MINISTER OF HOME AFFAIRS AND OTHERS v WATCHENUKA AND ANOTHER 2004 (4) SA 326 (SCA)

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Citation 2004 (4) SA 326 (SCA)

Case No 10/2003

Court Supreme Court of Appeal

Judge Howie P, Navsa JA, Mthiyane JA, Nugent JA and Heher JA

Heard November 10, 2003

Judgment November 28, 2003

Counsel D J Jacobs for the appellants.

Anton Katz for the respondents.

Annotations Link to Case Annotations

B

[zFNz]Flynote : Sleutelwoorde

Constitutional law - Constitutional principle of legality - Central to conception of constitutional order that Legislature and Executive in every sphere are constrained by principle that they may exercise no power and perform no function C beyond that conferred upon them by law - At least in that sense principle of legality implied within terms of Constitution of the Republic of South Africa Act 108 of 1996 - Common-law principles of ultra vires remain under new constitutional order; however, underpinned (and supplemented where necessary) by constitutional principle of legality - In relation to legislation and executive acts that do not constitute administrative D action, principle of legality necessarily implicit in Constitution - In absence of power to prohibit applicant for asylum from taking up employment or studying, Minister acting in conflict with Constitution in purporting to do so and prohibition in reg 7(1)(a) of Refugee Regulations (Forms and Procedure) 2000 promulgated in terms of Refugees Act 130 of 1998, read together E with form in annexure 3 to regulations, falls to be set aside.

Constitutional law - Human rights - Protection of - Limitation of rights - Onus on party invoking limitation to show that limitation reasonable and justifiable - Constitution of the Republic of South Africa Act 108 of 1996, s 36(1). F

Constitutional law - Human rights - Right to human dignity - Freedom to engage in productive work important component of human dignity - Constitution of the Republic of South Africa Act 108 of 1996, s 10 - Such right not absolute, however - Right to enter and remain in Republic and to choose trade, occupation or profession restricted to citizens in terms of ss 21 and 22 of Constitution - Such G restriction in accordance with recognised international human rights instruments - But where employment only reasonable means for person's support, other considerations arise - What is then in issue is not merely restriction on person's capacity for self-fulfilment, but restriction upon his/her ability to live without H positive humiliation and degradation - South Africa offering no State support to applicants for asylum, thus destitute person exercising right to apply for asylum having no alternative but to turn to crime, begging or foraging - Prohibition of employment of persons with no reasonable means of support other than employment is material invasion of human dignity that is not I justifiable in terms of s 36 - General prohibition by Standing Committee for Refugee Affairs established in terms of Refugees Act 130 of 1998 of employment and study for first 180 days after asylum seeker permit issued, in conflict with Bill of Rights, and to be set aside - Prohibition of work and study in reg 7(1)(a) of Refugee Regulations J

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(Forms and Procedure) 2000 promulgated in terms of Refugees Act, read together with form in A annexure 3 to regulations, also in conflict with Bill of Rights.

Constitutional law - Human rights - Right to education, s 29(1) of Constitution of the Republic of South Africa Act 108 of 1998 - Freedom to study inherent in human dignity enshrined in s 10 of Constitution - Right to education not absolute, and capable of being limited in appropriate B circumstances, for State cannot be obliged to permit any person to enter country and then to remain in order that he/she may exercise such right - But, where person concerned is child who is lawfully in country to seek asylum, no justification for limiting right so as to deprive him/her of opportunity for human fulfilment at critical period - General prohibition by Standing C Committee for Refugee Affairs established in terms of Refugees Act 130 of 1998 and in reg 7(1)(a) of Refugee Regulations (Forms and Procedure) 2000 promulgated in terms of Refugees Act, read together with form in annexure 3 to regulations, not allowing for study to be permitted in appropriate circumstances, unlawful and unconstitutional.

Constitutional law - Legislation - Validity of - General prohibition of work and study in reg D 7(1)(a) of Refugee Regulations (Forms and Procedure) 2000 promulgated in terms of Refugees Act 130 of 1998, read together with form in annexure 3 to regulations, in conflict with Bill of Rights.

Immigration - Refugee - Asylum seeker - Rights and obligations of - Asylum seeker permit issued in terms of s 22(1) of Refugees Act 130 of 1998, E subject to

conditions determined by Standing Committee for Refugee Affairs established in terms of Act - In terms of s 11(h) of Act, Standing Committee to determine conditions relating to study or work in Republic under which permit may be issued - In terms of s 38(1) of Act, Minister of Home Affairs to make regulations relating to, inter alia, conditions of asylum seeker's sojourn in F Republic - In terms of s 7(1)(a) of Refugee Regulations (Forms and Procedure) 2000, permit issued to be in form prescribed in annexure 3 to regulations - Form prescribed by annexure 3 containing, inter alia, prohibition on employment and study - Effect of s 7(1)(a), read together with prescribed form, is that every asylum seeker prohibited by conditions in his/her permit from undertaking employment or studying - Provided that Standing Committee's G determination in terms of s 11(h) properly taken, Act prescribing no formalities for such decision to be put into effect - Standing Committee exercising power to determine conditions relating to work and study merely by making decision - Any such determination given effect to by being included as condition in permit issued in terms of H s 22(1) - Having vested power to determine such conditions in Standing Committee, Legislature could not have intended same powers to be exercised by Minister - Necessarily implied in s 38(1)(e) that conditions of sojourn that Minister empowered to regulate not including conditions relating to work or study - In absence of power to prohibit applicant for asylum from taking up employment or from studying, Minister acting I in conflict with Constitution of the Republic of South Africa Act 108 of 1996 in purporting to do so, and prohibition in annexure 3 of regulations to be aside.

