38. For more detail, 23 October comments of National Consortium for Refugee Affairs, 'Summary of Concerns, Draft Refugee Bill 1998: Version Reviewed by the State Law Advisors', unpublished, Pretoria, 1998.
39. The NCRA (unsuccessfully) advocated for the right to naturalisation within five years of lodging an application, the right of a child born to refugee parents in South Africa to South African citizenship, and the right of a refugee to be informed of the right to make a submission with regard to a decision to withdraw refugee status.
40. While it was acknowledged that the Minister ought to be able to intervene in circumstances where an applicant was a threat to national security (also provided for in the Bill), it was felt that, in other provisions (e.g. at the appeal stage), the power to intervene was too wide. Furthermore, in the making of Regulations, it was felt that they ought to 'be promulgated through a process involving the independent statutory authorities created by the Bill'.
41. Section 4 of the Bill (relating to exclusion from refugee status) provided that 'a person does not qualify for refugee status ... if there is reason to believe that he or she ...', whereas international law clearly requires serious reasons. Despite lobbying, this provision remained unchanged in the final Act.
42. Section 33 of the Bill differed substantially from a similar provision in a previous draft of the Bill that was believed to comply with international law and was later changed by the Portfolio Committee. Concerns that were raised by the NCRA related to serious, alleged breaches of international refugee law (and principles) and the family unit principle.
43. The text contained in this draft of the Refugee Bill differed substantially from previous drafts (including the Draft Bill annexed to the White Paper), which provided that one be 'guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment'), rather than 'be regarded as a prohibited person'.
44. Portfolio Committee Amendments to the Refugees Bill No. 135a of 1998.
45. Ibid., Clause 24, No. 2, p. 4.
46. Ibid., Clause 30, No. 1, p. 4.
47. The most notable feature of the regulations implementing the Act is undoubtedly their prohibition on work or study by asylum-seekers. This was one side of the 'bargain' that the regulations struck, with the other side being that of a fair, timely refugee determination process. Any evaluation of these regulations should, in our view, assess both the constitutional limits on the first side of the bargain and the apparent administrative and capacity shortfalls on the second side with respect to the practical implementation of the regulations. See also Watchenuka (identifying this issue within both the regulations and decisions of the Standing Committee).
48. On 31 March 2000, President Mbeki declared the commencement date for the Refugees Act to be 1 April 2000. See R 22 of 2000 in GG 21075 (6 April 2000). The Regulations were made on 6 April 2000.
49. An important part of the history of the Refugees Act is also the story of the backlog project: see Chapter 5 of this collection.
50. See J. Klaaren, 'Preliminary Analysis of the Effect of the Draft Immigration Bill on the Refugees Act', unpublished paper presented at the University of Western Cape workshop: 'Forced Migrants in the New Millennium: Problems, Prospects, and Solutions', Cape Town, 2001.

4

Refugee Status Determination Procedures in South African Law

Jonathan Klaaren and Chris Sprigman

Introduction

This chapter critically investigates the South African procedures for determining refugee status that were in force from 1994 until the 1 April 2000 implementation of refugee legislation, as well as the intended changes to these procedures introduced by the Refugees Act 130 of 1998. After a brief historical overview of its development, Part I sets out an understanding of how the administrative system of refugee status determination operated during the period from 1994 to 2000.[1] Part II then closely examines this system – which we term the centralised bureaucratic model – and develops an argument for an alternative, decentralised model of refugee determination based on individualised refugee determination hearings. From 1996, the refugee rights community offered a version of this decentralised hearing-based model in advocating for the refugee status determination system that was eventually adopted in the Refugees Act 130 of 1998. Part III then examines the provisions of the Refugees Act relating to refugee status determination procedures, as well as the subsequent implementing regulations. It argues that, properly interpreted in terms of a decentralised hearings-based model, the Act represents an important step forward in South African refugee protection.

The main thrust of this chapter is to show that the best interpretation of the Act requires that the Department of Home Affairs put into place a hearings-based system similar to the one outlined in this chapter. We believe that the Act – as interpreted against the background of the right to just

administrative action accorded to all persons, refugees as well as citizens, by the Constitution – requires that applicants for refugee status be given hearings at which legal representation is allowed, be provided with written reasons when their applications are denied, and be accorded administrative review and full access to the courts to appeal adverse determinations. We believe, moreover, that everyone – the applicants, the Department of Home Affairs and South Africa as a whole – would be better off if expensive and protracted constitutional litigation over the meaning of the Act were avoided. The Department's regulations largely put into place the decentralised, hearing-based determination system we outline. We believe, and we hope to show in this chapter, that the system we favour is not only constitutionally required, but is also in the best interests of both applicants and the Department of Home Affairs. Accordingly, the Act and its implementing regulations should largely be welcomed and should be interpreted in terms of the decentralised hearings-based system we have identified.

Part I: 1994–2000 Procedures for Refugee Status Determination in South Africa

History

The initial post-apartheid developments regarding refugee protection were at the level of international law.[2] On 6 September 1993, South Africa signed a Basic Agreement with the United Nations High Commission for Refugees (UNHCR).[3] This followed an earlier Tripartite Agreement between Mozambique, South Africa, and the UNHCR regarding the voluntary repatriation of refugees.[4] By 14 April 1994, all operational officers of the Department of Home Affairs were given a set of guidelines for the refugee status determination of Mozambicans in South Africa.[5] Within six months, the scope of these administrative arrangements was widened to include all persons claiming refugee status.[6] By 23 September 1994, asylum-seekers in South Africa were protected at the level of formal internal departmental procedures, procedures making reference to the international law definition of a refugee.[7] This marked the first instance in which the international law of refugee status became formally applicable to persons seeking refugee status in South Africa.

These formal legal changes were paralleled by growth in the international and national bureaucracies concerned with refugee adjudication in South Africa. In 1991, the UNHCR set up a branch office in Pretoria. This office later expanded to be a regional office, with coverage extending beyond South Africa. Within the Department of Home Affairs, a separate organisational unit of Refugee Affairs, the 'sub-directorate: Refugee Affairs', was created between 1993 and 1994 and given separate funding. In the period since 1994, the precise administrative arrangements of Home Affairs

have varied significantly.[8] Nonetheless, the legal regime applicable to refugee status adjudication has remained the same.

This mixture of administrative arrangements – the asylum procedures – essentially constituted a legal regime governing the determination of refugee status. Courts reviewed decisions of the Department of Home Affairs with respect to several asylum applications pursuant to these procedures.[9] Since both the Department and the courts have recognised them as binding, the asylum procedures probably attained at least the legal status of a legitimate expectation on the part of a person applying for refugee status. In other words, if the Department were to have revoked these asylum procedures unilaterally, a court would probably have struck that action down. Although the procedures of the Refugees Act replaced these asylum procedures on 1 April 2000, the asylum procedures remained relevant to the large number of persons who lodged applications in terms of these procedures.[10]

While the Department's asylum procedures (described more fully below) could thus have been fairly described as firmly established, it is nonetheless also clear that the Department's refugee adjudication regime operative from 1994 to 2000 did not fit comfortably within South African immigration law. In terms of the Aliens Control Act 96 of 1991, the sole parliamentary statute determining the (substantive) regulation of immigration into South Africa, asylum-seekers were technically treated as 'prohibited persons', but were granted permission to reside and work in the Republic in terms of section 41(1). This section authorises the Minister, as a matter of discretion, to issue temporary permits to immigrants seeking admission, in spite of their status as prohibited persons.[11]

This situation did not change dramatically with the passage of the Refugees Act 130 of 1998. Since 1994, prospects for refugee legislation had gone through several ups and downs. The Act itself was introduced and passed within a period of only a few months at the end of 1998.[12] Yet nearly a year and a half passed before it was brought into operation. Even after the coming into legal effect of the Refugees Act, the influence of the 1994–2000 system persisted. While the formal law may change with the stroke of the President's pen giving a date of commencement to the Act, the informal law as administered by the Department of Home Affairs was unlikely to and did not change with such speed.

