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• CONSTITUTIONAL COURT REVIEW • LEAD ARTICLE

Constitutional Rights, Border Sovereignty and Public Order:

Reassessing South Africa's Constitutional Court Judgment on the Refugees Act Amid National Unrest

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> *"A constitutional democracy must protect the integrity of its borders, uphold the rule of law, safeguard human dignity and ensure that government remains accountable to the people it serves."*
>
> — AAAIC FOUNDING PRINCIPLE ON CONSTITUTIONAL GOVERNANCE

LEGAL AUTHORITY BOX

Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others [2026] ZACC 30

Constitutional Court of South Africa — 7 July 2026. Declaration of invalidity: ss 4(1)(f), (h), (i) and 21(1B) of Refugees Act 130 of 1998.

ZACC | REFUGEES ACT

ABSTRACT

This article provides a critical yet balanced reassessment of the Constitutional Court's judgment in *Scalabrini Centre v Minister of Home Affairs* [2026] ZACC 30, which declared certain procedural exclusions in the Refugees Act 130 of 1998 unconstitutional. Situated against the backdrop of violent protests in Johannesburg and Durban during October 2026, the paper argues that migration governance in South Africa cannot be reduced to either judicial compliance or sovereign enforcement alone. It clarifies what the Court did and did not decide, examines the constitutional limits of judicial power under sections 2 and 165, and defends the state's sovereign right to regulate borders while maintaining non-refoulement obligations. Drawing on AAAIC principles of meritocracy, Ubuntu, accountability and equal justice, the article diagnoses an implementation failure rather than a purely legal crisis, and proposes a ten-point framework for transparent, capable and lawful immigration management.

KEYWORDS

Constitutional Law, Refugees Act, Sovereignty, Non-refoulement, Rule of Law, Immigration Management, Public Order, South Africa, Ubuntu, Accountability

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01 Introduction: A Constitutional Judgment and a National Question

South Africa finds itself confronting a difficult constitutional, political and social question following the Constitutional Court's judgment of 7 July 2026 in *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* [2026] ZACC 30.

The judgment has generated intense public debate about irregular migration, the administration of the asylum system, national sovereignty, public resources, border management and the obligations imposed upon the state by the Constitution and international law.

The ensuing discontent, including protests that escalated into violence in parts of Johannesburg and Durban in October 2026, demonstrates that migration policy cannot be treated merely as a technical administrative matter. It touches upon questions of national identity, economic insecurity, public confidence in government and the perceived capacity of the state to enforce its own laws. Reports have documented the burning of vehicles, damage to businesses and confrontations involving protesters and foreign nationals. Such conduct raises serious concerns about public safety, the protection of property and the equal application of the law.

However, a constitutional judgment must be assessed according to its legal reasoning, its constitutional implications and the practical consequences of its implementation. It must neither be misrepresented to inflame public sentiment nor insulated from legitimate public scrutiny simply because it emanates from the highest court in the country.

The ARISE AFRIKA ARISE INDEPENDENT CONGRESS (AAAIC) approaches this issue from the standpoint of meritocracy, justice, fairness and equity, accountability, Ubuntu and the principle that public institutions exist to serve the people.

> **Central Proposition:** South Africa must not be forced to choose between constitutional compliance and effective immigration control. A capable, accountable state must pursue both.

02 What Did the Constitutional Court Actually Decide?

The Constitutional Court's judgment concerned provisions of the Refugees Act 130 of 1998 that restricted access to refugee status determination on certain procedural grounds.

The challenged provisions included sections 4(1)(f), 4(1)(h), 4(1)(i) and 21(1B). The Court confirmed the declaration that these provisions were unconstitutional and invalid.

Among the concerns was the potential exclusion of asylum seekers from the process because they had entered South Africa irregularly, failed to report to a Refugee Reception Office within the prescribed period, or encountered other procedural barriers. The judgment addressed the constitutional problem of preventing an individual's claim from being properly assessed before determining whether that person qualifies for protection.

