

The importance of administrative justice rights in international refugee law: a case study of South Africa

A study of administrative justice rights in international refugee law, using examples from South Africa to analyse the rights provided for in international and domestic legal mechanisms from a human rights and human dignity perspective.

Course code: **PBL5626W**
Course name: **Masters in Human Rights Law Dissertation**
Supervisor: **Fatima Khan**
Word Count: **24,922**

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Abstract

International human rights law instruments are not prescriptive regarding the procedure for processing refugees by an individual state. However, they do provide an extensive set of rights, and it is these rights that form the focus of this study. One of the main principles of international law is to protect human rights and human dignity. In the South African context, the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’) reinforces section 33 of the Constitution, the objective of which is to provide just administrative action for everyone – whether they are South African nationals or otherwise. The Department of Home Affairs (‘DHA’) is responsible for processing refugee applications under the Refugees Act 130 of 1998, and as a public body performing a public function it is obliged to adhere to the laws prescribed by PAJA. The Refugees Act states in the preamble the intention for the law to give effect to the relevant international legal instruments to which South Africa is party and the principles and standards relating to refugees contained within. These international instruments are the 1951 Convention Relating to the Status of Refugees, the 197 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. The preamble of the Refugees Act also refers to ‘other human rights instruments’ which includes legislation such as the 1966 International Covenant on Civil and Political Rights and the 1966 International Covenant on Economic, Social and Cultural Rights.

It is the recognition of the obligations assumed under the international instruments, combined with domestic legislation in PAJA and the Constitution, that provide a stringent set of rights designed to give refugees appropriate administrative justice by way of having applications processed and decided upon according to the law, including reviews and appeals if necessary. As is apparent from many studies and scholarly articles on this topic, refugees seeking protection in South Africa are not always treated as the law intended. This has a number of different consequences, some of which can pose a danger to life. This emphasises the gravity of making the correct legal decision on a refugee application. This study will focus on the procedural failings of the DHA, and how these failings often amount to insufficient administrative justice and in turn fail to provide refugee applicants with the rights to which they are entitled. The study examines this issue from a human rights and human dignity perspective – both of which are materially affected by the absence of administrative justice rights.

Chapter 1 – The importance of administrative justice rights

1.1 INTRODUCTION

The Refugees Act 130 of 1998 provides for the protection of those fleeing persecution and the implementation of international obligations into South African law.¹ In recent years those applying for refugee status in the Republic of South Africa (hereafter the ‘Republic’ or ‘South Africa’) have faced arduous problems stemming from the Department of Home Affairs (‘DHA’).² These include policy implementation that is restrictive through incorrect application according to the law, and includes institutional xenophobia, failure to provide accessible services, involves corruption and has a lack of awareness of human rights.³

A report by the United Nations High Commissioner for Refugees (‘UNHCR’) in 2016 listed access to an asylum procedure that is ‘fair and efficient’ as an issue that challenges the protection it is intended to offer.⁴ The report cites the limited number of Refugee Reception Offices (‘RROs’) as a barrier to processing application efficiently, and threat of closures of these offices represents a further threat to capacity issues. The UNHCR report also mentions issues surrounding social welfare during pending applications.⁵ This is further criticised by Amnesty International in its comments on the proposed asylum processing and administrative detention centres on the country’s borders where asylum seekers would be housed while their applications are processed. It is argued that this would limit the right to work and freedom of movement during the processing period.⁶

The processing of refugees in South Africa has faced substantial scrutiny. This study will narrow the focus down to the procedural aspects of the refugee system in South Africa,

¹ Refugees Act 130 of 1998, preamble at 1. Hereafter the ‘Refugees Act’.

² Janet McKnight, ‘Through the Fear: A Study of Xenophobia in South Africa’s Refugee System’ (2008) 2(2) *Journal of Identity and Migration Studies* 18-42 at 22.

³ Bronwyn Harris (2001) *A Foreign Experience: Violence, crime and xenophobia during South Africa’s transition* at 38-39. Centre for the Study of Violence and Reconciliation (CSVR), Violence and Transition Series, Volume 5.

⁴ UNHCR (August 2016) *Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights’ Compilation Report Universal Periodic Review: 3rd Cycle, 27th Session - Republic of South Africa* at 5, available at <<http://www.refworld.org/docid/5919a9ab4.html>> [accessed 19 May 2017].

⁵ Ibid.

⁶ Amnesty International (2017) *Amnesty International Report 2016/17: The state of the world’s human rights* at 311, available at <<https://www.amnesty.org/en/countries/africa/south-africa/report-south-africa/>> [accessed 15 May 2017].

exploring the access applicants have to the process, including appeals and reviews from an administrative justice perspective.

1.2 RESEARCH QUESTION

Does the administrative justice system meet international obligations to protect those who lawfully need and are entitled to proper protection under refugee laws and regulations, both domestic and international?

1.3 PROBLEM STATEMENT

The DHA is responsible for the policy implementation regarding refugees. This involves the issuing of permits and documentation in order to protect their rights and legalise their presence in the country.⁷ In 2016, the Parliamentary Monitoring Group declared that the refusal rate for refugee status determination sat at 96 per cent.⁸ Xenophobia is a frequently cited problem in South Africa and has been blamed on influencing government policies on refugee protection through corrupt practices that lead to restricted, or even barred, access to education, public health and other social services to which asylum seekers and refugees are entitled to.⁹ Xenophobia has been highlighted by the South African Human Rights Commission as ‘a human rights concern’ in the country.¹⁰

A poignant problem faced by asylum seekers is the difficulty in moving on from the section 22 ‘temporary asylum permit.’¹¹ This permit is intended to be temporary; however, there are ever increasing circumstances whereby this so-called temporary permit is continuously extended or renewed, preventing applicants from gaining permanent status. Proper process is rarely followed, leading to a lack of administrative justice for applicants.

The policy and administrative system must improve to meet international obligations to protect those who lawfully need and are entitled to proper protection under refugee laws and regulations, both domestic and international.

⁷ Bronwyn Harris op cit note 3 at 38-39.

⁸ Parliamentary Monitoring Group (8 March 2016) ‘Asylum statistics: Department of Home Affairs briefing; Immigration Amendment Bill 2016 deliberations’, available at <<https://pmg.org.za/committee-meeting/22163/>> [accessed 10 May 2017].

⁹ Bronwyn Harris op cit note 3 at 113.

¹⁰ South African Human Rights Commission (7 March 2016) ‘SAHRC raises human rights concerns with UNHRC’, available at <<https://www.sahrc.org.za/index.php/sahrc-media/news-2/item/367-sahrc-raises-human-rights-concerns-with-unhrc>> [accessed 10 May 2017].

¹¹ Refugees Act, section 22.

1.4 SIGNIFICANCE AND PURPOSE OF THE STUDY

The purpose of this dissertation is to highlight the procedural failings in the refugee system in South Africa. The study analyses the ways in which these improper practices are failing to meet the country's obligations under both domestic law and international law, and how the resulting barriers to access prevent refugees from enjoying the protection refugee status is designed to give. This is not a new topic – much has been written on the issue both scholarly and otherwise – yet there continues to be ongoing problems with policy and administration in this sector. The study will approach the subject from an administrative justice viewpoint and examine procedural compliance with administrative justice provisions and its suitability to assist a vulnerable group of people.

1.5 LITERATURE REVIEW

There are a number of scholarly articles on the issue of refugees in South Africa that highlight the processing of refugees and the application of refugee law as a real problem in the country. These articles often reach the same conclusions – that there are frequent and continuous systemic failing by the DHA.

Roni Amit examines the quality of 240 status determination decisions issued in 2011 in *All Roads Lead to Rejection*.¹² The report uses the benchmark of international law and domestic refugee law requirements to analyse the constitutional rights to administrative justice.¹³ A number of problems are identified; errors of law, references to the wrong claimant/country and failure to apply the mind, to name a few.¹⁴ Concerns are raised over asylum seekers rights and for good governance and service delivery,¹⁵ stating that the DHA are prioritising migration control over its protection obligations¹⁶ and the South African government and UNCHR should be alarmed as a result.¹⁷

In *No Refuge*, Amit writes South Africa's asylum system is being used by economic migrants from Africa due to the scarce opportunity for legal economic migration offered by South Africa's immigration framework.¹⁸ This has led to the protective nature of the refugee

¹² Roni Amit (2012) *All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination* at 8.

¹³ *Ibid.* at 7.

¹⁴ *Ibid.* at 8-9.

¹⁵ *Ibid.* at 9.

¹⁶ *Ibid.* at 85.

¹⁷ *Ibid.* at 86.

¹⁸ Roni Amit, 'No refuge: Flawed Status Determination and the Failures of South Africa's Refugee System to Provide Protection' (2011) 23(3) *International Journal of Refugee Law* 458-488 at 458.

system to become one of control¹⁹ and placed stress on the system, forcing proper consideration to be disregarded.²⁰ Some 324 status determination rejections were analysed in *No Refuge*,²¹ with the findings uncovering serious flaws of the same nature mentioned in the study above²² – reasons were simply cut and paste from other decisions.²³ The article blames the influence of larger immigration policy for giving rise to a system that violates human rights, in particular by failing to adhere to the *non-refoulement* principle.²⁴

Amit writes another article named *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination Decisions* which carries out an analysis of the quality of the status determination decisions, focusing on the decision letters from 324 negative decisions²⁵ issued at the refugee reception offices at the then five permanent refugee reception offices.²⁶ Micro and macro level causes are identified as influencing said decisions, and it was found that virtually none of the analysed decisions contained proper evaluations of the claims.²⁷ The refugee status determination officers often misapplied the law²⁸ and identical reasons for decisions were given.²⁹ Amit makes recommendations to recognise the refugee system is not an immigration system; that the protection purpose of refugee should be the priority, with more training for officers, stronger review produces and the need for quality over efficiency in assessing claims.³⁰

Amit also writes about The Zimbabwean Documentation Process (the 'ZDP'), which was carried out between 20 September and 31 December 2010.³¹ This was categorised by the DHA as an extension of the one-year special dispensation which ran from April 2009 to April 2010 and was designed to protect Zimbabweans from deportation by offering a three-month visa system.³² A number of requirements were relaxed without the applicants' knowledge, which presented an administrative justice problem.³³ Amit describes the ZDP as very

¹⁹ Ibid. at 460.

²⁰ Ibid.

²¹ Ibid. at 461.

²² Ibid. at 456.

²³ Ibid. at 475.

²⁴ Ibid. at 458.

²⁵ Roni Amit (2010) *Protection and Pragmatism: Addressing Administrative Failures in South Africa's Refugee Status Determination decisions* at 8.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid. at 39.

²⁹ Ibid. at 44.

³⁰ Ibid. at 9-15.

³¹ Roni Amit (2011) *The Zimbabwean Documentation Process: Lessons Learned* at 4.

³² Ibid.

³³ Ibid. at 20.

ambitious given the high number of Zimbabweans present in South Africa, as it left the DHA offices and officials without sufficient time to follow procedure.³⁴

Erika Feller reinforces the need to distinguish the refugee system from the immigration system in her article *Refugees are not Migrants*. The staunch argument is that the differentiation between refugees and migrants is essential as confusing the two groups is detrimental and even dangerous not only to the protection of refugees but also to the benefits of migration.³⁵ Abuse of the asylum system damages the reputation of migrants in the public eye and pushes for arguments of control. The article highlights the difficulties of distinguishing between when refugee approaches should be used and when migrant approaches should be used.³⁶ Feller describes broad use of the class ‘migrant’,³⁷ resulting in the perceived absorption of asylum policies into the ‘broader migration control framework.’³⁸

Elaborating further on the differences between refugees and migrants, Katy Long’s article *When Refugees Stopped Being Migrants* highlights the difficulty of separating the classification of refugees and migrants despite the regular insistence of the distinction between the two.³⁹ It looks at the historical confusion between classing refugees and migrants, and cites the 1950s as when definitions of the two groups started to become more prominent.⁴⁰ During this time refugees were given ‘an exceptional right’ to claim asylum which greatly helped bridge the protection gap.⁴¹ The article goes on to explain that whilst protection for refugees is necessary, it can create more harm than good in denying ‘economic livelihood’⁴² and the level of separation should actually be reversed as asylum by itself is not sustainable.⁴³ Long argues that protection should be accompanied by ‘sustainable livelihoods’⁴⁴ in order to further justify people’s escape from persecution in areas of conflict and crisis, and thus offer a better all-round solution.

With focus on South Africa and the problems faced by the country’s internal processing procedures, Fatima Khan’s book *Refugee Law in South Africa* has several chapters which are

³⁴ Ibid. at 7.

³⁵ Erika Feller, ‘Refugees are not Migrants’ (2005) 24(1) *Refugee Survey Quarterly* 27-35 at 27.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Katy Long, ‘When refugees stopped bring migrants: Movement, labour and humanitarian protection’ (2013) 1(1) *Migration Studies* 4-26 at 4.

⁴⁰ Ibid. at 4-5.

⁴¹ Ibid. at 4.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Ibid.

of particular significance to the study and cover the difficulty facing applicants in terms of the regulations requiring applications to be submitted at designated RROs.⁴⁵ This restricts access and delays applications, therefore working against the applicant.⁴⁶ In addition, refugee reception officers are regularly found to carrying out their duties incorrectly and in some cases the DHA even deliberately bars access.⁴⁷

Asylum seekers and refugees are regularly subject to unfair procedure and policies that make it difficult for them to find legal protection⁴⁸ and representation.⁴⁹ The Constitution gives asylum seekers and refugees the right to administrative justice that is lawful, reasonable and fair. In addition to the Constitution, the Promotion of Administrative Justice Act 3 of 2000 (PAJA) gives effect to constitutional rights to such justice, and aims to create an environment of increased accountability for decision makers.⁵⁰ This combination of constitutional and statutory rights brings the legislation in line with the 1951 Refugee Convention,⁵¹ effectively leading to an obligation for South Africa to offer sufficient civil and political rights.⁵² The effective use of the mechanisms in place *should* allow the refugee appropriate administrative and legal access the rights they are entitled to.⁵³

These rights provide for important safe-guarding measures, as intended by the South African Constitution and international human rights and refugee laws. However, refugee status determinations (hereafter ‘RSD’ or ‘RSDs’) are often found to contain errors of law that cite irrelevant factors, frequent failure to give adequate reasons or blatant ignorance of individual cases which combines to form a ‘biased incentive system that encourages the issuing of rejections.’⁵⁴ The policy of RSDs as a matter of humanitarian action or influx control and its administrative and constitutional legality is analysed extensively by Khan.⁵⁵

1.6 METHODOLOGY

The methodology in this paper will be desktop-based research and analysis of the law and relevant cases. Quantitative research will not be a part of this study. The research will be

⁴⁵ William Kerfoot and Tal Schreier ‘Application for asylum: Reception’ in Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 137-152 at 137.

⁴⁶ *Ibid.* at 139.

⁴⁷ *Ibid.* at 158.

⁴⁸ *Ibid.* at 208.

⁴⁹ *Ibid.* at 151.

⁵⁰ *Ibid.* at 209.

⁵¹ *Ibid.* at 205.

⁵² *Ibid.* at 204-6.

⁵³ *Ibid.* at 208.

⁵⁴ *Ibid.* at 154.

⁵⁵ *Ibid.*

centred on analysis of the legal instruments in place for South Africa's refugee law, the applicable international laws, and will use scholarly articles, case law and case studies. This will allow for detailed study into the way the law is applied, the process in which refugees must go through and any critical analysis dependent on the findings.

1.7 RESEARCH AIMS

The predominant aims of the research are to investigate the problem the South Africa has in processing refugee applications. The research will aim to highlight both the international obligations on the country regarding accepting refugee applications – such as the right to administrative justice which is invoked by various failings in policy implementation, time limits on temporary permits and ensuing delays, lack of access to appeal bodies and access to the process in general through scarce and exclusive RROs and other errors in law that deny these rights.

Using case law, scholarly articles and other literature by NGOs and other organisations, the aim will be to identify the problem and summarise where the law is misapplied and procedure is not being followed. The research will aim to provide an approach from a human rights and human dignity perspective through the assessment of international law, most notably the 1951 Refugee Convention and the obligations this imposes on states party to it.

1.8 OVERVIEW OF THE LAW

The 1951 Refugee Convention, along with other bodies of international law, is completely silent on procedure for the recognition of refugee status by a state or the UNHCR. However, what international law does provide for are rights⁵⁶ – and the predominant difference between affording and denying these rights, particularly in South Africa, is the right to administrative justice. Despite the silence in statute, the UNHCR has produced a Handbook that provides guidance on procedures and criteria for determining refugee status and what can be done in the absence of international law. This Handbook has been deemed to be soft law through its acceptance in case law, which has demonstrated its strength and usefulness in providing guidance on procedure.⁵⁷

⁵⁶ United Nations Convention Relating to the Status of Refugees, 189 UNTS 150, adopted on 25 July 1951 in Geneva and entered into force on 22 April 1954. Hereafter the '1951 Refugee Convention'.

⁵⁷ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3. Hereafter the 'UNHCR Handbook'.

