Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 734/2010

In the matter between:

M[...] A[...] A[...]	**First Appellant**
Y[...] A[...] D[...]	**Second Appellant**

and

THE MINISTER OF HOME AFFAIRS	**First Respondent**
THE DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	**Second Respondent**
KENYA AIRWAYS	**Third Respondent**
ANALYTICAL RISK MANAGEMENT INTERNATIONAL	**Fourth Respondent**
AIRPORTS COMPANY SOUTH AFRICA	**Fifth Respondent**

Neutral citation:	A[...] v Minister of Home Affairs (734/10) [2011] ZASCA 2 (15 February 2011)
Coram:	MPATI P, CACHALIA, LEACH and TSHIQI JJA and BERTELSMANN AJA
Heard:	**24 NOVEMBER 2010**
Delivered:	**15 FEBRUARY 2011**
Summary:	Appellants granted refugee and asylum seeker status in South Africa prior to departing for Namibia without informing authorities – deported from that country to their country of origin via South African airport – held in Inadmissible Facility and refused entry by first and second respondents – entitled to be re-admitted to South Africa with retention of their former status – failure to allow appellants entry criticised.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Goodey AJ sitting as court of first instance).

The appeal succeeds with costs, including the costs of two counsel.

The order of the court a quo is set aside and for it the following is substituted:

‘1. The Fourth and Fifth Respondents are directed forthwith to release the Applicants from detention in the Inadmissible Facility at OR Tambo International Airport.

2. It is declared that the First Applicant is entitled to remain in South Africa until a decision has been made on his application for asylum and, where applicable, the Applicant has had an opportunity to exhaust his rights of review or appeal in terms of Chapter 2 of the Refugees Act 130 of 1998 and the Promotion of Administrative Justice Act 3 of 2000.

3. It is declared that the Second Applicant is entitled to remain in South Africa in accordance with his status as a refugee.

4. The First and Second Respondents are directed forthwith to issue each of the First and Second Applicants with an Asylum Transit Permit in terms of section 23 of the Immigration Act 13 of 2002. Such permits shall remain valid for 14 days, during which period the First and Second Applicant will reside at My Lillipot Shelter, 4th Street, Rosettenville, or such other address as is provided to the First and Second Respondents.

5. The First and Second Respondents are ordered to pay the costs of the application, one paying the other to be absolved, including the costs of two counsel where applicable.’

JUDGMENT

BERTELSMANN AJA (MPATI P, CACHALIA, LEACH and TSHIQI JJA concurring)

[1] At the end of the hearing of this appeal, by agreement between the parties concluded at the suggestion of the President, this court made the following order:

'(a) By agreement it is ordered:

1. The Fourth and Fifth Respondents are directed forthwith to release the Applicants from detention in the Inadmissible Facility at OR Tambo International Airport.

2. It is declared that the First Applicant is entitled to remain in South Africa until a decision has been made on his application for asylum and, where applicable, the Applicant has had an opportunity to exhaust his rights of review or appeal in terms of Chapter 2 of the Refugees Act 130 of 1998 and the Promotion of Administrative Justice Act 3 of 2000.

3. It is declared that the Second Applicant is entitled to remain in South Africa in accordance with his status as a refugee.

4. The First and Second Respondents are directed forthwith to issue each of the First and Second Applicants with an Asylum Transit Permit in terms of section 23 of the Immigration Act 13 of 2002. Such permits shall remain valid for 14 days, during which period the First and Second Applicant will reside at My Lillipot Shelter, 4th Street Rosettenville, or such other address as is provided to the First and Second Respondents.

(b) The issue of costs stands over for later determination.'

[2] The court indicated that the reasons motivating the granting of the order and determining the costs would be given at a later stage. This judgment not only contains such reasons and deals with the costs but also serves to highlight significant shortcomings in the way in which the first and second respondents dealt with the matter.

[3] The order was issued immediately to address the self-evident urgency of resolving the appellants' plight. There is precedent for the granting of an order prior to giving judgment at a later stage when the outcome of the appeal is not in doubt and the litigants' interests demand an immediate resolution: *AD & another v DW & others (Centre for Child Law as amicus curiae*; *Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC); *Occupiers Erf 101, 102, 104 and 112 Shorts Retreat v Daisy Dear (Pty) Ltd & others* [2009] 2 All SA 410 (SCA).