The Court's reasoning engaged, among other matters, the constitutional protection of fundamental rights, the principle of non-refoulement and the need for decisions concerning refugee protection to be made through a constitutionally compliant process.

LEGAL NOTE

Non-refoulement

The principle of non-refoulement generally prohibits returning a person to a territory where they face the relevant risk of persecution or other serious harm covered by applicable refugee and human-rights law. See *Scalabrini* at paras 45-62; s 2 Refugees Act; s 7(2) Constitution.

The judgment must nevertheless be understood within its proper boundaries.

It did not automatically grant refugee status to all undocumented migrants. It did not grant permanent residence, confer citizenship or create voting rights for asylum seekers. Nor did it establish that every person who enters South Africa unlawfully has a valid claim to refugee protection.

Rather, it addressed barriers that could prevent qualifying claims from being considered on their merits. Individual claims remain subject to the applicable refugee status determination process, and the state retains lawful powers to administer immigration legislation and act against people who do not qualify for protection.

The distinction between access to an application process and the approval of an application is fundamental.

Legal authority: *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others [2026] ZACC 30*, Constitutional Court of South Africa, 7 July 2026.

03 The Constitutional Court and the Limits of Judicial Power

A constitutional democracy requires an independent judiciary. Courts must be able to determine whether legislation and executive conduct comply with the Constitution, even where their decisions are politically controversial or unpopular.

Section 2 of the Constitution establishes the supremacy of the Constitution and provides that law or conduct inconsistent with it is invalid. Section 165 protects judicial independence and requires court orders to be obeyed.

It follows that political parties, government departments and members of the public cannot lawfully treat a binding judgment as optional merely because they disagree with its outcome. However, constitutional supremacy does not eliminate democratic debate. Citizens retain the right to question public policy, criticise judgments, demand explanations from public officials and advocate legislative reform through lawful constitutional processes.

The distinction is between disagreement and defiance.

AAAIC maintains that the Constitutional Court must be respected as an institution, while the executive must remain accountable for the quality of the legislation it drafts, the manner in which it administers public policy and its ability to anticipate foreseeable operational consequences.

Where legislation is found unconstitutional, government must comply with the court order. Where administrative arrangements prove inadequate, government must improve them. Where legislative reform is constitutionally permissible and genuinely necessary, Parliament may consider it through the appropriate processes.

The proper response to a difficult judgment is neither hostility towards the judiciary nor the abandonment of public concerns. It is responsible constitutional governance.

04 National Sovereignty and the Right to Regulate Immigration

South Africa is a sovereign state entitled to regulate entry into, residence within and departure from its territory in accordance with its Constitution, legislation and international obligations.

Border control is a legitimate function of government. The state must maintain effective immigration procedures, verify identity documents, combat trafficking and document fraud, identify security risks, enforce immigration laws and ensure that public institutions can manage the volume of applications they receive.

These responsibilities are not incompatible with refugee protection.

An asylum seeker is a person seeking international protection whose claim has not yet been finally determined. A recognised refugee is a person whose entitlement to protection has been established under the applicable legal framework. An undocumented migrant, meanwhile, is not automatically a refugee merely because that person lacks lawful immigration documentation.

These categories should not be conflated.

Equally, irregular entry alone cannot establish that an individual has no legitimate need for protection. A person fleeing persecution may have entered without the documents or authorisation that would ordinarily be required. The circumstances must be considered in accordance with the governing law.

The challenge for South Africa is to maintain a system that is simultaneously accessible to people with potentially valid protection claims, resistant to abuse and capable of enforcing the law.

A state that cannot control its borders or administer its immigration system effectively undermines public confidence. A state that denies potentially valid refugee claims without lawful assessment risks violating its constitutional and international obligations.

Neither outcome represents sound governance.

05 Public Discontent, Community Frustration and the Duty of Government

The public reaction to the judgment cannot be understood solely through the language of xenophobia or hostility towards foreign nationals.

South Africans have legitimate reasons to demand effective public administration, including concerns about unemployment, pressure on public services, housing shortages, crime, corruption, identity-document fraud and the capacity of Home Affairs to manage immigration.

