ONE FOR THE ASYLUM SEEKER

Bula v Minister of Home Affairs (589/11) [2011] ZASCA 209

1 Introduction

South Africa has a large refugee population. In its 2010 report the United Nations High Commissioner for Refugees stated that South Africa received more than 222,000 new asylum requests (*2009 Global Trends Refugees, Asylum-seekers, Returnees, Internally Displaced and Stateless Persons,* United Nations Refugee Agency, November 2010 http://www.unhcr.org/4c11f0be9.html). This made South Africa the number-one asylum destination in the world, ahead of the United States, Sweden, France, and Germany. People across the African continent go to South Africa to escape violence and poverty because it is a beacon of stability and economic growth on the continent. They arrive by bus and by foot after journeys that last for weeks from countries such as Ethiopia, Uganda, Burundi, Rwanda, Sudan, Somalia and Tanzania (*How South Africa became the world's #1 asylum destination*, LGBT Asylum News, November 2011 http://madikazemi.blogspot.com/2010/09/how-south-africa-became-worlds-1-asylum.html). When they get close to the border, those without legal papers walk through the bush and swim across rivers to avoid being sent back. In a strongly-worded judgment, the Supreme Court of Appeal has affirmed the principles governing legal protection for asylum seekers in South Africa (SA) and censured a High Court acting judge for flouting the "fundamental rules of litigation" (par 52). Navsa JA went on to set out the approach that ought to have been followed. He said the laws governing asylum specifically required that a person who wanted to apply for asylum status should be allowed to apply, even if he had been arrested prior.

2 Facts and legal issues

This case was an appeal from the South Gauteng High Court (Cassim AJ sitting as court of first instance). It concerned the interpretation and application of the provisions of the Refugees Act 130 of 1998 (hereinafter "the RA"). The appeal was about the principle of legality. In about May 2010, the appellants, 19 Ethiopians, fled Ethiopia to escape political persecution and in fear of their lives, walked for a year through Kenya, Tanzania and Mozambique before arriving in South Africa (par [3] and [4]). The appellants claimed that they were all supporters of the opposition political party in Ethiopia, the Oromo Liberation Front and that they were pursued, threatened and in some cases severely beaten by the police and members of the Ethiopian Peoples' Democratic Front (par [4]). In terms of section 21(5) of the RA the appellants did not have to provide details of the nature of their claims for asylum. Section 21(5) of the RA provides as follows:

> "The confidentiality of asylum applications and the information contained therein must be ensured at all times."

When the appellants arrived in Johannesburg, South Africa, on 16 June 2011, they were taken in by a Somali national who resided in a house in Mayfair. Whilst at the residence of the Somalian the appellants were arrested as "illegal foreigners" as they were unable to provide legal documentation (par [5]).

After being detained at a Johannesburg police station for eight days, the appellants were transferred to Lindela, a holding facility and repatriation centre controlled by the Department of Home Affairs (par [6]). Approximately a month after their arrival at Lindela the appellants met with their attorneys, Lawyers for Human Rights, and a letter was then drafted to the Department of Home Affairs. In the letter, the appellants demanded that all deportations proceedings against them be halted and that they be released immediately and be afforded the opportunity to apply for asylum (par [6]).

The Minister and the DG justified the arrest of the appellants on the basis of the provisions of section 9(4) of the Immigration Act (hereinafter "the IA") read with section 1. Section 9(4) of the IA provides that (par [11]):

> "A foreigner who is not the holder of a permanent residence permit may only enter the Republic as contemplated in this section if (a) his or her passport is valid for not less than 30 days after the expiry of the intended stay; and (b) issued with a valid temporary residence permit, as set out in this Act."

On the merits of the appellants' claim for asylum the Minister and the DG denied that the appellants qualified as asylum seekers. They denied that the appellants had made applications for asylum and contended that a person may only be recognized as a refugee after a proper application in terms of the provisions of the RA (par [17]).

As there was no response to the above-mentioned letter and fearing their imminent deportation, the appellants approached the South Gauteng High Court for the following order:

(a) the reviewing and setting aside an order of the Magistrates' Court to extend warrants of detention; and

(b) interdicting the Minister of Home Affairs and the Director General of the Department of Home Affairs (the DG) from deporting them until their status under the RA was lawfully and finally determined.