The right to administrative justice is reflected in all forms of international law,⁵⁸ as well as the Constitution of the Republic of South Africa 1996 (hereafter the ‘Constitution’) and the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’). The purpose of PAJA is to ‘give effect to the right to administrative action that is lawful, reasonable and procedurally fair’ in line with sections 33(1) and (2) of the Constitution.⁵⁹ Both the Constitution and PAJA form part of the argument for the injustices faced by refugee applicants in South Africa.

The law surrounding refugees and asylum seekers in South Africa is governed by the Refugees Act 130 of 1998 (hereafter the ‘Refugees Act’). The purpose of the Act is to:

[G]ive effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; to provide for the rights and obligations flowing from such status; and to provide for matters connected therewith.⁶⁰

The preamble of the Refugees Act refers to the various international legislation the country has acceded to, namely the 1951 Convention Relating to Status of Refugees (hereafter ‘1951 Refugee Convention’); the 1967 Protocol Relating to the Status of Refugees (hereafter ‘1967 Protocol’);⁶¹ and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (hereafter ‘1969 OAU Convention’).⁶² The preamble further mentions ‘other human rights instruments’ and thus demonstrates its desire to cover human rights broadly.⁶³ It is these mechanisms that the Act seeks to give effect to, and it is therefore intended to adhere to these obligations and enable South Africa to ‘treat in its territory refugees in accordance with the standards and principles established in international law.’⁶⁴

The principle of *non-refoulement* – a fundamental principle of international law that has been defined by a number of international legal instruments⁶⁵ – is contained in section 2 of

⁵⁸ Daven Dass, Jonathan Klaaren, Kaajal Ramjathan-Keogh and Fatima Khan ‘The civil and political rights of refugees and asylum seekers in South Africa’ in Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 203-219 at 210.

⁵⁹ Promotion of Administrative Justice Act 3 of 2000, preamble. Hereafter ‘PAJA’.

⁶⁰ Refugees Act, preamble at 2.

⁶¹ United Nations Protocol Relating to the Status of Refugees, 606 UNTS 267, adopted on 31 January 1967 and entered into force on 22 April 1954. Hereafter the ‘1967 Protocol’.

⁶² Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, adopted on 10 September 1969 and entered into force on 20 June 1974. Hereafter the ‘1969 OAU Convention’.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ UNHCR ‘Note on Non-Refoulement (Submitted by the High Commissioner) EC/SCP/2’, available at <<http://www.unhcr.org/afr/excom/scip/3ae68ccd10/note-non-refoulement-submitted-high-commissioner.html>> [accessed 31 May 2017].

the Act. Under this principle, no person can be refused entry or be returned ‘in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.’⁶⁶ No reservations to this Article are permitted, which is ‘hailed as a cornerstone of refugee law by the UNHCR and academics.’⁶⁷ It is explicitly designed to protect the life of anyone falling under the definition of a refugee as provided by the 1951 Refugee Convention.⁶⁸

This is well covered in the Refugee Act, which makes the principle of *non-refoulement* absolute in the use of its wording:

[N]otwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

- (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or
- (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.⁶⁹

The qualification criteria for refugees are provided for in section 3, citing the need for ‘a well-founded fear’ of being persecuted due to a person’s ‘race, tribe, religion, nationality, political opinion or membership of a particular social group.’⁷⁰ Section 3(b) provides a definition of a refugee, expanding the definition set out the 1969 OAU Convention.⁷¹

In opposition to section 3, the exclusions from qualifying for refugee status are laid out in section 4(1), which refers particularly to omissions due to a person committing criminal acts;⁷² however section 4(d) notably disqualifies a person who is protected by another country in which they have taken residence – this is South Africa’s ‘first country of asylum’ policy.⁷³

⁶⁶ 1951 United Nations Convention relating to the Status of Refugees, Article 33(1).

⁶⁷ Fatima Khan ‘The principle of non-refoulement’ in Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 3-19 at 3-4.

⁶⁸ UNHCR Handbook op cit note 57 para 28.

⁶⁹ Refugee Act, section 2. The wording includes ‘notwithstanding any provision of this Act or any other law to the contrary.’

⁷⁰ *Ibid.*, section 3(a).

⁷¹ 1969 OAU Convention, Article 1.

⁷² Refugees Act, section 4(1)(a), (b) and (c). Subsection (a) provides for crimes against humanity, including those against peace or war crimes, and subsection (b) relates to crimes that would be punishable by imprisonment if they were committed in South Africa.

⁷³ *Ibid.*, section 4(d).

There are a number of ways in which the protections offered to refugees can legally cease to exist. These ways include voluntarily surrendering any protections offered by their home country; reacquiring original nationality either voluntarily or formally; acquiring a new nationality and the protections offered therein; and if the circumstances that caused an applicant to flee change and the threat posed is no longer genuine.⁷⁴

The Act's conformity with international law is included in section 6. The following international obligations are noted: the 1951 Refugee Convention; the 1967 Protocol; the 1969 OAU Convention; and the Universal Declaration of Human Rights 1948.⁷⁵

Refugee Reception Offices are covered by section 8 of the Act, with the responsibility for establishing these lying with the Director-General. There is no limit as to the number of RROs that can be set-up;⁷⁶ however they are required to have at least one Refugee Status Determination Officer ('RSDO') who must 'have such qualifications, experience and knowledge of refugee matters as makes them capable of performing their functions.'⁷⁷

The process for applying for asylum begins in section 21 of the Act. The primary requirement for application is that it is made in person at a RRO, and it imposes obligations on the officer tending to the application to ensure that the application is completed properly and to provide assistance wherever necessary.⁷⁸ Upon submission of an application, an applicant should be issued with an asylum permit which is temporary in nature and allows the applicant to reside in South Africa for the prescribed period.

The Refugee Regulations (Forms and Procedures) 2000 (hereafter the 'Refugee Regulations') states the time period that any asylum seeker should have such a temporary status is 180 days.⁷⁹ The intention of the drafters is clear; this is not a status that should continue in perpetuity. This thesis will address the recourse the applicant has in terms of administrative law.

⁷⁴ Ibid., section 5.

⁷⁵ Refugees Act, section 6.

⁷⁶ Ibid., section 8(1).

⁷⁷ Ibid., section 4(d). The Director-General has a duty to ensure all appointed RSDOs receive sufficient training to enable proper performance of their duties. The obligations of RSDOs are covered in section 24 of the Act.

⁷⁸ Ibid., section 21(1).

⁷⁹ Refugee Regulations (Forms and Procedures) 2000, regulation 2(2). Hereafter known as 'Refugee Regulations'.

1.9 CHAPTER SYNOPSIS

The first chapter contains the proposal, an introduction to the paper in general, including the title, methodology, problem statement, a brief literature review and an overview of the law to be studied in the research.

Chapter two focuses on asylum seekers and their rights, particularly the temporary asylum status compared against refugee status and the difficulty facing applicants in obtaining full refugee status. The term ‘asylum seeker’ is not mentioned in the 1951 Refugee Convention – it is a term adopted by states. This chapter studies the history of the term and why states use it, along with prejudices that the term can bring.

The third chapter looks at the applicable law relating to the processing of refugees claims. The right to reasonable administrative justice under international law is discussed in line with the processing of refugee claims under the procedure outlined by the Refugees Act. These rights will be studied alongside case law and the application of PAJA and the Constitution in order to determine the extent of South Africa’s legal obligations during the refugee status determination process.

Chapter four focuses on the suitability of administrative law in situations where status determinations are likely to take a long time. It will address the question of whether a vulnerable class of people such as refugees can effectively benefit from administrative justice.

Chapter five focuses on the South African problem. Using the examples and studies mentioned in the literature review to centre the discussion on what went wrong and what continues to go wrong in South Africa, the chapter will analyse why the system of processing refugees is not achieving what the law provides for. This analysis will demonstrate the procedural difficulties facing applicants, and will discuss whether appropriate and reasonable administrative rights are being provided to those seeking to obtain refugee status.

Finally, chapter six of this paper concludes the research findings and practically applies the analysis with the current situation facing refugee applicants in South Africa. This chapter will also make recommendations as to how South Africa could make administrative justice more effective through increasing the capacity of RROs, better training of RSDOs and a closer working partnership with the UNHCR in order to offer sufficient protection.

Chapter 2 – Asylum seekers: rights and temporary status

2.1 INTRODUCTION

The Office of the United Nations High Commissioner for Refugees defines an asylum seeker as ‘someone whose request for sanctuary has yet to be processed.’⁸⁰ However, this is not a legal definition and despite this recognition by the UNHCR, the term ‘asylum-seeker’ is not mentioned in the 1951 Refugee Convention or the 1967 Protocol. The international legislation merely defines a person’s right to *seek* asylum, rather than labelling those persons as so.⁸¹ The term has been adopted by states and is attributed to those whose claims for refugee status are yet to be fully processed or decided.

The 1951 Refugee Convention defines a refugee in Article 1A firstly by referring to preceding legislation and any previous decisions thereunder still applying,⁸² and then secondly by providing its own definition:

[A]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁸³

The UNHCR Handbook reinforces the definition provided in the 1951 Refugee Convention. Paragraph 28 provides potential guidance on how asylum seekers should be treated by stating that a person can become a refugee under the legislation before any formal determination is made on their status. A status determination ‘does not therefore make him a refugee but declares him to be one.’⁸⁴ This effectively means that an asylum seeker, as viewed by any prospective receiving states, could legally be a refugee before the receiving State has made any relevant internal determinations.

Consider then the potential for prejudice when a State does not afford a person the full range of rights they might be legally entitled to. This could be during the application process

⁸⁰ The Office of the United Nations High Commissioner for Refugees (no date) ‘Asylum-Seekers’, available at <<http://www.unhcr.org/pages/49c3646c137.html>> [accessed 10 September 2017].

⁸¹ UNHCR Handbook op cit note 57 para 22. The UNHCR Handbook refers to the second part of the definition provided in 1969 OAU Convention.

⁸² 1951 Refugee Convention, Article 1A(1). The instruments and legislation listed is the Arrangements of 12 May 1926 and 30 June 1928; the Conventions of 28 October 1933 and 10 February 1938; the Protocol of 14 September 1939 or the Constitution of International Refugee Organization.

⁸³ Ibid., Article 1A(2).

⁸⁴ UNHCR Handbook op cit note 57 para 28.

in the ‘asylum’ phase, or in failing to declare such a person to be a refugee either by refusing an application or allowing the asylum label to carry on in perpetuity. If the formal decision making process does not determine a person to be a refugee, but fulfils the criteria in the definition provided by the 1951 Refugee Convention, then the question arises as to why a person is denied recognition as a refugee despite legally being so.

The term ‘asylum seeker’ is described by Zetter as a label that is used as a form of temporary protection that has ‘no basis in international law’⁸⁵ despite its usage around the world. Zetter argues the purpose of this label is to act as a precursor to refugee status in order to ‘deter putative refugees and other migrants, to severely restrict access for those who made it to their borders, and relentlessly to curtail the rights and assistance afforded those who managed to gain entry.’⁸⁶

In South Africa, the DHA defines an asylum seeker as ‘a person who has fled his or her country of origin and is seeking recognition and protection as a refugee in the Republic of South Africa, and whose application is still under consideration.’⁸⁷ The Refugees Act defines an asylum seeker as ‘a person who is seeking recognition as a refugee in the Republic.’⁸⁸

The roots of the term can be traced to post-war Europe, whereby developments in policy tended to mirror one another in such a way as to restrict or limit the number of asylum applications.⁸⁹ Essentially, the creation, use and application of the term has made becoming a refugee significantly harder by pushing asylum claims ‘further back into the process of migration’⁹⁰ and thus reducing opportunities applicants have to achieve refugee status. In addition to this, the rights of refugees and those of asylum seekers are inherently different – this supports the notion that the term is a tool used by states to restrict and avoid accepting refugees. The use of the term asylum seeker is not in line with the purpose of the 1951 Refugee Convention which is protection-orientated. It is clear that the term was introduced into refugee law to exclude and restrict people from applying for asylum.

This chapter will provide an overview of the term, including its historical background, how it is legally different from a refugee and where such branding of those seeking protection

⁸⁵ Roger Zetter, ‘More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization’ (2007) 20(2) *Journal of Refugee Studies* 172-192 at 181.

⁸⁶ Ibid.

⁸⁷ Department of Home Affairs (no date) ‘Refugee Status and Asylum’, available at <<http://www.dha.gov.za/index.php/refugee-status-asylum>> [accessed 11 September 2017].

⁸⁸ Refugees Act, section 1(v).

⁸⁹ Roger Zetter, David Griffiths, Silva Ferratti and Martyn Pearl (2003) *An assessment of the impact of asylum policies in Europe 1990-2000* at 4. Home Office Research Study 259.

⁹⁰ Zetter op cit note 85 at 189.

from persecution are hindered by its usage both in a legal and social context which specific demonstration of the problem in South Africa.

2.2 HISTORY OF THE TERM

The emergence of this new label is attributed to legislative formations in Europe in the late 1980s to mid-1990s. European countries formed extensive frameworks of immigration policies as a way of responding to ‘a threatening rise in migration which extant domestic policies and procedures had failed to stem.’⁹¹ This European response was then reflected across the world – legislative instruments were enacted that ultimately transformed the meaning of a refugee under the 1951 Refugee Convention.⁹² Indeed, a desire to alter the meaning is demonstrated in the process of this transformation where there were calls to revise the 1951 Refugee Convention definition as it was deemed to no longer be appropriate nor applicable in light of the European change.⁹³

2.2.1 Developments of asylum policy in Europe

A key instrument of asylum policy in Europe is the 1951 Refugee Convention and singles out Article 1 (providing for the definition of a refugee) and Article 33 (the principle of *non-refoulement*) as two important aspects in relation to European policy.⁹⁴

Whilst it is the 1951 Refugee Convention that lays the foundations for asylum policy, a change in circumstances led to a change in the trajectory of intentions. The lack of any detailed ruling on dealing with mass influxes of those seeking asylum enabled receiving states to take measures to deter.⁹⁵ In identifying a pattern in these changes, Hatton looks at policy pre-1999 which largely saw development occur at State level, the period from 1999-2004 which saw policy efforts focus on an EU-wide policy, and a then future period (at the time Hatton’s article was written) of 2004-2010.

The pre-1999 period saw the introduction of restrictive policy on a broad scale, which reformed application assessments and changed the way in which applicants were treated during the processing period. The 1990 Dublin Convention and a ministerial meeting in London in 1992 saw several key recommendations made. The first was the ‘safe third country’ allowing a State to refuse an application if the applicant had travelled through a

⁹¹ Zetter op cit note 85 at 181.

⁹² Ibid.

⁹³ Ibid. at 182. Zetter writes these calls for change came predominantly from EU Member States.

⁹⁴ Timothy J Hatton, ‘European Asylum Policy’ (2005) 194 *National Institute Economic Review* 106-119 at 108.

⁹⁵ Ibid.

country that was deemed to be ‘safe’ – the idea is that an application should be submitted in this country.⁹⁶ Secondly, any ‘manifestly unfounded’ claims were allowed to be rejected without any right to appeal. Thirdly, a list of safe countries was put together whereby states could make the presumption that there was no risk of persecution and thus fast-track any claims by applicants from the listed countries.⁹⁷ These were just recommendations and not binding law, however a gradual spread was seen across Europe with most European Union (EU) nations implementing them in some shape or form between 1991 and 1998.⁹⁸

Another change of note was the rights of asylum seekers during the application process. Rights to work were restricted, as were access to welfare benefits and detention rules.⁹⁹ Such changes are described by Hatton as ‘a race to the bottom’¹⁰⁰ insomuch as receiving states wanted to be at the bottom of the list in terms of numbers of asylum seekers received. This involved deflection tactics whereby EU governments, in the absence of any binding, harmonised policy, could act individually in a way that protected themselves ‘against floods of asylum seekers by tightening access, toughening their procedures and affording less generous treatment to asylum seekers, thus deflecting them elsewhere.’¹⁰¹ Restricting asylum seeker rights was a way of reducing intake.

Germany proposed a system to the European Council (EC) in 1994 involving redistribution of asylum seekers within the EU using a formula calculated on population, size of country and GDP per capita, however this was rejected by a number of states who were, at the time, receiving far fewer asylum applications than Germany.¹⁰² Instead the EC proposed two resolutions in 1995 asking countries to protection asylum applicants ‘in a spirit of solidarity.’¹⁰³ It could be argued this reflects an overall aim of international law today, particularly the 1951 Refugee Convention and the ‘no reservation rule’ for Articles 2 to 34. However, these resolutions were never invoked and it wasn’t until the 1997 Treaty of Amsterdam that the EU began developing harmonised policies.¹⁰⁴

This harmonisation saw immigration and asylum policy moved from the Third Pillar (covering inter-governmental agreements relating to justice and other issues) to the First

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Ibid. at 109.

⁹⁹ Ibid. Hatton cites examples of France in 1991 and Belgium in 1993.

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

Pillar, putting it in the same bracket as free movement of goods, services and persons – an area in which the EU could make binding regulations.¹⁰⁵ A European Council meeting in Tampere, Finland, in 1999 discussed the implementation of the 1951 Refugee Convention and a unified status for those granted refugee status known as a ‘Common European Asylum System’¹⁰⁶ which reaffirmed the importance of ‘absolute respect of the right to seek asylum’ which was taken to mean that ‘asylum and access to asylum can never be subordinated to control measures.’¹⁰⁷

2.2.2 Development of asylum policy in Africa

A similar change was seen in Africa from the mid-1980s, which was the period in which African nations began retreating from the fundamental principles of international refugee law.¹⁰⁸ Before this shift Africa had a liberal policy described by Rutinwa as the ‘golden age’ of asylum in Africa which was largely attributed to the 1951 Refugee Convention and other human rights law mechanisms.¹⁰⁹ The shift saw refugees begin to be contained in their countries of origin, the principle of *non-refoulement* started to be ignored, and basic rights were not afforded. Examples of this include refusing entry or expelling refugees back to their country of origin before their case had been adequately investigated.¹¹⁰

From the 1990s onwards, the basic rights of refugees were declining significantly, particularly with regards to their physical protection within the host country and right to human dignity and self-sufficiency. Examples include Rwandan refugees in the DRC (known as Zaire at the time) and the large-scale refugee camps which are often over-populated, poorly maintained, and prevent the inhabitants from integrating into local society.¹¹¹ Rutinwa aptly quotes human rights author Bill Frelick with regard to the refugee crisis in the Great Lakes, where refugees from Rwanda fled to Tanzania, that ‘to use the word ‘asylum’ to describe the situation of [these refugees] is to bastardize the word. What we saw here was something else – “pseudo-asylum”.’¹¹²

¹⁰⁵ Ibid. at 109.

¹⁰⁶ European Council on Refugees and Exiles, *Observations by the European Council on Refugees and Exiles on the Presidency Conclusion of the Tampere European Council, 15 and 16 October 1999*, 16 October 1999 para 11.

¹⁰⁷ Ibid. para 12.

¹⁰⁸ Bonaventure Rutinwa, ‘The end of Asylum? The changing nature of refugee policies in Africa’ (2002) 21(1&2) *Refugee Survey Quarterly* 12-41 at 20.

¹⁰⁹ Ibid. at 16.

¹¹⁰ Ibid. at 23.

¹¹¹ Ibid. at 26.

¹¹² Ibid. at 27.

The reasons for such changes in Africa are attributed to a number of factors: the sheer size of the refugee problem; the effect of large refugee influxes on host communities; concerns over the economy and security; and other external reliance factors such as international support.¹¹³

However, mass influx situations do not provide an excuse for incorrect application of international refugee law. There are circumstances where *prima facie* recognition occurs, which involves determining refugee status for entire groups. The application of such recognition is given guidance by paragraph 44 of the UNHCR Handbook and is done in situations where assistance is urgently required and therefore individual determination is simply not practical.¹¹⁴ This form of recognition ‘raises a presumption that individual members of the group are refugees’¹¹⁵ and therefore can benefit from the relevant international protection until such time as it is established that they are indeed not, or are no longer.¹¹⁶ The approach has been used worldwide and specifically in Africa before and after the existence of the 1969 OAU Convention.

Tanzania applied this approach for Rwandan nationals, whereby asylum seekers were pre-screened and registered at a reception centre and then appear before a National Eligibility Committee at a later date, where evidence is sought relating to claims for refugee status.¹¹⁷ Guinea also implemented *prima facie* recognition in 1998 when the country experienced an influx of refugees from Sierra Leone. In this instance, the refugees passed freely across the border and were registered once inside Guinea. Lists of the groups granted *prima facie* recognition were passed to the UNHCR for registration. This example was also used in Liberia.¹¹⁸

In 1991, Kenya saw the arrival of a vast number of refugees from Somalia and Sudan. Kenya used an individual assessment system, which became impossible due to the scale of the influx and the responsibility for status determination was passed to the UNHCR who granted recognition of refugee status on a *prima facie* basis.¹¹⁹ In another instance whereby

¹¹³ Ibid. at 28.

¹¹⁴ UNHCR Handbook op cit note 57 para 44.

¹¹⁵ UNHCR, *Prima facie status and refugee protection*, 24 October 2002, ISSN 1020-7473 at 4.

¹¹⁶ Ibid.

¹¹⁷ Ibid. at 10.

¹¹⁸ Ibid.

¹¹⁹ Ibid. at 11.

the UNHCR was called upon, the Gambia enlisted the UN body who gave *prima facie* status to refugees coming from Sierra Leone and the Casamance region of Senegal.¹²⁰

2.2.3 Development of asylum policy in South Africa

During the apartheid era, the South African government refused to develop any sort of refugee policy and in doing so rejected the 1951 Refugee Convention and 1969 OAU Convention. The National Party policy saw asylum seekers as ‘illegal aliens’ under the Aliens Control Act of 1991 (‘ACA’),¹²¹ with heavy penalties imposed on those seeking to enter the Republic illegally and powers of entry, search and arrest were given to both the police and immigration officers.¹²²

The post-apartheid government became signatories to the conventions in 1995, and the emergence of the Refugee Act is described as a ‘landmark event’ by Crush and McDonald, as the ACA was ‘never intended to offer protection to anyone.’¹²³ Despite this, the same authors argue the country still does not provide an effective refugee determination system as it carries a ‘strong residual suspicion...that most asylum seekers are economic migrants in masquerade.’¹²⁴

South Africa is regrettably no exception to the trend set by European countries. It has included the term asylum seeker in its legislation, which is included in section 1 of the Refugees Act and defined as ‘a person who is seeking recognition as a refugee in the Republic.’¹²⁵ South Africa did not follow the lead of other countries in Africa that employed a *prima facie* mechanism for receiving refugees.

The examples of *prima facie* status recognition discussed above demonstrate times when countries in Africa have been compelled to move from an individual assessment system to a group-based status determination system. Whilst section 35 of the Refugees Act provides for the reception and accommodation of asylum seekers in the event of a mass influx,¹²⁶ the DHA does not apply a form of *prima facie* status determination. Scholarly research has attributed this to a lack of understanding in the DHA as to what ‘*prima facie* refugees’ mean

¹²⁰ Ibid.

¹²¹ Jonathan Crush and David A McDonald, ‘Introduction to Special Issue: Evaluating South African Immigration Policy after Apartheid’ (2001) 48(3) *Africa Today* 1-13 at 4.

¹²² Ibid. at 3.

¹²³ Ibid. at 6.

¹²⁴ Ibid.

¹²⁵ Refugees Act, section 1.

¹²⁶ Refugees Act, section 35.

and what constitutes a mass influx situation.¹²⁷ Shreier writes that this demonstrates a ‘clear inconsistency that exists in terms of the legislative intent of the Refugees Act as compared to the actual understanding and practice’¹²⁸ of DHA officials in the RROs. The DHA has claimed instances of mass influxes yet never implemented special power provisions under section 35 of the Refugees Act, which would allow the accommodation of specific categories or groups of refugees.¹²⁹

The approach of the DHA in determining refugee status appears to utilise the 1969 OAU Convention’s definition of a refugee to employ a unique method of *prima facie* refugee determination for individuals as opposed to groups of people during mass influx or emergency situations.¹³⁰ The South African approach bases status determination on whether or not it is ‘obvious’ according to the conditions of the applicant’s country of origin.¹³¹

The South African version of *prima facie* status determination includes practices that are unofficial or non-legislated such a pre-screening processes, white-listing of countries producing refugees and a focus on the nationality of an asylum seeker.¹³² Tuepker describes the DHA as having an ‘institutional culture that overwhelmingly supports an automatic link between nationality and refugeehood which produces the shared knowledge that asylum is only “really” for a select group of nationals.’¹³³ This results in a harsh interpretation of the term ‘asylum seeker’ and the definitions provided in international legislation as it narrows the acceptance of refugee applications based on the nationality of the applicant.

2.3 CURRENT TREND

The use of labels has been heavily influenced by the media. An example is the excessive use of the term ‘migrant’ in media report concerning asylum seekers, which Alexander Betts describes as a word that ‘says nothing about their entitlement to cross that border or whether they should be.’¹³⁴ It has become a word that does not reflect the needs of refugees – it implies voluntary movement instead of forced movement, and such words ‘that convey an

¹²⁷ I van Beek, ‘Prima facie asylum determination in South Africa: A description of policy and practice’ in *Perspectives on Refugee Protection in South Africa*, ed. J Handmaker, L de la Hunt and J Klaaren (2001) at 18.

¹²⁸ Tal Hanna Schreier, ‘An Evaluation of South Africa’s Application of the OAU Refugee Definition’ (2008) 25(2) *Refugee* 53-63 at 54.

¹²⁹ *Ibid.* at 54-55.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² *Ibid.* at 55.

¹³³ Anais Tuepker, ‘On the Threshold of Africa: OAU and UN Definitions in South African Asylum Practice’ (2002) 15(4) *Journal of Refugee Studies* 409-423 at 418.

¹³⁴ Camila Ruiz for BBC News Magazine (28 August 2015) ‘The battle over the words used to describe migrants’, available at <<http://www.bbc.com/news/magazine-34061097>> [accessed 21 March 2018].

exaggerated sense of threat can fuel anti-immigration sentiment and a climate of intolerance and xenophobia¹³⁵ according to Betts, who is the director of the Refugee Studies Centre at Oxford University.

Separating refugee from migrants is important.¹³⁶ The term is also increasingly being used in a pejorative sense¹³⁷ and has ‘evolved from its dictionary definitions into a tool that dehumanises and distances’¹³⁸ those who are legally entitled to protection. This is supported by Feller, who is the former Assistant High Commissioner for Protection at UNHCR and wrote in 2005 that ‘refugees are not migrants...it is dangerous and detrimental to refugee protection, to confuse the two groups, terminologically or otherwise.’¹³⁹ This statement was made in response to claims that refugees should first be treated as migrants upon reception – which is the reason for the term ‘asylum seeker’ emerging.

2.4 CONCLUSION

Until the move away from the apartheid era the policy was outright rejection sympathetic refugee policy under the ACA. Asylum policy in South Africa has a relatively young history due to the recent acceptance of the 1951 Refugee Convention and the 1969 OAU Convention. This is a stark contrast to the developments of asylum policies in Europe and other African countries, which have effectively moved from more liberal systems to gradual tightening.

It is important to separate refugees and migrants. Confusing the two creates danger for refugees and goes against the intentions of the 1951 Refugee Convention. Use of the word ‘migrant’ by the media when referring to asylum seekers creates a negative perception. The term does not feature in international legislation – it is a term that has emerged from the practice of states to categorise those whose applications for refugee status are not yet processed.

South African asylum and refugee policy has been criticised as remaining ineffective and offering little protection despite the adoption of the international laws in 1995. The country

¹³⁵ Adam Taylor for The Washington Post (24 August 2015) ‘Is it time to ditch the word ‘migrant’?’, available at <https://www.washingtonpost.com/news/worldviews/wp/2015/08/24/is-it-time-to-ditch-the-word-migrant/?utm_term=.6ab269317ad1> [21 March 2018].

¹³⁶ K Long op cit note 39 at 4.

¹³⁷ Ibid.

¹³⁸ Barry Malone for Al Jazeera News (20 August 2015) ‘Why Al Jazeera will not say Mediterranean ‘migrants’’, available at <<https://www.aljazeera.com/blogs/editors-blog/2015/08/al-jazeera-mediterranean-migrants-150820082226309.html>> [accessed 22 March 2018]. The article discusses the widespread use of the term ‘migrant’ in coverage of the refugee situation in Europe. It highlights the detrimental effects of confusing refugees and migrants, and is a useful account from a media editor as to why confusing the terms is a problem.

¹³⁹ E Feller, ‘Refugees are not Migrants’ (2005) 24 (4) *Refugee Survey Quarterly* 27–35 at 27.

has employed a version of *prima facie* recognition that is inconsistent with its definition. This has been attributed to a lack of understanding within the DHA as to what *prima facie* refugees are and what is perceived as a mass influx situation. There is an inconsistency between the intentions of the Refugees Act and the DHA's implementation and practice.

Chapter 3 – Establishing the normative framework

3.1 INTRODUCTION

The previous chapter has outlined the prejudices suffered by refugees as a result of the unfortunate classification of refugees as asylum seekers whilst their status is being determined by the host state. The 1951 Refugee Convention does not mention the term ‘asylum seeker’ or the phase before because a refugee is granted asylum. This may well be because the drafters did not foresee this phase to be as drawn out as it is currently experienced by refugees. There is however very little in the Convention that can assist the asylum seeker with a swift status determination because it is completely silent on the procedures of granting asylum – it is not dealt with by the 1951 Refugee Convention.¹⁴⁰

This chapter will therefore critically analyse the administrative justice offered by the Convention to see whether it is able to assist the refugee who is denied rights as a result of a lack of procedural safeguards within it. Although silent on procedure, international law is quite the opposite when it comes to rights. Various rights are outlined in the 1951 Refugee Convention, including the right to administrative assistance (Article 25) and the right to access the courts (Article 16). Administrative justice rights are also contained in the 1966 International Covenant on Civil and Political Rights (Article 14)¹⁴¹ and the 1986 African Charter on Human and Peoples Rights (Article 7)¹⁴² – of which the latter provides broader rights as follows:

1. Every individual shall have the right to have his cause heard. This comprises:
 - a. the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;
 - b. the right to be presumed innocent until proved guilty by a competent court or tribunal;
 - c. the right to defence, including the right to be defended by counsel of his choice;
 - d. the right to be tried within a reasonable time by an impartial court or tribunal.¹⁴³

Additionally, the UNHCR has produced a Handbook providing guidance on procedures and criteria for determining refugee status, which focuses of the 1951 Refugee Convention

¹⁴⁰ UNHCR Handbook op cit note 57 para 25.

¹⁴¹ International Covenant on Civil and Political Rights, 999 UNTS 171, adopted on 16 December 1966 and entered into force on 23 March 1976, Article 14 concerning the right to a fair trial. Hereafter the ‘ICCPR’.

¹⁴² African Charter on Human and Peoples’ Rights (Banjul Charter), 21 ILM 59, adopted on 27 June 1981 and entered into force on 21 October 1986. South Africa became a signatory to the African Charter in 1996.

¹⁴³ Ibid., Article 7(1).

and 1967 Protocol as the ‘two instruments of universal scope.’¹⁴⁴ The Handbook has taken a role as soft law, with its use in case law giving it substantial strength in providing for guidance and procedure relating to the determination of refugee status.¹⁴⁵ Its intention is to ‘guide government officials, judges, practitioners, as well as UNHCR staff applying the refugee definition.’¹⁴⁶ Guidelines on the procedural process for determining refugee status are provided in part two of the Handbook, listing ‘certain basic requirements’¹⁴⁷ that are to be met when considering an asylum application. One such requirement is that an applicant who is not recognised as a refugee should ‘be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system.’¹⁴⁸

With regard to domestic law, the Refugees Act is designed to ‘provide for reception into South Africa of asylum seekers’ and to regulate applications for refugee status.¹⁴⁹ The Act intends to give effect to ‘the relevant international legal instruments, principles and standards relating to refugees’ and mentions specifically the 1951 Refugee Convention, 1967 Protocol and 1969 OAU Convention in its preamble.¹⁵⁰ It is the Refugees Act that oversees the processing of refugee claims.

In addition, section 33 of the Constitution of the Republic of South Africa provides a ‘right to administrative action that is lawful, reasonable and fair.’¹⁵¹ It also gives the right to those who have been adversely affected by administrative action to be given written reasons for the action taken. Section 33(3) says ‘national legislation must be enacted to give effect to these rights’¹⁵² by providing for reviews of any administrative actions through courts or tribunals.¹⁵³ It also imposes a duty on the State to ‘promote an efficient administration.’¹⁵⁴ The Promotion of Administrative Justice Act 3 of 2000 (hereafter known as ‘PAJA’) is the legislation that enforces section 33 constitutional rights, with its aim to:

¹⁴⁴ UNHCR Handbook op cit note 57 para 23.

¹⁴⁵ *Katabana v Chairperson of Standing Committee for Refugee Affairs and others* [2014] JOL 31903 (WCC) at 9; *Tshiyombo v Members of the Refugee Appeal Board and other* [2016] 2 All SA 278 (WCC) para 37, where Binns-Ward J cites *Tantoush v Refugee Appeal Board and others* 2008 (1) SA 232 (T) paras 196-197; and *Dorcasse v Minister of Home Affairs and others* [2012] JOL 29567 (GSJ) para 36.

¹⁴⁶ UNHCR Handbook op cit note 57 at 2.

¹⁴⁷ Ibid. para 192.

¹⁴⁸ Ibid. para 192(vi).

¹⁴⁹ Refugees Act at 2.

¹⁵⁰ Ibid., preamble.

¹⁵¹ Constitution of the Republic of South Africa, 1996, section 33. Hereafter ‘The Constitution’.

¹⁵² Ibid., section 33(3).

¹⁵³ Ibid., section 33(3)(a).

¹⁵⁴ Ibid., section 33(3)(c).

[G]ive effect to the right to administrative action that is lawful, reasonable and procedurally fair and to the right written reasons for administrative action as contemplated in section 33 of the Constitution of the Republic of South Africa 1996; and to provide for matters incidental thereto.¹⁵⁵

The intended effect of PAJA is particularly pertinent to this study. An overview of the legislation from international law downwards to domestic instruments suggests conformity with international law and the Constitution. However, through analysis of case law and the problems identified in the literature review above, it is possible to identify ways in which the refugee status determination procedure under the Refugees Act is not fully affording the rights provided the law to refugee applicants in South Africa.

This chapter will provide the normative framework for providing refugee status in terms of international law as well as South African domestic law, identifying the gaps as well as critiquing the feasibility of a highly regulated asylum system such as the South African system.

3.2 THE PROCEDURE FOR SEEKING ASYLUM IN SOUTH AFRICA

Upon entry to the Republic, a person wishing to claim asylum reports to the government authority at a port of entry is issued with a temporary ‘asylum seeker permit’ under section 23 of the Immigration Act 13 of 2002.¹⁵⁶ This permit is valid for 14 days and allows the applicant to report to the nearest RRO in order to lodge their application.¹⁵⁷ Here the applicant’s fingerprints are taken, an interview with a RO is carried out, data and imagery are recorded on the refugee system, and a section 22 permit is issued in terms of the Refugees Act.¹⁵⁸

A second interview is then carried out by a Refugee Status Determination Officer (RSDO). It is the responsibility of the RSDO to make a decision on the application, and it must be done in a manner that is fair – this includes providing reasons for the decision. In deciding, a RSDO must either grant asylum and therefore refugee status, or reject the application on grounds that the application is ‘manifestly unfounded, abusive or fraudulent; or refer any question of law to the Standing Committee for Refugee Affairs.’¹⁵⁹ Where an application is rejected as unfounded, an applicant can lodge an appeal to the Refugee Appeal

¹⁵⁵ PAJA, preamble.

¹⁵⁶ Immigration Act 13 of 2002, section 23.

¹⁵⁷ Refugee Regulations, regulation 2(2).

¹⁵⁸ Refugees Act, section 22(1).

¹⁵⁹ Department of Home Affairs (no date) ‘Refugee Status and Asylum’, available at <<http://www.dha.gov.za/index.php/refugee-status-asylum>> [accessed 23 December 2017].

Board (hereafter the ‘Appeal Board’) within 30 days of the decision of the application being communicated to them. The entire status determination process should take place within 180 days.¹⁶⁰

This is not the case in reality. Whilst Amit writes that ‘a properly functioning status determination system is characterised by an administratively fair procedure’¹⁶¹ with which the integrity of such a system relies upon, the reality is that the system is under-resourced with insufficiently trained RSDOs and review procedures that focus solely on checking positive decisions in the interests of preventing corruption.¹⁶² All this has the effect of forming a flawed process that moves it away from sufficient administrative effectiveness and justice, as well as the fundamental aim of the refugee framework to protect those that need it.¹⁶³

3.3 ADMINISTRATIVE JUSTICE IN INTERNATIONAL AND SOUTH AFRICAN LAW

The right to administrative justice is enshrined in a number of legal mechanisms. Firstly, there is international law, which is interpreted into domestic law in South Africa through section 33 of the Constitution and then subsequently given effect by PAJA.

3.3.1 International law

Article 14 of the 1948 Universal Declaration of Human Rights (‘UDHR’) provides the right for everyone to ‘seek and enjoy asylum in other countries asylum from persecution.’¹⁶⁴ The introductory note of the 1951 Refugee Convention states its consolidation of previous international instruments relating to refugees and ‘provides the most comprehensive codification of the rights of refugees at the international level.’¹⁶⁵

The importance of international law is emphasised in the *Dorcasse* judgment. Moshidi J quotes Professor John Dugard in *International Law – A South African Perspective* on the intention of the Refugees Act, expressing the need for the Act to:

¹⁶⁰ Refugee Regulations, regulation 3(1).

¹⁶¹ Amit *Protection and Pragmatism* op cit note 25 at 6.

¹⁶² Ibid. at 10.

¹⁶³ Ibid.

¹⁶⁴ Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A810 at 71, 10 December 1948, Article 14(1).

¹⁶⁵ 1951 Refugee Convention, introductory note at 3.

...[b]e interpreted and applied with due regard to the 1951 Convention, its 1967 Protocol, the 1969 OAU Convention, the Universal Declaration of Human Rights and any other relevant human rights treaty to which South Africa is or becomes a party.¹⁶⁶

This is a powerful quote. The case law demonstrates that the interpretation and application of the Refugees Act is not in line with this intention. Paragraph 41 of the *Dorcasse* judgment is prevalent as the view is that the DHA has lost sight of its obligations when processing refugee applications under the Refugees Act. Justice Moshidi expresses frustration at the number of matters involving the DHA that come to High Court on an almost ‘weekly basis’ and the subsequent similar orders continually being made in favour of the applicants, and suggests the DHA needs to devise an ‘effective, cost-saving and well-balanced approach to matters of this nature and immigration issues.’¹⁶⁷ The judge states a need to ‘re-visit the preamble to the Refugees Act’ which reiterates South Africa’s accession to the international laws and obligations resulting from this accession to ‘receive and treat in its territory refugees in accordance with the standards and principles established in international law.’¹⁶⁸

The 2007 *Kiliko* judgment makes reference to South Africa’s international law obligations relating to human rights, stating that a failure provide ‘adequate facilities to receive; expeditiously consider; and issue asylum seeker permits’ was deemed by Van Reenen J to be inconsistent ‘with the State’s obligations in terms of the international instruments to which it has become a party.’¹⁶⁹

3.3.1.1 *The intentions of international refugee law*

Hathaway and Neve argue that the principal aim of refugee law is ‘not enforceability in a strict sense.’¹⁷⁰ Instead, it is intended to be a system in which governments collectively agree to co-operate for the purpose of containing conflict, pursuing decency and avoiding catastrophe. This involves a certain level of compromise on sovereignty to act independently in order to achieve a common goal.¹⁷¹

The 1951 Refugee Convention requires that states provide temporary protection, and its structure is such that it ‘establishes a continuum under which entitlement to rights increases

¹⁶⁶ *Dorcasse* supra note 145 para 41.

¹⁶⁷ *Ibid.*

¹⁶⁸ *Ibid.*

¹⁶⁹ *Kiliko and others v Minister of Home Affairs and others* [2007] 1 All SA 97 (C) para 28.

¹⁷⁰ James C Hathaway & R Alexander Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Orientated Protection’ (1997) 10 *Human Rights Journal* 115-211 at 116.

¹⁷¹ *Ibid.*

as a refugee's attachment to the asylum state deepens.¹⁷² In instances where an applicant holds temporary status for a prolonged period, rights can be claimed accordingly upon fulfilment of a 'durable three-year residence requirement.'¹⁷³

It is argued that the rights provided for by the 1951 Refugee Convention do not suggest an intention for rights to be 'bestowed at the moment of status recognition'¹⁷⁴ – that is to say the point at which refugee status is granted. This therefore means that those in the application process, so-called 'asylum seekers', should be awarded full rights under the 1951 Refugee Convention from the moment they become known.

However, in opposition to this idea, governments often maintain they do not owe asylum seekers any rights until status has been determined, thus implying that only upon achieving full status does an asylum seeker assume their rights under the 1951 Refugee Convention. This practice presents a distinct disadvantage for those with a genuine claim as it is 'one's de facto circumstances, and not the official recognition of these circumstances, that give rise to Convention refugee status.'¹⁷⁵ If the practice is to be to deprive applicants of their rights, then decision processes should be almost instant or a practice of presumed entitlement should be employed, whereby applicant is presumed to be a refugee until a determination or decision on their application and subsequent refugee status is made.¹⁷⁶

Rights of refugee applicants extend beyond the 1951 Refugee Convention.¹⁷⁷ Other instruments of human rights law apply, namely the 1966 covenants of the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Economic, Social and Cultural Rights ('ICESCR'). The ICCPR assures the majority of rights to all those under the authority of a State, both nationals and non-nationals,¹⁷⁸ and whilst the ICESCR allows developing nations to apply discretion when considering the extent to which economic rights are afforded, it still is still influential.¹⁷⁹

¹⁷² Ibid. at 157.

¹⁷³ Ibid. at 159.

¹⁷⁴ Ibid. at 158.

¹⁷⁵ Ibid.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid. at 160.

¹⁷⁸ ICCPR, Article 2(b) and 13.

¹⁷⁹ International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3. Article 2(3) gives developing countries discretion to 'determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.'

3.3.1.2 Administrative justice provisions in international law

Chapter V of the 1951 Refugee Convention provides for administrative measures to be undertaken by the Contracting State. Article 25 covers administrative assistance, and provides for assistance from authorities in order to exercise a right when the requirement arises.¹⁸⁰ Either the Contracting State or an international authority can provide this assistance.¹⁸¹

Despite entitlement to rights, the realistic view is that assistance from a State or international authorities is a necessity for refugees to be able to enforce their rights.¹⁸² The importance and extent of this necessity is further amplified by the fact that refugees cannot seek protection by way of consular assistance from their country of nationality.¹⁸³ This also highlights the vulnerability of refugees as well as the need for receiving states to act lawfully. The problem with administrative justice provisions in Article 25 of the 1951 Refugee Convention is that the nature of the duty to provide administrative assistance is not set out.¹⁸⁴ Furthermore, rights to administrative justice are impractical unless a person is able to access the Courts in the host state. Without this, the right to administrative justice is of no value.

The 1951 Refugee Convention provides the refugee with the right to access to the Courts of a Contracting State through Article 16 of the 1951 Refugee Convention.¹⁸⁵ The question to be asked is whether it can be extended to an asylum seeker due to the term not being mentioned in the Convention. Article 16 covers all Contracting States, not just the country in which the refugee is situated, and according to the drafting history applies regardless of whether the Contracting State has recognised that person as a refugee or not.¹⁸⁶ This is a particularly poignant aspect of administrative justice, as without access to the courts an applicant is offered no options. This is appropriately summed up by Hathaway in quoting Jowitt J in the English High Court:

[T]he use of the word “refugee” [in Art.16(1)] is apt to include the aspirant, for were that not so, if in fact it had to be established that he did fall within the definition of “refugee” in article

¹⁸⁰ 1951 Refugee Convention, Article 25(1).

¹⁸¹ Ibid.

¹⁸² James C Hathaway *The Rights of Refugees under International Law* (2005) at 626.

¹⁸³ Ibid. at 627.

¹⁸⁴ Ibid. at 635.

¹⁸⁵ 1951 Refugee Convention, Article 16.

¹⁸⁶ Hathaway op cit note 182 at 645. See the statement of Mr Henkin of the United States, UN Doc. E/AC.32/SR.25, Feb. 10, 1950, at 6.

1, he might find that he could have no right of audience before the court because the means of establishing his status would not be available to him.¹⁸⁷

3.3.2 South African law

The prevailing system in South Africa is the section 33 ‘constitutional imperative of just administrative action.’¹⁸⁸ The current system employs a ‘multiplicity of layers and administrative structures’ that are contrary to the proposed streamlined system in the 1997 Draft Green Paper on International Migration, which endorsed a one-step investigatory process involving an oral hearing before an independent status determination authority that conforms with all processes and rights given by international and constitutional law.¹⁸⁹ De la Hunt describes the three different structures – the DHA, the Standing Committee and the Appeal Board – in the Refugee Status Determination (RSD) system as having ‘different, interrelated, and sometimes duplicated functions’¹⁹⁰ citing the ability of the Standing Committee and the Appeal Board to determine questions of law that are referred to them.¹⁹¹

The entire RSD process from the initial application and the subsequent decision through to any appeals and reviews must be made under the consideration of international law.¹⁹² In addition to international law obligations, section 33 of the Constitution gives *everyone* the right to ‘administrative action that is lawful, reasonable and procedurally fair.’¹⁹³ Section 33 of the Constitution reads as follows:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.¹⁹⁴

¹⁸⁷ Ibid.; *R v Secretary of State for the Home Department, ex parte Jahangeer et al.* [1993] Imm AR 564 (Eng. QBD, 11 June 1993), per Jowitt J at 566.

¹⁸⁸ Lee Anne de la Hunt ‘Refugee status determination: Review and appeal’ in Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 172-199 at 174.

¹⁸⁹ GN 849 GG 18033 of 30 May 1997 33-34 para 4.1.

¹⁹⁰ Lee Anne de la Hunt op cit note 188 at 175.

¹⁹¹ Ibid.

¹⁹² An example being the *Dorcasse* judgement supra note 145 at para 41.

¹⁹³ The Constitution, section 33.

¹⁹⁴ Ibid.

The emphasis on the right being conveyed to ‘everyone’ is important, as constitutional rights have previously been seen to apply only to South African citizens.¹⁹⁵ The application of section 33 rights were discussed in *Tantoush*, where it was held that the Bill of Rights is to be applied equally to foreigners as it is to South African citizens. The judgment quotes paragraph 25 of the *Watchenuka* judgment in stating that ‘human dignity has no nationality.’¹⁹⁶

The *Tantoush* judgement also decided that the ‘duties imposed by the Bill of Rights are binding on the RSDO and the RAB [Refugee Appeal Board], both being organs of state exercising public power and performing a public function.’¹⁹⁷ Decisions by these organs amount to administrative action as defined by section 1 of PAJA, and therefore they are under an obligation to interpret legislation whilst promoting the ‘spirit, purport and objects of the Bill of Rights and consider international law, in terms of section 39 of the Constitution.’¹⁹⁸

Section 39(1)(b) of the Constitution states any interpretation of the Bill of Rights by a court, tribunal or forum ‘must consider international law.’¹⁹⁹ In addition, section 233 provides for the appropriate application of international law and that interpretation of any legislation by the courts must be done so in a manner that prefers ‘any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.’²⁰⁰

PAJA was enacted to provide for the rights to ‘lawful, reasonable and procedurally fair’ administrative action afforded under section 33 of the Constitution.²⁰¹ PAJA defines administrative action as any decision taken by:

- (a) an organ of state, when-
 - (i) exercising a power in terms of the Constitution or a provincial constitution;
or
 - (ii) exercising a public power or performing a public function in terms of any legislation; or
- (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision...²⁰²

¹⁹⁵ *Tantoush* supra note 145 para 64.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.* para 65.

¹⁹⁸ *Ibid.*; The Constitution, section 39, which provides for the requirements of interpreting the Bill of Rights.

¹⁹⁹ *Ibid.*, section 39(1)(b).

²⁰⁰ *Ibid.*, section 233.

²⁰¹ PAJA, preamble.

²⁰² *Ibid.*, section 1.

The DHA is an organ of state exercising a public power and performing a public function in terms of the Refugees Act, and therefore falls under this definition.

Section 34 of the Constitution grants access to courts to ‘everyone’.²⁰³ With the decision in *Tantoush* discussed above, this can be taken to include both citizens and non-citizens alike and therefore serves to further extend the safeguards of these broader rights provided by international law within South African law.²⁰⁴ Access to courts of law further enforces the ability to access administrative justice, and this provision extends the right to ‘lawful, reasonable and procedurally fair’ administrative action set out in section 33.

3.4 RIGHTS OF ASYLUM SEEKERS IN THE SOUTH AFRICAN CONTEXT

Section 38(1) of the Refugees Act has seen the Refugee Regulations make regulations regarding ‘the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration.’²⁰⁵ The effect of these regulations and conditions included prohibition on employment and studying.²⁰⁶ The rights of asylum seekers to take up work and study were discussed in *Watchenuka*.

In *Watchenuka*, the respondents were a mother and son of Zimbabwean nationality who had applied for refugee status under the Refugees Act 1998 and had been granted section 22 asylum permits.²⁰⁷ The mother wished to take up employment whilst the son wished to undertake a course of study whilst their application for refugee status was processed, however their permits contained a condition that prohibited employment and study. An order was granted declaring such prohibition to be *ultra vires* and therefore inconsistent with the Constitution, rendering it invalid.²⁰⁸

This case was taken to the Supreme Court of Appeal, and the judgment found that the Minister of Home Affairs ‘had no authority to impose the prohibition.’²⁰⁹ The Minister had acted in conflict with the Constitution in the absence of the authority to carry out such a prohibition of employment and study in this instance. The Standing Committee of Refugee Affairs (the ‘Standing Committee’) prohibits employment and study for the first 180 days of

²⁰³ The Constitution, section 34.

²⁰⁴ Lee Anne de la Hunt op cit note 188 at 199.

²⁰⁵ *Minister of Home Affairs and others v Watchenuka and another* [2004] 1 All SA 21 (SCA) para 8.

²⁰⁶ *Ibid.*

²⁰⁷ *Ibid.* para 5.

²⁰⁸ *Ibid.*

²⁰⁹ *Ibid.* para 16.

a section 22 asylum permit being issued, which was found to be in conflict with the Bill of Rights.²¹⁰

Nugent JA stated in the *Watchenuka* judgment that:

[H]uman dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by section 10 of the Bill of Rights.²¹¹

Nugent JA goes on to discuss the section 36 limitations of the Bill of Rights that can be appropriately applied to section 10 of the Bill of Rights, whereby the protection of human dignity ‘may be limited where the limitation is of general application and is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors”.’²¹²

The judgment considers a decision made by the United States Supreme Court alongside the restrictions of section 21 and 22 of the Bill of Rights, with Nugent JA opining that placing restrictions on employment for asylum seekers is appropriate.²¹³ However, considerations must be made when employment is the ‘only reasonable means for the person’s support’ as it then becomes a matter of humility and degradation – particularly as South Africa offers no support to asylum applicants.²¹⁴

The human dignity argument also extends to this thesis and to the asylum process altogether, and where the situation involves a child that is legally in the country under an asylum application, such as in *Watchenuka*, Nugent JA saw no justifiable reason for depriving the applicant of ‘the opportunity for human fulfilment at a critical period.’²¹⁵

It is therefore important to take into account the circumstances of the applicant.²¹⁶ Whilst asylum applicants are ‘not ordinarily entitled to take up employment or to study pending the outcome of his or her application, but there will be circumstances in which it would be unlawful to prohibit it.’²¹⁷

²¹⁰ Ibid. para 5.

