

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

- | | |
|-----|--|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: |

Date: **22nd October 2021** Signature: _____

A handwritten signature in black ink, appearing to be "P. H. M.", is written over the signature line.

CASE NO: 46972/2021

CASE NO: 46973/2021

DATE: 22ND OCTOBER 2021

In the matter between:

BIRHU, KIBAMO

Applicant (In 1st Case)

TESFAYE, JOHN

Applicant (In 2nd Case)

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR-GENERAL,

DEPARTMENT OF HOME AFFAIRS

Defendant

Heard: 15 October 2021 - The 'virtual hearing' of the Urgent Application was conducted as a videoconference on *Microsoft Teams*.

Delivered: 22 October 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being

uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 12:00 on 22 October 2021.

Summary: Opposed urgent applications – Refugees Act 130 of 1998 – asylum seekers failed to apply for asylum without delay – explanation by applicants is that Refugee Reception Office is closed due to Covid-19 – applicants entitled to rely on protection afforded by Refugees Act – urgent application granted –

ORDER

[1]. In case number **46972/2021** (*Birhu v The Minister of Home Affairs and Another*), I make the following order: -

- (1) This application is urgent.
- (2) Subject to the applicant approaching the Refugee Reception Office, as contemplated in paragraph 5 below, the first and second respondents are interdicted from deporting the applicant unless and until his status under the Refugees Act, Act 130 of 1998, has been lawfully and finally determined.
- (3) It is declared that the continued detention of the applicant is unlawful.
- (4) The first and second respondents are directed to release the applicant forthwith.
- (5) It is declared that the applicant is entitled to remain lawfully in the Republic of South Africa up and until a period of five days after the Refugee Reception Office re-opens, in order to allow him to approach a Refugee Reception Office.
- (6) The first and second respondents are directed, upon submission by the applicant of his asylum application, to accept the applicant's asylum application and to issue him with a temporary asylum seeker permit in accordance with Section 22 of the Refugee Act, pending finalisation of his claim, including the exhaustion of his right of review or appeal in terms of Chapter 3 of the Refugee's Act and the Promotion of Administrative Justice Act 3 of 2000 provided that the applicant applies for review or appeal in the

time periods as afforded by him in terms of Chapter 3 of the Refugee Act and the Promotion of Administrative Justice Act 3 of 2000.

(7) There shall be no order as to costs.

[2]. And in case number **46973/2021** (*Tesfaye v The Minister of Home Affairs and Another*), the following order is made: -

- (1) This application is urgent.
- (2) Subject to the applicant approaching the Refugee Reception Office, as contemplated in paragraph 5 below, the first and second respondents are interdicted from deporting the applicant unless and until his status under the Refugees Act, Act 130 of 1998, has been lawfully and finally determined.
- (3) It is declared that the continued detention of the applicant is unlawful.
- (4) The first and second respondents are directed to release the applicant forthwith.
- (5) It is declared that the applicant is entitled to remain lawfully in the Republic of South Africa up and until a period of five days after the Refugee Reception Office re-opens, in order to allow him to approach a Refugee Reception Office.
- (6) The first and second respondents are directed, upon submission by the applicant of his asylum application, to accept the applicant's asylum application and to issue him with a temporary asylum seeker permit in accordance with Section 22 of the Refugee Act, pending finalisation of his claim, including the exhaustion of his right of review or appeal in terms of Chapter 3 of the Refugee's Act and the Promotion of Administrative Justice Act 3 of 2000 provided that the applicant applies for review or appeal in the time periods as afforded by him in terms of Chapter 3 of the Refugee Act and the Promotion of Administrative Justice Act 3 of 2000.
- (7) There shall be no order as to costs.