The appellants also sought an order in terms of section 22 of the RA that they be afforded an opportunity to approach a refugee reception centre and that the Minister and the DG be directed to accept their applications for asylum and to issue them with temporary asylum-seeker permits (par [2]). The court refused this order on the basis that in the court's view the appellants had never really sought to apply for asylum. The court held that their alleged intention to apply for asylum was an afterthought, designed to defeat the decision to deport them. The court further stated that to grant the appellants asylum-seeker permits would be tantamount to irresponsible and reckless conduct by the court. As this would permit the appellants to roam the streets of South Africa freely and assuming if one or more of them were

then to commit a crime, the victim would then seek to hold the state liable for releasing a detainee without any connecting factor and who subsequently engaged in wrongful conduct. The court concluded that if, on the probabilities, the appellants were found to be party to a scheme to import them illegally into the country, they should not be afforded an opportunity to apply for asylum because such application could not be said to be *bona fide* (par [46–47]).

They were granted none of the demands for relief sought in the South Gauteng High Court.

3 Judgment

The SCA set aside the order of the High Court and replaced it with the following (par [2]):

(a) that the Minister of Home Affairs and the DG are interdicted from deporting the appellants until the appellants' status under the RA has been lawfully and finally determined;

(b) that the detention of the appellants was unlawful and that they be released;

(c) the court declared that in terms of Regulation 2 (2) of the Refugee Regulations, the appellants were entitled to remain lawfully in South Africa for a period of 14 days in order for the appellants to approach the Refugee Reception Office;

(d) the court directed that the Minister of Home Affairs and the DG accept the Appellants' asylum applications and to issue them with temporary asylum-seeker permits in accordance with section 22 of the Refugees Act, pending finalization of their claim, including the exhaustion of their rights of review or appeal in terms of Chapter 4 of the Refugees Act and the Promotion of Administrative Justice Act 3 of 2000; and

(e) the Minister of Home Affairs and the DG were ordered to pay the Appellants' costs in this application.

4 Analysis and discussion

In reaching this decision, the Supreme Court of Appeal (SCA) was critical of the manner in which the proceedings in the High Court were conducted. According to Navsa JA the High Court flagrantly flouted the fundamental rules of litigation. Navsa JA believed that the High Court had misconceived its function and misidentified the issues to be decided (par [52]). The judgment provided by the SCA provided guidelines and the approach to be followed when persons enter South Africa to seek refugee status. The judgment was also critical of the approach adopted in the High Court where there were clearly breaches of officialdom. The case as a whole was riddled with blatant disregard for the principle of legality which the SCA sought to rectify.

4 1 The rules of litigation

In the High Court oral evidence was undesirably taken from a witness who had not been sworn in. The High Court judge accepted the word of the advocate who was involved in the application above the word of the appellants, even though the advocate was not properly authorized (par [53]). This is clearly a breach of procedure and rules of evidence that exists for a reason (see Farlam, Fichardt and Van Loggerenberg *Erasmus Superior Court Practice* (loose-leaf 1994) B1–51). The SCA found that such conduct qualified as judicial conduct that is unacceptable, and held that the purpose of procedural rules and the rule of evidence are to ensure that there exists justice between the parties to a litigation. All witnesses, irrespective of their backgrounds or beliefs, should be treated fairly and with dignity (par [53]).

Judges in the course of their duties as adjudicators are expected to be impartial and not to make factual findings before all the relevant evidence has been adduced. Judges cannot make assumptions and base conclusions on suppositions, neither can they bring their preconceived views to bear on the issues at hand (par [56]). Only once the submissions of the legal representatives have been made and evidence heard, may the judge make an assessment and draw important conclusions (par [54]). In this regard, the court found that the continued intervention by the court *a quo* during proceedings was also unacceptable (par [54]).

The court found that statements made by the judge in the High Court lacked discretion. The statements concerning foreigners had the potential for creating and increasing tension between foreigners and nationals (par [55]).

4 2 Substantive issues

Navsa JA thought it important to set out the purposes of the RA and what it sought to achieve. The RA is designed to give effect within South Africa to the relevant international instruments, principles and standards relating to refugees as well as to make South Africa a place that is receptive to asylum seekers. The RA expressly regulates applications and recognition of refugee status and also recognizes the rights and obligations regarding a person being considered a refugee (par [58]).

Section 2 of the RA provides as follows:

> "Notwithstanding any provisions of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where – (a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or (b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country."

The RA also sets out the procedure that applicants have to follow in order to be considered in an application for asylum. Section 3 of the Act states that subject to Chapter 3, a person qualifies for refugee status, if that person:

> "(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of this or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere; or (c) is a dependant of a person contemplated in paragraph (a) or (b)."

In *Abdi v Minister of Home Affairs* (2011 (3) SA 37 (SCA) par [22]), the court held that the provisions of the RA, more specifically those provisions in sections 3 above, are similar to the provisions contained in the 1951 United Nations Convention on the Status of Refugees and the 1969 Organisation of African Unity Convention. In *Abdi v Minister of Home Affairs* (*supra*), the court went to hold that these provisions "patently prohibit the prevention of access to the Republic of any person who has been forced to flee the country of his or her birth because of any circumstances identified in section 2 of the Act".