[4] Although the deponent on behalf of the first and second respondents chose to deny this notorious fact, it was never suggested in argument that Somalia is anything other than a failed or dysfunctional state that is unable to maintain public order or protect the lives of its citizens. It is not disputed that the appellants hail from Somalia or that their lives would be in danger if they were to be forced to return to that country. The appellants had been held in the Inadmissible Facility at the Oliver Tambo International Airport ('the airport') since 7 September 2010. They were entitled to enter and remain in South Africa for as long as the law permitted - hence the immediate order.

[5] The present proceedings were initiated by Pamela Msizi, ('Msizi'), a protection officer at the United Nations High Commissioner for Refugees ('UNHCR') in South Africa. Her *locus standi* to launch the application by the exercise of the competence granted by s 38(b) of the Constitution was not challenged. She approached the Gauteng North High Court (Pretoria) on an urgent basis to interdict all respondents but the third from forcing the appellants to board a flight to Somalia and also to obtain a mandamus against them to facilitate the appellants' re-admission to the Republic. The second appellant was a recognised refugee and the first a registered asylum seeker. A further mandamus was sought to allow the 'second' appellant to continue his application for asylum under s 22 of the Refugee Act 130 of 1998 ('the Act') (the reference to the second appellant was a clear error as the first appellant is the asylum seeker – but this mistake caused no prejudice to the respondents). When the application was launched, the appellants were being held at the Inadmissible Facility at the airport. They had made telephonic

contact with Msizi after having been deported from Namibia as illegal aliens and informed her that they were on the verge of being placed on an Air Kenya flight en route to Mogadishu via Nairobi.

[6] The appellants also told Msizi that they had earlier fled Somalia for South Africa but, because of their fears of xenophobia here, had left for Namibia after they had been told that the officers of the UNHCR in that country might be able to arrange for their admission to a country such as Canada where they might also further their education. As a result of a misunderstanding it was stated in the founding affidavit that the second appellant had left South Africa for Namibia in April 2009 and not 2010, which is the correct date. This mistake was corrected in his replying affidavit. I deal with this aspect more fully later. Be that as it may, they left South Africa for Namibia without informing the authorities and were then arrested and deported as set out above.

[7] In the process of being deported from Namibia to Somalia, the appellants were flown by Air Namibia to Johannesburg where they were to be placed on a Kenya Airways flight to Nairobi, Kenya. From this country they were ultimately to be transported to Mogadishu. However, they wanted to remain in South Africa and sought Msizi's assistance to this end. From memory the appellants provided Msizi with the numbers of the files in which their applications for asylum and refugee status had been processed by the Department of Home Affairs ('the Department').

[8] Msizi attempted to solve the appellants' difficulties by engaging with the Department, represented in the later application to the court below and in this appeal by its Minister and its Director-General as first and second respondent respectively. The official tasked to deal with the appellants' case refused to permit their entry into the country on the ground that the appellants were Namibian deportees and that South African authorities had no jurisdiction to interfere with another state's deportation order.

[9] The urgent application referred to above followed. It was postponed to allow the first and second respondents to prepare and file opposing affidavits. An interim order was made to ensure that appellants were not removed to another country against their will, pending the finalisation of the application.

[10] The third respondent, Kenya Airways, was joined as the carrier that was to fly the appellants out of South Africa. The fourth respondent, Analytical Risk Management International: Aviation Security Division, is a private security business with its headquarters at 4 Karen Street, Bryanston, Johannesburg. It runs the international Inadmissible Facility under the auspices of the fifth respondent, the Airports Company of South Africa. Established in terms of the Airports Company Act 44 of 1993, the fifth respondent is responsible for the operation and control of the airport, including the Inadmissible Facility which is located in the airport building. The third, fourth and fifth respondents did not oppose the application.

[11] As stated above, the appellants sought an interdict to prevent their deportation from South Africa and also a mandamus to facilitate their entry into the country, the second appellant as a recognized refugee and the first appellant as an asylum seeker. A further order was sought against the first and second respondents to re-issue the second appellant with a permit in terms of the Act. (This order should have been sought on behalf of the first appellant as set out above.)

