SIHMA
Scalabrini Institute for Human Mobility in Africa

MANUFACTURING ILLEGALITY

THE IMPACT OF CURTAILING ASYLUM SEEKERS' RIGHT TO WORK IN SOUTH AFRICA

Edited by SIHMA
Written by Sergio Carciotto, Dr Vanya Gastrow and Corey Johnson

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List of Acronyms

Asylum Seeker Processing Centre (APC)

Department of Home Affairs (DHA)

Lawyers for Human Rights (LHR)

Refugee Appeal Board (RAB)

Refugee Reception Office (RRO)

Refugee Status Determination Officer (RSDO)

Somali Association of South Africa (SASA)

Standing Committee for Refugee Affairs (SCRA)

United Nations High Commissioner for Refugees (UNHCR)

Executive Summary

This report explores the development of new asylum seeker policy aimed at curtailing asylum seekers' right to work in South Africa whilst they await the finalisation of the claims, and what the country can learn from similar policy developments in the European Union (EU). It begins by tracing the development of South Africa's refugee policy since its inception and examines the motivation and rationale behind recent efforts to curtail asylum seekers' rights in the country. It shows that curtailing the right to work is a manifestation of a broader political trend to limit asylum seeker entitlements and protections in the country, which is largely driven by concerns regarding perceived abuse of the asylum system by 'economic migrants'. It then explores new legislative provisions that curtail asylum seekers' right to work and the possible social, political and economic implications of these curtailments. Lastly, the report explores similar efforts in the EU to limit both asylum seekers' ability to work and freedom of movement.

The report's findings are based on a literature review, as well as qualitative interviews and focus group discussions with asylum seeker participants from several countries, including Somalia, the Democratic Republic of Congo (DRC), Mozambique and Burundi.

In respect to the development of refugee policy in South Africa, the report finds that the country's progressive framework has frequently rested uncomfortably with broader immigration policy. Asylum seekers in South Africa enjoy freedom of movement and the right to work and study. However, the Department of Home Affairs (DHA), the government department tasked with managing refugee and immigration policy, has increasingly interpreted refugee legislation in a narrow and restrictive way and repositioned itself in the security apparatus of the state. It has offered few complementary immigration frameworks to cater for regional economic migration and, as a result, the refugee system has become the *de facto* immigration option for many to attain legal status regardless of protection needs. Many asylum seekers struggle to access services in the country due to closures of Refugee Reception Offices (RRO)s, incapacity and corruption at these offices and unlawful policies and practices to restrict access to protection. Asylum seekers have been forced to turn to the judicial system for relief, and a number of judgments have reinforced the rights of asylum seekers to access facilities, the right to work and self-employment and the right to freedom of movement. Those who do access services often find them lacking. Studies have shown high levels of corruption within the DHA and serious flaws in asylum determination processes that contribute to mass rejection of applications, resulting in an extremely protracted adjudication process measured in years. Asylum seekers in the country often struggle to integrate, as they do not hold recognised ID books, encounter economic challenges and often face local hostility. These barriers to protection have been heightened by the Refugees Amendment Act of 2017 (the Act), which introduces new restrictive changes to the country's asylum seeker policy, many of which relate to asylum seekers' right to work.

The Act's curtailments on asylum seekers' right to work will have many possible social, political and economic ramifications in the country. In the immediate term, the Act seeks to inhibit

asylum seekers from engaging in self-employment. This could severely impact asylum seekers' ability to sustain themselves, as they face many barriers accessing wage-earning employment in the country. It could also impact local South African economies, given that asylum seekers will be forced to compete with citizens in low-skilled job markets, and cause the closure of many asylum seeker enterprises, which often employ South African workers. It is likely that large numbers of asylum seekers may continue working for themselves for lack of other options, causing increased pressure on law enforcement agencies to identify and penalise self-employed asylum seekers. The policy will likely infringe upon asylum seekers' constitutional rights, as courts have recognised that economic restrictions that could leave many asylum seekers destitute breach their rights to dignity. Inhibiting asylum seekers from engaging in self-employment also has implications for integration, as poverty, increased subversion of the law by asylum seekers and heightened competition in low-skilled job markets may well raise levels of hostility towards asylum seekers in the country.

In the long term, the Act might authorise the complete removal of the right to work for most asylum seekers, as suggested in the White Paper on International Migration for South Africa. Asylum seekers will either have to find support from friends, relatives or charitable organisations whilst their applications are being processed or be housed in what the DHA has referred to as 'Asylum Seeker Processing Centres' (APC). Asylum seekers housed within APCs will be largely reliant on the state for basic sustenance and could face dire consequences should this be lacking. The policy could also impact refugee livelihoods, as many refugee businesses are reliant on asylum seeker staff. Refugees could also face economic strain as a result of expectations that they provide financial support to asylum seekers to keep them out of detention. Detaining asylum seekers in APCs could also come at a financial cost to the government, depending on how long asylum seekers are held and how many can access financial support outside of centres. This is because the state will, for the most, part be held responsible for meeting detained asylum seekers' physical, mental and medical needs.

However, detaining asylum seekers might offer some limited economic benefits to South Africans competing for wage-earning jobs or in the small business sector. Much like inhibiting asylum seekers from engaging in self-employment, prohibiting them from working and obliging many to report to APCs will likely see many asylum seekers subvert the law. At the same time, irregular migration will be unaffected as economic migrants will not report to APCs and will continue to enter the country in search of economic opportunities. Asylum seekers might also purchase illegal papers in order to reside and work in the country whilst they await the outcome of their claims. These activities could impact negatively on South African perceptions of foreign nationals and, in turn, undermine the ability of asylum seekers or recognised refugees to integrate once they are released from APCs. There are also constitutional implications for such a policy. The detention of asylum seekers could undermine their right to freedom and security of the person, their right to dignity, as well as their rights as detained persons.

Efforts to curtail the rights of asylum seekers in South Africa by limiting their right to work and freedom of movement are, to a large extent, mirrored in the EU. Thus, some lessons from South

Africa are applicable further afield. Similarly, South Africa can benefit from drawing on European policies and experiences. For example, in Europe, many asylum seekers are already kept in confinement and governments have established reception and transit centres where asylum seekers receive initial support and accommodation whilst their claims are processed. The EU has also set out minimum standards for asylum seeker reception. Asylum seekers enjoy access to labour markets, but Member States can place conditions on such access and prioritise citizens. Asylum seekers are also not guaranteed full freedom of movement, as host Member States are permitted to confine asylum seekers to specific areas within the state. Detention of asylum seekers is permitted, subject to conditions including that confinement be for as short a period as possible and on limited grounds set out in the EU's Reception Directive of 2013. More recently, the EU has developed a 'hotspots' approach, in which asylum seekers are confined at the EU's maritime borders whilst their applications are decided. This approach has been criticised for lacking clear legal authority, providing poor and inadequate reception conditions and for carrying out arbitrary detentions. Although hotspots are professed to only entail limitations on freedom of movement, some (e.g., restrictions to islands) could arguably amount to *de-facto* detention.

Similar to current European policy, South Africa plans to set up APCs near the country's northern border to accommodate asylum seekers whilst their claims are being decided. Thus, similar criticisms that have arisen in response to European hotspots will likely surface and be even more pronounced in relation to the country's envisioned holding facilities.

Introduction

In recent years, South Africa's migration policy has become increasingly geared towards heightened security and containment. In many respects, this development aligns with the globalisation of migration control, evidenced by migration policies both in the Global South and the Global North. The rational is that it is imperative to separate or filter, in a rapid and efficient manner, asylum seekers from economic migrants. Moreover, states believe it to be important to eliminate what are perceived as 'pull factors' for asylum seekers, such as the right to seek employment. This has given rise to policies both in Africa and Europe that seek to curtail asylum seekers' right to work and their freedom of movement.

In South Africa, such changes are reflected in the 2017 White Paper on International Migration for South Africa (the White Paper), which was issued to guide a comprehensive review of the country's immigration policy and legislation over the medium term. In order to be implemented, policy provisions will require necessary legislative changes, which government aims at completing during its next medium-term strategic framework (2019–2024). Within this context, the Refugees Amendment Act (No. 11, 2017) (the Act) comprises the first major change to South Africa's refugee policy since the Refugees Act (No. 130, 1998) (the Refugees Act) was passed twenty years ago. The Act was signed into law in December 2017 but will only go into effect once Regulations have been promulgated and published in the Government Gazette. At the time of writing, draft Regulations have been published for public comment and the Act is envisioned to enter into force by the end of the 2018/2019 financial year.

The Act introduces new amendments aimed at deterring asylum seekers from entering the country by curtailing their rights and inhibiting their ability to seek protection. For example, the Act adds new exclusions from refugee protection and shortens time periods for asylum seekers to report to Refugee Reception Offices (RROs). Central to these changes are new limitations on asylum seekers' right to work in the country while awaiting final determination of their refugee claim, a process that currently takes years to complete. These provisions will not only impact asylum seekers' livelihoods but will also have broader economic, political and social implications for refugees and South Africans in the country. This is because asylum seekers' economic activities are interconnected with those of refugees and South Africans. Moreover, their effort and ability to comply with new legislative changes can also shape social attitudes and have political and constitutional repercussions.

Attempts to deter migration through limiting asylum seekers' right to work and their freedom of movement are not unique to South Africa but, in many ways, converge with recent EU policies and practices. Therefore, the report will highlight asylum seeker reception conditions in Europe and compare them to recent developments in South Africa.

The report contains three main sections. The first section discusses the refugee protection framework in South Africa, including implementation challenges and the evolution of refugee law and policy. The second section covers the Act's changes and their possible future

repercussions for asylum seekers, refugees and citizens living in South Africa. Lastly, the third section describes European national practices regarding the provision of reception conditions to asylum seekers. This is in order to assess to what extent restrictions placed on the right to work, freedom of movement and the establishment of processing centres in South Africa are an adequate solution for the management of asylum seekers. Some policy recommendations are also provided in the last section of this report.

Methodology

The study is based on a review of existing literature, as well as qualitative interviews and two focus groups. The literature component entailed reading various policy papers, reports and academic articles about the operation of legal frameworks governing asylum seekers in South Africa and Europe, and their impact on asylum seekers in practice.

The authors also carried out five qualitative interviews with key stakeholders in Cape Town and Musina (including one interview with four Scalabrini Centre staff members about the Centre's Employment Access Programme) to better understand asylum seeker policy and practice in South Africa. These interviews were carried out with the informed consent of respondents. Respondents included NGOs and community organisations providing assistance to asylum seekers. The authors requested interviews with the Department of Home Affairs (DHA), the Chairperson of the Parliamentary Portfolio Committee on Home Affairs and the United Nations High Commissioner for Refugees (UNHCR) but did not receive any responses.

Lastly, to understand the views and experiences of asylum seekers, the authors conducted two focus groups with asylum seekers in Cape Town. The first focus group involved only female participants. This was because the authors wished to understand the specific social and economic conditions of female asylum seekers, and how new legislative policies might affect women in particular. There was also a concern that women might not be as vocal in mixed gender groups. The focus group was arranged with the assistance of the Somali Association of South Africa (SASA) and was held at their office in the Cape Town suburb of Bellville. It was attended by eight women (three from Somalia, three from Burundi and two from the DRC), and Somali and Burundian participants assisted with interpretation. The second focus group – which included male and female participants – was arranged with the assistance of the Scalabrini Centre of Cape Town and was held at their office in the city centre. It was attended by six participants (one from Somalia, one from Mozambique and four from the DRC). No assistance with interpretation was required, as all participants were fluent in English. The focus groups lasted approximately one and a half hours each and participants received a token of appreciation for their time. Focus groups were carried out with the informed consent of participants and on condition of anonymity.

1. Refugee Protection in South Africa

Refugee protection emerged in South Africa during the early 1990s as a part of the country's embrace of the international human rights regime during the transition to democracy. It was formalised with the adoption of the Refugees Act, establishing a strong protection framework based on local integration. However, in practice, high demand, limited capacity and a restrictive interpretation of refugee protection have resulted in a number of challenges that have been exacerbated by the socioeconomic challenges of the post-apartheid era, where high unemployment, poor service delivery and corruption have plagued governance and development. Amidst these socioeconomic challenges, foreign nationals – asylum seekers and refugees included – have often been blamed as the cause of the many problems hindering development. This has occurred particularly in relation to employment opportunities, with outbreaks of xenophobic violence becoming a common feature of post-apartheid South Africa.[1] As a means to address these issues, in line with the securitisation of migration evident in the Global North, the government has embarked upon what it has termed a 'paradigm shift' in migration and refugee policy, including the introduction of policies to deter asylum seekers and restrict access to rights and territory. Key amongst these changes is the curtailment of asylum seekers' right to work. This chapter briefly analyses 1) the genesis of the Refugees Act, 2) the challenges that have arisen in its implementation, 3) the evolution of refugee policy and law in response to these challenges and 4) the legislative changes adopted to nominally address these challenges.

1.1. The Development of the Refugees Act

The Refugees Act filled the void in refugee protection that existed during the apartheid era, when there was no mechanism for refugee protection. Refugees in South African territory during the apartheid era were treated as 'illegal foreigners', lacking a legal identity.

The adoption of the Constitution in 1996 established a strong baseline of refugee protection by proclaiming that "South Africa belongs to all those who live in it," extending protections to "everyone" regardless of legal status or nationality.[2] The 1951 Convention relating to the Status of Refugees[3] (the 1951 Convention) and the 1969 Organisation for African Unity Convention on the Specific Aspects of the Refugee Problems in Africa[4] (the 1969 OAU Convention) were both acceded to without reservations in 1996 and 1995, respectively. Formal domestic legislative and policy development began shortly thereafter through a substantive consultation process and engagement with civil society, international refugee law experts and government officials.[5] These consultations resulted in a draft Green Paper on International Migration published in 1997 that contained a chapter on refugee protection, advocating for a rights-based refugee protection framework separate from immigration matters.[6]

During the legislative development process, two opposing approaches to refugee protection became evident, with civil society organisations lobbying for an inclusive, rights-based protection system, while officials from the DHA pursued a more restrictive, control-based

approach.[7] The resulting Refugees Act is a result of this tension, establishing a strong rights-based protection model but also a model where national sovereignty and administrative discretion feature prominently.[8] In implementation, immigration control has remained a constant theme, with Klaaren *et al.* describing refugee protection as having "always nested somewhat uncomfortably" within broader migration policy legislation.[9] Thus, as opposed to a system of protection, the Refugees Act has been implemented and interpreted in a restrictive manner that is more in line with immigration imperatives, and this approach has become more pronounced over time.[10]

1.2. The Protection Framework under the Refugees Act and the Right to Work

The urban refugee protection framework set out by the Refugees Act was described in 2007 as "one of the most advanced and progressive systems of protection in the world" by then United Nations High Commissioner Antonio Guterres.[11] The framework grants refugees the right to work and study in the country, as well as access to basic health care. The Refugees Act specifies that it must be interpreted and applied with due regard to a range of human rights instruments, including the 1951 Convention, the 1969 OAU Convention, the Universal Declaration of Human Rights and "any other relevant convention or international agreement to which the Republic is party."[12] It contains a strong codification of the principle of *non-refoulement* providing a "general prohibition of refusal of entry," ensuring that it applies to those seeking entry at the border as well as those present on state territory.[13] It includes both the 1951 Convention and 1969 OAU Convention refugee definitions as well as a provision for dependents to receive refugee status,[14] providing a comprehensive definition covering the displacement dynamics common on the African continent.

In general terms, the Refugees Act, read with its accompanying Regulations,[15] sets out an individualised determination system in which asylum seekers awaiting final determination enjoy many of the same rights as recognised refugees. Compared to encampment models found elsewhere on the continent, asylum seekers and refugees both enjoy freedom of movement and are encouraged to locally integrate into communities. The Refugees Act is in line with the UNHCR's urban refugee policy, which acknowledges that cities in developing and middle-income countries are legitimate, and indeed likely, sites for refugees to find protection.[16]

Five RROs were initially established in the country's major urban centres of Johannesburg, Pretoria, Cape Town, Durban and Port Elizabeth, with an additional RRO established in Musina along the border with Zimbabwe in 2009. These RROs function as the lynchpin of the system and are the main point of contact between applicants and the state. It is at RROs that individuals lodge applications, undergo interviews and receive permit renewals and other administrative assistance. The framework itself is minimalist in that the government does not provide direct welfare assistance and asylum seekers and refugees are largely expected to provide for themselves.

