THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
MEDIA SUMMARY

FROM: The Registrar, Supreme Court of Appeal

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Please note that the media summary is for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

Irankunda and Another v Director of Asylum Seeker Management: Department of Home Affairs and Others (with Scalabrini Centre of Cape Town intervening as Amicus Curiae) (821/2022) [2024] ZASCA 87 (5 June 2024)

Today, the Supreme Court of Appeal handed down a judgment upholding an appeal against an order of the Western Cape Division of the High Court, Cape Town (the high court). That court dismissed the first and second appellants' application to compel the Department of Home Affairs (the Department) to accept their asylum seeker re-applications after the initial ones were unsuccessful.

The appellants are Burundian nationals. They seek to submit further asylum applications in South Africa after their initial applications were unsuccessful as being manifestly unfounded. The appellants averred that, after the rejection of their applications, circumstances changed in Burundi. Widespread political violence broke out, following which, thousands of Burundians fled the country. Those who remained were subjected to oppression, torture, rape, and sexual violence. The applicants said that it was therefore not safe for them to return to Burundi, as this would place them at risk of persecution or serious threat to their lives, safety and/or physical freedom. For these reasons, they considered themselves to be *sur place* refugees, and made new applications for asylum as such. The Department determined that the appellants may not again apply for asylum in South Africa without returning to their country of origin.

The high court dismissed their applications on the basis that a re-submission of an asylum application after the initial one had been unsuccessful amounted to abuse of the asylum system provided for in the Refugees Act 130 of 1998.

On appeal, the Supreme Court of Appeal had regard to international instruments such as the 1951 United Nations Relating to the Status of Refugees Convention (the UN Convention) and its 1967 Refugee Protocol, as well as the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (the OAU Convention). The Court noted that these treaties embodied the customary international law of non-refoulement.

The Court further explored the concept of refugee *sur place*, as embodied in the Handbook on Procedure and Criteria for Determining Refugee Status of United Nations High Commissioner for Refugees (UNHCR), the body responsible for overseeing the implementation of the UN Convention.

The Court noted that the principle of non-refoulement finds expression in the Refugees Act, which is the domestic legislation enacted to give effect to the relevant international legal instruments, principles

and standards relating to refugees, South Africa enacted the Refugees Act. The Court considered the relevant provisions of the Refugees Act.

Noting that South Africa has not yet developed a significant jurisprudence on *sur place* refugee claims, the Court turned to foreign law. The Court undertook a comprehensive excursion of the jurisprudence of the United Kingdom (the UK) and Canada, as to the treatment of *sur place* refuge claims.

The Court then turned to the appellants' appeal, based on the principle of non-refoulement. The Court clarified the reach of the principle of non-refoulement as follows. The protection afforded by the principle endures for as long as an asylum seeker has not exhausted all available remedies, including internal appeals and judicial review. But once these processes are exhausted, and an asylum application is finally rejected, the protection falls away. For, it is implicit in that rejection that the claimant does not meet the definition of a refugee. In other words, they do not have a well-founded fear of persecution for a Convention reason, as envisaged in article 1A(1) of the UN Convention.

The Court pointed out that whilst the high court was understandably concerned about the possible abuse of the asylum system by the appellants, it was not the court's place to determine whether indeed the new applications had merit. That was within the remit of the Department. To the extent the high court approached the matter in they manner it did, it erred. The matter had to be remitted to the Department to consider the merits of the appellants' refugee *sur place* claims in the light of certain guidelines outlined in the judgment.

However, the Court sounded caution against possible abuse of refugee *sur place* claims, and made the following observations. First, a *sur place* claim is not validly made by reformulating a claim that has already been finally determined. Second, a *sur place* claim must set out a proper evidential basis for the claim. What circumstances have changed, the evidence of that change, and their specific consequences for the applicant must be set out in the application. Absent this content, an application may be summarily rejected. Third, there is much scope for abuse, in which *sur place* claims are made, sometimes on a repeated basis, without proper foundation, to extend protections for lengthy periods of time. This should not be tolerated. And the Department should develop expedited procedures to bring to finality *sur place* claims that facially have no basis.

Accordingly, the Court upheld the appeal with costs, set aside the order of the high court and remitted the matter to the Department.

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