The 1994–2000 Asylum Procedures

The remainder of this Part outlines the regime of refugee status determination procedures that existed from 1994 to 2000.[13] It identifies six key elements of this system: the pre-interview stage, the initial interview, the pending decision stage, the Standing Committee decision, the Refugee Affairs Appeal Board decision, and the procedure for manifestly unfounded applications. As part of a critical model-building investigation, the regime as sketched here is a depiction of the Department's best practice during this

time period. Thus, this description does not limit itself solely to formal legal instruments, but neither does it document the frequent systemic lapses in complying with these asylum procedures. In this way, this chapter engages with the ideal type of the refugee status determination regime offered by the Department during this period.

Pre-interview Stage

First, the Department of Home Affairs did not have a proactive policy of asking persons with whom it had contact whether they were refugees. For instance, a person held pending removal at Lindela, the privately run but Department-authorised detention and repatriation centre in Krugersdorp, had to affirmatively ask for an investigation into his or her refugee status before that process was initiated. A detainee claiming refugee status at Lindela would be taken to the Department of Home Affairs refugee-receiving office established in Braamfontein (at least one hour away) to formally claim such status, after which the asylum-seeker would be released from detention. The Home Affairs internal policy document dealing with this point articulates the Department's policy: an investigation of a detainee's possible refugee status would be undertaken only 'if it becomes apparent during the investigation into his residence status that he may be a refugee as defined in the Basic Agreement between the Government of the RSA and the United Nations High Commissioner for Refugees'.[14] Since the investigations into residence status were, as a matter of practice non-existent or perfunctory, most asylum-seekers initiated the process of determining their status themselves.[15]

Home Affairs' internal directives also mandated that a refugee must apply for an initial asylum interview at an office of the Department as soon as possible after entering the country. An interview was usually given one to three months after it was requested. Indeed, it was Department of Home Affairs policy that no asylum claims could be made outside the territory of South Africa.[16] For this reason, there were no asylum requests entertained at South African embassies outside the country nor was there any programme to locate and interview asylum applicants in receiving countries other than South Africa. During this pre-interview stage, the asylum-seeker had no special legal protection other than protection from deportation.

The Interview

Secondly, interviews of applicants for refugee status were conducted by specially chosen and trained immigration officers (referred to herein as 'intake officers'). The Department established four Regional Offices of Refugee Affairs: Braamfontein (Johannesburg), Cape Town, Durban and Pretoria. Specially trained immigration officers also conducted interviews at outlying Department offices. The Department provided an interpreter if

necessary, and if the applicant could not provide one.[17] An adviser (who could be a legal representative) could be present during the interview but he or she could not intervene.[18]

The intake officer was involved in the preparation of three important documents at the interview stage, which would be forwarded to Head Office in Pretoria at the conclusion of the interview. In respect of the first document, the applicant was able make a written statement prepared in advance of the interview (in her own language).[19] The Department was required to assist in this as far as possible, although practice varied considerably.

In respect of the second document, the intake officer would query the applicant with regard to basic information such as her name, date and place of birth, citizenship, and ethnic or tribal identity. This information would be entered on the Department's standard 'Nationality Questionnaire' (the NQ). The NQ was not mentioned as part of Passport Control Instruction No. 63 of 1994 but was developed subsequently.[20] The Department used this two-page form as a means of verifying that the applicant was indeed a citizen of the country from which he or she claimed to have fled. For the purpose of verifying citizenship, the NQ directed the intake officer to query the applicant with regard to several items. These were the name of the capital city of the applicant's country of origin, the name of other large cities in that country, and the home country's political parties, religions, ethnic groups, 'tribes' and currency. The NQ also required that all passports and other citizenship and identity documentation possessed by the applicant – whether legally or fraudulently obtained – must be listed.

At the end of the NQ, a space was provided for the intake officer to state the country of origin as confirmed by the form. It seems a necessary corollary that if the applicant failed, in the opinion of the intake officer, to establish a 'confirmed' country of origin – whether through insufficient documentation or fraud – the intake officer would indicate that fact on the NQ. There was no space provided on the NQ, however, for the intake officer to give reasons for his or her finding on this vital fact.

Interestingly, the NQ is not entirely limited to the confirmation of identity and foreign citizenship. In fact, the form directs the intake officer to provide information on the central question in asylum adjudication. Entry no. 13 of the Nationality Questionnaire directs the intake officer to 'Indicate the significant events, incidents or circumstances which caused the applicant to proceed to South Africa.' Unfortunately, the five centimetres by fifteen centimetres space provided on the Nationality Questionnaire for the answer to this crucial question was clearly insufficient to provide a full and credible answer.

The 'Eligibility Determination Form' (the Eligibility Form or EF) was the third crucial document prepared by the intake officer at the applicant's initial interview. This four-page form consisted largely of information gained from the interview with the applicant. Many of the questions asked on the Eligibility Form went to the heart of eligibility for refugee status,

such as the following: (1) Why did you leave your home country? (2) Do you or your family belong to any particular political, religious, military, ethnic or social organisation or grouping in your home country? (3) What were you or your family's activities in such an organisation or grouping? (4) Were you ever involved in incident(s) involving physical violence? (5) Have you ever been arrested or detained? (6) Do you wish to return to your home country? (7) What do you think would happen to you if you were returned to your country and why? (8) Would you face any particular danger to your physical safety if you were to return?

Many of the questions on the Eligibility Form also related to possible bars to refugee status – such as the following: (1) Have you ever been convicted? (ineligibility due to criminal conduct); (2) Is military service compulsory in your country? (aliens fleeing forced conscription ineligible); (3) In what manner did you enter [South Africa]? Did you have a visa or work contract? (economic migrants ineligible); and (4) Would the authorities of your home country permit you to return there? (absence of well-founded fear of persecution).

It is important to note that, with respect to all the queries listed above, the Eligibility Form provided minimal space for the intake officer to record the applicant's responses, even though, in many cases, applicants' responses to these questions would have been lengthy, complex and subject to misinterpretation if not recorded in full. Moreover, the EF's instructions did not invite the officer to attach extra sheets where necessary. There was no space provided on the form for the applicant to indicate whether he or she had read the form and understood and agreed with the information that the intake officer had written thereon. The absence of any space for such an acknowledgement by the applicant suggested that applicants were not afforded any opportunity to inspect the completed EF to check that the information recorded on that form fairly reflected the applicant's testimony. The same was true of the NQ.

In any case, by far the most important feature of the Eligibility Form was the final entry, in which the intake officer was requested to provide an assessment of the credibility of the applicant's statements. Many interviewers took this occasion to recommend or not recommend asylum, though such a recommendation was not requested in the Eligibility Form.

The Pending Decision Stage

Thirdly, following his or her interview and pending decision on the application, the applicant received a permit in terms of section 41(1) of the Aliens Control Act. With this permit, the applicant was almost always permitted to take up employment or study. Permits were issued for limited periods. The renewal of these permits was a difficult process. From 1998, permits were only to be renewed for a period of three months, and could only be renewed if applications for asylum were launched.[21] If lost, the official rule was that the permits were not replaceable. The Department did not accept even certified photocopies as the equivalent of the original section 41(1) permit. Following the interview, the applicant was informed that, if her application failed, she would be required to leave the country, regardless of work or study already undertaken.[22] Pending a decision, an applicant could be given travel documents to leave and return to the country, although this privilege was extended only in exceptional circumstances.[23]

All documentation produced during the interview, including the EF, the NQ and, in cases where such documents were available, the applicant's written statement and the intake officer's notes, were sent to a body known as the 'Standing Committee for Refugee Affairs', located at the Department's Head Office in Pretoria. The exceptions were those applications from a few countries of origin that were processed at the regional level. The Standing Committee ordinarily took at least two years to process an application, although some were done in a shorter period.

