires asylum seekers to report their presence to officials at the port of entry and the officials are obliged to assist them to obtain a transit permit (the section 21 permit)²²⁴, which initially gave asylum seekers fourteen days but which has recently been reduced by the Immigration Amendment Act to a mere five days to access a RRO in order to lodge an asylum claim. The five day time period is considerably short since asylum seekers face numerous challenges during their travelling to RROs which would in all probability result in their failure to report to RROs within time. Should an individual be unable to lodge an application within the five day time period, no provision is made to allow an individual to apply thereafter.²²⁵ Such a restrictive time period do not consider the common access difficulties to RROs that has been occurring during the past decade.²²⁶

Officials are obligated to inform everyone who enters the country of the option to apply for asylum, however they fail to do so which adversely affects the migration experiences of asylum seekers to South Africa.²²⁷ Even though officials have to issue transit permits to everyone requesting it, a substantial amount of permits are refused, indicating a failure on the part of officials to comply with their obligations.²²⁸ The fact that individuals are not informed of the option to apply for asylum leads to them not requesting transit permits which could have been avoided should officials have complied with the obligation of informing such individuals of their rights. Such a failure could result in the prolongation of the RSD process since asylum seekers can be denied access to RROs or possibly be detained since they are not in possession of a transit permit.

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- (b) because of external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or
 - (c) is a dependant of a person as contemplated in paragraph (a) or (b).

²²⁴ Consortium for Refugees and Migrants in South Africa 'Protecting refugees, asylum seekers and immigrants in South Africa Johannesburg 18 June 2008' available at www.cormsa.org.za (accessed 12 July 2017).

²²⁵ Lawyers for Human Rights 'Situation report: Refoulement of undocumented asylum seekers at South African ports of entry with a particular focus on the situation of Zimbabweans at Beitbridge 2011' available at www.lhr.org.za (accessed 12 July 2017).

²²⁶ Lawyers for Human Rights 'Situation report: Refoulement of undocumented asylum seekers at South African ports of entry with a particular focus on the situation of Zimbabweans at Beitbridge 2011' available at www.lhr.org.za (accessed 12 July 2017).

²²⁷ Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 34.

²²⁸ Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 34.

The proposed Refugees Amendment Act relating to the DHA issuing asylum transit permits to asylum seekers at ports of entry must be done by way of a fair and non-discriminatory method, however it has been noted that transit permits are no longer issued at Beitbridge border post; this is as a consequence of officials who purposefully fail to provide asylum seekers with such permits.²²⁹ Border officials attempts to justify such conduct by saying that those individuals do not make use of official ports of entry, however if an individual request a transit permit from an official, the absence of a valid passport/visa (identification documentation) would encourage an official to decline such a request, which amounts to an unlawful practice.²³⁰ The Refugees Amendment Bill proposes to criminalise irregular entry and to exclude such persons from refugee status.²³¹ This would result into even more arrests, detentions and human rights violations of asylum seekers by excluding them from refugee status merely because they obtained entrance to the country through an illegal port of entry. It is arguable that asylum seekers who enter the country legally are better off than individuals who enter the country illegally since those who entered the country legally will be subjected to less harassment by the police due to them being in possession of documentation.²³²

Asylum seekers are being denied basic human rights within host countries and their lives and freedoms may be threatened by racial and religious intolerance.²³³ Due to the fact that individuals have entered the country illegally, a number of potential ethical risks arise since it is possible that they could be exposed and arrested by security agents.²³⁴ The threat of deportation leaves illegal asylum seekers in an environment which isolates them from the wider society,

²²⁹ Lawyers for Human Rights, Legal Resources Centre, The Scalabrini Centre of Cape Town *Thematic Report on the Rights of Migrants, Asylum Seekers and Stateless Persons in South Africa* (2016) para 26.

²³⁰ Lawyers for Human Rights, Legal Resources Centre, The Scalabrini Centre of Cape Town *Thematic Report on the Rights of Migrants, Asylum Seekers and Stateless Persons in South Africa* (2016) para 26. Relying on illegal or unofficial entrances into the country as a justification for not issuing a transit permit would not be a valid reason since individuals are attracted to such entrances due to reasons of corruption, violence and return to his or her country of origin which officials resort to at official ports of entry. Should asylum seekers have been issued with transit permits promptly and efficiently, they would have been in possession of documentation allowing them to remain in the country legally and, pending the outcome of their asylum application at a RRO nearby to where they initially intended to reside, which concurrently do away with arbitrary arrests and detentions.

²³¹ Scalabrini Centre of Cape Town *Submission regarding the Draft Refugees Amendment Bill* (2015) 9.

²³² Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 26.

²³³ Goodwin-Gill G 'The principle of international refugee law' in Jeleff S (ed) *Asylum* (1995)2 36.

²³⁴ Aransiola J, Zarowsky C 'Human trafficking and human rights violations in South Africa: Stakeholders' perceptions and the critical role of legislation' (2014) 14 *AHRLJ* 516.

since the fear of deportation limits their freedom and complicates their ability to enjoy rights and access services.²³⁵ Instead of criminalising illegal entry, the country should be concerned with the protection of asylum seekers regardless of their status or mode of entry, and detention should be used as a measure of last resort.²³⁶ A recent case brought before the Constitutional Court by Lawyers for Human Rights and the Legal Resource Centre displays disregard of over a decade by the DHA of existing legislation and legal rulings.²³⁷ The DHA has also been reprimanded for its failure to respect individual rights,²³⁸ which points to the abuse of human rights of those who remain illegal within the country. The criminalisation of illegal entry gives legal legitimacy to the discrimination against and the exclusion of undocumented asylum seekers.²³⁹ The doctrine of illegality means that an individual should not benefit from their wrongdoing and that rights should be withheld from such an individual.²⁴⁰ In my view the criminalisation of illegal entry is not in line with human rights law since it leaves more room for the unlawful detentions and deportations of asylum seekers. If they are criminalised it means that they are illegal and left without access to rights and services leaving them unprotected, while according to law, everyone must be granted protection regardless of their mode of entry.

The intentional refusal to issue transit permits results into severe consequences for asylum seekers which will be exacerbated by the proposed provisions of the Refugees Amendment Bill.²⁴¹ The criminalisation of illegal entry would be harmful to genuine asylum seekers and because it will amount to more rejections, there will be an increase of adjudication times and more resources from the DHA will be required.²⁴² Several of the proposed amendments fail to take into consideration the present circumstances at border posts or RROs and the proposed measures to be utilised do not take into regard the vulnerabilities of foreign nationals who are

²³⁵ 'Global labour column (2016)' available at <http://column.global-labour-university.org/> (accessed 27 March 2018).

²³⁶ Hiropoulos A African Policing Civilian Oversight Policy Paper No. 18, *Migration and Detention in South Africa: A Review of the Applicability and the Impact of the Legislative Framework on Foreign Nationals* (2017) 15.

²³⁷ *Lawyers for Human Rights v Minister of Home Affairs and Others* (CCT38/16) available at <http://www.saflii.org/za/cases/ZACC/2017/22.html/> (accessed 27 March 2018).

²³⁸ *Abdi and Another v The Minister of Home Affairs and 4 Others*, (734/2010) [2011] ZASCA (15 February 2011).

²³⁹ 'Global labour column (2016)' available at <http://column.global-labour-university.org/> (accessed 27 March 2018).

²⁴⁰ Ryan B 'The evolving legal regime on unauthorized work by migrants in Britain' (2005) 27 *Comparative Labor Law and Policy Journal* 27.

²⁴¹ Lawyers for Human Rights, Legal Resources Centre, The Scalabrini Centre of Cape Town *Thematic Report on the Rights of Migrants, Asylum Seekers and Stateless Persons in South Africa* (2016) para 27.

²⁴² Scalabrini Centre of Cape Town *Submission regarding the Draft Refugees Amendment Bill* (2015) 9.

usually not aware of their rights or the legislative requirements with which they have to comply with.²⁴³ Although it is meant to improve the asylum system, such amendments would make it even more difficult for foreign nationals to gain access to the country, leaving them with the only option of entering the country through unofficial ports of entry, resulting into possible subjection to violent acts against vulnerable groups such as women and children asylum seekers.

3.4 THE CONFIDENTIALITY OF THE REFUGEE STATUS DETERMINATION PROCESS

Legislation ensures confidentiality of the asylum application process.²⁴⁴ Everyone has the right to privacy which prohibits the disclosure of their communications with officials.²⁴⁵ All interviews must be held in private in order for an asylum seeker to freely disclose his or her case.²⁴⁶ Those who fled their country of origin because of persecution suffered as a result of their political beliefs or other reasons may be reluctant to disclose sensitive information while strangers listen in on such communications.²⁴⁷ No information disclosed may be made public unless the prior written consent of the applicant has been given.²⁴⁸ However it can be argued that such information can be disclosed under false names in order to facilitate an effective status determination system, but it can be contested that it involves a risk that the publication is higher than disclosure,²⁴⁹ and therefore a violation of the right to privacy. It has been found that in

²⁴³ Scalabrini Centre of Cape Town *Submission regarding the Draft Refugees Amendment Bill* (2015) 3.

²⁴⁴ Moodley Y University of Cape Town: *Refugee Rights Unit Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights* (2012) 6. See also the Constitution, section 14.

²⁴⁵ The Constitution, section 14. In order to provide administratively fair status determination procedures the confidentiality thereof must be present.

²⁴⁶ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 49.

²⁴⁷ Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 63.

²⁴⁸ Refugee Regulations, section 6(3).

²⁴⁹ It has been argued in *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board* (22346/2011) (2012) ZAG PPHC 341 (6 December 2012) that the limitation imposed by section 21(5) of the Refugees Act on the rights contained in section 16(1) of the Constitution does not constitute a justifiable limitation of those rights as well as the 'open justice' principle, and is accordingly unconstitutional. See also Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 49.

numerous cases individuals were reluctant to give complete details about their circumstances because other individuals overheard their interviews with RSDOs.²⁵⁰

At some RROs the violation of confidentiality occurs more than at others, as it was in the case of the Durban RRO where it has been reported that 43% of communications could be overheard.²⁵¹ Such circumstances could in all probability adversely affect an applicant's case because insufficient information has been given and such an individual is indirectly deprived of the right to seek asylum. During violating circumstances as such, applicants tend to leave out the most essential parts of information which would provide them with a valid ground(s) to qualify for refugee status and therefore they are unreasonably excluded from the asylum system. Even though confidentiality has improved to some extent, it continues to be an issue that thousands of asylum seekers face.

3.5 THE INTERVIEWS CONDUCTED BY RSDOs WITH APPLICANTS

The status determination interviews forms the crux of the process since it is when the RSDO determine an applicant's credibility,²⁵² to establish whether or not he or she has a genuine asylum claim. It is during an interview that the applicant must feel entirely free to speak and disclose all information relevant to an asylum claim.²⁵³ Given the sensitive nature of the matter, involving issues such as life and death, a need exists for interviews to be thorough and adequately structured²⁵⁴ to cover all the necessary and relevant aspects of the application. A failure to do so could place an individual's life in serious danger which is likely to occur in the future, should an application not be considered properly. Fair procedures removes arbitrariness and gives

²⁵⁰ Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 63.

²⁵¹ Forced Migration Studies Programme Wits University Research Report: *National Survey of the Refugee Reception and Status Determination System in South Africa* (2009) 38.

²⁵² Forced Migration Studies Programme Wits University Research Report: *National Survey of the Refugee Reception and Status Determination System in South Africa* (2009) 42. See also Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 42.

²⁵³ Moodley Y University of Cape Town: Refugee Rights Unit *Receiving LGBTI Refugees in South Africa: Towards a Culture of Non-Discrimination and Human Rights* (2012) 10.

²⁵⁴ Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 63.

applicants confidence that their cases will be considered impartially, it ensures that all relevant information is considered prior to reaching a final decision and it puts in place safeguards against human errors in the decision-making process.²⁵⁵

Despite the importance of conducting thorough interviews, it has been found that interview durations have decreased significantly and that a substantial amount of interviews done are shorter than the average.²⁵⁶ Shorter interviews than what is necessary prevent applicants from making complete disclosures of the information relevant to their asylum claims²⁵⁷ which ultimately adversely affect the likelihood of being successful in claiming asylum.²⁵⁸ Such practices lead to non-compliance with the requirements of procedural fairness and administrative justice.²⁵⁹ Interviews being too apparent and short are often due to the high demands on RROs and the RSDOs attempting to alleviate such demands, but which unfortunately leads to the rejection of thousands of genuine asylum applications.

Many asylum seekers find themselves traumatised, fearing government officials and being unsure of what information is required of them and therefore it is essential to spend adequate time on an interview. A fair hearing requires that individuals are provided with an opportunity to participate in decisions, and this is not provided for during brief interviews.²⁶⁰ Brief interviews in all likelihood result into an increase of problems. Because of time constraints and high demands on RROs, written decisions will not be individualised and asylum claims will not be carefully

²⁵⁵ Kagan M 'Assessment of refugee status determination procedure at UNHCR's Cairo Office' in Forced Migration and Refugee Studies Working Paper No 1 available at

<http://www.aucegyptedu/gapp/cmrs/reports/documents/rsdreport>. (accessed 17 July 2017).

²⁵⁶ Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 68.

²⁵⁷ Forced Migration Studies Programme Wits University Research Report: *National Survey of the Refugee Reception and Status Determination System in South Africa* (2009) 42.

²⁵⁸ Quinot G *Administrative Law: Cases and Materials* (2008) 110.

²⁵⁹ Norman S 'Assessing the credibility of refugee applicants: A judicial perspective' (2007) 19 *IJRL* 278. See also Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 69.

²⁶⁰ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 460. At Crown Mines, RSDOs are required to issue nine decisions per day, which do not leave enough time to conduct thorough interviews since decisions and interviews are now set to take place on the same day, however research has produced evidence which suggest that same day adjudication is no longer applied even though it should.

considered,²⁶¹ leaving asylum seekers with numerous violated human rights and most probably excluded from the asylum system.

It has been established that administrative unfairness occurs during the interviews conducted by RSDOs with applicants, at times decisions are reached even if an interview never took place, and where interviews do actually take place, it mostly focus on the eligibility form rather than asking applicants relevant questions and giving applicants an opportunity to explain his or her reason(s) for applying for asylum.²⁶² Asking questions as to what led to seeking refuge in South Africa remains to be one of the most crucial questions that a RSDO can ask an applicant. The answer to such a question provides a RSDO with the most important information to enable a determination on whether an applicant complies with the criteria of persecution and to be recognised as a refugee. When an individual do not have an opportunity to give such important information, it can be expected that such an individual will in any case be unsuccessful in claiming asylum. This amounts to prejudice being suffered on the part of the applicant.

Often the legitimacy of an applicant's claim is determined by comparing the information disclosed during the interview with the information provided on the eligibility form.²⁶³ Should there be any differences between the two sources of information it can easily be justified with reasons such as language and comprehension difficulties with regards to what the interview questions or eligibility form requires, and should there be a problem with how the eligibility form is completed; RSDOs do not allow applicants to correct such a problem.²⁶⁴ Nevertheless, RSDOs reach conclusions that such differences suggests that an applicant do not have a genuine asylum claim, leading to the rejection of an asylum application.