²¹¹ Ibid. para 25.

²¹² Ibid. para 28.

²¹³ Ibid. para 29.

²¹⁴ Ibid. para 32.

²¹⁵ Ibid. para 36.

²¹⁶ Ibid. para 34. The judgment cites Botha JA in *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639.

²¹⁷ Ibid. para 37.

The circumstantial approach is not reflected in the South African refugee system. Compare *Watchenuka* with the administrative failings discussed by Amit in a study analysing the quality of status determination decisions issued at refugee reception offices,²¹⁸ and it is clear that this forms part of the administrative failing in the refugee process. In Amit's study of 324 rejected applications, it was found that virtually none of the decisions contained any suitable or proper evaluation of the claims submitted. Identical reasons were given to different applicants.²¹⁹

3.4.1 Procedural rights for asylum seekers in South Africa

The law provides for a reasonable timeframe wherein the RSD process should be completed. The DHA should be guided by the Refugee Regulations, which state that an asylum application should be completed within 180 days. This is contained within regulation 3, which covers the adjudication process, time periods and conditions.²²⁰

In the event that the DHA fails to adjudicate an application within the specific time period, the regulations state an applicant is entitled to apply to the Standing Committee for permission to work or study, or for relief from any other conditions or restrictions that may have been imposed upon them.²²¹ This regulation is a clear indication that the asylum process is not intended to carry on in perpetuity. The case law demonstrates that despite the law stating a time limit for a decision, this is not always the reality.

The time limit provision is reinforced by section 7(1) of PAJA, which states that administrative decisions must be made 'without unreasonable delay and not later than 180 days.'²²² PAJA also covers administrative rights regarding delays in decision making processes. Section 6 of PAJA provides for judicial review of administrative action. Section 6(1) gives any person the right to begin proceedings in a court or a tribunal for the judicial review of an administrative action.

More specifically, section (6)(1)(g) allows proceedings to be brought in instances where the administrative action concerned failure to take a decision.²²³ Section 6(3) elaborates on this inasmuch as it provides for scenarios for bringing proceedings where an administrator

²¹⁸ Amit *Protection and Pragmatism* op cit note 25 at 8.

²¹⁹ Ibid.

²²⁰ Refugee Regulations, regulation 3(1).

²²¹ Ibid., regulation 3(3).

²²² PAJA, section 7(1).

²²³ Ibid., section (6)(1)(g).

has unreasonably delayed making a decision – this is covered by section 6(3)(b), which also states that, in addition to an event of unreasonable delay, a person may bring proceedings if:

- (i) an administrator has a duty to take a decision;
- (ii) a law prescribes a period within which the administrator is required to take that decision; and
- (iii) the administrator has failed to take that decision before the expiration of that period.²²⁴

The Refugee Regulations and PAJA collectively provide for administrative justice and rights when the procedure is not followed according to the law.

3.5 CONCLUSION

The normative framework in theory provides a strong set of administrative rights set out in both international and domestic law in South Africa. The international law is supported by the UNCHR Handbook which has gained strength through being used as soft law in a number of case law judgments relating to the refugee processing system in South Africa.

Administrative justice takes its form in international refugee law through Article 25 of the 1951 Refugee Convention, and is supported by Article 16 rights to access the courts of a host state – something which is essential if a person is to be able to achieve their right to administrative justice. In domestic law, the Bill of Rights in the Constitution and PAJA provide for consideration of international law and give administrative justice rights to *everyone*, which case law has decided includes both nationals and non-nationals. Case law has also determined that the duties contained within the Bill of Rights are directly applicable to the DHA as an organ of state exercising public power.

Despite the law being theoretically strong, in practice applicants are often denied their rights due to the way in which recognition of refugee status is perceived to be the moment with which a refugee is offered legal protection. This disadvantages those with genuine claims, and the intention of the 1951 Refugee Convention is for claims to be decided on the *de facto* circumstances of the individual applicant.

²²⁴ PAJA, section 6(3)(b).

Chapter 4 – The suitability of the normative framework

4.1 INTRODUCTION

An important aspect of the law is not only its ability to be effective but also its ability to be understood and accessible – particularly in the context of refugee law, where strict application and adherence is of utmost importance given the potential prejudices and resulting dangers stemming from misapplication. It is one thing for the law to function in practice, however if it is not easy for those seeking to use it to understand nor access then it could argued to be failing those it seeks to protect.

4.2 SUITABILITY OF INTERNATIONAL LAW

The silence of international law on procedure has left open gaps whereby states can implement their own systems that do not necessarily follow the intentions of the international statutes. The fact the UNHCR Handbook is in existence demonstrates this, as the need for additional guidance perhaps suggests the drafters missed including provisions relating to the processing of refugee applications. It could be argued this was done to preserve State sovereignty, although when this is considered alongside the universal approach to human rights it is unlikely this was the intention of the drafters.

The 1951 Refugee Convention claims to be the most ‘comprehensive’ set of refugee rights. Therefore, the question must be asked why the law is silent on procedure. Whilst this is a potential omission that could render the law insufficient, it is important to analyse what it does provide for. It essentially elaborates and codifies Article 14 of the UDHR, which provides an effective and positive reinforcement for the rights of those seeking protection as refugees. It provides for an extensive definition of when a person becomes a refugee, and encompasses rights seen in other legal instruments, such as rights to not be discriminated against and the freedom of practice religion, as well as welfare rights to housing, education, public relief and social security.

The silence on procedure makes the law unnecessary complicated, however the issue of State sovereignty is important and the balance between this and universal human rights presents a problem. Whilst it is speculative to suggest this is the reason for the absence of a set procedure in international law, it can be argued the rights contained within are intended to act as sufficient guidance for how the procedure should be set out. Furthermore, the acceptance of the UNCHR Handbook in case law demonstrates its importance in legal

interpretation. This perhaps suggests value in a uniformed approach to refugee law and therefore a contrast to the silence on procedure in international law.

The access to justice and administrative measures contained in Articles 16 and 25 of the 1951 Refugee Convention seems to sufficiently provide assistance in exercising prescribed rights. The law here is quite ambiguous as to its specificity, however with rights being extensively provided for in international law and therefore in any subsequent laws that are intended to give effect to these rights, it is fair to argue that whenever a refugee is denied a right to which they are entitled, a State should provide necessary assistance to ensure this is corrected. If international law is adhered to then there should not be a lack of administrative justice. However, it is not clear if this covers all rights or just rights that ‘would normally require the assistance of authorities.’²²⁵

During the drafting debates it was decided that certain rights such as legal assistance and exemption from *caution judicatum solvi* would only apply to refugees with an established ‘habitual residence’ in a state.²²⁶ Paragraphs 2 and 3 of Article 16 offer more practical assistance to refugees with habitual residence and states therefore have a duty waive court or other fees required to be paid by a refugee in order to pursue a court action. This means that those who have not established the necessary habitual residence are only eligible to receive the same access to the courts as non-citizens generally, as provided for by Article 16(1).²²⁷ In order to meet the requirements of habitual residence for the purposes of Article 16(2) and 16(3), a refugee’s presence should be ongoing – it needs to be more than a stay of short duration but does not need to be that of permanent residence.²²⁸

4.3 SUITABILITY OF SOUTH AFRICAN LAW

The South African legislation successfully implements the international law. The procedure sets out a clear step-by-step process highlighting both the obligations of the applicant as well as the obligations of the DHA and its administrators charged with processing and adjudicating the applications.

It is well set out and easy to follow and the Constitution and PAJA together provide for administrative justice rights and access to international law and all the rights contained within it. PAJA is particularly thorough on public authorities that are exercising their respective

²²⁵ 1951 Refugee Convention, Article 25(1).

²²⁶ Hathaway op cit note 182 at 908.

²²⁷ Ibid. at 908-909.

²²⁸ Ibid.

powers. Whilst the written law in South Africa suitably incorporates its international superior, the next question surrounds the ability of the legislation to be understood by the refugees seeking to use it.

With sufficient legal representation, there is no reason why an applicant would not be able to appropriately understand the legislation. The Refugees Act is has no particularly unusual aspects to it. In contrast, it sets out each particular provision clearly and the wording is generally reasonable. The confusion would perceivably arrive when the actual application of the law is not in accordance with the written legislation.

Administrative justice rights are mentioned in the Refugees Act through reference to PAJA alongside those provisions giving guidance on consideration of asylum applications²²⁹ and withdrawal of refugee status.²³⁰ The preamble acknowledges international legal obligations to ‘receive and treat in its territory refugees in accordance with the standards and principles established in international law.’²³¹ In this respect, the law can be deemed to be very transparent as to its intentions and the rights contained therein, serving as an effective communication of the rights and protections it offers.

4.4 COMPARISON WITH OTHER NATIONAL LEGISLATION

The ability of applicants to fully and clearly understand the law is of course subjective. Each individual may have a better or worse understanding of the law than the next person. However, when compared to other national legislation, it is fair to say that South Africa’s legislation is set out in a manner than can be suitably understood by those with a non-legal background.

4.4.1 The United Kingdom

In the United Kingdom, for example, the refugee and asylum laws are complicated. The UK’s Home Office provides an ‘Asylum Policy Instruction’ document that demonstrates the complexity of the UK’s version of the refugee system.²³² Firstly, it refers to the 1951 Refugee Convention,²³³ then the European Union legislation to which the country is bound.²³⁴

²²⁹ Refugees Act, section 24(2)(a).

²³⁰ Ibid., section 36(1).

²³¹ Ibid.

²³² United Kingdom: Home Office, *Asylum Policy Instruction: Assessing Credibility and Refugee Status*, 6 January 2015, Version 9.0, available at <<http://www.refworld.org/docid/54e487b14.html>> [accessed 16 February 2018].

²³³ Ibid. at 6.

²³⁴ At the time of writing, the UK is in negotiations to leave the EU and therefore the binding nature of EU law may be subject to change in the future.

Secondly, the domestic legislation is referred to – this contains three separate instruments in the Immigration Rules; the Asylum and immigration (Treatment of Claimants, etc.) Act 2004; and the Nationality, Immigration and Asylum Act 2002 (as amended).²³⁵ This network of different applicable legislation makes it difficult for the process to be easily understood.

With regards to administrative justice, the absence of a constitution in the UK means a reliance on the common law. The concept does not have a singular definition in UK law, but instead is ‘generally associated with a more holistic approach to citizen redress against government in which judicial review is only one mechanism among many others.’²³⁶ The Human Rights Act 1998 covers actions of public authorities and powers to take remedial action.²³⁷ Administrative justice is defined by the United Kingdom’s Tribunals, Courts and Enforcement Act 2007 as ‘the overall system by which the administrative decisions affecting individuals are taken, including the procedures and law governing such decisions and the process for resolving disputes and airing grievances in relation to them.’²³⁸ This lack of any singular definition is quite a contrast to the system in South Africa.

4.4.2 Australia

Australia’s asylum and refugee laws are governed by the Migration Act of 1958. It makes clear reference to the 1951 Refugee Convention; however the similarities to the South African system stop there. It is not specific to refugees, but instead provides for a vast range of governance covering non-citizens in general.²³⁹ Australia employs an encampment system, both on the Australian mainland and an off-shore facility located in Nauru.²⁴⁰ In the absence of a refugee-specific piece of legislation, coupled with the off-shore processing practices, it is fair to say the law has the potential to be perceived as being significantly more complex to the untrained legal reader. Australia has faced criticism for its use of off-shore processing centres on the island nation of Nauru, which has been argued to be a human rights issue in

²³⁵ Ibid.

²³⁶ Gordon Anthony ‘Administrative Justice in the United Kingdom’ (2015) 7(1) *Italian Journal of Public Law* 9-33 at 9.

²³⁷ Human Rights Act 1998, available at <<https://www.legislation.gov.uk/ukpga/1998/42/contents>> [accessed 26 March 2018].

²³⁸ Tribunals, Courts and Enforcement Act 2007, Schedule 7 para 13(4), available at <<https://www.legislation.gov.uk/ukpga/2007/15/schedule/7/enacted>> [accessed 23 December 2017].

²³⁹ Migration Act 1958, section 4, available at <<https://www.legislation.gov.au/Details/C2017C00384>> [accessed 23 March 2018].

²⁴⁰ Amnesty International (2017) *Treasure Island: How companies are profiting from Australia’s abuse of refugees on Nauru* at 5, available at <<https://www.amnesty.org/en/documents/asa12/5942/2017/en/>> [accessed 10 May 2017].

itself. The applicants through this refugee system often complain of a lack of access to rights.²⁴¹

Administrative law at the federal level in Australia was codified from the common law by way of the Administrative Decisions (Judicial Review) Act 1977.²⁴² This imposed a duty upon decision makers to give written reasons for decisions, which made challenging decisions a lot more feasible.²⁴³ This codification bears resemblance to PAJA, and therefore may present a better understanding of rights and entitlement; the use of an encampment system makes the whole process far less accessible to refugee applicants.

4.5 INACCESSIBILITY

Whilst physical barriers to accessibility exist through the Australian example of the use of encampment systems, a lack of understanding or knowledge of a legal system may appear complicated to an unfamiliar mind and will therefore require legal assistance. However, sufficient knowledge is not the last barrier to accessing a legal system.²⁴⁴

Levels of assistance stems further for those that do not speak the language of a Contracting State and interpreters may therefore be required. South Africa provides a number of suitable examples of this. Section 24(2) of the Refugees Act requires an RSDO to ‘have due regard for the rights set out in section 33 of the Constitution, and in particular, ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.’²⁴⁵ Interpreters form an important part in ensuring these requirements are met.²⁴⁶ This issue is far from straightforward, however, as the Refugee Regulations limit the burden of providing an interpreter in regulation 5(1) to such times as are ‘practicable and necessary’²⁴⁷ and further narrow the scope of the obligation in regulations 5(2) and 5(3) by

²⁴¹ United Nations Office of the High Commissioner of Human Rights (18 November 2016) “‘Australia’s human rights record blemished by punitive approach to migrants” – UN rights expert’, available at <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20889&LangID=E>> [accessed 23 March 2018].

²⁴² The Hon. Justice Garry Downes AM ‘The State of Administrative Justice in Australia’ (2007) *Canadian Journal of Administrative Law & Practice* 241.

²⁴³ Administrative Decisions (Judicial Review) Act 1977, section 13, available at <<https://www.legislation.gov.au/Details/C2017C00238>> [accessed 26 March 2018].

²⁴⁴ V Igglesden & T Schreier ‘Expanding the protection space for refugees’ (2010) Working Paper Series, available at <http://www.refugeerights.uct.ac.za/usr/refugee/Working_papers/Working_Papers_2_of_2011.pdf> [accessed 24 April 2018].

²⁴⁵ Refugees Act, section 24(2).

²⁴⁶ Justine de Jager ‘Refugee status determination in South Africa’ in Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 153-171 at 160.

²⁴⁷ Refugee Regulations, regulation 5(1).

shifting the responsibility to the applicant.²⁴⁸ This has the effect of putting an applicant in a vulnerable position or at risk of exploitation and damages the procedural right of an applicant to understand and participate in their own hearing.²⁴⁹

The issue of interpretation has arisen in case law, whereby Bozalek J held in *Katshingu* that that an RSDO's decision is rendered invalid when there is a failure to provide an interpreter competent in both English and the mother tongue of the applicant as no hearing or process could be deemed to have taken place.²⁵⁰ Failures to provide competent interpreters have also arisen in Amit's work, where non-professional interpreters were chosen at random from the crowd of asylum seekers at a RRO.²⁵¹ If no hearing has taken place, then the right to a fair hearing is not given.

Similarly, legal assistance should also be given where an applicant does not understand the legal system. Section 3(3)(a) of PAJA gives a person the right to obtain assistance and legal representation in order to ensure procedurally fair administrative action – specifically in 'serious or complex case.'²⁵² Amit's work has regularly found cases where applicants are unaware of the legal system and require assistance to follow proper procedure. One such example is the need to submit written appeals, which is described as being 'a requirement most asylum seekers are unable to meet without assistance from a legal service provider.'²⁵³

Financial constraints are described by the UNHCR as 'usually having a huge impact on access to justice.'²⁵⁴ Court proceedings often carry a heavy financial burden involving costs for various aspects such as lawyers' fees, travel and time, and in circumstances where a person's financial situation creates inequality before the law this can amount to discrimination.²⁵⁵

The UNHCR identifies the issue of inaccessibility as being particularly relevant to asylum seekers by stating:

²⁴⁸ Ibid., regulation 5(2) and 5(3).

²⁴⁹ Justine de Jager op cit note 246 at 160.

²⁵⁰ *Katshingu v The Standing Committee for Refugee Affairs* (19726/2010) (2011) ZAWCHC 480 (2 November 2011) 12.

²⁵¹ Amit *All Roads Lead to Rejection* op cit note 12 at 78.