[12] As proof of the second appellant's status, Msizi attached a copy of the second appellant's Recognised Refugee Status Permit to her founding

affidavit. This permit was issued in 2010 in terms of s 27(a) of the Act.[1] It is valid until January 2012.

[13] In a supplementary affidavit prepared after the interim order had been granted Msizi supplied the file number of the file in which the first appellant had lodged his asylum application. The appellants also filed supplementary affidavits to explain why they had entered South Africa. The second appellant left his home country and came to South Africa in 2003 because of the threat of violence that endangered his life. The first appellant had been persecuted in Somalia. Upon entry into South Africa in 2009 he was issued with a temporary asylum seeker's permit. He quoted the number of his file from memory. His memory failed him. The file number initially supplied was incorrect, but after discovering the error, he gave the correct reference in the replying affidavit.

[14] A Director: Port of Entry in charge of immigration duties at the airport, Mr Ronny Marule, deposed to the first and second respondents' ('the respondents') answering affidavit. He denied that the respondents had any record relating to the appellants and disputed their status as refugees or asylum seekers.

[15] He raised a number of further defences that may be summarized as follows:

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[1]'27 Protection and general rights of refugees
A refugee –
(a)is entitled to a formal written recognition of refugee status in the prescribed form;
(b) enjoys full legal protection, which includes the rights set out in Chapter 2 of the Constitution and the right to remain in the Republic in accordance with the provisions of this Act;
(c) is entitled to apply for an immigration permit in terms of the Aliens Control Act, 1991, after five years' continuous residence in the Republic from the date on which he or she was granted asylum, if the Standing Committee certifies that he or she will remain a refugee indefinitely;
(d) is entitled to an identity document referred to in section 30;
(e) is entitled to a South African travel document on application as contemplated in section 31;
(f) is entitled to seek employment; and
(g) Is entitled to the same basic health services and primary education which the inhabitants of the Republic receive from time to time.'

(a) The respondents were not responsible for the appellants as they were being deported by another country. They were in fact the responsibility of Air Namibia, on whose flight they had been brought to South Africa. Reliance was placed on the Chicago Convention on International Aviation, which was said to impose that duty upon the carrier.

(b) While being detained at the Inadmissible Facility they were not in law in South Africa and the South African authorities and courts had no jurisdiction over them. They were held pending their return to Namibia and were thus not being deported. Their status in South Africa was irrelevant to their fate.

(c) South African courts had no jurisdiction to consider or interfere with the execution of a deportation order issued by another country.

(d) As deportees of another country, the appellants had no right to invoke the protection of the Act. (A further suggestion that the appellants were being deported by order of the Namibian High Court, contained in Marule's affidavit, has no foundation in fact. No attempt was made to explain how that allegation came to be made. Marule opined, incorrectly, that such an order must be enforced by South African courts as a matter of course.)

(e) In argument a further point was raised that was not referred to in the affidavit filed on respondents' behalf, namely that the appellants had waived any claim to recognition of their respective status – if such were held to have been established – by reason of the fact that they had left the country without the Minister's or any other authority's consent.

[16] In their replying affidavits the appellants joined issue with the respondents' denial of being in possession of their files, evidencing their status. Msizi obtained proof from the Refugee Reception Offices in Durban and Port Elizabeth that a file existed in the Department for each appellant and confirmed the correct file numbers. The confusion that had arisen relating to the date upon which the appellants left the country was explained.

[17] The court below held that the appellants had not established their respective status as a recognized refugee and an asylum seeker. It concluded that an irresolvable dispute of fact had arisen in the affidavits in respect of this issue. It further held that a South African court could not interfere with a

Namibian deportation order and that it could not be argued that the appellants were in law in South Africa while being held in the Inadmissible Facility. The application was dismissed, but the appellants were allowed to remain in the Facility pending this appeal, leave having been granted by the court below.

[18] In argument before this court, the respondents relied upon substantially the same defences that had been advanced in the court below. I propose to deal with the respondents' grounds of opposition before commenting upon their approach toward this matter.