²⁶¹ Forced Migration Studies Programme Wits University Research Report: *National Survey of the Refugee Reception and Status Determination System in South Africa* (2009) 43.

²⁶² Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 65.

²⁶³ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 40-43.

²⁶⁴ Amit R African Centre for Migration and Society *No Way In: Barriers to Access, Services and Administrative Justice at South Africa's Refugee Reception Offices* (2012) 66. This would amount to a failure to fulfil obligations of RSDOs to assist applicants which also includes informing an applicant where he or she had made a mistake in one or another part of the status determination process. A reasonable RSDO must be in anticipation that mistakes are likely to be made by applicants for obvious reasons such as language, interpretation and understanding challenges which amounts to individuals being unable to fully explain why they want to claim asylum.

3.6 THE INTERPRETATION AND APPLICATION OF THE LAW

3.6.1 Well-founded fear

In order to determine whether or not an applicant qualifies for refugee status it remains crucial to apply the law properly.²⁶⁵ Regardless thereof status determination decisions are still being based on multiple errors of law. RSDOs continue to fail to properly apply the provisions of refugee law such as the concept of well-founded fear, persecution and credibility.²⁶⁶ If the law is applied and interpreted incorrectly it would lead to applicants not receiving a fair opportunity to have their claims considered.

Whether an individual will be successful in applying for asylum will depend on whether an individual had a well-founded fear of future persecution.²⁶⁷ An applicant's fear should be regarded as well-founded if he or she can establish to a reasonable degree, that his or her continued stay in the country of origin is unbearable.²⁶⁸ The well-founded fear determination is both of a subjective and an objective nature.²⁶⁹ Although fear is subjective, in order to determine refugee status, it must be well-founded meaning that it must have an objective basis, which requires it to be connected to the external reality of his or her circumstances.²⁷⁰

RSDOs fail to give proper consideration to an individual's state of mind, but rather rely exclusively on an assessment of the country of origin situations to determine both the subjective

²⁶⁵ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 464.

²⁶⁶ Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 25.

²⁶⁷ UNHCR Handbook, para 42.

²⁶⁸ UNHCR Handbook para 42.

²⁶⁹ Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 33.

²⁷⁰ UNHCR 'Interpreting Article 1 of the 1951 Convention relating to the status of refugees' available at <http://www.refworld.org/docid/3b20a3914.html/> (accessed 17 July 2017), para 11. See also UNHCR Handbook para 38. Both the subjective and objective elements must be present in order to conclude that a well-founded fear exist even though the determination of refugee status will mainly require an evaluation of the applicant's statements than a judgment on the situation in the country of origin. Regardless of such a provision, RSDOs tend to reject asylum claims because there have been no official reports on the situation in a country of origin, even though the applicant personally provide information to the RSDOs to serve as confirmation of the circumstances in a country of origin. This would suggest that even though the Handbook considers the subjective element to be sufficient, RSDOs fail to recognise it. In such instances the reasons as to why no judgment has been issued on the circumstances in the country of origin could possibly be because of conflict, leading to the malfunctioning of institutions responsible for issuing reports on the situation in the country. Just because incidents are not reported does not mean that it did not occur.

and objective elements.²⁷¹ Even when RSDOs do recognise the distinction between the subjective and objective elements, they fail to apply the subjective and objective tests correctly.²⁷² Where RSDOs relied on the situation in a country of origin, their decisions are mostly based on incorrect or out dated information.²⁷³ Even when internal relocation is not a practical alternative since state actors are the perpetrators, RSDOs would implement internal relocation without giving due regard to an individual's circumstances.²⁷⁴ Discretion as such, exercised by RSDOs leaves thousands of asylum seekers in serious danger since they may be subjected to life threatening persecution in their countries of origin.

3.6.2 Persecution

Another important aspect of seeking asylum within a host country is that an individual must have suffered some form of persecution in his or her country of origin.²⁷⁵ The 1951 Convention does not provide for a definition of persecution but the UNHCR interpret it to include a threat to life or freedom and other serious human rights violations.²⁷⁶ It is of utmost importance that the concept of persecution be applied correctly but regardless thereof RSDOs fail to do so. RSDOs tend to apply the concept in a restrictive manner which used to include only those who were members of a political party and not recognizing other grounds of persecution provided by the Refugees Act.²⁷⁷

Individuals may have a well-founded fear of persecution as past victims and as possible future victims, which may consist of a threat to life or freedom and other severe human rights violations

²⁷¹ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 39.

²⁷² Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 33.

²⁷³ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 469.

²⁷⁴ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 40.

²⁷⁵ Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 24.

²⁷⁶ 1951 Convention, Article 33.

²⁷⁷ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 465.

including discrimination and extreme punishment.²⁷⁸ However, RSDOs fail to recognise these factors and resort to only considering past victims of physical harm even though the UNHCR Handbook provides that past persecution is not a requirement for refugee status.²⁷⁹ This would suggest that it is not necessary for an individual to already have been subjected to persecution and that even if there is merely a possibility of such persecution taking place in the future, that an individual may apply for asylum. However RSDOs continue to reject asylum claims since there is an absence of physical harm which was already inflicted in the past.²⁸⁰ It is conduct of this nature that lead to RSDOs altering the requirement of a well-founded fear of persecution to one of persecution only which exclude the possible occurrence of future persecution.

Even when harm is determined, RSDOs regards a single act of persecution as insufficient and looks in more detail at the level or degree of severity and how much the act of persecution has been repeated in order to constitute an act of persecution.²⁸¹ It is unacceptable for one act of persecution to be insufficient, since a failure exists to recognise the fact that even though one single act of persecution may not cause harm to one individual, it could certainly cause significant harm to another individual. Therefore no general principle can be applied, requiring an act of persecution to be repeated multiple times and to a certain degree in order to qualify as persecution, but an individualised approach should rather be adopted to consider each applicant's circumstances in isolation from other applications. In any case RSDOs are under obligation to consider the possibility of future persecution rather than establishing a threshold of growing past harm suffered and in order to establish persecution it is required that an individual had to have been arrested but it would only be sufficient if an individual were subjected to physical abuse.²⁸² This is problematic since such a requirement excludes additional forms of persecution other than physical abuse.

²⁷⁸ UNHCR Handbook para 45, 51-58.

²⁷⁹ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 465.

²⁸⁰ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 32.

²⁸¹ Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 26.

²⁸² Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 27.

Since there is a lack of the definition of persecution, the concept has been developed by a substantial body of academic, administrative and judicial interpretations.²⁸³ The 1951 Convention defines persecution as harm suffered by an individual and not by a group of individuals while fleeing a specific form of persecution.²⁸⁴ The drafters of the 1951 Convention failed to consider different forms of persecution, such as gender-based persecution or persecution perpetrated by non-state actors, rather than persecution inflicted by state actors.²⁸⁵ The evolution of concepts is necessary to ensure the development of protection which host countries provide to asylum seekers.²⁸⁶

The importance of the concept of persecution and the absence of a definition thereof in the 1951 Convention has prompted doctrinal approaches to advance the concept; case law also on its part have been developing the concept progressively.²⁸⁷ Following quite progressive developments of the concept of persecution, the agents of persecution are no longer only state actors but also non-state actors and even sub-state actors, rebels and militia.²⁸⁸ The Rome Statute defines persecution as the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of a group of individuals.²⁸⁹ The Rome Statute demonstrates a development of the concept of persecution since it refers to groups of individuals rather than to an individual who have been persecuted as contained in the 1951 Convention. Recent case law reveals a tendency of recognising FGM as a relevant human rights violation for international refugee law,²⁹⁰ which goes together with the condemnation of this practice in international human rights law and demonstrates the evolving nature of the concept of persecution.²⁹¹ This has been

²⁸³ Fischel De Andrade JH 'On the development of the concept of persecution in international refugee law' (2008)2 *Anuário Brasileiro De Direito Internacional* 123.

²⁸⁴ McFadyen G 'The contemporary refugee: Persecution, semantics and universality' (2012) available at <http://www.dla.ac.uk.>media-234569-en> (accessed 17 July 2017).

²⁸⁵ United Nations High Commissioner for Refugees 'The wall behind which refugees can shelter' (2001) 2 (123) *Refugees* 11.

²⁸⁶ Slater RH A *Jurisprudential Analysis of the Interpretation of 'Persecution' under the 1951 Convention Relating to the Status of Refugees at the Domestic Level* (unpublished PHD thesis, University of Birmingham, 2014) iv.

²⁸⁷ Fischel De Andrade JH 'On the development of the concept of persecution in international refugee law' (2008)2 *Anuário Brasileiro De Direito Internacional* 136.

²⁸⁸ McFadyen G 'The contemporary refugee: Persecution, semantics and universality' (2012) available at <http://www.dla.ac.uk.>media-234569-en> (accessed 17 July 2017).

²⁸⁹ Slater RH A *Jurisprudential Analysis of the Interpretation of 'Persecution' under the 1951 Convention Relating to the Status of Refugees at the Domestic Level* (unpublished PHD thesis, University of Birmingham, 2014) 205.

²⁹⁰ *Adelaide Abankwah v Immigration and Naturalization Service*, 2nd Circuit, 185 F.3d 18, 1999, *Farah* (CAN).

²⁹¹ Slater RH A *Jurisprudential Analysis of the Interpretation of 'Persecution' under the 1951 Convention Relating to the Status of Refugees at the Domestic Level* (unpublished PHD thesis, University of Birmingham, 2014) 374-375.

confirmed even further in *RT and KM (Zimbabwe)*²⁹² where the notion of a hierarchy in the forms of persecution has clearly been rejected.²⁹³ The understanding of how the elements of persecution have been interpreted by doctrine and case law should contribute to a dynamic, progressive and yet harmonious interpretation of the refugee definition.²⁹⁴

3.6.3 Credibility

In most instances individuals have fled their countries without their supporting documentation to prove their stories; therefore the credibility of such an individual will have the principal role in the RSD process.²⁹⁵ Where no documentary evidence is present, an applicant's credible testimony may be sufficient to establish a claim for asylum.²⁹⁶ Credibility will be present where an applicant fully co-operates during cross-examination and presents a coherent and reasonable claim which do not conflict with generally known facts, is on balance and capable of being believed.²⁹⁷ However, to determine credibility in the RSD process can become extremely difficult since it is frequently accompanied by issues relating to culture, gender, class, education, trauma, nervousness and simple variations amongst human beings.²⁹⁸

Owed to past experiences, applicants may be fearful of authority and may be reluctant to speak freely and giving proper information regarding his or her asylum claim²⁹⁹ or to explain everything on an eligibility form. RSDOs would use the fact that the eligibility form contains limited information and the interview consists of more detailed information, as a basis to reject an asylum claim.³⁰⁰ Such an approach fails to recognise factors such as the eligibility forms only have a limited amount of space, restricting the extent of information that an applicant can include

²⁹² *RT and KM (Zimbabwe)*[2012] UKSC 38.

²⁹³ *RT and KM (Zimbabwe)*[2012] UKSC 38.

²⁹⁴ Fischel De Andrade JH 'On the development of the concept of persecution in international refugee law' (2008) 2 *Anuário Brasileiro De Direito Internacional* 136.

²⁹⁵ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 469.

²⁹⁶ UNHCR Handbook, para 196.

²⁹⁷ Gorlick B 'Common burdens and standards: Legal elements in assessing claims to refugee status' (2003) 15 *IJRL* 357, 376.

²⁹⁸ Kälin W 'Troubled communication: Cross-cultural misunderstanding in the asylum hearing' (1986) 20 (2) *International Migration Review* 230.

²⁹⁹ UNHCR Handbook, para 198.

³⁰⁰ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 470.

and that they are more often than not unsure of what they are expected to fill in, and language barriers related to such forms,³⁰¹ which is exacerbated by the absence of assistance. Given the difficult nature of determining credibility, RSDOs should rely on the guidance provided for in the case of *Tantoush v Refugee Appeal Board*³⁰² where the court held:

That the credibility and reliability of his testimony for the purpose of establishing whether he has a well-founded fear of persecution must be weighed, looking at the inherent probabilities, the presence or absence of external or internal contradictions, its consistency or otherwise with the other evidence, his candour and overall performance in testifying, and so forth. The objective facts must be examined to decide if a well-founded fear exists, and for that purpose it will usually be insufficient to rely almost exclusively on the evidence of the asylum seeker only to reject his claim of fear of persecution because he has previously lied while living, for whatever reasons, on the margins or in the shadows of a legal existence.³⁰³

Therefore it is important not to found a credibility determination on a prior inconsistency but it rather requires a thorough and holistic evaluation taking into consideration numerous relevant factors.³⁰⁴ The credibility assessment is primarily based on the consideration of factors such as the personal and family backgrounds of the applicant, his or her membership of a particular racial, religious, national, social or political group, his own interpretation of his situation, and his personal experiences.³⁰⁵ RSDOs utilised the credibility concept as a general category, applying it to rejections made on numerous other grounds, or in a situation where no clear reason for rejection existed, and where no evidence exists to support an asylum claim, RSDOs rejects an asylum claim.³⁰⁶ RSDOs tend to resort to such decision making regardless of the fact that the UNHCR provides that should no evidence/supporting documentation exist; RSDOs must conduct a credibility investigation of the applicant.

In order to question the credibility of an applicant, a RSDO would use trivial inconsistencies as reasons to reject an asylum claim. For instance where an applicant provided in his or her eligibility form that he or she were not politically active in his or her country of origin, but

³⁰¹ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 471.

³⁰² *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T).

³⁰³ *Tantoush v Refugee Appeal Board* 2008 (1) SA 232 (T) para 102.

³⁰⁴ De Jager J 'Refugee status determination in South Africa' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 163.

³⁰⁵ UNHCR Handbook, para 41.

³⁰⁶ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 469.

during an interview the individual stated that he or she were a supporter of a political group, a RSDO would consider him or her not to be credible,³⁰⁷ regardless of what the individual meant with ‘supported’. Being a supporter of a political group could mean that you support what the political party stands for and not necessarily that you consider yourself as a member of the political group. RSDOs should give applicants in such circumstances an opportunity to explain what they mean with ‘supporter’ before they resort to rejecting a claim based on their own assumptions. RSDOs would also question the credibility of an individual because of broader developments which seemingly improves the circumstances in a country of origin.³⁰⁸ This would suggest that even though an applicant gave proper and honest information regarding the situation in his or her country of origin, which establishes the credibility of an individual, the credibility will still be questioned merely because incidents occurring thereafter suggest that, according to RSDOs, circumstances in the country is about to improve.

3.7 THE NATURE OF DECISIONS REACHED AND THE REASONS PROVIDED THEREFORE

After the interviews comes to an end the RSDO have to reach a decision as a final outcome of the asylum claim, a RSDO will either grant the applicant refugee status or reject the asylum claim as unfounded or manifestly unfounded.³⁰⁹ If the asylum claim is rejected, the RSDO is obliged to provide the applicant with adequate written reasons for reaching a decision.³¹⁰ An applicant’s right to being provided with reasons for reaching a decision is particularly important in the asylum process since the applicant can use that reasons as a basis in challenging the decision.³¹¹ It may be accepted that an applicant may suffer prejudice in an attempt to challenge an asylum application outcome should reasons or in the least sufficient reasons lack. Section 5(2) of PAJA also on its part provides that an applicant’s right to reasons for administrative action

³⁰⁷ Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa’s Refugee Status Determination Decisions* (2010) 36.