Broadly speaking, the application and determination process is envisioned to function as follows: asylum seekers may enter the country through an official Port of Entry and receive a transit permit that grants the holder legal status for a prescribed number of days to travel to an RRO to lodge their claim. Irregular entry is not penalised, nor is a transit permit required to lodge an application, and applicants must report to an RRO "without delay." Upon application, they then receive an asylum seeker permit, generally valid from one to six months, which legalises their sojourn in the country and access to services.

Throughout the asylum process, the asylum seeker retains the temporary permit, renewing it as required. The refugee status determination process is conducted by a Refugee Status Determination Officer (RSDO) who can either recognise refugee status or issue a negative decision. If the claim is rejected, the asylum seeker is permitted to appeal the decision to the Refugee Appeal Board (RAB) in the case of unfounded rejections or to submit written representations to the Standing Committee for Refugee Affairs (SCRA) in the case of manifestly unfounded, fraudulent or abusive rejections. Should an applicant receive a final rejection, they can approach the High Court for judicial review proceedings or must leave the country. In cases of a mass influx of refugees, the Refugees Act provides the Minister with the discretion to grant refugee status to any group or category of persons that qualify for refugee status subject to certain conditions, and to designate areas, centres or places for temporary reception and accommodation pending their regularisation. "Mass influx" is not defined, leaving its application to the discretion of the Minister.

The right to work is not automatically granted to asylum seekers under the Refugees Act and the conditions relating to work and study are to be determined by the SCRA. Initially, the SCRA determined that there would be a blanket prohibition on the right to work and study for the first 180 days after an asylum seeker lodged their application. If the application was not finalised within 180 days, the applicant could then apply for the right to work directly. This interpretation was found unlawful by the Supreme Court of Appeal (SCA), which held that the right to conduct work cannot be limited when it is the only "reasonable means" to sustain oneself.[17] Subsequent to this ruling, the SCRA has issued all asylum permits with the right to work and study. Dass *et al.* have suggested that this blanket endorsement is due to the SCRA's inability to formulate guidelines for officials or make determinations on a case-by-case basis.[18] By contrast, section 27 of the Refugees Act specifically grants refugees the right to "seek employment" in the country. This right is limited by the Private Security Industry Regulation Act (No. 56, 2001), which largely bars refugees – and asylum seekers – from working in the private security industry. The SCA has clarified that the Refugees Act does not limit asylum seekers and refugees to wage-earning employment and grants them the right to engage in self-employment as well.[19]

1.3. Challenges in Refugee Protection

Many of the challenges encountered can be traced primarily to the structural imbalance within South Africa's broader migration policy, where the Immigration Act (No. 11, 2002) prioritises highly skilled migration and does not provide accessible legal pathways for low- to mid-skilled

migrants. Consequently, high numbers of applicants have lodged asylum claims as their only means to temporarily legalise their sojourn.[20] This dynamic has overwhelmed the limited capacity of the DHA to process applications efficiently, with South Africa receiving the highest number of individual applications globally from 2005–2011.[21] The delays in processing claims, as long as a decade or more in some instances, have made this a viable if imperfect option for many to attain legal status.[22]

The Immigration Act's restrictiveness is a key factor in the high number of applications, but the numbers cannot be simply explained by the lack of a complementary immigration regime. The volatile situation in Zimbabwe in the mid-2000s, exemplified by the political violence and mass evictions seen in Operation *Murambatsvina*,[23] resulted in the mass displacement of Zimbabweans, many of whom sought refuge in South Africa. Between 2008 and 2012, South Africa registered 778,600 new applications, with Zimbabweans accounting for more than half of all applications, close to a half million in total.[24]

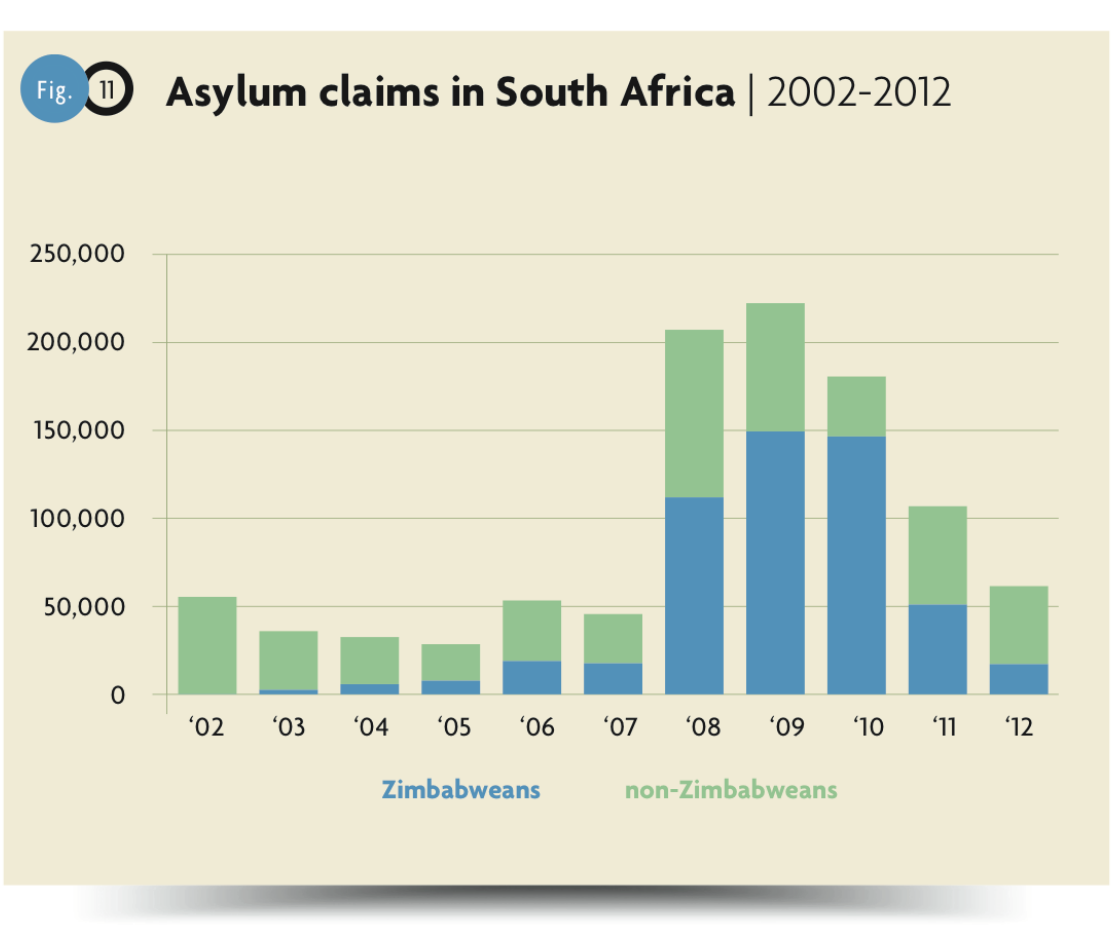


Figure 1: UNHCR Global Trends 2012

In response to the situation, instead of utilising a protection-based response to those fleeing instability, disruptions to public order and political violence,[25] the DHA implemented a

regularisation project for Zimbabweans in 2010. This resulted in roughly 275,000 individuals applying for work permits under the Immigration Act, with many transferring out of the asylum system to do so.[26] Khan has referred to this as merely "re-labelling refugees," a tactic to channel refugees into immigration categories where *non-refoulement* obligations are absent and individuals enjoy fewer rights.[27]

In addition to the structural imbalance and capacity constraints, a negative perception of migration amongst the general public and public officials has fed the perception that refugees and asylum seekers are purveyors of crime, illegitimately present and appropriating limited resources and employment opportunities. Opinion surveys have found that a majority of citizens find migrants and refugees threatening and there is substantial support for increased restrictions on migration.[28] With limited oversight and tacit endorsement, an autonomous bureaucracy within the refugee regime has emerged that has diverged from the humanitarian purpose of the Refugees Act and implemented extra-legal obstacles that circumvent the progressive law it is meant to implement.[29] Statements by public officials and authorities contribute to this perception as exemplified by a 2014 statement by the Deputy Minister of Home Affairs who stated, "many people who seek asylum in South Africa are actually economic migrants who use the asylum seeker process to avoid applying for a visa under the Immigration Act," thus emphasising an intent to circumvent the law as opposed to being the result of a lack of accessible permit options.[30] More explicitly linking asylum to criminal activity is a slide from a presentation given by the Director General of Home Affairs to a joint committee in Parliament in 2011, in which a fictional asylum seeker transgresses a number of laws and poses a socioeconomic threat to society.

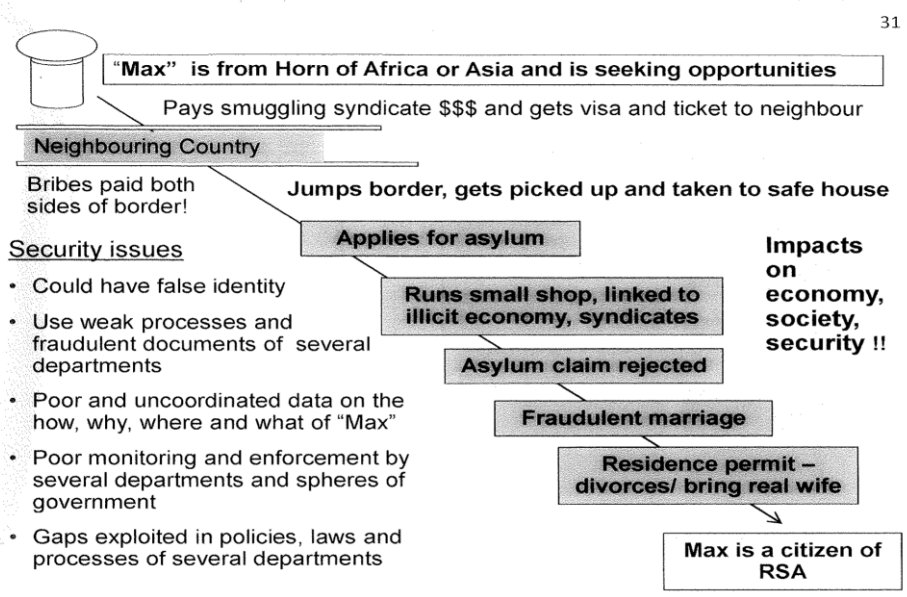


Figure 2: Department of Home Affairs: Asylum Fraud in South Africa

Ironically, the restrictive interpretation of the protection framework, when combined with weak oversight and high demand, has fostered conditions for the emergence of networks of corruption at all levels of the asylum process. Corrupt practices have been a constant feature in the asylum process since its inception.[31] The most substantial study on corruption in the asylum system found corruption prevalent at all levels of the asylum process, with one-third of respondents reporting that they have experienced corruption at an RRO.[32] The combination of ambiguous policies, unlawful restrictions and administrative capacity (as discussed in depth below), have often forced individuals to engage in corrupt practices for mere survival. Alfaro-Velcamp and Shaw have referred to this as a principal technique used to criminalise asylum seekers in South Africa.[33]

1.3.1. Barriers to Accessing Effective Protection

The trends discussed above have together resulted in a system in which formal protections built into the framework are ignored and refugees confront a myriad of barriers to accessing territory, RROs, fair refugee status determination procedures and enabling documentation amidst endemic corruption due to their perceived lack of legitimacy. In an effort to decrease the number of asylum applications, and in line with a more exclusionary and control-oriented vision of migration and refugee policy, the DHA operates with a level of bureaucratic autonomy that allows officials at RROs to actively shape the implementation of legislation and policy with a more restrictive interpretation of protection that diverges from legislation.[34] Remarking on the obstacles confronting asylum seekers at RROs in 2008, Vigneswaran concluded that they largely emanated from

> *The individual effort of officials of the DHA, who act outside their legislative mandate to prevent asylum seekers gaining access to the reception system [and are] embedded in an institution which sanctions its officials engaging in extra-legal practices that prevent foreigners from entering and residing legally in South Africa.*[35]

Evidence of Vigneswaran's conclusion is widespread throughout the asylum process. At border posts, officials have focused on restricting access to transit permits. The issuance of transit permits has historically been inconsistent, with various reports in the media detailing challenges faced by asylum seekers in gaining access.[36] Asylum seekers from specific countries perceived to be non-refugee producing, such as Zimbabwe, have faced the greatest difficulty in attaining these permits due to their perception as being "illegitimate."[37] Exemplifying this, a 2015 research report completed for Parliament found that no transit permits had been issued in the previous six months at the Musina/Beitbridge port of entry, despite it being the busiest port of entry into the country.[38] More recently, a human rights lawyer in Musina confirmed that officials at that border post have stated that they do not issue transit permits "because there is information that indicates [that asylum seekers] don't even go to these offices they say they are going to."[39] Corruption and maladministration at border posts has been acknowledged by government as a serious issue, with the Minister stating in 2015 that he was aware that officials were not following prescribed procedures but that this failure "boils down to the attitude of the particular

immigration official. That is not the official position of the South African government, but officials do it at borders."[40] The inconsistent practices and corruption create an environment that pushes asylum seekers to utilise irregular entry points and methods.[41]

Once in South African territory, asylum seekers face a number of obstacles in accessing the RROs. A 2009 survey of asylum seekers at RROs found that officials at RROs operate as "gatekeepers" aiming to keep out asylum seekers, which results in asylum seekers making repeated trips to RROs.[42] Similarly, a 2012 report found that almost two-thirds of survey respondents did not receive an asylum permit the first time they reported to an RRO and, once they did apply, it took an average of three visits to an RRO to have a single issue resolved.[43] Official procedures are often ignored, and asylum seekers often receive "informal" permit renewals, consisting of handwritten notes and stamps on expired documentation, sometimes for periods of a year or more.[44] The outcome of this is large numbers of asylum seekers remaining undocumented for protracted periods of time, and an artificially large number of applicants at RROs, as they are forced to return repeatedly for documentation.

Barriers to access to RROs are utilised to avoid conferring the rights associated with a formal application, and the required procedural obligations that follow. As such, barriers have been constructed to cap the number of applications received per day, through the use of 'pre-screening' methods outside RROs. These methods are used to deflect what are deemed illegitimate applicants without a formal consideration of their claim, and involve the use of administrative requirements such as requiring a section 23 transit permit to apply for asylum.[45] These practices have either been found unlawful by the courts or discontinued due to litigation. However, variants of these practices have continually been reinvented; for example, while the requirement of a transit permit to lodge an application was discontinued in 2011, legal NGO Lawyers for Human Rights (LHR) has reported that the Pretoria RRO has recently implemented a practice requiring individuals to be in possession of a valid passport or transit permit before being permitted to lodge a claim for asylum.[46] The barriers to access listed above exemplify how individual officials can obstruct persons from accessing legally entitled rights.

Perhaps the most significant obstacle has been the closure of urban RROs as a part of a policy to relocate these facilities to the borders, an integral part of the shift from self-settlement to containment. The Johannesburg RRO was closed entirely in 2011 and its files were moved to Pretoria, while the Port Elizabeth and Cape Town RROs were closed to new applicants in 2011 and 2012, respectively, and remained open on a partial basis to finalise existing applications.[47] The result has been a reduction in national capacity by half, and geographical limitations on services in the southern and western parts of the country. The DHA has stated that these closures are to address challenges in operating RROs in urban areas, to increase efficiency in adjudication and processing and to deter economic migrants from abusing the asylum system, as urban areas acted as pull factors for economic migrants.[48] Significantly, the closures have been accompanied by a policy requiring those who lodge applications at other RROs to report back to that RRO for any administrative assistance.[49] Over the protracted adjudication process

this policy has had significant implications for asylum seekers who have struggled to travel long distances to renew documentation and subsequently navigate the barriers discussed above.[50] The effects of the closures have been the creation of a large population of undocumented asylum seekers, or asylum seekers with expired permits, as well as increased demand at existing RROs. As of September 2018, applicants at the Durban RRO are given appointments for January 2019 to lodge their claims formally.[51]

The legality of the closures has been challenged in the courts, with each being found unlawful, on both procedural and substantive grounds and resulting in the SCA ordering the DHA to re-open these facilities for new applicants.[52] The accompanying policies restricting the freedom of movement have also been found unlawful in two judgments, affirming the right to freedom of movement within the protracted adjudication process.[53] At the time of writing, the Port Elizabeth RRO was re-opened on 22 October 2018, over three years after the 1 July 2015 date ordered by the SCA, while the Cape Town RRO remains closed despite the SCA ordering it to be re-opened by 31 March 2018.[54] The extended non-compliance has resulted in a system in which unlawful policies have been normalised. In sum, the barriers described above leave asylum seekers undocumented for significant periods of time, rendering them vulnerable to exploitation and extra-legal harassment and policing, and further conflating refugee protection with illegal immigration.