[19] The appellants' status as an asylum seeker and a recognized refugee respectively was established by the identification of their files and the second appellant's permit. The respondents' allegation that the department had no record of the appellants was refuted in the replying affidavits. The respondents did not file an additional affidavit once the appellants' correct file numbers were placed on record, which they surely would have done if the allegations in the replying affidavits were incorrect. Indeed, the respondents' officials were eventually able to trace the appellants' files. Counsel for the respondents informed the court from the Bar that they were in her possession at that stage, although she was instructed that they contained no trace of the appellants' permits or applications. But that does not mean that the applications had not been lodged nor permits issued as the appellants have alleged, and the court below erred in holding that the appellants had not succeeded in establishing their status.

[20] The argument that individuals who are held in an inadmissible facility at a port of entry into the Republic are beyond the courts' jurisdiction flies in the face of the decision of *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC). Yacoob J said the following at par 25 and 26:

'The government contended that our Bill of Rights does not accord protection to foreign nationals at ports of entry who have not yet been allowed formally to enter the country. It was accordingly suggested that the provisions in issue cannot be found to be inconsistent with the Constitution. The government relied on s 7(1) of the

Constitution which enshrines the rights of all the people "in our country". We were urged to find that people at ports of entry who have not yet been allowed formally to enter South Africa, are not "in our country" within the meaning of the subsection.

It is neither necessary nor desirable to answer the general question as to whether the people to whom s 34 of the Act applies are beneficiaries of all the rights in the Constitution. It is apparent from this judgment that the rights contained in s 12 and s 35(2) of the Constitution are implicated. The only relevant question in this case therefore is whether these rights are applicable to foreign nationals who are physically in our country but who have not been granted permission to enter and have therefore not entered the country formally. These rights are integral to the values of human dignity, equality and freedom that are fundamental to our constitutional order. The denial of these rights to human beings who are physically inside the country at sea- or airports merely because they have not entered South Africa formally would constitute a negation of the values underlying our Constitution. It could hardly be suggested that persons who are being unlawfully detained on a ship in South African waters cannot turn to South African courts for protection, or that a person who commits murder on board a ship in South African waters is not liable to prosecution in a South African court.'[2]

[21] It is a matter for comment that the respondents were parties to that matter and that the Constitutional Court rejected a similar argument that was advanced in the court below and before us. No submission was made before us that would justify any departure by this court from the principles laid down in that decision.

[22] Passengers on an international flight landing in South Africa are subject to the jurisdiction of South African courts: *Nkondo v Minister of Police & another* 1980 (2) SA 894 (O). The respondents' submission is not only incompatible with the provisions of the 1951 United Nations Convention on the Status of Refugees and its Protocol as well as the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, but also with the provisions of the Act, section 6 of which provides for it to be applied with due regard to the provisions of the UN Convention and its Protocol as well as the 1969 OAU Convention. The Act also provides for the admission of

[2]See further Madala J's minority judgment paras 55 to 57.

foreigners who find themselves in distressed circumstances owing to the conditions enumerated in ss 2 and 3 thereof.[3]

The words of the Act mirror those of the UN Convention and the OAU Convention of 1969.[4] They patently prohibit the prevention of access to the Republic of any person who has been forced to flee the country of her or his birth because of any of the circumstances identified in s 2 of the Act.

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[3] '2 General prohibition of refusal of entry, expulsion, extradition or return to other country in certain circumstances

Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where-

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.'

3 Refugee status

Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person-

(a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or

(b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere, or

(c) is a dependant of a person contemplated in paragraph (a) or (b).'

Sections 2, 3 and 4 of the Act have been amended by the Refugees Amendment Act 33 of 2008, which has not yet been implemented. The amendments do not change the essential spirit or import of the Act.

[4] 1969 OAU Convention

'Article 1

Definition of the term "Refugee"

1. For the purposes of this Convention, the term "refugee" shall mean every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.