³⁰⁸ Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa’s Refugee Status Determination Decisions* (2010) 38.

³⁰⁹ De Jager J ‘Refugee status determination in South Africa’ in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 164.

³¹⁰ Refugees Act, section 24(4) read with regulation 12(3).

³¹¹ De Jager J ‘Refugee status determination in South Africa’ in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 164.

requires that such reasons be adequate.³¹² The courts of South Africa is fully aware of the fact that it is impossible to determine a general rule of what constitutes adequate reasons³¹³ but in the important case of *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd*³¹⁴ sufficient guidance has been provided:

The court held that the decision-maker should set out his understanding of the relevant law, any findings of facts on which his conclusions depend (especially if those facts have been in dispute), and the reasoning processes which lead him to those conclusions. He should do so in clear and unambiguous language, not in vague generalities or the formal language of legislation. The appropriate length of the statement covering such matters will depend upon considerations such as the nature and importance of the decision, its complexity and the time available to formulate the statement.³¹⁵

In *Katabana v The Chairperson of the Standing Committee for Refugee Affairs*³¹⁶ Davis J recognised the fact that a RSDO is not a court and is therefore not required to provide a lengthy judgment, but that the decision is carefully considered and that the reasons therefore be set out adequately.³¹⁷ In *Koyobe v Minister of Home Affairs*³¹⁸ Mokgoro J held that reasons must be sufficient but it does not have to be in such particular detail, reasons should rather be of such a nature to enable an applicant to present a reasonably substantial case for either an appeal or review.³¹⁹ However, applicants are often given decision letters with blank spaces at the reasons

³¹² Promotion of Administrative Justice Act 3 of 2000, section 5(2).

³¹³ *Rèan International Supply Company (Pty) Ltd v Mpumalanga Gaming Board* 1999 (8) BCLR 926 F.

³¹⁴ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA).

³¹⁵ *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (6) SA 407 (SCA) para 40.

³¹⁶ *Katabana v The Chairperson of the Standing Committee for Refugee Affairs* (WC) unreported case no 25061/2011 of 14 December 2012.

³¹⁷ *Katabana v The Chairperson of the Standing Committee for Refugee Affairs* (WC) unreported case no 25061/2011 of 14 December 2012, 24. For a RSDO to conduct him or herself in such a manner is completely reasonable and therefore no valid reason exist on which a RSDO can rely in order to excuse a failure to fulfill such an expectation.

³¹⁸ *Koyobe v Minister of Home Affairs* 2010 (4) SA 327 (CC).

³¹⁹ *Koyobe v Minister of Home Affairs* 2010 (4) SA 327 (CC) 63. However, a rejection letter would for instance merely consist of a brief description of the claim and a restatement of section 3 of the Refugees Act which defines a refugee and manifestly unfounded claims are even worse off since it generally contains no reasons and merely stating that the asylum application was made on grounds that are not included in the Refugees Act. Section 6 of PAJA provides that there must be a rational connection between administrative decisions and the reasons given. Even though rationality requires that a decision be supported by evidence and information which the RSDO considered, numerous negative decisions either provided no reasons at all or were of a general nature, consisting of cut and pasted paragraphs at times which fail to consider claims individually. The cut and paste practise employed by many RSDOs has severely impacted the opportunities of individuals to apply for asylum in an environment which is completely fair as guaranteed by legislation. Numerous rejection letters merely contained the history of the country of origin and made no effort to connect the information to the claim or to establish an argument based on evidence as to why a negative decision were reached. This is an outright violation of an

section. It is clear that applicants whose claims have been rejected as manifestly unfounded are not treated the same as other unsuccessful applicants merely because of the fact that according to the asylum system their claims were of a fraudulent nature. Such treatment fails to take into consideration that some of these manifestly unfounded claims may be genuine asylum claims which may just have been misunderstood by RSDOs because of the poor implementation of asylum procedures.

3.8 CONCLUSION

As it has been determined, South Africa has numerous domestic, regional and international obligations originating from legislation which aims to protect foreign nationals, including asylum seekers. However, research reveals that South Africa finds it challenging to fulfil its obligations towards asylum seekers. The domestic framework enacted its own South African Refugees Act which includes not only the 1951 Convention's but also the OAU Convention's definition of a refugee. The instrument takes the definition of a refugee even further than both these two instruments by adding gender and tribe as additional grounds for persecution, and that a spouse or dependant of an individual who qualifies as a refugee in terms of the 1951 Convention and the OAU Convention also qualifies to apply for asylum in South Africa. Even though the Refugees Act does not compel South Africa to grant asylum to asylum seekers, the country must receive such individuals and assist them in the RSD process. Part of such an obligation to receive asylum seekers, is the duty to inform asylum seekers of their right to apply for asylum. Asylum seekers at many instances fail to register their asylum claims due to the failure of border post officials to inform asylum seekers of their rights. Border post officials also fail to issue transit permits to asylum seekers. Due to the absence of the required documentation such as the transit permit, asylum seekers are left susceptible to abuse and exploitation.

individual's right to just administrative procedures and ultimately a deprivation of an opportunity to apply for asylum fairly. Such misconduct of RSDOs lead to thousands of individuals being deprived of an opportunity to seek refuge in South Africa and violations of multiple human rights since failed asylum seekers in many instances has to return to their countries of origin where their lives might be threatened. A significant number of negative decisions reached by RSDOs is in violation of the rationality standard, as well as the reasonableness standard contained in section 6(2)(h) of PAJA, which provides that an unreasonable action is one that is so unreasonable that no reasonable person could have come to the same conclusion as that of a RSDO.

The confidentiality of the RSD process is one of the most important elements which have to be present in order for an asylum application to be fair and adequately considered. Due to such importance legislation provides that everyone has the right to privacy which prohibits the disclosure of communications between RSDOs and applicants. Regardless of the fact that privacy is guaranteed by legislation, communications between RSDOs and applicants are still being overheard. Such circumstances render applicants reluctant to divulge all the necessary information to enable them to present a valid asylum claim.

Since the interview process by the RSDO with an applicant forms the crux of the RSD process, it is important for it to be thorough and adequately structured. Despite such a need, it has been determined that interviews are shorter than what it should be. Shorter interviews prevent applicants from making complete disclosures of the circumstances relating to their asylum claims and the situation within their host countries. Shorter interviews can adversely affect the likelihood of applicants being successful in an asylum claim.

For an asylum application to be fair, RSDOs must be competent to assist applicants. Competency requires RSDOs to completely understand the law and concepts pertaining to the RSD process. Should RSDOs be incompetent they would expose applicants to unfair practices. Research has revealed that some RSDOs do not fully comprehend concepts such as well-founded fear, persecution and credibility. This results into applicants being denied asylum status not because of the absence of a valid ground for asylum but because RSDOs fail to properly understand and apply the concepts.

CHAPTER 4: THE APPEAL AND REVIEW PROCESS

4.1 INTRODUCTION

Up until this stage it has been established that South Africa has a progressive asylum system consisting of a substantial framework for asylum seekers present within its territory. Due to significant developments³²⁰ over the past few years South Africa's legal framework now consists of a variety of laws influencing its asylum system which aims to allow asylum seekers to enjoy the guaranteed rights to its broadest extent possible and ultimately to enjoy an adequate standard of living. This objective however, remains a challenging one to achieve in actual reality. With all the challenges that are experienced within the asylum system, a substantial amount of asylum applications are being rejected. It is more often than not that the majority of such rejections are those of genuine asylum seekers. These rejections do not necessarily mean the end of the RSD process since a number of remedies are available to the exhaustion of asylum applicants. How effective these remedies are being implemented is a matter that will be considered in this chapter.

This chapter will focus on the importance of adequate and justifiable decision making by considering the right to administrative justice and to determine what requirements must be complied with in order to reach administrative justice. The chapter will further cover the right to appeal, review and judicial review. In addition the chapter will also focus on how the provision of adequate reasons for reaching a decision and the right of appearance influences the effective implementation of the right to appeal, review and judicial review.

4.2 THE RIGHT TO ADMINISTRATIVE JUSTICE

The RSD process, which includes the appeal and review aspect, must be interpreted, applied and administered while giving due consideration to relevant international law as well as the Bill of Rights in Chapter 2 of the South African Constitution. Section 33 of the Constitution provides

³²⁰ The domestic framework enacted its own South African Refugees Act which includes not only the 1951 Convention but also the OAU Refugee Convention's definition of a refugee. The instrument takes the definition of a refugee even further than both these two instruments by adding that a spouse or dependant of an individual who qualifies as a refugee in terms of the 1951 Convention and the OAU Refugee Convention also qualifies to apply for asylum in South Africa.

everyone³²¹ with the right to administrative action that is lawful, reasonable and procedurally fair and includes fundamental principles of administrative law as developed by the courts during the exercise of their common-law review authority with the effect that administrative law is constitutional law.³²² The PAJA was enacted with the objective of giving effect to the right to administrative justice and the right to written reasons for administrative action.³²³ It is evident that the term decision in PAJA includes the decisions made or proposed to be made in respect of an application for asylum by a RSDO, the SCRA or the RAB.³²⁴

A brief reading of the Refugees Act discloses multiple examples of administrative action under PAJA and there are instances of decisions that may be taken under the Immigration Act that may materially and adversely affect the rights of asylum seekers and refugees.³²⁵ In addition to entrenching the right to administrative justice, PAJA also codifies the underlying principles developed by our courts.³²⁶ Although fair administrative procedure³²⁷ are determined on a case by case basis,³²⁸ the basic requirement in the context of RSD includes adequate notice of the nature and purpose of the proposed decision;³²⁹ a reasonable opportunity to make

³²¹ The Constitution, chapter 11 considers 'everyone' to include every individual within South Africa regardless of their citizenship or status.

³²² *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) para 33. See also the Promotion of Administrative Justice Act 3 of 2000, section 1(i)(a)(ii)(b) which defines administrative action as any decision taken, or any failure to take a decision, by an organ of state, when exercising a public power and performing a public function in terms of legislation; or a natural or juristic person other than an organ of state when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.

³²³ Promotion of Administrative Justice Act 3 of 2000. See also the preamble of the Promotion of Administrative Justice Act 3 of 2000 By giving effect to administrative justice in such a manner, the legislature intended to promote an efficient administration, good governance and to create a culture of accountability, openness and transparency in the public administration or in the exercise of public power or the performance of a public function, by giving effect to the right to just administrative action.

³²⁴ Promotion of Administrative Justice Act 3 of 2000, section 1(v), section 6(2)(g) and (3)(a).

³²⁵ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 195.

³²⁶ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 195.

³²⁷ If legislation does not provide otherwise, administrative bodies are free to adopt any procedures which they consider as being appropriate, provided that it is fair and does not defeat the purpose of such an empowering legislative provision, see *Aol v Minister of Home Affairs and Others* 2006 (2) SA 8 (D) 13.

³²⁸ Promotion of Administrative Justice Act 3 of 2000, section 3(2)(a).

³²⁹ Exercising discretion during the consideration of a decision is an important part of procedural fairness and such discretion should not establish bias or unreasonableness, see Brynard DJ 'The duty to act fairly: A flexible approach to procedural fairness in public administration' 2010 (18) *Administration Publication* 132. Where unfairness is suspected, it has to be of such a degree that it can be inferred that the individual who reached the decision has

representations; a clear statement of the administrative action; adequate notice of any right of review or internal appeal; and adequate notice of the right to request reasons.³³⁰ Administrative justice is a necessary component of a fair RSD process which functions according to the procedural guarantees found in the law.³³¹

4.3 THE RIGHT TO APPEAL

Asylum seekers who were unsuccessful in their claims for asylum and whose claims have been rejected as unfounded have the right, on application, to appeal such a decision at the RAB.³³² If an application for asylum has been rejected in terms of section 24(3) of the Refugees Act, the matter must be considered under the Immigration Act, unless the asylum seeker lodge an appeal in writing in terms of section 24B (1) of the Refugees Act.³³³ An asylum seekers' right to appeal an application which is unfounded is included under section 24B (1). The section provides that if an asylum application has been rejected as unfounded; meaning that if the application was lodged on grounds which are not included in section 3, an asylum seeker may lodge an appeal at the RAB in the prescribed manner.³³⁴

An applicant must lodge an appeal within thirty days from the date on which an asylum claim has been declared as unfounded.³³⁵ The appeal must be directly lodged at a designated RRO.³³⁶ Serving as a protection mechanism for applicants, the South African government cannot return applicants to their countries of origin or nationality while an asylum application is still pending.³³⁷ This would mean that such removal is prohibited during the appeal process as well

erred in a manner which creates grounds for review, see *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) 292.

³³⁰ Promotion of Administrative Justice Act 3 of 2000, section 3(2)(b).

³³¹ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 30.

³³² Lawyers for Human Rights 'Policy shifts in the South African asylum system: Evidence and implications' available at www.migration.org.za (accessed 25 November 2017). See also Refugees Act section 26(1).

³³³ Refugees Amendment Act 33 of 2008, section 24B (5)(b).

³³⁴ Refugees Amendment Act 33 of 2008, section 24B (1). The Refugee Appeal Authority has been established by section 8A of the Refugee Amendment Act 33 of 2008.

³³⁵ Refugees Amendment Act 33 of 2008, section 30 read with Regulation 14(1) (a).

³³⁶ Refugee Regulations, section 14.

³³⁷ *Ramoroka V The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) v.

since it is considered as part of the application process. The asylum application will only be considered as finalised once an applicant has exhausted all the remedies available such as an appeal amongst others.³³⁸

According to section 13 of the Refugees Act, the RAB must consist of a chairperson and at least two members who are chosen by the Minister of the DHA with due regard to their experience, qualification, expertise and capabilities and at least one member must be legally qualified.³³⁹ However this provision is frequently not complied with in practice. There have been many cases that have been reviewed, owed to the fact that the RAB was not properly constituted when it purported to dismiss applicants' appeals.³⁴⁰ It remains important to note that if an appeal is upheld while the RAB is not properly constituted, it may be easily overlooked unless it is reported by relevant authorities. In *Harerimana v The Chairperson of the Refugee Appeal Board and Others*³⁴¹:

The applicant inter alia sought to review the decision of a one member RAB panel on the basis that it was not properly constituted. The court held that at least two panellists are needed to constitute a quorum and that a decision must be taken by a majority of votes which manifestly requires a full quota of members or at the very least two members. The court concluded that the decision which the RAB made was invalid and had to be set aside.³⁴²

Cases such as *Backiokila Dorcasse v Minister of Home Affairs*³⁴³ and *Christian Bokesta Bolanga v Refugee Status Determination Officer and Others*³⁴⁴ supports the fact that a one member RAB panel does not comply with the requirements of the Refugees Act but that the RAB nevertheless persists to constitute one member panels to consider appeals.³⁴⁵ No case has as yet been reported in South Africa which has been adjudicated by the RAB.³⁴⁶ Therefore, when DHA officials

³³⁸ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) iv.

³³⁹ Refugees Act, section 30.