In terms of section 8 of the RA the DG is empowered to establish as many refugee reception offices as necessary for the purposes of the RA. It is important to note that in the present case there are such offices at the Mozambique/South Africa border but not at Lindela.

Section 9 of the RA provides for a Standing Committee for Refugee Affairs (the SCRA), which has the power, *inter alia*, to formulate and implement procedures for the granting of asylum.

Section 21 of the RA is of importance in the present case. Section 21(1) provides:

> "An application for asylum must be made in person in accordance with the prescribed procedures to a Refugee Reception Officer at any Refugee Reception Office."

In terms of section 21(2) a Refugee Reception Officer (RRO) is obliged to accept an application for asylum and, if required, must assist an applicant to complete the necessary application forms. An RRO is required to submit any application received together with relevant information to a Refugee-Status Determination Officer (RSDO) to be dealt with in terms of section 24.

In terms of section 22(1) of the RA, a RRO "must, pending the outcome of an application in terms of section 21(1), issue to the applicant an asylum-seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit".

Section 22(6) enables the Department of Home Affairs to withdraw an asylum-seeker permit under certain conditions. Section 26 gives the power to an RSDO to determine whether the applicant for asylum is entitled thereto. Section 24(3) provides as follows:

> "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."

In terms of section 25(1) of the RA, the Standing Committee is obliged to review any decision taken by an RSDO in terms of section 24(3)(b). This provision was clearly intended to ensure that deserving applicants are not wrongfully turned away. This in turn ensures that South Africa meets its international obligations.

Section 27 sets out the protections and rights that are conferred by refugee status. Section 38 empowers the Minister to make regulations, *inter alia*, for any matter necessary or expedient in order that the objects of the Act may be achieved.

An important regulation in this regard is Regulation 2 of the regulations under the RA which provides:

"2(1) An application for asylum in terms of section 21 of the Act:
(a) must be lodged by the applicant in person at a designated Refugee Reception Office without delay;
(b) must be in the form and contain substantially the information prescribed in Annexure 1 to these Regulations; and
(c) must be completed in duplicate.
(2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to subregulation 2(1), but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."

In terms of the present case Regulation 2(2) is relevant as the appellants fell within its ambit. The appellants had not lodged an application within the terms set out in Regulation 2(1)(a). The regulation does not require an individual to indicate an intention to apply for asylum immediately nor should it be interpreted as meaning that when the person does not do so there and then he or she is precluded from doing so thereafter. The purpose according to the court of subsection 2 is to ensure that, where a foreign national indicates an intention to apply for asylum, the regulatory framework of the RA comes in to play. This is to ensure that those asylum seekers who are honest and genuine are not turned away. In the present case the appellants had communicated to the Department's officials when they were at Lindela in the letter mentioned earlier, that they intended to apply for asylum. Once the appellants, through their attorneys, indicated an intention to apply for asylum they became entitled to be treated in terms of Regulation 2(2) and to be issued with an appropriate permit valid for 14 days, within which they were obliged to approach a refugee-reception office to complete an asylum application (par [72]). The court pointed out that the contrary view expressed in *Shabangu v Minister of Home Affairs* ((49231/10) [2010] ZAGPJHC 146 (10 December 2010)) is incorrect. The order in that case had the effect of placing the persons released into an unregulated position, which could never have been the intention of the RA(par [72]).

The court stated that decisions relating to the *bona fides* of the application was not made upfront. When the application had been made at a refugee-reception office, in accordance with section 21 of the RA, the Refugee-Reception Officer must accept, ensure that it is properly completed and render any necessary assistance. The Officer must then ensure that the relevant information is referred to the RSDO (par [73]).

Section 22 of the RA ensures that an asylum seeker has protection of the law pending the application for asylum. Regulation 2(2) of the Refugee Regulations makes it even more clear that, once there is an indication by an individual that he or she intends to apply for asylum, that individual is entitled to be issued with an appropriate permit valid for 14 days within which there must be an approach to a refugee-reception office to complete an application for asylum. This being the case, the asylum seeker is entitled to free movement within the Republic. The decision to grant or reject an application for asylum is left to the RSDO (par [74]).

The Minister and the DG contended that the decision on the *bona fides* of an application for asylum must be made at the outset and can be interrogated by the court. In stating this, they relied on the *Abdi v Minister of Home Affairs* (*supra* par [22]), where the court stated the following:

> "Refugees entitled to be recognised as such may more often than not arrive at a port of entry without the necessary documentation and be placed in an inadmissible facility. Such persons have a right to apply for refugee status, and it is unlawful to refuse them entry *if they are bona fide in seeking refuge*."

