In search of alternatives to pre-emptive immigration detention (or not): a review of recent South African case law

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Abstract

The power to arrest, detain and deport illegal foreigners remains the foundation of immigration control in post-apartheid South Africa. This power is regulated by section 34 of the Immigration Act 13 of 2002. A clear understanding of the scope and limits of this far-reaching power is essential for a human rights based approach to immigration. In an attempt to contribute to such an understanding, this essay explores whether section 34 authorises the pre-emptive arrest and detention of illegal foreigners, even before their status can be conclusively determined. Claims that it does often rests on the view that there are no effective alternatives available to immigration detention. However, international law recognises detentionless deportations, or the so-called Community Assessment and Placement model, as best practice under a number of different international human rights regimes. This international law approach contrasts sharply with the early or pre-emptive detention regime of the Department of Home Affairs in South Africa. A series of recent judgments by the Supreme Court of Appeal provides an opportunity to re-evaluate the lawfulness of this pre-emptive detention policy. After a close reading of these cases, this essay concludes that these judgments are best read against the grain as inaugurating a process of law reform that will hopefully soon culminate in the constructive abolition of pre-emptive immigration detention in South Africa.

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INTRODUCTION

During the public hearings into the Immigration Amendment Bill [B32–2010] that took place in January 2011, the Law Society of South Africa (LSSA) complained to the Portfolio Committee on Home Affairs that it was far from ideal that 'some of the critical amendments being tabled now are being considered in the absence of a fundamental review of the country's immigration policy'.[1] The Wits African Centre for Migration and Society expressed a similar concern and explained to the Portfolio Committee why the new proposals for stricter immigration control were problematic from a policy perspective.[2] The Centre pointed out that the current regulatory approach focuses on detentions and deportations, resulting in significant expenditures that have little effect on overall migration movements and provide few mechanisms for managing migration productively. A more effective immigration policy, the Centre suggested, would be one which 'acknowledges South Africa's role in regional migration, rather than seeking to stem it'.

These calls by civil society organisations for a new approach to immigration management are underscored by academic research into and scholarship on the issue.[3] Michael Neocosmos, for example, argues that the existing regulatory framework essentially perpetuates the anti-immigration stance of the apartheid state and negatively affects the development of a truly post-apartheid concept of democratic citizenship.[4] Neocosmos claims that migration law 'interpellates' (as Althusser would have put it) non-citizen residents as passive and depoliticised rights-bearing clients of the state.[5] There is a real danger that immigration law might be having a similar effect

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1 Law Society of South Africa Submission, available at: http://www.pmg.org.za/report/20110126-public-hearings-immigration-amendment-bill-b32-2010 (last accessed 20 April 2011).

2 Wits African Centre for Migration and Society Submission, available at: http://www.pmg.org.za/report/20110126-public-hearings-immigration-amendment-bill-b32-2010 (last accessed 20 April 2011).

3 For a general introduction see R Skeldon 'International migration as a tool in development policy: a passing phase?' (2008) 14 *Population and Development Review* 1.

4 M Neocosmos *From 'foreign natives' to 'native foreigners': explaining xenophobia in post-apartheid South Africa – citizenship and nationalism, identity and politics* (2010) 62–104. For a similar attempt to re-politicise the constitutionalisation of immigration law see Nancy Fraser 'Re-framing justice in a globalizing world' in T Lovell (ed) *(Mis)recognition, social inequality and social justice* (2007) 17.

5 M Neocosmos 'The politics of fear and the fear of politics' available at: www.abahlali.org/node/3616 (last accessed on 20 April 2011). See further L Althusser 'Ideology and ideological state apparatus' in L Althusser *Lenin and philosophy and other essays* (1971) 127.

on citizens, who are reduced by that law to passive political subjects, democratically paralysed by a 'politics of fear'.[6] According to Neocosmos, this 'politics of fear' lies at the root of xenophobic violence which is in turn symptomatic of a deeper 'fear of politics'. The origins of the 'politics of fear' can be traced back to the constitutional distinction between citizens and non-citizens, but takes its real effect when this already problematic distinction is overlaid with official discourses on xenophobia, South African exceptionalism and indigeneity.[7] The overlap in these discourses assumes disastrous consequences for the management of inter-country migration. Neocosmos summarises his case as follows:[8]

> As has been observed on many occasions, the legislation which deals with issues of migration in South Africa is founded on notions of exclusion and control and is founded on the assumption that [foreigners] wish to abuse the system and come to South Africa to take and not provide anything. The idea behind the legislation, according to one author is to defend 'Fortress South Africa' against 'hordes of immigrants'. To do this, police officers and officials from the Department of Home Affairs are given such excessive powers over extremely vulnerable people that bribery, extortion and corruption become not only possible but regular practices.

It is exactly the need for and the scope of these excessive powers that resurfaced as a critical concern during the recent public hearings into the Immigration Amendment Bill. One of the excessive powers in question is the power of immigration officers to arrest, detain and deport 'illegal foreigners'.[9] The power to administratively detain 'illegal foreigners' is

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6 Neocosmos n 5 below at 100.

7 Neocosmos *id* at 103–104 claims that liberalism and the discourse of human rights (with its focus on litigation) have resulted in passive citizens unable to counter the 'politics of fear'. For this reason Neocosmos would not have much sympathy for the rights based critique of immigration detention that we develop in the remainder of this note. According to Neocosmos, a better strategy would be the political mobilisation of migrant politics, including the recognition of non-citizen voting rights. For a robust residence-based theory of voting rights (if not citizenship) that includes a defence of non-citizen voting rights along similar lines, see W le Roux 'Economic migration, disaggregated citizenship and the right to vote in post-apartheid South Africa' in R Danisch (ed) *Citizens of the world: pluralism, migration and practices of citizenship* (2011) 119.

8 Neocosmos n 5 above.

9 We use the official designation 'illegal foreigner' in inverted commas to refer to undocumented or irregular migrants. Legality in this context is a contested concept which must either be placed under erasure in deconstructive fashion or used ironically. We use the term 'detention' as it is defined by the United Nations High Commissioner for Refugees: '[C]onfinement within a narrowly bounded or restricted location, including prisons, closed camps, detention centres, or airport transit zones, where freedom of movement is substantially curtailed and where the only opportunity to leave this limited area is to leave the country' (Guideline 1 of the UNHCR Revised Guidelines on

regulated by section 34(1) of the Immigration Act 13 of 2002, which provides as follows:

> Without the need for a warrant, an immigration officer may arrest an illegal foreigner and shall deport him or her and may, pending his or her deportation, detain him or her.

As long as the Department of Home Affairs forms part of the security cluster of state administrations, this section will remain at the centre of debates about post-apartheid immigration law and policy. In fact, its importance is likely to increase with the lifting of the moratorium on the deportation of 'illegal foreigners' from Zimbabwe. It is, therefore, crucial to develop a clear understanding of the precise conditions under which section 34(2) authorises the detention of 'illegal foreigners'.

One of the first questions arising in this regard is, at which stage may an immigration officer first arrest and detain an 'illegal foreigner' pending his or her deportation? Must an immigration officer wait for the final outcome of the status determination process, or may the officer detain an immigrant as soon as she makes a finding that the migrant in question is an 'illegal foreigner'? The question arises because procedurally speaking, an undocumented migrant who has been found to be an 'illegal foreigner', can either contest that finding (by appealing to the Minister of Home Affairs) or negate that finding (by applying for a different legal status, most typically, by submitting an asylum application). Under which circumstances, if any, may an 'illegal foreigner' be detained pre-emptively, that is, before the final outcome of the status determination process is known?