1.3.2. Systemic Challenges in Refugee Status Determination

The refugee status determination process has historically been characterised by poor decision-making and a lack of administrative justice, even prior to the Refugees Act entering into force.[55] Research conducted on the determination process in 2009, based on 324 decisions, found serious flaws in the determination process.[56] Subsequent research conducted in 2011, based on a further 240 decisions, found serious errors of law and a general failure to conduct a properly reasoned individualised assessment of asylum claims, with none of the decisions reviewed complying with standards of administrative fairness.[57] One factor in this low-quality decision-making involves capacity; the DHA's 2007 Turnaround Strategy introduced new operating procedures to increase efficiency in turnaround times within the adjudication process, significantly affecting the adjudication process.[58] This was primarily done through the establishment of daily targets for RSDOs, initially set at nine per day. In interviews discussing this process, an RSDO stated that it is a situation where "quantity is put before quality" and that there was not enough time to conduct a proper hearing.[59] Amit concluded that the emphasis on curbing abuse in the system resulted in a "bureaucracy that mass produces rejection letters without any evidence of a reasoned decision-making process," rendering South Africa's international legal commitments "virtually meaningless."[60]

Statistics provided by the DHA since Amit's research was published continue to show high rates of rejections in the first instance. Statistics from 2017 show that 92% of decided asylum applications (25,713) were rejected and only 8.8% (2,267) were approved, with roughly 1,788 flagged as family joining or reunification applications.[61] Thus, approximately only 479 individual

asylum applications unrelated to family re-unification were approved nationally in 2017 (i.e., 1.9% of all decided applications). Rejection rates vary by RRO, with the Musina RRO consistently featuring the highest rate of rejections; between 2013 and 2017, only 23 out of 45,144 applications were approved, resulting in a rejection rate above 99.99%.[62] While it is acknowledged by both civil society and government that many applicants do not meet the criteria for refugee status, the systemic mass rejection of applicants makes it impossible to determine how many applicants are in fact economic migrants as opposed to those with refugee claims.

The emphasis on processing claims has quickly resulted in the creation of backlogs within the appeal and review processes. As of 2017, the RAB has stated that it has a backlog of 147,794 cases and the SCRA has 40,326 pending decisions to review. In contrast to the magnitude of the backlog, the RAB conducted only 319 hearings during the year.[63] The outcome is a situation of protracted temporariness where asylum seekers are placed in limbo and required to return to RROs repeatedly for permit renewals, thus perpetuating the endless capacity issues at these offices. While it has been proclaimed that applications are now finalised within three months, the Director General admitted that the length of time including reviews and appeals was significantly longer, estimating it to be roughly three years.[64] Judicial review cases around the country routinely see individuals who have been in the system for a decade or longer.[65]

1.3.3. Barriers to Local Integration and Effective Protection

The difficulties in accessing the protection framework have a cascading effect on asylum seekers' ability to integrate into local communities. These challenges have their roots in the asylum system, and the documentation associated with it, and have been exacerbated by a socioeconomic environment of high unemployment, crime and xenophobic sentiments.

A major obstacle for asylum seekers and refugees is utilising the documentation provided by the DHA. The permits, issued on A4-sized security paper, differ significantly from the identity book provided to South African citizens in both appearance and specifics. Asylum seekers are not provided with a 13-digit identity number similar to a citizen, but instead a different file number specific to their RRO of application. Once an applicant attains refugee status, they are able to apply for an identity book that provides this identity number. The documentation poses problems for those seeking formal employment and has been referred to as "disabling", as it is subject to tears and folds and is not recognised by employers and law enforcement officials.[66] Consequently, many are forced into employment in the informal sector and into "opting out" of state regulatory frameworks, creating parallel, informal structures for economic activity and protection.[67] Writing in 2006, Landau argued that although the Refugees Act guarantees asylum seekers and refugees the right to integrate into local communities, the inability of asylum seekers and refugees to convert these legal entitlements into effective protection has resulted in South Africa failing to meet its domestic and international obligations to refugee protection.[68] The disabling documentation, and the inconsistent access and temporary nature of it, has

effectively pushed asylum seekers to the margins of economic activity despite their entitlement to access labour markets similar to citizens.

Over the past several years, political parties, state departments and public officials have increasingly called for the curtailment of asylum seekers' and refugees' ability to work in the country. At a meeting at Khayelitsha police station in 2011, former National Police Commissioner Bheki Cele complained that, "Our people have been economically displaced; all these spaza [informal grocers] shops [in townships] are not run by locals."[69] He went on to state that, "One day, our people will revolt, and we've appealed to Department of Trade and Industry to do something about it." The following year, the country's ruling party, the African National Congress (ANC), published a policy paper that stated that over 95% of asylum seekers were not genuine asylum seekers but "rather looking for work or business opportunities."[70] It argued that asylum seekers should not be permitted to engage in informal trading given that their status has not yet been determined. Similarly, the Department of Trade and Industry's 2014 National Informal Business Upliftment Strategy confronted what it called "the foreign trader challenge."[71] The strategy suggested that South Africa should follow the example of countries such as Ghana, where foreign nationals are almost wholly barred from operating small businesses in the country.

Anxiety over foreign national businesses became heightened in the aftermath of xenophobic riots in Gauteng and KwaZulu-Natal provinces in 2015. The violence caused the Presidency to establish an Inter-Ministerial Committee on Migration in April 2015. The Committee submitted that foreign businesses had contributed to the violence, as they had a negative impact on unemployed and low-skilled South Africans, engaged in unfair competition, did not pay taxes and sold substandard goods.[72] This was despite a large body of evidence showing that, on the whole, foreign national businesses made many contributions to local economies, engaged largely in regular business strategies (such as forming partnerships and partaking in price competition) and, in many ways, were more legally compliant than their South African counterparts.[73] Police have also engaged in levying fines against foreign national shops in the Western Cape and Limpopo Provinces. In the Western Cape, between 2011 and 2013, police fined foreign shopkeepers in Cape Town based on fictional legislation.[74] Foreign traders in Limpopo Province, who had been denied access to business licenses by local authorities, subsequently had their businesses shut down by police during the course of Operation Hardstick.[75] The SCA criticised the conduct and policy of local authorities, stating that:

> *In the present case, one is left with the uneasy feeling that the stance adopted by the authorities in relation to the licensing of spaza shops and tuck-shops was in order to induce foreign nationals who were destitute to leave our shores.*[76]

These formal governance efforts have been mirrored by informal attempts to clamp down on foreign businesses. Since 2006, police and NGOs have mediated informal agreements between South African and foreign national retailers associations across the Western and Eastern Cape provinces. These agreements usually prohibit foreign nationals from opening up new

businesses in township neighbourhoods – despite refugees and asylum seekers being legally entitled to trade.[77] State representatives such as the National Police Commissioner, and the Eastern Cape Member of the Executive Council for Local Government have actively endorsed such agreements.[78] What both formal and informal governance strategies show is that political hostility towards the economic activities of foreign migrants (including refugees and asylum seekers) in South Africa has been on the increase for some time. Both local and national political actors have sought diverse ways to constrain foreign nationals' ability to make a living, particularly in the small business sector. These efforts often involve interpreting the Refugees Act narrowly or, at times, ignoring refugees' and asylum seekers' legal entitlements and protections altogether.

1.4. Legal Evolution and Adherence to the Rule of Law

The restrictive interpretation of the Refugees Act has been challenged by affected asylum seekers, refugees and NGOs through the judicial system, resulting in a developing body of jurisprudence further defining the rights and responsibilities of asylum seekers as well as the legality of policies and practices. As a result of these challenges, policies and practices have continually been adapted and evolved along with judicial developments. This process has been characterised as one of "co-evolution" where "legal interpretation and refugee policy have each developed through mutual action and reaction."[79] In South Africa, this co-evolution has centred on contested issues regarding the right to work, access to asylum and the detention of asylum seekers. While the courts have found a number of policies and practices unlawful, the DHA's record on complying with orders of the court is inconsistent, suggesting a limit to the reach of the courts in effecting tangible oversight and the ability of legal challenges to ensure that the rights of asylum seekers are upheld.

The most prominent issue has involved the right of asylum seekers to conduct work, and the conditions under which they may do so. In the landmark case *Watchenuka*, the SCA held that restricting a person's right to work when it is their only means of supporting themselves constitutes a material invasion of the right to human dignity and is not justifiable under section 36 of the Constitution.[80] This reasoning was extended to the right to self-employment after officials attempted to limit asylum seekers' ability to operate business in Limpopo Province.[81] The courts have recognised that the right to work can be limited. In the *Union of Refugee Women* matter, the Constitutional Court held that, although refugees are unquestionably a vulnerable group, limitations are justifiable in certain circumstances, in this instance regarding narrow limitations confined to employment in the security industry.[82]

Access barriers have also featured prominently with the *Tafira*[83] and *Kiliko*[84] judgments, underscoring the importance of access and right to a fair process. In *Kiliko*, the court was concerned with how the DHA attempted to fulfill its duties, thereby linking a fair process to international and constitutional obligations.[85] Bureaucratic inefficiency cannot be used as a rationale for failing to comply with the court finding in the *Tafira* matter (involving the legality of pre-screening methods in front of RROs) that

> *The fact that the respondents might find it administratively difficult to deal with applications promptly, is no reason to act unlawfully and to place the rights and interests of asylum seekers in grave danger. No amount of administrative inconvenience can absolve the respondents of their legal and constitutional responsibility.*[86]

The jurisprudence on the closure of RROs has reinforced the right to public consultation for asylum seekers and refugees,[87] and found that the closing of urban RROs to control the asylum application process and restrict access to rights is contrary to the Refugees Act and, thus, unlawful.[88]

Unlawful detention and deportations have been routine, with many asylum seekers unlawfully detained. LHR brought 90 cases of illegal detention over a 23 month period in 2009 and 2010, with the DHA arguing that it is not bound by the law in situations where it deems its actions necessary.[89] Case law regarding individuals arrested for deportation as illegal foreigners has upheld the rights of asylum seekers to lodge applications before deportation as evidenced in the *Bula*,[90] *Arse*[91] and *Ersumo*[92] cases, referring to the dangers of *refoulement* in such situations. The courts have also recognised the possibility of *refoulement* from third countries as in the *Abdi* matter,[93] finding the return of refugees to a third country unlawful.

The inconsistent compliance with these judgments suggests that the DHA is not accountable to the law. Statements made to Parliament decry "judge-made law" and recent editorials blame the judiciary for sapping the DHA's resources, as opposed to focusing on ensuring that legislation and practice comply with the Constitution.[94] In the *Arse* matter, the DHA submitted in court papers that even if the court found the detention unlawful, it was still "necessary and justifiable," suggesting that immigration and refugee matters are held to a different standard.[95] The most prominent example is the protracted process to re-open the Port Elizabeth and Cape Town RROs in line with the orders of the court.[96] Further, the DHA has inconsistently applied the *Nbaya* judgment for individuals accessing the Cape Town RRO with permits from other RROs, creating hurdles for those negatively affected by the unlawful policy.[97]

Amit has noted that in the South African socio-political context, combined with minimal costs for non-compliance, judicial pronouncements are unlikely to prove effective.[98] However, the jurisprudence of the courts has resulted in tangible changes in policy, especially in relation to the right to conduct work and operate businesses, and has been a significant factor in the implementation of refugee policy. Therefore, the precedents set by the courts are critical considerations for future policy and legislation, as discussed below.

1.5. Legislative and Policy Developments: Reconfiguring the Urban Refugee Protection Framework and Curtailing the Right to Work

Under the auspices of the need to manage security risks within refugee and migration policy, the DHA has embarked on what it has termed a "paradigm shift" in migration and refugee management in 2011. The shift has included the DHA's move into the Justice and Crime

Prevention cluster within government and has been premised on the need to ensure migration policy and practice is integrated into a national security strategy and system and "is informed by national security and development imperatives, international commitments and constitutional prescripts."[99] The paradigm shift has been accompanied by an emphasis on reducing 'pull factors' such as limiting asylum seekers' ability to conduct work, particularly in the informal sector.[100]

Since the shift, new legislation has been introduced including the Border Management Authority Bill (B-12, 2016), currently before Parliament, and the Refugees Amendment Act of 2017. A discussion paper was also published for comments, which proposes repositioning the DHA within the state security system,[101] and the DHA has embarked on a fundamental reconfiguration of migration policy through the release of the Green Paper on International Migration for public comment in 2016 (the Green Paper), subsequently adopted as the White Paper in 2017.[102]

The White Paper can be characterised by two opposing themes. Regarding the asylum system, it introduces a host of restrictions utilised by states in the Global North as a part of the 'externalisation of asylum', as discussed in Chapter 3. This shift is intended to reduce pull factors by limiting the right to work and study for asylum seekers, and to increase efficiency through the creation of 'Asylum Processing Centres' (APCs) at the country's borders, where applicants will undergo a risk-based assessment and be detained during adjudication.[103] During this period, asylum seekers will be prevented from working in the country altogether. It also prescribes the need to pursue externalised mechanisms such as the first/third safe country principle.[104] On the other hand, the White Paper acknowledges the need to pragmatically address regional migration through the creation of an accessible visa regime, accompanied by regularisation programmes for undocumented migrants,[105] which has the potential to establish mechanisms to increase opportunities for legal economic migration. This proposal could alleviate the burden on the asylum system, allowing it to retain its rights-based approach. However, the proposed restrictions to the asylum system indicate a strong commitment to a securitised, restrictive approach to asylum regardless of a more pragmatic immigration regime.

The Act, the first major overhaul of the Refugees Act, was passed into law in 2017. At the time of writing this report, although signed into law, the Act is not yet in force and will go into effect once Regulations are promulgated and published in the Government Gazette. In Parliament, the rationale for the Act was to "tighten up" the Refugees Act, addressing the "abuse of the asylum system, corruption and ensuring that there was an increase in efficiency of workforce [sic]."[106] Further, as the previous regime was at "odds with the objectives of immigration legislation," the Act would align the refugee protection framework with immigration imperatives.[107] In substance, the Act sets out significant changes to the asylum system, with perhaps the most significant change relating to the rights of an asylum seeker to access employment. The Act sets out what can be termed a "sustainability determination process," whereby an asylum seeker is assessed regarding his or her ability to sustain himself or herself

and dependents for a period of at least four months upon application.[108] Specifically, section 22(7) states that if after being assessed it is found that the asylum seeker is unable to sustain himself or herself and his or her dependents, "that asylum seeker may be offered shelter and basic necessities provided by the UNHCR or any other charitable organization or person." Section 22(8) states explicitly that the right to work may not be endorsed for applicants who can sustain themselves, are offered shelter by the UNHCR or seek to extend the right to work having failed to produce a letter of employment within 14 days of taking up employment. Should an employer or educational institution fail to furnish the DHA with a letter within the allotted period, section 22(10) provides that they are guilty of an offence and liable upon conviction for a fine of up to R20,000. Lastly, if an asylum seeker is unemployed for six months or longer, the right to work endorsement must be revoked per section 22(11). At the time of writing, the draft Regulations indicate that the sustainability determination process will be conducted by an RSDO and based in part on written answers provided upon application but with minimal guidance otherwise.[109] Additionally, the SCRA will be tasked with determining the period and conditions attached to the right to work as well as which sectors within which an asylum seeker is not permitted to work or study.[110] Chapter 2 of this report analyses this aspect of the Act in more detail and the implications for refugee protection, local integration, the rule of law and social cohesion.