JUDGMENT

Adams J:

[1]. During the week of 11 to 15 October 2021, I had before me in the Urgent Court these two applications against the Ministry of Home Affairs (the Minister) by the applicants, in which they sought orders *inter alia* interdicting the Minister from deporting them, as well as orders declaring their continued detention unlawful. The applicants also asked for orders directing the Minister to release both of them without further delay. The relief sought by them were identical and were based on similar factual matrices and legal arguments. The applications were argued together and the legal principles applicable to both of the applications and the broad factual matrix relevant to each of them overlap considerably. A single judgment dealing with the two applications would therefore suffice and would, in my view, constitute an efficient use of judicial resources.

[2]. The two applicants (Mr Birhu and Mr Tesfaye) are illegal immigrants from Ethiopia who are presently detained at the Lindela Repatriation Facility (Lindela), awaiting deportation. The applicants entered South Africa illegally from Zimbabwe, having travelled from Ethiopia. Mr Birhu alleges that he entered South Africa during August 2020 and Mr Tesfaye states that he came into the country during April 2021. On 20 August 2021, Mr Birhu was arrested at Olievenhoutbosch, Pretoria, for unlawfully entering and residing in South Africa in contravention of the Immigration Act. On 23 August 2021, the Magistrates' Court in Pretoria authorised the detention of Mr Birhu for a period of thirty days in terms of the provisions of the Immigration Act, pending his deportation,

[3]. Mr Tesfaye was arrested on 7 August 2021 by members of the South African Police Services in Fochville for being an illegal immigrant. On 10 August 2021 the Fochville Magistrates Court authorised a warrant for the detention of Mr Tesfaye for purposes of repatriation. As already indicated both Mr Birhu and Mr Tesfaye are presently detained at Lindela, awaiting their deportation and repatriation to Ethiopia.

[4]. As I have indicated above, in their urgent applications, the applicants challenge the lawfulness of their continued detention and both of them sought orders interdicting the respondents from deporting them until their status under the Refugees Act, Act 13 of 1998, as amended ('the Refugees Act') have been determined. They further sought orders that they be released from jail in order to approach a Refugee Reception Centre to apply for asylum. The applications are opposed by the respondents.

[5]. The Minister contends that the applicants were detained in terms of the provisions of the Immigration Act and that there were court orders authorizing their detention pending deportation.

[6]. It is the case of the applicants that they are asylum seekers. Both of them fled their home country, Ethiopia, for fear of being persecuted for their political beliefs. So, for example, Mr Birhu, states in his founding affidavit that: 'Whilst living in Ethiopia in an area called Tigiri, I was persecuted for my political and religious beliefs. I am a member of the opposition party and was mobilizing in the area where I live. The ruling party was terrorizing, persecuting, torturing and killing members of the opposition party to which I belong. My party members were attacked and killed by the opposition party, I managed to escape and ran for my life. I was living in constant fear for my life at the hands of the ruling party and as a result I made the decision to flee Ethiopia and seek asylum in South Africa.'

[7]. He continues as follows later on in his founding affidavit: 'I arrived in the Republic of South Africa in August 2020 through the Zimbabwe border, after having fled Ethiopia in fear of persecution, on account of our political beliefs. On arrival I did not declare my intention to seek asylum at the border because I feared that I might be returned back to my country of origin where I fled in fear of persecution. I was also unsure where and how I should apply for asylum. There was also a possibility that I could move to another country if South Africa could not guarantee my safety.'

[8]. He furthermore states that he had every intention of approaching the Refugee Reception Office in order to legalize his stay in the country, by applying for an asylum seeker permit. However, he was not able to do so as refugee offices had been closed since March 2020 after the outbreak of the COVID-19 pandemic. His arrest happened before these offices re-opened.