The Standing Committee Decision

The fourth key element was the decision by the Standing Committee. The members of the Standing Committee for Refugee Affairs were appointed by the Director-General of the Department, who was its original chair.[24] The Standing Committee was composed of Home Affairs officials only. This Committee was responsible for considering and deciding upon applications for refugee status, based, of course, on the documents produced by intake officers during applicant interviews.[25] By 2000, the Director of the Residence Directorate, an administrative division including the Refugee Affairs unit, chaired the Standing Committee.[26] The head of the Refugee Affairs unit was also a member, along with the two assistant directors of that unit. Three persons constituted a quorum for decisions.

In virtually all cases, the Standing Committee did not itself interview applicants and therefore relied on the documents transmitted by the intake officers. Indeed, the Standing Committee itself depended on Administrative Officers, also later called case workers. These officials took the three documents completed by the immigration officers and prepared the file for the Standing Committee by doing research on the country of origin. In substance, these case workers made a recommendation to the Standing Committee. These case workers would specialise by country of origin. In any case, both the Standing Committee and the case workers lacked the capacity to independently assess the credibility of an applicant. Nonetheless, the Committee overturned the credibility indications of the intake officers conducting the initial interviews.[27] We shall return later in this chapter to the issue of the Standing Committee's inability to adequately assess the credibility of applicants. At this point, it suffices to note that the Standing Committee's reversal of credibility findings made by intake officers who conducted face-to-face interviews with applicants was

extremely problematic. This was especially so in the vast majority of cases where the Standing Committee did not issue any written findings that could explain its actions in these cases.

Applications from a limited number of countries were permitted to be processed at regional level by regional subcommittees of the Standing Committee. The establishment of such regional subcommittees of the Standing Committee was called for by the Human Rights Commission Workshop of November 1996 as a way of reducing a serious backlog and delay in processing asylum applications. Negative decisions of these regional subcommittees were reviewed by the Standing Committee.[28] The Standing Committee issued guidelines to the regional subcommittees for use in processing applications from these countries. While the list varied, the countries of origin processed by regional subcommittees were Angola, the former Zaire, Somalia and Burundi (for Cape Town only). The Standing Committee also decided which countries were on this list, based partially on the advice of the administrative officials within the refugee affairs sub-directorate.[29] The criteria used for this decision to include countries were a combination of factors relating to the likelihood of such countries generating refugee flows to South Africa and administrative convenience factors.[30] While the Department of Home Affairs was considering the inclusion of a country on this list or was unsure of the approach to take on a country, applications of persons from those countries could temporarily be put on hold.[31]

The Refugee Affairs Appeal Board

The fifth element of this regime was the appeal. If the Standing Committee denied an application, the disappointed applicant had the right to appeal. Negative decisions were, however, not automatically appealed. This appeal was made to the Refugee Affairs Appeal Board. While the Board's complement could be as large as three, the Board consisted of a single member from 1994 to 2000. The first occupant was an advocate; the second was a person without a legal professional qualification who had previously participated in the Department's immigration selection board.[32] Decisions of the Board were binding upon the Standing Committee.[33] Initially, the Board did not give reasons for its decisions (which were nearly all in favour of the government), and the Board thus came in for fairly intense criticism.[34] As a result of court decisions against the Department, some changes in the Board's procedures have come about, including the provision of reasons.

Manifestly Unfounded Applications

As a sixth and final element, the Standing Committee established special procedures for the 'fast-tracking' of applications that it considered

manifestly unfounded, abusive or fraudulent. An application could be declared manifestly unfounded by the head of the Refugee Affairs sub-directorate on the recommendation of the administrative official dealing with that application within the regional unit or at Head Office if the country was not on the 'regional list'. Notice of the declaration was given to the applicant and thirty days were granted for appeal. Most applicants declared to have submitted manifestly unfounded applications took advantage of this procedure. The declaration then had to be confirmed by the head of the relevant regional unit. The legal status of this procedure was that of practice and custom.[35] There was no right of appeal from the Committee's determination that an application was manifestly unfounded. The internal appeal was all that was provided.[36]

Part II: An Analysis of the Centralised Bureaucratic Model of Refugee Determination Procedures

In this section, we analyse the 1994–2000 procedures for making refugee status determinations. Two major flaws with these procedures are identified: their separation of fact-finding and decision-making, and their failure to allow for legal representation. These two aspects are most likely to affect the organisational structure of a refugee determination process. The remainder of the chapter outlines a system that we argue should replace the 1994–2000 procedures and should underlie the interpretation of the Refugees Act 130 of 1998. We favour a decentralised, hearing-based system in which intake officers conduct individual interviews with applicants, who are, whenever possible, represented by counsel. Under this system, intake officers are responsible both for fact-finding and for rendering decisions, subject, of course, to administrative and judicial review. Finally, we argue that the Refugees Act allows for the replacement of the 1994–2000 system with a system that conforms to our recommendations, as is indeed demonstrated by the regulations we describe. While the analysis thus appears to have been accepted at a formal level, the implementation of this model remains unsecured.

Refugee Status Determination Procedures should not Separate Fact-finding and Decision-making

Our first suggestion for reform of the 1994–2000 system relates to the practice of placing fact-finding responsibility with the intake officer, but reserving ultimate decision-making authority for the Standing Committee or the various regional committees. We believe that this division of authority leads inevitably to incorrect decisions based on miscommunication.

The problem with the 1994–2000 bifurcated hearing process should be clear. In many, if not most cases, applicants for refugee protection have a

long, complicated story to tell. This story may include several instances of persecution arising from one or more events, often separated in time. Applicants, usually completely unrepresented and, even in the best cases, without the assistance of their adviser during the interview, have to tell their story to an intake officer during the course of one brief interview. The intake officer would then transmit selected elements of that story, in fragmentary form, to the Standing Committee, which would make a decision based on its reading of the intake officer's abridged version of the applicant's hastily related story.

The Standing Committee (or, in respect of applications from persons claiming to come from designated countries, the regional committee) had no opportunity in the ordinary course of events to ask follow-up questions of the applicant or to request supplementary documentation. It had to depend on the information written down by the intake officer on the eligibility sheet. For this reason, the Standing Committee could not deal adequately with factual issues that were not addressed or were addressed incompletely in the intake officer's eligibility form. Even without problems of credibility, we believe this provision of partial information to the decision-maker is a serious shortcoming in the 1994–2000 system.

These problems were compounded, moreover, by the fact that the Standing Committee, on several occasions, overturned the credibility findings of intake officers. Again, in a system where fact-finding and decision-making are separated, the problems posed by the Standing Committee overturning an intake officer's credibility determination should be obvious. Of course, the Standing Committee had no opportunity to observe the applicant first-hand in these cases. The Committee therefore could not undertake an independent assessment of credibility apart from its review of the internal coherence of the applicant's story and its level of detail as recorded by the intake officer in the three documents described above. These documents were limited to an Eligibility Form, as well as often, but not always, the original factual statement made by the applicant, in some cases an NQ, and perhaps some corroborating exhibits submitted by the applicant. As outlined earlier, the Eligibility Form, which constitutes the most important document transmitted to the Standing Committee, was not a literal transcription of the interview; it was merely a four-page form filled out by the officer as he questioned the applicant. When reduced to paper, the intake officer's recording of the applicant's account would be necessarily partial, and thus would often lack the richness and texture that gives rise to credibility. Furthermore, no matter how accurately and completely the intake officer records the applicant's testimony, it is not possible to adequately record non-verbal indications of credibility.