Immigration - Refugee - Asylum seeker - Rights and obligations of - Asylum seeker permit issued in terms of s 22(1) of Refugees Act 130 of 1998, J

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subject to conditions determined by Standing Committee for Refugee A Affairs established in terms of Act - In terms of s 38(1) of Act, Minister of Home Affairs to make regulations relating to, inter alia, conditions of sojourn in Republic of asylum seeker - In terms of s 7(1)(a) of Refugee Regulations (Forms and Procedure) 2000, permit issued in terms of s 22(1) of Act to be in form prescribed in annexure 3 to regulations - Form prescribed by annexure 3 B containing, inter alia, prohibition on employment and study - Effect of s 7(1)(a), read together with prescribed form, is that every asylum seeker prohibited by conditions in his/her permit from undertaking employment or studying - Such prohibition in conflict with Constitution of the Republic of South Africa Act 108 of 1996 and to be set aside. C

Immigration - Refugee - Asylum seeker - Rights and obligations of - Asylum seeker permit issued in terms of s 22(1) of Refugees Act 130 of 1998, subject to conditions determined by Standing Committee for Refugee Affairs established in terms of Act - In terms of s 11(h) of Act, Standing Committee to determine conditions relating to work and study in Republic under which permit may be D issued - Determination by Standing Committee that all permits issued to contain condition prohibiting

employment and study, but that if application for asylum not finalised within 180 days, applicant can apply to it to lift restriction - Standing Committee's general prohibition on employment and study for first 180 days in conflict with Constitution of the Republic of South Africa Act 108 of 1996 and to be set aside - In exercising powers and E duties conferred upon it by s 11(h) of Act, Standing Committee to take account of circumstances of applicant, whether on case-by-case basis or by formulating guidelines to be applied by Refugee Reception Officers when issuing permits in particular cases.

Immigration - Refugee - Asylum F seeker - Rights and obligations of - Asylum seeker permit issued in terms of s 22(1) of Refugees Act 130 of 1998, subject to conditions determined by Standing Committee for Refugee Affairs established in terms of Act - Necessarily implied in s 22 that permit granting applicant right to work or to study conferring those rights upon permit holder, and where applicable, his/her dependants, notwithstanding provisions of Aliens Control Act 96 of 1991 or Immigration Act 13 of 2002. G

[zHNz]Headnote : Kopnota

The rights and obligations of asylum seekers - people who claim to be taking refuge in this country from persecution or conflict elsewhere - are governed by the Refugees Act 130 of 1998 (the Act). A person who wishes to be given asylum must apply to H be recognised as a refugee. If that recognition is granted the refugee, and his or her dependants, enjoys various rights specified in the Act. An application for asylum must be made to a Refugee Reception Officer, who refers the application to a Refugee Determination Officer. I In terms of s 22(1) of the Act, once an applicant has applied for asylum, the Refugee Reception Officer must issue to the applicant an asylum seeker permit allowing him or her to sojourn in the Republic temporarily, subject to any conditions determined by the Standing Committee for Refugee Affairs (established in terms of the Act), which are not in conflict with the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) or international law. In terms of s 11(h) of the Act, the Standing Committee must determine the conditions relating to study or J

work in the Republic under which an asylum seeker permit may be issued. Section 38(1) of the A Act authorises the Minister of Home Affairs to make regulations relating to certain matters including '(c) the form to be used under certain circumstances and the permit to be issued pending the outcome of an application for asylum' and '(e) the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration'. The Refugee Regulations (Forms and Procedure) 2000 were promulgated on 6 April 2000 under B Government Notice R 366 in Government Gazette 21075 of 6 April 2000. Regulation 7(1)(a) provides that a permit issued in terms of s 22 of the Act 'must be in the form and contain substantially

the information prescribed in annexure 3 to these Regulations'. The form prescribed by annexure 3 contains various conditions that the permit-holder is required to adhere to and includes a condition in the following terms: 'EMPLOYMENT AND STUDY C PROHIBITED.' The effect of reg 7(1)(a), when read together with the prescribed form, is that every asylum seeker is prohibited by the conditions in his or her permit from undertaking employment or studying.

Section 11(h) of the Act confers on the Standing Committee the power and duty to determine the conditions under which a permit may be issued insofar as those conditions relate to work and study. D Provided that its decision in that regard - in other words its determination - is properly taken, the Act prescribes no formalities in order for that decision to be put into effect. There is nothing in the Act to justify a conclusion that once the Standing Committee has determined such conditions they have no effect unless translated into law by regulation. The Standing Committee exercises its E power to determine conditions relating to work and study, either generally or in particular cases, merely by making a decision to that effect. Any such determination is given effect to by being included as a condition in the permit that is issued in terms of s 22(1), which expressly requires such permits to be issued subject to, and endorsed with, any conditions that have been determined by the Standing Committee. No doubt the Standing Committee might publish, and make F known to the public, the decisions that it makes in relation to such conditions, but that does not mean that it must do so by causing regulations to be promulgated. Having vested the power to determine such conditions in the Standing Committee, the Legislature could not have intended the same powers to be exercised by the Minister. It is necessarily implied in s 38(1)(e) of the Act that the G 'conditions of sojourn' that he is empowered to regulate do not include conditions relating to work or study. (Paragraphs [17] and [18] at 337C - H/I.)