[9]. Mr Tesfaye's story is the same as that of Mr Birhu – the similarity is uncanny. This is what Mr Tesfaye says in his founding affidavit: -

'Whilst living in a small town called Durame in Tigra (Ethiopia), I was persecuted. The leaders of the Tigray People's Liberation Front (TPLF), which ruled Ethiopia for almost three decades, is at war with the central government. In the town I live, a group called Junta started to fight back against TPLF. During these fight they were forcing everyone in our community to join them and if you refused, you get killed. My parents stood their ground by refusing to be part of the war and they were brutally killed. In fear of my life, I fled from Ethiopia to seek refuge in another country. I have travelled in many countries south and in some countries the authorities were sympathetic to my cause, but I was tipped that persecutors are aware of my presence in those countries and were trying to get me. I would move from country to country (which I cannot mention at this stage as that may compromise the hosts who will helped me) until I arrived in South Africa.'

[10]. He then goes on and states as follows:

'I arrived in the Republic of South Africa in April 2021 through the Zimbabwe border, after having fled Ethiopia in fear of persecution, on account of our political believes. On arrival I did not declare my intention to seek asylum at the border because I feared that I might be returned back to my country of origin where I fled in fear of persecution. I was also unsure where and how I should apply for asylum. There was also a possibility that I could move to another country if South Africa could not guarantee my safety.'

[11]. Mr Tesfaye also claims that he had every intention of approaching the Refugee Reception Office in order to legalize his sojourn in the country, by applying for an asylum seeker permit. However, he was prevented from doing so as the COVID-19 pandemic had intervened and all RRO's had been closed down indefinitely. Before the Refugee Reception Office could be opened, he was arrested on 7 August 2021, and charged with the contravention of the Immigration Laws of this country. He alleges that he tried to explain to the arresting officers, in his 'broken English', that he was seeking asylum in South African and that he required an opportunity to make such application. His pleas, so Mr Tesfaye avers, fell on deaf ears.

[12]. A reading of a number of cases heard in the High Court and other courts confirms that the stories of Mr Birhu and Mr Tesfaye are all too familiar. However, it has to be accepted, if regard is had to the numerous cases, including those in

the Constitutional Court and the Supreme Court of Appeal, that once an applicant indicates his intention to apply for asylum, he is entitled to be given an opportunity to do so by releasing him and issuing him with a temporal permit until the determination of his asylum application.

[13]. The applicants say that they entered South Africa in fear of being persecuted in Ethiopia and that it was their intention to seek asylum in South Africa. They were unable to do so in the time they have been here largely due to the effects of the lockdown. They have a right to seek asylum, so the applicants contend, and they should be released from detention to enable them to apply for asylum. They contend that their continued detention is unlawful given their intimation that they seek to apply for asylum.

[14]. The respondents oppose the relief sought and deny that the applicants are entitled to their release and further rely on the provisions of the Refugees Act and the Regulations promulgated thereunder to argue that in not complying with the peremptory requirements of the Act and the regulations, the applicants are firstly not entitled to their release and secondly can only make application for asylum if they have shown good cause for their illegal entry and stay in the country as contemplated in the Act and Regulations.

[15]. The provisions of the Refugees Act, Act 13 of 1998, as amended ('the Refugees Act') and the Regulations promulgated thereunder apply to the relief sought by the applicants. A new regulatory framework came into operation on 1 January 2020. Amendments to the Refugees Act were also effected and came into force on the same date.

[16]. It is the case of both applicants that, notwithstanding their illegal entry into South Africa, their entitlement to apply for asylum has not and cannot be extinguished simply on account of their illegal entry and stay in the country.

[17]. The relevant provisions of the Refugees Act and the Regulations provide as follows:

'4. Exclusion from refugee status

- (1) An asylum seeker does not qualify for refugee status for the purposes of this Act if a Refugee Status Determination Officer has reason to believe that he or she

... ..

- (h) having entered the Republic, other than through a port of entry designated as such by the Minister in terms of section 9A of the Immigration Act, fails to satisfy a Refugee Status Determination Officer that there are compelling reasons for such entry; or
- (i) has failed to report to the Refugee Reception Office within five days of entry into the Republic as contemplated in section 21, in the absence of compelling reasons, which may include hospitalisation, institutionalisation or any other compelling reason: Provided that this provision shall not apply to a person who, while being in the Republic on a valid visa, other than a visa issued in terms of section 23 of the Immigration Act, applies for asylum.'