In addition to amending asylum seekers' right to work, the Act provides for the expansion of the grounds for exclusion from refugee status in section 4 of the principal act based on *inter alia* a failure to report to an RRO within five days of entering the country, entering irregularly without just cause or through conviction of criminal offences.[111] These exclusions are also to be determined by an RSDO, adding another layer to the adjudication process that is unrelated to protection needs. The Act also introduces restrictions on freedom of movement, with the draft Regulations stating that an asylum seeker must report to the RRO of application for determination hearings, permit extensions and to receive determination outcomes.[112] Should an asylum seeker allow their visa* to expire for 30 days or more, their claim will be considered abandoned unless there are compelling reasons for its expiry, to be determined by the SCRA.[113] In terms of increasing efficiency, the Act streamlines the process for appeal hearings and appointment of members to the RAB and introduces integrity measures to combat corruption.[114] In general, the Act is focused on restricting both access to the system and rights afforded to applicants, with one refugee lawyer stating that the Act "restricts and excludes."[115]

1.6. Conclusion

The framework envisioned by the Act does not appear to address the fundamental challenges of the previous 20 years: effective implementation. It instead introduces provisions that limit the core rights protected under the Constitution and international human rights regime through the introduction of a complex sustainability determination process that limits asylum seekers'

* The definitions for the Act now refer to asylum seeker permits as "visas."

right to work and that increases the scope for exclusion from protection. In doing so, the Act adds further duties to officials in an already overtaxed and protracted application process.

The system envisioned by the Act has as much potential to actively create illegality as providing protection for asylum seekers. Many of the provisions, such as curtailments on asylum seekers' right to work, the requirement to be in possession of a section 23 permit to lodge an asylum application, or the requirement to report to an RRO within five days of application, are, in addition to being onerous, often obstructed by the conduct of officials themselves. In this regard, the system may establish an apparatus for what De Genova has labeled the "legal production of *illegality*,"[116] where state actions and policy actively produce *illegality*.

The development and implementation of South Africa's refugee policy since 1998 illustrates that the Act's curtailment of asylum seekers' right to work is part of a broader trend of limiting the rights and protections of asylum seekers and refugees. The rationale and motivation of these amendments are embedded in anxieties over a perceived proliferation of 'economic migrants', weakened state security, as well as the targeting of foreign businesses during xenophobic riots. At the crux of many of these concerns are the economic activities of refugees and asylum seekers in the country. They have, to a large extent, crystallised in efforts to limit asylum seekers' right to work and potentially house them in state facilities – thereby removing them from the country's workforce altogether. The following chapter will explore the Act's provisions, which are aimed at limiting asylum seekers' right to work in South Africa, and what the implications of these changes might be.

2. Refugees Amendment Act and its Possible Implications

2.1. Legislative Provisions Aimed at Curtailing Asylum Seekers' Right to Work

The Act introduces many new curtailments on asylum seeker rights in South Africa and represents an increasing trend towards securitisation of migration and the restriction of the core rights of asylum seekers in the country. This trend is similarly mirrored in many countries globally. A key change introduced by the Act is the limitation of asylum seekers' right to work in the country. This will come into effect once draft regulations[117] have been passed under the Refugees Act. This chapter examines new legislative efforts in South Africa to curtail asylum seekers' right to work and the possible economic, social, political and constitutional implications of these developments.

The Act's limitations on asylum seekers' right to work will have current and possible long-term implications. Currently the Act's provisions alter asylum seekers' right to work by limiting their ability to engage in self-employment (to be discussed in more detail below). The draft regulations also empower the SCRA to bar asylum seekers from working in certain economic sectors.[118] The long-term implications of the Act are less clear. The Act might enable the establishment of APCs, where asylum seekers would be detained whilst their applications are being considered. These asylum seekers would not enjoy any right to work in South Africa and would be largely reliant on the state to meet their basic needs.

This section sets out both potential policies, namely 1) retaining full freedom of movement in the country, but only enjoying a limited right to work or 2) being confined to a particular facility and losing the right to work altogether.

2.1.1. Potential Limitation of Self-Employment: Visas Endorsed with the Right to Work

Section 18 of the Act provides that asylum seekers can only work in the country if their visas are endorsed with the right to work. Visas will not be endorsed if, after a 'sustainability determination process,' it is found that that applicants:

1) Can sustain themselves with or without the assistance of family or friends for a period of at least four months;
2) Have been offered shelter and basic necessities by the UNHCR or any other charitable organisation or person; or
3) Are attempting to extend their right to work after having failed to produce a letter of employment.

In the event that the department endorses asylum seekers' visas with the right to work, "relevant employers [...] must furnish the Department with a letter of employment" within 14 days of asylum seekers taking up employment.[119] Asylum seekers will not be able to extend their work endorsements without producing such a letter.[120] Furthermore, the Act provides that work endorsements will be automatically revoked if a "holder thereof is unable to prove that he or

she is employed after a period of six months from the date on which such right was endorsed."[121]

The provisions of the Act are ambiguous when it comes to asylum seekers' right to self-employment. The Act contains no specific reference to self-employment, and there is no mention of whether 'self-employed' asylum seekers are considered 'employed' for the purposes of the Act. The exact degree to which the Act limits asylum seekers' right to work is therefore open to debate. A restrictive reading could construe the Act as barring asylum seekers from engaging in any self-employment altogether, as the Act requires asylum seekers to provide the DHA with a letter of employment by a "relevant *employer*" (emphasis added). Furthermore, asylum seekers must provide such letters to extend their work endorsements and need to prove that they are employed in order to prevent the automatic revocation of their endorsements after six months.

On the other hand, the provisions could be interpreted as permitting asylum seekers to engage in self-employment for the initial duration of their work endorsements. This is because the Act does not expressly prohibit self-employment. As a result, work endorsements could arguably authorise asylum seekers to work for themselves. However, their right to self-employment would still be constrained, as without letters of employment, asylum seekers would be unable to extend their work endorsements and would risk having their endorsements revoked after six months. Accordingly, at best, asylum seekers will only be permitted to engage in short-term self-employment.

The Act enables the state to restrict asylum seekers' ability to work even further. Section 6 of the 2018 Draft Refugees Regulations,[122] states that the SCRA must determine "the sectors within which an asylum seeker is *not permitted* to work or study in the Republic, whilst awaiting the outcome of his or her application for asylum [...]" (emphasis added). Thus, asylum seekers may be barred from working in certain economic sectors in the future. It is not yet known what sectors these might be.

2.1.2. Potential Exclusion from All Forms of Work: Reporting to a Designated 'Other Place'

It could be the case that in the long-term asylum seekers will be completely barred from working and instead be obliged to report to an APC.[123] The Department's White Paper on International Migration (White Paper) states that:

> *In order to admit asylum seekers in the refugee regime in a humane, secure and effective manner, South Africa will establish Asylum Seeker Processing Centres. The centres will be used to profile and accommodate asylum seekers during their status determination process.*[124]

It envisions these centres being jointly operated by multiple stakeholders, including the DHA, the Department of Social Development, the Department of Health and the UNHCR (although the UNHCR has stated that it does not intend to provide assistance[125]). Asylum seekers would

be categorised as 'low risk' and 'high risk', with low risk asylum seekers possibly being allowed to "leave the facility under specified conditions."[126] These conditions may include having written assurance from friends, family or charitable organisations that they would provide basic services to them.[127] The White Paper does not set out the criteria for determining the risk levels of asylum seekers.

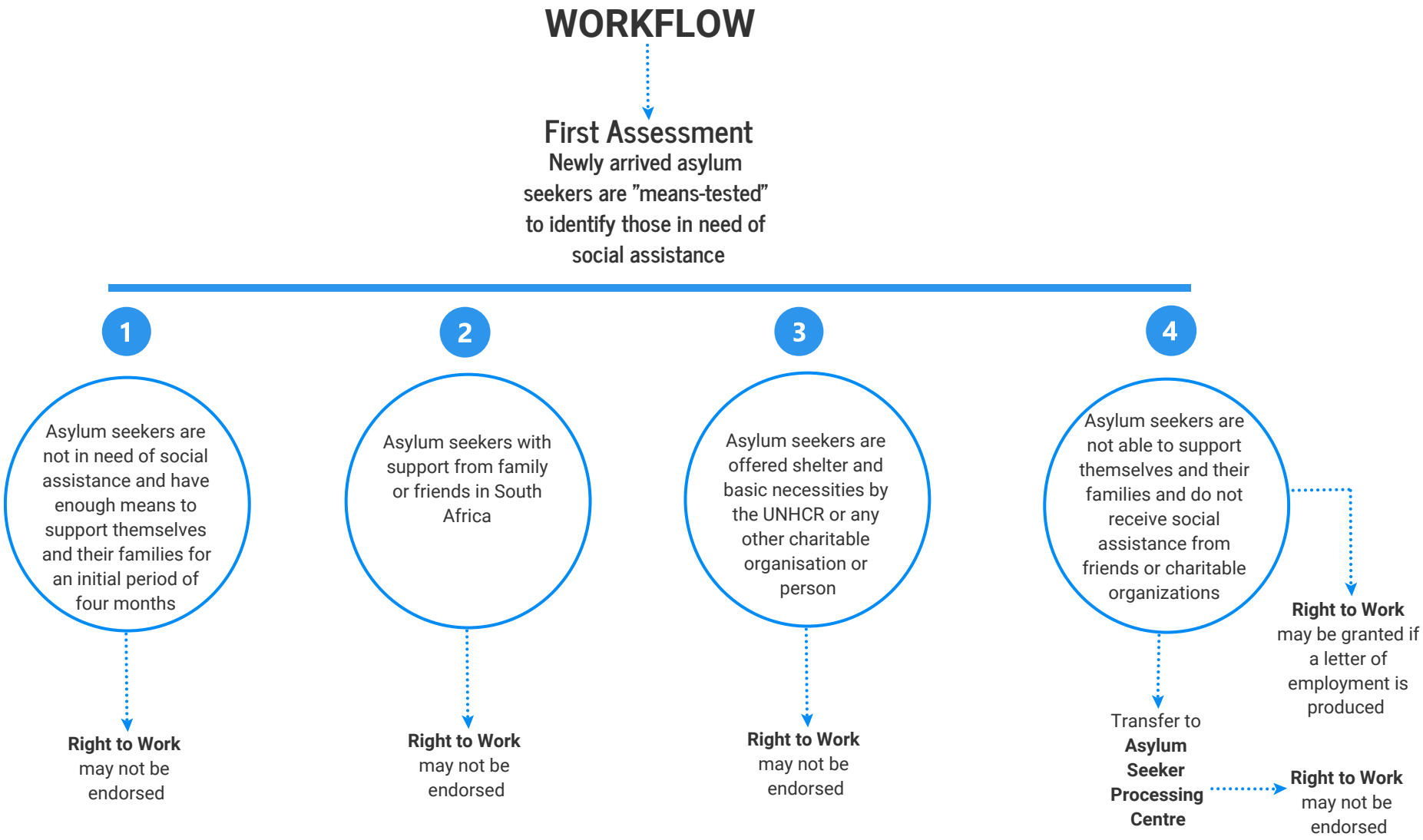
According to the White Paper, in the event that APCs are established, asylum seekers would lose the right to work, since "their basic needs will be catered for in the processing centres." It states that they will only be allowed to work and study in exceptional circumstances, for instance in the event of their cases going on judicial review.

In contrast to the White Paper, the Act itself is vague about the establishment of APCs. However, it can be read to create legislative authority for the establishment of these facilities. For example, section 15 of the Act amends section 21 of the Refugees Act by obliging asylum seekers to report to "a Refugee Status Determination Officer at any RRO or at *any other place* designated by the Director-General by notice in the Gazette" (emphasis added). This suggests that asylum seekers may have to report to a "place" other than a RRO in future, which could potentially be a "processing centre."

It may be the case that only certain groups of asylum seekers will be obliged to report to APCs. This is because the Director-General has the power to require certain categories of asylum seekers to report to any particular reception office or specially designated place.[128] These categories refer to asylum seekers "from a particular country of origin, or geographic area, or of a particular gender, religion, nationality, political opinion or social group."[129] Therefore, the Act essentially grants the Director-General the power to discriminate against specific groups of asylum seekers on grounds such as their religion or political opinion. This could contravene asylum seekers' constitutional rights to equality, dignity and freedom of religion, belief and opinion.

The provisions of the Act thus mirror the White Paper to a large extent. Like the White Paper, the Act prescribes that asylum seekers may be assessed to determine whether they can support themselves or access financial support from their friends or family, or if charitable organisations can support them. At the moment, these provisions relate to obtaining work endorsements on their visas, but these provisions could also form a type of screening process to assess whether to confine asylum seekers in APCs. Those who can demonstrate that they or others can sustain them may be permitted to live outside centres. In contrast, those who lack savings or third-party assistance would likely be detained whilst they await the finalisation of their applications (see Figure 3 below).

Management of Asylum Seekers in South Africa



Source: Department of Home Affairs, 2017

2.2. Potential Impact of Inhibiting Self-employment

2.2.1. Introduction

As of yet, no APCs or camps have been established in South Africa. In August 2018, Mr Thulani Mavuso, Acting Director General of the DHA, briefed the Portfolio Committee on Home Affairs on the plan to build a processing centre in Lebombo, close to the border with Mozambique. He indicated that in 2016/2017 a feasibility study,[130] including a financial model, for building an asylum processing facility was completed and submitted to the Minister for approval, and that a bidder is expected to be appointed in 2020, while construction is envisaged to start in 2021/2022 depending on Treasury approval.[131] Thus, when the Act is implemented (likely by the end of the 2018/2019 financial year), asylum seekers will still be able to move around the country freely. However, their right to work will be significantly limited, as they will, at the very least, be prevented from engaging in long-term self-employment. This will significantly impact asylum seekers' ability to work in the country, which in turn will have broader social, political and economic repercussions. This section explores what the possible implications would be of inhibiting asylum seekers from engaging in self-employment in the country.

2.2.2. Barriers to Wage-earning Employment and Potential Impact on Asylum Seekers' Livelihoods

Asylum seekers in the focus groups faced immense financial hardship in South Africa and identified a number of barriers that they encountered in accessing wage-earning jobs in the country. These included the brief duration of their asylum seeker permits, which were usually only valid for a few months, and having to take leave from work in order to renew their documents every few months. Finding a job was also made difficult due to lack of access to bank accounts and inability to register with professional councils or obtain drivers licenses. Other challenges included language barriers, cultural barriers, lack of local references and black economic empowerment policies. At the same time, asylum seekers are not entitled to social welfare grants in the country. As a result, many have no option but to seek out means of self-employment, usually in the small business sector.[132]

Female asylum seekers face even greater barriers when trying to find work in South Africa. Women tend to have lower levels of education and fewer language skills than men.[133] Focus group participants and members of the Scalabrini Employment Access Programme stated that the primary opportunities available to female asylum seekers were cleaning, childcare or working in a foreign-owned business or home.[134] Many female asylum seekers could not enter the hospitality industry because their English was too poor (e.g., French, Portuguese or Somali speakers). Other jobs were often the preserve of men, such as working as security guards or gardeners. Cultural and language barriers also often meant that female asylum seekers tended not to keep their jobs for very long.[135] Thus, female focus group participants reported that they relied mostly on self-employment to survive. Jobs included braiding hair, sewing or selling fruit and vegetables.

Although women fared worse than men, male asylum seekers – even those who were highly educated – did not fare much better. In the mixed men and women's focus group in Cape Town, male participants also encountered many barriers to accessing wage-earning employment. In their view, asylum seeker permits automatically disqualified them from most wage-earning jobs, as permits were only valid for a few months, came in the form of a piece of paper rather than an ID book (some participants jokingly referred to it as "the newspaper") and the thirteen-digit ID number was not recognised by many employers.