These concerns deserve serious investigation and credible responses.

Nevertheless, public frustration does not establish that migrants collectively are responsible for unemployment, crime or the deterioration of public services. Such claims require evidence and must be assessed rather than assumed.

The state must distinguish between documented offences, administrative failures, economic pressures and allegations directed at entire communities.

Where foreign nationals commit crimes, the appropriate response is investigation, prosecution and lawful enforcement. Where officials facilitate corruption or fraud, they must be held accountable. Where immigration procedures are abused, the state must identify and address those abuses. Where public resources are inadequately managed, government must explain the failure and implement corrective measures.

Collective blame is not a substitute for evidence.

Likewise, the constitutional rights of foreign nationals do not remove the obligation of government to respond to the needs of South African citizens. A responsible administration must address the interests of both without creating a false choice between them.

AAAIC therefore calls for a public policy approach that takes citizens' concerns seriously while refusing to legitimise intimidation, looting, assault or the destruction of property.

No political grievance, however strongly held, gives an individual the right to take the law into their own hands.

06 The Government’s Implementation Failure and the Crisis of Public Confidence

A court judgment may establish the legal framework, but implementation remains the responsibility of the relevant public institutions.

The October 2026 events raise questions about whether the Department of Home Affairs adequately assessed the operational implications of implementing the judgment, communicated the legal position to the public and prepared its refugee reception facilities for increased demand.

Reports indicate that the implementation directive led to substantial queues at refugee reception offices, while violent protests and security concerns subsequently disrupted operations. The Department of Home Affairs withdrew the directive on 9 October 2026, but that administrative development did not itself overturn the Constitutional Court’s judgment. The department indicated that it would pursue a fresh operational approach to compliance.

These developments expose a fundamental distinction between legal compliance and administrative competence.

Compliance requires the state to give effect to a binding judicial order. Competence requires the state to do so through lawful, adequately resourced, secure and properly communicated procedures.

Government cannot reasonably expect the public to have confidence in a system that appears reactive, poorly coordinated or unable to anticipate foreseeable consequences.

Nor can an administrative directive be permitted to become a substitute for a coherent national immigration strategy.

AAAIC CALLS UPON GOVERNMENT TO EXPLAIN

01 How the judgment was translated into administrative instructions.

02 Whether sufficient staffing, security, facilities and identity-verification systems were available before implementation.

03 What measures will ensure that valid asylum claims can be lodged and determined without unnecessary delay.

04 How fraudulent applications, identity manipulation and abuse of the asylum process will be detected and addressed lawfully.

05 How the department will maintain ordinary Home Affairs services for South African citizens while managing asylum applications.

06 How government will communicate changes in immigration administration in a manner that reduces misinformation and unnecessary public anxiety.

These are reasonable questions of accountability, not an attack on the judiciary or on the principle of refugee protection.

07 The Rule of Law Must Apply to Everyone

A constitutional state cannot selectively enforce the law according to nationality, political pressure or public popularity.

The rule of law requires lawful conduct from citizens, foreign nationals, public officials, political organisations and law-enforcement agencies alike.

Foreign nationals must comply with applicable immigration requirements, subject to the legal protections available to asylum seekers and refugees. Public officials must administer those requirements lawfully and without corruption. Political leaders must not incite violence or spread information they know to be false. Protesters must exercise their rights peacefully and within the law.

Where violence, looting, intimidation, assault or arson occurs, the police must investigate and the prosecuting authorities must act on the available evidence. Suspects must receive the protections and fair procedures guaranteed by law.

Equally, law-enforcement agencies must protect people at risk of attack, including foreign nationals whose businesses or personal safety are threatened. Such protection is not an endorsement of irregular migration; it is an obligation of lawful public administration.

The constitutional rights to dignity, equality and security of the person cannot be made conditional upon whether a person is popular with a particular group.

At the same time, the protection of these rights must coexist with the lawful enforcement of immigration legislation.

The rule of law loses its credibility if either side of this equation is ignored.

