/SG

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~.
(3) REVISED.

10/2/2011
DATE SIGNATURE

DATE:
CASE NO: 27294/2008

In the matter between:

ZIMBABWE EXILES FORUM AND 34 OTHERS	APPLICANT
And	
MINISTER OF HOME AFFAIRS	1ST RESPONDENT
DIRECTOR-GENERAL: HOME AFFAIRS	2ND RESPONDENT
BOSASA (PTY) LTD T/ALINDELA HOLDING FACILITY	3RD RESPONDENT

JUDGMENT

KOLLAPEN, AJ

Introduction and Background

[1] The movement of people within and across the borders has always been part of the human condition as people leave their countries of origin either in search of a better life or when compelled to do so in order to flee persecution or harm to themselves and their families. These movements of people have and continue to pose significant

challenges for nation States in how to effectively and adequately manage both the movement of such persons as well as the consequences that flow from it.

[2] International law as well as most domestic systems recognise two categories of persons in this regard. They are broadly termed migrants and secondly asylum seekers and refugees. Different legal regimes apply to the two broad categories of person. In respect of the former it is logically seen as a matter of national sovereignty for the State to determine who should enter its borders and under what terms and conditions while in respect of the latter category international law creates an obligation on the part of State to provide refuge and asylum to those who flee persecution in their country of origin.

[3] In South Africa this distinction is also recognised and the Immigration Act 13 of 2002 was enacted to provide for the regulation of admission of persons to their residence in and their departure from the Republic while the Refugees Act 130 of 1998 was enacted to give effect within the Republic of South Africa to the relevant international legal instruments, principles and standards relating to refugees and their reception into South Africa as well as the rights and obligations that flow from the granting of such status.

[4] While different legal regimes apply to migrants and refugees in practice there exists a relationship between these legal regimes as people may

be subject to both regimes either simultaneously or consecutively. It is not as if the two legal regimes exist separately and insulated from each other. In practice a person may well gravitate from one regime to the other. This application involves the interpretation of Immigration Act as well as the Refugees Act as well as their relationship to each other.

The Parties

[5] The application is brought by the Zimbabwe Exiles Forum a non profit organisation registered in the Republic of South Africa as such with the broad objective of providing social, legal and economic assistance to Zimbabwean Exiles and refugees as well as monitoring the violations of rights of those in exile through research monitoring and litigation. The second to the 34th applicants are all Zimbabwean nationals who were in South Africa and who were arrested at a demonstration held in Pretoria outside the Chinese Embassy. The first respondent is the Minister of Home Affairs and the second respondent the Director-General of the Department of Home Affairs.

THE PROCEEDINGS BROUGHT AND THE RELIEF SOUGHT.

[6] The relief sought in respect of part A of the notice of motion has been dealt with and disposed of and in the main related to securing the release of the second to the 34th applicants from custody and to the granting of temporary asylum seeker permits to them in accordance with section 22(1) of the Refugees Act.

[7] The relief sought in part B of the notice of motion related to certain procedures and practises under which the second to the 34th applicants were arrested, processed dealt, with and detained.

[8] The applicant seek an order in the following terms:

1. Declaring the failure of the First and Second Respondents to issue section 22 permits to asylum seekers upon their application, whether the practice is a policy, directive or decision made on a case by case basis, as unlawful and inconsistent with the Refugees Act 130 of 1998;

2. Declaring the failure of the First and Second Respondents to verify the identity and status of detainees who have informed the Respondents that they have applied for asylum and not yet received their permits, in order for them to be issued with section 22 permits and released, as unlawful and inconsistent with the Refugees Act 130 of 1998 read with the Immigration Act 13 of 2002 whether this practice is a policy, directive or decision made on a case by case basis;

3. Declaring that the practice and/or policy and/or directive of the respondents wherein asylum seekers who make asylum applications whilst in immigration detention must remain in

detention pending the outcome of that application us unlawful, inconsistent with the Constitution and invalid;