³⁴⁰ Casette J, Chemaly R, Erasmus T, and Wellcome R 'Systematic problems for refugees' (2015) *Without prejudice* 36.

³⁴¹ *Harerimana v The Chairperson of the Refugee Appeal Board and Others* 2014(5) SA 550 (WCC).

³⁴² *Harerimana v The Chairperson of the Refugee Appeal Board and Others* 2014(5) SA 550 (WCC).

³⁴³ *Backiokila Dorcasse v Minister of Home Affairs* 2012 JDR 1889 (GSJ).

³⁴⁴ *Christian Bokesta Bolanga v Refugee Status Determination Officer and Others* 5027/2012.

³⁴⁵ *Backiokila Dorcasse v Minister of Home Affairs* 2012 JDR 1889 (GSJ).

³⁴⁶ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 50. Where cases have been reported it is only in the form of reviews or

consider asylum cases, no precedent exists for them to base their decisions on.³⁴⁷ The practice of not reporting cases considered by the RAB, would suggest that those instances where the RAB considered cases while its panel was improperly constituted is also not being reported. This is because of the fact that most applicants are not aware of the requirements with which the RAB hearings have to comply with therefore they are not in a position to report such transgressions, and should they be aware of such requirements they often lack the resources which enables them to report such transgressions.

As it has been reported in 2013, appeal completions are slow owed to low capacity and the need to rehear numerous cases leads to new backlogs of cases which ultimately increase appeal waiting periods; new RAB judges are inexperienced in refugee law and they receive insufficient training pertaining to refugee law.³⁴⁸ New procedures renders it even more difficult for asylum seekers to manage their own appeals, which disadvantages those who do not have access to legal service providers, including especially those who are based outside of the major metro areas where legal service providers' offices are established.³⁴⁹ The dissection of responsibilities between the DHA and the RAB and the extent of the RAB's independence is also a matter of great concern.³⁵⁰ In order for any appellate process to make meaningful sense, it is important that an independent and impartial body be established to consider appeals instituted by aggrieved applicants.³⁵¹ Apart from being improperly constituted, the impartiality and independence of the RAB can also be compromised if incompetent members are being appointed. As a measure to avoid such practice, the Refugees Act provides that a person may not be appointed as a member of the RAB if that person:

- (a) Is not a South African;
- (b) Has been sentenced to imprisonment without the option of a fine during the preceding four years;

appeals to the High Courts of South Africa, such as the cases *Arse v Minister of Home Affairs* 2010 (7) BCLR 640 (SCA) and *Abdi v Minister of Home Affairs and Others* 2006 (2) SA 8 (D).

³⁴⁷ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 50.

³⁴⁸ Lawyers for Human Rights 'Policy shifts in the South African asylum system: Evidence and implications' available at www.migration.org.za (accessed 25 November 2017).

³⁴⁹ Lawyers for Human Rights 'Policy shifts in the South African asylum system: Evidence and implications' available at www.migration.org.za (accessed 25 November 2017).

³⁵⁰ Lawyers for Human Rights 'Policy shifts in the South African asylum system: Evidence and implications' available at www.migration.org.za (accessed 25 November 2017).

³⁵¹ Abuya EO, Wachira GM 'Assessing asylum claims in Africa: Missing or meeting standards?' (2006) *NILR* 201.

- (c) Is an unrehabilitated insolvent;
- (d) Has been judicially declared of unsound mind;
- (e) Has been removed from office of trust on account of misconduct involving theft, fraud or corruption,
or
- (f) Is a political office bearer holding a position in the national executive structure of any political party.³⁵²

Regardless of the required independence of the RAB, the policy of the DHA to require applicants to return to RROs where they initially applied in order to finalise their claims, has influenced the RAB to refuse to accept notices of appeals at RROs other than those at which a RSDO considered the asylum application initially.³⁵³ Despite the fact that procedure requires applicants to appeal at a specific RRO, applicants are often furnished with a notice of the right to appeal but it fails to designate the specific RRO where the notice of appeal is to be lodged.³⁵⁴ Since RSDOs often fail to inform applicants of their right to appeal a decision, they would be unaware thereof and they would fail to lodge a notice of appeal due to their ignorance. It may be useful for RSDOs to write their decisions in such a manner which clearly informs applicants of their right to appeal a decision with which they are not satisfied. Regardless of the judgment in *Fikre v Minister of Home Affairs*³⁵⁵ in which the court emphasised the importance of the right of *non-refoulement*, and that an application for condonation of the late filing of a notice of appeal brings back a person's right not to be deported until the asylum seeker have exhausted all appeal, review and judicial review remedies, undocumented migrants continue to face a real risk of being arrested and deported.³⁵⁶

³⁵² Refugees Act, section 8E as inserted by section 11 of the Refugees Amendment Act 2008 and as amended by section 5 of the Refugees Amendment Act 2011. See also Ramoroka *V The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 47, the objective of the previously mentioned legislative provision is to ensure the independence of the RAB and to avoid possible external political influences in order to maintain the impartiality of the RAB.

³⁵³ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 184. Although there is a requirement that an appeal be lodged within thirty days at a RRO where the applicant initially applied, from the date that an unsuccessful decision has been reached, condonation of such failure is possible. See also, Refugee Appeal Board Rules, 2013 Rule 4.5 allows the RAB to condone an applicant's failure to comply with the thirty day time frame provided that good cause is shown. Such condonation would allow applicants to appeal a decision regardless of the fact that the time period of thirty days ceased provided that he or she has valid reasons for the non-compliance.

³⁵⁴ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 185.

³⁵⁵ *Fikre v Minister of Home Affairs* 2012 (4) SA 348 (GSJ).

³⁵⁶ *Fikre v Minister of Home Affairs* 2012 (4) SA 348 (GSJ) para 82.

In addition to section 21(5) of the Refugees Act which provides for the confidentiality of asylum applications,³⁵⁷ the Appeal Board Rules provide for closed proceedings,³⁵⁸ which appear to limit the right to confidentiality, since the RAB may allow any person to attend appeal proceedings. Appeal Board Rule 14.1 confers the discretion on the RAB to, on application or on its own accord allow any person to attend a hearing.³⁵⁹ In *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board*³⁶⁰ three media houses asked the court to conclude that section 21(5) of the Refugees Act is unconstitutional to the extent that it precludes members of the public or the media, in appropriate cases, from attending and reporting proceedings of the RAB and a counter application was filed by the respondents which required the court to declare that the Appeal Board Rules were ultra vires and invalid.³⁶¹ The applicants on their part argued that section 21(5) of the Refugees Act infringed the right to freedom of expression,³⁶² the freedom of the press and freedom to receive or import information or ideas.³⁶³

The court rejected the argument of the applicants that confidentiality applied only to the initial stages of the RSD process by saying that ‘all times’ means exactly that, that the confidentiality principle applies from the beginning until the end of the RSD process.³⁶⁴ The fact that the RSD process includes both the beginning and the end of it means that the appeal process is also included in the RSD process and that confidentiality should apply during an appeal as well. The court held that Appeal Board Rule 14.1 was ultra vires of the Act, that section 21(5) is absolute and that the limitation imposed by section 21(5) of the Refugees Act to the rights contained in section 16(1) of the Constitution amounts to a justifiable limitation of those rights and is therefore not unconstitutional.³⁶⁵

³⁵⁷ Refugees Act, section 21(5).

³⁵⁸ Refugee Appeal Board Rules, 2003.

³⁵⁹ Refugee Appeal Board Rule 14.1.

³⁶⁰ *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board* (22346/2011) (2012) ZAG PPHC 341 (6 December 2012).

³⁶¹ *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board* (22346/2011) (2012) ZAG PPHC 341 (6 December 2012) para 2.

³⁶² The Constitution, section 16(1) which provides for the right of everyone to freedom of expression.

³⁶³ *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board* (22346/2011) (2012) ZAG PPHC 341 (6 December 2012) para 11.

³⁶⁴ *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board* (22346/2011) (2012) ZAG PPHC 341 (6 December 2012) para 12.

³⁶⁵ *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board* (22346/2011) (2012) ZAG PPHC 341 (6 December 2012) para 14,15,18,27 and 29.

Further in *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board* the applicants applied to the Constitutional Court for leave to appeal against the dismissal of their claim for the court to declare section 21(5) unconstitutional, leave for appeal was granted and the appeal was upheld:

The court held that section 21(5) does not make provision to allow the RAB to give access to individuals to attend proceedings in appropriate cases and that the limitation on the right to freedom of expression is unreasonable, unjustifiable and invalid. The court held that the intended purpose of section 21(5) can be obtained through less restrictive means such as conferring discretion on the RAB to allow access to appeal hearings in appropriate cases while strict terms and conditions apply. The court concluded that it would suspend the declaration of section 21(5) of the Refugees Act which is inconsistent with section 16 (1) (a) (b) of the Constitution to the extent that it exclude members of the public or the media from attending appeal hearings and that it fails to confer discretion on the RAB to allow the public and the media access to its hearings in appropriate cases; and allowed the Parliament to correct the constitutional defect within two years.³⁶⁶

Research have established that even though the RAB claims to ensure that the female board members consider cases involving FGM or rape, female applicants are still left to have their cases considered by male board members most of the time.³⁶⁷ This can be problematic because in many cultures women are not allowed to look men into the eyes and this may be interpreted to mean that women are not being honest in their asylum applications. Therefore, it is crucial for women to rather be assisted by female officials to ensure fair procedures and to avoid the misinterpretations of behaviour. Regardless thereof, appeal hearings comply with the required average length and it has been reported that RAB board members are sympathetic and decent.³⁶⁸

4.4 THE RIGHT TO REVIEW

The SCRA has been authorised and is obligated under section 25 (1) to review a decision of a RSDO to reject an asylum application as manifestly unfounded, fraudulent or abusive under

³⁶⁶ *Mail and Guardian Media Limited v MJ Chipu, NO, Chairperson of the Refugee Appeal Board* (22346/2011) (2012) ZAG PPHC 341 (6 December 2012) para 94, 93 and 115.

³⁶⁷ Harris LM 'Untold stories: Gender related persecution and asylum in South Africa' (2009) 15 *Michigan Journal of Gender Law* 339.

³⁶⁸ Harris LM 'Untold stories: Gender related persecution and asylum in South Africa' (2009) 15 *Michigan Journal of Gender Law* 339.

section 24 (3)(b).³⁶⁹ A RSDO is required to provide written reasons for reaching such a decision and a record of proceedings to the SCRA within ten working days from the day of rejection in order for an asylum claim to be automatically reviewed.³⁷⁰ An individual continues to be an asylum seeker until he or she has exhausted all the remedies available such as appeals and reviews, such an individual is also entitled to documentation which legalises his or her stay in the host country.³⁷¹ After the review of an asylum application, the SCRA may either confirm or set aside the decision of the RSDO.³⁷² Should the SCRA set a decision aside; the SCRA will refer the claim back to the RSDO together with direction for further action.³⁷³ It is important that the SCRA function without any bias and be independent.³⁷⁴ It is required that SCRA members be appointed for five years and that the grounds under which the Minister may remove them from office be limited which simultaneously supports the independence of the SCRA.³⁷⁵ However as noted previously, it was held in *Wathenuka* that a committee which consists of employees of the DHA can hardly be a source of independent advice and it cannot constitute an independent review tribunal.³⁷⁶

Individuals whose claims are considered on review have less procedural rights than those claims which are rejected as unfounded therefore the review process is often described as an expedited or fast track process.³⁷⁷ The review of decisions are based on fast track procedures because manifestly unfounded, abusive or fraudulent claims are considered to be onerous to South Africa and detrimental to the interests of applicants who might have genuine grounds for an asylum claim.³⁷⁸ Such decisions are in most instances being reached by RSDOs because of their incorrect implementation and application of what the law provides. Fast track procedures which aims to alleviate the backlog of asylum claims of the SCRA can either be positive or negative but

³⁶⁹ Refugees Act, section 25(1).

³⁷⁰ See note 110 above.

³⁷¹ Amit R, Kriger N 'Making Migrants "Il-legible": The Policies and Practices of Documentation in Post-Apartheid South Africa' (2014) 277.

³⁷² Refugees Act, section 25(3) (a).

³⁷³ Refugees Regulations, section 13(2).

³⁷⁴ Refugees Act, section 9(2).

³⁷⁵ Refugees Amendment Act 33 of 2008, section 8 A.

³⁷⁶ See note 106 above.

³⁷⁷ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 177.

³⁷⁸ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 177.

in most circumstances it is negative.³⁷⁹ It has been argued that fast track procedures aimed at limiting internal appeals and access to courts on review forms part of a group of restrictive policies that are being used to deter asylum seekers or to prevent asylum seekers from entering and applying for asylum within the country.³⁸⁰

Different from the appeal process, manifestly unfounded claims are automatically referred to the SCRA, but asylum applicants of such outcomes are not allowed to appear before the committee and due to the high rate and poor quality of decisions reached by RSDOs, the review of decisions is even more important.³⁸¹ Regardless of such added importance, reviews are conducted based on documentation alone, unless the SCRA invites an applicant to appear before it in order to provide further information related to the review of the asylum claim which the SCRA deem necessary.³⁸² By relying on documentation alone creates the risk of repeating the mistakes which were made by the RSDOs; therefore the ability of the SCRA to reach well-reasoned conclusions are heavily challenged as a result of the false information upon which most decisions are based.³⁸³ Owing to the multiple misconduct exercised by DHA officials, current procedures require a mandatory review of all positive decisions in order to protect asylum seekers against corruption since most negative decisions are not subjected to internal review.³⁸⁴ This would encourage RSDOs to ensure that all decisions are of a higher quality which includes adequate reasons for reaching an outcome.³⁸⁵

Since an applicant has no right of appearance at the review process, unless he or she is invited to appear before the SCRA, it could be detrimental to the applicant since SCRA officials merely base their review considerations on the written documentation which is provided by the RSDO. These documents normally contain incorrect, inadequate and/or false information related to the

³⁷⁹ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 177.

³⁸⁰ Hathaway J 'The emerging of politics non-entrée' (1992) 91 *Refugees* 40.

³⁸¹ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 98.

³⁸² See note 111 above.

³⁸³ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 98.

³⁸⁴ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23 *IJRL* 460.

³⁸⁵ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23 *IJRL* 460.

asylum claim.³⁸⁶ This further reduces the possibility of negative asylum decisions being set aside especially since RSDOs already have negative perceptions of manifestly unfounded, abusive or fraudulent asylum claims especially since such claims is considered to be a burden to the South African asylum system.

4.5 THE RIGHT TO JUDICIAL REVIEW

After a negative asylum application has been upheld by both the RAB and the SCRA an asylum seeker can as a final remedy apply to have his or her asylum application considered on judicial review based on one or more of the grounds for judicial review. For purposes of the research the discussion of the grounds for judicial review will be limited to what is relevant to the RSD process as it has been focused on in the previous chapters.

An asylum seeker has the right to written reasons for a decision which would adversely affect an asylum seeker³⁸⁷ which an applicant may seek within ninety days from the date on which the decision was reached.³⁸⁸ Should a RSDO fail to provide such reasons within ninety days it would suggest that the administrative action was reached without good reason(s) unless evidence exists to prove otherwise;³⁸⁹ the absence of written reasons gives rise to the application for judicial review.

Reaching a decision that no reasonable individual would have reached³⁹⁰ is another ground for judicial review. In *Katshingu v Standing Committee for Refugee Affairs*³⁹¹ the court held that a failure to consider relevant information to an asylum claim and considering irrelevant information indicated a failure of the decision maker to apply his or her mind properly to the application.³⁹² The court held in *Katabana v Chairperson of the Standing Committee for Refugee*

³⁸⁶ A review of negative status determination decisions or rejection letters considered by South Africa's RROs exposes serious flaws in the status determination process, see Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23 *IJRL* 459.

³⁸⁷ Promotion of Administrative Justice Act 3 of 2000, section 3(5).

³⁸⁸ Promotion of Administrative Justice Act 3 of 2000, section 5(1).

³⁸⁹ Promotion of Administrative Justice Act 3 of 2000, section 5(3).

³⁹⁰ Promotion of Administrative Justice Act 3 of 2000, section 6(2)(h).

³⁹¹ *Katshingu v Standing Committee for Refugee Affairs* (19726/2010) (WC) unreported decision 2 November 2011.

³⁹² *Katshingu v Standing Committee for Refugee Affairs* (19726/2010) (WC) unreported decision 2 November 2011 10-20.

*Affairs*³⁹³ that the evidence suggested that the decision reached could not be connected to the presented facts.³⁹⁴

The absence of procedural fairness can also result into administrative injustice. Procedural fairness is best defined as when all cases are accorded equal treatment and handled according to similar procedures.³⁹⁵ For a decision to be procedurally fair it must be unbiased and should unfairness be present, it must be of such a nature so that a degree of inference can be drawn from it that the decision maker had made a mistake in such a manner that it establishes grounds for review.³⁹⁶ Since the exercise of discretion is important it should not be of a bias or unreasonable nature.³⁹⁷ All the procedures used by the DHA must respect the gender and ages of the applicants at all times.³⁹⁸ Unfair procedure which violates the right to seek and enjoy asylum occurs when extreme limitations are imposed on applicants or if they are treated in an unacceptable manner.³⁹⁹ Generally it is accepted that at least one ground must be present in order for an asylum seeker to refer a decision to a High Court for review.⁴⁰⁰

After all internal remedies have been exhausted; an asylum applicant may institute judicial review of a negative decision upheld by both the RAB and the SCRA as a last resort. Judicial review is governed by section 7 of PAJA. Proceedings for judicial review must be initiated without unreasonable delay and within one hundred and eighty days from the day on which all internal remedies have been exhausted; or if no internal remedies exist, when the person became aware of or reasonably should have been aware of the administrative action and the reasons for it.⁴⁰¹ Judicial review must be instituted in a High Court and its rules are governed by the High

³⁹³ *Katabana v Chairperson of the Standing Committee for Refugee Affairs* (25061/2011) (WC) unreported decision of 14 December 2012.

³⁹⁴ *Katabana v Chairperson of the Standing Committee for Refugee Affairs* (25061/2011) (WC) unreported decision of 14 December 2012 25 lines 8-11.

³⁹⁵ May L *Global Justice and Due Process* (2011) 48.

³⁹⁶ *Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) 292.

³⁹⁷ Brynard PA 'Policy implementation and cognitive skills: the difficulty of understanding implementation' (2010 *Administration Publication* 132.

³⁹⁸ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 57.

³⁹⁹ Mole N and Plender R 'Beyond the Geneva Convention: Constructing a *de facto* right of asylum from international human rights instruments' in Nicholson F and Twomey P (eds) *Refugee Rights and Realities: Evolving International Concepts and Regimes* (1999) 82.

⁴⁰⁰ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 58.

⁴⁰¹ Promotion of Administrative Justice Act 3 of 2000, section 7.

Court Rules.⁴⁰² Even though judicial review is an influential remedy, access to it is limited since magistrates' courts have not yet been designated as administrative justice courts in terms of section 1 of PAJA.⁴⁰³ However, jurisprudence that is focussed on the judicial review of decisions made by the SCRA and RAB is a limited but developing body of law.⁴⁰⁴

4.6 THE IMPORTANCE OF THE RIGHT TO ADEQUATE REASONS FOR REACHING A DECISION

After a RSDO has considered an asylum application and the outcome thereof is unsuccessful, the RSDO is obligated to provide the asylum seeker with a written decision which contains reasons for the rejection.⁴⁰⁵ Such a requirement is intended to ensure that the applicant's right to reasons for the adverse administrative action is provided for.⁴⁰⁶ The right to reasons is important since it provides the grounds on which an unsuccessful asylum applicant can challenge such an outcome, either on appeal to the RAB or through automatic review by the SCRA and then finally judicial review in a High Court.

In order for an applicant to rely on the remedies provided, it is crucial that he or she have received adequate reasons in order to ensure an efficient review or appeal process of an asylum decision. By providing adequate reasons for a decision it can be determined, although not guaranteed at all times, that an adjudicator is independent and that a decision has been reached strictly on its merits, free from political, social, diplomatic, or any other external influences or pressures.⁴⁰⁷ Therefore should reasons, or adequate reasons lack, it would mean that a decision is unfair towards an applicant and that it should not be binding on the applicant. Since reasons for a

⁴⁰² De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 195.

⁴⁰³ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 195.

⁴⁰⁴ De la Hunt L, 'Refugee status determination: Appeal and review' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 195.

⁴⁰⁵ The Refugees Act, section 24(4) read with regulation 12(3).

⁴⁰⁶ The Constitution, section 33(2) read with section 5 of Promotion of Administrative Justice Act 3 of 2000.

⁴⁰⁷ Abuya EO, Wachira GM 'Assessing asylum claims in Africa: Missing or meeting standards?' (2006) *NILR* 196.

decision are so important in the RSD process, research has proven that the UNHCR actually recommend the issuance of reasons for reaching a decision.⁴⁰⁸

When a RSDO fails to provide an asylum seeker with adequate reasons for a decision reached, it can be accepted that the decision was taken without any sufficient reason therefore.⁴⁰⁹ Should a RSDO refuse to provide reasons, it can only be done in circumstances where a refusal is in accordance with the limitation clause.⁴¹⁰ It is often that applicants convey information relevant to their asylum claim to RSDOs but RSDOs fail to include it in their written reasons for rejections.⁴¹¹ This then mean that such information were also omitted in the documentation provided to the RAB which may result in flawed decision making which the RAB then uphold based on the misinterpretations or the failure of RSDOs to take relevant information into consideration.

It is also required that the reasons provided be rationally connected to the administrative decision taken.⁴¹² This would suggest that the nature of the circumstances of the application should be in accordance with the reasons as to why a specific decision has been reached. Therefore it is important for decisions taken to be of a sufficient and adequate standard. However, it has been argued that RSDOs in South Africa reach decisions which are of poor quality since they fail to apply the OAU Convention's definition specifically.⁴¹³ An example of such misconduct would be where individuals have fled civil war and political instability as required by section 3(b) of the Refugees Act who was incorrectly required by the RSDOs to prove individual persecution.⁴¹⁴

⁴⁰⁸ Abuya EO, Wachira GM 'Assessing asylum claims in Africa: Missing or meeting standards?' (2006) *NILR* 201. See also the UNHCR, 'Procedural standards for refugee status determination under UNHCR's mandate' available on the www.unhcr.org (accessed 05 September 2017) and Abuya EO, Wachira GM 'Assessing asylum claims in Africa: Missing or meeting standards?' (2006) *NILR* 198, this procedural safeguard has been reiterated by the UNHCR with its provision that applicants whose claims have been rejected, should be informed of the reasons thereto in writing and that applicants must be able to make an informed decision about whether an appeal is appropriate and to focus appeal submissions on relevant facts and issues.

⁴⁰⁹ Promotion of Administrative Justice Act 3 of 2000, section 5(3).

⁴¹⁰ The Constitution, section 36.

⁴¹¹ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 97.

⁴¹² Promotion of Administrative Justice Act 3 of 2000, section 6(2)(f)(ii)(dd).

⁴¹³ Schreier T 'Refuge: Canada's periodical on refugees (2008)' available at http://heinonline.org/hol/page?handle=hein.journals/iolr2&div=6&q_sent=1&collection=journals (accessed 09 January 2018).

⁴¹⁴ Forced Migration Studies Programme Wits University Research Report *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 40.

RSDOs often also rely on out-dated or false information of countries of origin on which they found their decisions to reject asylum claims which is incorrect since their perceived objective circumstances are not related to the applicants' subjective circumstances.

4.7 THE RIGHT OF APPEARANCE

The issue of whether an applicant has the right to be present at an appeal hearing and make representations to the RAB was considered in *AOL v Minister of Home Affairs*.⁴¹⁵ The court held that section 26(4) which provides that the RAB must allow legal representation upon the request of the applicant implies that the applicant is entitled to be present at the hearing and must be given notice of the hearing, to be able to request and arrange legal representation.⁴¹⁶ Despite such a significant interpretation, asylum seekers are often deprived of the right to appear at an appeal hearing due to the failure of RAB officials to inform asylum seekers of such a right.

The right to appeal an unfounded asylum application decision includes the right to appear before the RAB during the appeal hearing; however DHA intends to remove such a right of appearance and to have hearings based on documentation alone,⁴¹⁷ which is already the rule when cases are being reviewed by the SCRA, unless the SCRA invites an applicant to appear before the SCRA. In the event that an applicant has not been invited to appear before the SCRA, it could be extremely problematic since documentation alone is not sufficient to adequately explain the particulars of an asylum application. In all likelihood the actual presence of an applicant at such proceedings will ensure that more concrete information is provided as to why asylum should be granted to the applicant. By removing the right of appearance, asylum seekers would be disadvantaged while there remains a possibility that their appeals may fail merely because of the fact that they did not have an opportunity to explain their circumstances personally. There is also the new requirement that applicants have to submit detailed written appeals, a requirement which most asylum seekers are unable to satisfy unless they have the assistance of a legal services

⁴¹⁵ *Aol v Minister of Home Affairs* 2006 (2) SA 8 (D) 13C.

⁴¹⁶ *Aol v Minister of Home Affairs* 2006 (2) SA 8 (D) 187-188, 13D.

⁴¹⁷ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 96.

provider.⁴¹⁸ This can be regarded as yet another challenge for asylum seekers. The requirement of having to submit a detailed written appeal as to the reasons why an asylum application cannot be considered as unsuccessful fails to take into account that many applicants are either illiterate or they do not understand English. Even if applicants understand English, the required content to be furnished is of such a nature that the applicants are unsure of what to furnish in their written appeals.

The proposed removal of the right of appearance of the applicant during the appeal hearing holds serious implications because of the poor quality of decisions and the fact that the written record (the RSDOs reasons for a rejection) fails to reflect the details of the claim as conveyed by the applicant.⁴¹⁹ The failure of applicants to submit written appeals due to the lack of legal assistance perpetuates the disadvantages suffered on their part and creates a risk that individuals with a genuine fear of persecution could be sent back to their countries of origin because of such procedurally unfair practices,⁴²⁰ putting their lives at risk of threats and physical harm.

4.8 CONCLUSION

The main aim of this chapter was to determine whether or not asylum seekers are able to effectively implement the guaranteed remedies through which they can challenge undesirable asylum application decisions. Research have established that the right to administrative justice requires sufficient reasons for reaching a decision, reasonable opportunity to make representations, adequate notice of the right to remedies such as appeal and review and adequate notice of the right to request reasons for decisions reached.

One of the remedies available to asylum seekers whose asylum claims have been rejected as unfounded is to appeal such an outcome at the RAB. For the proper functioning of the RAB it is required that it should consist of a chairperson and at least two members, one of which must be legally qualified. Despite the importance of the proper composition of the RAB it has been

⁴¹⁸ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 96.

⁴¹⁹ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 96.

⁴²⁰ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 97.

determined that the RAB often consider appeals while being improperly constituted. The rate of appeal completions are already low which is exacerbated by the fact that RSDOs reject asylum claims even more causing elevated backlogs of appeals to be considered by the RAB.

Since applicants whose asylum claims have been rejected as manifestly unfounded and whose claims are considered on review by the SCRA have less procedural rights than claims which have been rejected as unfounded, the review of decisions are based on fast track procedures. This is owed to the fact that manifestly unfounded, abusive or fraudulent claims are considered to be a burden to South Africa and detrimental to the interests of applicants who actually have genuine asylum claims. In an attempt to reduce the amount of asylum claims which have to be considered by the SCRA, it has implemented the fast track procedures which mostly have a negative effect since it places the lives of many genuine asylum seekers at risk of being subjected to threats and violence. Other than with appeals, the review of cases does not provide for the right of appearances before the SCRA, unless the SCRA invites an applicant to appear before the SCRA in terms of section 25(2) of the Refugees Act;⁴²¹ however an applicant has the right to make written representations to the SCRA. Unless otherwise provided, the SCRA merely relies on the written records furnished by the RSDO, which in many instances contain incorrect or inadequate information related to the particulars of the asylum claim.

After an asylum application has been considered to be unsuccessful, the RSDO is required by legislation to provide the applicant with reasons for reaching such a decision. The requirement intends to ensure that an applicant's right to reasons for adverse administrative action is complied with. Therefore the absence of adequate reasons for reaching a decision can hold multiple negative consequences for applicants who want to challenge their unsuccessful asylum applications. The provision of reasons is extremely important since it determines the effectiveness of the appeal and review process. Numerous asylum seekers are suffering prejudice since they are deprived of a fair chance to properly challenge the negative outcomes of their applications due to the lack of reasons or adequate reasons.⁴²² Further the lack of reasons may infer that a RSDO have reached an unsuccessful decision without sufficient reason(s) which

⁴²¹ Refugees Act, section 25(2).

⁴²² Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 61.

means that the outcome is invalid since no ground exists to justify the decision. However at many instances such decisions are being upheld when considered by the RAB and the SCRA.

Although the right of appearance applies when cases are being appealed, it may soon be removed from practice.⁴²³ The right of appearance should be included both at the appeal and the review of asylum applications. This would rule out the fact that officials merely rely on written records which would consequently reduce the possibility of negative decisions being upheld. By appearing both before the RAB and the SCRA, applicants will be able to state their distinct cases and avoid being placed under generalized categories which RSDOs create. It appears as if RSDOs consider all asylum seekers to come from similar backgrounds and circumstances, therefore they fail to comprehend that each asylum application should be treated on a case by case basis. Therefore it is very important for applicants, whether their cases are on appeal or review to be given the opportunity to appear before the RAB or SCRA in order for them to present their cases and to avoid officials reaching conclusions based on the incorrect determinations previously reached by RSDOs.

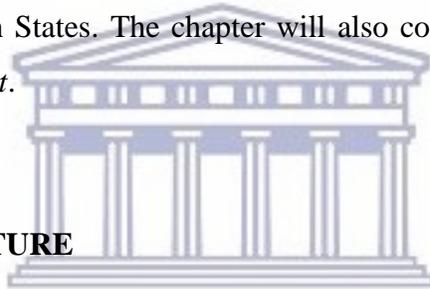
It can be concluded that although South Africa has made provision for multiple remedies to be exhausted in order to challenge RSD decisions, asylum seekers are faced with many challenges in enjoying these remedies. Due to the flawed implementation of law in practice and the right to appeal, review and judicial review asylum seekers are being denied the right to challenge RSD outcomes effectively. The lack of proper enjoyment of the guaranteed remedies results into the violation of asylum seekers' constitutional rights such as the right to just administrative action. South Africa still has a long way to go in order to provide asylum seekers with the proper enjoyment of the rights related to administrative justice.