It is 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 that sense the H principle of legality is implied within the terms of the Constitution. The common-law principles of ultra vires remain under the new constitutional order; however, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. In relation to legislation and to executive acts that do not constitute 'administrative action' the principle of legality is necessarily implicit in the Constitution. In the absence of the power I to prohibit an applicant for asylum from taking up employment, or from studying, the Minister acts in conflict with the Constitution in purporting to do so, and the prohibition in annexure 3 of the regulations falls to be set aside on that ground. (Paragraphs [19] and [20] at 337I - 338C/D.)

At a meeting held on 18 September 2000 the Standing Committee resolved that J

all permits issued in terms of s 22 of the Act must contain a condition prohibiting employment and study, but that if an A application for asylum were not finalised within 180 days the applicant could apply to the Standing Committee to lift the restriction. The Standing Committee's general prohibition of employment and study for the first 180 days after a permit has been issued is in conflict with the Bill of Rights. The general prohibition in the regulations is unlawful for the same reasons, which constitutes a further ground for B setting it aside. (Paragraph [24] at 339A/B - B.)

Human dignity has no nationality. It is inherent in all people - citizens and non-citizens alike - simply because they are human. While that person happens to be in this country, for whatever reason, it must be respected, and is protected, by s 10 of the Bill of Rights. The inherent dignity of all people is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the C recognition that is given to other more specific protections that are afforded by the Bill of Rights. The freedom to engage in productive work - even where that is not required in order to survive - is an important component of human dignity, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth - the fulfilment of what it is to be D human - is most often bound up with being accepted as socially useful. But the protection even of human dignity - that most fundamental of human values - is not absolute, and s 36 of the Bill of Rights recognises that it may be limited in appropriate circumstances. If the protection of human dignity were to be given its full effect in the context of permitting any person at all times to undertake employment, it would imply that any person might freely enter and remain in this E country so as to exercise that right. However, it is an accepted maxim of international law that every sovereign nation has the inherent power to forbid the entrance of foreigners, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. It is for that reason that the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by ss 21 and 22 of the Bill of Rights. The F restriction to citizens of the right to choice of occupation is in accordance with recognised international human rights instruments. There are reasonable and justifiable grounds for limiting the protection that s 10 of the Bill of Rights accords to dignity so as to exclude from its scope a right on the part of every applicant for asylum to undertake employment. (Paragraphs [25] - [31] at 339B/C - D and 339F - 340G.) G

But where employment is the only reasonable means for the person's support, other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. South Africa offers no State support to applicants for asylum. Thus a person who exercises his or her right to H apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging. The deprivation of the freedom to work assumes a different

dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment. There is no justification for limiting beyond that degree the protection that is afforded by s 10. It is for the party relying on the limitation to satisfy a Court that I the limitation is justified, and not for the party challenging it to show that it is not justified. A prohibition against employment in the case of persons who have no reasonable means of support other than through employment is a material invasion of human dignity that is not justifiable in terms of s 36. That must necessarily mean that in exercising the powers and duties conferred upon it by s 11(h) the J

Standing Committee must take account of the circumstances of the applicant, whether on a case by case basis, or by A formulating guidelines to be applied by Refugee Reception Officers when issuing permits in particular cases. Provided that a Refugee Reception Officer acts within closely and clearly defined guidelines, and the Standing Committee retains its powers of oversight, the delegation to him or her of the power to assess what conditions should be imposed in particular cases would not be unlawful. (Paragraphs [32], [33] and B [34] at 340G - 341I.)

Although an applicant for asylum may be permitted to be in the country by the Refugees Act, his or her presence might often be in contravention of the Aliens Control Act 96 of 1991, or the Immigration Act 13 of 2002 which repealed it, with the result that the prohibitions in s 22 of the former Act and in s 38 of the latter Act would ordinarily be applicable. That construction would effectively negate C the express power conferred upon the Standing Committee by the Refugees Act to permit applicants for asylum to enter into employment or to study, and that could not have been intended. It must necessarily be implied in s 22 of the Refugees Act that a permit granting an applicant the right to work or to study confers those rights upon the permit holder, and where applicable his or her dependants, notwithstanding the provisions of the Aliens Control Act or the D Immigration Act. (Paragraph [35] at 342B/C - E.)

The Standing Committee's general prohibition against study is also unlawful. The freedom to study is also inherent in human dignity, for without it a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, E including adult basic education, and to further education. That right, too, cannot be absolute, and is capable of being limited in appropriate circumstances, for the State cannot be obliged to permit any person to enter the country, and then to remain, in order that he or she might exercise that right. But where, for example, the person concerned is a child who is lawfully in the country to seek asylum (there might be F other circumstances as well), there is no justification for limiting that right so as to deprive him or her of the opportunity for human fulfilment at a critical period. A general prohibition that does not allow for study to be permitted in appropriate circumstances is unlawful. (Paragraph [36] at 342E - I.) G

The decision in the Cape Provincial Division in Watchenuka and Another v Minister of Home Affairs reported at 2003 (1) SA 619 (C) (2003 (1) BCLR 62) confirmed partly for different reasons.