²⁵² PAJA, section 3(3)(a).

²⁵³ Amit *All Roads Lead to Rejection* op cit note 12 at 81.

²⁵⁴ United Nations Human Rights Council Report of the Special Rapporteur on the Independence of Judges and Lawyers EHR/8/4, 13 May 2008, para 24, available at <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/134/14/PDF/G0813414.pdf?OpenElement>> [accessed 9 April 2018].

²⁵⁵ Ibid. para 25.

[C]ases involving immigrants, asylum seekers and ethnic minorities are revelatory, since cultural and language barriers compound the already precarious situation in which they find themselves in regard to the effective exercise of their rights before the courts.²⁵⁶

4.6 CONCLUSION

The international law is comprehensive regarding rights, despite it falling short of providing guidance on procedural aspects. However, the existence of the UNHCR Handbook offering guidance on procedure has given a voice to the silence. The administrative justice provisions in Article 25 of the 1951 Refugee Convention are absent of any specific definition, which makes it relatively vague. However, it does demonstrate recognition of the vulnerability of a refugee and the subsequent necessity of administrative assistance being provided by a Contracting State as a way of mitigating this vulnerability. Although not part of chapter V of the 1951 Refugee Convention and the title of administrative measures, the right to access courts of law under Article 16 provides an appropriate administrative justice provision with regards to appeals of decisions made during the RSD process.

The incorporation of international obligations into South African law is done so in a clear and concise manner, with the legislation expressly designed to give effect accordingly. The case law has demonstrated a desire by the courts to ensure the international law provisions are applied correctly and effectively. The law theoretically provides a strong level of protection to refugees entering South Africa, and is comparably more understandable than other legal mechanisms in other countries offering protection.

Underneath the incorporation of international law, the thorough codification of the constitutional rights to administrative justice through PAJA underpins an intention for the law to succeed. In order to do this it needs to be effective, and an ability for it to be understood by those seeking to rely on it is a step towards that success.

Where the suitability fails in South Africa is with its accessibility. Certain assistance such as interpreters, legal and financial aid is often vital in ensuring sufficient access to rightful administrative justice. Amit's work has uncovered situations where applicants require this sort of assistance in order to properly participate in the procedure, and case law has demonstrated that the decisions of an RSDO can be rendered invalid if the right levels of accessibility are not given.

²⁵⁶ Ibid. para 29.

Chapter 5 – The South African problem

5.1 INTRODUCTION

Administrative justice forms a fundamental part of human rights law instruments, particularly in the context of refugee rights. With such grave potential consequences at stake under the principle of *non-refoulement*, it is absolutely vital that sufficient administrative justice is carried out when determining the application of an asylum seeker so as to provide the protection that international legal mechanisms are intended to afford.

The UNHCR Handbook provides valuable guidance on sufficient protection to be provided to refugees.²⁵⁷ It has been considered soft law in a number of jurisdictions, with a South African example being in *Tantoush*. Here the Handbook was used as an aid for the interpretation and implementation of the Refugees Act in order to establish the required burden and standard of proof in the status determination process.²⁵⁸ There are also annual conclusions on various topics issued annually by the UNHCR Executive Committee which have been used by the courts in different jurisdictions to interpret and implement their relevant domestic legislation.²⁵⁹

Guidelines on the procedural process for determining refugee status are provided in part two of the Handbook, listing ‘certain basic requirements’²⁶⁰ that are to be met when considering an asylum application. One such requirement is that an applicant who is not recognised as a refugee should ‘be given a reasonable time to appeal for a formal reconsideration of the decision, either to the same or to a different authority, whether administrative or judicial, according to the prevailing system’²⁶¹ which is the Constitution in South Africa.

Despite such suitable codification of international law in the domestic law in South Africa,²⁶² there are continued failings to give asylum applicants the rights to just and fair administrative action in the status determination process. The case law demonstrates the scale of the failings, and this chapter will analyse the particulars of these failings from the specific viewpoint of the right to administrative justice and human dignity.

²⁵⁷ Lee Anne de la Hunt op cit note 188 at 173.

²⁵⁸ *Tantoush* supra note 145 paras 96-98.

²⁵⁹ Lee Anne de la Hunt op cit note 188 at 173.

²⁶⁰ UNCHR Handbook para 192.

²⁶¹ *Ibid.* para 192(vi).

²⁶² Daven Dass et al op cit note 58 at 209, particularly with regards to Article 25(1) of the 1951 Refugee Convention.

5.2 WHAT WENT WRONG IN SOUTH AFRICA?

A number of studies conducted on the processing of refugees in South Africa have often lead to similar conclusions – that the refugee status determination process in South Africa is failing those applying for the protection it is supposed to offer. Roni Amit has conducted a number of studies analysing these failing, with one particular piece exploring 240 status determination decisions in 2011. The study looks at the quality of the decisions made in accordance with international and domestic refugee law, as well as the policy and practice of the DHA and the subsequent adherence to the law.²⁶³

5.2.1 Highlighting the failures

Citing constitutional rights to just administrative action, Amit lists certain requirements that a RSDO must meet in order to adhere to the law. Any decisions must provide clear reasons for that decision; must correctly apply the law; must be based on relevant considerations; must not be arbitrary; and must be both rational and reasonable, showing a logical connection to the information and reasons relating to any decision.²⁶⁴

Amit's work identifies several specific problems. In terms of legal application, errors in law such as misapplications of the concept of 'well-founded fear' and 'persecution' – both of which are used in the 1951 Refugee Convention definition of a refugee²⁶⁵ – and of section 3(b) of the Refugees Act which provides for protection of those fleeing from general conditions of instability. In addition, Amit cites the improper use of the credibility standard, the wrong burden and standard of proof, and improper use of the manifestly unfounded standard²⁶⁶ (which is defined in the Refugees Act as 'an application for asylum made on grounds other than those on which such an application may be made under this Act'²⁶⁷).

The study also found administrative errors such as reference to the wrong claimant or their respective country and inaccurate assessment of the conditions in the country the applicant is fleeing from.²⁶⁸ Crucially, Amit identifies administrative justice as one of three key concerns found as a result of the study, whereby applicants were denied their 'constitutionally guaranteed right to just administrative action, which requires government

²⁶³ Amit *All Roads Lead to Rejection* op cit note 12 at 7.

²⁶⁴ Ibid.

²⁶⁵ 1951 Refugee Convention, Article 1A(2).

²⁶⁶ Amit *All Roads Lead to Rejection* op cit note 12 at 8-9.

²⁶⁷ Refugees Act, section 1.

²⁶⁸ Amit *All Roads Lead to Rejection* op cit note 12 at 9.

actions to be fair, transparent, and accountable.²⁶⁹ This point is further elaborated on by Kerfoot and Schreier in studying the reception of asylum applications and the subsequent barriers to access faced by applicants.²⁷⁰ Two other concerns are a lack of protection and the outright functional failure of the DHA with regards to the asylum system.²⁷¹

5.2.2 Failings lead to a denial of rights

The consequences of insufficient administrative justice go further than affecting the applicants. Not only can failure to administrate correctly affect the individuals seeking international law protection by violating the *non-refoulement* principle, but its disregard can erode the rule of law. Amit writes that it ‘undermines public confidence in the institutions of the state, and threatens the vibrancy of democracy.’²⁷² It also allows individuals to exploit the refugee system, which has the effect of further diminishing public confidence in the system.²⁷³

Many asylum applicants do not understand their right to appeal.²⁷⁴ This makes the rights to administrative justice all the more crucial, as the reasons given for a negative decision are the basis on which an applicant must base their appeal. If these reasons are incorrect, vague or insufficient then the chances of a successful appeal are heavily reduced – something which should not happen when those forced to return to their country of origin face potentially life-threatening situations.²⁷⁵ The only other option for applicants may be to remain in South Africa illegally which will further expose their lack of protection. The decision of the RSD is aptly described by Amit as being ‘central to whether South Africa fulfils its international and domestic legal obligations to provide protection to persons fleeing persecution and conflict.’²⁷⁶

The result of poor decision letters has the effect of turning the Appeal Board into a court as it is ‘forced to re-hear most cases that come before it in order to reach a decision.’²⁷⁷ In another Amit’s studies, 324 decision letters were analysed and not a single one was found to be ‘fulfilling the Constitutional guarantee of administrative justice.’²⁷⁸ The legal requirement

²⁶⁹ Ibid.

²⁷⁰ William Kerfoot and Tal Schreier op cit note 45 at 137.

²⁷¹ Amit *All Roads Lead to Rejection* op cit note 12 at 9.

²⁷² Amit *Protection and Pragmatism* op cit note 25 at 7.

²⁷³ Ibid. at 7-8.

²⁷⁴ Ibid. at 12.

²⁷⁵ Ibid. at 13.

²⁷⁶ Ibid. at 12.

²⁷⁷ Ibid.

²⁷⁸ Ibid. at 13.

for sufficient, detailed reasons were instead replaced errors of law, a lack of case-specific decisions, a distinct lack of provided reasons and extensive failure to apply the mind.²⁷⁹ In finding such a substantive failure to meet administrative justice standards, Amit describes the RSD process as being fatally flawed.²⁸⁰

5.3 INVOKING ADMINISTRATIVE JUSTICE TO ADDRESS THE FAILINGS

The problems facing applicants going through the South African asylum and refugee system can be demonstrated through case law, which uncovers a number of areas which hinder refugee rights in South Africa. These are attributed to a number of factors and include errors of law that lead to a restriction of human rights and human dignity, the adverse impact of inappropriate and incorrect administrative action, and incidences whereby grounds for review are triggered by negative decisions. These areas demonstrate the misapplication of the law and the subsequent denial of administrative justice in South Africa's refugee system.

5.3.1 RRO closures

The issue of RRO closures in South Africa is described by Kerfoot and Schreier as 'the harshest form of a barrier to access'²⁸¹ faced by applicants. Closures began in 2011 as part of a government plan to move RROs to border areas in the north of the country.²⁸² Six RROs existed at the beginning of 2011, and since then the offices in Johannesburg, Port Elizabeth and Cape Town either closed completely or refused to accept any new applications.²⁸³ This brought about an outpouring of litigation challenging the lawfulness of these decisions to close or restrict access.²⁸⁴ Each challenge was successful, with the High Court deeming the decisions to be unlawful.²⁸⁵

The *SASA* case concerned the closure of the RRO in Port Elizabeth.²⁸⁶ The applicants sought to have the decision to close the office declared unlawful on the basis that it was taken without consultation with the Standing Committee for Refugee Affairs – a requirement under

²⁷⁹ Ibid.

²⁸⁰ Ibid. at 14.

²⁸¹ Kerfoot and Schreier op cit note 270 at 140.

²⁸² Ibid. at 143.

²⁸³ Ibid. at 143-144.

²⁸⁴ *Minister of Home Affairs and others v Somali Association of South Africa, Eastern Cape (SASA EC) and another* [2015] 2 All SA 294 (SCA) para 5.

²⁸⁵ Ibid., editor's summary.

²⁸⁶ *Somali Association of South Africa, Eastern Cape & another v Minister of Home Affairs & others* [2012] JOL 28458 (ECP) at 2.

section 8(1) of the Refugees Act.²⁸⁷ It was also argued by the applicants that the decision to close was taken irrationally, unreasonably and was based on irrelevant considerations. It was also absent of any proper public consultation or opportunity for those affected by the decision to make representations.²⁸⁸

In the High Court judgment, Pickering J held that:

[I]n all the circumstances I am satisfied that the decision taken by the second respondent to close the Port Elizabeth refugee Reception Office without having first consulted with the Standing Committee for Refugee Affairs is unlawful and falls to be set aside.²⁸⁹

Pickering J describes one of the core functions of a RRO as providing ‘the necessary administrative machinery to enable new applicants to apply for asylum.’²⁹⁰ This quote, along with the overall judgment in *SASA*, demonstrates the importance of RROs in ensuring sufficient administrative justice is afforded to asylum seekers.

Failure to consult the Standing Committee arose again in the first *Scalabrini* case of 2012, where a High Court order was issued to reopen the Cape Town RRO on grounds of a breach of the provisions of PAJA. These closures make it difficult for those residing and arriving in certain areas of the country to attend RROs.²⁹¹ This view is expressed in the 2013 *Scalabrini* judgment, which argues the requirement of applicants residing in Cape Town will ‘need to spend time and money to travel’²⁹² to RROs which is described as ‘grossly unreasonable’²⁹³ and presents problems to those applicants that are working or have dependents. The 2017 *Scalabrini* judgment held the decision to close the Cape Town RRO was irrational²⁹⁴ and therefore unlawful under the constitutional principle of legality as well as the provisions of section 8 of the Refugees Act.²⁹⁵

5.3.2 Where access is denied to the asylum system

The 2007 *Kiliko* case saw claims that only a limited number of applicants were allowed to enter the RRO in Cape Town to make an application for asylum, which meant they were unable to start the process and were subsequently detained as illegal foreigners under section

²⁸⁷ Ibid. at 8-9.

²⁸⁸ Ibid., mini summary.

²⁸⁹ Ibid. at 10.

²⁹⁰ Ibid. at 8.

²⁹¹ Kerfoot and Schreier op cit note 270 at 145.

²⁹² *Scalabrini Centre v Minister of Home Affairs* 2013 (3) SA 531 (WCC) para 110.

²⁹³ Ibid.

²⁹⁴ *Scalabrini Centre, Cape Town and others v Minister of Home Affairs and others* [2017] 4 All SA 686 (SCA) para 64.

²⁹⁵ Ibid. para 29.

1 of the Immigration Act.²⁹⁶ The State argued the backlog of applications caused by the high numbers of refugees entering the country was the reason for the restricted access to the RRO, however this response was deemed to be unsatisfactory and the court cited international law obligations on the State to ‘respect the basic human rights of any foreigner who has entered its territory.’²⁹⁷

The 2008 *Kiliko* judgment describes the denial of access to a section 22 permit as affording an applicant nothing but ‘disadvantages and disabilities’²⁹⁸ when referring to the restrictions and limitations faced by those found to be illegal foreigners under the Immigration Act. A section 22 permit protects applicants from apprehension, detention and deportation, and offers other rights to employment, education and other activities that ‘human beings ordinarily participate in.’²⁹⁹ Failure to issue section 22 permits ‘impacts deleteriously upon or threatens to so impact upon at least his or her human dignity and the freedom and security of his or her person.’³⁰⁰

The practice of limiting the number of applicants processed restricts rights, and the extent of these failures is summed up by Van Reeren J in the 2008 *Kiliko* judgment:

[T]he affidavits of those who have repeatedly but unsuccessfully attempted to obtain section 22 permits paint a graphic but debilitating picture of the gross humanity which is being meted out to asylum seekers because of the failure on the part of the South African authorities to fully adhere to the International Instruments as regards to the treatment of refugees assented to by the Government and to fully comply with the laws passed by it in order to give effect thereto.³⁰¹

Access to RROs has been challenged in a number of cases. In addition to failures by the Cape Town, the offices in Johannesburg and Pretoria have also been challenged. The DHA was exposed in *Tafira* for having too few refugee reception officers to deal with the number of applications being received,³⁰² and the consequences of such under-resourcing lead to improper and unlawful practices, such as the use of ‘appointment slips’ containing a date on which the applicant must return to the RRO to consult with an officer³⁰³ and pre-screening

²⁹⁶ *Kiliko* [2007] supra note 169 para 1.

²⁹⁷ *Ibid.* para 28.

²⁹⁸ *Kiliko and others v Minister of Home Affairs and others* (2739/05) [2008] ZAWCHC 124 (4 March 2008) para 8.

²⁹⁹ *Kiliko* [2007] supra note 169 para 27.

³⁰⁰ *Ibid.* para 28.

³⁰¹ *Kiliko* [2008] supra note 298 para 8.

³⁰² *Tafira and others v Ngozwane and others* (12960/06) [2006] ZAGPHC 136 (12 December 2006) at 3.

³⁰³ *Ibid.* at 5.

procedures whereby the Zimbabwean applicant in question were told they did not qualify for refugee status – one person was even ‘advised’ that she did not meet the requirements.³⁰⁴

The issue of under-resourcing arises in *Voortrekker Road*, where the issue at hand was initially a planning and land use dispute between the owner of the property adjacent to the premises being used for the relocated RRO in Cape Town.³⁰⁵ Part of the applicant’s argument extended to the issue of the under-resourced RRO leading to a large crowd of asylum seekers gathering outside the gates and spilling out on to the roads of the RRO in order to increase their chances of being processed that day.³⁰⁶ There were also incidents of applicants sleeping on the street outside the premises. In the judgment, Binns-Ward J described the RRO as being ‘unable to deal adequately with the average number of asylum seekers who present themselves daily.’³⁰⁷

The problems identified in *Tafira* link with *Kiliko* whereby failure to issue section 22 permits results in those applicants being at risk of becoming illegal foreigners under the Immigration Act and therefore subsequently exposed to the disadvantages pertained thereof. The appointment slips issued offers no rights similar to the section 22 permit, nor does it offer any similar protection.³⁰⁸

The aims of the section 22 asylum permit and its role in terms of protection are discussed further in *Arse*, which saw the applicant unlawfully detained under the Immigration Act on section 23 grounds for being an illegal foreigner as his asylum transit permit has expired. The applicant contested he tried to enter the RRO in Port Elizabeth but was unable to gain entrance due to lengthy queues.³⁰⁹ The judgment considered the conflicts between the Immigration Act and the Refugees Act, with a focus on achieving the ‘spirit of the international instruments the Refugees Act seeks to give effect to.’³¹⁰ It was decided the applicant had not exhausted all rights to review or appeal under the Refugees Act and therefore his detention was unlawful.³¹¹

³⁰⁴ Ibid. at 7-8.