2. The term "refugee" shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

3. In the case of a person who has several nationalities, the term "a country of which he is a national" shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of which he is a national if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Refugees entitled to be recognised as such may more often than not arrive at a port of entry without the necessary documentation and be placed in an inadmissible facility.[5] Such persons have a right to apply for refugee status, and it is unlawful to refuse them entry if they are *bona fide* in seeking refuge. The Department's officials have a duty to ensure that intending applicants for refugee status are given every reasonable opportunity to file an application

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4. This Convention shall cease to apply to any refugee if: (a) he has voluntarily re-availed himself of the protection of the country of his nationality, or, (b) having lost his nationality, he has voluntarily reacquired it, or, (c) he has acquired a new nationality, and enjoys the protection of the country of his new nationality, or, (d) he has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution, or, (e) he can no longer, because the circumstances in connection with which
he was recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality, or, (f) he has committed a serious non-political crime outside his country of refuge after his admission to that country as a refugee, or, (g) he has seriously infringed the purposes and objectives of this Convention.
5. The provisions of this Convention shall not apply to any person with respect to whom the country of asylum has serious reasons for considering that:
(a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
(b) he committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
(c) he has been guilty of acts contrary to the purposes and principles of the
Organization of African Unity;
(d) he has been guilty of acts contrary to the purposes and principles of the United Nations.
For the purposes of this Convention, the Contracting State of Asylum shall determine whether an applicant is a refugee.

Article 2
Asylum
1. Member States of the OAU shall use their best endeavours consistent with their respective legislations to receive refugees and to secure the settlement of those refugees who, for well-founded reasons, are unable or unwilling to return to their country of origin or nationality.
2 The grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.
3. No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.
4. Where a Member State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international cooperation take appropriate measures to lighten the burden of the Member State granting asylum.
5. Where a refugee has not received the right to reside in any country of asylum, he may be granted temporary residence in any country of asylum in which he first presented himself as a refugee pending arrangement for his resettlement in accordance with the preceding paragraph.
6. For reasons of security, countries of asylum shall, as far as possible, settle refugees
at a reasonable distance from the frontier of their country of origin.'

with the relevant Refugee Reception Office – unless the intending applicant is excluded in terms of s 4 of the Act.[6]

[23] An intending applicant's rights are clearly justiciable, even if the individual is held in an inadmissible facility. The Act indubitably applies to the very category of persons into which the appellants fall. The respondents' argument that the Act does not apply to them ignores the very reason for placing the Act on the statute book.

[24] The Act's provisions are in accordance with international law and practice, as evidenced by decisions of the European Court of Human Rights to which we were referred by counsel for the appellants: *Amuur v France* (1996) 23 EHRR 533 and *Riad and Idiab v Belgium* No 29787/03. In both instances that court had no difficulty in holding that municipal courts had

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[5] Yacoob J's description of alleged illegal foreigners in *Lawyers for Human Rights* supra para 20 applies in equal measure to refugees and asylum seekers:
'The provisions challenged in the High Court are of immense public importance, being concerned with a delicate issue that has implications for the circumstances in and the extent to which we restrict the liberty of human beings who may be said to be illegal foreigners. The determination of this question could adversely affect not only the freedom of the people concerned but also their dignity as human beings. The very fabric of our society and the values embodied in our Constitution could be demeaned if the freedom and dignity of illegal foreigners are violated in the process of preserving our national integrity.
Moreover, many of the people who arrive at a port of entry without being entitled to any of the large variety of residence permits allowed by the Act may be vulnerable and poor without support systems, family, friends or acquaintances in South Africa. Their understanding of the South African legal system, its values, its laws, its lawyers and its non-governmental organisations may be limited indeed. Finally, it is apparent that in most cases, the ship that brought the affected person into the country would depart within a few days, and in many cases in under 24 hours of its arrival.'

[6] '4 Exclusion from refugee status
(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she-
(a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or
(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or
(d) enjoys the protection of any other country in which he or she has taken residence.
(2) For the purposes of subsection (1) (c), no exercise of a human right recognised under international law may be regarded as being contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity.'

jurisdiction to deal with the rights of persons held in circumstances similar to those of the appellants.

[25] The respondents relied on the Chicago Convention on International Civil Aviation to support the argument that an inadmissible facility is the domain of international carriers who are responsible for the transport of deportees to the state to which the deporting state has decreed that they should be deported to, regardless whether the deportees are refugees from that country or not. It appears, however, that they had the previous version of Article 5.4 of Annex 9 to the Convention (Standards and Recommended Practices on Facilitation) in mind, which placed the responsibility for looking after a person who was denied entry into a contracting state's territory on the carrier who transported him or her to the relevant Port of Entry. Counsel for the appellant drew attention to the latest version of this particular Article, to which a note was added in 2005 which reads:

'Note – nothing in this provision is to be construed so as to allow the return of a person seeking asylum in the territory of a Contracting State, to a country where his life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group or political opinion.'

