

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matters between:

ALI BHUIYAN	Applicant in Case No: 2585/2011
NUR ISLAM	Applicant in Case No: 2586/2011
IFTEHAR AHMED	Applicant in Case No: 2587/2011
MOSAROF MOSAROF	Applicant in Case No: 2588/2011
RIAD HOWLADER	Applicant in Case No: 2589/2011
YOUSUF IQBAL	Applicant in Case No: 2590/2011
SAIFUL ISLAM RANA	Applicant in Case No: 2591/2011
AKASH RAJNIBHAI	Applicant in Case No: 2592/2011
SAYED MOHAMMED FAZUL ALAM	Applicant in Case No: 2593/2011
IMAN HOSSAIN	Applicant in Case No: 2594/2011
RASEL GOLAM	Applicant in Case No: 2595/2011
KADIRE IBIRO ERSUMO	Applicant in Case No: 2599/2011

And

THE MINISTER OF HOME AFFAIRS 1st Respondent

DIRECTOR GENERAL: DEPARTMENT OF HOME AFFAIRS 2nd Respondent

Coram: **Chetty, J**

Heard: **1 September 2011**

Delivered: **15 September 2011**

Summary: **Practice and Procedure – Urgent applications – Time limits imposed for filing of opposing affidavits woefully inadequate –**

Abuse of process – **Immigration Act** – Illegal foreigners – Applies to all persons entering the Republic of South Africa in contravention of Act – Mere intention to apply for refugee status not triggering operation of **Refugees Act**.

JUDGMENT

Chetty, J

1. There has of late developed an unfortunate practice of launching applications on the grounds of extreme urgency affording the state attorney grossly insufficient time, not only to obtain instructions from various government departments, but moreover from drafting opposing affidavits within truncated time periods imposed by attorneys representing the applicants. The majority of the matters currently in vogue, concern applications by illegal foreigners in which the relief sought is either for his/her immediate release from custody pending a determination of such person's status, whether as refugee or asylum seeker and, to prohibit such persons deportation pending the finalization of the aforesaid proceedings.

2. The tendency has been to file the certificate of urgency, which the practice rules require be placed before a judge before the papers are read, either late on Wednesday or on a Thursday or Friday morning in the expectation that interim relief, whether an order for the applicant's immediate release or an order

preventing his/her deportation, will be obtained. Persuaded, no doubt, by the uncontested version of the applicants, the relief is granted, and the matter then postponed for later final adjudication, invariably the following week's opposed motion court day. Certificates of urgency in each of these matters were placed before the duty judge on Wednesday, 24 August 2011. It would appear that, given the orders which issued on Friday, 26 August 2011, that the judge was satisfied that the matters were sufficiently urgent so as to warrant an abridgment of the time limits. Given the limited period within which to file the answering papers, a task which proved to be well nigh impossible given the volume of the applications, the respondents were constrained to agree to a postponement. In each matter an order issued in terms of which the respondents were directed not to deport the individual applicants, the matters were postponed to the following weeks opposed motion court roll and orders were made relating to the filing of further affidavits and heads of argument.

3. When the first matter was called I directed counsel's attention to the fact that in none of the matters had there been compliance with the practice directions relating to the indexing and pagination of the papers. No proper explanation for this unsatisfactory state of affairs could be advanced and in the ordinary course I would have struck the matters from the roll. However such a course would only have burdened the opposed motion court roll for the following week and I decided that, given the similarity of the various matters, that they be heard as one.

[4] The applicants are predominantly from Bangladesh, save for the applicants in case no's 2592/2011 and 2599/2011 who are from India and Ethiopia respectively. The relief sought and the legal contentions advanced in each of the matters are identical and the parties were in agreement that the outcome of one matter would determine the fate of each of the others. The same counsel moreover appeared for all the applicants and so too those representing the respondent. The same argument was consequently advanced on behalf of the applicants collectively.