In sum, the separation of fact-finding from decision-making is a thoroughly bad idea that has many undesirable effects. It makes it more difficult for truthful applicants to establish the credibility of their factual account, thus increasing the chances for error. Similarly, it makes it easier

for untruthful applicants to defraud the Department. This aspect of the 1994–2000 system, in short, benefited no one.

Refugee Status Determination Procedures should Allow Applicants to Exercise their Legitimate Administrative Justice Rights, Including that of Legal Representation

Under the 1994–2000 procedures, applicants lacked a right to legal representation at their hearings – even when such representation was provided at the applicant's expense. Under these procedures an 'adviser' could be present during the interview, but was not permitted to intervene. As a consequence, the presence of such an adviser, even if the adviser is a lawyer, clearly does not amount to legal representation.

This is an unwise policy from the standpoint of administrative efficiency. Allowing the applicant to be represented by a lawyer will often be helpful for both the applicant and the government. An applicant who is represented by a lawyer will be better able to provide for the intake officer a complete, accurate, organised, and credible account of the facts underlying his or her claim. This will improve both the accuracy and the efficiency of the process.

Perhaps the most important benefit to be obtained from legal representation is that a represented applicant will be prepared to offer testimony, that is relevant to his or her claim. The importance of this point cannot be overstated. The Department has devoted and will devote considerable resources, in both money and personnel, to the interview component of the refugee adjudication process. It is therefore only common sense that the Department should structure the interview process in a manner that will elicit the most relevant, most accurate, and generally the most helpful information from applicants. The early involvement of trained lawyers is immensely helpful in this regard.

To see why this is so, it is only necessary to remember that applicants for refugee status succeed or fail to the extent that their story, as told to an intake officer, meets a legal definition of refugee status that is highly technical. According to the legal framework set forth under the UN and OAU refugee definitions to which South Africa acceded, an applicant will be entitled to protection as a refugee only if he or she can establish either the existence of 'a well-founded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group, or political opinion', or that 'owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his or her country, [he or she] is compelled to leave his or her place of habitual residence.'[37] An applicant's inability to find a job in his or her native country generally does not count, nor does the fact that the applicant may lack freedom of speech, or of religion, in his home country, unless that fact manifests itself as actual or threatened persecution.

Few applicants for refugee status are lawyers. Fewer still possess any real knowledge of the intricacies of the law of asylum. So an unprepared and unrepresented applicant often comes to his interview wanting to talk about everything in his personal history, or in the political, social and economic conditions prevailing in his country, that relates in any way, even tangentially, to his decision to flee. This is especially crucial because many, if not most, applicants will admit that their decision to flee their country was motivated by a mix of considerations, some of which might be relevant for the purpose of establishing refugee status and others not.

Consider, for example, the case of a Mozambican applicant who has left his country for two reasons. The first is because all the land in his home region is sown with landmines, with the result that he cannot farm and cannot support himself. The second is because he has worked in a local office of the central government, has articulated pro-government political views and has received several letters threatening his life, which he believes were sent to him by local members of the anti-government Renamo militia. Both reasons for leaving Mozambique may have been equally important to the applicant. However, from the point of view of obtaining refugee status, the applicant's second reason for fleeing, i.e. the threats to his life, may, if proved, entitle him to relief under both the UN and OAU definitions of refugee status. His first reason, i.e. his inability to farm, may be irrelevant under both definitions (although emotionally compelling). Unless the client is represented by competent counsel, the applicant will lack guidance with respect to which facts are relevant, and the intake officer will be required to sort through a number of irrelevant facts, thereby wasting valuable administrative resources.

A well-represented applicant is a better and more helpful witness for the intake officer. The applicant will have been interviewed by his lawyer on several occasions prior to the interview. The lawyer will make sure that he has a full understanding of why his client fled his home country, and why the client is afraid to return. The lawyer will also assess whether the facts alleged by the client, if substantiated, would qualify that client for refugee status. Thus the lawyer can act as a filter in certain cases, by advising clients with non-meritorious cases that relief may come through another avenue, but will likely not be available via the asylum process. And a responsible lawyer will, with respect to all clients, advise that the client is bound to testify truthfully, that there are penalties for perjury before the intake officer and that the lawyer cannot be party to perjured testimony. In any event, the applicant will arrive at the interview prepared to testify to relevant facts.

Representation is also necessary because the intake officer must, in addition to assessing the facts testified to by the applicant, make decisions on a number of legal questions, such as the possibility of disqualification due to participation in persecution, or firm resettlement in a third country. Many questions that initially seem clearly factual – for example, whether country conditions have changed sufficiently to defeat any claim of a well-

founded fear – must be determined using a legal standard. These legal questions are often determinative, but they are often also highly technical, so much so that ordinary applicants cannot adequately present their case without legal assistance.

For example, an applicant who has come to South Africa via Senegal after fleeing Liberia may face disqualification if it is found that he has been an irregular mover within the African region. Unless the applicant understands this concept (which is itself not yet clear within the structure of the Refugees Act) and the factors relevant to whether or not he was indeed an irregular mover, he will not understand how best to demonstrate that he was not in such a category. For example, he may not know that whether he was offered or accepted regularised immigration status in Senegal would be relevant.[38] In sum, the absence of legal representation may lead in many cases to unnecessary costs and wastage of administrative resources and avoidable, incorrect results. Indeed, a number of officials completing the Eligibility Forms under the 1994–2000 procedures would informally offer decisions on such legal questions, though they lacked the legal training to do so and were not specifically empowered to do so.

Beyond considerations of efficiency, the 1994–2000 system was not in fact fair and was not perceived as fair either by the client population of asylum-seekers or by the South African public. The legitimacy of a system that offers face-to-face status determinations by intake officers authorised to make such decisions would be much greater. First, the procedural fairness of a personal interview and decision will be greater than that of a centralised bureaucratic process where the applicant does not have the opportunity to make his or her case. Secondly, the hearing-based system we favour would also fare better in its inevitable journey through the judicial system. Providing procedural protection such as legal representation as part of the status determination process will mean that judges reviewing a specific case are more likely to approve of the substantive result, whether or not the asylum applicant is granted refugee status.

The Decentralised Hearing-based Model

A feasible alternative to the 1994–2000 procedures is a true decentralised hearing-based model, where properly trained and supervised intake officers both find facts and render initial decisions. In contrast to a centralised bureaucratic model, a hearing-based system offers superior efficiency, accuracy and fairness. Such a system would have two necessary features: decentralisation of authority to intake officers and restructuring the centralised refugee status determination institutions. Beyond reflecting these two elements, the model will also allow for two additional innovations in refugee status determination: centralised information on country conditions and an individualised, but decentralised, 'fast-track' procedure for applications judged to be manifestly unfounded.

The first feature necessary to a decentralised hearing-based system involves pushing authority down to the intake officers to conduct interviews, to find facts and then to make initial eligibility determinations. With this decentralisation of decision-making authority, the advantages we pointed out above of efficiency and credibility will begin to be realised.