[18]. Section 21, under the heading 'Application for Asylum' reads thus: -

- '(1) (a) Upon reporting to the Refugee Reception Office within five days of entry into the Republic, an asylum seeker must be assisted by an officer designated to receive asylum seekers.

... ..

- (1B) An applicant who may not be in possession of an asylum transit visa as contemplated in section 23 of the Immigration Act, must be interviewed by an immigration officer to ascertain whether valid reasons exist as to why the applicant is not in possession of such visa.

... ..

- (4) Notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if
 - (a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such application has been reviewed in terms of section 24A or where the applicant exercised his or her right to appeal in terms of section 24B: or
 - (b) such person has been granted asylum.'

[19]. And then lastly s 22 provides as follows: -

'22. **Asylum seeker visa**

- (1) An asylum seeker whose application in terms of section 21 (1) has not been adjudicated, is entitled to be issued with an asylum seeker visa, in the prescribed form, allowing the applicant to sojourn in the Republic temporarily, subject to such

conditions as may be imposed, which are not in conflict with the Constitution or international law.'

[20]. The Regulations relating to asylum transit visas provide that any person, who intends to apply for asylum, must declare his or her intention, while at a port of entry, before entering the Republic and provide his or her biometrics and other relevant data as required. Further, an application for asylum in terms of section 21 of the Refugees Act is to be made in person by the applicant upon reporting to a Refugee Reception Office.

[21]. The regulations also provide that an Asylum Seeker, who fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act, must, prior to being permitted to apply for asylum, show good cause for his or her illegal entry or stay in the Republic. And sub-regulation (4) requires of a judicial officer, before whom any foreigner appears, who indicates his or her intention to apply for asylum, to show good cause as contemplated in sub-regulation (3).

[22]. What is clear from the Act and the Regulations is that an aspirant asylum seeker is required to indicate an intention to do so at a port of entry. However, the Act and the regulations also provide a mechanism for someone who has not done so at a port of entry nevertheless to be afforded the opportunity to declare such an intention at a later stage and thereupon may be afforded the opportunity to apply for asylum.

[23]. In my view, these provisions do not create a bar to an application for asylum on the part of those who have either entered South Africa illegally and remain here illegally. This was confirmed by the Constitutional Court in *Ruta v Minister of Home Affairs*¹, when it said so in the following terms:

'The Refugees Act makes plain principled provision for the reception and management of asylum seeker applications. The provisions of the Immigration Act must thus be read together with and in harmony with those of the Refugees Act. This can readily be done. Though an asylum seeker who is in the country unlawfully is an "illegal foreigner" under the Immigration Act, and liable to deportation, the specific provisions of the Refugees Act

¹ *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC), (CCT02/18) [2018] ZACC 52

intercede to provide imperatively that, notwithstanding that status, his or her claim to asylum must first be processed under the Refugees Act.

This is the meaning of Section 2 of the Act, and it is the meaning of the two statutes when read together to harmonise with each other.'

[24]. On what is before, I am satisfied that the applicants should not automatically be excluded from the provisions of the Refugees Act. Each of them say that what compelled them to leave Ethiopia is the fact that they feared persecution.

[25]. The applicants say that once they make an election to apply for asylum they are entitled to their release in order to present themselves to a Refugee Reception Office and that the refusal by the respondents to release them renders their current detention unlawful.

[26]. The applicants did not report at a port of entry and intimated an intention to apply for asylum. They were therefore not issued with asylum transit visas that would have allowed them to enter the country and thereafter present themselves to a Refugee Reception office. They do not have valid immigration visas and they were accordingly at risk of being arrested and this is what occurred.

