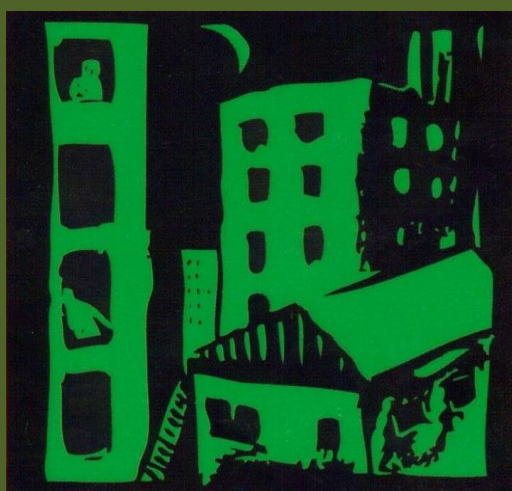


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## Has South Africa committed in good faith to article 34 of the UN Refugee Convention, which calls for the naturalisation of refugees?

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### ABSTRACT

*It is widely accepted that to be naturalised one must acquire the nationality of a political or national community, and that such a status is accompanied by various rights. It is also widely accepted that nationality can be acquired in various ways. Article 34 of the 1951 United Nations Convention Relating to the Status of Refugees provides that States must facilitate the naturalisation and assimilation of refugees and expedite these proceedings as far as possible. As South Africa has not filed any reservations to the UN Refugee Convention, it is bound to respect Article 34 of this treaty and thus not block the*

*pathway to naturalisation. Failure to do so means that South Africa is violating its obligations under international law. There is a legal pathway to ending refugee status in South Africa; however, it is bound by a complicated process regulated by three different pieces of legislation, namely, the Refugees Act, the Immigration Act, and the Citizenship Act. It therefore appears that South Africa has not enacted this provision in good faith. This article provides an analysis of South Africa's domestication of Article 34 of the UN Refugee Convention. Moreover, it concludes that the current system is complicated and hinders refugees from accessing naturalisation, and therefore is not in the spirit of the UN Refugee Convention*

**Key words:** naturalisation, assimilation, local integration, permanent residence, refugeehood

## 1 INTRODUCTION

The state of refugeehood provides “surrogate protection”<sup>1</sup> but is not considered a durable solution because refugees do not automatically acquire the nationality of a host State. They may enjoy a range of rights as refugees, but they are excluded from belonging to the political community and therefore do not have a normal citizen-State relationship.<sup>2</sup> Moreover, they no longer have the protection of their home State or the citizenship rights they once had. Regular migrants, on the other hand, even if they remain migrants, have a choice: they can come and go from host States as they please and re-establish the citizen-State bond with their home States.<sup>3</sup> When refugees are expected to remain refugees, they are deprived of a citizenship bond with *any* State. It is for this reason that the concept of durable solutions is continuously developed by the UNHCR.<sup>4</sup> The international community has recognised the injustices and prejudices suffered when refugees are forced to live in protracted refugee situations, and this has

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<sup>1</sup> Hathaway J C & Foster M *The law of refugee status* 2<sup>nd</sup> ed (Cambridge: Cambridge University Press 2014) at 495.

<sup>2</sup> This article views a citizen as someone “who enjoys the full panoply of rights—civil, social, economic, and *political*—accorded by a nation state; a citizen can call on his or her nation state, and only that nation state, to claim diplomatic protection; and the nation state can in turn demand the ultimate loyalty of its citizens, including the obligation to fight and die”. Hansen R “State controls: borders, refugees, and citizenship” in Fiddian-Qasmiyeh E, Loescher G, Long K & Sigona N (eds) *The Oxford handbook of refugee and forced migration studies* (Oxford: OUP 2014) 253.

<sup>3</sup> Teitelbaum M “The role of the state in international migration” (2002) 8 *The Brown Journal of World Affairs* 157 at 167.

<sup>4</sup> UNHCR “Refugee protection and mixed migration: the point plan in action” (2007) available at <https://www.unhcr.org/50a4c2b09.pdf> (accessed 17 February 2017).

been widely studied.<sup>5</sup> States, scholars and the United Nations High Commission for Refugees (UNHCR) have also acknowledged the temporariness of refugee status<sup>6</sup> and that only re-attachment to a home State through repatriation or the host State through naturalisation or third country resettlement<sup>7</sup> will lead to a citizenship bond with a State for the refugee.<sup>8</sup>

This article begins by examining the only durable solution which signifies an end to refugeehood in the host State by the 1951 United Nations Convention Relating to the Status of Refugees (UN Refugee Convention)<sup>9</sup> in Article 34. Furthermore, it provides an analysis of South Africa's commitment to Article 34 and argues that the current three step system, spread across three legislative acts, is paved with obstacles and in fact hinders refugees from accessing naturalisation. It also posits that if South Africa is to truly adhere to Article 34 in good faith, the Standing Committee for Refugee Affairs (SCRA) that is responsible for the first and vital step toward naturalisation in terms of the Refugees Act needs to guarantee efficiency, stand autonomously as an independent body, and interpret refugee law concepts in accordance with current international jurisprudence. This article also objects to the cumbersome and prejudicial process which sees permanent residency and naturalisation proceedings removed from the protection of refugee law and placed under the operation of immigration law and citizenship law, respectively. This article thus concludes that South Africa has not committed to Article 34 in the spirit of the UN Refugee Convention which calls for an expedited process and one that will be beneficial to the refugee.

## 2 ARTICLE 34 OF THE UN REFUGEE CONVENTION: AN ANALYSIS

Article 34 is the closest that the UN Refugee Convention gets to a solution to ending refugeehood in a host State. It states:

“The Contracting States shall as far as possible facilitate the *assimilation* and *naturalization* of refugees. They shall in particular make every effort to expedite

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<sup>5</sup>For example, see: Loescher, Milner J, Newman E & Troeller G (eds) *Protracted refugee situations: political, human rights and security implications* (Tokyo, New York, Paris : UN University Press 2008) at 3; Konyndyk J “Towards a new model for post-emergency refugee assistance” *Human Practice Network* (2005) G18 available at <http://odihpn.org/magazine/towards-a-new-model-for-post-emergency-refugee-assistance/> (accessed 28 November 2017) ; United Nations High Commissioner for Refugees (UNHCR) Executive Committee Conclusion No 109 (LXI) on Protracted Refugee Situations (2009) UN GA Doc A/AC.96/1080; Loescher G & Milner J “Case studies: contemporary protracted refugee populations in Africa and Asia” (2005) *45 The Adelphi Papers* at 35.

<sup>6</sup> Loescher G *The UNHCR in world politics: a perilous path* (Oxford: OUP 2001) at 75 (citing van Heuven Goedhart G J “Refugee problems and their solutions” (address of UNHCR at Oslo on 12-12-1955).

<sup>7</sup>The UNHCR only facilitates resettlement if it ends refugee status. See UNHCR “Resettlement Handbook” (2011).

<sup>8</sup> Haddad E *The refugee in international society: between sovereigns* (Cambridge: Cambridge University Press 2008) at 34.

<sup>9</sup> 189 UNTS 150.

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naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.”<sup>10</sup>

The Article requires States to facilitate assimilation *and* naturalisation<sup>11</sup>, terms that are not defined in the Convention. It is trite that the word naturalisation<sup>11</sup> has a distinct bearing on immigration status, whereas assimilation does not. Assimilationist policies are generally viewed in a negative sense because, in their worst form, a State could put extreme pressure on minorities to relinquish their culture and adopt the culture of the State to ensure a homogenous national identity.<sup>12</sup> Assimilation is often understood as conforming to the norms and ideals of the host State in order to fully become an accepted member of society.<sup>13</sup> Integration allows for cultural differences and occurs when different groups in society can co-exist as equals.<sup>14</sup> Commentators agree that the drafters of the UN Refugee Convention intended assimilation to be understood in the sense of integration into the economic, social and cultural life of the host community without forcing refugees to forsake their own culture and way of life.<sup>15</sup> Hence, the preferred term by the UNHCR today is “integration” rather than “assimilation.”<sup>16</sup> However, this has not been adopted into law. Since the UNHCR is not calling for refugees to relinquish their identity, it might be worth reconsidering the legal phrasing in the UN Refugee Convention. The UNHCR has however formalised its use of the term integration in various guidelines and executive committee conclusions.<sup>17</sup>

Naturalisation, on the other hand, guarantees nationality and membership of a political or national community and is accompanied by various rights and State obligations. Nationality can be acquired in various ways.<sup>18</sup> For refugees, Article 34 of the UN Refugee Convention envisions that States will implement an effective and respectful pathway to naturalisation that is specific to refugees, and thus end their refugee status. It is not a self-executing Article. The Article calls for States to facilitate the process “as

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<sup>10</sup> Art 34 of UN Refugee Convention.