Although we believe that a hearing-based system must allow legal representation, we are not suggesting that the advantages of efficiency and legitimacy can only be attained if the refugee hearings are conducted according to a full-blown adversarial procedure. Rather, the intake officer should have the opportunity to question the applicant, free from interference from a lawyer, with regard to the facts underlying the applicant's claim. However, at the close of the applicant's testimony, the applicant's lawyer should also be allowed to question the applicant with regard to important factual issues that were not covered in the officer's questioning. The lawyer should also be permitted to summarise the most important points of the applicant's testimony, and to direct the officer's attention to especially important supporting documents, if any have been submitted. Finally, the lawyer must have input on any legal issues that have arisen as a result of his client's testimony. Without participation by the lawyer on these legal issues, the applicant will be effectively denied a full and fair opportunity to make his case. In contrast, if lawyers are introduced into the process in the manner set out above, lawyer participation will be found to be an aid to accurate determination of an applicant's status, rather than a hindrance.

In sum, a workable level of lawyer participation in hearings strikes a balance between the intake officer's need to make an independent credibility assessment of the applicant free from undue interference from the lawyer, and the interest of all parties, including the government, that important legal issues be fully canvassed and the vital factual issues and relevant documents briefly be set in proper perspective.

The second feature necessary to institute a true decentralised hearing-based system would be to restructure the central bodies of the refugee determination process at levels above the initial hearing. This entails three elements: an expert administrative supervisory body, a legally rigorous review body and access to judicial review.

The supervisory body provides a place to catch administrative mistakes. This element of the refugee determination procedure should provide Home Affairs with a chance to remedy its own errors. A six or seven member administrative supervisory body could include senior intake officers from the decentralised offices, as well as several officials from Head Office. All cases would be reviewed by such a body, which would not need to give individualised attention to each case. Such a body would be able to detect and concentrate resources upon the anomalous cases that might signal a mistake or an instance of fraud. With a reduced portfolio, the 1994–2000 secretariat of the Standing Committee could be greatly reduced and the

organisational resources thus freed could be devoted to the decentralised system of intake officers. The training programmes that under a bureaucratic model would be directed at the secretariat of a Head Office Standing Committee would be devoted instead to the training of decentralised intake officers.

The second element required is to provide all applicants denied refugee status at the intake officer and Standing Committee level an appeal as of right, but on legal issues only, to a departmental legal tribunal. In much the same way as the function of the reconstituted Standing Committee would be to isolate and investigate the discrepant cases with regard to the facts, the function of a reconstituted Appeal Board would be to make all refugee decisions within the department consistent with the department's understanding of binding refugee law.

In respect to this second element, a concern about the independence of the Refugee Affairs Appeal Board under the 1994–2000 procedures must be raised.[39] The Refugee Affairs Appeal Board was located administratively within the sub-directorate for Refugee Affairs. The Board employed dedicated staff but these staff remained answerable to the head of the Refugee Affairs sub-directorate. This organisational placement raised issues about the Board's independence, issues that were hardly addressed by the performance of the Board over the 1994-2000 period. In comparison, the Immigrants Selection Board, as an administrative body with statutory independence, does not report administratively to an official in a unit charged with line functions. Instead, the Selection Board reports directly to the Director-General. This is in recognition of its independence from political interference and its direct establishment by legislation.[40]

The third element required at the level of the centralised institutions of the refugee status determination process is to provide for appropriate and efficient judicial review. Adverse decisions of the departmental tribunal should be appealable to an independent judicial body. Our model would be consistent with either direct High Court review or a corps of magistrate judges constituted as special immigration judges with the power to review departmental decisions. In order to make such review accessible, consideration should be given to making legal aid available to indigent applicants.

Finally, our model of a decentralised hearing-based system is consistent with two further innovations: centralised information on country conditions and an individualised but decentralised 'fast-track' procedure for applications judged to be manifestly unfounded. While these are not necessary features of a decentralised hearing-based model, they are elements that would improve the accuracy and fairness of the determination system.

First, accurate, complete and up-to-date information on country conditions is vital to the refugee adjudication process. Applicants come to the process and tell a personal story that will be judged according to the legal framework set forth under the UN and OAU refugee definitions.[41]

Whether the applicant's statement entitles him or her to refugee status will only be assessed within the context of the history, politics and social conditions of the refugee's home country. Consequently, the refugee adjudication process will yield accurate results only if the decision-making officers have access to complete and accurate information on applicants' home countries.

Collecting such information is clearly beyond the capacity of decentralised intake officers. It is likely also beyond the capacity of the refugee rights community. There is thus a strong argument that this function should be centralised. The Refugee Affairs Sub-directorate took a first step towards providing such information for its personnel by establishing a centralised set of files containing information on country conditions. This was an encouraging step and warranted further development. In particular, a centralised database on country conditions, similar to Canada's Documentation Centre,[42] is vital to the efficient and fair administration of a reformed refugee adjudication procedure in South Africa.[43]

Second, the Department can implement the Act in a fashion that will increase the effectiveness of the procedure for rejecting applications as 'manifestly unfounded' that has been developed under the 1994–2000 determination system. We believe that a 'fast-track' procedure for rejecting manifestly unfounded applications makes sense, but only if the truncated procedure is not used as a mechanism to reject applications from nationals of a 'white list' of countries that the Department believes do not create refugee flows. Indeed, granting the authority to reject an application as manifestly unfounded at the regional level emphasises the character of the manifestly unfounded decision as an individualised determination rather than one based on nationality, a principle important to uphold in providing a refugee determination procedure consistent with international law. The authority to determine that an application for refugee status is manifestly unfounded resided in the 1994-2000 period at the level of the Standing Committee. In line with our recommendation that individualised refugee hearings be conducted by intake officers, we would also recommend that the power to reject an application as manifestly unfounded be devolved to the initial intake officers – but only if accompanied by the built-in protections that exist elsewhere in our model of the decentralised hearing-based system, i.e. the provision of a written decision with reasons, an administrative filter by the supervisory body for cases of mistake or fraud, an internal legal review function by the Appeal Board, and judicial review.

Part III: The Refugees Act: Properly Interpreted in Terms of a Decentralised Hearing-based Model

On 20 November 1998, South African President Nelson Mandela signed into law a Refugees Act.[44] The first paragraph of the new Act states that

the Act is intended '[t]o give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees; to provide for the reception into South Africa of asylum seekers; to regulate applications for and recognition of refugee status; [and] to provide for the rights and obligations flowing from such status'. In this section, we briefly examine whether the new Act does in fact accomplish these goals in its specification of the procedures to govern refugee status determination. We investigate several topics relevant to key components of the decentralised hearing-based model: hearing and legal representation, the internal appellate tribunal and the right to written reasons. We argue that the Act is an important step forward and, properly interpreted, reflects our decentralised hearing-based model. In this section, we also review the Department's implementing regulations, issued in April 2000.

Hearing and Legal Representation

The Act as introduced to the National Assembly contained provisions explicitly requiring that every asylum applicant be afforded an oral hearing before a Refugee Reception Officer. Furthermore, that version of the Act (the 'draft Act') guaranteed to refugees a right to legal representation in their oral hearing. The specific language granting an oral hearing with legal representation was contained in section 24(2) of the draft Act, which provides, in pertinent part, that:

> When considering an application the Refugee Status Determination Officer must have due regard for the rights set out in section 33 of the Constitution, and in particular, must –
> (a) hear oral evidence;
> (b) allow legal representation
> (c) ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.

This language was substantially altered in the Act as amended by the National Assembly's Portfolio Committee on Home Affairs, which was the version of the Act that was eventually passed into law (hereinafter referred to as the 'final Act'). Section 24(2) of the final Act provides only that: 'When considering an application the Refugee Status Determination Officer must have due regard for the rights set out in section 33 of the Constitution, and in particular, ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.' In short, section 24(2) of the final Act drops the explicit reference to an oral hearing with legal representation that was included in the same section of the draft Act.