4. Declaring that the practice and/or policy and/or directive and/or decision of the respondents wherein asylum seekers, whose applications for asylum are rejected as unfounded and who indicate an intention to appeal the decision to reject their applications in terms of Chapter 4 of the Refugees Act, are to be detained pending the finalisation of that appeal process as unlawful, inconsistent with the Constitution and invalid;

5. Declaring that the practice and/or policy and/or directive and/or decision of the respondents wherein detainees, whose detention under the Immigration Act becomes unlawful by virtue of the expiration of the 30 day period referred to in section 34(1)(d) of the Immigration Act, are released and summarily rearrested as unlawful, inconsistent with the Constitution and invalid;

6. Directing that the First Respondent, and any other respondent who opposes the application, pay the costs of this application on an Attorney – Client scale.

Discussion

[9] The legal regimes that apply to migrants asylum seekers and refugees have their foundations deeply rooted within the constitution and in

particular within the chapter of the Bill of Rights. Given that what is often at stake is the liberty of a individual, their freedom and security and their right to just administrative action including their right to seek and receive the protection of the State in appropriate circumstances it is therefore essential that in all such matters the policy and practice followed by the State and its organs are consistent with both the values of the Constitution and the human rights imperative set out therein.

[10] For the purposes of this application the right to dignity, the right to freedom and security, the right to movement and the right to just administrative action all are relevant.

[11] Section 7(2) provides that "the State must respect protect and promote and fulfil the rights in the Bill of Rights" while section 8(1) provides that "the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and organs of State".

[12] It must accordingly follow that any policy practice directive or conduct which is inconsistent with the constitution and/or undermines the constitution and its values falls to be declared inconsistent as such and in terms of section 172(1) of the Constitution the court has both the power and the responsibility when deciding a constitutional matter within its power to "declare that any law or conduct that is inconsistent with the constitution is invalid to the extent of its inconsistency".

[13] On that basis and of course provided that the evidential burden is discharged in demonstrating conduct in the form of a practice policy directive or a decision that is unlawful or inconsistent with the constitution then the applicants would in the ordinary course be entitled to the relief they seek.

[14] It is also so that a court confronted with such inconsistencies has no discretion but is enjoined to declare such offending conduct invalid to the extent of its inconsistency.

THE FAILURE TO ISSUE SECTION 22 PERMITS:

The applicant seeks an order: -

> "Declaring the failure of the first and second respondents to issue section 22 permits to asylum seekers upon their application, whether the practice is a policy, directive or decision made on a case by case basis, as unlawful and inconsistent with the Refugees Act 130 of 1998.

Section 21 of the Refugees Act provides for the procedure to be followed in making application for asylum and in broad terms provides that such application shall be made in person to a refugee reception officer at any refugee reception office. It further provides that such a refugee reception officer must accept the application from the applicant ensure that it is properly completed and may conduct such enquiry in

order to verify the information furnished in the application. The section further provides for the refugee reception officer to refer such application to a refugee status determination officer to deal with further.

[15] Section 22 of the Act provides that the refugee reception officer 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.

[16] It is clear and that provided that an applicant for asylum has complied with the formal requirements of section 21(1) that there is in terms of section 22 of the Act an obligation on the refugee reception officer to issue an asylum seeker permit. The use of the word must in the body of section 22 makes the issue of such a permit peremptory. A refugee reception officer as no discretion in this regard.

[17] A related but relevant issue is precisely when such permit must be issued. It is clear that the issue of a section 22(1) permit is significant in the sequence of the process by which an application for asylum is made. Its effect is to allow the applicant temporary sojourn in the Republic as well as to recognise the applicant as one who has in terms of the Act submitted an application for asylum.

[18] Accordingly the phrase "must issue" having regard to the context and the purpose of the permit can only mean that it must be issued immediately or at the very least without any undue delay.

[19] To suggest otherwise would be to undermine the spirit of the Refugees Act insofar as it provides explicit recognition of the application for asylum and is the only testament that indeed such an application has been lodged. For an asylum seeker who may not be possessed of any other documents and who may have had to flee his or her country of origin such a permit takes on an enormous significance in at the very least regularising the applicant's sojourn in the Republic.