[zCAz]Cases Considered

Annotations

Reported cases

Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd 1965 (4) SA 628 (A): dictum at 639 applied H

Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC) (1997 (1) BCLR 1): dicta in paras [20], [21] applied

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458): dictum in paras [58] and I [59] applied

Johannesburg City Council v Administrator, Transvaal, and Another 1969 (2) SA 72 (T): referred to

National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) (1998 (2) SACR 556; 1998 (12) BCLR 1517): applied J

Nishimura Ekiu v The United States 142 US 651 (1892): dictum at 659 applied A

R (on the application of Q and Others) v Secretary of State for the Home Department [2003] 2 All ER 905 (CA): referred to

S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665): dicta in paras [102], [144] and [328] applied

Traube and Others v Administrator, Transvaal, and Others 1989 (1) SA 397 (W): referred to B

Watchenuka and Another v Minister of Home Affairs 2003 (1) SA 619 (C) (2003 (1) BCLR 62): confirmed partly on appeal, for different reasons.

[zSTz]Statutes Considered

Statutes

The Constitution of the Republic of South Africa Act 108 of 1996, ss 10, 21, 22, 29, 36(1): see Juta's Statutes of South Africa 2002 vol 5 at 1-146 - 1-148 C

The Refugees Act 130 of 1998, ss 11(h), 21, 22(1), 38(1)(c), (e): see Juta's Statutes of South Africa 2002 vol 5 at 2-45, 2-46, 2-48

The Refugee Regulations (Forms and Procedure) 2000, reg 7(1)(a), annexure 3: See Government Notice R366 of 6 April 2000 in Government Gazette 21075 of 2000 D

The Aliens Control Act 96 of 1991, s 22: see Juta's Statutes of South Africa 2001 vol 5 at 2-14

The Immigration Act 13 of 2002, s 38: see Juta's Statutes of South Africa 2002 vol 5 at 2-64 - 2-65.

[zCIz]Case Information

Appeal from a decision in the Cape Provincial Division (H J Erasmus J). The facts appear from the judgment of Nugent JA. E

D J Jacobs for the appellants.

Anton Katz for the respondents.

In addition to the authorities cited in the judgment of the Court, counsel for the parties referred to the following: F

Amazulu Football Club and Helenic Football Club (2002) 23 ILJ 2357 (ARB) at 2367E - F (para [26.7.1])

Baramoto and Others v Minister of Home Affairs and Others 1998 (5) BCLR 562 (W)

Booysen and Others v Minister of Home Affairs and Another 2001 (4) SA 485 (CC) G

Case and Another v Minister of Safety and Security; Curtis v Minister of Safety and Security 1996 (3) SA 617 (CC) para [57] at 643H

Catholic Bishops Publishing Co v State President and Another 1990 (1) SA 849 (A) at 861E H

Coetzer v Comitis and Others 2001 (1) SA 1254 (C) at 1262D - 1263G

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (1) SA 997 (C) at 1027B - I

Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) I para [47] at 966F - 967A, para [34] at 961A - C, para [53] at 969A - C, para [59] at 971F - G, para [11] at 952F

Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) SA 984 (CC) paras [168], [229] - [230] J

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Hoffmann v South African Airways 2001 (1) SA 1 (CC) at 16E (para [27] and para [38] at 20B) A

Holomisa v Argus Newspapers Ltd 1996 (2) SA 588 (W)

Holomisa v Khumalo 2002 (3) SA 38 (T) at 49D

Kabuika v Minister of Home Affairs 1997 (4) SA 341 (C)

Larbi-Odam v MEC for Education (Northwest Province) 1998 (1) SA 745 (CC) in para [23] at 758E - G B

Makinana and Others and Keelty and Another v Minister of Home Affairs and Another 2001 (6) BCLR 581 (C) at 605G - 607E

Masamba v Chairperson, Western Cape Regional Committee, Immigrants Selection Board and Others 2001 (12) BCLR 1239 (C) at 1252A

Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party C and Others 1998 (4) SA 1157 (CC) para [64] at 1181D - E

Minister of Health and Others v Treatment Action Campaign and Others (No 2) 2002 (5) SA 721 (CC)

Minister of Home Affairs v Liebenberg 2002 (1) SA 33 (CC) D

Minister of the Interior v Machadodorp Investments (Pty) Ltd and Another 1957 (2) SA 395 (A) at 405G - H

Mustapha and Another v Receiver of Revenue, Lichtenburg and Others 1958 (3) SA 343 (A) at 347F - G

NST Ferrochrome (Pty) Ltd v Commissioner for Inland Revenue 2000 (3) SA 1040 (SCA) para [12] at 1046I E

Nasionale Vervoerkommissie v Salz Gossow Transport 1983 (4) SA 344 (A) at 357B - C

National Coalition for Gay and Lesbian Equality v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) paras [28] - [29] at 22E - 23F

Neethling v Klopper 1967 (4) SA 459 (A) at 464G - H F

New National Party of South Africa v Government of the Republic of South Africa and Others 1999 (3) SA 191 (CC) para [162] at 253E - F