This change from the draft Act to the version enacted does not mean, however, that the Act does not require that asylum applicants be afforded a hearing. The provision of a hearing may still be required by section 24(3)

of the Act, albeit not quite as clearly as in section 24(2) of the draft Act. Section 24(3) of the final Act provides that:

> The Refugee Status Determination Officer must at the conclusion of the hearing –
> (a) grant asylum; or
> (b) reject the application as manifestly unfounded, abusive or fraudulent; or
> (c) reject the application as unfounded; or
> (d) refer any question of law to the Standing Committee.

The use of the word 'hearing' in section 24(3) could be a mere drafting error, a failure on the part of the legislature to remove the word 'hearing' from section 24(3) when it removed the provisions in section 24(2) establishing an applicant's right to an oral hearing with legal representation. But we believe it far more likely that the continued presence of the word 'hearing' in section 24(3) of the final Act reflects a determination by the drafters to provide some kind of oral hearing, the exact parameters of which remain to be defined by regulation.

We believe that the drafters recognised, for reasons similar to those stated above, that the refugee determination process cannot provide, in the absence of a hearing, the procedural fairness that the right of just administrative action provided in section 33 of the Constitution requires. Genuine refugees are often forced to flee their native country with little or none of their property. Accordingly, the records that might provide evidence for an applicant's claim for refugee status may not be available to aid his or her claim. Additionally, persecutors do not ordinarily issue documents evidencing that a claimant has indeed been persecuted. While an applicant may be able to document conditions in his or her country that relate to the reason for his persecution, the applicant will most often lack documentary evidence of the relationship between country conditions and his own story of persecution. For all these reasons, a fair decision 'on the papers' is simply not possible in respect of many asylum claims. In most cases, the Refugee Status Determination Officers will be obliged to make a decision based on little more than the internal consistency of the applicant's account of persecution, along with other, more intangible, indications of credibility. However, unless the applicant is heard in person, the internal consistency of the applicant's account cannot be fully probed, and many other important indications of credibility will be lost. For example, the applicant will be unable to demonstrate credibility by giving testimony consistent with the facts as presented in his written application. The applicant will also be deprived of the chance to demonstrate credibility by answering questions regarding the details of his account. Just as importantly, the Department will be unable in most cases to probe applicants to determine whether the facts presented in their written application are truthful. For all these reasons, hearings are vital to the fairness of the refugee determination process and, we believe, are therefore constitutionally required, in addition to representing the best policy choice for applicants and the Department.

The Department at least initially formally agreed with this view. Section 38(g) of the final Act provides that the Minister of Home Affairs may make regulations pertaining to 'any ... matter which is necessary or expedient to prescribe in order that the objects of this Act may be achieved'. Regulations published on 6 April 2000 detail the refugee status determination process and implement the Act.[45] These regulations define a hearing to be 'an informal, non-adversarial interview with a Refugee Status Determination Officer'.[46] Regulation 10(1) provides as follows: 'In complying with the provisions of section 24 of the Act, the Refugee Status Determination Officer will conduct a non-adversarial hearing to elicit information bearing on the applicant's eligibility for refugee status and ensure that the applicant fully understand the procedures, his or her rights and responsibilities and the evidence presented.' The Refugee Status Determination Officer may receive evidence and question the applicant and any witness.[47] The applicant has the right to be represented by legal counsel, present witnesses and submit affidavits of witnesses and other evidence.[48] Importantly, regulation 10(5) provides: 'At the end of the initial hearing, the applicant's counsel or representative shall have an opportunity to make a statement or comment on the evidence presented, subject to the Refugee Status Determination Officer's discretion regarding the length of such statement or comment. Comments may also be submitted in writing.'

The precise character of this hearing will undoubtedly vary over time through departmental capacity, negotiation and case-by-case issues.[49] But the threshold issue has been dealt with adequately. We believe that the Department's principle of provision of hearings and legal representation is both wise policy and a sound statutory and constitutional interpretation.

Judicial Review and the Appeal Board

An important part of the model we propose is the monitoring by the judicial system of the internal tribunals on refugee affairs. The Act and regulations are both silent on whether and under what conditions unsuccessful applicants who have exhausted their administrative remedies may resort to the courts. It is also true that neither document explicitly purports to oust judicial review. Given that ousters of judicial review are particularly disfavoured under South African law, we see no reason to construe the Act as providing for ouster. Instead, the default rule of section 7(2)(a) of the Promotion of Administrative Justice Act 3 of 2000 would presumably apply. Judicial review in terms of this Act is available only where 'any internal remedy ... has been exhausted'. This exhaustion of remedies requirement is the substantive condition on access to court.[50] Applicants unhappy with their cases will have to go first to the Appeal Board before going to the High Court.[51] But there is clearly no possibility of an ouster of judicial review.

Additionally, there are persistent concerns regarding the independence of the Refugee Affairs Appeal Board. Section 33(3) of the Constitution

requires that all administrative action must be subject (via national legislation) to review 'by a court or, where appropriate, an independent and impartial tribunal'. While significant, the language in section 12 of the Act providing that the Appeal Board 'must function without any bias and must be independent' cannot by itself guarantee these 'independence and impartiality' requirements of the right of just administrative action. Two features are of particular concern.[52]

First, under section 17(1), the Minister of Home Affairs is given the authority to remove a member of the Appeal Board 'on account of misconduct or inability to perform the functions of his or her office properly'. This standard is far too hazy for comfort. Could the Minister, for example, dismiss a member of the Appeal Board who persisted in reaching decisions he did not like, even if they complied with the terms of the Refugees Act, by finding that the member was incapable of performing the functions of his or her office properly? We would suggest not, but the question remains open.[53] The Minister should adopt a regulation clarifying and addressing the issue.

The second concern regarding the Appeal Board's lack of independence is much broader than the question of the Minister's power to hire and fire its members. Neither the Act nor the draft regulations suggest that the Appeal Board will enjoy even the slightest degree of independence within the administrative structure of the Department. In real terms, this means that the Appeal Board's budget, its staff and its facilities, right down to its supply of pens and paper clips, will potentially be controlled by the Department. That means that, if the Appeal Board makes decisions that displease the Minister, it may feel the Minister's ire very directly. The Appeal Board's susceptibility to budgetary strangulation hardly recommends it as an 'independent and impartial' body capable of substituting for judicial review under Section 33 of the Constitution. Again, formal adoption of a regulation providing for administrative independence would be helpful to the ultimate success of the Refugee Affairs Appeal Board.

The Right to Written Reasons in Refugee Status Determination

The Act does not contain an explicit requirement that applicants be given written reasons should their application for refugee status be denied, but the Department has provided for the provision of written reasons in its regulations implementing the Act. Regulation 12(3) provides that: 'If an application is rejected, the applicant must be provided with a written decision identifying the reason for the rejection.' This regulation includes within its ambit those cases rejected as manifestly unfounded, abusive or fraudulent. In these cases, the written reasons must be provided for the applicant within five working days after the date of rejection, pursuant to section 24(4)(a) of the Act. In line with the decentralised hearing-based model, this rejection is within the authority of the Refugee Status Determination Officer. The five-

day deadline to provide written reasons in the context of applications rejected as manifestly unfounded, abusive or fraudulent will facilitate the Standing Committee's expedited review of this class of applications.[54]

In respect of applications rejected for ordinary reasons – i.e. as merely 'unfounded', rather than 'manifestly unfounded' – the regulations do not set a deadline for the Department to provide the applicant with written reasons. However, under Regulation 14(1)(a), rejected applicants are required to lodge an appeal with the Appeal Board within thirty days of receipt of a letter of rejection. Obviously, in order to make the applicant's appeal possible, the Department will have to provide the applicant with written reasons well in advance of the expiration of the thirty-day deadline.