[20] While there is nothing in the wording of section 22(1) to suggest that such a permit must be issued immediately, if one has regard, however, to the architecture of the Act and to the protection that asylum seekers are entitled to in terms of the Act then there can be no other interpretation other than that provided an application has been properly made and submitted that such a permit as provided for in terms of section 22(1) should be issued immediately or at the very least without any undue delay.

[21] The question then to be determined is whether in the context of this application there has been a failure by the first and second respondents to issue such section 22 permits either immediately or without undue delay.

[22] The respondents concede that due to increased volumes of people that came through South Africa's borders it was unprepared for the high number of asylum seekers and was as a result unable to deal sufficiently with the number of asylum seekers reporting daily at various refugee centres to apply for asylum. In this regard it further concedes that the department was unable to receive and process applications for asylum and issue section 22 permits upon application resulting in many asylum seekers being turned away and thereby being exposed to arrest and detention by the departmental immigration branch for violation of immigration laws.

[23] While it appears from the respondents' papers that it has now remedied the administrative and logistical difficulties it faced in the past it does not detract from the fact that it must be evident from the respondent's own version that at the time this application was launched section 22 permits were not issued immediately or without undue delay.

[24] As I understand it the practice of not issuing permits upon application may have been due to capacity constraints and may not have been a deliberate or premeditated strategy on the part of the respondents. Notwithstanding such mitigating factors, there is nothing on the papers to suggest that the respondents at the time took all reasonable steps to ensure maximum compliance with their constitutional obligations. In this regard see *S v Jaipal* 2005 4 SA 581 (CC) 56. It is evident that

South Africa's constitutional framework and the legislation that has been enacted to support such a constitutional framework has created the expectation of high and exacting standards in particular insofar as it is relevant to the protection and promotion of the human rights. The maintenance of such standards often requires considerable public resources and it is incumbent upon organs of State to use the resources they have to their maximum capacity in order to ensure compliance with their constitutional obligations.

[25] The consequence of the large influx of asylum seekers and the inability of the respondents to put in place adequate measures to deal with them resulted in a most unsatisfactory State of affairs conceded to by the respondents where applicants for asylum were simply left in limbo unable to access the relevant offices of the respondent to make application for asylum and those who were ultimately able to do so were not in a position to receive the necessary acknowledgment of their applications for asylum in a form of a section 22 permit to which they were entitled to either immediately or without undue delay. The consequence of all this may well have led to the unnecessary arrest of asylum seekers under circumstances that could have been avoided.

[26] While one must commend the measures taken by the respondents in addressing the situation it does not detract from the fact that the respondents had in fact allowed a practice to develop whereby applications for asylum were unduly delayed simply because people

did not have access to the respondents' offices alternatively where they were successful in accessing such offices had to wait for extended periods for their permits to be issued with prejudicial consequences. Under the circumstances I am satisfied that the applicants have made out a proper case for the relief sought in respect of this prayer.

[27] In this regard one expresses the hope that the respondents efforts to improve its capacity will yield the necessary results and one is heartened by the stance of the respondent that it is now in a position to accept and issue section 22 permits immediately in respect of asylum seekers visiting refugee reception centres daily.

[28] In my view this undertaking accords with the interpretation that I have attached to section 22 which provides that an asylum seeker permit must be issued immediately or without undue delay. If indeed the respondent has the capacity to issue such permits immediately then there should be no problem in this regard and the dispute as to whether such permits should be issued immediately or not is then rendered academic.

THE FAILURE TO VERIFY THE IDENTITY AND STATUS OF DETAINEES

The applicant seeks an order:-

"Declaring the failure of the First and Second Respondents to verify the identity and status of detainees who have informed the Respondents

that they have applied for asylum and not yet received their permits in order for them to be issued with section 22 permits and released, as unlawful and inconsistent with the Refugees Act 130 of 1998 read with the Immigration Act 13 of 2002 whether this practice is a policy, directive or decision made on a case by case basis;"