Patel v Minister of Home Affairs and Another 2000 (2) SA 343 (D) at 349I - 350B

Permanent Secretary, Department of Welfare, Eastern Cape, and Another v Ngxuza and Others 2001 (4) SA 1184 (SCA) G

Pharmaceutical Manufacturers Association of SA and Others: In re Ex parte President of the Republic of South Africa and Others 2000 (2) SA 674 (CC) para [20] at 687H - 688A

Principal Immigration Officer v Bhula 1931 AD 323 at 337

R (on the application of S and Others) v Secretary of State for Home Department [2003] EWHC 1941 (Admin), H [2003] All ER (O) AG 14 (Avg)

Re Wilson & Medical Services Commission of British Columbia (1988) 53 DLR (4th) 171 (BCCA)

Rennie NO v Gordon and Another NNO 1988 (1) SA 1 (A) at 22E - G

Ruyobeza and Another v Minister of Home Affairs and Others [2003] 2 B All SA 697 (C) I

S v Jordan and Others 2002 (6) SA 642 (CC) para [21]

S v Manamela and Another 2000 (3) SA 1 (CC) paras [32] - [34] at 19E - 21A

S v Weinberg 1979 (3) SA 89 (A) at 98D - E J

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Scagell and Others v Attorney-General, Western Cape, and Others 1997 (2) SA 368 (CC) at 374D - G para [9] A

Standard Bank Investment Corp v Competition Commission; Liberty Life Association of Africa Competition Commission 2000 (2) SA 797 (SCA) ([2000] 2 B All SA 245) para [23] at 812G - H (SA)

Dugard International Law - A South African Perspective 2nd ed (2000) at 269, 270 B

Handbook on Procedures and Criteria for Determining Refugee Status (Re-edited, Geneva, January 1992) under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, published by the Office of the United Nations High Commissioner for Refugees at para [28] C

Rose-Innes Judicial Review of Administrative Tribunals in South Africa (1963) chap 7 at 120.

Cur adv vult.

Postea (November 28). D

[zJDz]Judgment

Nugent JA:

[1] This appeal concerns the rights of asylum seekers - people who claim to be taking refuge in this country from persecution or conflict elsewhere - and in E particular the extent to which they may be prohibited from being employed and from studying while they are waiting to be recognised as refugees.

[2] The rights and obligations of those who seek asylum are governed by the Refugees Act 130 of 1998, which was enacted to give effect to South Africa's international obligations to receive refugees F in accordance with standards and principles established in international law. The effect of s 2 of the Act is to permit any person to enter and to remain in this country for the purpose of seeking asylum from persecution on account of race, religion, nationality, political opinion or membership of a particular social group, or from a threat to his or her life or physical safety or G freedom on account of external aggression, occupation, foreign domination or disruption of public order.

[3] A person who wishes to be given asylum must apply to be recognised as a refugee. If that recognition is granted the refugee - and his or her dependants - enjoys the various rights specified in s 27 of the Act, which include the H right in certain circumstances to apply for permanent residence, the right to a South African travel document, the right to seek employment, and the right to receive basic health services and primary education. It is implicit in that section (particularly when it is read together with the Aliens Control Act 96 of 1991 and the Immigration Act 13 of I 2002 that replaced it) 1 that an applicant for asylum has none of those rights until he or she is recognised as a refugee.

[4] An application for asylum must be made in the prescribed form to a Refugee Reception Officer at one of the Refugee Reception A Offices that are established in terms of s 8 of the Act. The Refugee Reception Officer must refer the application to a Refugee Status Determination Officer who is required to make appropriate enquiries and to determine whether or not the applicant qualifies for recognition as a refugee. If the application is refused the applicant is entitled to appeal. 2 B

[5] Section 22(1) of the Act provides that once an applicant has applied for asylum:

'The Refugee Reception Officer must, pending the outcome of [the] application . . . issue to the applicant an asylum seeker permit in the prescribed form

allowing the applicant to sojourn in the C 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.'

[6] The Standing Committee referred to in that section is the Standing Committee for Refugee Affairs established by s 9 of the Act. The Standing Committee comprises a chairperson (the third appellant) D and members appointed by the Minister of Home Affairs (the first appellant) and it 'must function without any bias and must be independent' (s 9(2)).

[7] The powers and duties of the Standing Committee are, amongst E others, to formulate and implement procedures for the grant of asylum, to regulate and supervise the work of the Refugee Reception Offices, to advise the Minister and the Director-General, to review certain decisions made by Refugee Status Determination Officers, and to monitor such decisions (s 11). Section 11(h) provides that the Standing Committee F

'must determine the conditions relating to study or work in the Republic under which an asylum seeker permit may be issued'.

[8] Section 38(1) of the Act authorises the Minister of Home Affairs to make regulations relating to certain matters including

'(c) the forms to be used under certain circumstances and the permit to be issued pending the outcome of an G application for asylum;

(d) . . .

(e) the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration'.

[9] The Refugees Act came into operation on 1 April 2000. On 6 April 2000 the Refugee Regulations (Forms and Procedure) 2000 H were promulgated. 3 Regulation 7(1)(a) provides that a permit issued in terms

of s 22 of the Act (ie the permit issued to an asylum seeker pending the determination of an A application for asylum)

'must be in the form and contain substantially the information prescribed in annexure 3 to these regulations'.