It is worthwhile to pause at this point to make clear that the Department's provision of written reasons in the draft regulations was not a matter of discretion – rather, it was required to save the Refugees Act from constitutional invalidity. Under the 1994–2000 status determination system, the initial practice of the Department's Refugee Affairs Appeal Board was not to give written reasons for their decisions. This practice was the subject of litigation by the refugee rights community. The issue was resolved against the Department of Home Affairs when the Board agreed in the *Pembele*[55] settlement to provide written reasons.

The reason for the Department's change of heart can best be found in section 33(2) of the Constitution, which provides that 'everyone whose rights have been adversely affected by administrative action has the right to be given written reasons'. In the context of the Department's administration of South Africa's refugee status determination system, section 33(2) makes clear that any adverse decision rendered by a Refugee Status Determination Officer must be embodied in a written document that sets forth the reasons why the Department has rejected the applicant's claims.[56]

What is required in order to comply with the right to written reasons? The decided cases initially expressed a rationale of linking the provision of detail to the severity of the consequences of the decision.[57] Given the potentially severe – indeed, possibly fatal – consequences of deporting a bona fide refugee, this rationale would clearly act in favour of the need to disclose the basis for the denial of refugee status in considerable detail. More recently, the right has been grounded in the necessity for effective judicial review.[58] The latter rationale is, in our opinion, by far the more important. If the applicant does not know exactly why his application was rejected, his ability to have that decision reviewed by a court will be crippled. This is an outcome that the Constitution, which subjects administrative action to judicially enforced standards of due process, cannot countenance.

In order for a Refugee Status Determination Officer's written decision to provide an adequate basis for judicial review, it must, at a minimum, set forth the relevant facts as found by the Refugee Status Determination Officer, as well as testimony by the applicant found not credible by the

officer, and the grounds for such adverse credibility findings. The written decision must also provide the reason or reasons for the adverse finding. For example, it must disclose that the intake officer has determined that the applicant lacks a well-founded fear because country conditions have changed or that the applicant is ineligible for asylum due to firm resettlement in another country. More importantly, it must set forth the facts and analysis underlying each reason for the adverse finding.[59] Unless this degree of specificity is provided in the written decision, applicants will lack the knowledge necessary to mount a successful appeal against the denial of their claim for relief.

Conclusion

As it had when drafting the Refugees Act, the Department of Home Affairs, now working with the Refugees Act having legal effect, still has a chance (indeed, a duty) to identify and implement a workable system of refugee determination. The 6 April 2000 regulations are a good start. The courts, however, have made clear that the policy area of refugee determinations is an area in which they as judges feel competent and in which they will grant relief to sympathetic applicants. They and the Department will both by necessity engage in a process of interpreting as well as implementing the Act. We argue that the component elements of an efficient and fair decentralised and hearing-based system – which are laid out in the Refugees Act and confirmed in the regulations at a formal level – need to be given substance by the Department in its training programmes and its organisational policies. If this does not occur, then the policy development in this area over the next few years will be a process that is driven by court decisions. Such decisions, we believe, will emphasise fairness elements at the expense of efficiency concerns. The swift and thorough institutionalisation of the decentralised hearing-based model would be a proactive political strategy, rather than a reactive court-based one.

Notes

1. Some of the material in this first section is adapted from J. Klaaren, 'Contested Citizenship in South Africa' in *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law*, ed. P. Andrews and S. Ellmann (Johannesburg, 2001), 304–25.
2. Before the period 1991–93, South Africa had a refugee problem but no refugee regime. Indeed, the apartheid state was involved in creating refugees through its policies of regional destabilization. In particular, Mozambican refugees came in significant numbers to what were then homelands in the eastern Transvaal. C. Murray, 'Mozambican Refugees: South Africa's Responsibility', *South African Journal of Human Rights* 154 (1986): 2. Little attention was given to the issue by the apartheid central government, certainly not from a human rights perspective. For the most part, these refugees were left to find their own accommodation with the homeland governments of the time. Since the time of these Mozambican refugees, however, dramatic changes have occurred both at the level of formal law and at the level of state bureaucracy. See generally L. de la Hunt, 'Refugees and Immigration Law in South Africa', in. *Beyond Control: Immigration and Human Rights in South Africa*, ed. J. Crush (Cape Town, 1998), 124.
3. In 1991, the UNHCR had signed a Memorandum of Understanding with South Africa. This related largely to the return of exiles.
4. South Africa has ratified several international treaties regarding the treatment of refugees and asylum-seekers. These treaties are: the 1951 UN Convention on the Status of Refugees, the Protocol to the UN Convention on the Status of Refugees (both ratified in the Senate on 14 September 1995, Hansard col. 2966, and in the National Assembly on 11 October 1995, Hansard col. 4361), and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (Hansard, ibid). These treaties were formally acceded to in January 1996. Section 6 of the Refugees Act states that that Act must be 'interpreted and applied with due regard to' these treaties, among others.
5. See Passport Control Instruction No. 20 of 1994. Initially, applicants who appeared to be refugees were issued with permits on the condition of proceeding to Gazankulu or KaNgwane for contact with the UNHCR and assistance in repatriation to Mozambique. This condition was later dropped. An attachment to this Passport Control Instruction contained criteria to be used in the evaluation of refugee claims by Mozambicans.
6. Passport Control Instruction No. 63 of 1994. Issued on 23 September 1994, this Passport Control Instruction specifically mentions and draws upon the Basic Agreement signed between the government and the UNHCR.
7. The Minister of Home Affairs approved a set of 'Voluntary Repatriation Arrangements', which were intended to 'give effect to' the UNHCR Basic and Tripartite agreements. These arrangements were known as the asylum procedures and constituted the understanding between the Minister and the UNHCR as to the content of applicable asylum procedures. See 3 July 1996 communication from C. Schravesande, Department of Home Affairs, to J. Klaaren with `voluntary repatriation arrangements' attached.
8. For instance, in 1994, asylum-seekers in Johannesburg initially went to the District Office at Market Street, but this office could not cope with the demand. (See Passport Control Instruction No. 32 of 1995.) In response, a specialised office dealing with asylum-seekers was opened in Braamfontein.
9. See, *inter alia*, *Kabuika and Another* v *Minister of Home Affairs and Others* 1997 (4) SA 341 (C), *Pembele and Others* v. *Appeal Board for Refugee Affairs* (unreported, Case No. 15931/96, 10 December 1996, Cape Provincial Division), and *Baramoto* v *Minister of Home Affairs* 1998 (5) BCLR 562 (W).
10. See Chapter 6 of this collection.
11. Section 41(1) provides: 'The Minister may issue to a prohibited person a temporary permit on the prescribed form to enter and reside in the Republic for the purpose, and subject to the other conditions, mentioned therein.' This discretionary function was delegated to the level of immigration officers. See, for example, Passport Control Instruction No. 29 of 1997 (replacing Passport Control Instruction No. 33 of 1992).
12. See Chapter 3 of this collection.
13. There were special procedures for stowaways claiming to be refugees. PCI No. 33 of 1995.
14. Passport Control Instruction No. 63 of 1994 (Procedures for Handling Asylum-Seekers and Refugees).
15. See South African Human Rights Commission, *Illegal? Report on the Arrest and Detention of Persons in Terms of the Aliens Control Act* (Johannesburg, 1999).