[29] It is the argument of the second to the eighteenth applicants that at the time of their arrest they had already made application for asylum, that they had not been issued with the necessary section 22 permits as provided for in terms of the Act and that the officials of the respondent had failed to take measures to verify whether in fact they had submitted such applications for asylum as they alleged. The applicants further argue and provide numerous instances in the papers that seem to suggest a consistent practice whereby individuals who have applied for asylum and who are in possession of the necessary section 22 permits face arrest and detention when such permits are expired and cannot be renewed because of long delays outside refugee reception offices. It is the applicant's contention that the failure to verify the identity and status of detainees as asylum seekers violates the provisions of the Refugees Act as well as the immigration Act and that the practices outlined in the papers certainly suggest that this far from being an irregular occurrence occurs with frequent regularity to the extent that it could be classified as constituting a practice. Section 41 of the Immigration places an obligation on an immigration officer to take reasonable steps to assist a person in

verifying his or her identity or status. The regulations issued in terms of the Immigration Act attempt to unpack this duty in greater detail and provides that the immigration or police officer shall take the following steps in order to verify the identity and status of the person contemplated in section 41(1) of the Act:

(a) Access relevant documents that may be readily available;

(b) Contact relatives or other persons who could prove such identity and status; and

(c) Access departmental records in this regard.

[30] It is evident from the reading of section 41 read together with the regulations that the objective of the obligation created is to ensure that if someone has a valid claim as an asylum seeker that the immigration officer or police officer at the very least has a positive duty to assist such person in verifying such claim. The process and the outcome of such verification process are critical. It may ensure that the liberty and freedom of such an individual is not constrained because the verification process may well establish that the person has applied for asylum and therefore it is a duty which has to be accepted with the necessary responsibility for both its content as well as its outcome. From the numerous examples provided in the papers of asylum seekers whose permits expire through no fault of their own and then

face arrest without any process by which their status as asylum seekers is verified it is evident that the numerous instances do provide evidence of a practice in this regard. The consequence of such a practice has been that in many such cases applicants were able to access legal representation had to resort to litigation in order to secure their release. One should not speculate with regard to what happens to others who are not fortunate enough to access legal representation except to say that in all of the instances referred to in the paper it was evident that the officials of the respondents did not discharge the obligations visited upon them by section 41 of the Immigration Act and in most cases to the prejudice of the individual involved.

[31] Such a practice would obviously have the effect of impeding negatively on the freedom and security of the individual. It would in most instances have resulted in the summary detention of an individual under circumstances where verification may have established that the person was indeed a *bona fide* asylum seeker and that the expiration of the permit was on account of factors beyond the control of the individual involved but more particularly the result of long queues and administrative and logistical difficulties on the part of the respondents.

[32] It is simply untenable in a constitutional democracy that someone should have to give up their liberty on account of administrative difficulties or inefficiencies on the part of an organ of State.

[33] For these reasons I am satisfied that on the evidence before me the applicants have established a practice with regard to immigration officers simply failing to take the necessary steps to verify and assist applicants in verifying their identity and status and that the failure to take such measures is clearly inconsistent with the provisions of the Immigration Act, the Refugee Act as well as the specific provisions of the Constitution and the Bill of Rights insofar as they relate to the freedom and liberty of the individual, the right to movement and the right to just administrative action.

[34] For those reasons I am satisfied that a proper case has been made out for the relief sought in respect of this prayer.

THE DETENTION OF ASYLUM SEEKERS WHO APPLY FOR ASYLUM WHILE IN IMMIGRATION DETENTION

The applicant seeks an order: -

> "Declaring that the practice and/or policy and/or directive of the respondents wherein asylum seekers who make asylum applications whilst in immigration detention must remain in detention pending the outcome of that application as unlawful, inconsistent with the Constitution and invalid;

[35] The applicants cite numerous examples in their papers that suggest that a firm practice has been established in terms of which asylum

seekers who happen to be in immigration detention and then apply for asylum continue to remain in detention pending the outcome of their applications for asylum. The applicants further provide instances of a similar practice being put in place in respect of asylum seekers who avail themselves of the appeal procedures in terms of Chapter 4 of the Refugees Act.