08 AAAIC’s Position: Meritocracy, Accountability and Equal Justice

AAAIC believes that public policy must be evaluated according to evidence, constitutional principles, administrative effectiveness and its consequences for the people of South Africa.

Our principle of meritocracy requires that decisions be made on relevant facts and lawful criteria rather than political convenience, prejudice or public pressure.

Applied to the asylum system, this means that claims must be assessed individually and competently. Decisions should be based on the applicable legal requirements, credible evidence and properly conducted procedures.

The same principle demands that immigration enforcement be professional and consistent. Identity verification, investigation of suspected fraud, border management and the determination of asylum claims must be undertaken by officials equipped to perform their duties and held accountable for failures.

Ubuntu requires us to recognise the humanity of others. It does not require the state to abandon its laws, nor does it require citizens to remain silent when public administration fails.

Justice requires the protection of legitimate refugee claims as well as the fair and lawful enforcement of immigration requirements.

Fairness and equity require government to consider the needs of South African communities, particularly where poverty, unemployment and inadequate public services place pressure on vulnerable households.

Truth requires political leaders to distinguish established facts from speculation, and to correct misinformation even when it appears to support their preferred political position.

These principles lead AAAIC to reject two equally unhelpful extremes: the suggestion that every concern about immigration is necessarily xenophobic, and the suggestion that every foreign national is responsible for the country's social and economic difficulties.

Neither proposition is a sound basis for policy.

09 Policy Recommendations: From Constitutional Conflict to Effective Governance

AAAIC proposes a comprehensive, evidence-based response built around the following priorities.

9.1 A transparent national immigration management framework

Government should publish a coherent framework explaining how border management, immigration enforcement, asylum applications, refugee status determination and deportation procedures operate together. The framework must identify the responsibilities of each institution, the applicable legal safeguards and the measures available to prevent abuse.

9.2 Adequate capacity at refugee reception offices

Home Affairs should assess staffing, infrastructure, digital systems, appointment arrangements and security at refugee reception facilities. Where demand exceeds capacity, the department should develop lawful measures to improve processing and manage queues safely, while ensuring that administrative arrangements do not recreate unconstitutional barriers to access.

9.3 Efficient and credible asylum determinations

Applications should be processed within reasonable periods, with adequate screening, identity verification, individual assessment and reasons for decisions. A system that leaves applicants in prolonged uncertainty is unfair to legitimate asylum seekers and makes effective immigration administration more difficult.

9.4 Evidence-based enforcement against fraud and crime

Government should strengthen investigations into document fraud, trafficking, corruption and other offences associated with immigration processes. Enforcement must target demonstrable unlawful conduct and responsible individuals, not entire nationalities or communities.

9.5 Parliamentary scrutiny and lawful legislative reform

Parliament should scrutinise the implications of the judgment and consider whether amendments to the Refugees Act or related legislation are necessary. Any reform must comply with the Constitution, respect binding court orders and remain consistent with South Africa's applicable international obligations. It must address genuine administrative or legislative shortcomings rather than merely respond to political pressure.

9.6 Public communication and voter education

Government should provide accessible explanations of the distinction between asylum applications, recognised refugee status, permanent residence, citizenship and voting rights. Public communication must be timely, consistent and based on the actual judgment. Political parties, civil society organisations and the media should help correct misinformation without dismissing legitimate questions about immigration management.

9.7 Protection against violence and vigilantism

Law-enforcement authorities should take appropriate measures to protect life, property and lawful business activity, investigate criminal conduct and prevent intimidation. Peaceful protest must remain protected, but violence and the deliberate obstruction of lawful processes cannot be treated as acceptable substitutes for democratic engagement.

9.8 Accountability for administrative failures

Where investigations establish that negligence, misconduct, corruption or a failure to follow lawful procedures contributed to the crisis, appropriate accountability measures should follow. Such measures must be based on evidence, fair processes and the responsibilities of the individuals and institutions concerned.

9.9 Regular public reporting

Home Affairs should publish appropriate statistics on asylum applications received, claims determined, processing times, outcomes, backlogs and enforcement actions. Reliable information would allow Parliament and the public

to evaluate the system on evidence rather than speculation. Personal information must, of course, be protected in accordance with applicable law.