The Convention, which has been incorporated into our municipal law by the Civil Aviation Act 13 of 2009, thus provides no support for the respondents' case.

[26] The appellants would face a real risk of suffering physical harm if they were forced to return to Somalia. It is obvious that no effective guarantee can be given that the appellants would not be persecuted or subjected to some form of torture, or cruel, inhuman and degrading treatment if they are compelled to re-enter that country. It is the prevention of this harm that the Act seeks to address by prohibiting a refugee's deportation. Deportation to another state that would result in the imposition of a cruel, unusual or degrading punishment is in conflict with the fundamental values of the Constitution: *Mohamed & another v President of the Republic of South Africa*

& others (Society for the Abolition of the Death Penalty in South Africa & another intervening) 2001 (3) SA 893 (CC) in which the court stated:[7]

'In Makwanyane Chaskalson P said that by committing ourselves to a society founded on the recognition of human rights we are required to give particular value to the rights to life and dignity, and that 'this must be demonstrated by the State in everything that it does'. In handing Mohamed over to the United States without securing an assurance that he would not be sentenced to death, the immigration authorities failed to give any value to Mohamed's right to
life, his right to have his human dignity respected and protected and his right not to be subjected to cruel, inhuman or degrading punishment. . . .
' But whatever the position may be under Canadian law where deprivation of the right to life, liberty and human dignity is dependent upon the fundamental principles of justice, our Constitution sets different standards for protecting the right to life, to human dignity and the right not to be treated or punished in a cruel, inhuman or degrading way. Under our Constitution these rights are not qualified by other principles of justice. There are no such exceptions to the protection of these rights. Where the removal of a person to another country is effected by the State in circumstances that threaten the life or human dignity of such person, ss 10 and 11 of the Bill of Rights are implicated. There can be no doubt that the removal of Mohamed to the United States of America posed such a threat. This is perhaps best demonstrated by reference to the case of Salim, who was extradited from Germany to the United States subject to an assurance that the death penalty would not be imposed on him. This assurance has been implemented by the United States and Salim is to be tried in proceedings in which the death sentence will not be sought. . . .
It is not only ss 10 and 11 of the Constitution that are implicated in the present case. According to s 12(1)(d) and (e) of our Constitution, everyone has the right to freedom and security of the person, which includes the right not to be tortured in any way and not to be treated or punished in a cruel, inhuman or degrading way. For the reasons given in Makwanyane, South African law considers a sentence of death to be cruel, inhuman and degrading punishment.'

[27] By the same token, refusing a refugee entry to this country, and thereby exposing her or him to the risk of persecution or physical violence in his home country is in conflict with the fundamental values of the Constitution.

[7]7 Paragraphs 48, 52 and 54.

[28] The argument that a South African court has no jurisdiction over the Inadmissible Facility by virtue of the fiction that it does not form part of the Republic's territory is wrong. Potential asylum seekers and refugees held in that facility are entitled to the assistance of the Department's officials and need show no more than that they are persons who might qualify as refugees or asylum seekers. Whether or not the appellants were previously admitted to the Republic or were granted the status of recognized refugee or asylum seeker is irrelevant for the determination of this question.

[29] The suggestion that a Namibian deportation order precludes the South African authorities and courts from dealing with the case of a Namibian deportee who is held in an inadmissible facility at a South African port of entry is untenable. If correct, it would constitute an unwarranted administrative intrusion into the affairs of the Republic, a sovereign state. This suggestion is foreign to international law: *Commissioner of Taxes, Federation of Rhodesia v McFarland* 1965 (1) SA 470 (W) at 473G - 474G. A sovereign State has exclusive control over its territory. Foreign States may exercise only such authority in its domain as may be agreed by international treaty. Dugard *International Law – A South African Perspective* 3rd ed (2005) p 82 states that statehood is defined by a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states. He adds in respect of the characteristic of government: 'In order to meet this requirement a state must have a government that is in effective control of its territory, and that is independent of any other authority.' South Africa is clearly a sovereign and independent state.[8] The appellants are within this country