[36] It is the applicants' contention that the detention of such asylum seekers is unlawful and that upon the submission of an application for asylum in terms of section 21 of the Act an asylum seeker is entitled in terms of section 22 of the Act to be issued with an asylum seeker permit and that once such a permit has been issued the further detention of an asylum seeker in terms of the Immigration Act is unlawful and inconsistent with the constitution and invalid as such.

[37] While the respondent has denied that such a policy exists and has contended that the various claims with regard to the applicants in support of its stance that such a policy does exist is at best generic it would appear that indeed on the respondents' own version such a practice does exist and has been put in place.

[38] In a memorandum dated 14 May 2008 despatched by the Deputy Director of Deportations, Ronney Marhule and directed to Mr R Nesengane of the Lindela Holding Facility the Deputy Director of

Deportations relying on the judgment of the High Court in the matter of *Cormsa v Minister of Home Affairs* issues a directive as follows:

> "In light of the above, any practice of releasing foreigners who apply for asylum should be stopped with immediate effect. The contents of this memo should be brought to the attention of all personnel in the office."

It is evident from the contents of this memo that officials of the second respondent took the position that foreigners who were in immigration detention and then applied for asylum should not be released.

[39] There is hardly much scope for the respondents to argue that such a practice did not come into existence in the light of this memorandum which is hardly ambiguous and speaks for itself.

[40] This stance seems to have been confirmed from the minutes of a meeting held between the Refugee Ministry Centre and the Director of Deportations which meeting took place on 2 July 2008. The minutes of that meeting which appear in the record at page 579 and 580 suggest that the Refugee Ministry Centre were informed in the course of that meeting that "we were informed by the director of deportations that asylum seekers who are issued with section 22 permits form Lindela cannot be released on that basis until a final outcome of the application from refugee affairs". It must be evident from both the memo as well

as the minutes of the meeting of 2 July 2008 that indeed the respondent was of the view that it was entitled to detain asylum seekers who were in immigration detention when they made their applications for asylum pending the outcome of such applications.

[41] The stance contended for by the applicants seem to be supported by the affidavit of one Albert Matsaung Deputy Director of Refugee Affairs in his opposing affidavit where he makes the submission that a decision to detain such a person (who has applied for asylum) in terms of the Immigration Act is lawful and further deposes to the fact that the position of the department was confirmed by the *Cormsa* judgment.

[42] This would suggest that even prior to the *Cormsa* judgment the stance of the respondent that they were indeed entitled to detain in immigration detention persons who had elected to apply for asylum in terms of the Refugee Act and in broad terms it would appear that the justification for such detention was to avoid asylum seekers abusing the asylum process and in particular persons who only chose to apply for asylum after being arrested by immigration officials. The respondents' stance appears to have been that they were entitled to detain such asylum seekers in detention pending their status determination in terms of the Refugees Act. Accordingly there does not appear to be much factual dispute with regard to the existence of such a practice of detention pending the determination of the asylum application.

[43] The legal position in this regard was initially dealt with in the matter of *Consortium for Refugees and Migrants in South Africa and Others v The Minister of Home Affairs and Other* (South Gauteng High Court). MOTLOUNG J ruled that a person who was in immigration detention and who sought to then apply for asylum was not entitled to his unconditional release. In this regard he was of the view that the refusal by the respondents to release such persons from detention was "perfectly in order provided of course all the other requirements of the Immigration Act regarding the legality or lawfulness of the detention are in place".

[44] He accordingly took the stance that the mere submission of an application for asylum in terms of the Refugees Act the issue of section 22 permit did not have the automatic result that such a person was entitled to his unconditional release from immigration detention.

[45] Mr Bofilatos for the respondent argued that the relief sought by the applicant and the interpretation that the applicant sought to place on the consequences of the issue of a section 22 permit were far reaching and would have the absurd and unintended result that every person lawfully held in immigration detention would be entitled as a matter of right to their automatic and unconditional release from such detention once they applied for and were issued with an asylum seeker permit in terms of section 22 of the Refugees Act.