4. The orders sought in each instance are framed as follows: -

“2.1 That the Second Respondent is directed to assist the Applicant to properly complete an application for asylum, in the form as prescribed in Annexure 1 of the Refugee Regulations (Forms and Procedure) 2000, at the Refugee Reception Office nearest the Applicant’s current location and at a date and time deemed meet by the above Honourable Court;

2.2 That, upon the completion of paragraph 2.1 supra, the Respondents are compelled to comply fully with the provisions of section 21 of the Refugees Act 130 of 1998;

2.3 That any process of deportation currently pending in

respect of the Applicant be cancelled;

2.4 That the Applicant be released, immediately, from detention;”

5. It will be gleaned from the foregoing that the relief sought is predicated upon the supposition that each of the applicants are asylum seekers and their fate, as such, falls to be determined in accordance with the provisions of the **Refugees Act**¹. The respondents on the other hand contend that the applicants are illegal foreigners as defined in the **Immigration Act**² (the Act) and liable for deportation in accordance with the provisions thereof.

6. It is common cause that, save for Mr. *Kadire Ibiro Ersumo (Ersumo)*, who was arrested on 15 August 2011 in Willowmore, the remaining applicants were all arrested outside the Port Elizabeth refugee reception office (RRO). That fact alone, declared counsel for the applicants, evinced a clear intention on the part of each applicant to seek asylum. Consequently, so he submitted, they could not be regarded as illegal foreigners as defined in the Act nor was the Act applicable to them. The argument is fallacious.

7. The Act, *inter alia*, regulates the admission of all persons to, their residence in, and their departure from the Republic of South Africa. The purpose of the Act is to be found in its preamble. It is devoted to foreigners and regulates

¹ Act No, 130 of 1998

² Act No, 13 of 2002

their entry to and departure from the Republic of South Africa, their residence in this country and is aimed at setting in place a system of immigration control which is aimed at ensuring that:-

“(a) temporary and permanent residence permits are issued as expeditiously as possible and on the basis of simplified procedures and objective, predictable and reasonable requirements and criteria, and without consuming excessive administrative capacity;

(b) security considerations are fully satisfied and the State retains control over the immigration of foreigners to the Republic;

(c) interdepartmental coordination and public consultations enrich the functions of immigration control;

(d) economic growth is promoted through the employment of needed foreign labour, foreign investment is facilitated, the entry of exceptionally skilled or qualified people is enabled, skilled human resources are increased, academic exchanges within the Southern African Development Community is facilitated and tourism is promoted;

(e) the role of the Republic in the continent and the region is recognised;

(f) the entry and departure of all persons at ports of entry are efficiently facilitated, administered and managed;

(g) immigration laws are efficiently and effectively enforced, deploying to this end significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration;

(h) the South African economy may have access at all times to the full measure of needed contributions by foreigners;

(i) the contribution of foreigners in the South African labour market does not adversely impact on existing labour standards and the rights and expectations of South African workers;

(j) a policy connection is maintained between foreigners working in South Africa and the training of our citizens;

(k) push factors of illegal immigration may be addressed in cooperation with other Departments and the foreign states

concerned;

(l) immigration control is performed within the highest applicable standards of human rights protection;

(m) xenophobia is prevented and countered;

(n) a human rights based culture of enforcement is promoted;

(o) the international obligations of the Republic are complied with;
and

(p) civil society is educated on the rights of foreigners and refugees.”

8. Section 9 of the Act governs the admission to and departure of persons from the Republic of South Africa and provides as follows: -

“9 Admission and departure

(1) Subject to this Act, no person shall enter or depart from the Republic at a place other than a port of entry.

(2) Subject to this Act, a citizen shall be admitted, provided that he or she identifies himself or herself as such and the immigration officer records his or her entrance.

(3) No person shall enter or depart from the Republic-

(a) unless in possession of a valid passport;

(b) unless, if he or she is a person under the age of 16 years who does not hold a passport, he or she is accompanied by his or her parent who holds a passport in which his or her name was entered in terms of the South African Passports and Travel Documents Act, 1994 (Act 4 of 1994), or on behalf of any government or international organisation recognised by the Government of the Republic;

(c) except at a port of entry, unless-

(i) in possession of a certificate issued by the Director-General granting permission upon application to enter or depart from the Republic at a place other than a port of entry within a certain period not exceeding six months at a time, provided that for good cause the Director-General may withdraw such permission; or

- (ii) exempted as an individual or falling within a category of persons exempted by the Minister, on the recommendation of the Director-General, which exemption may be withdrawn by the Minister;
 - (d) unless the entry or departure is recorded by an immigration officer; and
 - (e) unless examined by an immigration officer as prescribed.
- (4) 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.” (emphasis supplied)

In terms of the definition section, an illegal foreigner is thus defined as “a foreigner who is in the Republic in contravention of this Act”.