9.10 **A balanced assessment of public-service pressures**

Government should examine the actual effects of migration on local service delivery, employment, housing and municipal resources. Where additional resources are required, planning should be based on reliable population and service-demand data. Claims about the effects of migration must be tested rather than accepted as self-evident.

10 Constitutional Reform Must Be Considered Carefully

Some public debate has raised the possibility of constitutional amendment in response to the judgment and its consequences.

Constitutional amendment is a lawful possibility within the framework established by the Constitution, but it is not a shortcut around an inconvenient judicial decision.

Any proposed amendment must identify the specific constitutional problem it seeks to address, demonstrate why existing constitutional and legislative mechanisms are insufficient, and comply with the applicable amendment procedures.

Government should first establish precisely what the judgment requires, what operational deficiencies have arisen and what lawful legislative or administrative remedies are available.

The public must be able to scrutinise the reasoning behind any proposed reform, its likely consequences and its compatibility with South Africa’s constitutional commitments.

Constitutional change should not be undertaken merely to demonstrate political toughness or to appease an angry public. Equally, legitimate proposals for reform should not be excluded from consideration without proper examination.

The question is whether a proposed measure will improve governance, protect constitutional rights and create a more effective immigration system.

11 Political Leadership in a Time of National Tension

Periods of public unrest test the quality of political leadership.

Leadership is not measured by the ability to exploit anger, assign collective blame or promise solutions that have not been properly examined. It is measured by the ability to identify the real causes of a problem, communicate honestly, propose workable solutions and protect the constitutional order.

South Africans deserve a government that can explain its decisions before confusion develops into a national crisis. They deserve immigration administration that is firm, lawful and competent. They deserve public institutions that can enforce the law without discrimination and respond to legitimate concerns without abandoning constitutional obligations.

They also deserve political parties that engage difficult issues through evidence and reason rather than inflammatory generalisations.

AAAIC calls upon political leaders across the political spectrum to avoid language that encourages hostility towards entire communities. The legitimate exercise of political leadership requires the ability to acknowledge public frustration while discouraging violence and defending lawful democratic processes.

Similarly, the judiciary should not become the target of threats or intimidation because its decisions are unpopular. Constitutional disagreements must be addressed through legal argument, democratic debate and lawful institutional reform.

A society that abandons these principles in moments of tension risks weakening the very institutions upon which its long-term stability depends.

12 Conclusion: The Need for a Capable, Accountable and Constitutional State

The Constitutional Court's judgment on the Refugees Act presents South Africa with a serious governance challenge. It has highlighted the relationship between constitutional rights, refugee protection, immigration enforcement and the operational capacity of the state.

The resulting public discontent must neither be dismissed nor manipulated. Citizens are entitled to demand secure borders, lawful immigration administration, effective public services and accountable government. Individuals seeking refugee protection are entitled to have their claims dealt with in accordance with the Constitution and applicable law.

These interests must be reconciled through competent institutions, sound legislation, effective administration and responsible leadership.

AAAIC maintains that a constitutional democracy is strongest when it can protect fundamental rights while ensuring that public authority is exercised responsibly. The rule of law must not become an excuse for administrative incompetence, and public frustration must not become a licence for lawlessness.

The state must enforce immigration legislation, investigate fraud, protect the public and provide fair procedures for determining asylum claims. Parliament must scrutinise the legal and policy framework. The executive must implement binding judgments competently. The judiciary must remain independent. Political organisations must debate these issues honestly, and communities must be protected against violence and intimidation.

Above all, South Africa needs a governance model in which decisions are guided by merit, evidence, accountability, justice and fairness.

For AAAIC, the objective is not to create hostility between South Africans and foreign nationals. It is to build a country in which constitutional rights are respected, public institutions function effectively, immigration laws are administered properly and the interests of the people are served through responsible governance.

> ***A fairer South Africa requires both constitutional integrity and administrative competence. Neither can sustainably exist without the other.***

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