<sup>11</sup> Manby B *Citizenship law in Africa: a comparative study* 3<sup>rd</sup> ed ( New York: Open Society Foundations 2016) at xi. Nationality is usually conferred on a person at birth either because the person is born in a territory or because one or both of their parents possess the nationality in question. Nationality may also be conferred upon a person later by an application filed by the individual seeking to be naturalised. In the case of a refugee, this would largely be the case.

<sup>12</sup> Brown S K & Bean F D “Assimilation models, old and new: explaining a long-term process” (2006) available at <http://www.migrationpolicy.org/article/assimilation-models-old-and-new-explaining-long-term-process> (accessed 22 October 2016).

<sup>13</sup> Snauwaert B, Soenens B, Vanbeselaere N & Boen F “When integration does not necessarily imply integration: different conceptualizations of acculturation orientations lead to different classifications” (2003) 34 *Journal of Cross-Cultural Psychology* 231 at 231.

<sup>14</sup> Kuhlman T “The economic integration of refugees in developing countries: a research model” (1991) 4 *Journal of Refugee Studies* 1 at 3.

<sup>15</sup> See Brown & Bean (2006) .

<sup>16</sup> UNHCR Executive Committee “Conclusion no 104 (lvi) on local integration” (2005) UN GA Doc a/ac/.96/1021 7 October 2005.

<sup>17</sup> UNHCR Executive Committee “Local integration and self-reliance” (2005) available at <https://www.unhcr.org/excom/standcom/42a0054f2/local-integration-self-reliance.html> (accessed 18 February 2019).

<sup>18</sup> See Manby (2016).

far as possible”; thus States are not held accountable to one specific standard of implementation.

Although assimilation and naturalisation may be two distinct processes, there is a nexus between them. Article 34 mentions assimilation first, which potentially indicates that this process must occur prior to the facilitation of naturalisation. Similarly, the UNHCR does not equate local integration with naturalisation but does refer to it as a durable solution.<sup>19</sup> Hathaway refers to it as a bifurcated approach to naturalisation,<sup>20</sup> because local integration and naturalisation require a separate legal analysis. Since the UNHCR regards local integration as a durable solution for refugees even though it does not signify an end to refugeehood, and because of its link to Article 34, an analysis of the concept of local integration follows.

### 3 IS LOCAL INTEGRATION THE EQUIVALENT OF NATURALISATION?

According to the UNHCR,

“[i]ntegration requires preparedness on the part of the refugees to adapt to the host society, without having to forego their own cultural identity as is generally expected of assimilation. From the host society, local integration requires communities to be welcoming and responsive to refugees, and public institutions that are able to meet the needs of the diverse population”.<sup>21</sup>

Local integration has three specific dimensions – legal, economic, and socio-cultural.<sup>22</sup> In terms of the legal dimension, refugees are granted durable residence with a progressively wider range of rights that are equivalent to those granted to citizens, except for the right to vote. These rights include, amongst others, freedom of movement, access to the labour market, access to public relief and assistance, access to healthcare and education, the right to travel and identity documents, as well as the right to family unity,<sup>23</sup> which ought to lead to the social and economic integration of refugees. Local integration, as envisaged by the UNHCR, provides a wide range of rights to refugees that can facilitate their integration into the host community. According to the UNHCR, the range of the rights available ought to allow the refugee to live a meaningful life in the host State.<sup>24</sup>

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<sup>19</sup> UNHCR “Local integration” available at <https://www.unhcr.org/local-integration-49c3646c101.html> (accessed 14 June 2019).

<sup>20</sup> Hathaway J C *The rights of refugees under international law* (Cambridge: Cambridge University Press 2005) at 978.

<sup>21</sup> UNHCR Executive Committee (2005)

<sup>22</sup> UNHCR Executive Committee “Local integration and self-reliance” (33<sup>rd</sup> Meeting, 2 June 2005) EC/55/SC/CRP.15 paras 19-24.

<sup>23</sup> UNHCR ExCom “Local integration and self-reliance” (2005) paras 11 and 19.

<sup>24</sup> UNHCR ExCom “Conclusion on local integration” No 104 (LVI) (2005) A/AC.96/1021.

According to Hathaway, “[l]ocal integration means in essence that a refugee is granted some form of durable legal status that allows him or her to remain in the country of asylum on an indefinite basis, and fully participate in the social, economic, and cultural life of the host community”.<sup>25</sup> So conceived, he says, local integration is not really distinguishable from the primary solution envisaged by the UN Refugee Convention which is simple respect for rights.<sup>26</sup> Yet, the UNHCR Executive Committee’s Conclusion on Local Integration refers to local integration as one of three durable solutions for refugees. The other two are resettlement<sup>27</sup> and voluntary repatriation, which differ from local integration because they signify the end of refugee status.<sup>28</sup> Local integration without the possibility of termination of refugee status can thus lead to an anomalous situation of a permanent refugee status. Therefore, the UNHCR’s reference to local integration as a durable solution<sup>29</sup> is especially problematic. While local integration is necessary to access a vast range of rights, it is insufficient on its own as a solution as it does not lead to the end of refugeehood. Despite referring to local integration as a durable solution, there is no evidence that the UNHCR has replaced naturalisation with local integration.

#### **4 NATURALISATION - SIGNIFIES AN END TO REFUGEE STATUS IN THE HOST STATE**

Citizenship, while indisputably the most durable solution for a refugee from the host State, can only be granted by the host State.<sup>30</sup> It ends refugee status and allows refugees to be part of a national community. From a legal point of view, citizenship for the refugee not only represents the right to full legal and diplomatic protection from the State (both within and outside the country), but also indicates a commitment to the State on the part of the refugee.<sup>31</sup>

Whilst the UN Refugee Convention does not enshrine an absolute right of naturalisation and, in fact, the enjoyment of most of its provisions is conditional on the immigration status of the refugee, the notion of becoming a permanent citizen is not

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<sup>25</sup> See Hathaway (2005) at 977-978.

<sup>26</sup> See Hathaway (2005) at 977-978.

<sup>27</sup> See UNHCR *Resettlement Handbook* (2011).

<sup>28</sup> UNHCR *Voluntary Repatriation International Protection Handbook* (1996).

<sup>29</sup> UNHCR “Local integration” available at <https://www.unhcr.org/local-integration-49c3646c101.html> (accessed 21 June 2019).

<sup>30</sup> Huddleston T & Vink M P “Membership and/or rights? Analysing naturalisation and integration policies for immigrants in Europe” (2013) *RSCAS PP 2013/15* at 1-2 available at [http://cadmus.eui.eu/bitstream/handle/1814/28121/RSCAS\\_PP\\_2013\\_15rev.pdf?sequence=1&isAllowed](http://cadmus.eui.eu/bitstream/handle/1814/28121/RSCAS_PP_2013_15rev.pdf?sequence=1&isAllowed) (accessed 22 October 2016).

<sup>31</sup> UNHCR “Rights of Refugees in the Context of Integration: Legal Standards and Recommendations” (June 2006) available at 83 at <https://www.refworld.org/docid/44bb9b684.html> (accessed 21 June 2019).



alien to it.<sup>32</sup> The notion of permanence for refugees was postulated by Grahl-Madsen when he examined the plight of refugees without a country of origin, that is, Stateless refugees.<sup>33</sup> He maintained that when the State is unable to remove refugees they gain freedom of movement and residence; they must be considered to be “lawfully staying” in the territory, such that “after a number of years (normally about three years) [their] interest in growing roots must override any other considerations”.<sup>34</sup> In short, a refugee who has stayed uninterruptedly in the host State for a considerable period of time acquires a legitimate expectation to be treated fairly, including when applying for naturalisation, which is consistent with Article 34.<sup>35</sup>

#### 4.1 State’s obligations in relation to naturalisation

Article 34 of the UN Refugee Convention provides that States “shall as far as possible facilitate the assimilation and naturalization of refugees”.<sup>36</sup> The use of the word “shall” in legislation usually suggests that a duty is imposed<sup>37</sup>; however, in this case, this duty is qualified by the words “as far as possible”. The State can therefore decide whether it is dedicated to naturalising any individual or any number of refugees.<sup>38</sup> The decision by the State must, however, be guided by the well-known principle of good faith.<sup>39</sup> States cannot simply ignore a provision in an international legal instrument that they have ratified.<sup>40</sup> A State that refuses to assimilate or naturalise a refugee without demonstrating its inability to do so, or refuses simply because it is unwilling, would be in violation of the UN Refugee Convention.<sup>41</sup> Furthermore, once the State has made the decision to allow for the naturalisation of refugees, it *must* abide by the other requirements of Article 34, namely, to “expedite” naturalisation proceedings and to

<sup>32</sup>See Hathaway (2005) at 171-190.

<sup>33</sup> Grahl-Madsen A *A commentary on the Refugee Convention 1951 articles 2-11, 13-37* (Geneva : Division of International Protection of the UNHCR 1997).

<sup>34</sup> Grahl-Madsen A *The status of refugees in international law* vol II (Leyden : A W Sijthoff 1972) at 437.