9. The circumstances under which each of the applicants entered the Republic of South Africa emanate not from themselves but from third persons who allege that they are either related to or friends of the individual applicants. Mr. **Mohin Uddin (Uddin)** deposed to both the founding affidavit and answering affidavit in *Bhuiyan, Ahmed, Mosarof, Iqbal, and Rana*; Mr. **Rajesh Patel (Patel)** in *Rajnibhai*; **Rafiqul Islam (Islam)** in *Islam and Howlader*; Mr. **Alfaj Ahmed (Ahmed)** in *Alam and Golam* and Mr. **Hossain Saym (Saym)** in *Hossain*. Each of them moreover described themselves as Bangladesh citizens and asylum seekers. The reason advanced why they and not the applicants themselves deposed to the affidavits is that by virtue of the applicants’ incarceration in the Lindela repatriation facility in Gauteng, they were unable to themselves depose to the affidavits.

Whence and how the Applicants came into the Republic of South Africa

10. The circumstances in which each of the applicants came into the Republic of South Africa appear from the founding affidavits, and, shorn of excess verbiage, can be summarized as follows –

10.1 *Bhuiyan* allegedly left Bangladesh on 15 June 2011 and entered the Republic of South Africa on 28 June 2011 via Mozambique. How he got there and thence to Port Elizabeth is not adverted to, save that he arrived in Port Elizabeth and met up with ***Uddin***. On 19 August 2011 he was standing in the queue outside the RRO when he was arrested and detained.

10.2 *Islam* and *Howlader* allegedly landed together at Cape Town International airport by air on 18 June 2011, arrived in Port Elizabeth on 19 June 2011, and were arrested whilst queuing at the RRO in Port Elizabeth on 19 August 2011. How the two of them arrived in Port Elizabeth is not disclosed.

10.3 *Ahmed* allegedly fled Bangladesh on 15 July 2011, entered the Republic via Mozambique on 19 July 2011 and was arrested in a queue at the RRO on 17 August 2011.

10.4 *Mosarof* fled Bangladesh on 20 July 2011, entered the Republic and was

also arrested in a queue outside the RRO on 17 August 2011.

10.5 *Iqbal* fled Bangladesh on 18 June 2011, arrived in the Republic on 1 July 2011 and was arrested whilst standing in a queue outside the RRO on 19 August 2011.

10.6 *Rana* fled Bangladesh on 3 August 2011, arrived in the Republic via Mozambique on 10 August 2011 and was arrested standing in a queue outside the RRO on 19 August 2011.

10.7 *Rajnibhai* fled India, landed on some unspecified date at O.R. Tambo International, arrived in Port Elizabeth on 26 June 2011 and was arrested in a queue outside the RRO on 17 August 2011.

10.8 *Alam* entered the Republic via Mozambique on some unspecified date during July 2011, came to Port Elizabeth four days later and was arrested in a queue outside the RRO on 17 August 2011.

10.9 *Hossain* entered Mozambique on 30 July 2011, exited therefrom through a forested area into the Republic of South Africa on 3 August 2011, and was arrested in a queue outside the RRO on 17 August 2011.

10.10 *Golam* too entered the Republic on some unspecified date during July

2011 through a forested area from Mozambique and was arrested in a queue outside the RRO on 17 August 2011.

11. Each of the applicants lay claim to asylum on an identical basis, formulated as: -

“ . . . due to severe political persecution which he was subjected to by the members of the opposing parties. The situation became intolerable for the Applicant in Bangladesh and he decided to flee from the said country and seek asylum elsewhere.”

The Indian national, *Rajnibhai*, similarly lays claim to asylum but on the grounds of religious persecution by virtue of his Islamic faith in a predominantly Hindu society.

12. The foregoing synopsis of the applicants' flight from and travails en route to their ultimate destination, viz, Port Elizabeth are sourced entirely from the founding affidavits deposed to by ***Uddin, Islam, Patel, Ahmed*** and ***Saym***. They contend that their hearsay accounts of the applicants' circumstances are a true reflection of what had been relayed to them by the applicants themselves at the Mount Road police station following upon their incarceration.

13. The foregoing constituted the factual matrix upon which relief was sought as a matter of extreme urgency. The applicants were portrayed as genuine

asylum seekers and the actions of the respondents' officials lambasted. Their conduct, the deponents claimed, was so deplorable that a punitive costs order was imperatively called for.

14. The respondents were, as adumbrated hereinbefore, required to file their opposing affidavits by no later than 12 noon on Thursday, 25 August 2011 i.e. in 24 hours time. When the matter was called on 26 August 2011, they were afforded further time to comply, viz, until 2 p.m. on Thursday, 30 August 2011. In terms of a time table agreed upon, the replying papers were to be filed by 1 p.m. on Wednesday and heads of argument by 15h30 the same day.

15. The opposing papers, and in particular, the applicants' passports, tell an entirely different story. It demonstrates that the versions deposed to by the deponents in the founding affidavits as allegedly conveyed to them by the applicants to be a total and utter fabrication.

15.1 **Bhuiyan** was issued with a Bangladesh passport at the Bangladesh High Commission in Pretoria on 19 July 2011. His South African address is reflected as 5977 Enkuluek, Weni, Queenstown, Republic of South Africa. Following his alleged flight from Bangladesh owing to “**political persecution**” he nonetheless, on arrival surreptitiously in South Africa repaired to the Bangladesh High Commission to apply for a Bangladesh passport.

15.2 **Islam's** passport bears the date 6 June 2011 and the stamp of the Bangladesh High Commission, Pretoria. On a page titled “**observations**”, his South African address is reflected as 26 Park Road, Mansions, Germiston, Republic of South Africa. The visa section of the passport is endorsed with the remark that his passport had gone missing. During argument, I invited Mr. *Moorhouse's* response to the fact that *Islam's* passport contained no South African passport control entry stamp. His immediate answer was that it was not inconceivable that those entrusted with the stamping of passports at Cape Town International airport may have omitted to do so. Scrutiny of the passport itself proves, not only that Mr. *Moorhouse's* submission is nonsensical, but that it is moreover contrived. He must have realized when reading the opposing papers that the passport had been issued in Pretoria 12 days prior to *Islam* arriving in the country. Counsel's conduct in making the aforesaid submission is, to say the least, astounding and reprehensible.

15.3 **Ahmed** had a valid Bangladesh passport issued to him in Sylhet, Bangladesh which had been renewed until 2014.

15.4 **Mosarof's** Bangladesh passport bears a stamp of the Mozambican Immigration control which records his arrival in that country on 9 July 2011. No exit stamp nor South African immigration entry stamp is to be found therein.

15.5 **Howlader's** passport was issued to him in Pretoria at the Bangladesh

High Commission on 29 July 2011 and reflects a South African address, *to wit*, 2 Bulrush Street, Arcadia, Port Elizabeth, Republic of South Africa. The founding affidavit in his application reflects that after landing in South Africa on 18 June 2011 at Cape Town International Airport, he arrived in Port Elizabeth on 19 June 2011 and remained here until his arrest. His passport proves the falsity of the allegations proffered on his behalf that he arrived in South Africa from Bangladesh on 18 June 2011 with *Islam*. Like the latter, his passport bears no South African passport control entry stamp.

15.6 ***Iqbal*** holds a Bangladesh passport valid until 22 June 2013. The visa section contains a number of stamps, the last, a stamp by the Tanzanian authorities on 29 March 2011.

15.7 **Rana's** passport shows that he left Dhaka in Bangladesh on 28 May 2011. The visa section contains a stamp of the Mozambican authorities that he entered that country on 2 June 2011.

15.8 ***Alam's*** Bangladesh passport was issued in Bangladesh on 19 August 2008. The visa section bears a Mozambican stamp and is dated 10 July 2011.

15.9 ***Hossain's*** Bangladesh passport was issued on 27 April 2009 and reflects that he left Dhaka on 19 July 2011. The visa section indicates that he was issued with a visa to visit Mozambique.

15.10 **Golam** was issued with a Bangladesh passport in Pretoria at the Bangladesh High Commission on 20 July 2011. It contains an endorsement to the effect that his existing passport had gone missing. It moreover contains an address, being his South African address, as, Bloemfontein, Republic of South Africa.