As a result, focus group men (all of whom had tertiary degrees in subjects such as education, business science and veterinary science) could not find work in their fields. Male asylum seekers mainly supported themselves through self-employment by working as car guards, Uber drivers, barbers, bouncers, bead workers or car washers.[136] One participant lamented his inability to pursue a career in line with his degree:

> *So I go to the lower class which is bad. To the lower class where I meet the lower people who don't have the qualification as me. So for them it's like "you came to take my job" actually.*[137]

Thus, prohibiting asylum seekers from engaging in self-employment severely impacts their ability to survive in the country. One focus group participant stated bluntly that rather than prohibiting her from operating her business, the state should "take me home and let me die there." Another asked: "If you have a child how can you survive? How can you pay your rent, your food?"[138]

Focus group participants believed that potential support from friends and family would be very limited.

> *They will support you only in the first month, and the second month then they will tell no you can't. For us also we are fighting [for] our lives.*[139]

Another focus group participant explained that "he [a friend or relative] is using an asylum seeker [permit]. You meet him, also he has that condition you have. How he's going to help you?"[140]

Although the UNHCR does provide some rudimentary support to asylum seekers in South Africa, this assistance is very limited. Their primary recipients of aid are recognised refugees rather than asylum seekers. Furthermore, its limited funding to the country has been cut in recent years.[141] In the event that asylum seekers cannot find work and are barred from working for themselves, there would be very little alternative source of support to which they can turn.

2.2.3. Potential Impact on South African Local Economies

Apart from having a detrimental impact on asylum seekers' livelihoods, barring asylum seekers from self-employment would also restrict opportunities for South African job seekers. For example, unless the state intends to exclude asylum seekers from the few sectors accessible to them, South Africans would face increased competition from asylum seekers for low-end jobs such as hospitality, gardening, domestic work and childcare.

Many studies have found that foreign national enterprises employ significant numbers of South Africans.[142] These enterprises (such as wholesalers, supermarkets, clothing shops and food stalls) might be forced to replace South African staff with asylum seekers due to increased pressure for wage employment in their communities.

Some economic sectors such as the spaza market would most likely not be heavily impacted by the Act's provisions in the short to medium term. This is because asylum seekers in the market rarely start up their own shops on arrival in the country, and rather seek job opportunities in existing foreign national spaza shops.[143] Asylum seekers usually only establish their own businesses after a few years, once they have saved up enough investment. However, should the DHA delay issuing refugee permits for years (as it currently does[144]), it might eventually inhibit asylum seekers from opening new shops. While this might benefit competing South African spaza shopkeepers, it could harm other South African players in the grocery market, such as wholesalers, suppliers, transporters, manufacturers and shop landlords.[145] It could also impact negatively on low-income township consumers.

2.2.4. Engendering Illegality

It would be optimistic to believe that all asylum seekers – especially those with no other means of supporting themselves – would comply with the Act's provisions and cease all forms of self-employment, either when the Act comes into effect or after the expiry of their right to work endorsements (depending on one's interpretation of the Act). The impact of the Act would likely be such that, for many, they will have no other option but to sidestep the law and continue engaging in self-employment rather than face destitution.

Focus group participants gave examples of instances in which they felt forced to engage in fraudulent activities in order to access employment or government services. For example, one focus group participant stated that her local hospital would not attend to her because she was an asylum seeker. Therefore, she approached another hospital using her friend's address and received help there. Another asylum seeker sought to register at a placement agency but was refused because her asylum seeker permit was only valid for six months. Therefore, she applied under the name of a friend, using a copy of her friend's ID.

Similar activities would likely also take place should restrictions be placed on asylum seekers' right to work. The state may find that prohibiting asylum seekers from engaging in self-employment is easier said than done. Many forms of self-employment are not very visible (e.g.,

Uber driving, selling items door to door or home-based enterprises such as sewing and baking).[146] Other asylum seekers could mask their business arrangements.[147] For instance, South African landlords might pretend to be their foreign tenant's employers. Refugees might also claim to employ asylum seekers when in actuality they are business partners.[148] Asylum seekers might also acquire false refugee papers, so that they can start-up businesses or engage in casual labour without fear of being fined or arrested by authorities.[149]

Thus, the Act's provisions would be relatively easy for asylum seekers to subvert, and result in the state having to expend increased resources on law enforcement and court proceedings. The Western Cape Chairperson of SASA stated that it was unlikely that asylum seekers would leave their occupations:

> *Unless they are forced to leave and force is used against them. [It] is the only way they can leave… because that's the only way that they can survive*.[150]

2.2.5. Potential Impact on Constitutional Rights

According to the Supreme Court of Appeal,[151] a blanket prohibition on asylum seekers from working – in the absence of any state support – unjustifiably undermines their right to dignity, as it could result in many asylum seekers being left destitute.

Yet, some limitation on asylum seekers/refugees' right to work is permitted. For example, in the *Union of Refugee Women* case[152] the court found that preventing asylum seekers and refugees from working in the private security industry had a rational purpose, was narrowly tailored and did not apply to all industries.

In the *Somali Association of South Africa* [153] case, the court held that asylum seekers and refugees did not enjoy the right to choose their vocation, which was the preserve of citizens only. However, the court stated that where an asylum seeker faced destitution as a result of being prohibited from engaging in self-employment, the right to dignity was implicated. The court accordingly extended the *Watchenuka* principle and held that traders who had been denied spaza shop licences in Limpopo were entitled to trade, as they had no other means of supporting themselves.[154]

Thus, when it comes to the constitutional rights of asylum seekers, the issue is whether the state's potential blanket ban on self-employment could force many asylum seekers into destitution. This seems to be the case, as asylum seekers face numerous barriers accessing wage-earning jobs in the country, and do not enjoy any state support. In the absence of either, the only option remaining for continued survival and living with a degree of dignity in the country is self-employment.

2.2.6. Potential Impact on Social Integration

The amendments introduced by the Act are likely to have a negative impact on social integration. A recent HRSC survey asked South Africans to state what they thought the main

reason was for anti-immigrant violence in South Africa.[155] The three most common responses were that foreigners increase or cause unemployment (30%), are perceived as selling drugs (17%) or cause other forms of crime (15%).

It is unlikely that preventing asylum seekers from operating businesses would diminish these perceptions. Forcing them into the job market (especially the few low-paid and low-skilled sectors available to them) would probably increase the perception that they steal jobs. There is also the likelihood that many asylum seekers might need to breach the law and trade illegally in order to survive. This could increase perceptions of foreigners being involved in crime and unlawful activities.

Other asylum seekers might resort to crime should they not be able to find work. For example, a focus group participant explained: "They don't give opportunity to work normally. So how is he going to survive? He's going to get himself in illegal things."[156] The SCA in the *Somali Association of South Africa* case similarly stated that:

> *[…] A person who exercises his or her right to apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging*.[157]

Increased criminal activities such as drug-dealing and prostitution may raise animosity towards foreign nationals in the country and limit their chances of social integration.

Other asylum seekers who cannot find work may choose to become destitute rather than resort to crime. This brings with it social ramifications, such as psychological trauma, homelessness and health problems. These difficulties are already confronted by many asylum seekers. For example, members of the Scalabrini Employment Access Programme stated that a number of asylum seekers in Cape Town were too poor to pay rent, so they lived in shelters.[158] They also often encountered teenagers attending seminars aimed at helping adults find employment:

> *Interesting enough we got a lot of the seventeen year olds. They want to join this. And the reason is the parents that have been out of jobs for several years. They cannot afford to pay for school fees for their children. Children are clever, they bright, but they are out of school*.[159]

It is unlikely that people who are living in shelters or are unable to ensure that their children are educated would be able to integrate easily into South African society. Instead, their inability to meet their basic needs would probably exacerbate their marginal status in the country.

Thus, it is doubtful that the legislation will ameliorate levels of anxiety towards foreigners in the country and improve integration and social cohesion. Illegal trading, increased extents of criminal involvement and heightened destitution amongst asylum seekers do not seem like healthy ingredients for a stable, diverse society. This, as well as heightened job competition, would more likely raise levels of xenophobia towards foreign nationals and the possibility of violent action being taken against them.

2.3. Potential Impact of Establishing APCs

2.3.1. Introduction

Although not explicitly mentioned in the Act, the DHA has declared an intention to create APCs to house asylum seekers while their applications for refugee status are being considered. These centres will be used to "profile and accommodate asylum seekers during their status determination process."[160]

The Department's White Paper provides three justifications for the setting up of APCs.[161] First is to improve the efficiency of status determination processes and ensure that applications "are processed in a secure, efficient and humane manner." Second is to reduce "the incentive for abuse by economic migrants" and thereby make the asylum system transparent and responsive. Lastly, the department anticipates that APCs will reduce the cost of managing asylum seekers residing in the country.[162]

Section 15 of the Act creates a legislative space for the establishment of APCs by amending section 21(1) of the Refugees Act. It states that:

> *An application for asylum must be made [...] to a Refugee Status Determination Officer at any Refugee Reception Office or at* ***any other place*** *designated by the Director-General by notice in the Gazette* (emphasis added).

The Director-General also has the power to require "any category of asylum seekers" to report to a RRO or "other place specially designated as such when lodging an application for asylum."[163] Thus, asylum seekers may in future have to report to a "place" other than a RRO, which could likely be a processing centre. This section examines what the economic, social and political implications would be of housing asylum seekers in these centres whilst they await the outcome of their applications.

2.3.2. Impact on Asylum Seeker and Refugee Livelihoods

The effect of confining asylum seekers in centres would mean that they would be almost completely reliant on the state to meet their survival needs. Should the state neglect its responsibility to provide adequate shelter, food and other necessities to asylum seekers, it could undermine their ability to survive. This is a real possibility given the state's record of treatment of detainees at Lindela Repatriation Centre – the country's primary holding facility for undocumented migrants. Civil society organisations and courts have condemned abuses at the facility for many years, including overcrowding, lack of access to medical care and insufficient food.[164]

Detaining asylum seekers in APCs could also negatively affect refugee livelihoods. Many refugee-operated businesses are staffed by asylum seekers who share the same national origin as owners. Losing these staff members might harm these enterprises, as they might not work as efficiently with replacement South African staff who would come from different cultural,

religious and linguistic backgrounds. Business practices also rest on mutual trust and partnership,[165] which would be harder to generate between different national groups.

The Act's means assessment process might result in many refugees offering financial support to asylum seekers, as a way of keeping them out of detention camps – even though in reality they may not have the capacity to do so. This could place further financial strain on refugees in the country. For example, an attorney at the UCT Refugee Rights Unit explained:

> *I think that a refugee family would very easily say that, "Yes, I will support this person," instead of letting a person languish at a processing centre. So I can see that. But them saying they can help doesn't mean that they can actually help*.[166]

Thus, detaining asylum seekers in APCs would not only pose a threat to their livelihoods should the state fail to guarantee their basic needs in detention, but could also impact on the economic condition of refugees living in the country.

2.3.3. Potential Impact on the South African Economy

Determining the economic impact of interning asylum seekers in APCs depends largely on the number of asylum seekers who would be housed in such facilities and the duration that they would spend there.

The White Paper envisages only 'high risk' and a minority of 'low risk' asylum seekers being housed in APCs. It states that, "Most asylum seekers who fall into low risk categories could be released into the care of national or international organisations and family or community members." Released asylum seekers would only enjoy the right to work in exceptional circumstances, such as in the event that their cases go on judicial review.[167]

However, focus group participants believed that it was unlikely that asylum seekers' friends and family could offer them sufficient support.[168] The UNHCR has also made it clear that it does not intend to cover the living costs of asylum seekers in South Africa.[169] Therefore, the state might find larger numbers of asylum seekers living in centres than it envisions.

At the same time, asylum seekers may end up spending significant periods of time in centres. Asylum seekers often wait many years for the finalisation of their cases. This is aggravated by near blanket rejections by initial status determination officers in granting refugee status, causing many asylum seekers to apply for lengthy reviews and appeals. The Western Cape Chairperson of the SASA reported that "near to zero" Somalis in Cape Town were being granted refugee status in South Africa. Similarly, an attorney at LHR in Musina knew of only five individuals who had been granted refugee status over the past five years,[170] and a representative of Future Families in Musina did not know of anyone being granted refugee status in the past 12 months that he had been stationed at the office.[171] The DHA's records show that 92% of decided asylum applications (25,713) in 2017 were rejected and only 8.8% (2,267) were approved, most of the latter being family joining or reunification applications.[172]

An attorney at LHR in Musina reported that individuals applying for asylum in the town were being immediately interviewed and rejected on the spot. He questioned the reliability of this practice:

> *[…] If I come to you and tell you this is the reason why I came to South Africa, I was a member of the opposition party in DRC… Do you think that within three hours you will be able to verify the information? You won't*.[173]

These mass rejections resulted in many applicants lodging lengthy appeals:

> *[…] If the decision was rejected as unfounded, it means the person still has to go through the stages of the appeal board. But now, like I'm saying, there is a lot of backlog. So it will take years. It takes years. I'm telling you we still have people who applied in 2009*.[174]

Most focus group participants had been registered as asylum seekers for several years – one as long as 16 years (since 2002). Many NGOs and community organisations have claimed the same.[175] The Chairperson of the African Diaspora Forum stated on radio that asylum applications often took longer than ten years to be finalised. He urged that:

> *[…] If you give me two days, I'll bring you over one thousand papers of people who have been locked on [stuck in the asylum process] more than 10 years*.[176]

The DHA foresees asylum seeker applications declining dramatically in the event that they are made to report to APCs. This is because economic migrants using the asylum system to enter the country would likely find it futile to spend their stay in detention instead. But this does not necessarily mean that applications would be processed more quickly, as the DHA would no longer only be responsible for processing asylum seeker applications, but also providing housing, education and medical care for detainees – something that would also draw on its resources and budgets. Even if the DHA is able to process applications much more quickly, asylum seekers could still have to wait in APCs for a year or more given the current waiting period of over a decade. So far, neither policy documents nor legislation have provided any guidelines on expected application durations and periods of detention.

It is unclear how much it would cost to detain asylum seekers whilst they await the finalisation of their applications. Estimated costs for the detention of migrants in previous years vary between R36,284.65 and R70,810 annually per person.[177] Should these detentions be prolonged, it could come at great financial cost to South African taxpayers. Possible lawsuits in respect of contraventions of detainee rights would also come at a financial cost for the state. In assessing financial implications, these costs need to be weighed against possible benefits to the South African economy. Interning asylum seekers could give rise to less job market and small business competition for South Africans. The policy might also pressure foreign national businesses into hiring more South African staff. But in practice the situation may not be as black and white. Many economic migrants might bypass asylum seeker APCs altogether and work unlawfully in the country.[178] Furthermore, foreign national businesses might come under strain without asylum seeker staff, resulting in the possible reduction of these enterprises –

particularly in the spaza sector. This could impact negatively on many South Africans working in the grocery sector (such as wholesalers, transport providers, manufacturers, suppliers and landlords of spaza shops), as well as township consumers.[179] Although the corporate sector might be able to step into the township grocery market and fill the gap,[180] this could result in a concentration of supply networks in the food sector and hence reduced competition and price competitiveness. State coffers might also be negatively affected by reduced VAT payments by asylum seeker and refugee businesses. For example, a study of Somali spaza shops in Motherwell in PE, found that each shop paid on average of R38,740 annually in VAT.[181] The constriction of larger, more formalised foreign national businesses (such as mini-markets, wholesalers and clothing shops) could result in the state further losing out on business and income tax. Thus, possible economic benefits of confining asylum seekers are limited and offset by a number of economic drawbacks.

2.3.4. Engendering Illegality

> *You know, life always finds a way. It's like a seed. When you put it under a big stone, that plant will seek all the way to come out even to go around that big stone and come out.*[182]

Many economic migrants might continue to migrate to South Africa (particularly from SADC regions) to seek employment, because of a lack of opportunities in their home countries and the presence of social networks in South Africa. It is likely that these migrants would not report to APCs and would instead choose to live in the country without documentation.[183] A representative from LHR in Musina stated that many migrants were already bypassing the asylum system:

> *[…] In 1998 there were lots of Zimbabweans in the asylum system. But if you go and look in Musina, in terms of data for foreign nationals, we have lots for Zimbabwean foreign nationals, mostly undocumented. But it doesn't detract them. You'll find your way, to manoeuvre, whether police or not, as long as I survive.*[184]

Respondents also believed that many asylum seekers in APCs might buy fraudulent papers in order to be released.[185] The Western Cape Chairperson of the SASA believed that:

> *Corruption is going to be started there in the camp itself. People who will be able to get money and pay those authorities there will be able to make their way. They will make all their way possible to get out of the camp.*[186]

Thus, as is the case with preventing self-employment, many asylum seekers and economic migrants would find ways of subverting the law to avoid finding themselves detained in APCs. Increased numbers of undocumented persons could place strain on the state, which would have to invest resources in detecting and deporting undocumented people or investigating and prosecuting corruption. Subversion of the law could also weaken the state's ability to record the numbers and identities of foreign nationals entering and living in the country.