Since the promulgation of its policy of indefinite detention a decade ago, the Department of Home Affairs has maintained that 'illegal foreigners' may under all circumstances be arrested and detained, as soon as an initial adverse status determination has been made. In terms of this policy, it was irrelevant whether the 'illegal foreigner' requested a ministerial review of the decision, or applied for asylum in an attempt to legalise his or her status. Numerous 'illegal foreigners' were, on this basis, indefinitely detained at the Lindela Holding facility outside Krugersdorp, until they were finally awarded a

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Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999)). Available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html (last accessed 20 April 2011). We use the term 'alternatives to detention' to include any legislation, policy or practice that allows for asylum seekers, refugees and migrants to reside in the community with freedom of movement, while their migration status is being resolved/determined.

different legal status or deported.[10] This invasive detention policy was fully sanctioned by the High Courts of Gauteng.[11] The courts reasoned that since the unconditional release of undocumented migrants would open a loophole so wide that an entire nation could walk through it, the pre-emptive detention of 'illegal foreigners' was (almost by default) authorised by section 34(2) of the Immigration Act.[12]

A number of NGOs fought diligently and tirelessly to challenge this official pro-detention stance. As a result of a sustained and praiseworthy litigation campaign lead by Lawyers for Human Rights,[13] the legality of early or pre-emptive immigration detention recently attracted the attention of the Supreme Court of Appeal (SCA) in three separate cases. The SCA confirmed the lawfulness of pre-emptive detention in the *Jeebhai* and *Ulde* cases,[14] but declared it unlawful in the *Arse* case.[15] The aim of this article is to take these three cases under critical review in an attempt to identify common principles that may be used to guide immigration policy reform and, at the same time, may account for the seemingly contradictory judgments of the SCA.

The discussion begins with a overview of the legality of immigration detention under international human rights law (section 2). The aim is briefly to point out that deportation without detention, or the so-called Community Assessment and Placement (CAP) model, is widely regarded as best practice under a number of different international human rights regimes.[16] The discussion then proceeds to compare the non-detention regime

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[10] The policy of indefinite detention meant that many undocumented migrants were detained pending deportation for periods in excess of 120 days, in most instances, without the statutory prescribed detention warrants. The question whether detention for longer than 120 days pending deportation is lawful, falls outside the limited scope of this note. The same applies to the question whether the conditions under which 'illegal foreigners' are detained at the Lindela Holding facility and elsewhere meet constitutional standards. Questions such as the legality of separating parents and children during detention, for example, must therefore wait to be discussed on another occasion.

[11] The case law in question is discussed further below in ss 3 and 4.

[12] Act 13 of 2002.

[13] For an overview of this campaign see R Amit (ed) *Monitoring immigration detention in South Africa* (2010). Available as a free download at: http://www.lhr.org.za/publications/immigration-detention-report (last accessed 20 April 2011).

[14] *Jeebhai v Minister of Home Affairs* [2009] ZASCA 35, [2009] 3 All SA 103 (SCA), 2009 5 SA 54 (SCA).

[15] *Arse v Minister of Home Affairs* [2010] ZASCA 9, 2010 7 BCLR 640 (SCA), [2010] 3 All SA 261 (SCA).

[16] The CAP model is developed in Sampson, Mitchell, and Bowring *There are alternatives: A handbook for preventing unnecessary immigration detention* (2011). (Available as a free download at: http://idcoalition.org/handbook). Our thanks to Miranda Madikane

of international law with the early or pre-emptive detention regimes that have been applied under section 34(1) of the Immigration Act, in cases where undocumented migrants await a ministerial review of their status (section 3); and also, in cases where undocumented migrants await the outcome of their asylum applications (Section 4). The discussion concludes (section 5) with the claim that the recent case law in the Supreme Court of Appeal should best be read against the grain as inaugurating a process of law reform that will culminate in the constructive abolition of pre-emptive immigration detention.

IMMIGRATION DETENTION AND INTERNATIONAL HUMAN RIGHTS LAW

As mentioned above, the legality of pre-emptive immigration detention rests on the correct interpretation of section 34(1) of the Immigration Act. In terms of section 233 of the Constitution,[17] a proper interpretation of section 34(1) requires that courts 'prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law'. There is a vast body of international law on detention in general and immigration detention in particular.[18] In this section we briefly introduce the relevance of only two of these instruments, namely the International Covenant on Civil and Political Rights (ICCPR) and the Geneva Convention on the Rights of Refugees, as far as they apply to the policy of early or pre-emptive immigration detention.

Immigration detention under the ICCPR

Article 9(1) of the ICCPR contains the classic formulation of the international law norm that '[n]o one shall be subjected to arbitrary arrest or detention'. At the beginning of the 1980s, a number of state parties to the

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from the Scalabrini Centre in Cape Town for drawing our attention to this model.

[17] Of the Republic of South Africa, 1996.

[18] Other important international instruments which have a bearing on immigration detention includes the UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment (as adopted by the UN General Assembly per Resolution A/RES/43/173 on December 9, 1988); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (as adopted by the UN General Assembly per Resolution A/RES/39/46 on December 10, 1984); The Universal Declaration of Human Rights (as adopted by the UN General Assembly per Resolution on December 10, 1948) art 9; The African Charter on Human and Peoples' Rights (as adopted by the OAU/AU on 27 June 1981) art 6; and the Cairo Declaration on Human Rights in Islam (as adopted by the Islamic Conference of Foreign Ministers of the Organisation of Islamic Cooperation on August 5 1990) art 20. All the above mentioned instruments specify, in more or less similar terms, that no one may be arbitrarily arrested, detained or deprived of her liberty.

treaty claimed that article 9(1) only applies to cases of criminal detention. This prompted the Human Rights Committee (the institution responsible for monitoring state compliance with the ICCPR) to issue General Comment 8 in which it determined that the section 'is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as [...] immigration control'.[19] In General Comment 15 the Committee further clarified its earlier statement by explaining that it is precisely because '[t]he Covenant does not recognize the right of aliens to enter or reside in the territory of a State party', that foreign nationals must 'enjoy the protection of the Covenant even in relation to entry or residence'.[20] At the beginning of the 1990s, the Committee directly confronted some of the abuses it anticipated in its General Comments, when it was asked to express its 'view' on the matter of *A v Australia*.[21] This case arose from the fact that a Cambodian national (Mr A) landed per boat on Australian shores in November 1989, without prior authorisation. He was immediately arrested and as a matter of routine detained in accordance with the official detention policy. Mr A immediately thereafter applied for asylum. Just short of four years later, he was still in detention, awaiting the finalisation of his asylum application on appeal. Mr A complained to the Human Rights Committee that his routine and ongoing detention violated article 9(1) of the ICCPR. The Australian government responded that its policy of mandatory detention did not amount to arbitrary detention, as it was necessary to prevent undocumented immigrants from absconding while their asylum applications were being processed.

The view of the Committee was that it is not per se arbitrary under article 9(1) of the ICCPR or customary international law routinely and pre-emptively to detain undocumented immigrants (including asylum seekers)

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19 Human Rights Committee, General Comment 8: Right to liberty and security of persons (Art. 9) (1982/06/30) (available at: http://www2.ohchr.org/english/bodies/hrc/comments.htm (last accessed 20 April 2011)).

20 Human Rights Committee, General Comment 15: The position of aliens under the Covenant (1986/04/11) par 5. (available at: http://www2.ohchr.org/english/bodies/hrc/comments htm (last accessed 20 April 2011).

21 Communication 560/1993: Australia 1997/04/30, CCPR/C/59/D/560/1993 (available at: http://www.unhchr.ch/tbs/doc nsf/0/30c417539ddd944380256713005e80d3?Opendocument (last accessed 20 April 2011)). In terms of the Optional Protocol to the ICCPR (2002) states party to the Convention accept the competence of the Human Rights Committee (HRC) to receive, consider and express 'views' on communications from individuals alleging violations of the Covenant. The Committee regards the 'views' it expresses on individual communications as quasi-judicial rulings that represent authoritative determinations of the correct interpretation and meaning of the Covenant. See General Comment 33 (CCPR/C/GC/33) dated 5 November 2008 par 11 and par 13 (available at: http://www2.ohchr.org/english/bodies/hrc/comments htm (last accessed 20 April 2011)). We proceed in our discussion on this basis.

pending the determination of their status.[22] According to the Committee, the fact of illegal entry by itself may indicate a need for further investigation and there may be other factors peculiar to the individual, such as the likelihood of absconding and lack of cooperation, which may justify administrative detention for a limited period. That said, the Committee also suggested that the notion of 'arbitrariness' under article 9(1) meant more than 'unlawfulness' and included elements of appropriateness, necessity and justice.[23] Detention must in all instances be proportionate to the end for which it is employed. Where the limits of necessity, appropriateness and justice are exceeded, a 'detention may be considered arbitrary, even if entry was illegal'.[24] In short, in the view of the Committee, the Australian immigration authorities acted within their powers under the ICCPR when they initially arrested and detained the Cambodian immigrants. However, four years later, the detention had become arbitrary as the Australian government could not explain why the ongoing detention was proportionate (necessary, appropriate and just) to the ends it sought to achieve.

The view expressed by the Human Rights Committee in *A v Australia* remains the most authoritative statement about immigration detention under the ICCPR. However, within the general system of human rights protection under the United Nations, that 'view' has recently received a slightly more radical gloss. The UN Working Group on Arbitrary Detention added this gloss by summarising its own understanding of the term 'arbitrary detention' in the context of immigration control as follows:[25]

> [A]dministrative detention as such of migrants in an irregular situation, that is to say migrants crossing the border of a country in an irregular manner or without proper documentation, or having overstayed a permit of stay, and hence being liable for removal, is not in contravention of international human rights instruments. The Working Group is fully aware of the sovereign right of States to regulate migration. *However, it considers that immigration detention should gradually be abolished*. [...] If there has to be administrative detention, the principle of proportionality requires it to be the last resort.

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[22] Paragraph 9.3.
[23] Paragraph 9.2.
[24] Paragraph 9.4.
[25] Report of the Working Group on Arbitrary Detention to the 13th session of the Human Rights Council, 18 January 2010 (available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A.HRC.13.30_en.pdf; (last accessed 20 April 2011). Our emphasis.

By suggesting that there is an international law duty on states to gradually abolish immigration detention, the UN Working Group is willing to subject the power of sovereign states to detain undocumented immigrants to a far stricter proportionality test than that set by the Human Rights Committee in *A v Australia*. According to the Working Group, where the principle of immigration detention is applied in practice, strict proportionality requires that immigration detention must be the very last remaining option. The crucial point is that the UN Working Group accepts or implies that states will be hard pressed to meet this strict proportionality test in practice. This is why it calls for the abolition of immigration detention. There are simply too many non-custodial alternatives available (or potentially available) to proceed as if detention is the first (let alone only) option available (as many states still do).[26] It is notable that the interpretation of the UN Working group turns article 9(1) of the ICCPR into a right to the gradual abolition of immigration detention; in other words, it converts a negative right into a positive or programmatic right. In terms of the latter, states have the duty to take reasonable steps progressively to realise the abolition of all forms of immigration detention. This obligation is self-reinforcing. As detention is only lawful where no alternatives exist or can be provided, a state that fails to develop and implement meaningful non-custodial or community-based alternatives to immigration detention could, in principle, be precluded from detaining any immigrants. This line of reasoning, of course, implies that such alternatives exist or are readily available; a point to which we return below.

It is worth noting that the strong focus on proportionality (and thus on compulsory alternatives to immigration detention) also finds application outside the UN system in regional human rights systems. Article 5(1)(f) of the European Convention on Human Rights explicitly authorises the detention of irregular migrants in order to prevent unauthorised entry, or to effect deportation. State reliance on this provision is increasingly subject to a strict proportionality requirement.[27] The Parliamentary Assembly of the

[26] The view that the prohibition of arbitrary detention in provisions like art 9(1) of the ICCPR effectively precludes all forms of immigration detention, is shared by the UN Special Rapporteur on the Human Rights of Migrants, which has for long called on members states of the UN to consider the progressive and constructive abolition of administrative detention as a means of immigration management. See Report to the 59th Session of the UN Commission on Human Rights, 30 December 2002 (par 73–74) and in general the Report to the 7th Session of the UN Human Rights Council, 25 February 2008. These Reports are available at: http://www.un.org/ga/59/documentation/list0.html (last accessed 20 April 2011).

[27] The section reads in parts as follows: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the case of the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or

Council of Europe, for example, adopted a report by the Special Rapporteur on the Detention of Asylum Seekers and Irregular Migrants in Europe in 2010, which encourages member states to include a presumption against immigration detention in their national law, and to identify a statutory list of alternatives that immigration officers must consider before resorting to immigration detention.[28] The list of recommended alternatives includes placement in special open-access immigration residences, a strict registration and reporting regime, release on bail, and controlled release into the care of individuals, NGOs or religious organisations.[29] These alternatives are not exhaustive but are sufficient to provide state authorities with a large degree of control over the whereabouts of irregular migrants, while respecting their basic freedom of movement.

In summary, as governments around the world, including that of South Africa, are increasingly making use of detention as an immigration management tool, leading international human rights institutions have relied on article 9(1) of the ICCPR to impose a highly demanding duty on states to explore and establish alternatives to immigration detention. The hope is that the availability of these alternatives will increasingly render the detention of undocumented migrants unnecessary and thus arbitrary within the meaning of section 9(1) of the ICCPR. According to some, this will lead to a point where states will effectively be precluded from detaining immigrants. This programmatic human rights dimension should, via section 233 of the Constitution, be read into any statutory provision, such as section 34(1), seeking to regulate the administrative detention of immigrants.[30]

International human rights law draws a clear distinction between undocumented migrants and asylum seekers (sometimes distinguished as economic and political refugees). This distinction has become controversial but still lies at the root of the Geneva Convention on the Status of Refugees of 1951. Even if we were to reject the claim that article 9(1) of the ICCPR implies a strong programmatic right to the constructive abolition of all forms

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of a person against whom action is being taken with a view to deportation or extradition.'

28 Report: The detention of asylum seekers and irregular migrants in Europe (Document 12105). Debated and adopted by the Parliamentary Assembly on 28 January 2010 per Resolution 1707 (2010). Available at: http://www.unhcr.org/refworld/category,LEGAL,COEPACE,,,4b6bee412,0 html (last accessed 20 April 2011).

29 *Id* pars 32–62.

30 The international law understanding of the right not to be arbitrarily detained must also be considered when s 12(1)(a) of the Constitution is interpreted (see s 39(1)). This must be done whether s 12 is applied directly or indirectly to establish the constitutional scope of s 34(1) of the Immigration Act.

of immigration detention, it remains necessary to consider whether a ban on immigration detention exists under the Refugee Convention.[31]

Immigration detention under the UN Refugee Convention

As far as it is relevant to this discussion, article 31 of the Refugee Convention provides as follows:

> (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who [...] enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
> (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.

Article 31(2) recognises the power of states to detain asylum seekers pending status determination but limits this power to situations where it is 'necessary' to do so. The article thus immediately incorporates a proportionality requirement into the discussion. Does this also mean that the explicit proportionality requirement under the Refugees Convention should be applied more strictly than the implicit requirement under the ICCPR? Article 32(1) seems to point in that direction. The article prevents states from ever claiming that it is necessary to pre-emptively detain asylum seekers, solely on the basis of their illegal presence in or entry into a foreign country. This principle gives general direction to the interpretation of the 'necessity' requirement in article 31(2). The on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers adopt this strict proportionality test and state explicitly, in Guideline 2, that asylum seekers should, as a general rule, never be subjected to detention.[32] In terms of Guideline 3, article 31(2) establishes a presumption against detention in international law. Given this presumption, detention should only take place in exceptional circumstances, where it is necessary after a full consideration of all possible alternatives. According to the UNHCR, this means that a cooperative

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[31] In *A v Australia* it was argued that art 9(1) of the ICCPR should be read with art 31 of the UN Convention on the Status of Refugees to result in a total ban on the detention of asylum seekers. As was discussed above, this argument was rejected at the time by the Human Rights Committee of the ICCPR but the question remains worth asking.

[32] UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (February 1999). Available at: http://www.unhcr.org/refworld/docid/3c2b3f844.html (last accessed 20 April 2011).

asylum-seeker who does not pose a security risk may only be detained for the purposes of conducting a preliminary interview to establish his or her identity and to identify the basis of the asylum claim. Guideline 3 explicitly warns that this exception to the general principle of non-detention cannot be used to justify detention for the entire status determination process, or for an unlimited period of time thereafter. As we have already mentioned above, the effectiveness of any presumption against immigration detention depends on the availability of meaningful non-custodial alternatives, providing an option between the Scylla of indefinite detention and the Charybdis of unconditional release. Guideline 4 provides a list of such alternatives. These include periodic reporting requirements, residence requirements, the provision of a guarantor or surety, release on bail and placement in an open-access centre dedicated to asylum seekers. These alternatives allow for the conditional release of asylum seekers in situations where outright detention would not be warranted, but where unconditional release could not be risked. This situation would apply to the vast majority (if not all) asylum applications (if the interpretation of article 31(2) by the UNHCR is accepted).

In summary

The important point is that international human rights law has either abolished immigration detention (in the case of some asylum seekers), or imposes a duty on states to gradually abolish it. This duty has resulted in a lively and ongoing debate about a range of non-custodial or community-based enforcement mechanisms. These options far transcend any crude choice between the indefinite detention and unconditional release of 'illegal foreigners' and asylum seekers.

As will be seen shortly, South Africa's immigration laws and policies unfortunately lag far behind these positive developments. South African law serves today as the textbook example of a domestic order that remains hamstrung by an over-reliance on detention as an immigration monitoring and enforcement mechanism. The recent case law of the Supreme Court of Appeal provides a valuable glimpse into the Kafkaesque workings of a migration management system that uncompromisingly relies on the detention of 'illegal foreigners' as a first (as opposed to a last) choice.

In the next section we discuss the recent case law of the SCA pertaining to the pre-emptive detention of 'illegal foreigners' under the Immigration Act, followed by the case law pertaining to the pre-emptive detention of asylum seekers.

IMMIGRATION DETENTION PENDING STATUS DETERMINATION UNDER THE IMMIGRATION ACT

Section 41 of the Immigration Act authorises immigration officers to stop people in the street and request that they identify themselves as citizens, permanent residents or foreigners. If the immigration officer suspects on reasonable grounds that the accosted person is not entitled to be in the country, she may further interview or question the person about her identity or status, take the suspected immigration offender into custody, and detain her for forty-eight hours pending the verification of her identity or status.[33] In cases where the suspicion of the immigration officer is confirmed, section 8(1) of the Immigration Act requires that the immigration officer immediately inform the 'illegal foreigner' that he or she may in writing request a ministerial review of the decision about his or her status. Having notified the 'illegal foreigner' of her procedural rights, the immigration officer may release the 'illegal foreigner' to leave the country voluntarily within fourteen days. The officer may also detain the 'illegal foreigner' under section 34(1) pending her deportation.[34] The Immigration Act is silent about 'illegal immigrants' who dispute their current status or who wish to apply for a different status. May these 'illegal foreigners' be kept in detention while their status applications are being processed or should they be released?

The *Khan* precedents

This very question first attracted the attention of the Gauteng High Courts even before the current Immigration Act came into operation. In *Arisukwu v Minister of Home Affairs,*[35] De Villiers J held that the administrative review process under the Aliens Control Act 96 of 1991 had to be completed before an 'illegal alien' could be arrested and detained pending deportation in terms of that Act. Pre-emptive detention pending status determination was thus not allowed under the previous Act. The court regarded the provisions of the review and appeal procedure as peremptory requirements of the deportation process and failure to comply with those requirements rendered any subsequent arrest and detention unlawful. The reasoning in the *Arisukwa* decision was applied to the current Immigration Act by Southwood J in the unreported case of *Muhammed v Minister of Home Affairs*[36] and again by

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[33] Section 41 of the Immigration Act read with s 34(2). The immigration officer must take reasonable steps to assist the detainee during this period to verify his or her identity or status.

[34] See s 41(1) read with s 34(1).

[35] 2003 6 SA 599 (T).

[36] [2007] JOL 18935 (T).

Bertelsman J in another unreported case, *Khan v Minister of Home Affairs*.[37] In the latter case the learned judge summed up what then appeared to be settled law:[38]

> (O)nce an official had decided that a foreigner was illegally in the country and the foreigner had been informed of that fact, the foreigner must be informed of his rights in terms of [section 8]. The foreigner is entitled, as a matter of law, not to be detained immediately after his having been informed of the decision to deport him, but to exercise his rights [...] to appeal to the Minister [...] without and before being incarcerated.[39]

In spite of the strong judicial authority to the contrary, the department continued blindly to arrest and detain all 'illegal foreigners'. The department's persistence with its policy finally paid off when the *Khan* precedents were overturned and the department's detention policy endorsed by a full bench of the North Gauteng High Court in *Jeebhai v Minister of Home Affairs*.[40]

The *Jeebhai* case

The applicant in this case acted on behalf of a foreign national who was arrested, and after admitting that he was in the country illegally, detained in terms of section 34(1) before he was eventually deported to Pakistan. The applicant relied on the established authority of the *Khan* precedents to argue that the detention was unlawful, as the deportee was arrested and detained

37 [2007] JOL 18958 (T).

38 *Id* at 18.

39 The *Khan* precedents resonated closely with a line of cases decided in the United Kingdom under the Immigration Act of 1971 about the power to detain irregular migrants pending their removal from Britain (the exact equivalent of s 34(1) of the South African Immigration Act). See *R v Secretary of State for the Home Department ex parte Khadir* [2005] UKHL 39 par 21–32. These cases gave rise to the so-called *Hardial Singh* principles regulating immigration detention. The core of these principles is that immigration detention is only authorised if the immigrant is being detained pending her removal or deportation. It cannot, pre-emptively, be used for any other purpose (deterrence; retribution). Equally, if the removal is not actually pending, no authority exists to arrest and detain. Deportation cannot be said to be pending unless it can be achieved within a reasonably short period of time. In other words, according to the *Hardial Singh* cases, the phrase 'pending deportation' in s 34(2) should be interpreted to mean that the Department may detain an 'illegal foreigner' only where deportation was indeed pending (where 'pending' is used as a predictive adjective meaning 'imminent'). On this basis, it could hardly be contended that deportation was imminent in cases where the status of the migrant had not even been finally determined. In fact, deportation in such cases was not only not imminent, it was actually prohibited (s 8(2)(b) prohibits the deportation of an 'illegal foreigner' before the Minister's decision is made).

40 *Jeebhai v Minister of Home Affairs* [2007] ZAGPHC 47; [2007] 4 All SA 773 (T).

before the ministerial review procedure under section 8(1) could be instituted and completed. The court rejected the merits of this argument on the facts. Not only did the deportee admit that he had fraudulently entered the country, he also never invoked the ministerial review procedure under section 8(1).

However, the court did not leave the matter there. It proceeded to rule, in an *obiter* judgment, that even if the deportee had invoked the ministerial review process, the department would still have had the authority immediately to arrest and detain him under section 34(1). The court ruled explicitly that the *Khan* precedents were wrongly decided. In the absence of clear textual authority for this proposition, the court appealed to the purpose of the Immigration Act as a whole, and section 34(1) in particular. From this perspective, the main problem with the *Khan* precedents was that they made it practically impossible to effectively administer and achieve the objectives of the Immigration Act:[41]

> With thousands of illegal foreigners entering the country every day it would mean there would literally be thousands of people without proper documentation roaming freely all over the country; no country would allow that. With the level of crime in the country, it is difficult to see how, realistically speaking, that could be allowed. [...] It would be unworkable to say that immigration officers should make an appointment with potential deportees to come back for possible deportation in the event of their representations failing, and then release them. How many of them would keep the appointment once their representations have failed? There are simply no resources to trace them.

For all its administrative realism, it is difficult to overlook the rhetorical work done in the court's purposive interpretation by the xenophobic discourse that Neocosmos warns against. It is notable how the court makes two crucial background assumptions which allow its conclusion some semblance of authority. The court assumes, in the first place, that irregular or undocumented immigrants are already part of, or will inevitably disappear into, the criminal underground if they are not kept in detention. A second problem is that the court further assumes that it is compelled to choose between only two immigration enforcement options: the unconditional release of all 'illegal migrants' (called for by the applicants), and the pre-emptive detention of all 'illegal migrants' (called for by the respondents). These two assumptions reinforce each other in a subtle but carefully crafted manner. Because undocumented immigrants are criminal enemies of the

[41] *Id* pars 21–22.

good society, we can safely accept that the legislature left us with no option but to arrest and pre-emptively detain them as soon as possible. With this purposive inference in place, the court returns more boldly to the text of section 34(1), stating that it is 'unequivocal about the authority to detain pending deportation: Indeed, one can be detained even without a warrant'.[42] To reinforce this conclusion, the court switches to a quasi-constitutional mode to claim that a hard line against undocumented migrants does not have a negative impact on their constitutional rights. Pre-emptive detention did not disable an 'illegal foreigner' from making proper legal decisions and pursuing the ministerial review process under section 8(1).[43] Immigration security could be gained without any normative costs.

The High Court's assessment of the impact that pre-emptive detention will have (or rather not have) on the procedural rights of 'illegal foreigners' is highly questionable. So too, are the two assumptions that frame the court's interpretation of section 34(1). Nothing more needs to be added about the first assumption and the ease with which the court exploits and reinforces the almost eschatological social mythology surrounding undocumented migrants. Suffice to say that the same social mythology is also at work in the uncompromising attitude of the court towards the effect of detention on the lives of undocumented migrants. Pre-emptive detention will almost always impact negatively on the ability of 'illegal foreigners' to effectively exercise their rights under section 8(1). It is important to remember that under section 8(1) a completed written application, stating the legal reasons for the review, must be submitted within three days after receiving the section 8(1) notice (Form 1). Also to be remembered is that an arrested and detained migrant will in all likelihood be in transit to the Lindela Detention Centre during most or all of this three day period. The unsympathetic attitude of the High Court contrasts sharply with the empathy expressed by the Constitutional Court in *Lawyers for Human Rights v Minister of Home Affairs*.[44] In the latter case the court's reasoning was influenced by the fact that many undocumented migrants 'may be vulnerable and poor without support systems, family, friends or acquaintances in South Africa. Their understanding of the South African legal system, its values, its laws, its lawyers and its non-governmental organisations may be limited indeed.'

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42 *Id* at par 22.
43 *Ibid*.
44 *Lawyers for Human Rights v Minister of Home Affairs* (CCT 18/03) [2004] ZACC 12; 2004 4 SA 125 (CC); 2004 7 BCLR 775 (CC) par 21.

Had the court in *Jeebhai* understood that a system of pre-emptive detention would further compound the difficulties that 'illegal foreigners' already face in accessing their rights under the Constitution and the Immigration Act, it would have directed its attention towards ways of mitigating the normative costs of its desire for more effective immigration control. The obvious way of doing so would have been to pitch the purpose of the Immigration Act at a higher level, and to explore non-custodial or community-based alternatives to detention, in line with South Africa's international law obligations (the court could have relied on section 233 of the Constitution or the presumption that the legislature does not intend to enact a statute in conflict with international law).[45] The legal presumption against immigration detention would then have been set to work against the cultural presumptions about migration and immigrants that wreak havoc with the court's reasoning. As it is, the court's failure to bring international law to bear on the issue, creates the impression that its hands are tied; that little can be achieved within a legislative scheme that provides no realistic alternatives to the routine and pre-emptive detention of all 'illegal foreigners' (the second background assumption mentioned above).

The remainder of this discussion is aimed at dispelling this presumption. The obvious starting point for doing so is the judgment of the Supreme Court of Appeal in the *Jeebhai* case. Before we turn to that judgment, it is necessary first to point out that the about turn in the *Jeebhai* case was shortly thereafter followed and entrenched by the South Gauteng High Court in *Ulde v Minister of Home Affairs.*[46]

The *Ulde* case

The applicant in this case was arrested and detained while visiting his friend at Lindela, in spite of having been released on bail in a criminal trial related to his disputed illegal presence in the country. Relying on the *Khan* precedents, the applicant argued that he had a right not to be detained 'pending deliberations about status', in other words 'that it was unlawful to detain a person to whom a section 8 notice had been given, until after expiry of the prescribed days for the appeal to the minister'.[47] The court rejected this version of the *Khan* precedents on the sole basis that it was bound to follow the more recent decision of the full bench in *Jeebhai*.[48] The case in the High

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45 See J de Ville *Constitutional and statutory interpretation* (2002) 191.

46 *Ulde v Minister of Home Affairs* [2008] ZAGPHC 53; 2008 6 SA 483 (W); [2008] 2 All SA 580 (W).

47 *Id* at par 30.

48 *Id* at par 34.

Court thus added nothing further to the argument for pre-emptive detention under the Immigration Act. However, the *Ulde* judgment was soon thereafter taken on appeal. It is here that the case unexpectedly took the argument about the legality of pre-emptive detention in a new direction.

Lawyers for Human Rights (LHR) joined the dispute in Bloemfontein as *amicus curiae* and pointed out to the court that the applicant had been arrested in terms of a 'blanket policy to detain all persons found to be illegal foreigners'.[49] This policy was unlawful, LHR claimed, because it negated the discretion of immigration officers whether or not to arrest and detain an 'illegal foreigner' pending deportation (the section reads that an immigration officer '*may*, pending deportation, detain' an illegal foreigner).[50] The Supreme Court of Appeal agreed with the submissions of LHR. It accordingly held that the detention of an 'illegal foreigner' pending her deportation would be unlawful if the arresting officer had 'failed to exercise his discretion properly or at all'.[51] This principle was particularly apposite to the *Ulde* case. The court accepted that the immigration officer executed a policy directive to blindly arrest all 'illegal foreigners', which meant that he did not exercise any discretion at all. To the limited extent that the immigration officer might have exercised his discretion, he had failed to do so properly because he did not consider that the 'illegal foreigner' had been released on bail in a criminal trial involving his status. For this reason, the Supreme Court of Appeal upheld the appeal and ordered the immediate release of the applicant.

The *Jeebhai* case on appeal

The judgment of the Supreme Court of Appeal in *Jeebhai* was delivered together with the judgment in *Ulde*. One the face of it, the *Ulde* judgment promised to have far-reaching consequences for the High Court's vindication of pre-emptive detention. However, as it turned out, the judgment had no influence on the assessment of the *Jeebhai* judgment at all. The court ruled that the *Khan* precedents were correctly overturned by the High Court. It is not *per se* unlawful to pre-emptively arrest and detain an 'illegal foreigner' under section 34(1) before the ministerial review process under section 8(1) has been completed.[52] The majority of the court, somewhat disappointingly, disposed of the *Jeebhai* issue on the basis that section 1 of the Immigration

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49 *Id* at par 10.
50 *Id* at par 3.
51 *Id* at par 10; see also *Jeebhai* n 40 above at par 25 where the principle is formulated as quoted above.
52 *Jeebhai* n 40 above at pars 32 and 59.

Act defines an 'illegal foreigner' as 'a person who is in the Republic in contravention of the Act and not a person who is confirmed to be an illegal foreigner by the Minister upon review in terms of s 8(2)'.[53] This statement is disappointing, not primarily because of the formalistic manner in which the court purports to resolve a complex policy issue, but because it comes close to reviving the idea, shortly before rejected in *Ulde*, that once an immigrant has been defined as an 'illegal foreigner', there is sufficient reason immediately and routinely to arrest and detain that person.

Given the court's own insistence on the discretionary nature of the power involved, this cannot be what the Supreme Court of Appeal wished to say. The finding that it is not *per se* unlawful to pre-emptively arrest an 'illegal foreigner' should thus not opportunistically be misread to mean that it will never be unlawful to do so. The question depends on the circumstances of each case. From the perspective of the *Ulde* judgment, the policy of blanket release (argued for by the applicants) is simply the reverse of the policy of blanket detention (argued for by the department). If all the Supreme Court of Appeal wished to say was that an 'illegal foreigner' *may* be (as opposed to *must* be) pre-emptively detained, then the debate should no longer be to formulate a blanket rule for or against administrative detention during status determination; it should rather be to carefully structure and guide the administrative discretion in question. However, it is precisely on this point that the judgments of the Supreme Court of Appeal reproduce the greatest weakness of the High Court judgment in *Jeebhai*. The court failed to subject the discretion of immigration officers pre-emptively to detain 'illegal foreigners', to sufficiently demanding standards. Short of a policy of blanket pre-emptive detention, the department is effectively left unrestrained in its ability to arrest and detain 'illegal foreigners'. In other words, like the High Court, the Supreme Court of Appeal failed to subject the detention regime of the Department to a strict proportionality test as required by the constitutional duty to read section 34(1) in line with developments in international law.

The court started out promisingly enough. Having explained that the discretion of immigration officers is subject to the requirement that she must properly apply her mind,[54] the court proceeded to add that immigration

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[53] *Id* par 59; see also pars 25 and 34. Having decided to detain the deportee under s 34(1) the immigration officials failed to issue the required detention warrant. In the absence of such a warrant, the detention was unlawful. The appeal succeeded on this basis against the judgment of the High Court.

[54] *Ulde* n 46 above par 8.

officers must exercise their discretion in favour of liberty or against the detention of 'illegal foreigners'.[55] The court saw this principle as a presumption of statutory interpretation derived from the common law, but also pointed out that it can equally be derived (via section 39(2)) from the prohibition against arbitrary detention in section 12(1)(a) of the Constitution.[56] Does this presumption also mean, as it does in international human rights law, that an 'illegal foreigner' may only be detained as a last resort, in other words, only where it is necessary to do so because no other non-custodial alternative is available? Must an immigration officer show that she considered non-custodial alternatives before deciding to arrest and pre-emptively detain an 'illegal foreigner'?

According to the Supreme Court of Appeal, the presumption against immigration detention cannot be formulated in these strong terms. This is so because the legislature has explicitly excluded the requirement of necessity (and thus the element of proportionality) from the formulation of section 34(1) of the Immigration Act.[57] According to the court, section 41(1) requires that detention for status verification purposes must be necessary. However, the same requirement does not apply to detention for deportation purposes under section 34(1). There is no doubt that had this not been the case, the department would have been greatly curtailed in its ability to arrest and detain 'illegal foreigners'. As the court explained:[58]

> The requirement of necessity (and the concomitant element of proportionality) connotes that an immigration officer must consider whether there are sufficient grounds for the detention and also whether there are other less coercive measures to achieve the objective.

However, because the requirement of necessity is omitted from section 34(1), the court held that immigration officers are relieved of this more onerous justificatory requirement in instances of pre-emptive detention.[59] It is not clear what remains of a presumption against detention if it does not have this

55 *Id* at par 7.

56 *Id* at par 8. What the Court failed to realise is that in the latter instance the principle no longer operates as a presumption about legislative intention, but as a substantive canon of interpretation, enforced by the Courts regardless of the actual or presumed intention of the legislature. Perhaps this explains why the Court failed to give the presumption the content and force that it has acquired in international human rights law. On the role of the substantive canons in statutory interpretation see C Sunstein *After the rights revolution: Reconceiving the regulatory state* (1990).

57 *Id at* par 7 footnote 6.

58 *Ibid*.

59 *Ibid*.

limiting effect. More importantly, the court's finding that section 34(1) detentions are not subject to a necessity requirement is simply wrong. The problem lies with the court's reading of section 41(1). The section obliges an immigration officer to assist a suspected 'illegal foreigner' to verify her status. The section then proceeds to state that the immigration officer may 'thereafter, if necessary' detain the 'illegal foreigner' in terms of section 34 pending her deportation. There is little doubt that 'illegal foreigners' who are already in detention for status verification purposes may only be further detained under section 34(1) if it is 'necessary' to do so. The same applies to all other instances of detention pending deportation under section 34(1).[60] The court is thus simply wrong to conclude that an immigration officer need not consider whether there are any less coercive measures available to prevent an 'illegal foreigner' from absconding before the outcome of the ministerial review is known. As our review of recent developments in international law has shown, the release of 'illegal immigrants' need not be unconditional (as the *Jeebhai* court implied) but can be combined with a rich variety of conditions to ensure compliance with the next step in the immigration process (similar to those already in place for the conditional release of suspects in the case of criminal detentions).[61]

The *Jeebhai* judgment thus represents a failed opportunity on the part of the Supreme Court of Appeal to subject the department's detention policy to the requirements of necessity and proportionality. There is nothing in the scheme of the Immigration Act or the wording of section 34(1) to preclude the introduction of a system of conditional release, such as the CAP model of

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[60] In fact, it is far less clear whether the requirement of necessity applies to status verification detentions in terms of s 41(1) as the Court held (*Jeebhai* n 40 above par 24).

[61] It is difficult to understand how a legal system that provides extensive protection to criminal suspects against unnecessary detention, can provide almost no protection to undocumented migrants against unnecessary administrative detention. In the case of criminal suspects, only a court of law can issue a detention warrant. In the case of undocumented migrants, any immigration officer can issue a detention warrant (s 34(1) of the Immigration Act read with regulation 28(1)). A detained criminal suspect must be brought before a court of law as soon as reasonably possible but within 48 hours (s 35(1)d) of the Constitution). A detained undocumented migrant must only be brought before a court of law after 30 days, unless she requests otherwise (s 34(1)(d) read with s 34(1)(b) of the Immigration Act). A criminal suspect has a constitutional right to be released from detention if the interests of justice permit, subject to reasonable conditions (s 35(1)(f) of the Constitution). According to the *Ulde* and *Jeebhai* judgments, an undocumented migrant has no such right. If this is indeed the case, then South African immigration law allows undocumented migrants to be treated worse than those suspected of serious crimes. Perhaps further support for the suggestion by Neocosmos that our law is marked by an institutionalised state discourse of xenophobia.

migration control.[62] On the contrary, section 34(1) (read with section 41(1) of the Immigration Act, section 12 of the Bill of Rights, and article 9 of the ICCPR) imposes an obligation on the department to put in place non-custodial and community based alternatives to immigration detention. This duty is at its strongest at the beginning of the process while the status determination process is still pending.

The deferential findings in *Ulde* and *Jeebhai* about the broad range of circumstances in which pre-emptive detention would be lawful, belong to the *obiter* part of the judgments. There are strong indications that these findings might not necessarily be adopted when the issue serves before the court again. These indications come from refugee law and a recent judgment of the Supreme Court of Appeal in which the pre-emptive detention of asylum seekers was declared unlawful.[63] In order to strengthen our case against the tendency to present detention as the default position under the Immigration Act, we turn our attention to this important case in the next section.

IMMIGRATION DETENTION PENDING STATUS DETERMINATION UNDER THE REFUGEES ACT

In terms of section 21(1) of the Refugees Act 130 of 1998, an application for asylum or refugee status must be made in person to a Refugee Reception Officer at a Refugee Reception Office. The Refugee Reception Officer must accept the application and, in terms of section 22(1) of the Act, issue the applicant with an asylum seeker permit. The asylum seeker permit serves as a temporary identity document and affords the applicant the right to 'sojourn in the Republic' pending the outcome of his or her asylum application.[64] Complications arise where a person who is already in detention as an 'illegal foreigner' under section 34(1) of the Immigration Act, decides to apply for asylum under the Refugees Act. On application, such an 'illegal foreigner' will be issued with an asylum seeker permit. Does this mean that she has to be released immediately or may the department continue to detain her as an 'illegal foreigner' pending the outcome of her status application?

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62 The model is explained in Sampson, Mitchell, and Bowring *There are alternatives: A handbook for preventing unnecessary immigration detention* (2011). (PDF version available as a free download at: http://idcoalition.org/handbook).

63 *Arse v Minister of Home Affairs* [2010] ZASCA 9, 2010 (7) BCLR 640 (SCA), [2010] 3 All SA 261 (SCA).

64 In *Minister of Home Affairs v Watchenuka* [2003] ZASCA 142; [2004] 1 All SA 21 (SCA) the Supreme Court of Appeal ruled that in spite of its temporary nature, an asylum seeker permit affords its bearer the right to seek work and to study while awaiting the finalisation of his or her asylum application.

The *Mustafa* case

As we saw above, the department has always held the view that it has the unlimited power to arrest and detain all 'illegal foreigners'. Pursuant to this view, the department consistently refused to release 'illegal foreigners' who had applied for asylum but were still awaiting the outcome of their applications. This detention policy was fully sanctioned by the High Courts of Gauteng. In *Mogul v Minister of Home Affairs*,[65] for example, the High Court ruled in favour of the Department that it could continue to detain the applicants, because 'the applicants remain[ed] illegal refugees so long as they have not been accorded asylum refugees status'.[66] Mavundla J explained the thinking behind the court's finding in no uncertain terms:[67]

> I am also of the view that no country in the world, no matter how much it is human rights orientated, will allow that foreigners should swell into its borders unchecked, and that they must be freed from detention without much ado. The Courts must be careful in dealing with these matters of illegal foreigners; a too liberal approach might result in foreigners taking advantage of such a liberal approach by the courts to free them [...].

The judicial concern that 'illegal foreigners' in detention might abuse the asylum seeker process as a loophole to secure their release from detention also determined the outcome of the ruling in favour of the department in *Mustafa v Minister of Home Affairs*.[68] The applicant in this case was issued with an asylum transit permit in terms of section 23 of the Immigration Act. The asylum transit permit afforded the applicant the right to 'enter and sojourn in the Republic' for 14 days with the sole purpose of applying for asylum.[69] The applicant entered the country on this basis, but failed to apply for asylum as required. He was arrested a few months later and detained under section 34(1) as an 'illegal foreigner' pending his deportation. While in detention, the applicant finally applied for asylum and duly received an asylum seeker permit in terms of section 22 of the Refugees Act.[70] When the

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65 *Mogul v Minister of Home Affairs* [2008] ZAGPHC 227; (unreported judgment of the TPD, case 27497/08, 29 July 2008). Available at: http://www.saflii.org/za/cases/ZAGPHC/2008/227.pdf (last accessed 20 April 2011).

66 *Id* par 39.

67 *Id* par 39.

68 *Mustafa v Minister of Home Affairs* [2010] ZAGPJHC 1; (unreported judgment of the South Gauteng High Court, case 52898/09, 7 January 2010). Available at: http://www.saflii.org/za/cases/ZAGPJHC/2010/1.html (last accessed 20 April 2011).

69 Section 10(1) of the Immigration Act.

70 Under normal circumstances the asylum seeker permit would have replaced the existing asylum transit permit and would thus also have substituted the Refugees Act for the Immigration Act as basis of the asylum seeker's residence status in the Republic (see s

department refused to release him, he applied for an order declaring his ongoing detention illegal.

The High Court dismissed the application and ruled, first, that the detention of the applicant in terms of section 34(1) was lawful at the time when he submitted his asylum application and secondly, that the asylum application did not afford the applicant the right to be released.[71] The first finding by the court was clearly wrong. When the asylum application was filed, the detention warrant required under section 34(1) had expired without being renewed. The applicant was therefore already unlawfully detained at that point and the court should have ordered his immediate release. However, it is the second finding by the court that is of greater interest here. Willis J ruled that an asylum seeker permit does not by itself give rise to the right to be released from detention. The term 'sojourn' in section 22(1) meant nothing more than the right to remain in South Africa, that is, not to be deported.[72] In reaching this conclusion, Willis J echoed the sentiments of the High Court in cases like *Jeebhai* and *Mogul*, that the unconditional release of 'illegal foreigners' (in this case on the back of an asylum application) would seriously compromise the ability of the department effectively to control illegal migration.[73]

However, unlike the courts in those cases, Willis J was not willing to accept that the ongoing detention of 'illegal foreigners' under these circumstances was therefore automatically warranted. Willis J was convinced that there were other options available. On this basis he requested the parties before him to negotiate the conditional release of the applicant. Willis J himself suggested a number of conditions that might be imposed, including that the applicant be placed into the care and shelter of a lawful resident, that the applicant pay bail in the amount of R2000 and that he report to the nearest Refugee Reception Office twice a week.[74] The applicant, however, rejected these conditions and insisted (as pointed out above, correctly) on his unconditional release from detention. This rejection led Willis J to conclude that ongoing detention was the only available enforcement option for the indigent and undocumented migrant, and to dismiss the application.

22(2) of the Refugees Act).

71 *Mustafa* n 68 above page 2.

72 *Id* at page 5.

73 Willis J was particularly concerned about the 'precedent that would be created by persons entering the country illegally, waiting until they are apprehended, then applying for asylum status and then seeking court orders that they be released 'into the wilderness' so to speak' (*Mustafa* n 68 above page 5).

74 *Id* at page 3.

The *Arse* case

Willis J's creative attempt to secure the conditional release of the applicant received a cold shoulder in the Supreme Court of Appeal when the matter was taken on appeal by the applicant. The court insisted in its judgment (reported as the *Arse* case) that the detention of the applicant without a detention warrant was unlawful and that Willis J should have ordered his immediate release.[75] Under these circumstances, the attempt to secure the conditional release of the applicant was a misplaced attempt to paper over the unlawfulness of the detention preceding the application.

However, how would the Supreme Court of Appeal have reacted to Willis J's initiative had the detention preceding the asylum application been lawful? Not much more favourably, it would seem. The problem is that Willis J had assumed that the ongoing detention after the asylum application would be lawful (if undesirable). He relied in this regard on an apparent exception that section 23(2) of the Immigration Act creates to the principle that asylum seekers may not be detained. The section reads as follows (our emphasis):

> *Notwithstanding anything contained in any other law*, when the [asylum transit permit] expires before the holder reports in person to a Refugee Reception Officer [...] the holder of that permit shall become an illegal foreigner and be dealt with in accordance with [the Immigration Act].

The aim of this section 23, which was inserted into the Immigration Act in 2004, is to counter wide-spread abuse of asylum transit permits. The overriding provision makes it clear that 'illegal foreigners' who had already once abused an asylum transit permit, should not be trusted to 'sojourn' freely again in the country, this time on the basis of an asylum seeker permit. The pre-emptive detention of asylum seekers under these unique circumstances is warranted as an exception to the normal policy of non-detention, an exception justified by the need to prevent the abuse of asylum law to evade immigration law.[76] The Supreme Court of Appeal rejected this

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75 *Arse v Minister of Home Affairs* [2010] ZASCA 9, 2010 (7) BCLR 640 (SCA), [2010] 3 All SA 261 (SCA) par 9–12.

76 This line of reasoning is bolstered somewhat by the latest Immigration Amendment Bill [B32-2010]. The Bill proposes a further amendment to s 23(1). The amendment imposes stricter control on asylum transit permit holders by reducing the period of validity from 14 to 5 days and by introducing a pre-screening test before the permit is issued (a clear indication that the problems with abuse persisted in spite of the 2004 amendments). In response to critical comments against this amendment, the Department recently issued the following explanation (see Response by the Department to submissions made on the Immigration Amendment Bill, 2010 [B32W–2010]) on 25 – 27 January 2011 [Portfolio Committee on Home Affairs] 8 February 2011: 'The proposal to reduce the number of

purposive interpretation of section 23(2) of the Immigration Act.[77] It claimed that the case was governed by section 21(4)(a) of the Refugees Act, which contains its own overriding provision and reads as follows (our emphasis):

> *Notwithstanding any law to the contrary*, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if such person has applied for asylum [...] until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal [...]