[8] Friedman J identified independence in a defined territory as a key aspect of sovereignty in *S v Banda & others* 1989 (4) SA 519 (BG) at 524F – 525G, adopting the concept of territorial sovereignty coined in the *Island of Palmas Arbitration* by Max Huber.
' It is beyond question that the Republic of South Africa is a sovereign State having majestas, and is recognised as such internationally. Sovereignty has been defined in international law G by Max Huber, Arbitrator on Territorial Sovereignty, in Island of Palmas Arbitration (1928) 22 AJIL 867 at 874, 875, 876 as follows:
". . .Sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. . . . Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this

and are entitled to the protection of its laws, even if they happen to have arrived here in the course of being deported from another sovereign and independent state The respondents' contrary contentions are without merit.

[30] The respondents sought to persuade this Court that the appellants were not held by them, but by the fourth and fifth respondents, who fall under the Department of Transport's jurisdiction. This argument was not raised in the court below. It is pure sophistry. Refugees are the responsibility of the respondents, who are tasked by the Act to attend to individuals who find themselves in such invidious circumstances. The fourth and fifth respondents did not oppose the application. The respondents' refusal to allow the

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principle of the exclusive competence of the State in regard to its own territory in such a way to make it the point of departure in settling most questions that concern international relations. . . .

Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as a corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty. Territorial sovereignty cannot limit itself to its negative side, ie to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points in the minimum of protection of which international law is the guardian. . . . "

'An incident of the general right of sovereignty is the right of a State to deal with its territory. According to the *Journal of American Jurisprudence*:

'It is part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective limits. The boundaries so established and fixed by compact between nations become conclusive on all the subjects and citizens thereof, and bind their rights; they are to be treated, to all intents and purposes, as the real boundaries. Included within the territory of a nation are all such islands as are natural appendages of the coast on which they border and from which they are formed. It is immaterial whether they are formed of earth, sand, rock, or some other substance, or whether they are of sufficient firmness to be inhabited or fortified. Islands of alluviation are within the rule. Governments as well as private persons are bound by the practical line that has been recognised and adopted as their boundary. A settlement of national boundaries is not a judicial, but a political, question. The courts are bound by the decisions of the executive and legislative departments of the government in this respect, and judicial notice may be taken of the territorial extent of the nation whose laws the courts administer.'

(See 45 Am Jur 2d S 23 at 363.) 'Sovereignty' has been further defined in 45 Am Jur 2d S 37 at 378 as follows:

'"Sovereignty", in its full sense, imports the supreme, absolute, and uncontrollable power by which an independent State is governed. (Moore v Smaw 17 Cal 199, 218; M Salimoff & Co v Standard Oil Co 237 App Div 686, 262 NYS 639, affd 262 NY 220, 186 NE 679, F 89 ALR 345. For other definitions, see Brandes v Mitterling 67 Ariz 349, 196 P2d 464; Bisbee v Cochise County 52 Ariz 1, 78 P2d 982; Antonik v Chamberlain 81 Ohio App 465, 37 Ohio Ops 305, 78 NE2d 752.)'

In addition thereto, each State legislates for itself, but its legislation can operate on itself alone, and except as otherwise provided by statute or government, only within its own territory.'

appellants to enter the country is the single cause for their continued sojourn in the Inadmissible Facility. Nothing more need be said about this submission.

[31] The respondents' contention that the appellants would not be deported, but only returned to Namibia, where they would not face physical hardship, is also bereft of validity. If returned to Namibia the appellants would simply be deported again – this time perhaps via another country - to Somalia.

[32] The further suggestion that the appellants had waived their right to be considered as refugees or asylum seekers, advanced for the first time in reaction to a question by this court, faces insurmountable obstacles. Waiver is never to be presumed, especially not in respect of an alleged surrender of the protection afforded by fundamental rights.[9] Quite apart from the fact that reg 9(1) published in terms of the Act expressly provides for a second application by a returning refugee, there is nothing in the papers to suggest that the appellants were aware of the full extent of their rights, or that they appreciated that their departure might be regarded as a waiver of the protection they enjoyed under the Act. There can be no suggestion that the appellants intended to abandon their respective refugee or asylum seeker status.