⁴²³ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 96.

CHAPTER 5: *NON- REFOULEMENT*

5.1 INTRODUCTION

As it has been provided earlier, an asylum seeker has the right to seek and enjoy asylum in a host country.⁴²⁴ Such asylum seekers, while they are in the process of seeking asylum may not be returned to their countries of origin or nationality until the RSD process comes to an end. The principle of *non-refoulement* prohibits the return of asylum seekers and refugees to their countries of origin where he or she may face persecution or torture.⁴²⁵ The principle of *non-refoulement* serves to ensure the protection of vulnerable foreign nationals. Therefore it is the cornerstone of both asylum and international refugee law.⁴²⁶ This chapter will consider how *non-refoulement* applies to the right to freedom from torture, the application of *non-refoulement* to economic migrants, the exception to the principle and how the principle influences bilateral extradition agreements between States. The chapter will also consider the relation between the right to life and *non-refoulement*.



5.2 FREEDOM FROM TORTURE

Article 33(1) of the 1951 Convention provides for the principle of *non-refoulement* which prevents a host country from returning an asylum seeker against his or her will in any manner to a territory where he or she fears threats to life and freedom.⁴²⁷ The Convention against Torture⁴²⁸ upholds the prohibition of *refoulement* by providing that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.⁴²⁹ Torture does not mean pain or suffering which arise from lawful sanctions,⁴³⁰ and a foreign national can only be entirely protected if he or she is protected against the risk of extradition to a country where he or she fears

⁴²⁴ The UDHR, Article 14(a). See note 6 above.

⁴²⁵ Goodwin-Gill G and McAdam J *The Refugee in International Law* 3rd ed (2007) 201.

⁴²⁶ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 72.

⁴²⁷ 1951 Convention, Article 31(1).

⁴²⁸ United Nations Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, GA Res. 39/46, UN GAOR, 1984, Supp. No. 51, UN Doc. A/39/51 (1984). (Hereafter referred to as CAT).

⁴²⁹ Convention against Torture, Article 3(1).

⁴³⁰ Convention against Torture, Article 1.

persecution.⁴³¹ It can be said that *non-refoulement* is applicable to individuals who fear torture or other ill-treatment under human rights law when the persecution or fear of persecution is based on the grounds contained in the 1951 Convention or the Refugees Act.⁴³² Host countries will also be in violation of Article 6 of the UN International Covenant on Civil and Political Rights (ICCPR)⁴³³ if such a country would return an individual to a country where his or her life may be under threat since Article 6 provides that everyone has the right to life.

The principle of *non-refoulement* represents the international community's commitment to ensure the enjoyment of human rights such as the right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment.⁴³⁴ Article 3 of CAT provides that no State Party shall expel, return or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.⁴³⁵ Article 3 of the European Convention on Human Rights (ECHR),⁴³⁶ Article 7 of the ICCPR, and Article 3 of CAT which all prohibits torture, and inhuman or degrading treatment or punishment, is absolute.⁴³⁷ The CAT defines the act of torture as:

Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes of obtaining from him or a third person information or a confession, punishing him for an act he or such a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁴³⁸

It has been noted that CAT does not consider cases of ill-treatment which occurs in an exclusively non-governmental setting, it merely relates to practices which involves some sort of

⁴³¹ Ramoroka V *The Determination of Refugee Status in South Africa: A Human Rights Perspective* (unpublished LLM thesis, University of South Africa, 2014) 78.

⁴³² 1951 Convention, Article 1 and the Refugees Act, section 3.

⁴³³ UN International Covenant on Civil and Political Rights 999 UNTS 171, adopted 16 December 1966, entered into force on 23 March 1976. (Hereafter referred to as the ICCPR).

⁴³⁴ Johnson C 'Failed asylum seekers in South Africa: Policy and practice' (2015) *AHMR* 3.

⁴³⁵ The Convention against Torture, Article 3.

⁴³⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms ETS 5; 213 UNTS 22, entered into force September 3, 1953.

⁴³⁷ Bruin R Wouters K 'Terrorism and the non-derogability of non-refoulement' (2003) 15 *IJRL* 5. See also Freshwater PJ 'The obligation of non-refoulement under the Convention against Torture: When has a foreign government acquiesced in the torture of its citizens?' (2005) 19 *Georgetown Immigration Law Journal* 586.

⁴³⁸ The Convention against Torture, Article 1 at 55-56.

public official responsibility or other persons acting in an official capacity.⁴³⁹ During the drafting of CAT there has been a debate about whether an act amounts to torture regardless of who the perpetrator is, it has however been agreed that the Convention's protection merely extends to torture inflicted by government authorities.⁴⁴⁰ The reason for reaching such a conclusion is that if torture is committed by a private actor, in normal circumstances, the government of a country of origin should take responsibility for protecting its citizens and the punishment of the perpetrators.⁴⁴¹ The rationale is that if a state agent is the perpetrator of torture inflicted on an individual, the absence of state protection and the presence of persecution are even more so established when an asylum application is being considered. Protection under CAT does not require the infliction of torture to be based on one of the grounds of persecution as provided for in the definition of a refugee, which shows that if one can determine that he or she would likely be tortured if returned to a country of origin, it would serve as sufficient reason for a country to refrain from returning such a foreign national.⁴⁴² Once such a burden of proof has been discharged by the asylum applicant, he or she must be granted the protection of *non-refoulement*.⁴⁴³

The challenges that asylum seekers face when they seek sanctuary are in legal terms challenges to the realization of basic human rights,⁴⁴⁴ which collectively pose substantial social and humanitarian predicaments.⁴⁴⁵ As a result of the significance that refugee status holds for an individual and the complex nature of the refugee definition, the assessment of asylum applications requires a thorough analysis accompanied by a much needed human rights approach, with regards to the various concepts included in the definition of a refugee.⁴⁴⁶ In order to achieve this, domestic laws and policies should embrace the universal nature of human rights protection without considering nationality or status of an individual.⁴⁴⁷ Asylum applicants are

⁴³⁹ As noted by Burgers JH and Danelius H, the drafters of the Convention against Torture.

⁴⁴⁰ Freshwater PJ 'The obligation of non-refoulement under the Convention against Torture: When has a foreign government acquiesced in the torture of its citizens?' (2005) 19 *Georgetown Immigration Law Journal* 587.

⁴⁴¹ As noted by Burgers JH and Danelius H, the drafters of the Convention against Torture.

⁴⁴² 8 C.F.R. §208.16(c) (2005).

⁴⁴³ 8 C.F.R. §208.16(c)(4) (2005).

⁴⁴⁴ Such as socio-economic, cultural, civil and political rights.

⁴⁴⁵ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 518.

⁴⁴⁶ Khan F 'Well-founded fear' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 35.

⁴⁴⁷ Ngandwe PJ 'The paradox of migration and the interests of the atomistic nation-states: The Southern African perspective' (2013) 16 *PELJ* 444.

often exposed to the risk of being subjected to torture because RSDOs tend to selectively choose information from country reports in order to make determinations that it is safe for asylum applicants to return to their countries.⁴⁴⁸ In many instances RSDOs consider domestic laws or constitutional provisions which prohibit torture and cruel, inhuman and degrading treatment as sufficient to serve as evidence that a country of origin upholds the respect for human rights, while failing to investigate whether these countries of origin actually comply with such provisions.⁴⁴⁹ A Ugandan asylum seeker who has been detained and tortured because of his political association with the rebels were rejected, the RSDO in reaching this decision failed to take into account that he was arrested, detained, and tortured for his political activities.⁴⁵⁰ Such flawed RSD procedures, from a human rights perspective returns genuine asylum seekers to life-threatening circumstances giving rise to serious humanitarian concerns while violating the well-recognized international principle of *non-refoulement*.⁴⁵¹ RSDOs continue to employ such flawed practices regardless of the Refugees Act and its regulations which set out in detail the procedures that have to be followed in order to adequately consider an asylum application.⁴⁵² However, there have been recent developments in the asylum system since case law reveals a tendency of recognising FGM as a relevant human rights violation for international refugee law, which demonstrates the evolving nature of the concept of persecution.⁴⁵³ Such developments ensure that the principle of *non-refoulement* is applied appropriately and that individuals enjoy freedom from torture.

While perpetrators of torture may be excluded from refugee protection in accordance with Article 1F of the OAU Convention, they may still have the right to be protected against the violation of essential human rights in accordance with the obligation of *non-refoulement*.⁴⁵⁴ It however does not mean that such individuals can escape justice since they have to be held

⁴⁴⁸ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 483.

⁴⁴⁹ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 486.

⁴⁵⁰ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 487.

⁴⁵¹ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection'(2011) 23(3) *IJRL* 460.

⁴⁵² Khan F 'Well-founded fear' in Khan F & Schreier T (eds) *Refugee Law in South Africa* (2014) 35.

⁴⁵³ See notes 291-297 above.

⁴⁵⁴ Wouters K 'Editorial: How absolute is the prohibition on torture?' (2006) 8 *European Journal of Migration and Law* 6.

accountable for their alleged crimes.⁴⁵⁵ In the case of *Minister of Home Affairs v Tsebe*⁴⁵⁶ the Constitutional Court held that a fugitive from justice may not be extradited, deported or otherwise removed from South Africa to a country where he or she may be at risk of being subjected to the death penalty.⁴⁵⁷ Such an act would violate the right to life, human dignity and protection against punishment which is cruel, inhuman or degrading.⁴⁵⁸ It however remains important to note that States are under no circumstances and for no apparent reason allowed to commit or condone any acts of torture.⁴⁵⁹ Therefore is it important to recognize that the protection under *non-refoulement* even applies to those in conflict with the law if their return to countries of origin would mean that they would be subjected to cruel or inhuman treatment which would place their lives under threat. The mere fact that individuals are in conflict with the law does not give host countries the right to return such individuals to their countries of origin, such host countries are rather under obligation to protect such individuals to the best of its ability.



5.3 THE APPLICATION OF *NON-REFOULEMENT* TO ECONOMIC MIGRANTS

Although many African countries continue to receive large numbers of asylum seekers while upholding the principle of *non-refoulement*, there have however been quite a number of instances which threatens the proper implementation of the principle.⁴⁶⁰ South Africa's immigration policy, which is meant to be separate from the protective orientation of its asylum system is often applied together which can result into serious implications, not only for genuine asylum seekers but also the legitimacy of the country's public institutions.⁴⁶¹ The South African asylum system's deficiencies have frustrated the intended protective purposes of refugee law, the ability of the country's public institutions which represents the new, democratic South Africa to function in

⁴⁵⁵ Wouters K 'Editorial: How absolute is the prohibition on torture?' (2006) 8 *European Journal of Migration and Law* 7.

⁴⁵⁶ *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC).

⁴⁵⁷ *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC).

⁴⁵⁸ *Minister of Home Affairs v Tsebe* 2012 (5) SA 467 (CC) para 74.

⁴⁵⁹ Wouters K 'Editorial: How absolute is the prohibition on torture?' (2006) 8 *European Journal of Migration and Law* 1.

⁴⁶⁰ Bueno O 'Perspectives on Refoulement in Africa' (2006) 2 Canadian Council for Refugee Conference, Toronto, June 17, 2006 2.

⁴⁶¹ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 461.

accordance with the rule of law and to give effect to administrative justice guarantees which are a fundamental component of democracy, are also being questioned.⁴⁶² The current asylum system as influenced by larger immigration policy gives rise to serious human rights violations due to the non-compliance with *non-refoulement*, which results into an ineffective and flawed RSD process.⁴⁶³

There is no doubt that abuse of the asylum system exist by those who enter a host country illegally for various reasons.⁴⁶⁴ Immigration legislation encourages economic migrants to use the asylum process as a ‘back door’ to legalizing their stay in the country.⁴⁶⁵ Public perceptions, government policies and the laws of States more and more fails to make a distinction between asylum seekers and economic migrants which leads to the failure to identify refugee protection from migration control.⁴⁶⁶ Such an argument suggests that economic migrants and asylum seekers should be treated differently and therefore *non-refoulement* would not be applicable to both groups. The *travaux préparatoires*⁴⁶⁷ of the 1951 Convention indicates that the drafters intended to provide all refugees with the benefits of *non-refoulement*, no distinction should be made between different groups of foreign nationals.⁴⁶⁸

The failure to distinguish between economic migrants and asylum seekers remains dangerous since the right to seek and enjoy asylum is firmly entrenched in international human rights law, particularly in Article 14 of the non-binding UDHR while the economic migrants have no such

⁴⁶² Amit R ‘No refuge: Flawed status determination and the failures of South Africa’s refugee system to provide protection’ (2011) 23(3) *IJRL* 461.

⁴⁶³ Amit R ‘No refuge: Flawed status determination and the failures of South Africa’s refugee system to provide protection’ (2011) 23(3) *IJRL* 460.

⁴⁶⁴ Feller E ‘Asylum, migration and refugee protection: Realities, myths and the promise of things to come’ (2006) *Oxford Journals* 515.

⁴⁶⁵ Landau LB ‘Protection and dignity in Johannesburg: Shortcomings of South Africa’s urban refugee policy’ (2006) 19 *Journal of Refugee Studies* 309. See also Amit R ‘No refuge: Flawed status determination and the failures of South Africa’s refugee system to provide protection’ (2011) 23(3) *IJRL* 461 Since South Africa’s immigration policy provide limited opportunity for economic migrants to enter the country, they opt to gain entrance through the asylum system, which exceeds the system’s capacity to process asylum claims adequately.

⁴⁶⁶ Feller E ‘Asylum, migration and refugee protection: Realities, myths and the promise of things to come’ (2006) *Oxford Journals* 515 Confusing asylum seekers with ordinary migrants poses danger to refugee protection since it fails to take into account that those who are forced to flee due to the absence of national protection and those who migrate for economic or social improvement are two different groups. The confusion between asylum seekers and ordinary migrants places the human rights of genuine asylum seekers under threat since it is substantially easier to overlook their valid claims for asylum.

⁴⁶⁷ The record of negotiations at the drafting of the 1951 Convention.

⁴⁶⁸ D’Angelo EF ‘Non-refoulement: The search for a consistent interpretation of Article 33’ (2009) 42 (279) *Vanderbilt Journal of Transnational Law* 307.

international legal basis since they benefit from an internationally endorsed protection framework and their needs and framework are different from asylum seekers.⁴⁶⁹ Governments are more focused on the better management and control of the movement of migrants, rather than being concerned about defining and protecting migrants' rights, therefore migrants are not a legally recognized group,⁴⁷⁰ and particularly so in the asylum system context. This would mean that economic migrants do not enjoy the protection which the principle of *non-refoulement* provides or the rights which is relevant in the asylum context such as the right to apply for asylum. Economic migrants are only able to enjoy the rights provided for within the economic context such as the right to seek employment, provided that such an individual is in possession of a valid work permit.