15.11 **Rajnibhai's** passport conclusively establishes the falsity of the averments made in the founding affidavit. His Indian passport was issued on 10 November 2010. It shows that he left Mumbai, India on 22 July 2011. The allegations made in the founding affidavit that he arrived in Port Elizabeth on 26 June 2011 is clearly false and so too the further allegations that he was taken to the Refugee Reception Office in Port Elizabeth on 6 July 2011. His passport further indicates that his passport was stamped at O.R. Tambo as “**transit**” in conformity with a transit visa issued to him in terms of which he was permitted 72 hours sojourn in South Africa en route to and from Mozambique.

16. What emerges from the foregoing analysis of the applicants travel documents and the plethora of lies made in support of their claim to be refugees is that the applicants are clearly not refugees. They journeyed to South Africa for no other purpose save their economic salvation. They are, to borrow the phraseology of Mr. *Bofilatos*, economic migrants, and nothing else. Refugees or asylum seekers they certainly are not.

17. Yet, in order to circumvent the provisions of the Act, attorneys acting on their behalf on a weekly basis, regularly launch several applications, all on an urgent basis, in which the relief sought is the “refugee’s” or “asylum seeker’s” immediate release, that he be assisted in applying for refugee status, and costs of suit on a punitive scale. There are, no doubt, cases where persons genuinely seek asylum and the courts will, where appropriate, come to their assistance. None of these matters nor the overwhelming majority of the others which routinely clog the court rolls fall into that category. These cases epitomize the abuse which has hitherto endured.

18. Although the foregoing remarks are of equal application to the *Ersumo* matter, I deal separately with his, merely for the sake of convenience. He deposed to his own affidavit. He too, in common with the other applicants, claims to have fled his country of origin, Ethiopia, as a result of political persecution and seeks asylum in South Africa. To that end he alleges that he journeyed from there to Kenya and thence to Zimbabwe and entered South Africa at the Musina border post at the end of May 2011. He alleges that he was issued with an asylum transit visa and made his way to Pretoria. There his attempts to apply for asylum at the local Refugee Reception Office proved unsuccessful and he then proceeded to the North West Province. En route thereto, his belongings, including his asylum transit visa, was stolen which he duly reported to the Wolmaranstad police station. The respondent confirms that the applicant

reported to the Wolmaranstad police station on 10 June 2011 and made a written statement to them. It appears that the applicant was then furnished with a copy of the statement.

19. The applicant alleges that he then journeyed to his cousin in Willowmore and thence to Cape Town where his application for asylum was frustrated by the respondents' officials. He then decided to return to Willowmore with the intention of then going to Port Elizabeth to apply for asylum, but he was then arrested on the ground that he was an illegal foreigner. In his case too, the argument was advanced that by virtue of his intention to apply for asylum, the *Act* was not of application and that he fell to be dealt with in accordance with the provisions of the *Refugees Act*. As adumbrated hereinbefore the argument advanced is untenable.

20. The Act is of general application to all persons who enter the Republic of South Africa. Entrance, in contravention of the provisions of the Act is unlawful and anyone doing so is an illegal immigrant, *caedit quaestio*. If such person thereafter wishes to apply for asylum then he/she is of course entitled to seek such recognition in terms of the provisions of the **Refugees Act**. Pending the finalization of that process, he/she remains an illegal foreigner and liable to be dealt with in terms of the provisions of the Act.

21. It follows that none of the applicants are entitled to the relief they seek and

that the applications fall to be dismissed.

Costs

22. Counsel for the applicants submitted that in the event of their applications being dismissed, they not be mulcted with costs in as much as the applications involve constitutional litigation. This submission, in conformity with the others, is plainly nonsensical. The averments made and the legal submissions which flowed therefrom are contrived and this is a proper case where an adverse costs order against each of the applicants is justified.

23. In the result the following orders will issue: -

In each of the matters, case no's, 2585/2011, 2586/2011, 2587/2011, 2588/2011, 2589/2011, 2590/2011, 2591/2011, 2592/2011, 2593/2011, 2594/2011, 2595/2011 and 2599/2011, the applications are dismissed with costs on a scale as between attorney and client.

D. CHETTY

JUDGE OF THE HIGH COURT

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