Although Navsa JA agreed with the High Court that there was a certain amount of scepticism and disbelief as to how the appellants had made their way to Johannesburg, Navsa JA held that such could not be held against the appellants and a conclusion on this basis that their subsequent application for asylum was not *bona fide* was unfounded (par [75]). Navsa JA based this conclusion on the very next sentence in the *Abdi v Minister of Home Affairs* (*supra*) upon which the Minister and the DG relied:

> "The Department's officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file an application with the relevant refugee reception office – unless the intending applicant is excluded in terms of s 4 of the Act."

The concluding sentence in the *Abdi v Minister of Home Affairs* (*supra*) makes it clear that that the Department's officials were obliged to ensure that once there is an indication of an intention to apply for asylum they had to assist the person concerned to lodge such an application at a refugee-reception office.

The court stated that the principle of legality dictated that all officials act in accordance with the law. The court relied on the decision in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* (1999 (1) SA 374 (CC) par [58]), where the Constitutional Court explained legality in the following manner:

> "It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of

> legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality."

The manner in which the appellants were arrested, their difficulty in communicating with the authorities, the fact that they were in a foreign country without proper documentation, and the approach adopted by the learned judge in the High Court, coupled with the conduct of the counsel for the Minister and the DG are indications that the principle of legality was clearly breached in this case (par [79]).

A further indication that the principle of legality was overlooked in this case is evident in the High Court's view that there was "substantial compliance" with Regulation 28(4) under the Immigration Act (IA). There is no room for the "substantial compliance" as set out by the High Court (par [84]).The regulation dealt with the notification of intention to apply for extension of detention be served on the detainee. Section 28(4)(a) of the IA reads as follows:

> "(4) An immigration officer intending to apply for the extension of the detention period in terms of section 34(1)(d) of the Act shall – (a) within 20 days following the arrest of the detainee, serve on that detainee a notification of his or her intention on a form substantially corresponding to Form 31 contained in Annexure A; ..."

This section involves the liberty of an individual and thus must be strictly interpreted. In *Arse v Minister of Home Affairs* (2010 (7) BCLR 640 (SCA) par [10]) Malan JA, in dealing with the fundamental rights to liberty, said the following:

> "The importance of this right 'can never be overstated'. Section 12(1)(b) of the Constitution of the Republic of South Africa, 1996 guarantees the right to freedom, including the right not to be detained without trial. This right belongs to both citizens and foreigners. The safeguards and limitations contained in section 34(1) of the Immigration Act justify its limitation of the right to freedom and the right not to be detained without trial. Enactments interfering with elementary rights should be construed restrictively."

The court did acknowledge the difficulties that the Department experienced in keeping track of the numerous individuals that are in the similar position as the appellants. The RA is drafted in line with other international instruments and conventions in relation to refugees. Section 21(2) obliges applicants for asylum to provide fingerprints and photographs to enable them to be monitored. The permit in terms of section 22(1) of the RA enabling a sojourn in South Africa may be issued subject to conditions determined by the Standing Committee, which are not in conflict with the Constitution or international law. It does not appear that such conditions have in fact been determined. Section 38(1)(e) of the RA enables the Minister to make regulations relating to "the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration". The court pointed out that "the conditions of sojourn in the Republic of the asylum seeker, while his or her application is under consideration" is not for the court to prescribe but for the department to do

so (par [84]). The court relied here on the statement of the court in *Arse v Minister of Home Affairs* (*supra* par [23]), where the court said the following:

> "I am aware of the concerns of the respondents as expressed in the judgment of the court *a quo* that the state has a legitimate interest in trying to curb illegal immigration. However, these concerns could have been addressed by the imposition of conditions in terms of s 22 of the Refugees Act and their effective monitoring."

5 Conclusion

South Africa must continue to be committed to ensuring that legitimate asylum seekers have their hopes, humanity and dignity restored when they seek protection in the country. South African officials must ensure that they treat asylum seekers in a fair and consistent way across the country, and not to resort to the often easy route of imprisoning them. People fleeing wars and persecution to save their lives and freedom deserve respect and fair and humane treatment. These often traumatized individuals – many of whom may have suffered torture or other abuses in their home country, should not have to overcome unnecessary obstacles to tell their stories and seek refuge. It is clear from the judgment that asylum seekers should enjoy the right to free movement subject to any other factor that may cause officials to keep them in custody. It is also essential that asylum seekers are able to complete the relevant application forms and submit any relevant information in order to be provided with documents giving proof of their status. It is also important that all officials and departments concerned follow the relevant procedures when processing the applications of asylum seekers. Furthermore, this case reminds us that members of the judiciary must wait until all evidence is adduced before making assumptions on the plight and circumstances of asylum seekers. It is important that when deciding cases that involve foreigners judges must guard against comments that had the potential for "creating and heightening tensions between nationals and foreigners".

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