<sup>35</sup> Art 34 of UN Refugee Convention.

<sup>36</sup> Art 34 of UN Refugee Convention.

<sup>37</sup> Botha C *Statutory interpretation: an introduction for students* 3<sup>rd</sup> ed (Cape Town: Juta 1997) at 67. “Shall” is deemed to be mandatory.

<sup>38</sup> See Huddleston & Vink (2013).

<sup>39</sup> The concept of “good faith” is an abstract notion. Justice Stewart famously noted that “I shall not today attempt to define [it]...But I know it when I see it”. Whilst good faith has no clear definition, the term has been widely accepted as one of the main sources of international law. It is incumbent on States Parties, at the very least, to provide a good faith justification for excluding refugees from naturalisation. See Reinhold S “Good faith in international law” (2013)2 *UCLJLJ* 40 and Weis P “Commentary of the 1951 UN Refugee Convention Travaux Préparatoires” (1995) available at <http://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html> at 989 (accessed 21 June 2019).

<sup>40</sup> See *The North Atlantic Coast Fisheries Case (Great Britain v United States of America)* (Award) [1910] XI RIAA 169 at para 188.

<sup>41</sup> However, the UN Refugee Convention does not establish an inter-State supervisory body to hold States accountable if and when they fail to meet their internationally defined protection obligations. See Hathaway J et al “Introduction” (2013) 26 *Journal of Refugee Studies* 323.

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“reduce the cost” of naturalisation. Unlike the duty to provide for naturalisation, the duties to expedite and reduce the costs of naturalisation are framed without qualification. These unqualified duties are especially necessary because refugees generally struggle to access their rights due to their vulnerable status<sup>42</sup>. In many countries, naturalisation procedures are expensive and involve long waiting periods, which is contrary to what Article 34 expects of States. The UNHCR has explained the duty to facilitate naturalisation as follows:

“To ‘facilitate’ naturalization means that refugees and stateless persons should be given appropriate facilities for the acquisition of the nationality of the country of asylum and should be provided with the necessary information on the regulations and procedures in force. Furthermore, it implies that national authorities should adopt legal or administrative procedures for the benefit of refugees by which they are enabled to qualify for naturalization earlier than aliens generally, they are not required to give evidence of loss of their former nationality and that the fees normally paid for naturalization proceedings are reduced or waived.”<sup>43</sup>

As stated above, the UN Refugee Convention gives direction on the costs and speed of processing the application for naturalisation, but it does not recommend a time period that a refugee must spend in the host State before he or she becomes eligible for naturalisation. This issue was raised by the drafters, but no consensus was reached, and it was therefore left to individual States to decide. The Canadian representative recommended that the period from initial displacement before formal refugee status is granted must be taken into account,<sup>44</sup> and that the refugee’s stay in the host country must be uninterrupted before he or she can be eligible for naturalisation.<sup>45</sup> The Italian government objected to the naturalisation of refugees who have just entered a country, arguing that such action might “embitter the internal situation” or cause “the gravest concern to over-population and unemployment”.<sup>46</sup> The French representative submitted that the duty to “expedite the proceedings” should not apply to the period of residency prior to an application for naturalisation.<sup>47</sup> In the end, the draft committee agreed not to include a specific time period within which to obligate States to allow for naturalisation.<sup>48</sup> Article 34 thus recommends naturalisation without giving an indication of the length of sojourn in the host State for a refugee to become eligible to make such an application.

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<sup>42</sup> *Union of Refugee Women v Director, Private Security Industry Regulatory Authority* 2007 (4) SA 395 (CC) at para 22.

<sup>43</sup> UNHCR “Positive Steps Forward in the Field of Citizenship” (2006) *BiH press release* available at <http://www.unhcr.ba/press/2006pr/030806.htm> (accessed 22 October 2016).

<sup>44</sup> UNHCR “The Refugee Convention, 1951: The *travaux préparatoires* analysed with commentary by Dr. Paul Weis” (1990) at 247 available at <https://www.refworld.org/docid/53e1dd114.html>.

<sup>45</sup> See UNHCR (1990).

<sup>46</sup> See UNHCR (1990) at 247. See also Grahl-Madsen (1997).

<sup>47</sup> See UNHCR (1990) at 247.

<sup>48</sup> See UNHCR (1990) at 250.



A possible way for individual States to address this issue is to apply the principle of non-discrimination that exists in international human rights law<sup>49</sup> and is also available in the national laws of most countries.<sup>50</sup> As stated above, according to the immigration laws of many States, foreigners become eligible for permanent residence or naturalisation after a period of uninterrupted stay in the host State. Refugees need to be given different consideration to ordinary immigrants because of their particular vulnerabilities, and a large number of countries have reduced the time period for refugees to become eligible to apply for naturalisation.<sup>51</sup> The length of time a person remains a refugee in the host State if there is no other possibility of ending refugee status is increasingly coming under scrutiny because of the large number of protracted refugee situations in the world today and the obvious prejudices suffered by refugees as a result of their protracted refugee status.<sup>52</sup>

Notwithstanding that the duty to facilitate naturalisation is qualified by the phrase “as far as possible”, Article 34 is binding on States. Article 34 is clearly breached where a State Party does not allow refugees to secure their citizenship and refuses to provide an explanation for that inaccessibility. The article will now direct its attention to South Africa and see whether South Africa has adopted policies and practices of naturalisation that benefit refugees.

## 5 A BRIEF OVERVIEW OF THE SOUTH AFRICAN REFUGEES ACT

South Africa enacted the Refugees Act<sup>53</sup> in 1998, and substantively it is compatible with international refugee and human rights law. Among other things, the Refugees Act sets out structures and mechanisms for administering status determination. These structures include Refugee Reception Offices,<sup>54</sup> which are staffed by reception officers<sup>55</sup>

<sup>49</sup> Article 7 of the Universal Declaration of Human Rights 1948 : “All are equal before the law and are entitled without any discrimination to equal protection of the law.” See also Art 26 of the International Covenant on Civil and Political Rights 1966.

<sup>50</sup> UNHCR “The Rule of Law, Equality and Non-discrimination” available at <https://www.un.org/ruleoflaw/thematic-areas/human-rights/equality-and-non-discrimination/> (accessed 20 June 2019).

<sup>51</sup> In 1969, the Council of Europe recommended to all Members that refugees be subject to a minimum period of residence that does not exceed five years. In current German law, the residency requirement for refugees may be reduced from the normal 8-year period to 6 years. UNHR (1990) (per Weis) notes that at the time Denmark reduced the requirement from seven to six years in the case of refugees, Belgium from six to three years, and the Netherlands from five to four years. He also writes that some States reduce other hurdles to naturalisation, such as exempting refugees from the requirement to renounce dual-nationality, as in Switzerland and Finland. In Denmark, the language and integration requirements are relaxed for refugees. To cite other examples, in both Kenya and Rwanda, naturalised citizenship can be acquired after only five years of residence.

<sup>52</sup> These prejudices include poorer access to employment, education and housing and can be exacerbated in States that use encampment policies for refugees as they limit freedom of movement. See Loescher & Milner (2005).

<sup>53</sup> Act 130 of 1998.

<sup>54</sup> Refugees Act at s 8.

<sup>55</sup> Refugees Act at s 8(2).

and status determinations officers,<sup>56</sup> as well as two oversight bodies. The SCRA<sup>57</sup> and the Refugee Appeal Board (RAB)<sup>58</sup> consider reviews and hear appeals, respectively. In addition, the SCRA has an oversight role and must administer the certification process which is the first step in the naturalisation process. The SCRA is thus the most important decision-maker with regard to accessing naturalisation for the refugee.

The Refugees Act also offers a generous range of rights and entitlements to refugees. It defines the refugee in terms similar to those of the UN Refugee Convention as well as the Organisation of African Unity Refugee Convention (OAU Refugee Convention).<sup>59</sup> It expressly states that all rights in the Bill of Rights of the South African Constitution apply to refugees.<sup>60</sup>

Like the UN Refugee Convention, the Refugees Act has provisions on cessation of refugee status<sup>61</sup>, and recognises the principle of non-refoulement.<sup>62</sup> Significantly, the Refugees Act provides for possibilities for ending refugee status after a period of continuous stay.<sup>63</sup>

The major shift in refugee law and policy from Apartheid to democracy can be summarised as follows: South Africa has moved away from the *ad hoc* approach during Apartheid, which denied a human rights approach and advocated discriminatory laws based on skin colour<sup>64</sup> and excluded black refugees. The previous policy used the doctrine of sovereignty to regard citizenship as a prerogative of the State, such that the State would choose (without censure) to whom it granted refugee status and citizenship. Presently, the State's actions have to be counterbalanced by the country's commitment to human rights as espoused in the South African Constitution.

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<sup>56</sup> Refugees Act at s 8(2).

<sup>57</sup> Refugees Act at s 9(1).