³⁰⁵ *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and others* 2010 (8) BCLR 785 (WCC) para 5.

³⁰⁶ Ibid. para 73.

³⁰⁷ Ibid. para 71.

³⁰⁸ Ibid. at 5.

³⁰⁹ *Arse v Minister of Home Affairs and others* 2012 (4) SA 544 (SCA) para 2.

³¹⁰ Ibid. para 19F.

³¹¹ Ibid.

5.3.3 Delay in decision-making

Regulation 3(1) of the Refugee Regulations states an application will ‘generally be adjudicated by the Department of Home Affairs within 180 days.’³¹² It is important, therefore, to consider the implications resulting from a failure to adjudicate a RSD within the prescribed timeframe.

One such consequence of delays in decision making is the creation of an ‘unjustifiable prejudice’ as described by Thring J in *Ryobeza*.³¹³ In this instance, the applicant was granted refugee status and had been a continuous resident in South Africa for more than five years and therefore wished to apply for an immigration permit under section 25 of the Aliens Control Act 1991, with a view to progressing to permanent residency.³¹⁴ This is covered by section 27(c) of the Refugees Act as long as it is certified by the Standing Committee that the person concerned will remain a refugee indefinitely.³¹⁵

The application sought certification from the Standing Committee in September 2002 by way of a letter demonstrating ongoing high levels of violence in Burundi, the applicant’s home country. No response was received despite a written reminder being sent in October 2002. An affidavit was filed in December 2002 and the DHA stated in an opposing affidavit in February 2013 that the applicant was ‘expecting the impossible.’ This was absent of any explanation as to why this was considered impossible and why the committee had not provided so much as an acknowledgment of the applicant’s request.³¹⁶

The applicant applied to the court on 24 December 2002 as a matter of urgency due to two underlying reasons. The first was that his personal and professional life is being comprised by the delay, citing the failure to get a loan from the bank in order to purchase a car which he needed for work.³¹⁷ The second submission questioned the legitimacy of the committee members and sought to have them removed. This was argued to be urgent because it is important for the committee members to know whether they are acting lawfully with regard to proper administration of the Refugees Act³¹⁸ – which is to be independent and to function without bias according to section 9 of the Refugees Act.³¹⁹

³¹² Refugee Regulations, regulation 3(1)

³¹³ *Ryobeza and another v Minister of Home Affairs and others* [2003] 2 All SA 696 (C) at 708.

³¹⁴ *Ibid.* at 697-698.

³¹⁵ Refugees Act, section 27(c).

³¹⁶ *Ryobeza* supra note 313 at 698.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.* at 698-699.

³¹⁹ Refugees Act, section 9.

In the judgment, Thring J made an order declaring the appointment of the Standing Committee members to be *ultra vires*, unlawful, unconstitutional and invalid³²⁰ due to the members being employees of the DHA and therefore lacking sufficient independence. The respondent was also ordered to receive the immigration permit application from the applicant and consider it accordingly.³²¹

5.3.4 Errors in decision-making

PAJA entrenches the right to administrative justice,³²² and the basic requirements with regards to RSDs are contained in section 3(2)(b) of PAJA, including adequate notice of the decision, reasonable opportunity to make representations, clear statements of administrative action, adequate notice of any right of review or internal appeal and adequate notice of the right to request reasons for any decision.³²³

5.3.4.1 Failure to elicit relevant information

Another notable error of law during status determination is the duty of the RSDO to elicit information.³²⁴ This is governed by section 24(1) of the Refugees Act and permits liaison with the UNHCR with regards to specific incidents and cases, and also allows an RSDO to provide any relevant information to the UNHCR as part of any consultation over a particular case (although this requires the permission of the applicant).³²⁵ The aim of this is to assist the RSDO to get as clear a picture as possible in order to make an appropriate and correct decision.³²⁶ A demonstration of this failing is seen in *Katabana* whereby an application was refused on grounds that were not permitted under the Refugees Act.³²⁷ The applicant had claimed he was forced to flee the DRC after his mother was burned to death by the community on suspicion of witchcraft. The RSDO had been extremely brief in the decision and failed to elicit information as to the area from which the applicant had fled. The Court later found that to return him to the DRC would contravene the principle of *non-refoulement* by exposing him to an ‘excruciating set of dangers which seems wrong, unjust and unfair.’³²⁸

In addition to eliciting information, any information used to consider information relating to an applicant’s country of origin in the decision making process must be shared with the

³²⁰ Ibid. at 708-709.

³²¹ Ibid. at 709.

³²² Lee Anne de la Hunt op cit note 188 at 192.

³²³ PAJA, section 3(2)(b).

³²⁴ Kerfoot and Schreier op cit note 270 at 159.

³²⁵ Refugees Act, section 24(1)(c).

³²⁶ Kerfoot and Schreier op cit note 270 at 159.

³²⁷ *Katabana* Court Record 75.

³²⁸ *Katabana* supra note 145 at 27.

applicant in the interests of procedural fairness. In *AOL*, Swain J stated in the judgment that ‘it was clear that an individual had to be furnished with all information that was prejudicial to his or her case before a decision was taken.’³²⁹ The facts in this case demonstrated this was not done, and the decision was set aside on these grounds as well as the lack of any indication that the initial decision to refuse the application was actually made by an RSDO under section 24(3)(b) and 24(3)(c) of the Refugees Act, which consequently meant the Appeal Board did not have jurisdiction to review the decision.³³⁰ Furthermore, no notice of the appeal hearing was issued to the applicant and therefore appropriate legal representation was not obtained, which was deemed to be an example of procedural unfairness.³³¹

5.3.4.2 *Sufficient reasons not provided*

A common criticism of the DHA amongst scholars is insufficient reasons provided to applicants for negative decisions. This is a regular occurrence in the findings of Amit’s work,³³² and important rights exist when potentially adverse consequences can result from negative refugee status decisions.³³³ The RSDO is obliged to provide written reasons for refusal to the applicant³³⁴ to ensure rights to reasons for adverse administrative action are afforded. The case law around this issue presents a number of different arguments. Firstly, in *Katabana* the judgment accepted that ‘a body such as the RSDO is not a court and is not required to prepare a judgment’³³⁵ or an extensive set of legal reasons, however the judge goes on to emphasise the need for ‘great care’ to be taken in making these decisions.³³⁶

Secondly, due to the disadvantages to an individual being declared an illegal foreigner and the adverse effect this can have, particularly in the case rejected applications, it is understandable for that individual to want to know why that decision was taken. This was the view of Mokgoro J in *Koyabe*, whereby the example was used to justify and emphasise the importance of communicating true reasons to the applicant in the event that they wish to seek a ‘meaningful review.’³³⁷ Amit writes in her study of RSDO rejection letters there were sometimes no reasons given at all or were incredibly general in nature, sometimes even cut

³²⁹ *AOL v Minister of Home Affairs* 2006 (2) SA 8 (D) para 13I.

³³⁰ *Ibid.* at 12H - I.

³³¹ *Ibid.* at 13E - F.

³³² Amit ‘No Refuge’ op cit note 18 at 462; *Protection and Pragmatism* op cit note 25 at 45; and *All Roads Lead to Rejection* op cit note 12 at 44.

³³³ Kerfoot and Schreier op cit note 270 at 164.

³³⁴ Refugees Act, section 24(4) read with regulation 12(3).

³³⁵ *Katabana* supra note 145 at 24.

³³⁶ *Ibid.*

³³⁷ *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* 2009 (12) BCLR 1192 (CC) para 61.

and pasted paragraphs that did not assess the individual claim whatsoever.³³⁸ The key message is that each application must be considered on a case-by-case basis.

Assessing asylum applications of a case-by-case basis is mentioned in *Dorcasse*. Moshidi J, quoting Professor John Dugard in *International Law – A South African Perspective*, states:

[A]ssessments as to whether an individual will face persecution if returned to a particular state must be made on a case by case basis taking into account, on the one hand, the notions of individual integrity and human dignity and, on the other hand, the manner and degree to which they stand to be injured.³³⁹

Not only does this emphasise the right to human dignity in the assessment process as a whole, but it also emphasises the importance of the *non-refoulement* principle in safeguarding a person from persecution.

Dass et al write that ‘where *any* administrative action is taken which adversely affects the rights of refugees and asylum seekers; they are entitled to request written reasons for that decision.’³⁴⁰ When this is viewed alongside the findings in Amit’s work the extent of the failed duties is exposed.³⁴¹ Failure to provide written reasons is contrary to section 5(1) of PAJA, which provides that such written reasons should be provided within 90 days of the request.³⁴² Section 5(2) states that the given reasons must be adequate and further reinforces the 90 day timeline.³⁴³

Section 5(3) of PAJA is crucial as it provides that in the event of a failure to provide adequate reasons for the administrative action taken, the presumption is that the respective action was taken without good reason.³⁴⁴ When the wording of this section is applied to Amit’s findings, any incident where there was found to be either no reason or inadequate reasons given for RSDs, then those particular decisions should be presumed to be decisions made *in absentia* of any lawful or valid reason and are therefore by default in contravention of the legal requirements of PAJA.

5.3.4.3 Errors in law

Errors in law can result in restrictions of human rights and human dignity. Section 10 of the Constitution provides for human dignity, giving everyone the right to ‘inherent dignity and

³³⁸ Amit ‘No Refuge’ op cit note 18 at 475.

³³⁹ *Dorcasse* supra note 145 para 36.

³⁴⁰ Daven Dass et al op cit note 58 at 209.

³⁴¹ Amit *All Roads Lead to Rejection* op cit note 12 at 44-45.

³⁴² PAJA, section 5(1).

³⁴³ *Ibid.*, section 5(2).

³⁴⁴ *Ibid.*, section 5(3).

the right to have their dignity respected and protected.’³⁴⁵ Human dignity is an issue that arises in a number of case law judgments.

In *Ersumo*, the applicant was an Ethiopian national who was arrested for not reporting to an RRO within 14 days of being issued with an asylum transit permit³⁴⁶ – which is a requirement under section 21 of the Refugees Act. The applicant argued the section 21 requirements were impossible for him to comply with as officials at the RRO were not assisting all those in the queue.³⁴⁷ He also claimed he had been mugged and lost his permit in the process. The State, in response, disputed his claims citing incorrect factual detail and contradictions in the story.³⁴⁸

Despite the State arguing that, regardless of the claimed circumstances of the applicant relating to the lost permit, regulation 2(1)(a) of the Refugee Regulations requires asylum applications to be made without delay, the Supreme Court of Appeal held that whilst regulation 2(1)(a) requires there to be no undue delay it also fails to specify a particular time period for making an application.³⁴⁹ Furthermore, the Refugees Act does not state that a delay in making an application constitutes grounds for refusal of a proper claim for refugee status. This is supported further by regulation 2(2),³⁵⁰ whereby anyone found to be in the country in contravention of the Immigration Act that expresses an intention to apply for asylum is to be permitted to do so and therefore shall be issued a section 23(1) asylum transit permit allowing them to lodge an asylum application at an RRO within 14 days.³⁵¹

The Court found no reason for denying the applicant his regulation 2(2) rights and an asylum transit permit was issued. To avoid the applicant being prevented from applying for asylum again, the Minister and Director-General of Home Affairs were directed to give the applicant priority upon his attendance at an RRO.³⁵²

The importance of regulation 2(2) is emphasised in *Bula*, particularly how it is designed as such to ensure ‘genuine asylum seekers are not turned away.’³⁵³ *Bula* further emphasised that once an intention to apply for asylum is expressed, they have the right to be treated

³⁴⁵ The Constitution, section 10.

³⁴⁶ *Erusmo v Minister of Home Affairs and others* [2012] 3 All SA 119 (SCA) para 72.

³⁴⁷ *Ibid.* para 3.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.* para 17.

³⁵⁰ *Ibid.*

³⁵¹ *Ibid.* para 16.

³⁵² *Ibid.* para 23.

³⁵³ *Bula and others v Minister of Home Affairs and others* [2012] 2 All SA 1 (SCA) para 72.

according to regulation 2(2) whether that intention is expressed immediately or not.³⁵⁴ The applicant therefore has the right under section 22 to have their case heard by a RSDO who is responsible for determining the merits of a claim, as the law determines it is an RSDO responsibility and not the responsibility of a court investigation.³⁵⁵

The argument extends beyond pursuing the rights of refugees regarding decisions made by the various bodies in *Tantoush*, and demonstrates that decisions made by RSDOs and the Appeal Board constitute administrative action under the meaning of section 1 of PAJA.³⁵⁶ This example provides a basis for other failures in the processing system and their respective duties under PAJA. It sets out the grounds for when an applicant is entitled to review, and draws on section 6 of PAJA by stating that it ‘concretely embodies the constitutional right to just administrative action, and codifies and supplants the common law grounds for judicial review.’³⁵⁷ The judgment cites *Bato Star Fishing*, which is an environmental law case that determined that matters relating to PAJA became constitutional matters by virtue of the fact that PAJA is designed to give effect to section 33 of the Constitution.³⁵⁸

Although there are a number of grounds for review, *Tantoush* can be used to demonstrate grounds for review and appeals of RSDs in the context of rights to a fair hearing and decisions made with errors of law.³⁵⁹ The main arguments put forward by the applicant in this case were that the proceedings were procedurally unfair and the decision contained material errors of fact and law, and that the decision was not rationally connected to the information presented, nor were the considerations relevant and that it was therefore unreasonable.³⁶⁰ The submission was that the decision was unconstitutional and unlawful due to bias and prejudice towards the applicant.³⁶¹ JR Murphy agreed with the applicant’s submission and the decisions of the RSDO and the Appeal Board was set aside and the applicant was granted refugee status under the Refugees Act.³⁶²

In *Tantoush*, the first error of law surrounded the failure of the Appeal Board to consider the correctness of the RSDO decision. As a result of this failure, the decision is set aside

³⁵⁴ Ibid.

³⁵⁵ Ibid. para 77.

³⁵⁶ Daven Dass et al op cit note 58 at 209.

³⁵⁷ *Tantoush* supra note 145 para 66.

³⁵⁸ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and others* 2004 (4) SA 490 (CC) para 25.

³⁵⁹ Lee Ann de la Hunt op cit note 188 at 196-197.

³⁶⁰ *Tantoush* supra note 145 para 5.

³⁶¹ *Tantoush* supra note 145 para 67.

³⁶² Ibid. para 139.

under section 6(2)(a) and 6(2)(f)(i) of PAJA, both of which provide provisions for judicial review where the administrator was not authorised to take the respective action.³⁶³

The second error of law related to the ‘appropriate standard of proof applicable in the determination of whether an applicant has a “well-founded fear” of persecution in order to qualify for refugee status under section 3(a) of the [Refugees] Act.’³⁶⁴ The judgment describes the well-founded fear principle as the ‘primary question for determination before the RSDO.’³⁶⁵ States are in charge of forming their own procedures in the absence of any set procedure in the 1951 Refugee Convention. In South Africa, the common-law dictates the applicable standard of proof.³⁶⁶ In criminal matters the threshold is *beyond a reasonable doubt*, and in civil matters the threshold is lower with a *balance of probabilities*.³⁶⁷ However, in *Tantoush* the judgment determined this approach to be incorrect, based on prior case law that established the ‘appropriate standard is one of “a reasonable possibility of persecution”’ and therefore takes the form of a lower threshold.³⁶⁸

There is a UNHCR note providing guidance on the standard and burden of proof, which determines the balance of probabilities standard to be too burdensome.³⁶⁹ The judgment further references the UNHCR Handbook paragraphs 196 and 197, which provide guidance on when to apply the benefit of the doubt and the strictness of application with regard to evidence requirements.³⁷⁰

In *Dorcasse*, an applicant from the DRC was arrested and issued with a deportation order after her asylum application was rejected and her section 22 permit had expired.³⁷¹ The applicant has arrived in South Africa in 2006 and issued with a section 22 permit in 2007.³⁷² Her permit was renewed and extended a number of times, and a decision on her application was not made until 2009 whereby it was rejected.³⁷³ The applicant lodged an appeal in 2010 to the Appeal Board and her permit was continually renewed until a decision was made on

³⁶³ *Tantoush* supra note 145 para 93.

³⁶⁴ *Ibid.* para 94.

³⁶⁵ *Ibid.*

³⁶⁶ Fatima Khan ‘Well-founded fear’ in Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 34-45 at 34.

³⁶⁷ *Ibid.* at 41.

³⁶⁸ *Tantoush* supra note 145 at 97. The case law cited in the judgment is *Immigration and Naturalization Service v Cardoza-Tonesca* 480 US421 (1987) at 440; *Fang v Refugee Appeal Board and others* 2007(2) SA 447(T); and *Van Garderen N.O v Refugee Appeal Board* unreported decision 30720/2006 of 19 June 2007.