2.3.5. Potential Impact on Constitutional Rights

The establishment of APCs represents a key political shift away from South Africa's constitutional values of diversity, inclusivity and human rights. Detaining asylum seekers (including children) in state facilities seems to comprise the antithesis of the Constitution's assertion that "South Africa belongs to all who live in it, united in our diversity." It also represents a turn away from the Constitution's founding values, which include "Human dignity, the achievement of equality and the advancement of human rights and freedoms." Rather, the establishment of APCs would entail the retreat (as opposed to the advancement) of human rights and freedoms in the country.

APCs do not only run in conflict with the spirit and values of the Constitution, they also potentially run the risk of contravening the constitution's provisions. This includes the constitutional right to freedom and security of the person. The Western Cape Chairperson of SASA stated of refugee camps in Malawi that, "[People] are forced to stay in the camp forever and they are not allowed to get out of the camp like they're in jail or in prison."[187] A focus group participant who had fled a camp in Malawi described that, "Actually if I think about camping in Malawi, whatever will happen to me in South Africa I will tolerate it because I don't want to be in a camp."[188] She explained that:

> *Because when I was in Malawi I could not work. We are just being in a camp. Wait for the UN to come and give us what to eat. You become like a useless person*.[189]

Section 12(1) of the Constitution states that "everyone has the right to freedom and security of the person." This includes the right—

> (a) Not to be deprived of freedom arbitrarily or without just cause;
>
> (b) Not to be detained without trial;
>
> (c) To be free from all forms of violence from either public or private sources;
>
> (d) Not to be tortured in any way; and
>
> (e) Not to be treated or punished in a cruel, inhuman or degrading way.

Whether detentions breach the above provisions would depend on whether the state can show "just cause" for its actions. Currie and de Waal argue that this entails demonstrating that the restraint is "in accordance with the basic tenets of the legal system."[190] For example, measures should serve a compelling public interest and go no further than what is necessary to serve such a purpose. Levels of scrutiny would be contingent on the duration for which individuals are incarcerated.[191] It would be harder for the state to justify lengthy incarcerations of asylum seekers of several months than detentions that last a few days.

The state would also need to ensure that asylum seeker detainees in APCs are not exposed to inhuman and degrading treatment in contravention of section 12(1)(e), or breach section 35(2) of the Constitution, which sets out the rights of detained persons. These rights include the right

to "conditions of detention that are consistent with human dignity, including [at the] very least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment."

As discussed in Chapter 1, the DHA has a very weak track record regarding the treatment of asylum seekers in the country, even at the present moment. Numerous studies have documented how the department has undermined refugees' and asylum seekers' rights on a widespread scale and flagrantly breached and misapplied laws.[192] Participants in both focus groups related similar narratives. They stated that staff at reception offices treated them "worse than animals" and were openly xenophobic towards them. For example, staff would state, "Go back to your country. What are you doing here?"[193] Another participant described that "They push you. They will throw you out like animals."[194]

Asylum seekers in Cape Town stated that negative treatment by the department usually started outside the city's RRO, where those seeking help (including young children) were forced to wait in long queues without any shelter. Asylum seekers who wished to be assisted would have to join the queue at approximately 5:00 am, resulting in many needing to spend the night under nearby bridges where they were exposed to the elements and at risk of criminal attack.[195] This included a regular client of the Scalabrini Centre of Cape Town who was forced to sleep under a bridge on numerous occasions alongside her two children – a daughter and "a little boy with leukaemia."[196] The situation seems similar elsewhere in the country. For example, in 2011, asylum seekers were observed burning tires and cardboard to keep themselves warm whilst waiting overnight to join the queue outside the DHA office in Pretoria.[197]

Forms of state abuse outside RROs have included *sjambocking* (whipping) people to keep them in queue and the use of water hoses.[198] Many human rights abuses have been documented at the Lindela Repatriation Centre, South Africa's primary temporary holding facility for undocumented migrants. These include routine violence, insufficient medical care, prolonged and indefinite detentions without judicial oversight, insufficient food, overcrowding and suspicious deaths.[199]

Thus, the risk of neglect and human rights abuses in proposed APCs is high, considering past and current practices by the DHA. It is also unclear how APCs would be funded to ensure that asylum seeker inmates are adequately cared for. The UNHCR office in South Africa has so far refused to offer financial assistance towards the state's proposed camps. It has stated:

> *UNHCR calls upon the Government of South Africa to refrain from including reference to UNHCR and its partners in Section 22 (7) referring to provision of shelter and assistance.*[200]

The risk of abuses within detention centres is also raised by the department's poor record of complying with the law.[201] Many respondents felt that the department and its staff showed little respect for the law. One focus group participant described that she once approached an officer at the Cape Town Refugees Reception Office with a letter from an attorney, but "He just look at

it and then throw it there [...] Not even reading it."[202] Respondents stated that corruption at the DHA was rife: "They're just there for money. They are not there for help."[203] The DHA shares a similar view of many Home Affairs officials. A representative of the DHA stated that the department closed down the Port Elizabeth reception office partly because "there was rampant corruption. We learned that it wasn't just one or two officials, it was essentially all of them."[204] This indifference towards the law goes all the way to the top. An attorney at the UCT Refugee Right Unit described the DHA as having:

> *[...] A very poor record [of legal compliance]. They have a poor record of abiding by court orders, poor record of properly implementing our laws. A poor record of abiding by clear laws and court orders*.[205]

This raises questions about whether the DHA has the capacity to adequately care for and protect the rights of those confined under its supervision. The situation would likely be even further aggravated by the DHA's intention to locate centres in isolated regions near the country's borders,[206] and far from urban centres where many organisations providing legal support and oversight are located. The DHA has also remained very vague about how it intends to protect the rights of asylum seekers inside its facilities. For example, at the moment, legislation provides no guidance regarding whether a designated "other place" refers to APCs and, if so, for what duration asylum seekers would be kept there, the degree of judicial oversight and what asylum seekers' basic conditions of stay would be like.

Detentions might also undermine asylum seekers' right to dignity. This is not only because of the possibility of prolonged confinements without "just cause" or inhumane conditions, but also because they arguably amount to the use of asylum seekers as instruments to discourage migration to the country. The Constitutional Court has ruled that:

> *Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence... the offender is being used essentially as a means to another end and the offender's dignity assailed*. [207]

The DHA's purported justification for the detention of asylum seekers on the basis that it would reduce incentives for economic migrants to enter the country[208] might therefore not pass constitutional muster. Such a justification arguably entails using the asylum seekers in an instrumental way to deter migration, rather than recognising their inherent worth as human beings.

Housing asylum seekers in APCs consequently raises a number of important constitutional concerns. These concerns are heightened by the DHA's longstanding poor track record of conduct towards foreign nationals in the country. However, exact constitutional arguments and potential court findings regarding detentions would depend on factors still to be disclosed by

the DHA, such as whether APCs would be established, durations and conditions of stay at centres and degrees of independent oversight. In any event, irrespective of their legality, the setting up of APCs represents a worrying political turn away from the human rights values that characterised the country's early democratic dispensation towards a narrow political preoccupation with national security and economic interest.

2.3.6. Potential Impact on Social Integration

Recent research has found that many South Africans believe that economic competition feeds xenophobic violence in South Africa,[209] even though research has also shown that many foreign migrants create economic opportunities for South Africans.[210] Nevertheless, the detention of asylum seekers could, in theory, result in lower levels of perceived competition over jobs and resources. Although this is a problematic way of dealing with high levels of xenophobia (i.e., separating out and detaining targeted groups) it might contribute to stability in the country. At the same time, it could normalise harsh and extreme approaches towards other unpopular categories of people in future and thereby also erode constitutional rights and values in the country.

The degree to which detaining asylum seekers in processing facilities would promote their integration in South Africa would depend on how long they are detained for, the conditions of detention and what integration services are available in these centres. For example, should asylum seekers be housed in APCs on an optional basis for a few days during which they would enjoy the right to enter and leave the premises, be well catered for and be inducted with relevant information about living in the country, their stay might assist with their integration. Should they be held in APCs on a compulsory basis for long periods, in poor conditions and without any exposure to preparatory information about residing in the country, it could lead to secondary trauma and hostility towards the country, and in turn hinder their ability to integrate in the event that they are granted refugee status and released.

Increased numbers of undocumented economic migrants bypassing camps could result in heightened operations against people on the street who look 'foreign'. This in turn could raise levels of antagonism towards foreign nationals and diminish the ability of recognised refugees to integrate. Thus, even in the event that asylum seekers emerge from centres unaffected, they might still encounter a hostile population that is not willing to incorporate them into the country's social fabric.

2.4. Conclusion

The Act's limitations on asylum seekers' right to work as well as state proposals to establish APCs could have many possible repercussions for those living in South Africa – including asylum seekers, refugees and citizens alike. These range from weakening the ability of asylum seekers to sustain themselves, placing financial strains on state resources, eroding social cohesion and breaching asylum seekers' constitutional rights. Ultimately, the Act's provisions represent a shift from a political emphasis on human rights and inclusivity to an increasing preoccupation with

security concerns and national economic interest. These developments are not unique to South Africa, but are also mirrored in policies globally. Efforts to curtail the economic rights of asylum seekers in South Africa (by either inhibiting self-employment or detaining them) thus pose lessons for many countries and regions grappling with similar issues. At the same time, South Africa can benefit from exploring how other countries have attempted to limit asylum seekers' right to work and move freely in their territories. The following chapter explores reception conditions for asylum seekers in the EU, how these policies converge with recent developments in South Africa and what lessons can be learnt from European experiences

.

3. Two Converging Paradigms? Reception Conditions for Asylum Seekers in the EU

3.1. Introduction

Despite having distinct narratives and priorities on migration,[211] Africa and Europe have a general convergence trend in the migration policy field as they both place a strong emphasis on border control and the fight against irregular migration. The African Union's revised Migration Policy Framework for Africa and Plan of Action (2018–2027) indicates that "border management is strongly affected by security concerns. In Africa, as in other parts of the world, border management systems are coming under increasing pressure from large flows of persons, including irregular and mixed flows."[212] The policy goes on to say that, "specific challenges to border management mechanisms include building capacities to distinguish between persons having legitimate versus non-legitimate reasons for entry and/or stay and consequently, the strengthening of border management systems in terms of technology, infrastructure, processes for the inspection of travellers, and training of staff, are key."[213]

Furthermore, in its African Common Position on Migration and Development, the African Union states that "large spontaneous and unregulated migrant flows can have a significant impact on national and international stability and security" and "combating irregular migration and establishing comprehensive migration management systems can contribute to enhancing national and international security and stability."[214] Emphasis on border control and national security makes evident the progressive shift operated by countries in the Global North and the Global South towards the "securitisation of migration," an approach that favours security interests of states aiming to reduce risks associated with migration and limit the influx of irregular migrants, including 'bogus'* asylum seekers. These groups are framed in public discourses and news media as a threat to the security and well-being of nations[215] and, therefore, in order to counter what is perceived as a security risk, states have adopted mechanisms to manage and control mixed migration flows and separate *bona fide* asylum seekers and refugees from those who intend to abuse the system.

For this purpose, most European countries have established *reception* and *transit* centres where applications for asylum are processed and asylum seekers receive initial support and accommodation. In 2015, so-called hotspots centres were created in Italy and Greece to assist frontline Member States facing disproportionate migratory pressures at the European external borders and stem irregular flows into the EU. More recently, the European Commission has proposed the establishment of *controlled centres* "to improve the process of distinguishing between individuals in need of international protection, and irregular migrants with no right to remain in the EU."[216] The proposal of establishing *controlled centres* has received criticism from

* The term 'bogus' refers to asylum seekers with an unfounded claim.

humanitarian agencies as these centres prospect "lengthy and indefinite detention, in breach of international law and the convention on human rights."[217]

Similarly, in South Africa, government has laid down a plan to build ACP "to profile and accommodate asylum seekers during their status determination processes[218] and speed up the return of failed asylum seekers. In this regard, the convergence of paradigms between South Africa and Europe is evident. The former's policy on international migration makes explicit reference to international practices of migration management based on border control and confinement of newly arrived migrants as best practice models. As discussed in Chapter 1, over recent years, South Africa has, in some ways, adopted a European-style approach for the management of migration based on migration containment and control with the aim of deterring asylum seekers from entering the country. Furthermore, "non-arrival measures to control asylum seekers and undocumented migrants and to restrict their access to large metropolitan areas have been applied through the years in contravention of international obligations for refugee protection."[219]

The introduction of the Border Management Bill and the repositioning of the DHA in the Security Cluster, reveal how the country's new policy views migration as a threat to national security.[220] Furthermore, the "need to keep the security dimension connected with migration issues"[221] emerges from the White Paper, which argues that "South Africa has become an attractive destination for irregular migrants [...] who pose a security threat to the economic stability and sovereignty of the country."[222]

The following section intends to describe European national practices with regards to the provision of reception conditions to asylum seekers. This is in order to discuss to what extent restrictions placed on the right to work, freedom of movement and the establishment of APCs in South Africa are adequate solutions for the management of asylum seekers. It will also provide a description of the strategies of migration containment put in place by the EU to stem the large number of arrivals of asylum seekers.

3.2. Reception Conditions for Asylum Seekers

According to the UNHCR, the expression 'reception standards' "refers to a set of measures related to the treatment of asylum seekers throughout the asylum procedure."[223] This implies that from the moment they apply for asylum until a decision is made on their claim, asylum seekers should be guaranteed, by the state responsible for their application, appropriate reception conditions comprising "access to legal counselling, freedom of movement, accommodation and adequate means of subsistence to access education, medical care and employment."[224]

The Directive 2013/33/EC of 26 June 2003 laying down minimum standards for the reception (recast)[225] replaces Directive 2003/9/EC of 27 January 2003, with the aim of standardising reception conditions in the EU[226] and adopting standards for the reception of asylum seekers. These standards are meant to be sufficient "to ensure a dignified standard of living and

comparable living conditions in all Member States."[227] The Preamble of the Reception Directive acknowledges the fundamental principles enshrined in the Charter of Fundamental Rights of the European Union, in particular the full respect for human dignity and the promotion of the right to asylum (Article 18 of the Charter).[228] This also implies that despite the fact that under exceptional circumstances reception conditions may be reduced or withdrawn, "there can be no moment when the asylum seeker can be left destitute anywhere in the EU."[229]

Article 2 of the Reception Directive defines 'reception conditions' as "the full set of measures that member states grant to applicants," while a definition of 'material reception conditions' includes "housing, food and clothing provided in kind, or as financial allowances or in vouchers, or a combination of the three, and a daily expenses allowance."[230] Despite the provisions, Member States have a certain margin of discretion regarding the determination of material reception conditions, [231] however, these ought to be "compatible with the Reception Directive."[232] It is worth noting that across the European asylum system there is often no formal and legal distinction between different types of reception. As observed by the European Council on Refugees and Exiles (ECRE), distinctions "between first-line reception, second-line reception, emergency accommodation or even detention, are often absent from both policy and practice making the line between open accommodation and confinement often difficult to draw."[233]

Among other aspects, the Reception Directive takes into consideration the issues of employment for asylum seekers and freedom of movement. In this regard, the provisions in Article 7(1) establish that "applicants may move freely within the territory of the host Member State or within an area assigned to them by that Member State,"[234] and that Member States "shall provide for the possibility of granting applicants temporary permission to leave the place of residence and/or the assigned area."[235] Regarding employment provisions, Member States have to guarantee asylum seekers effective access to the labour market and self-sufficiency[236] by providing clear rules on the applicants' access to the labour market but can decide on specific conditions and can prioritise nationals and EU citizens. Employment is deemed fundamental in maintaining the dignity of asylum seekers, fostering the integration process and enabling self-sufficiency.[237] Article 15(1) specifies that

> *Member States shall ensure that applicants have access to the labour market no later than nine months from the date when the application for international protection was lodged, if a first instance decision by the competent authority has not been taken and the delay cannot be attributed to the applicant.*[238]

Furthermore, Article 15(3) establishes that "access to the labour market shall not be withdrawn during appeals procedures."[239]

A comparison of different types of reception conditions in ten selected countries is presented in Table 1 below. It shows that issues such as access to the labour market, freedom of movement and types of reception facilities may vary from country to country.

Table 1: Reception Conditions in 10 EU Countries

Country	*Time Before Right to Work is Granted*	*Description*	*Restrictions*	*Type of Reception Centre*	*Freedom of Movement*
Austria	90 days	The Aliens Employment Act (AuslBG) states that an employer can obtain an employment permit for an asylum seeker 3 months after the asylum application is admitted to the regular procedure, provided that no final decision in the asylum procedure has been taken prior to that date	Access to the labour market is restricted by a labour market test (Ersatzkraftverfahren), which requires proof that the respective vacancy cannot be filled by an Austrian citizen, a citizen of the EU or a legally residing third-country national with access to the labour market	*EAST* (*Erstaufnahmestelle*) Distribution centres	May be restricted depending on the type of asylum procedure
France	270 days	Need to provide proof of employment	Sector-based restrictions	CADA (*Centre d'accueil de demandeurs d'asile*) CAO (*Centres d'accueil et d'orientation*) Emergency accommodation	
Germany	90 days, however, asylum seekers hosted in newly established 'Anker' centres are not allowed to work	Need to provide proof of employment and job centres have to conduct a "priority interview"	Asylum seekers are not allowed to work as self-employed	Initial reception centres Collective accommodation centre Decentralised accommodation *Anker* centres	Geographical restrictions are applied at the beginning of the asylum procedure (generally 3 months) Asylum seekers in "Anker" centres have to remain in reception facilities until their case is decided
Greece	As soon as application has been lodged and asylum seeker's card has been received		No formal restrictions	EKKA *(National Centres of Social Solidarity)* Temporary accommodation centres UNHCR accommodation scheme Hotspots (RIC)	No restrictions, except for hotspots (Eastern Aegean Islands)
Hungary	In the past 270 days but currently there is no right to work	As a result of the March 2017 amendments, asylum seekers no longer have access to the labour market		Private Accommodation Open Reception Centres Transit zones	Asylum seekers held in 'open centres' detained can move freely within the country, with some time restrictions. Those who are in 'transit zones' are *de facto* detained and dot not have freedom of movement

Ireland	240 days	Provided asylum seekers have been waiting at least 8 months for their first instance recommendation. The permission allows access to employment and is valid for six months. It may be renewed if applicants have not received a final decision on their protection application within this timeframe.	Sector-based restrictions	Direct provision centres EROC (*Emergency Reception and Orientation Centre*)	No restrictions
Italy	60 days	According to LD 142/2015, an asylum applicant can start to work within 60 days from the moment he or she lodged the asylum application. Even if they start working, however, their stay permit cannot be converted in a work stay permit.	No limitations	Governmental centres SPRAR (*Sistema di Protezione per Richiedenti asilo e Rifugiati*) CAS (*Centri di accoglienza straordinaria*) Hotspots / CPSA (*Centri di Primo Soccorso e Accoglienza*) Private accommodation with families and churches	The competent Prefect may limit the freedom of movement of asylum seekers, delimiting a specific place of residence or a geographic area where they may circulate freely Asylum seekers need to return to their accomodation within a brief period of time or need an authorization to leave for a few days.
Sweden	Not specified	Asylum seekers can work provided that they possess a certificate stating that they are exempted from the requirement to have a work permit and they can provide identity documents or some other way to prove their identity	Asylum seekers are not allowed to work in areas that require certified skills. In practice, they are limited to the unskilled sector.	Apartment Housing area Reception centre	No restrictions to freedom of movement. A place of residence may be assigned by the Migration Agency
The Netherlands	180 days	The Aliens Labour Act and other regulations lay down the rules regarding access to the labour market for asylum seekers	Despite having the right to work, asylum seekers can only work limited time, namely a maximum of 24 weeks each 12 months	COL *(Centraal Opvanglocatie)* POL *(Process Opvanglocatie)* AZC *(Asielzoekerscentrum)* EBTL *(Extra begeleiding en toezichtlocaties)*	May be restricted depending on the type of asylum procedure
United Kingdom	364 days	Asylum seekers may apply to the Home Office to be given permission to enter employment when their claim has been outstanding for a year	Sector-based restrictions (shortage occupation list)	Initial accommodation centres Dispersed accommodation	No restrictions to freedom of movements. asylum seekers are requested to stay at the allocated address

In particular, the right to work for asylum seekers is a highly contentious issue among Member States, some of which, in the past, have put a ban on work for asylum seekers based on the assumption that granting them the right to work acts as a 'pull factor.'[240] A large body of research conducted in the United Kingdom has shown, however, that there is no long term correlation between labour market access and destination choice, as asylum seekers do not prefer to reach countries where employment policies are more favourable.[241]

An example of how contentious the issue of the right to work may be is Ireland, which had very strict provisions regulating the daily life of asylum seekers until the Reception Directive came into effect in May 2018. In 2000, in fact, Ireland adopted the Dispersal and Direct Provision Scheme (DP), according to which asylum seekers dispersed in reception centres across the territory were denied the right to work and were given a weekly allowance of €19.10 per week. Conceivably, the small weekly allowance and the denial of a formal right to work pushed asylum seekers to look for jobs in the informal economy. In 2018, a Mauritian asylum seeker was arrested for performing illegal work for a catering company.[242] The application of DP on asylum seekers also resulted in feelings of loneliness, detachment and isolation from Irish society. In 2017, a Burmese asylum seeker Mr V., appealed to the Irish High Court after being denied permission to work as a chef for the reception centre that was hosting him. Mr V. "expressed his distress and demoralization about being unable to work after being confined to a Direct Provision centre for eight years."[243] On 30 May 2017, after several years of court battle, the Irish Supreme Court in the case *N.V.H vs Minister for Justice & Equality and others* declared the denial of the right to work unconstitutional[244] and the Irish government initiated the process to adhere to the Reception Directive.

Denying asylum seekers the right to work has proved to have many negative consequences. Firstly, it may result in asylum seekers turning to unauthorised employment with lower working conditions; secondly, there is indication that forbiddance of employment can affect the psychological well-being of asylum seekers because of inaction, poverty and social exclusion; and lastly, it impedes integration processes.[245] Most Member States are in compliance with the provisions on employment, allowing asylum seekers to work within a certain number of days after filing an application; although, in many cases, access to the labour market is restricted in practice due to numerous barriers.[246]

Article 7 of the Reception Directive regulates residence and freedom of movement and establishes that, "Member States may decide on the residence of the applicant for reasons of public interest, public order or, when necessary, for the swift processing and effective monitoring of his or her application for international protection." This provision allows states to detain asylum seekers whose application is processed as manifestly unfounded under an accelerated procedure.[247] Some Member States grant asylum seekers free movement within the entirety of their territory, while others have more rigorous reporting obligations and may restrict free movement to a specific geographical area.

A legislative proposal[248] introduced by the European Commission in July 2016 to reform the Reception Directive 2013/33, includes provisions to further restrict freedom of movement for asylum seekers. The proposal states that better reception conditions in certain Member States are the cause for secondary movements and "asylum shopping," thus asylum seekers abscond in violation of the Dublin Regulation.[249] In order to prevent secondary movements, the proposal recommends stricter rules on the freedom of movement, such as allocating a precise place of residence to the applicants, enforcing the obligation to report when leaving and returning to the reception facilities and supplying material reception conditions only in kind and not in cash. A provisional agreement on the recast regulation was reached on June 14th, 2018. The recast regulation will be put to a vote in plenary once progress will also be made on changes to the Dublin Regulation.[250]The so-called Dublin III Regulation provides a mechanism to determine which country is responsible for examining an application for asylum. So far, disagreements between countries and the lack of political consensus have made it impossible to amend the existing Dublin Regulation.

The line between restrictions on freedom of movement and deprivation of liberty is extremely blurred and, in some cases, may breach the requirement of lawfulness.[251] The Reception Directive defines "any confinement of a person to a specific place where he or she is deprived of his or her liberty" as 'detention'.[252] However, as emphasised by Peers *et al*, there is no "conceptual distinction between detention, restriction of freedom of movement and reception in practice"[253] and, therefore, "administrative detention of asylum seekers in Europe has become fragmented and widespread as there is no common definition of grounds, conditions, length and legal guarantees for the detention of asylum seekers."[254]

The Reception Directive recalls the principle that "a person should not be held in detention for the sole reason that he or she is seeking international protection"[255] and requires that confinement is "for as short a period as possible"[256] and only for the grounds set out in Article 8(3).[257] Detention and confinement of asylum-seekers should be a measure of last resort and should always be based on a decision by a judicial or administrative authority and subject to the principles of proportionality and necessity.[258] It is worth noting that the interrelation of different Directives,[259] as well as the Dublin regime which regulate the restriction of liberty for asylum seekers "may multiply the grounds for detention and its possible justifications, sidelining the maximum periods foreseen for pre-removal confinement, and expanding State discretion to intolerable margins."[260] Recently, the hotspots approach "has introduced greater ambiguity in the reception/detention divide."[261] In hotspots centres, in fact, asylum seekers are often held for a prolonged period of time and their freedom of movement is restricted up to the limit to be considered a *de facto* detention.

3.3. From Territorial Reception to Containment at the Border: The Hotspots Approach

The establishment of hotspots centres serves two purposes: first and foremost, to contain asylum seekers at the border of the EU, facilitating the return of failed asylum seekers and, secondly, to deter migrants from taking a risky journey to get to Europe. Currently there are five

hotspots in Greece with a total capacity of 6,338 places, and another five in Italy with a total capacity of 1,850 places.[262] The hotspots approach represents a shift, not free from criticism, from territorial reception of asylum seekers to containment at the maritime borders of the EU. Understanding rationale, implications and consequences of deterrence policies in Europe might help in drawing policy conclusions on the management of asylum seekers in South Africa, a country whose plan is to build asylum seekers APCs close to the borderline and to limit asylum seekers' freedom of movement.

Since their establishment in 2015, hotspots centres represent the cornerstone of the European approach to address the challenges of the refugee and migration crisis.[263] According to the European Border and Coast Guard Agency, in 2015, a total of 1,049,400 refugees and migrants reached the shores of Europe through the Eastern and the Central Mediterranean Route, while in 2016 the total number dropped to 374,318.[264] The hotspots approach is an integrated reception system placed at the external borders of Europe for the identification of migrants, initial screening, debriefing, support in processing asylum applications and coordination of return activities, managed by hosting European Member States and EU agencies including, FRONTEX, the European Asylum Support Office (EASO) and Europol. Hotspots in Italy and Greece also contribute to the implementation of the relocation scheme, which was set by Member States to transfer a total of 160,000 asylum seekers, over a two-year period, from Greece and Italy to other European states.[265] As of 13 October 2017, however, just over 30,000 people were actually relocated.[266]

The establishment of the hotspots is closely linked to the EU-Turkey refugee agreement, which was signed in March 2016. Under this agreement, Turkey would accept some of the migrants who cross the Aegean Sea to reach the Greek islands and send to European countries an equal number of refugees. The EU-Turkey deal is based on a 'safe third country' assessment, which implies that in Turkey there is no risk of serious harm or persecution, as defined in the Geneva Convention, and the principle of *non-refoulement* is respected.[267] However, the concept of 'safe countries of origin' is controversial and highly debated as, in some instances, it justifies the inadmissibility of an application for asylum.[268] The Danish Refugee Council has described the introduction of a mandatory 'safe country' concept as a further shift towards a policy of externalisation of the asylum system in Europe.[269] Based on this consideration, duties and responsibilities are transferred to other, non-EU countries where asylum seekers have not applied for protection.

NGOs in Europe have repeatedly expressed their concerns about the legitimacy of the hotspots, arguing that their activities are not regulated by an overarching legal framework[270] and, in the case of Italy, do not have legal basis within the domestic legislative system.[271] Furthermore, the hotspots approach has raised humanitarian concerns due to poor and inadequate reception conditions, the under-identification of vulnerable individuals, including children in need of protection, the lack of access to the asylum procedure and arbitrary detention. A report from

the European Parliamentary Research Service highlighted overcrowding, as well as poor living conditions, in the majority of the hotspots.

Filtering mechanisms to screen people at arrival into different categories were also highly criticised. In Italy, an initial screening process is conducted by the Italian police after disembarkation, and if migrants fail to express their willingness to apply for asylum, they are labelled as 'irregular' and face dire consequences, including deportation or detention.[272] According to the Italian NGO Association for Juridical Studies on Immigration, migrants are classified mainly on the basis of their nationality and are "detained without any court order, forced to be fingerprinted, and classified as asylum seekers or economic migrants depending on a summary assessment, mainly carried out either by using questionnaires filled in by migrants at disembarkation, or by orally asking questions relating to the reason why they have come to Italy."[273]

In Italian hotspots, between 2015 and 2016, newly arrived migrants were unlawfully detained for identification purposes and to obtain fingerprints.[274] Research released in 2017 revealed that "detention, disguised as restriction of freedom of movement of persons, is widely applied as standard practice in the hotspots, making it difficult to distinguish between 'reception' and 'detention.'"[275] In the Greek case, new arrivals have their freedom of movement restricted for an initial period of 25 days and cannot leave the hotspots. Restrictions of asylum seekers' freedom of movement to specific geographical areas (in this specific case, islands in the Aegean Sea) may amount to a situation of *de facto* detention in violation of the applicants' right to liberty and protection from arbitrary detention. Article 31 of the 1951 Convention relating to the Status of Refugees and Article 8 of the Reception Directive reaffirms that, "as a general principle, asylum seekers should not be detained;" however, international and domestic legislation have established exceptional cases in which detention may be used and freedom of movement for asylum seekers may be restricted.[276] Furthermore, Member States exercise a large amount of discretion and can "confine an applicant to a particular place in accordance with their national law, for example for a legal reason or reasons of public order."[277]

The establishment of the hotpots raises a number of legitimate questions regarding the lawfulness of confinement and restrictive procedures targeting newly arrived asylum seekers in Greece and Italy. To be lawful, such restrictions should respect three requirements: they must be regulated under domestic law, serve a legitimate purpose (i.e., national security, public order and prevention of crime) and be necessary for achieving this legitimate objective.[278] Furthermore, they should respect the widely acknowledged principles in international law of necessity and proportionality. In the case of the hotspots centres, evidence reveals that practices of confinement that deprive migrants and asylum seekers of their liberty and restrict their freedom of movement may lead to a situation of the *de facto* detention.[279]

Despite the criticism, the hotspots approach remains a cornerstone of the European policy to deal with the influx of migrants and asylum seekers. A recent proposal of the European Council provides for the establishment of so-called 'controlled centres' to differentiate "rapidly and

securely between irregular migrants, who have no right to stay in the EU, and persons who may be in need of international protection."[280] The difference between the terms 'hotspots' and 'controlled centres' is a matter of semantics but the underlying principle is the same, that is, to establish reception facilities where the process of returning irregular migrants to their countries of origin can be eased and the individual assessment of each migrant's case fast-tracked. The risk, however, is for reception centres to become largely pre-removal detention centres. Furthermore, rapid assessments might lead to inaccurate screenings of newly arrived people and impede access to the asylum system likely resulting in violations of the principle of *non-refoulement*.

It appears evident how the hotspots approach represents a shift from territorial reception to containment of migrants at the border. In Greece and, to a lesser extent in Italy (i.e., the island of Lampedusa), first reception facilities have moved from mainland to islands where newly arrived migrants are confined after disembarkation. It then appears that inadequate reception conditions, restriction of asylum seekers' freedom of movement and lack of procedural safeguards in the accelerated procedure, all form part of a policy to control and deter migration. Similarly, border management through the containment paradigm is also the purpose of *transfer centres*, established in Hungary along the Serbian border. Here, asylum seekers are kept in remote areas outside Hungarian soil, in a sort of 'no man's land' that is outside of domestic and international rule of law.[281] Recently, the UNHCR Filippo Grandi compared border 'transit zones' to detention centres where migrants, including minors, are in *de facto* indefinite detention.[282]

3.4. Europe and South Africa: What Similarities?

Bilateral relationships between the EU and South Africa have flourished over the years leading to policy dialogues and sectoral cooperation in a number of different fields. The South Africa-European Union Strategic Partnership, established in 2007, is the only country-level strategic partnership in Africa and affirms the need of both parties to deepen and broaden co-operation in different areas, including migration.[283] Given the general convergence trend in the migration policy field, it is not surprising for South Africa to frame migration as a security issue and to resort to a politics of containment of asylum seekers similar to the one enforced by European states. Whether this is part of a deliberate strategy to lower standards of reception and increase the use of detention as a migration management tool, or whether asylum policies are facing unintended consequences, many reception centres in Europe are turning into overcrowded *de facto* detention facilities. In these centres, asylum seekers are deprived of their liberty and procedural safeguards in respect of asylum claims are lacking.

In South Africa, official policy documents such as the 2016 Green Paper and the 2017 White Paper on International Migration provide for the processing of asylum claims to take place whist applicants are accommodated in APCs. These centres, to be built closer to the borderline, share similar features to those of the European *hotspots* and *transfer centres* and are motivated by similar security concerns. First and foremost is the urgent need to rapidly separate genuine

asylum seekers and economic migrants. This was explained by the Deputy Director General for Immigration Services, Mr Jackie Mckay, who clarified that,

> *[…] in processing centres, asylum-seekers would not be kept for too long. Their applications would be considered within a reasonable time […] because of disaggregation, asylum applications would be dealt with quicker. Only those who qualify to be refugees would be allowed to move freely in the country.*[284]

This seems to imply the possibility to detain, under certain conditions, asylum seekers for the sole reason of seeking international protection or for entering the country illegally, underlying a widespread narrative "that represents asylum seekers and refugees in South Africa negatively, as 'chancers' and 'bogus' asylum claimants."[285] Section 21(4) of the Refugee Act serves as a protection against the use of the detention of an asylum seeker for unlawful entry and the Supreme Court of Appeal in *Arse* established that the provisions of s 23(2) of the Immigration Act "no longer permit the detention of an asylum seeker once an application has been made."[286] A similar conclusion was reached by the European Court of Justice in *Kadzoev* and *Arslan*, making clear that asylum seekers "should not be regarded as staying illegally on the territory of [the] Member State [concerned] until a negative decision on the application [for international protection], or a decision ending [their] right to stay… has entered into force."[287] Notwithstanding, derogations to the general principle that asylum-seekers should not be detained leave a certain margin of discretion to restrict asylum seekers' liberty. In particular, certain grounds related to "national security," "national interest" or "public order" are prescribed by the South African refugee law[288] as justifying exceptions to the rule. The risk is that, similar to the legality concerns around cases of European transit zones near land borders and hotspots, APCs may restrict freedom of movement, exceeding the requirement of necessity. So far, policy documents do not provide detailed information on the APCs (see Figure X) and, therefore, it is difficult to predict how they will operate in future. However, the Green Paper formulates that "these centres will accommodate asylum seekers during their status determination process and […] secure administrative detention centres could be established within the APCs to accommodate certain categories of asylum seekers while their claims are being adjudicated."[289]

APCs and detention provisions have raised numerous concerns amongst civil society organisations. LHR has compared the establishment of APCs to the "facilities in remote areas on the US-Mexico border, where detained asylum seekers face obstacles to medical and psychological care, education and legal representation."[290] They further pointed out that "the remoteness of the proposed facilities would make it difficult for asylum seekers to have adequate legal assistance and that asylum seekers would face a greater chance of immediate deportation if they were rejected in their first interview."[291] It is also worth noting that the remoteness of APCs is likely to hinder the integration process for asylum seekers, while a lengthy stay in reception facilities is also associated with health risks and mental disorders.[292]

The idea of establishing APCs near the borderline is the expression of a progressive shift from territorial and urban reception of asylum seekers to containment at the border. It is a deliberate

deterrence policy aiming to contain newly arrived migrants and limit their freedom of movements. In this context, APCs can be seen as part of "an increasing armoury of technologies of control and exclusion mobilized against immigrants, refugees and asylum seekers such as detention facilities and prevention of access to work."[293]

3.5. Conclusion

South Africa is undergoing a process of legislative changes aimed at achieving policy objectives over its next medium-term strategic framework. The Refugees Amendment Act of 2017 and its draft Regulations comprise the first major change since the White Paper on International Migration was published in 2017. Amongst other things, Section 18 of the Act seeks to limit the right of asylum seekers to work. The government's justification for the ban of the right to work has been that an automatic right creates 'incentives' that increase the number of asylum seekers looking for international protection in South Africa. However, research conducted in the United Kingdom has shown that there is no long-term correlation between labour market access and destination choice, as asylum seekers do not prefer to reach countries where employment policies are more favourable.

While this change is predicated on the need to reduce 'pull factors' and social tensions, the Act's curtailment of asylum seekers' right to work could have a number of socio-economic impacts that go far beyond the lives and conditions of asylum seekers. Preventing asylum seekers from engaging in long-term self-employment may result in increased competition with South Africans for low-level wage-earning jobs. Those who cannot find jobs, as pointed out in the *Watchenuka* judgment, will be forced to choose between working illegally, resorting to crime or being left destitute. In this context, government's policy and legislation is unlikely to achieve the desired outcome of deterring asylum seekers from entering the country and accessing the informal market and will rather 'manufacture' more illegality. Furthermore, this policy, in light of the implementation issues evident in refugee protection, will most likely be found to be unconstitutional. This is because it remains an open question as to if the sustainability determination process can be implemented in a lawful manner, and the courts have held that restrictions that undermine people's ability to earn a living, leading to them being desperate and destitute, deny their right to dignity.

Beside the desire to cater to perceived political needs, the economic and social benefits of inhibiting asylum seekers from working will be limited. Although some South Africans in certain business sectors will be happy to not have to compete with asylum seekers, South Africans who are not in competition with asylum seekers will lose out on the benefits of their entrepreneurialism. At the same time, foreign nationals may be increasingly be associated with crime and other social ills. This might lead to a greater criminalisation of migrants and a tougher enforcement of the legislation, including increased police raids and special operations targeting irregular migrants.

In government's view, obliging asylum seekers to report to APCs will present some economic benefits, as South Africans will not need to compete with asylum seekers in labour markets for low-end jobs or in small business sectors. This is part of a strategy that denies the relevance of refugee informal economies and reinforces policies that marginalise and exclude businesses owned by foreigners. However, these policies also have huge financial implications, as setting up and maintaining APCs, for instance, will draw on state resources and tax payers' money.

The detention of asylum seekers could also threaten their wellbeing and weaken refugee enterprises in the country. Further, it will have no deterrent effect on irregular migration, as migrants will continue to search for economic opportunities. APCs also raise constitutional flags, as the state might not be able to show 'just cause' for lengthy detentions of asylum seekers who have not been accused or convicted of any crime. The risk is that, similar to European transit zones near land borders and hotspots centres, which have raised concerns about their legality, APCs may restrict freedom of movement, exceeding the requirement of the principles of proportionality and necessity that restrain and limit the use of detention.

There is also a high probability that the DHA will not adhere to constitutional prescripts governing the treatment of those held in confinement, given its past and present patterns of conduct. Lastly, the DHA's stated goal of using detentions to reduce "the incentive for abuse by economic migrants," might infringe asylum seekers' right to dignity. This proposal, and the recent amendments to the Refugees Act, do not address the challenges that have arisen regarding implementation and may, in fact, exacerbate these issues by introducing more onerous policies that have possibly severe consequences if not implemented with due diligence. While the White Paper offers proposals that may lead to increased legal avenues for regional migration, policy towards asylum seekers and refugees remains intent on pursuing a more restrictive regime. This not only has negative consequences for the rights of asylum seekers and refugees but could potentially also have wider effects on social cohesion and the rule of law. This calls for a re-consideration of the appropriate means to better govern immigration policies in South Africa.

4. Recommendations

To the South African Government

1. Desist from preventing asylum seekers from engaging in self-employment to avoid contributing to destitution amongst asylum seekers, infringing their rights and undermining social cohesion and local economies. It will also incur costs through protracted litigation that the state is likely to lose along the lines of *Minister of Home Affairs and Others v Watchenuka and Another* and *Somali Association of South Africa and Others v Limpopo Department of Economic Development Environment and Tourism and Others*.
2. Reduce barriers to employment for skilled asylum seekers (for example, by permitting them to register with professional councils) to lessen competition over low-skilled jobs.
3. Develop and implement provisions for low-skilled workers in regional labour mobility protocols and encourage alternative legal pathways for safe and voluntary migration and resettlement, as outlined in the 2017 White Paper on International Migration.
4. Implement the SADC Protocol on the Facilitation of Movement of Persons, the SADC Labour Action Plan, the Protocol on Employment and Labour and the SADC Portability of Accrued Social Security Benefits within the Regional Labour Migration Policy Framework. These agreements could be a steppingstone to the establishment of a harmonised regional labour migration regime and can relieve the pressure on the asylum system and reduce abuses.
5. Reconsider the policy to establish detention procedures and APCs along the country's borders, as the confinement of asylum seekers is likely to result in human rights abuses, increased undocumented migration and considerable financial, legal and social costs to the state.
6. Instead of establishing detention procedures at APCs, the state should consider alternative reception procedures in line with the UNHCR guidelines that respect the rights of asylum seekers. This could include a brief screening process (such as an initial verification of identity) to take into consideration state concerns regarding security. Such reception procedures must adhere to the following principles:
    a. Detention, confinement and restriction of movement are exceptional measures and can only be justified for a legitimate purpose.

b. Detention can only be utilised when it is determined to be necessary, reasonable in all the circumstances and proportionate to a legitimate purpose.

c. Alternatives to detention must be considered prior to any detention process occurring.

d. No restrictions on personal freedom must be applied in reception procedures. This is in line with Objective 13 of The Global Compact for Safe, Orderly, and Regular Migration, which calls for the monitoring of the conditions of detention to ensure its use as a measure of last resort and encourages the broad use of alternatives to detention.

e. Reception procedures for asylum seekers cannot result in detention solely for identification purposes.

f. Reception procedures must not be discriminatory and must take into consideration the rights of vulnerable individuals and groups.

g. Reception procedures must include procedural safeguards such as the right to be informed in languages asylum seekers understand of asylum procedures and processes, the right to legal counsel and assistance, the right to have decisions issued in writing and to provide for independent review procedures for decisions that negatively affect the rights of an asylum seeker.

Improved reception procedures for asylum seekers should include:

h. Improved procedures for the issuing of section 23 transit permits, including initial identity and security checks. Such procedures should not be conducted for refugee status determination processes or to fast-track asylum applications and must be done in a manner that respects the principle of family unity. After being issued with a transit permit, asylum seekers will need to undergo refugee status determination processes at an urban RRO.

i. Special procedures for vulnerable groups developed in close consultation with appropriate government departments and civil society organisations.

7. Local government should include social integration as a key policy concern and make conscious efforts to ensure that grassroots programmes are inclusive of all demographic groups and encourage interactions and trust between citizens and foreign nationals.

To the DHA

8. Improve training mechanisms and resources for personnel at all stages of the migration process. Ensure that officials are provided with adequate training in the identification of refugees and migrants in need of special protection so that the basic rights of vulnerable people are guaranteed upon arrival. This will also help to prevent backlogs in appeals and reviews and, in turn, extended durations of asylum applications.
9. Consider methods to increase the accuracy and efficiency of refugee status determinations to ensure deserving refugees are recognised without undue delay. Such measures may include increasing the professional requirements of RSDO positions, increased engagement with UNHCR to improve processes and the publication of clear guidelines for refugee status determination processes, protections for family unity and country of origin information.
10. Introduce measures to address the backlogs in the appeal process to ensure adjudication times remain within reasonable time frames. Such measures should approach the backlog in a holistic manner and include the use of group determinations for applicants from refugee producing countries and regions, the introduction of regularisation projects in line with the White Paper's proposals and an increased capacity of the RAB.

To Parliament and the Portfolio Committee on Home Affairs

11. Regulations should ensure that self-employment is permitted whilst asylum seekers await the finalisation of their applications and should set out what proof of employment self-employed asylum seekers should provide in order to prevent the automatic revocation of their right to work endorsements after six months.
12. In light of the significant changes in the Refugees Amendment Act (No. 11, 2017), require that the Draft Regulations and Rules for the SCRA are scrutinised by members of Parliament and the public before publication in the Government Gazette.
13. Require that the DHA present to the Committee a full strategic and operational plan regarding:
    j. The implementation of the Refugees Amendment Act and its accompanying Regulations; and
    k. The proposed move of reception and processing facilities to the borders.

14. Demand greater accountability from the DHA regarding adherence to legislation and respect of Constitutional rights for asylum seekers and refugees.

To the South African Human Rights Commission

15. Engage with the DHA regarding the implementation of the Refugees Amendment Act to ensure that when it enters into force it will be implemented in a manner consistent with constitutional and human rights standards.
16. Monitor RROs to ensure asylum seekers are able to access services in a manner consistent with constitutional and human rights standards.

To South African business sectors

17. Raise public awareness of the possible impacts of the Act and highlight them with the DHA and the Department of Trade and Industry to promote more informed policies.
18. Explore ways of increasing wage-earning employment opportunities for asylum seekers – for example, by developing access to employment programmes for asylum seekers – to ameliorate the possible negative impacts of the Act.
19. Work towards reducing barriers to work for asylum seekers by ensuring that Human Resources staff recognise 13-digit ID numbers, accept asylum seeker permits as a form of personal identification and are informed about and sensitive to the extraneous pressures placed on asylum seeker employees, such as the need to frequently renew permits.
20. The banking sector should improve the ability of asylum seekers to access bank accounts.
21. Professional councils should ensure that their policies enable the registration of asylum seekers who hold relevant qualifications.

To Civil Society

22. President Cyril Ramaphosa has acknowledged the critical role played by NGOs and has stressed the importance of strengthening relationships with civil society organisations. The President has also called for the establishment of a democratic society built on the principle of integrity and the commitment to ethical behavior. Within this context, civil society organisations, as 'critical friends', should develop strong working relationships with government and institutional actors to support their efforts to create a society striving towards social justice and equity.

To Refugee and Asylum Seeker Community Organisations

23. Ensure that community members are informed about impending amendments to asylum seeker rights.
24. Highlight community concerns about the Act's impact and barriers to work to civil society members, government stakeholders, public interest attorneys and relevant business sectors, and engage in raising public awareness.
25. Request access to more detailed information about the DHA's planned policies.
26. Assist asylum seekers to overcome barriers to wage-earning employment through offering advice and referrals.
27. Collect and distribute data on the impacts of the Act's provisions once it comes into effect.

To the Academic Community

28. Raise public awareness of the Act and its possible implications through policy briefs, reports, academic presentations, meetings and media opinion pieces.
29. Conduct further studies on the Act's amendments and comparative trends globally.
30. Conduct field research on the impact of the Act's provisions once it comes into effect.
31. Find effective ways of sharing evidence-based research with relevant stakeholders, including government departments, refugee and asylum seeker community organisations, civil society and the business sector.
32. Explore social, political and economic challenges confronting both South Africans and asylum seekers to identify areas where solidarity and integration can occur.

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About the Scalabrini Institute for Human Mobility in Africa

SIHMA's work is founded on the Scalabrini ethos and inspired by universal values such as respect for human dignity and diversity. Our vision is an Africa where the human rights of people on the move are ensured and their dignity is promoted; our mission is to conduct and disseminate research that contributes to the understanding of human mobility and informs policies that ensure the rights and dignity of migrants, asylum seekers and refugees in Africa.

About the HSF

The Hanns Seidel Foundation is committed to support research in the migration and refugee context with the aim to stimulate broad dialogue which includes a variety of opinions and dissenting voices at times, and to contribute to a rigorous and informed discussion.

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