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Can children be denied asylum protection due to their parents' failure to comply with procedural requirements?

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by Naledi Motsiri, Director, and Tshegofatso Matlou, Associate

This question lies at the intersection of immigration control, constitutional rights and the principle that the best interests of the child are paramount in every matter concerning the child.

Against a backdrop of heightened public concern about undocumented migration in South Africa, the Constitutional Court's judgment in *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* [2026] ZACC 30 raises important questions about the consequences of procedural barriers to asylum protection, particularly for children.

The judgment concerned the constitutionality of provisions of the Refugees Act 130 of 1998 and the Refugees Regulations, the implications of which extend beyond the administration of asylum processes. Children may be affected by their parents' procedural non-compliance despite having little or no control over those circumstances. The judgment therefore invites consideration of how immigration procedures can be administered consistently with children's fundamental rights.

The *Scalabrini* judgment

The Scalabrini Centre of Cape Town ("**Scalabrini**") challenged sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B) of the Refugees Act, as well as specified provisions of the Regulations. Collectively, these provisions had the effect of preventing asylum seekers from accessing asylum protection because of procedural non-compliance.

Scalabrini argued that these provisions created barriers to the assessment of asylum claims on their merits, potentially exposing asylum seekers to being returned to the same countries where they previously faced persecution or serious human rights violations. This implicated

the principle of non-refoulement, which prohibits returning a person to a territory where they face certain risks of harm.

The Constitutional Court confirmed the High Court's declaration that the challenged statutory provisions were unconstitutional and invalid. It identified uncertainty arising from inconsistent procedural thresholds and insufficient guidance for their application. It also found that section 21(1B) formed part of a framework that could prevent asylum seekers from having their claims assessed on their merits.

The Court held that procedural non-compliance could not, by itself, justify preventing access to asylum protection where the consequences could violate the principle of non-refoulement. The judgment illustrates that, although procedural requirements serve legitimate administrative purposes, they must operate within constitutional limits.

For children, the consequences of these barriers raise additional concerns about the protection of their individual rights.

The implications of parental non-compliance for children

The Helen Suzman Foundation (HSF), which was admitted as a friend of the court, made submissions concerning the effect of the challenged provisions on children of asylum seekers. The High Court considered these submissions central to its analysis of the constitutional implications of the challenged provisions for children.

HSF argued that children faced a "double harm" in that they could be denied an assessment of their protection needs, while also experiencing the consequences of procedural failures over which they had little or no control.

The concern was that the legislative scheme, including section 21B(2A) of the Refugees Act, could result in children being returned to countries where they faced human rights violations with their parents without the merits of their protection claims being assessed. A parent's failure to satisfy procedural requirements could therefore detrimentally affect the protection of a child's constitutional rights, irrespective of the circumstances or strength of the child's claim.

A parent's failure to comply with a procedural requirement does not necessarily establish that a child has no need for protection. The risks a child may face if they are returned to their country of origin must be considered in accordance with the applicable legal framework, rather than assumed to be resolved by the parent's procedural compliance or lack thereof.

Children have their own rights and interests, even when their circumstances are closely connected to those of their parents. The challenge in *Scalabrini* illustrates the potential consequences when a legislative scheme does not adequately account for children's individual circumstances.

The best interests of the child

Section 28(2) of the Constitution provides that a child's best interests are of paramount importance in every matter concerning the child. This principle requires meaningful consideration of children's interests in decisions affecting them.

HSF also argued that children should be heard in matters concerning their interests before decisions are taken that may adversely affect their rights. These submissions highlighted the importance of recognising children as individuals with their own protection needs, rather than treating their circumstances solely as an extension of their parents' applications.

Where a decision may result in a child's return to a country in which they face persecution or serious harm, their individual circumstances are particularly relevant. The best-interests principle does not automatically entitle every child seeking asylum to refugee status. Rather, it reinforces the need for decisions affecting children to comply with constitutional requirements and for their protection needs to receive appropriate consideration.

The High Court found that the impugned provisions unjustifiably limited children's constitutional rights and could not be interpreted in a manner that adequately protected their best interests and dignity. The Constitutional Court subsequently confirmed the declaration of invalidity concerning the statutory provisions, finding that they obstructed merits-based assessments of asylum claims and violated the principle of non-refoulement, including the fundamental human rights underlying that protection.

Although the Constitutional Court did not undertake an exhaustive analysis of every children's rights argument, the *Scalabrini* judgment demonstrates how procedural barriers in the asylum process may have significant consequences for children.

Conclusion

The *Scalabrini* judgment was delivered amid heightened public debate about undocumented migration and demands for stricter immigration enforcement. Subsequent controversy surrounding a Department of Home Affairs directive concerning the intake of asylum applications further illustrates the challenges of implementing asylum policy in a politically sensitive environment.

South Africa has a legitimate interest in regulating migration and administering its asylum system. However, those objectives must be pursued consistently with constitutional obligations, including the protection of children's rights and the principle of non-refoulement.

The *Scalabrini* judgment does not remove the state's authority to regulate migration or guarantee refugee status to every asylum seeker. It confirms that procedural requirements cannot operate as arbitrary barriers preventing the substantive assessment of asylum claims.

For children, the central issue is whether the legal framework adequately accounts for their rights and circumstances when parental non-compliance may affect their right to constitutional protection. Ensuring that immigration procedures operate within constitutional limits is essential to protecting those rights while maintaining an effective asylum system.



Naledi Motsiri

Director

View Profile



Tshegofatso Matlou

Associate

View Profile