16. Communication from M Schoeman, Department of Home Affairs to J. Klaaren, 20 May 1999.
17. Voluntary Repatriation Arrangements (see n. 7) at section 6.2.2.
18. Lawyers for Human Rights and Wits Refugee Research Programme, 'Asylum and Naturalisation: Policies and Practices', unpublished workshop preparatory document, 1996.
19. Voluntary Repatriation Arrangements at s. 6.2.3.
20. Personal communication from Home Affairs official to Jonathan Klaaren, Pretoria, May 1998.
21. Departmental Circular No. 50 of 1998.
22. This was entirely a matter for self-enforcement. In discussions with the National Consortium for Refugee Affairs in mid-1999, neither the UNHCR nor the Department of Home Affairs was aware of any person deported after having had an asylum application rejected.
23. Letters from Director-General regarding Documents for Travel Purposes to Refugees, dated 7 March 1995 and 20 January 1995.
24. Voluntary Repatriation Arrangements at s. 1.3.
25. Voluntary Repatriation Arrangements at s. 3.
26. The chairmanship had also been at the deputy Director-General level but the practice of delegating evolved since such top officials did not have the time to give to the consideration of applications.
27. Lawyers for Human Rights,'Asylum and Naturalisation: Policies and Practices', unpublished Workshop Report, 14 November 1996.
28. Voluntary Repatriation Arrangements at. s. 3.7.
29. This advice is gathered from a number of sources, including embassy and NGO reports as well as input from UNHCR.
30. A similar standard articulated for a determination with respect to stowaways is whether a country is one 'where the safety or freedom of any such person [claiming to be a refugee] is seriously threatened'. Passport Control Instruction No. 33 of 1995 (Stowaways Procedures).
31. Lawyers for Human Rights and Wits Refugee Research Programme, 'Asylum and Naturalisation', 5.
32. Voluntary Repatriation Arrangements at s. 1.4. The procedures for the appointment of the first member did not follow the terms of the voluntary arrangements entered into by the government with the UNHCR, in that the Department of Justice was not consulted in the appointment. The Refugee Affairs unit had recommended such consultation but this was not heeded. See n. 27: 'Asylum and Naturalisation: Policies and Practices', 3 (notes by the organisers of a talk by C. Shravesande, Director of Refugee Affairs). Since that appointment (where the response of the Department of Justice was not thought of as adequate), these procedures have been amended by the Minister. Communication from a Home Affairs official to one of the authors.
33. Voluntary Repatriation Arrangements at s.4.2.8.
34. See, for example, Human Rights Watch, *'Prohibited Persons:' Abuse of Undocumented Migrants, Asylum Seekers, and Refugees in South Africa* (New York, 1998).
35. According to the Voluntary Repatriation Arrangements, Eligibility Committees established near the border areas would have the power to declare an application 'manifestly unfounded' but, as has been pointed out in the text, this was not the source of authority for the operative manifestly unfounded procedure.
36. An alternative to the arrangements would have been to have such declarations confirmed instead by the Refugee Affairs Appeal Board, the body that heard appeals from adverse decisions of the Standing Committee with respect to applications not declared manifestly unfounded. This alternative was within the powers of the Standing Committee under the asylum procedures. Voluntary Repatriation Arrangements at s.2.1.4 and s.3.9.

37. Section 3(a) and (b), Refugees Act 130 of 1998.
38. In general, South Africa has refused to grant asylum to refugees who could have applied for asylum elsewhere, and as a rule takes residence as longer than three months.
39. The institution of a wide-ranging independent review structure within the department may be worth investigation. The argument for such a body is that not only would it go a great way towards remedying many of the manifestly unconstitutional practises of the Department and contribute better legitimacy, it would foster more rational and effective immigration policy and better-informed decisions. See *Draft Green Paper on International Migration*, 1997, paragraph 1.3.5. A scaled-down version of this vision – and one that may contribute to greater independence from political decision-making – would be an important concept to retain and may contribute to a streamlining of the refugee determination process.
40. Section 24 of the Aliens Control Act 96 of 1991 established the Immigrants Selection Board.
41. Section 3, Refugees Act 130 of 1998.
42. The Canadian Immigration and Refugee Board has established an official Documentation Centre. The Centre's legal database has been opened to the public online through QuickLaw, Canada's largest on-line legal research database.
43. Such a database, to be credible, must draw information from a wide variety of sources, including government reports (such as the country conditions reports of the United States Department of State), NGO reports (such as those published by Human Rights Watch, Amnesty International, the Lawyers Committee for Human Rights, and many others), reports of the United Nations High Commissioner for Refugees, and news articles from the domestic and international press. Additionally, this database must be accessible to the public – preferably online. Of course, the existence of such a database will not preclude applicants from being afforded the opportunity to supplement the materials in the database both with materials relating generally to country conditions, and with data specifically corroborating their own factual account.
44. Act 130 of 1998.
45. Refugees Act Regulations (No. R 366) (6 April 2000), GG 21075.
46. Refugees Act Regulation 1 Definitions.
47. Refugees Act Regulation 10(2).
48. Refugees Act Regulation 10(4).
49. Perhaps the most striking character of this hearing is its split personality. The Regulations speak of 'the initial hearing' and the later 'conclusion of the hearing'. Regulation 12(2) provides: 'The applicant must return to the designated Refugee Reception Office to conclude the initial hearing and personally receive the decision on his or her asylum application. At his or her discretion, the Refugee Status Determination Officer may ask the applicant additional questions regarding eligibility for refugee status.' One issue that will surely arise will concern access to information during the period of time between the initial hearing and the conclusion of the hearing and service of decision. For instance, must country condition information contrary to that supplied by the applicant be disclosed? The answer is likely to be yes. Another issue that is also likely to arise is that of legal representation at the conclusion of the hearing referred to in Regulation 12(2). To the extent that questions will be directed to the applicant, a legal representative should be allowed to be present to advise his or her client.
50. Here, the Regulations' definition of a final determination is somewhat broader. According to Regulation 1, a 'final determination' means 'a determination for which any appeal to the Refugee Appeal Board has been exhausted or the time period to file an appeal has expired, or [any] mandatory review by the Standing Committee has been completed'.

51. In terms of Regulation 14(1)(a), an appeal to the Appeal Board must be launched within thirty days of receipt of the letter of rejection and must be lodged directly in person. The Regulations do not provide for any target time period for the Appeal Board decision of appeals.
52. Another feature is perhaps of concern as well. Under section 13(1), the members of the Appeal Board will be appointed by the Minister of Home Affairs. There is no provision in the Act or draft regulations that establishes any mechanism that would result in Appeal Board members being less beholden to the Minister for their jobs. Such a mechanism could be a committee tasked with recommending persons to be appointed to the Board or even involvement by the Judicial Service Commission. In fact, a selection committee did meet in April 2000 and decided to recommend two persons for immediate appointment and further to recruit more broadly for additional part-time members. This procedure should be formalised.
53. Section 17(2) requires the Minister to 'tak[e] ... into consideration' comments by the relevant member as well as the Appeal Board's chairperson before removing a member, but it does not subject the Minister's decision to review by any Departmental body or a court. And even if a court eventually finds that the Minister's authority to fire Appeal Board members is more circumscribed than the vague text of section 17(1) suggests, for the moment at least Appeal Board members have a strong incentive to follow their Minister's directives closely.
54. Also in line with section 24(4)(a), Regulation 13(4) provides that the Standing Committee shall normally inform the Refugee Status Determination Officer of its decision within five days of referral of the determination of whether an application was correctly rejected as manifestly unfounded, abusive or fraudulent.
55. See note 9 above.
56. See also section 5 (reasons for administrative action) of the Promotion of Administrative Justice Act 3 of 2000.
57. *Moletsane* v *Premier of the Free State and Another* 1996 (2) SA 95 (O).
58. *Afrisun Mpumalanga (Pty) Ltd* v *Kunene NO and Others* 1999 (2) SA 599 (T) at 631I – 632A.
59. Regulation 12(1)(c) allows the Refugee Status Determination Officer while making an eligibility determination to 'consider country conditions information from reputable sources'.

Part II

The Implementation of Refugee Policy in South Africa