This would undermine the proper administration of the Immigration Act, lead to wide abuse of the Refugee Act and would effectively render the institution of immigration detention ineffective if individuals were able to effect a cessation of their detention by simply applying for and being issued with section 22 permits.

The fact that a section 22 permit was not determinative of the merits of the asylum application but rather served as a testament that such an application was submitted would have the effect that even individuals in immigration detention who may never have intended to apply for asylum would be encouraged to do so if the consequence of doing so would be their release from immigration detention.

The risks and unintended consequences of such an approach do appear to be substantial.

[46] The applicant on the other hand sought to rely on the judgment in the matter of *Arse v Minister of Home Affairs* for the stance. In the *Arse* matter a judgment of the Supreme Court of Appeal delivered on 12 March 2010 the SCA had to deal with a similar issue and in that matter MALAN J delivering the judgment of the court concluded that "after an asylum seeker permit has been issued to him or her the asylum seeker cannot be regarded as an illegal foreigner as contemplated by the Immigration Act". He further expressed the view that the detention of an asylum seeker can only be effected in terms of

the Refugees Act if the department has withdrawn an asylum seeker permit in terms of section 22(6). The court further went on to find that the withdrawal of an asylum seeker permit is thus a jurisdictional fact for the lawful detention of the asylum seeker. In addition the court found that the detention of any person who is in possession of an asylum seeker permit in terms of section 22 would be a contravention of section 2 of the Refugees Act.

The judgment concluded by alluding to the concerns of the Department of Home Affairs and the legitimate interests that the state has in trying to curb illegal immigration, but suggested that those concerns could have been addressed by the imposition of conditions in terms of section 22 of the Refugees Act and their effective monitoring.

The judgment disposes of the dispute that may have existed with regard to the detention of asylum seekers who apply for asylum while in immigration detention and would appear to be authority for the proposition that immigration detention is incompatible with the rights an asylum seeker in possession of a section 22 permit has such a person would be entitled to their release from immigration detention pending the outcome of the asylum application as well as the outcome of any review or appeal in terms of such application.

[47] It would appear from the judgment in the *Arse* matter that the submission of an application for asylum and the subsequent issue of a

permit in terms of section 22 of the Refugees Act would have the effect of bringing to an end the immigration detention of a person who applies for asylum while in Immigration detention.

[48] I am obliged to follow the dicta of the Supreme Court of Appeal in this regard and on that basis and in view of the fact that the applicants have established on the facts that there indeed is a practice of detaining individuals in immigration detention who have applied and been issued with section 22 permits. The applicant would accordingly be entitled to the relief it seeks in respect of this prayer.

THE DETENTION OF ASYLUM SEEKERS PENDING THEIR APPEALS

From the aforegoing and in the light of the *Arse* judgment and provided that an asylum seeker permit has not been withdrawn by the Minister in terms of section 22(6), the detention of an asylum seeker who has submitted an appeal against the refusal to grant asylum would also be inconsistent with the Refugees Act.

It would appear that if the respondent were to seek to justify the detention such an individual pending an appeal, a precondition would be the withdrawal of the asylum seeker permit in terms of section 22(6).

There hardly appears to be any dispute that there is indeed a practice of detaining asylum seekers who are in immigration detention pending

the submission and adjudication of the appeals and on the basis of the reasoning in the *Arse* matter such detention cannot be countenanced (unless the asylum seeker permit has been withdrawn) and indeed would be inconsistent with the Refugees Act.

The applicant is according entitled to the relief it seeks in terms of this prayer.

THE RELEASE AND RE-ARREST OF PERSONS IN TERMS OF THE IMMIGRATION ACT

The applicant seeks an order:

> "Declaring that the practice and/or policy and/or directive and/or decision of the respondents wherein detainees, whose detention under the Immigration Act becomes unlawful by virtue of the expiration of the 30 day period referred to in section 34(1)(d) of the Immigration Act, are released and summarily rearrested is unlawful, inconsistent with the Constitution and invalid;"

Section 34 of the Immigration Act provides that a person may not be held in detention for longer than 30 calendar days without a warrant of a court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days.