[10] The form prescribed by annexure 3 contains various conditions that the permit-holder is required to adhere to and includes a condition in the following terms:

'EMPLOYMENT AND STUDY PROHIBITED'. B The effect of reg 7(1)(a), when read together with the prescribed form, is that every asylum seeker is prohibited by the conditions in his or her permit from undertaking employment or from studying.

[11] The first respondent applied for asylum on 2 February 2002 after entering this country from Zimbabwe with her C disabled 20-year-old son. She alleges that she left Zimbabwe for fear that her son would be forced to join militant supporters of the ruling political party in Zimbabwe who she alleged were intimidating supporters of the political opposition. Shortly after applying for asylum she secured a place for her son to study at a Cape Town college. The first respondent is a widow who is trained as a pharmacy D technician. She alleges that her savings have been depleted and that she needs to secure employment in order to support herself and her son.

[12] A permit was issued to the first respondent as provided for in s 22(1) of the Act that included the standard conditions to E which I have referred and she and her son were thus prohibited respectively from undertaking employment and from studying.

[13] The first respondent applied to the Cape High Court for an order declaring the prohibition in annexure 3 to the regulations to be contrary to the Constitution and directing the appellants to permit F her and her son to be employed and to study respectively pending the finalisation of her application for asylum. The second respondent - which is a voluntary association that has amongst its objectives the provision of assistance to applicants for asylum - supported the application, not only in the first respondent's interest, but also in the interest of applicants for asylum generally. G

[14] The application came before H J Erasmus J, who granted the relief that was sought (the judgment of the Court a quo is reported as Watchenuka and Another v Minister of Home Affairs 2003 (1) SA 619 (C) (2003 (1) BCLR 62)) but he granted the appellants leave to appeal to this Court. H

[15] The Court a quo decided the matter on a narrow ground. The learned Judge pointed out that while s 38(e) of the Act empowers the Minister in general terms to make regulations relating to the conditions of sojourn in the Republic of an applicant for asylum, s 11(h) expressly enjoins the Standing I Committee to determine the conditions relating to study or work under which an asylum seeker permit may be issued. In those circumstances, the Court a quo reasoned, 'the Minister cannot make regulations about conditions relating to study and work in the Republic under which an asylum seeker permit may be issued without J

having regard to the determination made by the Standing Committee'. It followed, A said the learned Judge, that because the Standing Committee had made no such

determination at the time the regulations were made the Minister had no power to prohibit employment and study. (The implication of that finding is that the prohibition in annexure 3 to the regulations would have been intra vires if it had accorded with a prior B determination that had been made by the Standing Committee.)

[16] I agree that the Minister had no authority to impose the prohibition but my reasons for reaching that conclusion - and consequently its implications - differ from those of the Court a quo.

[17] Section 11(h) of the Act confers upon the Standing Committee the power and the duty to determine the conditions C under which a permit may be issued insofar as those conditions relate to work and study. Provided that its decision in that regard - in other words its determination - is properly taken, the Act prescribes no formalities in order for that decision to be put into effect. The Court a quo appears to have been of the view that once the D Standing Committee has determined such conditions they have no effect unless translated into law by regulation. I see nothing in the Act to justify that conclusion. On the contrary, it would be most unusual if the powers expressly conferred upon the Standing Committee were to have no effect unless the Minister chose to exercise the separate powers E conferred upon him by s 38, for there would be an inherent potential for the exercise of the respective powers to be frustrated. In my view the Standing Committee exercises its power to determine conditions relating to work and study, either generally or in particular cases, merely by making a decision to that effect. Any such determination is F given effect to by being included as a condition in the permit that is issued in terms of s 22(1), which expressly requires such permits to be issued subject to, and endorsed with, any conditions that have been determined by the Standing Committee. No doubt the Standing Committee might publish, and make known to the public, the decisions that it G makes in relation to such conditions, but that does not mean that it must do so by causing regulations to be promulgated.

[18] Having vested the power to determine such conditions in the Standing Committee the Legislature could not have intended the same powers to be exercised by the Minister. It must necessarily be implied in s 38(1)(e) of the Act that the 'conditions of sojourn' H that he is empowered to regulate do not include conditions relating to work or study.

[19] In Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC) (1998 (12) BCLR 1458) at paras [58] and [59] the following was said: 4 I

'It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by A 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. . . . There is of course no doubt that the common-law principles of ultra vires remain under the new constitutional order. However, they are underpinned (and supplemented where necessary) by a constitutional principle of legality. . . . In B relation to legislation and to executive acts that do not constitute "administrative action", the principle of legality is necessarily implicit in the Constitution.'

[20] In the absence of the power to prohibit an applicant for asylum from taking up employment, or from studying, the Minister acted in conflict with the Constitution in purporting to do so and the Court C a quo correctly set aside the prohibition in annexure 3 of the regulations on that ground.

[21] It does not follow, however, that the first respondent was entitled to an order directing the appellants to permit her and her son to be employed and to study respectively, for on the view that I D take of the matter there was a further hurdle to the granting of that relief.