³⁶⁹ UNHCR Note on Standard and Burden of Proof, 16 December 1998, available at <<http://www.refworld.org/docid/3ae6b3338.html>> [accessed 7 February 2018].

³⁷⁰ *Tantoush* supra note 145 at 98.

³⁷¹ *Dorcasse* supra note 145 para 7.

³⁷² *Ibid.* para 6.

³⁷³ *Ibid.* para 7.

the appeal. Upon the applicant's arrival at the RRO in Pretoria in 2012 to once again renew her permit she was arrested on grounds of being an illegal foreigner.³⁷⁴ As it transpired, a decision had been made on her appeal a year earlier and it had been rejected – however, neither the applicant nor her representatives knew of the decision.³⁷⁵

Two issues are of particular importance in this case. The first is the time taken to provide a decision on the original application – the so called ‘temporary’ asylum permit as per section 22 had to be renewed by the applicant continually from its issue in 2007 to when the original decision is made in 2009. The second is the way in which the appeal was conducted by the Appeal Board. This is perhaps the most striking error of the two issues highlighted, and the judgment emphasises this by determining the applicant's request for an order for release should succeed based on the procedural aspects in the claim and shortcomings in the appeal procedure.³⁷⁶

Not only did the Appeal Board fail to inform the applicant and/or her representative of the outcome of the appeal, but the decision was deemed to be *ultra vires* by Moshidi J as the appeal process was not legally constituted according to the law.³⁷⁷ Section 13 of the Refugees Act requires an appeal to be heard by a ‘chairperson and at least two other members’,³⁷⁸ yet the decision letter was signed by only one member.³⁷⁹ The counter argument put forward by the respondents was that section 13 of the Refugees Act had been repealed and replaced by section 11 of the Refugees Amendment Act and therefore the appeal was heard by the Refugee Appeals Authority rather than the Appeal Board, however the judgment determined the new law had not taken effect at that point.³⁸⁰ In any case, whether the Appeal Board or the Appeals Authority heard the appeal, the composition of the body that heard the appeal in *Dorcasse* was ‘not properly and legally constituted.’³⁸¹

In *Tshiyombo*, the applicant had also been refused refugee status on grounds of an unfounded claim. A subsequent appeal was also refused. The entire process from original application to the conclusion of appeals took seven and a half years, which Binns-Ward J

³⁷⁴ Ibid.

³⁷⁵ Ibid. para 9.

³⁷⁶ Ibid. para 10.

³⁷⁷ Ibid. para 14.

³⁷⁸ Refugees Act, section 13.

³⁷⁹ *Dorcasse* supra note 145 para 14.

³⁸⁰ Ibid. para 13.

³⁸¹ Ibid. para 15.

described as ‘an inordinate length of time’³⁸² and on the subject of administrative action stated that:

[C]onstitutional principles enjoin administrative efficiency; not as an abstract norm, but for the benefit and protection of all of us who are unavoidably affected by various forms of administrative action to a greater or lesser degree.³⁸³

The judgment also describes the Refugees Act and its administration as being ‘imbued with a humanitarian approach’³⁸⁴ and emphasises the adverse effects faced by the applicant and his family by the delays experienced in the decision making process, which include security and freedoms such as ‘travel documentation, health and education benefits and eventual qualification for permanent residence.’³⁸⁵

5.3.4.4 Rights to a fair hearing

A number of failures during the hearing process rendered the hearing unfair in *Tantoush*, which contained allegations of bias by the Appeal Board whereby meetings with Interpol were not recorded and not presented to the applicant’s legal representatives, thus denying them the opportunity to raise any objections. Although the judgment admits that the respondent’s approach to Interpol did not constitute bias, it was the ‘shortcomings in conduct’ that amounted to a ‘reasonable perception of bias’ that might not have been so had the content of the meetings been disclosed to the applicant. The result of not disclosing this information meant it could be reasonably argued that the Appeal Board members may not be impartial – which is contrary to section 12(3) of the Refugees Act requiring the Appeal Board to be independent and free from bias.³⁸⁶ Furthermore, the judgment describes the members of the Appeal Board as ‘administrators tasked with quasi-judicial functions.’³⁸⁷

Section 6(2)(a)(iii) of PAJA gives power to a court to judicially review an administrative action if the action was undertaken by an administrator who was biased or reasonably suspected of being biased.³⁸⁸ The evidence in *Tantoush* indicated the decision was a result of external influence, and the judgment describes this as a ‘procedural irregularity’ that is unable to be rectified by an appeal and ‘a total failure of the proper exercise of an independent and impartial decision.’³⁸⁹ This was sufficient grounds for setting aside the decision of the RSDO.

³⁸² *Tshiyombo* supra note 145 para 43.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.* para 44.

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid.* para 86.

³⁸⁷ *Ibid.* para 85.

³⁸⁸ *Ibid.* para 81.

³⁸⁹ *Ibid.*

It also constituted further grounds for review under section 6(2)(e)(iv) of PAJA as the decision was made ‘because of the unauthorised or unwarranted dictates of another person or body.’³⁹⁰

Another example of failure to provide a fair hearing arose in *AOL*, whereby a failure by the Appeal Board to give notice of the hearing meant that the applicant was not able to arrange sufficient legal representation.³⁹¹ Section 26(4) of the Refugees Act provides the Appeal Board must allow legal representation, therefore implying that notice must be given in order for an applicant to arrange the legal representation they are entitled to have.³⁹²

5.3.4.5 Other grounds for review

These include situations where there is lack of jurisdiction or errors of fact,³⁹³ decisions made in bad faith, arbitrarily or capriciously,³⁹⁴ decisions made based on irrelevant considerations or failure to consider relevant facts,³⁹⁵ and unreasonable decisions that no reasonable decision maker would have made.³⁹⁶

5.4 CONCLUSION

In analysing Amit’s findings and the relevant case law, it is clear that South Africa’s refugee system is failing to provide sufficient administrative justice to those seeking protection. The requirements under PAJA and the Constitution are not met, which in turn means the respective international legal obligations are not acknowledged. The need to afford the rights to administrative justice is important even to those who do not qualify for refugee status – administratively fair decisions apply regardless. For those who do qualify, the need is even greater due to the potential for administratively unfair decisions to create potentially life-threatening situations, particularly in situations where the RSD is negative. It is imperative that administrative processes are followed to the letter of the law.

³⁹⁰ Ibid.

³⁹¹ *AOL* supra note 329 at 13.

³⁹² Ibid. at 13D.

³⁹³ Lee Ann de la Hunt op cit note 188 at 195. *AOL* supra note note 329 discussed above is the example provided here. It could not be proven that the RSDO was responsible for rejecting this particular application on grounds that it was unfounded, and as a result the Appeal Board did not have jurisdiction.

³⁹⁴ Ibid. at 196. Adverse decisions made when the applicant refuses to pay a bribe is an example of the ground for review in these scenarios, according to section 6(2)(e) and (d) of PAJA respectively.

³⁹⁵ Ibid. at 197. The cited example is *Deo Gracias Katshingu v The Chairperson of the Standing Committee for Refugee Affairs* (19726/2010) (WC) unreported decision of 2 November 2011.

³⁹⁶ Ibid. The cited examples are *Katshingu v Standing Committee for Refugee Affairs* (19726/2010) (WC) unreported decision of 2 November 2011, 12 lines 10-20; and *Katabana v Chairperson for the Standing Committee for Refugee Affairs* (25061/2011) (WC) unreported decision of 14 December 2012, 25 lines 8-11.

The most notable risk exposed by the identified DHA failings is the violation of the principle of *non-refoulement*. Described as ‘the most vital element of refugeehood’,³⁹⁷ it is covered by section 2 of the Refugees Act and Article 33(1) of the 1951 Refugee Convention. Its importance is further emphasised by Article 1(1) of the 1967 Protocol which requires states to apply Articles 2 to 34 absolutely and does not allow any reservations to these articles. The drafters of the 1951 Refugee Convention made it clear the intention of the *non-refoulement* principle was to protect those who fall under the definition of a refugee – something which the UNHCR Handbook says can be the case even before a formal decision is made on the applicant’s status.³⁹⁸ A refugee status determination is merely a declaration: an applicant ‘does not become a refugee because of recognition, but is recognized because he is a refugee.’³⁹⁹

Therefore, insufficient administrative justice poses a significant risk to the protection the *non-refoulement* principle seeks to provide, and failure to apply administrative justice procedures can lead to refoulement in all forms: direct, indirect and constructive.⁴⁰⁰ The principle highlights the need for administrative justice, and the case law analysis coupled with the evaluation of Amit’s work demonstrates the procedural failings that lead to failures in applying the law correctly. The failure to apply the law correctly results in a restriction of rights, especially those rights provided by international law to which South Africa is a party.

³⁹⁷ Fatima Khan ‘The principle of non-refoulement’ in Fatima Khan and Tal Schreier (eds) *Refugee Law in South Africa* (2014) 3-19 at 3.

³⁹⁸ UNHCR Handbook op cit note 57 para 28.

³⁹⁹ Ibid.

⁴⁰⁰ Fatima Khan op cit note 67 at 4.

Chapter 6 – Conclusion

The underlying theme of the refugee processing system in South Africa is that there is an absence of legal conformity. The law itself is strong, with PAJA giving effect to section 33 of the Bill of Rights in the Constitution to place comprehensive administrative justice obligations upon public authorities. Internationally, the extensive set of rights are designed to protect human rights and human dignity collectively. The Refugees Act 1998 states its intention to give effect to international law and although the international law is absent of procedural aspects, the extent to which rights are afforded is dependent on comprehensive and proper procedure.

The system in South Africa is sufficient to provide for the rights obliged by international law. Aside from the scarce existence of RROs, the step-by-step process sufficiently incorporates international and domestic legal rights encapsulated in the legislation. The issuance of temporary permits, the interview process and time limits for processing applications can all be considered reasonable in theory, and when compared with equivalent legislation in other countries it can be argued that the procedure in South Africa is comprehensible. Despite its reasonableness in theory, the reality is that practice has led to it being decidedly unreasonable – and it is this that creates the problem.

Whilst the law is strong, it is only as strong as it is applied to the law. This study has identified a number of procedural failings including. There are delays in decisions that go beyond the prescribed limits of 180 days by the Refugee Regulations and PAJA that lead to temporary permits going on in perpetuity, errors of law leading to restrictions of human rights and denials of human dignity. Errors of law also materially affect decisions, particularly decisions made surrounding the issue of well-founded fear of persecution. This is a prime example of the adverse effect administrative action can have, and highlights the importance of offering sufficient administrative justice paths to those individuals directly affected by these decisions. In addition, general failures to adhere to the legal procedure can result in instances such as an unfair hearing and unfair proceedings – something which PAJA and the Constitution seek to protect.

The importance of sufficient and appropriate administrative justice in refugee law is vital. The principle of *non-refoulement* exists to protect those whose lives are in danger due to persecution, and aspects of administrative justice such as the requirement to provide written reasons for decisions are designed to aid appeal and reviews of decisions. Without written

reasons there is an absence of evidence to build a case for appeal or review and that is fundamentally unfair. Consider this alongside the fact that genuine refugee applicants are seeking protection in a foreign land due to being forced out of their country of origin in fear of persecution, and one can understand the need for the procedure to be carried out correctly. An applicant should be given the full extent of their rights to have their case heard as it can quite simply be a matter a life or death.

Written reasons are valuable in building a case for appeal, however there are other important aspects of administrative justice that are relevant in this scenario. In situations where refugees may not know the full extent of their rights or the process generally, of which it might be reasonable to assume, then a refused application may be enough for someone to think they have exhausted all of their options. This highlights the importance of proper practice in ensuring those seeking protection are made aware of their rights. Furthermore, and perhaps most importantly, if the law was followed appropriately and applications considered competently then it could be argued that rights would be afforded almost automatically. This is particularly true in South Africa with the robustness of the Refugees Act.

The South African problem demonstrates where a lack of administrative justice can cause a human rights problem. It is one thing for the law to be sufficient; however this is irrelevant if it is not applied correctly.

6.1 RECOMMENDATIONS

The overriding purpose of refugee law is to protect. Legal obligations presented by international law and subsequently filtered into domestic law provide for this protection. The conclusions of this study are that the current refugee application system is not providing the protective measures intended by the legal mechanisms. Administrative justice is a vitally important component of legal protection that needs to be administered more effectively in the South African refugee system.

The need for more effective administrative justice is demonstrated by Justice Moshidi in paragraph 41 of the *Dorcasse* judgement:

...[I] need to make mention of one issue which is bothersome. There are numerous similar matters involving the Department of Home Affairs on the motion court roll of this High Court. This occurs on a weekly basis almost. In my experience, most of these matters ought not to be coming to court. In most of the matters the allegations of the applicants are often conceded or the matters are simply settled at court. It is not unusual for draft orders in these matters to provide for the immediate release of the applicants as well as ancillary relief. It may be that the time has arrived for the Department of Home Affairs to devise an effective,

cost-saving and well-balanced approach to matters of this nature and immigration issues. There is plainly a need to re-visit the preamble to the Refugees Act...⁴⁰¹

This rather telling assessment of the DHA from 2012 emphasises that the issues arising from the refugee system in South Africa should simply not be happening. The assertion is that the submissions put forward by applicants are often succeeding, which suggests general misapplication or misunderstanding of the law by the DHA.

On this basis, the question of how to increase the effectiveness of administrative is answered by increasing competency and understanding the law as well as the intentions of it. The preamble of the Refugees Act makes the intentions abundantly clear regarding international legal obligations, and PAJA and the Constitution provide for transparent interactions between individuals and the state in order to create regulated accountability for the actions of that particular institution. Appropriate application of the law will therefore lead to effective administrative justice. The case law judgments discussed in this study demonstrate the extent of misapplication that from improper procedure practices through to the improper composition of authoritative bodies such as the Standing Committee – there appears to be no end.

The DHA could begin by training RSDOs to a sufficient level of competency in order to ensure that the earlier stages of the application process are correctly applied. The words of Justice Moshidi in *Dorcasse* call for an ‘effective, cost-saving and well-balanced approach’, something which could be achieved by giving RSDOs appropriate resources to carry out adequate interviews and assessments of each claim. With adequate training, it is possible to ensure RSDs are meeting the requirements of administrative justice provided by all appropriate legal mechanisms fulfilled – and providing the required levels of administrative justice would result in fewer claims going through lengthy court applications and appeals.

Inadequate resourcing and lack of facilities are attributed to the DHA by Van Reenan J in the 2007 *Kiliko* judgment. The DHA has attributed its policies and practices to a lack of capacity to deal with the number of applications received, yet this is not acceptable as an excuse as all reasonable steps must be taken to ensure unconditional compliance with constitutional obligations regardless of the adequacy of the resources. Rabie J expresses in the *Tafira* judgement the clear fact that the DHA has insufficient personnel to deal with the number of applications being received. Therefore, it is simple to recommend that the DHA

⁴⁰¹ *Dorcasse* supra note 145 para 41.

should increase the capacity, resources and facilities in a way that it is legally obliged, as failing to do so is a violation of its constitutional obligations.

It is of course easy to merely state the DHA should expand its resourcing, training and other general capacities to facilitate proper process of the refugee system when in practice such expansion may not be immediately practical. This concession is defeated slightly by the fact that the case law demonstrates a continued and sustained period of failure, however in a gesture towards a balanced argument it is an important point to make. If it is the case that it is impractical or difficult due to the number of applications being received – which have been acknowledged to be ‘literally hundreds of thousands’ by Rabie J in *Tafira* – then group *prima facie* determination as employed by other countries in Africa that have been compelled to move from an individual assessment system to a group-based status determination system should be considered.

A closer partnership with the UNHCR would be a valuable move for the DHA to make. The Human Rights Committee of the ICCPR acknowledges the problems with access to the RSD procedure in its concluding observations of CCPR/C/ZAF/CO/1 of 27 April 2016, in particular the ‘inadequate safeguards’ in the process.⁴⁰² The Committee expresses concerns at the obstacles being created by improper practice, and believes it contributes to corruption and increased vulnerability of those seeking to use the system. The Committee describes its concerns at the ‘increase in difficulties encountered in gaining access’⁴⁰³ which suggests no solution to facilitating these difficulties is being implemented. Furthermore, the Committee expresses regret that the report on South Africa is ‘14 years overdue.’⁴⁰⁴

The concluding observations also recommend:

[T]he State party should facilitate access to documentation and fair procedures for asylum seekers, including translation services and, where the interests of justice so require, access to legal representation. It should ensure that asylum applications are processed expeditiously and that the principle of non-refoulement is respected under all circumstances.⁴⁰⁵

This recognition by the UNHCR of the problems with the asylum process in South Africa demonstrates there is scope for a closer working relationship between South Africa and the UN body, especially as the country’s courts have continuously determined there are problems

⁴⁰² UNHCR (April 2016) *Concluding observations on the initial report of South Africa CCPR/C/ZAF/CO/1* para 34, available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/ZAF/CO/1&Lang=En [accessed 03 May 2018].

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.* para 2.

⁴⁰⁵ *Ibid.* para 35.

with the application of its refugee law. This argument is further reinforced by the mention of the UNHCR Handbook in the case law judgments of *Katabana*, *Tshiyombo*, *Tantoush* and *Dorcasse* – if the courts are using UNHCR guidance in this way, then the DHA would benefit from closer consultation in order to address the issues.

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