Although economic migrants are argued to be individuals who want to escape poor economic conditions in their countries of origin, they may also be individuals fleeing persecution resulting from poor economic conditions and if their financial situation is linked with a political reason, it might also be regarded as persecution.⁴⁷¹ This means that such individuals flee from their countries out of necessity rather than choice.⁴⁷² An economic migrant may even become an asylum seeker and later a refugee if conflict arises in a home country or when the government or other actors in that country begin to inflict serious human rights violations on the community of an economic migrant.⁴⁷³ Therefore, taking into consideration that economic migrants in certain circumstances may also have a right to apply for asylum, measures must be adopted to ensure that RSDOs and relevant authorities would be able to recognize when protection under *non-refoulement* should apply to those individuals who initially gained access to the country as

⁴⁶⁹ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 516.

⁴⁷⁰ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 516. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and certain of the International Labour Organization (ILO) agreements are exceptions that is applicable here.

⁴⁷¹ Bacaian E 'The protection of refugees and their right to seek asylum in the European Union' (2011) 70 *Institute of the European Union* 19.

⁴⁷² United Nations General Assembly 'The right to food-note by the Secretary General, A/62/289, 22 August 2007' available at <http://www.righttofood.org/new/PDF/A62289.pdf> (accessed 25 April 2018).

⁴⁷³ UNHCR 'Refugee protection and international migration, 17 January 2007' available at <http://www.unhcr.org/refworld/docid/462f6d982.html> (accessed 25 April 2018).

economic migrants.⁴⁷⁴ RSDOs must refrain from disqualifying such individuals from the opportunity to apply for asylum simply because they initially entered as economic migrants, since a valid ground(s) could arise after an economic migrant have accessed the country.

Recent case law opens up limited possibilities for economic migrants to rely on Article 3 of the ECHR which prohibits torture and inhuman or degrading treatment or punishment.⁴⁷⁵ The case of *N v UK*⁴⁷⁶ clearly establishes an extremely high threshold for Article 3 of the ECHR and maintains that there are no economic, social and cultural rights obligations for Council of Europe State Parties entailed in the ECHR, therefore for economic migrants to claim protection under the principle of *non-refoulement* is left with minimal success.⁴⁷⁷ This judgment however continues to receive criticism as being too stringent and incorrect in relation with the object and purpose of the ECHR.⁴⁷⁸ Since extreme poverty is in most instances a more general condition rather than a personal one, the real risk threshold of exceptional circumstances in which an individual can rely on *non-refoulement* appears almost impossible to be reached by an applicant.⁴⁷⁹ However, *MSS v Belgium and Greece*⁴⁸⁰ provides a remarkable reinterpretation of *non-refoulement* based on the vulnerability of economic migrants due to the conditions in their countries of origin, which may provide a possible basis for economic migrants to rely on Article 3 of the ECHR in order to enjoy the protection under the principle of *non-refoulement*.⁴⁸¹ The case provides economic migrants with a ground on which they can rely in order to claim protection under the principle of *non-refoulement* in a host country.

South Africa's immigration policy provides little opportunity for African economic migrants to enter the country legally which is why they opt to enter the asylum system in overwhelming numbers, and as a result places unreasonable demand on the asylum system which exceeds the

⁴⁷⁴ Bacaian E 'The protection of refugees and their right to seek asylum in the European Union' (2011) 70 *Institute of the European Union* 21.

⁴⁷⁵ Flegar V 'Vulnerability and the principle of non-refoulement in the European Court of Human Rights: Towards an increased scope of protection for persons fleeing from extreme poverty' (2016) 8(2) *Contemporary Readings in Law and Social Justice* 148.

⁴⁷⁶ ECtHR, *Grand Chamber, N v UK*, Merits, 27.05.2008, Application no. 26565/05.

⁴⁷⁷ ECtHR, *Grand Chamber, N v UK*, Merits, 27.05.2008, Application no. 26565/05.

⁴⁷⁸ See ECtHR, *Grand Chamber, S.J. v Belgium*, Merits (struck out), 19.03.2015, Application no. 70055/10.

⁴⁷⁹ Flegar V 'Vulnerability and the principle of non-refoulement in the European Court of Human Rights: Towards an increased scope of protection for persons fleeing from extreme poverty' (2016) 8(2) *Contemporary Readings in Law and Social Justice* 156.

⁴⁸⁰ ECtHR, *Grand Chamber, MSS v Belgium and Greece*, Merits, 21.01.2011, Application no. 30696/09.

⁴⁸¹ ECtHR, *Grand Chamber, MSS v Belgium and Greece*, Merits, 21.01.2011, Application no. 30696/09.

system's capacity to process asylum claims.⁴⁸² Placing an unreasonable burden on the asylum system, compromises its ability to effectively process asylum claims and it results into the serious violation of human rights of those who are in genuine need of protection in a host country.⁴⁸³ The gaps in the broader immigration framework have affected the refugee protection system, leading to the system being left unable to perform its core function which is to investigate the validity of asylum claims and identifying those individuals who are in genuine need of protection.⁴⁸⁴

In *Lawyers for Human Rights v Minister of Home Affairs*⁴⁸⁵ the Constitutional Court found that the Bill of Rights as contained in Chapter 2 of the Constitution applies to everyone present within the territory of South Africa, regardless of whether they have been formally admitted to the country, the court further held:

Refusing a refugee entry to South Africa, and thereby exposing them to the risk of persecution or physical violence in his country of origin is in direct conflict with the fundamental values of the Constitution.⁴⁸⁶

The international protection framework does not create a hierarchy determining which foreign nationals have more priorities over others, therefore, the manner through which an individual have gained entrance to a country should not be a factor when it is determined who is more deserving of international protection.⁴⁸⁷ This is a significant inference that *non-refoulement* should apply to economic migrants as well. However, RSDOs repeatedly continue to consider the asylum claims of genuine asylum seekers as invalid since they are of the opinion that such individuals are economic migrants.⁴⁸⁸ This would suggest that the principle of *non-refoulement* is not being applied to economic migrants since they are denied the right to seek refuge within the country. In many instances individuals' human rights are being overlooked merely because of the

⁴⁸² Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 459.

⁴⁸³ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 459.

⁴⁸⁴ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 459.

⁴⁸⁵ *Lawyers for Human Rights v Minister of Home Affairs* 2004 (4) SA 125 (CC).

⁴⁸⁶ *Abdi v Minister of Home Affairs* 2011 (3) SA 37 (SCA) paras 27-28.

⁴⁸⁷ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 523.

⁴⁸⁸ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 483.

fact that they are considered as individuals who have sought refuge in South Africa in order to seek better economic conditions as opposed to having a well-founded fear of persecution.⁴⁸⁹

5.4 THE EXCEPTION TO *NON-REFOULEMENT*

The exception to Article 33(1) of the 1951 Convention serves as an identification process of persons who are involved in terrorist activities, it foresees their exclusion from refugee status and it does not protect them against criminal prosecution or expulsion.⁴⁹⁰ Therefore it can be accepted that the exception to the principle of *non-refoulement* which is contained in Article 33(2) of the 1951 Convention can be applied to foreign nationals, including economic migrants if they are considered to pose a threat to the security or public order of the host country.⁴⁹¹ Economic migrants may also be returned to their countries of origin should it be established that they are abusing the country's asylum system by presenting themselves as individuals deserving of international protection. Even if an individual such as an asylum seeker is considered to be in need of international protection, Article 33(2) of the 1951 Convention make provision for the expulsion of such an individual where national security or public order is under threat, as long as the expulsion is carried out in line with a decision which is reached by due process of law and other procedural safeguards are met.⁴⁹²

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5.5 THE PRINCIPLE OF *NON-REFOULEMENT* AND BILATERAL EXTRADITION AGREEMENTS

The legal basis of *non-refoulement* in international human rights law lies in the obligation of States to respect and protect the human rights of all people within the jurisdictions of all

⁴⁸⁹ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 483.

⁴⁹⁰ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 521.

⁴⁹¹ 1951 Convention, Article 33(2).

⁴⁹² States are obligated to provide an individual with a reasonable period within which an individual can seek legal admission within another host country, but the host country is allowed to reserve the right to apply for refuge within its territory, see Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 521.

States.⁴⁹³ It can be inferred that the principle of *non-refoulement* also prohibits the extradition of refugees between States.⁴⁹⁴ The principle of *non-refoulement* has become a customary international law norm which is non-derogable and it is supreme over a State's obligations in terms of an extradition treaty.⁴⁹⁵ The purpose of asylum would not be achieved if an extradition request concerning a refugee was accepted under all circumstances if priority was given to extradition over the protection of refugees.⁴⁹⁶ Therefore, the same prohibitions which apply to other forms of transfer apply to extradition.⁴⁹⁷

Even without explicit mention in extradition laws and treaties, States are obligated by international legal standards to refrain from exposing a person to circumstances which would lead to the violation of fundamental rights such as the right to life, the right to be free from torture and the right to be free from discrimination.⁴⁹⁸ It is however also argued that human rights do not stand in the way of extradition; it is an important tool of legitimate law enforcement which ensures that States can hold individuals responsible for committing serious human rights violations and international crimes.⁴⁹⁹ It however remains important to acknowledge the fact that international human rights law does require that the human rights of an individual be taken into account during the extradition process.⁵⁰⁰ In certain circumstances individuals seek to hide behind asylum for the purpose of evading justice.⁵⁰¹ States on its part use extradition requests with persecutory intent, which may lead to the violation of *non-refoulement* since such an individual might be at risk of persecution.⁵⁰² Therefore while States provide asylum to those who are in genuine need of international protection, States should also avoid abuse of asylum systems

⁴⁹³ ECHR Article 1, ICCPR Article 2.

⁴⁹⁴ UNHCR 'Guidance note on extradition and international refugee protection', April 2008 available at <http://www.refworld.org/docid/48ec7d92.html> (accessed 29 October 2018) at para 10.

⁴⁹⁵ UNHCR 'Guidance note on extradition and international refugee protection', April 2008 available at <http://www.refworld.org/docid/48ec7d92.html> (accessed 29 October 2018) at para 8.

⁴⁹⁶ Karakaya M 'The protection of refugees and asylum seekers against extradition under international law' (2014) *Law & Justice Review* 169.

⁴⁹⁷ International Commission of Jurists Transnational Injustices *National Security Transfers and International Law* (2017) 41.

⁴⁹⁸ Kapferer S Legal and Protection Policy Research Series *The Interface between Extradition and Asylum* (2003) 43.

⁴⁹⁹ Kapferer S Legal and Protection Policy Research Series *The Interface between Extradition and Asylum* (2003) 41.

⁵⁰⁰ Kapferer S Legal and Protection Policy Research Series *The Interface between Extradition and Asylum* (2003) 42.

⁵⁰¹ Karakaya M 'The protection of refugees and asylum seekers against extradition under international law' (2014) *Law & Justice Review* 225.

⁵⁰² Karakaya M 'The protection of refugees and asylum seekers against extradition under international law' (2014) *Law & Justice Review* 225.

by criminals who wants to escape from criminal justice.⁵⁰³ This requires a complete and fair RSD process while States also complies with their protection obligations under international law.⁵⁰⁴

5.6 THE RIGHT TO LIFE

As a point of departure it must be understood that the right to life as contained in Article 6 of the ICCPR, can be violated through commission, disregard or acquiescence by State Parties.⁵⁰⁵ Article 6(1) provides that every human being has the inherent right to life.⁵⁰⁶ The word every, is used which is very distinct since it is only used in this specific provision. Every human being is indicative of the all-inclusive nature of the provision, meaning that all human beings have the right to life, which is much broader than everyone and no one. The term inherent suggests that every human being has the right to life merely by virtue of being human, which would give one the impression that deprivation and derogability of life in any form is absolutely prohibited.

The right to life needs to be interpreted in the broad sense,⁵⁰⁷ this would mean that the right to life do not merely refer to being alive (narrow sense) but it also requires or include that every human being lead a dignified life. This supposes that an individual must be provided with the enjoyment of at least the minimum of rights such as the right to enjoy protection under the principle of *non-refoulement* and the prohibition of torture amongst others, in order to enable an individual to enjoy a dignified life. This also portrays the interdependence and interrelatedness of rights, since it can be seen that the right to life cannot exist on its own.

Even though the right to life is considered to be the supreme right, it must be complemented by other essential human rights.⁵⁰⁸ Similarly an individual cannot enjoy the other rights without being alive, since the dead cannot enjoy human rights. Therefore it remains essential for an individual not to be tortured in any form or exposed to such a risk of torture since even if torture

⁵⁰³ Karakaya M 'The protection of refugees and asylum seekers against extradition under international law' (2014) *Law & Justice Review* 225.

⁵⁰⁴ UNHCR 'Guidance note on extradition and international refugee protection', April 2008 available at <http://www.refworld.org/docid/48ec7d92.html> (accessed 29 October 2018) at paras 97-100.

⁵⁰⁵ *Lubuto v Zambia Communication* No. 390/1990.

⁵⁰⁶ The ICCPR, Article 6(1).

⁵⁰⁷ General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4).

⁵⁰⁸ General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4).

will not be fatal it still amounts to the violation of the right to life. The basis for such reasoning is that torture of an individual amounts to the violation of the right to life even if it will not result in death because the right to life requires that one also live a dignified life which cannot be obtained if torture is present. Similarly, if one is returned to a country of origin, where an individual may be subjected to torture, both the right to be free from torture and the principle of *non-refoulement* is violated and thereby also the right to life.

Further with regards to economic migrants, host countries may be violating the right to life when it refuses to grant access to economic migrants to their asylum system. Economic migrants leave their countries in an attempt to achieve better economic conditions since the economic conditions available in their countries are of such a nature that they cannot lead a dignified life. In order for host countries to comply with the right to life, it must appreciate the fact that grounds for asylum may arise after an individual have accessed a host country as an economic migrant due to certain changes that occurred within countries of origin.

5.7 CONCLUSION

As long as asylum seekers are still engaged in the RSD process, they may not be returned to their countries of origin if it means that they would be subjected to torture or inhuman or degrading treatment or punishment. It has been established that CAT does not cover incidents of ill-treatment which occurs outside of governmental settings. Therefore, an individual can only be protected from torture if such torture is inflicted by a government official or an individual who has been authorized by a governmental official to execute such torture. The rationale is that if the torture was not committed by a government official it would mean that an individual is still able to seek protection from his or her government and therefore no need will exist to seek refuge in another country. Should the right to be free from torture be violated, it would be a violation of Article 3 of CAT, Article 3 of the ECHR and Article 7 of the ICCPR. As it has been established in this chapter, the protection which the principle of *non-refoulement* provides to asylum seekers is essential. Therefore, it is important that the principle be properly applied should asylum seekers require such protection during the RSD process. However it has been found that opposing arguments exist on whether *non-refoulement* should apply to economic

migrants and whether they are deserving of the protection under *non-refoulement*. South Africa in most instances does not consider economic migrants as asylum seekers and therefore the country does not apply *non-refoulement* to them. Governments are more focused on the better management and control of the movement of migrants, rather than being concerned about defining and protecting migrants' rights, therefore migrants are not a legally recognized group.⁵⁰⁹ The current asylum system as influenced by larger immigration policy gives rise to serious human rights violations due to the non-compliance with *non-refoulement*, which results into an ineffective and flawed status determination process, returning genuine asylum seekers to conditions which may be life-threatening, giving rise to grave humanitarian concerns.⁵¹⁰ The failure to comply with the principle of *non-refoulement* results into the violation of numerous instruments such as Article 33(1) of the 1951 Convention, Article 3 of CAT and Article III(3) of the OAU Convention.