[49] The need to ensure judicial oversight of immigration detention is consistent with the commitment to the freedom and liberty of the individual set out in our constitution and the Bill of Rights. There hardly appears to be any dispute that there has been a practice that has developed where immigration detention is not extended by a warrant of a court but individuals are released from detention and immediately thereafter rearrested. The fourteen applicants in this matter were so released and so rearrested. The respondent contends that such release and re-arrest is not inconsistent with the law and in particular argue that even if a person has been released after thirty days such a person status as an illegal foreigner continues and therefore such a person is liable to re-arrest.

[50] With respect such an approach undermines both the spirit of the Immigration Act as well as the commitment to freedom and liberty. If the respondents are correct in their interpretation of the law it would simply mean that a person could be held virtually indefinitely simply on the authority of an immigration officer while the Immigration Act places an upper limit of ninety days in respect of any such detention provided of course that any detention in excess of thirty days is sanctioned by a court. It must be evident that any such practice should immediately desist. The respondents have sufficient means at their disposal to ensure that in appropriate cases where they seek to detain a person for a period longer than thirty days to approach a court timeously in order to provide good and reasonable grounds for such detention to be

extended. Under the circumstances the practice of releasing and re-arresting is clearly inconsistent with the Immigration Act and violates both the constitution as well as the provisions of the Bill of Rights insofar as it relates to the freedom and security of the person. The applicants are accordingly entitled to the relief they seek in respect of this prayer.

Costs

[51] The costs in respect of Part A were reserved for determination at the haring of Part B.

[52] In view of the findings I have made, there is no reason to depart form the ordinary rule that the costs should follow the result, this being applicable to Part A of the application as well.

The applicant has sought costs on the attorney and client scale and the court has a wide discretion in granting costs save that attorney and client costs are not easily granted. The applicant contends that undue delay by the respondents in the filing of papers led to the delay in the hearing of this matter and that the behaviour of respondents was dilatory and obstructive.

While I am willing to accept that there were delays largely occasioned by the respondent that led to the matter not being finalised earlier, I am

not convinced that such conduct, unhelpful and dilatory as it may have been is sufficient to justify a punitive costs order.

I accordingly make the following order:-

It is declared that:-

1. The failure of the First and Second Respondents to issue section 22 permits to asylum seekers upon their application, whether the practice is a policy, directive or decision made on a case by case basis, is unlawful and inconsistent with the Refugees Act 130 of 1998;

2. The failure of the First and Second Respondents to verify the identity and status of detainees who have informed the Respondents that they have applied for asylum and not yet received their permits, in order for them to be issued with section 22 permits and released, is unlawful and inconsistent with the Refugees Act 130 of 1998 read with the Immigration Act 13 of 2002 whether this practice is a policy, directive or decision made on a case by case basis;

3. That the practice and/or policy and/or directive of the respondents wherein asylum seekers who make asylum applications whilst in immigration detention must remain in

detention pending the outcome of that application is unlawful, inconsistent with the Refugees Act and the constitution;

4. That the practice and/or policy and/or directive and/or decision of the respondents wherein asylum seekers, whose applications for asylum are rejected as unfounded and who indicate an intention to appeal the decision to reject their applications in terms of Chapter 4 of the Refugees Act, are to be detained pending the finalisation of that appeal process is unlawful, inconsistent with the Constitution and invalid;

5. That the practice and/or policy and/or directive and/or decision of the respondents wherein detainees, whose detention under the Immigration Act becomes unlawful by virtue of the expiration of the 30 day period referred to in section 34(1)(d) of the Immigration Act, are released and summarily rearrested is unlawful and inconsistent with the Immigration Act and the constitution.

6. The first and second respondents are ordered to pay the costs jointly and severally the one paying the other to be absolved, both in respect of Part A and Part B of the application.

N J KOLLAPEN
JUDGE OF THE NORTH GAUTENG HIGH COURT

Heard on: 6/08/2010

For the Applicant: Adv K Hofmeyer

Instructed by: Lawyers for Human Rights

For the Respondent: Adv M Bofilatos

Instructed by: State Attorney

Date of Judgment: