

ASYLUM SEEKERS RIGHT TO NON-REFOULEMENT WITHOUT FEAR OF DETENTION AND DEPORTATION

When South Africa acceded to the international principles and standards set out in the various Conventions and Protocols on Status of Refugees after 1994, it imposed on itself the widely held right of non-refoulement.

In refugee parlance this right is accepted internationally and implies that no person may be returned or refouled to his or her country from which he departed in order to seek refuge in another country until such asylum application has been adjudicated upon.

This right is entrenched in our refugee law in terms of section 21(4) of our Refugees Act 130 of 1998 (the "Act"). This section provides that no proceedings may be instituted or continued against any person in respect of his or her unlawful entry or presence within the Republic if such person has applied for asylum and a final determination, which will include the right to appeal or review, has been invoked.

Regulation 2(2) of the Refugee Regulations endorses the principle of non-refoulement by stating that any person who entered the Republic and is encountered in violation of the Aliens Control Act (now the Immigration Act) who has not submitted an application in terms of section 21 of the Act, but indicates an intention to apply for asylum, shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application.

Regulation 2(2) is synonymous with an asylum transit permit under section 23 of the Immigration Act. Whilst in principle the timelines seem acceptable to most, the reality is that the Department dragged its heels in setting up enough refugee offices to cater for the reception of high volumes of asylum seekers.

What transpired was an inevitable backlog, which left many asylum seekers unable to successfully lodge an application within the 14-day period and vulnerable to detention and deportation by over-zealous immigration officers.

The Department of Home Affairs resorted to ill-considered and reactive tactics of 'policing' asylum seekers who exceeded their allotted 14 days as opposed to redirecting their resources around setting up more refugee centres and increasing the number of trained officers to timeously adjudicate and expedite such applications.

Regardless of the correct idealistic approach, the fact is that large volumes of asylum seekers who are undocumented for various reasons or have failed to apply for asylum within the 14 days, are detained and deported over the borders of South Africa as 'illegal foreigners'. They are 'herded' into repatriation centres in inhumane circumstances, like Lindela, and 'disposed' of across the borders.

What the authorities have failed to realise is that the enforcement elements under the Immigration Act are not applicable to refugee law and the Act and an entirely different approach to detention and deportation is contemplated and expected.

Clearly the international principle of non-refoulement, enshrined in our refugee law, has been abused to the detriment of many legitimate asylum seekers.

Well-intended organisations vigorously challenge the arbitrary practices of the authorities with great zest and admiration, but until such time as enforcement and ‘policing’ are mere secondary and not primary steps to control and regulate asylum seekers, we will continue to shore up the repatriation centres and keep a few ‘well-connected’ firmly in business.

We encourage those asylum seekers to enforce their rights to enter and remain in South Africa and not to be refouled in terms of section 21(4) of the Act until they have enjoyed their rightful opportunity to apply for asylum without fear of reprisal.

Moreover, we would encourage those who are detained to seek legal assistance to ensure that it is reasonable and justifiable, and no longer than 30 days, unless a judge of the High Court has reviewed such detention as required in terms of section 29 of the Act.

Of course, it could be argued on the flip-side that elements of cross-border criminality impinge on balancing individual rights against that of the state – but it does not permit an erosion of what South Africa purported to honour in the first place.