[22] At a meeting held on 18 September 2000 - well before the first respondent's permit was issued - the Standing Committee itself resolved that all permits issued in terms of s 22 of the Act must contain a condition prohibiting employment and study, but that if an application for asylum E were not finalised within 180 days the applicant could apply to the Standing Committee to lift the restriction. The conditions in the first respondent's permit were thus in accordance with the Standing Committee's own decision, quite apart from what was provided for in the regulations. I can see no proper grounds for directing the Standing F Committee to act in conflict with its own decision unless that decision is itself assailable. Whether the prohibitions in the first respondent's permit fall to be interfered with at all seems to me to depend upon whether and to what extent the Standing Committee's own determination might itself be unlawful. G

[23] There was some suggestion in the papers that at the time the decision was taken the Standing Committee was improperly constituted, with the result that all its decisions are invalid. That issue arose when the answering affidavit filed on behalf of the appellants revealed that the deponent was not only an employee of the Department of Home Affairs but also a member of the Standing Committee. The respondents allege that that is in conflict with s 9(2) of the H Act, which requires the Standing Committee to be 'independent'. Whether the Standing Committee was indeed properly constituted was not decided by the Court a quo and it is also not necessary - nor desirable - that we should decide it. The application was not brought on those grounds. The issue arose for the first time in reply and I am not satisfied that it was I fully canvassed. No doubt the appellants will note the respondents' contention and will act appropriately if they consider it necessary to do so, but I do not think the

matter falls properly to be dealt with in this appeal. I proceed on theassumption that the Standing Committee was indeed properly constituted J

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at the time its decision was made. A

[24] In my view, the Standing Committee's general prohibition of employment and study for the first 180 days after a permit has been issued is in conflict with the Bill of Rights. 5 I consider that the general prohibition in the regulations is unlawful for the same reasons, which constitutes a further ground for setting it aside. B

[25] Human dignity has no nationality. It is inherent in all people - citizens and non-citizens alike - simply because they are human. And while that person happens to be in this country - for whatever reason - it must be respected, and is protected, by s 10 of the Bill of Rights.

[26] The inherent dignity of all people - like human life itself - is one of the foundational values of C the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights. In S v Makwanyane and Another 1995 (3) SA 391 (CC) (1995 (2) SACR 1; 1995 (6) BCLR 665) at para [144] Chaskalson P said the following: 6 D

'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.'

In the same case, at para [328], O'Regan J said the following: E

'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.' F

[27] The freedom to engage in productive work - even where that is not required in order to survive - is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth - the fulfilment of what it is to be human - is most often bound up with being accepted as socially useful. G

[28] But the protection even of human dignity - that most fundamental of constitutional values - is not absolute and s 36 of the Bill of Rights recognises that it may be limited in appropriate circumstances. It may be limited where the limitation is

of general application and is 'reasonable and justifiable in an open and democratic society based on H human dignity, equality and freedom taking into account all relevant factors'.

[29] If the protection of human dignity were to be given its full effect in the present context - permitting any person at all times to undertake employment - it would imply that any person might freely enter and remain in this country so as to I exercise that right. But as pointed out by

the United States Supreme Court over a century ago in Nishimura Ekiu v The United A States: 7

'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.' B

[30] It is for that reason, no doubt, that the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by ss 21 and 22 of the Bill of Rights. As pointed out in Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 1997 (2) SA 97 (CC) (1997 (1) BCLR 1) at para [20], the restriction to citizens C of the right to choice of occupation is in accordance with recognised international human rights instruments. The Court went on to say the following at para [21]:

'This distinction [between citizens and others] is in fact recognised in the United States of America and also in Canada. There are other acknowledged and exemplary constitutional democracies where D the right to occupational choice is extended to citizens only, or is not guaranteed at all. One need do no more than refer to India, Ireland, Italy and Germany. [Constitutional Principle] II, as we made plain in the [Certification judgment], requires inclusion in a bill of rights of "only those rights that have gained a wide measure of international acceptance as fundamental human rights". The fact that a right, in the terms contended for by the objector, is E not recognised in the international and regional instruments referred to and in a significant number of acknowledged constitutional democracies is fatal to any claim that its inclusion in the new South African Bill of rights is demanded by [Constitutional Principle] II.'

[31] Those considerations alone, in my view, constitute reasonable and justifiable grounds for limiting the protection that s 10 of the Bill of Rights accords to dignity so as to exclude from its scope a F right on the part of every applicant for asylum to

undertake employment - a limitation that is implied by s 27(f) of the Refugees Act, and that has been expressed in the Standing Committee's decision.

[32] But where employment is the only reasonable means for the G person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. For it is not disputed that this country, unlike some other countries that receive refugees, offers no State support to applicants for asylum. 8 While the second respondent offers some assistance as an act of charity, that assistance is confined to H applicants for asylum who have young children, and even then the second respondent is able to provide

no more to each person than R160 per month for a period of three months. Thus a person who exercises his or A her right to apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging. I do not suggest that in such circumstances the State has an obligation to provide employment - for that is not what is in issue in this appeal - but only that the deprivation of the freedom to work assumes a different dimension when it threatens positively to B degrade rather than merely to inhibit the realisation of the potential for self-fulfilment.