[27]. The Refugee Reception Offices remain closed and it is not clear when they will be re-opened. The applicants do however retain the right to be afforded the opportunity to show good cause and if successful to then apply for asylum. The only way in which the applicants can be allowed to exercise this right is to release them from detention.

[28]. As the law presently stands, the applicants are entitled to be released from detention as per *Ruta*. That position has not been changed by the recent amendment to the Refugees Act and the Regulations which came into effect on 1 January 2020. The applicants are therefore entitled to the relief claimed in their urgent applications.

[29]. As to costs, I consider that it would be fair to all the parties to direct that there shall be no order as to costs. Although the applicants have been successful, I do think that it was unreasonable of the respondents to oppose the applications on the basis they did. It is so that the applicants in both applications could and

should have been more pro-active in their attempts to regularize their stays in the country. Therefore, in the exercise of my discretion I intend granting no order as to costs in both the applications.

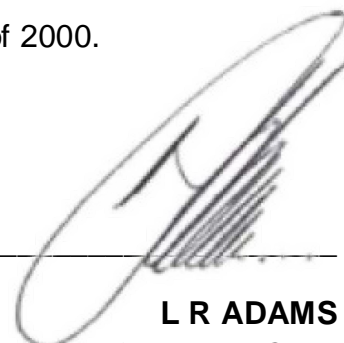
Order

[30]. Accordingly, in case number **46972/2021** (*Birhu v The Minister of Home Affairs and Another*), I make the following order: -

- (1) This application is urgent.
- (2) Subject to the applicant approaching the Refugee Reception Office, as contemplated in paragraph 5 below, the first and second respondents are interdicted from deporting the applicant unless and until his status under the Refugee Act, Act 130 of 1998, has been lawfully and finally determined.
- (3) It is declared that the continued detention of the applicant is unlawful.
- (4) The first and second respondents are directed to release the applicant forthwith.
- (5) It is declared that the applicant is entitled to remain lawfully in the Republic of South Africa up and until a period of five days after the Refugee Reception Office re-opens, in order to allow him to approach a Refugee Reception Office.
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- (7) There shall be no order as to costs.

[31]. And in case number **46973/2021** (*Tesfaye v The Minister of Home Affairs and Another*), the following order is made: -

- (1) This application is urgent.
- (2) Subject to the applicant approaching the Refugee Reception Office, as contemplated in paragraph 5 below, the first and second respondents are interdicted from deporting the applicant unless and until his status under the Refugee Act, Act 130 of 1998, has been lawfully and finally determined.
- (3) It is declared that the continued detention of the applicant is unlawful.
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- (5) It is declared that the applicant is entitled to remain lawfully in the Republic of South Africa up and until a period of five days after the Refugee Reception Office re-opens, in order to allow him to approach a Refugee Reception Office.
- (6) The first and second respondents are directed, upon submission by the applicant of his asylum application, to accept the applicant's asylum application and to issue him with a temporary asylum seeker permit in accordance with Section 22 of the Refugee Act, pending finalisation of his claim, including the exhaustion of his right of review or appeal in terms of Chapter 3 of the Refugee's Act and the Promotion of Administrative Justice Act 3 of 2000 provided that the applicant applies for review or appeal in the time periods as afforded by him in terms of Chapter 3 of the Refugee Act and the Promotion of Administrative Justice Act 3 of 2000.
- (7) There shall be no order as to costs.



L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

HEARD ON:	15 th October 2021 – in a ‘virtual hearing’ during a videoconference on <i>Microsoft Teams</i>
JUDGMENT DATE:	22 nd October 2021 – judgment handed down electronically
FOR THE APPLICANTS:	Advocate T Lipshitz
INSTRUCTED BY:	N F Buthelezi Attorneys, Roodepoort
FOR THE FIRST AND SECOND RESPONDENTS:	Advocate Retha Richards
INSTRUCTED BY:	The State Attorney, Pretoria