<sup>58</sup> Refugees Act at s 12(1).

<sup>59</sup> See s 3 of the Refugees Act, which states: "Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or (c) is a dependent of a person contemplated in paragraph (a) or (b)."

<sup>60</sup> Section 27 states: "A refugee... (b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act."

<sup>61</sup> See s 5 of the Refugees Act, which provides for the "cessation of refugee status".

<sup>62</sup> See s 2 of the Refugees Act, which provides for the "general prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances".

<sup>63</sup> See s 27(c) of Refugees Act.

<sup>64</sup> Crush J "Introduction: immigration, human rights & the Constitution" in Crush J (ed) *Beyond control: immigration & human rights in a democratic South Africa* (Cape Town: South African Migration Project 1998) at 2.

## 6 IDENTIFYING AND ANALYSING THE STEPS IN THE NATURALISATION PROCESS IN TERMS OF SOUTH AFRICAN LAW

South Africa has not filed any reservations to the UN Refugee Convention and provides for the naturalisation of refugees. However, the pathway is bound by complicated processes regulated by three different pieces of legislation. First, refugees are required to seek permission to apply for permanent residence in terms of the Refugees Act,<sup>65</sup> a process called “certification”.<sup>66</sup> Thereafter, refugees may apply for permanent residence in terms of the Immigration Act.<sup>67</sup> Finally, refugees may apply for naturalisation in terms of the Citizenship Act.<sup>68</sup> Each step is activated by an application and requires the previous step to be satisfactorily completed. Since each step is governed by a different institution the system can be difficult to navigate and is not as linear as it seems. Hathaway calls for a simpler system that is well-resourced and accountable, and which could take the form of a specialized body that is responsible for the entire process of refugee applications.<sup>69</sup> Nevertheless, the law as it stands requires refugees to manoeuvre through a prohibitively complicated process that makes naturalisation a difficult feat. Moreover, the difficulties faced by refugees throughout the asylum process make it harder for them to reach the final stage of the Refugees Act or the certification process. Such problems include: accessing the asylum system,<sup>70</sup> the length of time it takes to process the claims, and the extended appeals process.<sup>71</sup> A lack of consistent good faith is also evident by assessing some of the actions taken against the SCRA.<sup>72</sup> The process of certification and the entitlement to apply for permanent residence are found in section 27 of the Refugees Act. This section also confirms the rights that refugees have and is pivotal to the refugees’ full integration in South Africa. Section 27(c) states:

“A refugee is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991<sup>73</sup> after five years’ continuous residence in the Republic from the

<sup>65</sup> See s 27 of the Refugees Act.

<sup>66</sup> Refugees must prove to the SCRA that they will remain refugees indefinitely.

<sup>67</sup> Act 13 of 2002.

<sup>68</sup> Act 88 of 1995.

<sup>69</sup> Hathaway J “Refugee law challenges: a conversation with James Hathaway” presentation delivered at the University of Cape Town (2019); Hathaway J C “The global cop-out on refugees” (2018) 30 *International Journal of Refugee Law* 591.

<sup>70</sup> Amit R *No way in: barriers to access, service and administrative justice at South Africa’s refugee reception offices* ACMS Research Report (2012) at 47.

<sup>71</sup> Amit R *Queue here for corruption: measuring irregularities in South Africa’s asylum system*. Report by Lawyers for Human Rights and The African Centre for Migration and Society (2015).

<sup>72</sup> See: *The Somali Association of South Africa and others v The Chairperson of the Standing Committee for Refugee Affairs (WCHC)* case no 18655/14 (case withdrawn), *Akanakimana v Chairperson of the Standing Committee for Refugee Affairs and others* (2015) ZAWCHC 17, *Katshingu v The Standing Committee for Refugee Affairs and others (WCHC)* unreported case no 19726/2010 (2 November 2011).

<sup>73</sup> The Aliens Control Act was replaced by the Immigration Act 13 of 2002.

date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely.”<sup>74</sup>

The positive feature of this provision is that it provides for a legal pathway to ending refugee status. First, a refugee must make an application to the SCRA, which is an independent body created by the Refugees Act, certifying that he or she will remain a refugee indefinitely.<sup>75</sup> However, after gaining certification, refugees are asked to step outside of the Refugees Act, which is protection oriented, and make an application in terms of the Immigration Act, (since the Aliens Control Act has been repealed) which is generally control oriented. Thereafter refugees with permanent residence must navigate the Citizenship Act which favours assimilation and does not provide any safeguards for refugees. It is clear from a reading of the preamble that the Refugees Act seeks to provide benefits and protections to refugees, whereas the Immigration Act aims to control the influx of people. This provides a further reason for a unified system and for all refugee matters to be dealt with under the Refugees Act. Refugees are a particularly vulnerable group that should not be assessed under control oriented immigration laws.<sup>76</sup>

## 7 THE CERTIFICATION PROCESS IN TERMS OF THE REFUGEES ACT

The certification process in terms of the Refugees Act is the first step toward naturalisation but it is fraught with obstacles. The only South African case where the applicants sought clarification of the approach used by the SCRA to interpret the certification process, in terms of the Refugees Act, is *The Somali Association of South Africa and others v the Chairperson of the Standing Committee for Refugee Affairs*<sup>77</sup> (*Somali Association case*). This case is significant because it challenged the SCRA's narrow interpretation of section 27 (c) of the Refugees Act. It furthermore challenged the SCRA's use of the forward-looking test, its failure to apply the *audi alteram* principle in its use of country of origin information, and its incorrect application of the standard of proof requirements when refugees are required to speculate about their safety upon return to their country of origin. Most importantly, this case challenged the SCRA's literal interpretation of the requirement that refugees must prove that they will remain refugees indefinitely, an approach that undermines the lived experiences of refugees and their lasting fear of past persecution.

This case deals with Somali refugees who have made applications for certification to the SCRA. Due to the intensification of violence in Somalia in 2016, the SCRA allowed the applicants to resubmit their applications and thus there was no final judgment. Nevertheless, the founding documents of this case reveal the SCRA's approach to certification. According to the *founding affidavit*, 35 Somali refugees made

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<sup>74</sup> Section 27 of the Refugees Act.

<sup>75</sup> Section 9 of the Refugees Act.

<sup>76</sup> Hathaway J “Refugee law is not immigration law” (2002) *World Refugee Survey* 38.

<sup>77</sup> (WCC) unreported case no 18655/14 (case withdrawn).

their applications for certification between October 2010 and June 2012. They all received feedback in 2014, stating that their applications had been rejected because they were unable to prove that they would remain refugees *indefinitely*. In addition to these 35 Somali refugees, a further 132 Somali refugees made an application for joinder as all of them also had their certification applications rejected on exactly the same basis: that they were unable to prove that they would remain refugees indefinitely. Both groups approached the University of Cape Town Refugee Law Clinic for legal assistance. Similar experiences by Somali refugees were noted throughout the country, and the applicants submitted supporting affidavits from the Nelson Mandela Metropolitan University Law Clinic,<sup>78</sup> the Legal Resources Centre,<sup>79</sup> the Wits Law Clinic, and Lawyers for Human Rights.<sup>80</sup>

The response to the applicants' case shows that the SCRA has adopted a literal approach to the interpretation of the provision that refugees must prove that they will remain refugees *indefinitely* before certification can be granted for purposes of permanent residence.<sup>81</sup> In its answering affidavit, the SCRA maintains that the literal meaning of the word "indefinitely" must be used. In support of its position, it makes reference to a rule of statutory interpretation, which states that

"... in the first instance you take what the word means in the popular sense and ordinary parlance, words use in an enactment should be understood in their everyday meaning unless that word is in conflict with the intention of the law giver as it appears from the statute read as a whole and from other material circumstance".<sup>82</sup>

The SCRA also used as authority for its approach the case of *Vansa Vanadium SA Ltd v Registrar of Deeds*,<sup>83</sup> which interpreted the word "indefinite" as meaning without "limitation as to time". It adopted this meaning without considering the context in which the word was used and interpreted in that case. A further authority used by the SCRA is *Treadwell and another v Roberts*,<sup>84</sup> where the Court considered the meaning of the expression "for an indefinite period" and held that "indefinite" in itself means "not defined". The SCRA also made reference to the dictionary meaning of "indefinitely". Using these sources, it came to the conclusion that all of the applicants were unable to prove that they would remain refugees indefinitely and therefore refused to grant them certification, effectively blocking their permanent residence applications.

<sup>78</sup> Available at <http://cla.nmmu.ac.za>.

<sup>79</sup> Available at <http://lrc.org.za/lcrarchive/>

<sup>80</sup> Available at <http://www.lhr.org.za/>

<sup>81</sup> *Somali Association case*, answering affidavit at paras 15-18.

<sup>82</sup> Kellaway E A *Principles of legal interpretation of statutes, contracts and wills* (Oxford : Butterworths 1995) at 69.

<sup>83</sup> (1996) 1 All SA 433 (T).

<sup>84</sup> 1913 WLD 54.

Since it is impossible for anyone to prove that they will remain a refugee indefinitely, the literal approach adopted by the SCRA has had the effect of making permanent residence unavailable to refugees.<sup>85</sup> Also noteworthy is the fact that the SCRA's interpretation did not consider the term "foreseeable future" used in the Regulations to the Refugees Act<sup>86</sup> (Refugee Regulations) which state that the applicant must set out the reasons why he or she "will not be able to return to his or her country in the foreseeable future". It also did not consider the application form for certification which asks the same of applicants. It is thus unclear whether proving indefinite refugee status means proving that the reasons that gave rise to refugee status are likely to subsist indefinitely or for the foreseeable future.<sup>87</sup>

It is trite law in South Africa that an Act of Parliament is superior to regulations. However, regulations that are inconsistent with their parent Act cannot be ignored without reasons. In the light of the fact that there are no guidelines for the SCRA to make this determination, well-known principles of statutory interpretation should have been utilised. In the absence of specific guidelines, the Refugee Regulations must thus be interpreted in a manner that reflects the purpose of the Refugees Act. That is, they must be interpreted to ensure the protection – rather than the control – of refugees.<sup>88</sup> The starting point for statutory interpretation is that an administrator must interpret the word in its ordinary meaning as long as it does not contradict the clear intention of the legislature. Additional presumptions in statutory interpretation caution against adopting an interpretation that renders an Act superfluous, futile, or nugatory or an interpretation that is "harsh, unjust and unreasonable".<sup>89</sup>

To prove that they will remain a refugee *indefinitely*, a refugee would have to show, for example, that the current government will remain in power indefinitely; where the civil war has ended, that it will not flare up again; or where there is peace, that the peace will not last. All of these claims are difficult, if not impossible, to prove. Proving the risk of harm faced by the refugee – whether from the State or non-State actors – is also difficult. These are thus particularly harsh and unreasonable requirements that the applicant is expected to meet. These harsh requirements could render certification impossible and section 27 of the Act superfluous. To avoid making section 27 of the Act meaningless, it must be presumed that the Act was enacted to ensure that the certification process was fair, accessible and just and to facilitate access by refugees to a

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<sup>85</sup> See Botha (1997) for a full discussion of the application of statutory interpretation principles.

<sup>86</sup> Pursuant to 27 (c) of the Act reg 15 (4)(c) states:

" 1. If the Standing Committee determines that the individual will remain a refugee for the foreseeable future, the Standing Committee will certify that the individual will remain a refugee *indefinitely*, and the individual may apply for an immigration permit pursuant to section 27(c) of the Act."

<sup>87</sup> It is confirmed that "indefinitely" could be defined as "endlessly, [continually](#), [forever](#), ad infinitum", whereas "foreseeable future" means that part of the future that can be envisioned whilst the current circumstances remain intact. *Oxford Dictionary of English* (Oxford: Oxford University Press 2010).

<sup>88</sup> Department of Home Affairs *Draft of Green Paper on International Migration* (GN 849 in GG 18033 of 30 May 1997).

<sup>89</sup> *Mankayi v Anglogold Ashanti Ltd* 2010 (5) SA 137 (SCA).



suitable immigration permit. The literal interpretation employed by the SCRA provides a significant barrier to naturalisation.

Furthermore, from the letters of rejection received by the Somali applicants it is apparent that the SCRA came to the conclusion that the applicants would not remain refugees indefinitely by looking only at the conditions in the country of origin and not the individual refugee claims of the Somali applicants. The SCRA justified its decision to reject the certifications by stating that significant change had occurred in Somalia, indicating that the current conflict was reaching an end.<sup>90</sup> Arguing that certification was inherently a forward-looking process, it said that the current conditions in the country of origin had to be taken into account<sup>91</sup> and not simply those when the refugees fled their country. The SCRA appears to have relied on evidence that supported its view that conditions had changed so much in Somalia that it was safe for refugees to return home. There is no indication that the SCRA considered the information supplied by the applicants that showed that violence in Somalia had continued to occur and was likely to continue into the foreseeable future. The SCRA also only considered information about improvements in Somalia at the national level and ignored the specific areas whence the refugees had fled.<sup>92</sup> Even though the burden of proof in a civil matter is generally on the applicant, international refugee law has recognised the prejudice to vulnerable refugees and thus advises that this burden should be shared between examiner and refugee.<sup>93</sup> While decision-makers are allowed to conduct their own investigations to assist them in discharging their evidential burden,<sup>94</sup> the information gathered must be shared with the affected refugees. In administrative law generally, it is also the case that when an administrator uses information not considered by the applicant, the applicant must be given an opportunity to respond to it.<sup>95</sup> These concepts were reinforced in *AOL v Minister of Home Affairs*.<sup>96</sup> In that case, the Court considered whether the RAB was obliged to bring prejudicial information to the attention of the applicant and afford the applicant an opportunity to deal with the information before it made its final decision. The Court, referring to *Kotzé v Minister of Health and another*,<sup>97</sup> came to the conclusion that the applicant was denied a fair hearing because “the applicant should have been granted the opportunity to deal with the information, which did not form part of his application, and which was later taken into account”.<sup>98</sup> This decision is consistent with section 6 of the Promotion of Administrative Justice Act

<sup>90</sup> Answering affidavit at paras 50-59.

<sup>91</sup> Answering affidavit at para 17.

<sup>92</sup> Answering affidavit at paras 50 – 59.

<sup>93</sup> 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 (UNHCR Handbook) available at <https://www.refworld.org/docid/4f33c8d92.html> at para 196.

<sup>94</sup> UNHCR *Handbook* at para 196.

<sup>95</sup> *Kotzé v Minister of Health and another* 1996 (3) BCLR 417 (T).

<sup>96</sup> *AOL v Minister of Home Affairs and others* 2006 (2) SA 8 (D).

<sup>97</sup> See *Kotzé v Minister of Health and another* 1996(3) BCLR 417 (T).

<sup>98</sup> See *AOL v Minister of Home Affairs and others* 2006(2) SA 8 (D) at para 14.

(PAJA),<sup>99</sup> which provides that any person adversely affected by administrative action has the right to know what evidence is being relied upon to reach a decision against him or her.<sup>100</sup>

In spite of this decision, it is evident from the *Somali Association case* that the SCRA used reports on countries' conditions without giving the applicants an opportunity to respond. However, under both administrative and refugee law in South Africa, information must be shared with an applicant for refugee status, who must be given an opportunity to respond to such information or adduce his or her own information to contradict it. Only the launching of the *Somali Association case* to challenge this practice led to the SCRA backtracking on conditions in Somalia and inviting applicants to resubmit their certification applications.

Furthermore, the SCRA's forward-looking assessment of the risk requires conjecturing about the future. The UNHCR,<sup>101</sup> refugee law scholars<sup>102</sup> and the courts<sup>103</sup> have commented on both of these issues (discussed below), that is, lasting and durable change and the application of a forward-looking test.

The UNHCR's publications on cessation can be extrapolated to provide guidance on durable and lasting change.<sup>104</sup> As outlined in the UNHCR's "The cessation clauses" report (UNHCR Guidelines 1999), the ceased circumstances, or cessation, clause is only invoked if peace in the country of origin is durable and lasting, for which there are three requirements.<sup>105</sup> The first is that there must be lasting peace. The second is that the peace must be enduring. The third is that peace must result in the eradication of a well-founded fear of persecution as well as the restoration of the refugees' protection by his or her country of origin.<sup>106</sup> Ultimately, a fundamental change in the country of origin, which refers complete political change, has to occur, and it must be of such a "profound and enduring nature that refugees from that country no longer require protection from a foreign country".<sup>107</sup> The home government must be able to demonstrate that it can take care of its citizens and that it can guarantee their safety.

Depending on the grounds for flight, significant reforms, such as, elections, declarations of amnesties, and the repeal of oppressive laws, may serve as evidence of a

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<sup>99</sup> Act 3 of 2000.

<sup>100</sup> Section 6 of PAJA.

<sup>101</sup> Khan F & Schreier T *Refugee law in South Africa* (Cape Town: Juta 2014) at 41.

<sup>102</sup> Goo\dwinn-Gill G & McAdam J *The refugee in international law* 3<sup>rd</sup> ed (Oxford: Oxford University Press 2007).\

<sup>103</sup> *INS v Cordoza-Fonseca* 480 US 421 (1987) 453; *Van Garderen NO v Refugee Appeal Board* (TPD) unreported case no 30720/2006 (19 June 2007); *Fang v Refugee Appeal Board* 2007 (2) SA 447 (T).

<sup>104</sup> Article 1C of the UN Refugee Convention.

<sup>105</sup> UNHCR "The cessation clauses: guidelines on their application" (1999) available at <http://www.refworld.org/docid/3c06138c4.html> (accessed 2 February 2013) at paras 10-16.

<sup>106</sup> See UNHCR Guidelines (1999).

<sup>107</sup> See UNHCR Guidelines (1999).

fundamental change.<sup>108</sup> Most importantly, the home government must be able to demonstrate that it can take care of its citizens and that it can guarantee their safety. Evidence of movement in a peaceful or rights-based direction is insufficient: the basic reforms must be in place.<sup>109</sup> Not all political reforms warrant cessation — they must be causally connected to the risk upon which refugee status was recognised.<sup>110</sup>

It is also important that the fundamental change is tested against the individual applicant's personal circumstances. The Court in *Mayonga v Refugee Appeal Board* found that even though the war was officially over in Angola it had a duty to assess the impact of those changes on Mr Mayonga.<sup>111</sup> The Court made it clear that the decision-maker must not be content to simply note that changes have taken place but must assess the impact of those changes on the person concerned. Additionally, Hathaway asserts that "formal evidence of change" must be tested against the reality on the ground.<sup>112</sup> The durability of the reform must be tested, and the period over which the reform is tested will inevitably be longer where the country has just emerged from conflict.

Furthermore, the supposed reform must also be linked to the core concern of the refugee. For instance, an individual who identifies as part of the Lesbian, Gay, Bisexual, Transgender, or Intersex community (LGBTI) and who fled a war-torn country, would not necessarily cease to be a refugee when the war is over and a stable government is established, if their sexual or gender identity remains a target of persecution. The question for that refugee will be whether conditions for persecution based on their LGBTI status remain. Ultimately, the question that results is: can refugees avail themselves of the protection of their home State – where the protection provided is effective, viable and has regard to the general human rights situation of the country?

South Africa employs a forward-looking test in its determination of refugee status – the putative refugee is expected to satisfy the administrator that they will face persecution should they be returned to their country of origin. Their past persecution may be a factor in the determination of their refugee status, but they will not be granted refugee status if they cannot provide evidence of continued fear of persecution. Many countries, including the United States of America and Canada, do not rely on the forward-looking test when refugees apply for refugee status, but simply consider the situation at the time of application. The forward-looking test is not considered

<sup>108</sup> See UNHCR Guidelines (1999).

<sup>109</sup> See UK House of Lords *Hoxha* judgement : *R v Secretary of State for the Home Department, Ex parte Hoxha*, [2002] EWCA Civ (CA 2002); see also *Nkosi v Canada* (1993) FCJ 629 (Can FC, Jun 23 1993), "declining to refuse refugee status on the basis of a hesitant and equivocal finding that certain limited changes in circumstances in Zaïre occurred". Hathaway (2005) at 923.

<sup>110</sup> See paras 23 and 24 of "Ceased Circumstances Clause" of UNHCR Guidelines (1999). Fundamental changes are considered effective only if they remove the basis of the fear of persecution; therefore, such changes must be assessed in the light of the particular cause of the fear, so as to ensure that the situation which warranted the grant of refugee status has ceased to exist.

<sup>111</sup> *Mayonga v Refugee Appeal Board* (2007) JOL19645 (T) at para 9.

<sup>112</sup> See Hathaway (2005) at 925.

realistic, and the discretion afforded to administrators is considered to be too wide to ensure fairness and justice.<sup>113</sup>

Even though South Africa has provided in its Refugees Act for refugee status on the basis of past persecution<sup>114</sup>, the forward-looking test is generally employed for refugee status determination.<sup>115</sup> This forward-looking test is also required at the certification stage when refugees are expected to speculate whether they will remain refugees indefinitely. Expecting the refugee to prove that he or she will remain a refugee indefinitely requires speculating about the future. The manner in which refugee law has dealt with the speculative test in status determination is by *reconsidering* the accepted standard of proof of a “balance of probabilities” that is generally used in ordinary civil proceedings.<sup>116</sup> As a result the standard of proof for establishing refugee status has been set lower than on a balance of probabilities. It is internationally accepted that the standard of proof is reasonable possibility.<sup>117</sup>

Goodwin-Gill and McAdam have argued that

“... a decision on the well-foundedness of the fear is essentially an essay in hypothesis, an attempt to prophesy what might happen to the applicant in the near future, if he returned to his country of origin. Particular care, therefore, needs to be exercised in applying the correct standard of proof”.<sup>118</sup>

Goodwin-Gill and McAdam further explain that in civil cases the typical issue is whether a legally close, relevant relation exists between past causes and past effects. “An applicant for refugee status is adducing a future speculative risk as the basis for a claim to protection”<sup>119</sup> – a degree of lesser likelihood than that of a balance of probabilities is required.

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<sup>113</sup> See US Immigration Regulations, 8 CFR. § 208.13(b)(1)(iii)(a)(2005); Immigration and Refugee Protection Act, chap 27, SC 2001, § 108(4) (Can.).

<sup>114</sup> Section 5(2) of the Refugees Act.

<sup>115</sup> *Van Garderen NO v Refugee Appeal Board* (TPD) unreported case no 30720/2006 (19 June 2007) ; *Fang v Refugee Appeal Board and others* 2007 (2) SA 447 (T).

<sup>116</sup> Goodwin-Gill & McAdam (2007); See also UNHCR “Note on standard and burden of proof in refugee claims” (16 December 1998) available at <http://www.refworld.org/docid/3ae6b3338.html> . (accessed 5 May 2016). The United States Supreme Court in *INS v Cordoza-Fonseca* 480 US 421 (1987) 453; *Van Garderen NO v Refugee Appeal Board* unreported case no 30720/2006( 19 June 2007) ; and *Fang v Refugee Appeal Board* 2007 (2) SA 447 (T)) rejected the traditional balance of probabilities standard in favour of a more generous reasonable possibility test. The US Supreme Court held : “There is simply no room in the United States definition for concluding that because an applicant has a ten percent (10%) chance of being shot, tortured, or otherwise persecuted, that he or she has no well-founded fear” of the event happening ... [A ] moderate interpretation of the well-founded fear standard would indicate that so long as an objective situation is established by the evidence, it need not be shown that the situation will probably result in persecution, but it is enough that persecution is a reasonable possibility.” (Gibney M “A ‘well-founded fear’ of persecution” (1998) 10(1) *Human Rights Quarterly* 109 at 110 ).

<sup>117</sup> UNHCR Note (1998).

<sup>118</sup> See Goodwin-Gill & McAdam (2007) at 54.

<sup>119</sup> See Goodwin-Gill & McAdam (2007) at 54-55.

South Africa has only applied the lesser standard of proof when determining whether a person is a refugee.<sup>120</sup> Upon application for certification a refugee is expected to establish whether he or she will remain a refugee indefinitely; he or she is similarly demanded to speculate about the future, not about the foreseeable future as specified by the SCRA on the certification form. There is currently no set standard of proof at the certification stage. The author accordingly submits that South Africa should also apply the lesser standard of proof when considering certification applications.

From the above discussion it is apparent that a harsh or literal interpretation of the legislative provision that entitles a refugee to apply for a durable immigration permit can effectively block the refugee's path thereto, which inevitably results in perpetual refugee status if return to the country of origin is not possible.

## **8. FROM REFUGEE STATUS TO IMMIGRATION STATUS: EVALUATING PERMANENT RESIDENCE AS A DURABLE SOLUTION IN SOUTH AFRICA**

Living with refugee status in South Africa is an insecure way of life. This insecurity stems largely from the type of short-term documentation issued to refugees (two years for the section 24 permit), and the fact that far too many services are withheld from refugees due to their status. Accordingly, refugees struggle to enjoy the rights guaranteed to them by the South African Constitution and the Refugees Act. They may work and study, but cannot be registered in respect of the legal, medical, and educational professions.<sup>121</sup> They also struggle to open bank accounts, access pension funds, obtain home loans, acquire a driver's licence, and find jobs.<sup>122</sup> Given this lack of access to rights and protection, permanent residence undoubtedly provides a more secure legal status. In South Africa, permanent residence is made available to refugees through the Immigration Act,<sup>123</sup> but as explained above, the applicant must meet the prescribed requirements of the Refugees Act before the completion of an application in terms of the Immigration Act.

Permanent residence is not mentioned in the UN Refugee Convention, but it allows refugees a secure legal status. Refugees may want to retain their nationality for various reasons, but this does not mean that they do not want to be part of a world community. Permanent residence can give refugees a sense of belonging. For refugees who do not want to change their nationality, permanent residence is a good middle ground solution.

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<sup>120</sup> See *Van Garderen NO v Refugee Appeal Board (TPD)* unreported case no 30720/2006 (19 June 2007); *Fang v Refugee Appeal Board and others* 2007(4)SA 447(T).

<sup>121</sup> Bhamjee A & Klaaren J "Legal problems facing refugees in Johannesburg" in Loren B Landau (ed) *Forced migrants in the new Johannesburg: towards a local government response* (Johannesburg: Forced Migration Studies Programme, University of the Witwatersrand 2004) at 54–60.

<sup>122</sup> See Bhamjee & Klaaren (2004) at 54–60.

<sup>123</sup> Act 13 of 2002.

The courts, too, have identified permanent residents as a class of foreigners with more rights than refugees.<sup>124</sup> Furthermore, in contrast to local integration, which in reality can mean indefinite refugee status, permanent residence could signify an end to refugee status and should be considered as a durable solution.

Permanent residency refers to a person's visa status and means that a person is allowed to reside indefinitely within a country of which he or she is not a citizen. Most importantly, permanent residence allows a foreigner to reside permanently in a host country without giving up his or her nationality. This secure legal status allows for greater integration into the host community than local integration. According to section 25(1) of the Immigration Act, a holder of a permanent residence permit "has all the rights, privileges, duties and obligations of a citizen save for those rights, privileges, duties and obligations which a law or the Constitution explicitly ascribes to citizenship".<sup>125</sup>

Permanent residence is distinct from citizenship, but it is also distinct from refugee status. This difference is evident in South Africa, because permanent residence is a legal residency status that a refugee can apply for only five years after being granted refugee status.<sup>126</sup>

In South Africa, a refugee can apply for permanent residence in terms of section 27 of the Immigration Act. Section 27(d) provides: "The director-general may issue a permanent residence permit to a foreigner of good and sound character who is a refugee referred to in section 27(c) of the Refugees Act subject to any prescribed requirements." However, the Department of Home Affairs (DHA) is not required to inform refugees of the availability of permanent residence as an option to end their refugee status. Refugees may thus be unaware of this right and continue to live with refugee status in perpetuity in South Africa.

According to regulation 24(11) of the Immigration Regulations,<sup>127</sup> the requirements contemplated in section 27(d) of the Immigration Act are:

- "(a) the submission of the certification contemplated in section 27(c) of the Refugees Act, 1998 (Act No. 130 of 1998);
- (b) where applicable, the submission of affidavits with regard to aliases used by the applicant and family members; and
- (c) the submission of the documentation contemplated in regulation 22(3)(b), (f), (g), (h) and (i): Provided that in the case of documents issued by the country from which he or she fled not being available, a sworn affidavit shall be submitted."<sup>128</sup>

<sup>124</sup> *Khosa & others v Minister of Social Development and others* 2004 (6) SA 505.

<sup>125</sup> Section 25(1) of the Immigration Act.

<sup>126</sup> Refer to the explanation of s 27 of the Immigration Act below.

<sup>127</sup> DHA Immigration Regulations 2014 (GNR 413 of 22 May 2014 in GG 37679).

<sup>128</sup> Regulation 24(11) of the Immigration Regulations.



All refugee applicants for permanent residence must therefore satisfy the DHA that they have been granted certification by the SCRA on the basis that they will remain refugees indefinitely and that they have been continuously present in South Africa for a period of five years after being granted refugee status. In addition, the applicants must submit their own birth certificates and those of their dependents, proof of spousal relationships, medical and radiological reports, and police clearance certificates.

It may not always be possible for refugees to provide all of these documents because of the manner in which they are forced to flee and because their refugee status makes it difficult for them to approach their governments for such documents. Understandably, the Regulations require an affidavit in place of the prescribed documents where the documents cannot be obtained.

Generally, permanent residence applicants have to demonstrate that they are of good character, and a police clearance certificate issued by their own government is taken as evidence of this. The certificate normally attests that the bearer has not been convicted of any criminal offence or engaged in any undesirable behaviour. The Regulations make an exception for a refugee who cannot be expected to approach their government for such a reference of good character. Refugees must instead source such confirmation of good character from the South African police, who will only issue such certificate if there is no criminal record in South Africa.<sup>129</sup>

While this exception is welcome, it has been found to be particularly prejudicial to refugees who are charged with a crime if their permits expire and are forced to admit guilt and pay administrative fines.<sup>130</sup> Permits expire most often because refugees are unable to access the Refugee Reception Offices due to maladministration at these offices or due to lack of funds to travel to offices located far away from their places of residence.<sup>131</sup> These technical difficulties in accessing the Refugee Reception Offices have criminalised refugees and compromised their good character, and thus their ability to receive permanent residence even after they have successfully received certification from the SCRA.

Another major obstacle is the processing time for a permanent residence application, which currently is at least two years. This problem is not unique to

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<sup>129</sup> See South African Police Service "Police clearance certificates: Applying for a police clearance certificate (PCC)" available at [https://www.saps.gov.za/services/applying\\_clearance\\_certificate.php](https://www.saps.gov.za/services/applying_clearance_certificate.php) (accessed 17 February 2017).

<sup>130</sup> *Bukasa v Minister of Home Affairs* (WCC) unreported case no 22197/10.

<sup>131</sup> *Abdulaahi and others v The Director General of Home Affairs and others* (WCC) unreported case no 7705/2013.

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refugees who apply for permanent residence: it applies to all permanent resident applicants.<sup>132</sup>

In *Eisenberg and others v Director-General Home Affairs and others*, the Western Cape High Court held that waiting for 19 months for a visa and permit to be finalised is unlawful, unjust and procedurally unfair. Applicants have a right to have their applications finalised speedily. For refugees the delay is particularly prejudicial because they have already waited more than five years to receive certification from the SCRA before applying for permanent residence.

Yet another obstacle is monetary. Even though refugees have been exempted from paying the fees for the application, they still have to pay the private company, VFS Global, which processes all immigration visa applications (apart from asylum applications) made within South Africa. There is an enormous administrative fee of R1350 for handling the application.<sup>133</sup>

South Africa has only considered the particular position of refugees to a certain extent. This has been done by lowering the requirements for their applications for permanent residency, by reducing their application fees, and by allowing them to obtain a police clearance in South Africa, as opposed to their countries of origin. However, there are still many obstacles. It is clear from the extended waiting periods and remote Refugee Reception Offices that South Africa has not sufficiently considered the vulnerabilities of refugees in legislating permanent residency requirements.

While it appears that South Africa has adhered to Article 34 of the UN Refugee Convention by making it easier for refugees to apply for residency through the two exceptions, in fact South Africa has made the process more cumbersome by expecting refugees to fulfil additional requirements that other foreigners do not have to. For example, a refugee, unlike other foreigners, has to undergo the burdensome certification process. Furthermore, while other foreigners can easily apply for permanent residence on the basis of their permanent employment and other visa status in South Africa, this option only became available to refugees and asylum seekers after a Constitutional Court ruling in October 2018.<sup>134</sup> However, because refugee documents are only valid for a period of two years, refugees struggle to find permanent employment that would enable them to apply for permanent residence.

It is recommended that, similarly to permanent residence, applicants' information about their personal circumstances in South Africa, such as, their contribution or loyalty to South Africa or their self-sufficient status, should be considered. Overall, the system does not favour the application by refugees for

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<sup>132</sup> *Eisenberg and others v Director-General Home Affairs and others* 2012 (3) SA 508 (WCC).

<sup>133</sup> VFS Global "Visa fees at a glance" available at <https://www.vfsglobal.com/dha/southafrica/visa-fees-at-glance.html> (accessed 8 September 2016).

<sup>134</sup> *Ahmed and others v Minister of Home Affairs and another* (2018) (12) BCLR 1451 (CC).

permanent residence. Refugees must first overcome the hurdle of proving that they will remain a refugee indefinitely, and once they have overcome that hurdle, they have to fulfil the eligibility and procedural requirements of permanent residency. While permanent residency has been granted to a significant number of refugees, this does not negate that the process is cumbersome and not easily available to all.<sup>135</sup>

## **9 FROM PERMANENT RESIDENCE IN TERMS OF THE IMMIGRATION ACT TO NATURALISATION VIA THE CITIZENSHIP ACT**

Once a refugee has been afforded permanent residence in South Africa, they can apply for naturalisation. The application for naturalisation can be made only after five years of continuous residence as a permanent resident.<sup>136</sup> This means that a refugee who obtains permanent residence and lives in South Africa continuously for at least five years can apply for naturalisation. There is thus a legal pathway to naturalisation for refugees in South Africa by means of the immigration and citizenship laws. Although these provisions give expression to Article 34 of the UN Refugee Convention, many challenges make it difficult for refugees to obtain naturalisation.

Refugees may acquire citizenship in South Africa, but only upon submission and acceptance of an application. Furthermore, consideration of the application is discretionary as the responsible Minister may reject it if he or she feels that the applicant is not of good moral character, does not speak any official South African language well enough, or for other reasons.<sup>137</sup> South African citizenship policy thus appears to be assimilationist in nature.

Section 5(a) of the Citizenship Amendment Act<sup>138</sup> provides :

“The Minister may, upon application in the prescribed manner, grant a certificate of naturalization as a South Africa citizen to any foreigner who satisfies the Minister that:

(b) he or she has been admitted to the Republic for permanent residence therein; and

(c) he or she is ordinarily resident in the Republic and that he or she has been so resident for a continuous period of not less than five years immediately preceding the date of his or her application.”<sup>139</sup>

According to these provisions a refugee is eligible for naturalisation in South Africa if he or she has been physically and continuously present in South Africa for no less than 10 years. This means that the minimum period of qualification for

<sup>135</sup> DHA “White Paper on international migration for South Africa” ( GN 750 in GG 41009 of 28 July 2017 ) at 46.

<sup>136</sup> Section 5 of Citizenship Act 88 of 1995.

<sup>137</sup> Sections 5(1)(d)-(g) of Citizenship Act 88 of 1995.

<sup>138</sup> South African Citizenship Amendment Act 17 of 2010.

<sup>139</sup> Section 5(b) of South African Citizenship Amendment Act 17 of 2010.

naturalisation is more than double the period stipulated by the UNHCR for refugees in protracted refugee situations.<sup>140</sup>

South Africa makes no distinction between refugees and other foreigners as far as the application for naturalisation is concerned, although the UN Refugee Convention expects it to do so.<sup>141</sup> The European case study serves as a good example of Article 34 implemented in good faith. South Africa should consider these good faith practices. Specifically, the Council of Europe Explanatory Report<sup>142</sup> contains some examples of favourable conditions for refugees applying for naturalisation, and which include a shorter period of required residence, less stringent language requirements, a simpler procedure, and the lowering of fees. Some European Union States have translated the spirit of these provisions into their national laws by reducing waiting periods and fees or removing the requirements for the renunciation of the citizenship of the host country. A further good practice among European States is that the period spent as an asylum seeker is taken into consideration when calculating the waiting period required for refugees to apply for citizenship. In contrast, section 5 of the Citizenship Act suggests that the period between entry into South Africa and obtaining refugee status is not considered. This is inconsistent with the duty that South Africa has in international law to assist refugees to meet the requirements for naturalisation.

No immigrant can hold more than one legal status in South Africa, and refugees must give up their refugee status when they gain permanent residence or naturalisation.<sup>143</sup> However, by the time refugees apply for naturalisation, they are no longer considered to be refugees but permanent residents. Accordingly, refugees have a choice, as they are not compelled to apply for naturalisation once they acquire permanent residence. It is therefore important to ask whether refugees who have been granted permanent residence need or want the additional guarantee of naturalisation because adopting South African citizenship could very well mean that they will lose the citizenship of their own countries

It cannot be disputed that permanent residence ends refugee status and hence can be used to avert protracted refugee situations. However, there is a strong possibility that those with permanent residence may become stateless. Refugees in protracted refugee situations may become *de facto* stateless as they do not possess the nationality of their host state but cannot claim nationality in their country of origin due to fear of persecution. Furthermore, South Africa has been hesitant to grant refugees citizenship even if they are legally entitled to it.<sup>144</sup> Children born to parents with permanent residency may also become stateless as they might not qualify for nationality in both

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<sup>140</sup> UNHCR Executive Committee Conclusion No 109 (2009).

<sup>141</sup> Article 34 of the UN Refugee Convention requests that the process be expedited and, amongst others, the fees be lowered.

<sup>142</sup> Council of Europe "Explanatory report to the European agreement on the transfer of responsibility for refugees" (16 X 1980) *European Treaty Series No 107*.

<sup>143</sup> Immigration Act i3 of 2002.

<sup>144</sup> *Mulwayi and others v Minister of Home Affairs and another* 2019 (4) BCLR 496 (CC).

their host and home state.<sup>145</sup> A strong commitment to naturalisation is an appropriate solution for these cases. For example, refugee children born in South Africa may be denied the nationality of their parents.<sup>146</sup> Naturalisation is strongly recommended in these instances where refugees or permanent residents are in danger of becoming stateless.

### 9.1 Naturalisation for refugees is a contentious issue.

Naturalisation is increasingly becoming a contentious issue as more and more Western States are concerned about maintaining and securing national borders.<sup>147</sup> Not only have States sought “to implement more restrictive asylum regimes that prevent ‘bogus’ applicants and grant refuge only to the ‘deserving’”,<sup>148</sup> governments are also adopting systems that include stricter tests for citizenship which make it more difficult for refugees to gain citizenship because of their vulnerable status. South Africa is, for example, proposing delinking citizenship and refugee status.<sup>149</sup> Refugees will never be able to apply for naturalisation in terms of this recent government proposal.

Refugees, unfortunately, have become tied to broader debates on general migration and race relations policies, and are often portrayed as a threat to national security.<sup>150</sup> Regrettably, this has led to the move from granting permanent refugee status to granting refugee status for a limited period. This system takes away the basis on which refugees build their lives – the certainty of their status.

Like other nations, South Africa is looking at separating refugee status from citizenship. Recent efforts to reform South African refugee policy suggest a shift to a more restrictive approach to naturalisation for refugees. The 2017 White Paper seeks to achieve this. It states that “there should be no automatic progression from residency to citizenship in law or in practice. That is, the process of granting residency (short-term and long-term) and citizenship will be delinked”.<sup>151</sup> It further states:

<sup>145</sup> *DGLR and another v Minister of Home Affairs and others (GPJHC)* unreported case of 3 July 2014.

<sup>146</sup> Manby (2016) at 53. Manby notes: " In some cases, though nationality may be transmitted to those born outside the country, there are additional requirements either to take positive steps to claim the right to nationality or to notify the authorities of the birth. These provisions, while in principle acceptable, may leave some children stateless, since they are often little known and if nationality is not claimed within the relevant time limits the right may be lost. It may also be very difficult to fulfil the requirements in practice, especially where the country of the parents' nationality has no diplomatic representation in their country of residence."

<sup>147</sup> E J “Migration crisis in the EU: developing a framework for analysis of national security and defence strategies” (2018) 6 *Comparative Migration Studies* 28.

<sup>148</sup> Stewart E & Mulvey G “Seeking safety beyond refuge: the impact of immigration and citizenship policy upon refugees in the UK” (2014) 40 *Journal of Ethnic and Migration Studies* 1023 at 1023.

<sup>149</sup> DHA “White paper on international migration” (2017).

<sup>150</sup> See Stewart & Mulvey (2014) at 1024.

<sup>151</sup> DHA “White paper on the international migration” (2017) at 42.

“Steps should be taken to ensure due weight is given to the value of the status of residence and of citizenship, including the level of approval necessary. The process for awarding citizenship should ensure that rights and responsibilities are explained, understood; and ensure that the conditions attached to them are accepted by those to whom the status is conferred.”<sup>152</sup>

With this approach, citizenship is clearly seen as a prestigious status.<sup>153</sup> Its function is mainly to control access to the Nation and, within such a framework, refugees are excluded. The 2017 White Paper also states that the granting of citizenship should be considered exceptional, and thus, a list of those who have applied for citizenship through naturalisation shall be approved by the responsible Minister and published periodically.<sup>154</sup>

The 2017 White Paper views South Africa’s approach to residency or naturalisation as being “mechanical and compliance-based”, and not tailored to achieve specific strategic goals, such as building the nation. It states:

“ In South Africa there is a misconception that immigrants have a constitutional right to progress towards residency or citizenship status (naturalisation). A sovereign State has the prerogative to determine who enters its territory, control migration patterns relating to the country and enact laws to regulate such migration.”<sup>155</sup>

In short, the White Paper represents the greatest assertion of sovereignty over naturalisation since 1993. The White Paper is clearly inconsistent with international law, which urges States to naturalise and assimilate refugees who cannot be returned to their home countries. South Africa, therefore, cannot ignore its international obligations to refugees.<sup>156</sup>

## 10 CONCLUSION

The UN Refugee Convention’s assertion of naturalisation is not a strongly stated right, and as such, States have significant leeway in their implementation thereof. South Africa has included a path to naturalisation in its legislation, but this article demonstrates the complexities involved in accessing this right. Consequently, refugees have been in South Africa as refugees for a long period of time without being able to

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<sup>152</sup> DHA “White paper on international migration” (2017) at 43.

<sup>153</sup> Masumbe P S *The process of naturalisation of refugees under international and South African law and its implications for human rights* (unpublished PhD thesis, Nelson Mandela School of Law, 2015).

<sup>154</sup> DHA “White paper on international migration” (2017) at 41.

<sup>155</sup> DHA “White paper on international migration” (2017) at 41.

<sup>156</sup> See Hathaway (2005) at 978.



successfully access this right or access it with great difficulty. The cumbersome three-step process spread across three pieces of legislation and the complicated manner in which they are regulated and administered are further evidence that South Africa has not committed to Article 34 in good faith. Furthermore, the administrative bodies responsible for facilitating access to permanent residence and naturalisation have interpreted the law in such a harsh manner that it has made these pathways superfluous at times or stalled the process for an inordinately and unreasonably long time. It is evident that the special vulnerabilities<sup>157</sup> of refugees were not taken into account when South Africa legislated on this issue.

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<sup>157</sup> Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others, BCLR 339 (CC) para 29.

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