Although not always applied in practice, South Africa recognizes that it may not return an asylum seeker to a country where such an individual may face some form of persecution. The country however relies on the exception to the principle of *non-refoulement* in order to justify a violation of *non-refoulement*. In instances where an individual is considered as a threat to the national security of the country, such an individual would be returned to his or her country of origin. South Africa however can only rely on such an exception provided that it is employed in a manner which is in line with the due process of law and while proper procedural safeguards are put in place. Although some authors argue that human rights does not stand in the way of extradition requests and that it is a means of legitimate law enforcement, counter arguments suggest that it is crucial to acknowledge human rights during extradition processes. States have a duty to ensure that all measures taken, gives priority to the protection of foreign nationals rather than giving priority to extradition requests.

⁵⁰⁹ Feller E 'Asylum, migration and refugee protection: Realities, myths and the promise of things to come' (2006) *Oxford Journals* 516. The 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, adopted by the General Assembly Resolution 45/158, on 18 December 1990 and certain of the International Labour Organization (ILO) agreements are exceptions that is applicable here.

⁵¹⁰ Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 460.

Article 6(1) of the ICCPR provides that every human being has the inherent right to life.⁵¹¹ Section 11 of the South African Constitution also guarantees that everyone present within the country has the right to life.⁵¹² The right to life can be violated through commission, disregard or acquiescence by State Parties.⁵¹³ Every human being is indicative of the all-inclusive nature of the provision, meaning that all human beings have the right to life. The term inherent suggests that every human being has the right to life merely by virtue of being human, which would give one the impression that deprivation and derogability of life in any form is absolutely prohibited. This would suppose that an individual must be provided with the enjoyment of at least the minimum of rights such as the right to enjoy protection under the principle of *non-refoulement* and the prohibition of torture amongst others, in order to enable an individual to enjoy a dignified life. This also portrays the interdependence and interrelatedness of rights, since it can be seen that the right to life cannot exist on its own. If one is returned to a country of origin, where an individual may be subjected to torture, both the right to be free from torture and the principle of *non-refoulement* is violated and thereby also the right to life. Non-compliance with the basic right to life is in direct violation of Article 6(1) of the ICCPR and section 11 of the Constitution. With regards to economic migrants, for host countries to comply with their right to life, it must acknowledge the fact that grounds for asylum may arise after an individual has entered the country as an economic migrant. Therefore, instances may arise where protection under *non-refoulement* should be extended to those individuals who initially obtained access to a host country as an economic migrant.

⁵¹¹ The ICCPR, Article 6(1).

⁵¹² The Constitution, section 11.

⁵¹³ *Lubuto v Zambia Communication* No. 390/1990.

CHAPTER 6: CONCLUSIONS AND RECOMMENDATIONS

6.1 CONCLUSIONS

Regardless of relevant and applicable domestic, regional and international refugee status determination related legislation, South Africa continuously finds it difficult to implement the law successfully in practice. Asylum seekers are faced with numerous challenges related to the RSD process. In many instances the process results into the deprivation or denial of human rights by South Africa. Such rights are mainly contained in both international and domestic instruments such as the 1951 Convention which provides for the right to seek asylum in a host country and the Constitution of South Africa which guarantees the basic human rights to asylum seekers present within its territory. The research focused on these violations, related challenges and the main question that the research aimed to answer was whether or not the South African refugee status determination process is in compliance with its obligations under domestic, regional and international human rights law.

Chapter 2 focussed on the regional and international legal framework related to the RSD process in South Africa, in order to establish what South Africa's obligations are towards asylum seekers. Although the contents of the instruments of each legal framework differ at instances, such as the different elements that each instrument require to be present in order for an individual to qualify as a refugee, they share the basic principle of providing asylum seekers with the protection that they seek in host countries. However, as it has been revealed, there are multiple definitions of who qualifies as a refugee. Initially the 1951 Convention's definition of a refugee was very restrictively applied. However, its limitations were removed at a later stage for the benefit of asylum seekers. The OAU Convention's definition of a refugee is similar to that of the 1951 Convention but the OAU Convention adds to the definition to make it broader. The definition includes more grounds on which asylum seekers can rely in order to qualify as a refugee. The development of its frameworks portrays the strong will of South Africa to provide protection to asylum seekers.

South Africa also has its own domestic legal framework governing the RSD process which was considered in chapter 3 together with the actual status determination process of the country. The status determination process comprises of different aspects and for purposes of this study, it

begins at the time that an individual enters the country until he or she has exhausted all the remedies such as the appeal, review and judicial review of a negative asylum decision. At the domestic level South Africa enacted its own legal instrument, the South African Refugees Act which includes not only the 1951 Convention's but also the OAU Convention's definition of a refugee. The instrument takes the definition of a refugee even further than both these two instruments by adding gender and tribe as additional grounds for persecution, and that a spouse or dependant of an individual who qualifies as a refugee in terms of the 1951 Convention and the OAU Convention also qualifies to apply for asylum in South Africa. Even though the Refugees Act does not compel South Africa to grant asylum to asylum seekers, the country must receive such individuals and assist them effectively in the RSD process. Part of such an obligation to receive asylum seekers, is the duty to inform asylum seekers properly, timely and in a language which they adequately understand, of their right to apply for asylum.

Forming part of the status determination process is the remedies on which asylum seekers may rely in order to challenge an undesired asylum application outcome. Whether or not asylum seekers are able to effectively exhaust these remedies were considered in chapter 4. Research has established that the right to administrative justice requires sufficient reasons for reaching a decision, reasonable opportunity to make representations, adequate notice of the right to remedies such as appeal and review and adequate notice of the right to request reasons for decisions reached. Due to the flawed implementation of law, and with regards to the right to appeal, review and judicial review, asylum seekers are at many instances, either directly or indirectly denied the right to challenge RSD outcomes effectively. The lack of proper enjoyment of the guaranteed remedies results into the violation of multiple constitutional rights of asylum seekers such as the right to just administrative action. As it has been determined by case law amongst other sources, South Africa still has a long way to go in order to provide asylum seekers with the proper enjoyment of the rights related to administrative justice.

The significance which the principle of *non-refoulement* holds for foreign nationals within a host country has been considered in chapter 5. Given the importance of the principle, it should be applied properly to those who would be at serious risk of being persecuted should they be returned to their countries of origin. However, distinctions between economic migrants and asylum seekers continue to be made, and opposing arguments exists on whether or not *non-*

refoulement should also apply to economic migrants as well. South Africa seems to be in favor of the argument that *non-refoulement* should not apply to economic migrants. This can be concluded especially since the country deals with economic migrants under its immigration framework rather than its asylum system. If an individual gained access to the country due to reasons of seeking better economic conditions, the country does not apply *non-refoulement* to such individuals. One of the reasons to justify such a practice is that unlike with asylum seekers, economic migrants continue to enjoy the protection of its country of origin while present within South Africa. At instances the country returns asylum seekers to countries of origin where they might be subjected to persecution. The country justifies such a violation of *non-refoulement* by relying on the exception that an individual may be returned to his country of origin if he poses a threat to national security, regardless of the fact that such an individual may be subjected to persecution in a country of origin.

The Convention against Torture only provides protection to those individuals who have been subjected to torture by a government official or an individual who has been authorized by such a government official to execute an act of torture. Article 6(1) of the ICCPR provides that every human being has the inherent right to life.⁵¹⁴ The term inherent suggests that every human being has the right to life merely by virtue of being human, which would give one the impression that deprivation and derogability of life in any form is absolutely prohibited. The right to life does not only require that an individual be alive but that he or she enjoys a dignified life. In order to enjoy a dignified life an individual must be able to enjoy at least the basic human rights which would include amongst others the right to be free from torture and the protection which *non-refoulement* provides.⁵¹⁵ This also portrays the interdependence and interrelatedness of rights, since it can be seen that the right to life cannot exist on its own. Further with regards to economic migrants, host countries may be violating the right to life when it refuses to grant economic migrants access to their asylum systems. Refusing genuine asylum seekers access to asylum systems amounts to a denial of the basic human rights which individuals must enjoy in order lead dignified lives.

⁵¹⁴ The ICCPR, Article 6(1).

⁵¹⁵ Even though the right to life is considered to be the supreme right, it must be complemented by other essential human rights, see General Comment No.3 on the African Charter on Human and Peoples' Rights: The Right to Life (Article 4).

The research has revealed multiple challenges with which the South African RSD process is faced. Gender-based persecution is one of the grounds of asylum which is regularly overlooked or misunderstood. RSDOs fail to properly comprehend what amounts to gender-based persecution which results into the ground being overlooked and asylum applications being rejected. Before gender-based persecution has been recognised separately, RSDOs often failed to recognise that gender-based persecution is included under membership of a particular social group. Gender-based persecution probably delivers the most compelling evidence which discloses that the South African refugee reception system fails to provide the protection which it aims to deliver.

For an asylum application to be fair, RSDOs must be competent to assist applicants. Competency requires RSDOs to completely understand the law and concepts pertaining to the RSD process. Should RSDOs be incompetent they would expose applicants to unfair practices. Research has revealed that some RSDOs do not fully comprehend concepts such as well-founded fear, persecution and credibility. This results into applicants being denied asylum status not because they do not have a valid ground for asylum but because RSDOs fail to properly understand and properly apply the concepts.

Providing reasons for decisions reached are required to ensure that applicants have been given a fair opportunity to apply for asylum. However RSDOs altogether fail to provide applicants with reasons and when they actually do provide reasons it is mostly inadequate. Providing adequate reasons is important since it is used to found an appeal or review of a negative asylum decision on. If there are no reasons or inadequate reasons, the RAB have to consider the application *de novo* in order to determine whether the RSDO has made the correct decision. The absence of adequate reasons prolongs both the RSD process for the applicant and the backlog of appeals for the RAB. The absence of reasons or adequate reasons amounts to the violation of the right to administrative justice since the lack of adequate reasons prevents asylum applicants from challenging the outcomes of their decisions on either appeal or review effectively.

The principle of *non-refoulement* is only applied to asylum seekers and not to economic migrants. South Africa considers economic migrants as the group of individuals who enters South Africa with the purpose of abusing the country's asylum system. This ultimately means

that the country only provides protection for asylum seekers under the principle of *non-refoulement* and not to economic migrants.

The main legislative obligation that South Africa has towards asylum seekers is to provide protection to those who are in genuine need thereof, which requires that the country must refrain from violating their human rights. However the study has revealed that although South Africa portrays a strong will to protect the rights of asylum seekers and to receive them with the aim of properly assisting them in the process of refugee status determination, the country still has a long way to go before it is actually achieved. Many asylum seekers still finds it challenging to apply for asylum and to simultaneously enjoy the constitutionally guaranteed human rights within the territory of South Africa. It has been established that although South Africa aims to ensure that its asylum system complies with domestic, regional and international human rights law, there however remains quite a number of instances where the country is still in violation of multiple human rights of those who are in genuine need of protection.

6.2 RECOMMENDATIONS

DHA should establish a mandatory training programme which RSDOs have to pass at a certain rate which demonstrates their proper understanding of gender-based persecution.⁵¹⁶ DHA should create a required set of qualifications which RSDOs must possess in order to occupy a position within the Department to ensure that RSDOs possess the necessary expertise. South Africa must ensure that its RSDOs are adequately trained in order for them to produce administratively fair and individualized decisions which are based on the proper application of the law.⁵¹⁷

South Africa must ensure that an independent oversight body is established to review the quality of status determination decisions.⁵¹⁸ An oversight body would encourage RSDOs to consider asylum applications adequately. Realistic targets to be achieved by RSDOs should be set to

⁵¹⁶ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 14.

⁵¹⁷ Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 10.

⁵¹⁸ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 11.

ensure that RSDOs have sufficient time to consider asylum claims and to do so properly.⁵¹⁹ DHA officials must be held accountable for the incorrect application and violation of the law,⁵²⁰ provided that it is done so only after sufficient training has been provided to RSDOs.

The DHA must provide its RSDOs with sufficient time and resources to interview asylum seekers, to conduct the required country research and to write well-reasoned decisions which include individualized assessments of asylum claims and the reasons for rejection.⁵²¹ The same day adjudication rule which requires officials to reach a final decision on the same day on which the asylum application has been considered must be done away with since it prevents RSDOs from considering asylum claims properly. RSDOs must be able to draw a connection between the circumstances of the host countries and the decision reached after an asylum application has been considered. Guidelines must be established which will assist appeal and review officials to confirm that the RSDOs have properly applied their minds to each asylum application. Since the lack of reasons or adequate reasons violates the constitutionally guaranteed right to administrative justice, the government of South Africa should implement measures which punish those who are responsible for such a grave violation.

South Africa must ensure that it provides more opportunity for economic migrants to enter the country legally, to deter them from entering the country through the asylum system in overwhelming numbers.⁵²² This would ensure that the asylum system is not burdened and that the system maintains its capacity to properly process asylum claims. South Africa must take into account that valid grounds for asylum may arise after an individual accessed the country regardless of the fact that he or she initially accessed the country as an economic migrant. In such instances South Africa should adopt measures which would allow the country to extend protection under *non-refoulement* to economic migrants as well. The protective purpose of

⁵¹⁹ "South Africa 'Talk for us please' Limited options facing individuals displaced by xenophobia violence" *Amnesty International* September 2008 36.

⁵²⁰ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 11.

⁵²¹ Forced Migration Studies Programme Wits University Report: *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* (2010) 10.

⁵²² Amit R 'No refuge: Flawed status determination and the failures of South Africa's refugee system to provide protection' (2011) 23(3) *IJRL* 459.

refugee law must be supreme within the status determination process,⁵²³ both in law and practice, provided that all exceptions contained in refugee law are taken into consideration and applied where necessary. The requirement that an act of torture must have been committed by a government official in order for it to qualify as torture must be removed. Such a requirement places those who have been tortured in a non-governmental setting and who cannot seek protection from his or her government, under serious threat. Whether or not an act of torture was committed by a government official, it will still amount to the violation of the right to life and this includes the right to enjoy a dignified life, therefore the removal of such a requirement is crucial.



⁵²³ Amit R African Centre for Migration and Society *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* (2012) 11.

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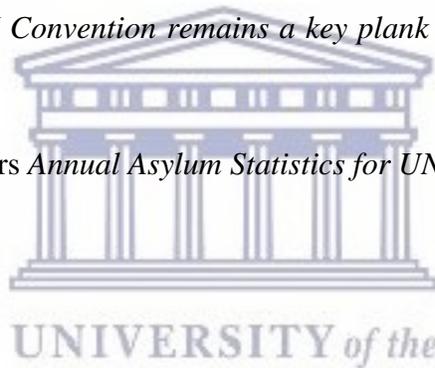
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