The court further pointed out that under the Refugees Act an 'illegal foreigner' ceases to be such at the moment that an asylum seeker permit is issued to him or her.[78] From that moment onwards, section 23(2) of the Immigration Act also no longer finds application.[79] In terms of section 23 of the Refugees Act, an asylum seeker may thereafter only be detained if the asylum seeker permit has been withdrawn.[80] Furthermore, the detention of asylum seekers would be a violation of their statutory right to 'sojourn' in the country.[81] All of which meant that Willis J was incorrect to assume that the detention of an 'illegal foreigner' who turned asylum seeker could ever be lawful. There was thus no legal basis for the conditional release of the applicant after he had submitted his asylum application. Even if the detention preceding the application had been lawful, the court should still have ordered the immediate release of the applicant.

Does this mean an end to the judicial search for alternatives to pre-emptive immigration detention under the Refugees Act? Before answering this question in conclusion, it is worth reflecting on a persistent unease with the

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days is necessary. In most cases, persons who are granted this permit tend not to apply for asylum, and take advantage of the number of days to move inwards leaving the nearest Refugee Reception Centre. If given fewer days to apply, this will encourage compliance by genuine asylum seekers.'

77 *Arse* n 75 above par 19.

78 *Id* at par 19.

79 The obiter judgment of the Court on the ongoing detention of asylum seekers who had earlier failed to comply with an asylum transit permit is far from convincing. For example, the Court appeals vaguely to the spirit of international refugee law to justify its conclusions but fails to mention that art 31(1) of the UN Refugee Convention limits the immigration amnesty afforded to refugees, to those asylum seekers who immediately present themselves to the immigration authorities (in this context, within the 14 days stipulated on the asylum transit permit). The interpretation of s 23(2) contended for by the Department would thus be fully in line with the Convention.

80 *Arse* n 75 above par 21.

81 *Id* par 22.

unconditional release of all asylum seekers favoured by the Supreme Court of Appeal in *Arse*.

A persistent unease: the *Zimbabwe Exiles Forum* case

This unease surfaced in the High Court judgment in *Zimbabwe Exiles Forum v Minister of Home Affairs*.[82] The case involved thirty-four Zimbabwean nationals who applied for asylum while in detention as 'illegal foreigners'. The court (per Kollapen AJ) confirmed that 'illegal foreigners' who apply for asylum while in detention are entitled to be immediately issued with an asylum seeker permit,[83] and to be unconditionally released from detention pending their status applications.[84] In the process, the court rejected the argument by the department that ongoing detention is warranted, not only in cases where asylum transit permits are abused (as in *Arse*), but in all cases where refugees do not immediately present themselves to the authorities but wait to be arrested and detained as 'illegal foreigners' before applying for asylum.[85] The department contended that the unconditional release of every *pro forma* asylum seeker under these circumstances would signal the end of immigration detention as an effective immigration management option, as it would enable individuals to abuse the Refugees Act to escape the reach of the Immigration Act. While conceding that the 'risks and unintended consequences of such an approach do appear to be substantial', the court nevertheless ruled that it was 'obliged to follow the dicta of the Supreme Court of Appeal' and on that basis declared the departmental detention policy invalid and ordered the unconditional release of the applicants.[86]

CONCLUSION

This concern with the unconditional release of 'illegal foreigners' or what the court in *Zimbabwe Exiles Forum* described as the 'risks and unintended consequences' of the judgment in *Arse*, runs like a golden thread through the judgment of Willis J in *Mustafa* and the judgment of Mavundla J in *Mogul*. It also resonates with the concerns raised about the unconditional release of 'illegal foreigners' in both the *Jeebhai* and *Ulde* judgments. We argued above that these concerns are often overstated, and in some instances even inspired by xenophobic sentiments. We also argued that these concerns are

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82 *Zimbabwe Exiles Forum v Minister of Home Affairs* [2011] ZAGPPHC 29 (unreported judgment of the North Gauteng High Court, case 27294/2008, 17 February 2011). Available at: http://www.saflii.org/za/cases/ZAGPPHC/2011/29.html (last accessed 20 April 2011).

83 *Id* at par 28.

84 *Id* at par 47.

85 *Id* at par 42. This argument relies on the proviso to art 31 of the Refugee Convention.

86 *Id* at par 45 and par 48.

exacerbated by the conventional wisdom that post-apartheid immigration legislation forces immigration officers to choose between the unconditional release of 'illegal foreigners' and their pre-emptive detention (the second assumption in the *Jeebhai* case). We indicated that this assumption has lost touch with recent developments in and best practice under international law, and that it rests on important misreadings of the statutory provisions in question.

Against this background, Willis J must be commended for denying the conventional wisdom that pre-emptive detention is the only way to overcome security concerns and for his willingness to explore the possibility of a non-custodial or community based alternative. In his mind the availability of such an alternative would have meant the conditional release of the detainee in question. We noted above that according to the Supreme Court of Appeal, there can be no question of conditional release under these circumstances. Where does this leave us in the judicial search for alternatives to pre-emptive immigration detention under the present Immigration Act and Refugees Act?

The finding in *Ulde* that a necessity requirement does not apply to detention pending status determination under the Immigration Act has carved away much of the legal ground and impetus to develop such alternatives. The same can ironically also be said about the finding in *Arse* that detention pending status determination under the Refugees Act cannot be justified as a limited exception to the general rule of non-detention. However, all is not lost. In the concluding paragraph of its judgment in *Arse*, the Supreme Court of Appeal (per Malan JA) made the following important nod in the direction of Willis J's attempt to secure the conditional release of the 'illegal foreigner' in question:[87]

> I am aware of the concerns of the [department] as expressed in the judgment of the court a quo that the state has a legitimate interest in trying to curb illegal immigration. However, these concerns could have been addressed by the imposition of conditions in terms of s 22 of the Refugees Act and their effective monitoring.

These concluding words are an indication that the Supreme Court of Appeal might yet be fully in support of the attempt to design non-custodial alternatives to immigration detention (at least in the case of asylum seekers). The court is simply insisting that the proper legal basis for these alternatives is not the authority to detain 'illegal migrants' under section 34(1) of the

[87] *Arse* n 68 above at par 23.

Immigration Act (as Willis J had assumed), but the authority to issue asylum seeker permits under section 22 of the Refugees Act.

The development of non-custodial forms of immigration control along these lines, under the Refugees Act, will have important consequences for pre-emptive detentions under the Immigration Act. The proportionality requirement under section 41(1) assumes a different complexion once it is accepted that a range of options for the conditional release of 'illegal foreigners' already exists in our law. If an immigration officer has the authority to arrest and detain an 'illegal foreigner' only when it is necessary to do so, as we argued above, then that officer also has the authority (or better still the obligation) to conditionally release the 'illegal foreigner' whenever measures similar to those proposed by Willis J are available. This will go a long way towards addressing the security concerns surrounding the unconditional release of 'illegal foreigners' that have so dominated recent case law.

The example set by Willis J shows that a far more activist role for the judiciary in the crafting of a system of non-custodial monitoring and control within the existing statutory framework is possible. The recent case law of the Supreme Court of Appeal, flawed as it is, supports judicial and civil society activism along these lines against the pre-emptive detention of undocumented migrants and asylum seekers. As such, it places the abolition of immigration detention squarely on the table, as an issue for further advocacy, litigation and research. This is an important development in our law. For as Jacoob J pertinently reminded us in *Lawyers for Human Rights v Minister of Home Affairs*:[88]

> [t]he very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.

[88] *Lawyers for Human Rights v Minister of Home Affairs* [2004] ZACC 12; 2004 4 SA 125 (CC); 2004 7 BCLR 775 (CC) par 20.