[33] In my view, there is no justification for limiting beyond that degree the protection that is afforded by s 10. As pointed out in Makwanyane (supra at para [102]), it is for the C party relying upon the limitation to satisfy a court that the limitation is justified and not for the party challenging it to show that it was not justified. 9 The appellants made little attempt to show why such a limitation would be justified. It was alleged that the prohibition on employment is consistent with art 17 of the 1951 United Nations Convention Relating to the Status of Refugees D and its 1967 Protocol but those instruments are neutral on this issue. There was some suggestion that the rights that are accorded to applicants for asylum are abused by persons who are not genuine E refugees, but that provides no reason for limiting the rights of those who are genuine. There was also a suggestion that to permit an applicant for asylum to undertake employment would deprive citizens of that opportunity, but there is no reason to believe that that will always be so. No doubt these are matters that might properly be taken into account in determining whether a particular applicant for asylum should or should not be permitted to take up employment or to study, but I do not think they provide grounds for applying a general F prohibition. For a general prohibition will inevitably include amongst those that it affects applicants for asylum who have no reasonable means of support other than through employment. A prohibition against employment in those circumstances is a material invasion of human dignity that is not justifiable in terms of s 36. G

[34] That must necessarily mean that in exercising the powers and duties conferred upon it by s 11(h) the Standing Committee must take account of the circumstances of the applicant, whether on a case by case basis or by formulating guidelines to be applied by Refugee Reception Officers when issuing permits in particular cases. Provided that a Refugee Reception Officer acts within H closely and clearly defined guidelines, and the Standing Committee retains its powers of oversight, I do not think the delegation to him or her of the power to assess what conditions should be imposed in particular cases would be unlawful. As pointed out I

by Botha JA in Attorney-General, OFS v Cyril Anderson Investments (Pty) A Ltd 1965 (4) SA 628 (A) at 639:

'It is not every delegation of delegated powers that is hit by the maxim [delegatus delegare non potest], but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.' 10

[35] There is one further consideration to be borne in mind. At the time that is relevant to this appeal the Aliens Control Act 96 of B 1991 was still in existence. It has since been repealed and replaced by the Immigration Act 13 of 2002. 11 Although an applicant for asylum is permitted to be in this country by the Refugees Act, his or her presence might often be in contravention of the Aliens Control Act (and now in contravention of the Immigration Act), with the result that the prohibitions in s 32 of that Act (and the prohibitions C in s 38 of the Immigration Act) would ordinarily be applicable. That construction would effectively negate the express power conferred upon the Standing Committee by the Refugees Act to permit applicants for asylum to enter into employment or to study and that could not have been intended. It must necessarily be implied in s 22 of the Refugees D Act that a permit granting an applicant the right to work or to study confers those rights upon the permit-holder, and where applicable his or her dependants, notwithstanding the provisions of the Aliens Control Act or the Immigration Act.

[36] In my view, the Standing Committee's general prohibition against study is also unlawful. The freedom to study is also inherent E in human dignity for without it a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education. (We are not concerned in this case with whether the State is F obliged to provide educational opportunities to applicants for asylum but only with whether they may be deprived of the freedom to receive education that is available.) For reasons that I have already advanced that right, too, cannot be absolute, and is capable of being limited in appropriate circumstances, for I reiterate that the State cannot be obliged to permit any person to enter this country, and then to remain, G in order that he or she might

exercise that right. But where, for example, the person concerned is a child who is lawfully in this country to seek asylum (there might be other circumstances as well) I can see no justification for limiting that right so as to deprive him or her of the opportunity for human fulfilment at a critical period, H nor was any suggested by the appellants. A general prohibition that does not allow for study to be permitted in appropriate circumstances is, in my view, unlawful, and I reiterate what has been said in para [34].

[37] It remains to consider whether the Court a quo was justified in directing the appellants to permit the first I respondent and her son to take up employment and to study respectively. I have pointed out that an

applicant for asylum is not ordinarily entitled to take up employment or to study pending the A outcome of his or her application, but that there will be circumstances in which it would be unlawful to prohibit it. Section 11(h) confers upon the Standing Committee the power and the duty to determine in any particular case whether that should be permitted, and it has not yet applied its mind to whether it ought to be permitted in the present case. I do not think it is for a court to usurp that function. There is B no reason to believe that the outcome is a foregone conclusion, nor that the Standing Committee is not able properly to exercise its powers (Johannesburg City Council v Administrator, Transvaal, and Another 1969 (2) SA 72 (T); Traube and Others v Administrator, Transvaal, and Others 1989 (1) SA 397 (W)). The proper order is to direct the Standing Committee to exercise its powers C in the present case, rather than to usurp its functions. (We were informed from the Bar that the first appellant's application for asylum was refused but that an appeal against that refusal has yet to be determined.)

[38] For those reasons the appeal can succeed only to the extent that the second part of the order made by the Court a quo D falls to be set aside. However, that was not the main thrust of this appeal. The respondents have been substantially successful and are entitled to the costs of the appeal. E

[39] The following orders are made:

1. The appeal succeeds to the extent that para 2 of the order made by the Court a quo is set aside and the following is substituted:

'The Standing Committee for Refugee Affairs is directed to consider and determine whether the first applicant and her son respectively should be permitted to undertake employment and to study F pending the outcome of the first respondent's application for asylum, and to cause the appropriate condition to be endorsed upon the permit issued to her in terms of s 22 of the Refugees Act.'

2. The appellants are ordered to pay the costs of the appeal.

Howie P, Navsa JA, Mthiyane JA and Heher JA concurred. G

Appellants' Attorneys: State Attorneys, Cape Town and Bloemfontein. Respondents' Attorneys: Legal Resources Centre, Cape Town; Israel & Sackstein, Bloemfontein.