[33] It follows that the appeal must succeed. However, it is unfortunately necessary to comment upon the respondents' approach to this litigation. Section 7 of the Constitution imposes the duty on organs of State – and thus on officials of the Department – to 'respect, promote and fulfil the rights in the Bill of Rights.' The respondents' officials have failed to comply with these demands. It is obvious from the manner in which they dealt with the appellants that they had little regard to their fears for their safety should they be compelled to return to Somalia.

[34] A copy of the second appellant's Recognised Refugee Status Permit was annexed to the founding affidavit. It contained a clear fingerprint and a clear Bar Code which, if it had been read even once, would have provided

[9] *Mahomed's* case paras 62 to 64.

confirmation of second appellant's status and identity. Marule failed to inform the court whether or not he had inspected the Bar Code. He adopted an evasive approach by arguing that if second appellant had left the country in 2009, he could not have been issued with a permit in 2010. When the correct date was recorded in the replying affidavit, no attempt was made to place the correct information on record and to concede what could not be denied. Instead, Marule indulged in a sophistic exercise of referring to another official, one Sibanyone, who had allegedly informed him that the permit was not authentic. Her so-called confirmatory affidavit, upon which he relied, revealed no more than a laconic confirmation of Marule's allegation as far as they related to her. This slothful way of placing Sibanyone's evidence before the court resulted in her confirming no more than that she had told Marule what he said she had, but this is no evidence of the truth of the content of that statement or why she had said that the permit was not authentic. This comes perilously close to a deliberate failure to take the court into the official's confidence.

[35] Similar criticism must be levelled at the respondents' failure to inform the court immediately of the fact that the appellants' files had been traced in the Department's records. In spite of the fact that the respondents could no longer harbour any doubt about the appellant's identity once the correct file numbers were placed on record, and they were therefore in duty bound to set the record straight, the respondents persisted in their heads of argument with the denial of being in possession of any record relating to the appellants, putting them to needless effort and expense to meet this spurious defence.

[36] Our courts have on several occasions expressed their disquiet at the failure of Government officials, including the Department's officials, to respect the rights of individuals they deal with and to act in accordance with their duties imposed by the Constitution: *Eveleth v Minister of Home Affairs & another* 2004 (11) BCLR 1223 (T) paras 45 to 48; *Nyathi v MEC for the Gauteng Deparrtment of Health & another* 2008 (5) SA 94 (CC); *Total Computer Services (Pty) Ltd v Municipal Mayor, Potchefstroom Local Municipality & others* 2008 (4) SA 346 (T) para 21; *Van Straaten v President*

of the Republic of South Africa & others 2009 (3) SA 457 (CC). In the present instance the respondents' officials failed to understand the very object and purpose of the Act it was their duty to apply, causing unnecessary litigation and wasted costs. Had the appellants given timeous notice of an intention to apply for a punitive costs order, such would in all likelihood have been granted.

[37] The respondents also argued that even if the appeal succeeded they should not be held liable for the appellants' costs. This argument, too, is devoid of substance. The appellants had to approach a court to avoid their deportation and this court in order to obtain relief denied them in the court below. There is no reason for costs not to follow the event.

[38] The appeal is upheld with costs, including the costs of two counsel. The order of the court a quo is set aside and replaced with the following order (for completeness I repeat paragraphs 1 – 4 of the order granted at the conclusion of the appeal):

'1. The Fourth and Fifth Respondents are directed forthwith to release the Applicants from detention in the Inadmissible Facility at OR Tambo International Airport.

2. It is declared that the First Applicant is entitled to remain in South Africa until a decision has been made on his application for asylum and, where applicable, the Applicant has had an opportunity to exhaust his rights of review or appeal in terms of Chapter 2 of the Refugees Act 130 of 1998 and the Promotion of Administrative Justice Act 3 of 2000.

3. It is declared that the Second Applicant is entitled to remain in South Africa in accordance with his status as a refugee.

4. The First and Second Respondents are directed forthwith to issue each of the First and Second Applicants with an Asylum Transit Permit in terms of section 23 of the Immigration Act 13 of 2002. Such permits shall remain valid for 14 days, during which period the First and Second Applicant will reside at My Lillipot Shelter, 4th Street Rosettenville, or such other address as it provided to the First and Second Respondents.

5. The first and second respondents are ordered to pay the costs of the application, jointly and severally, the one to pay, the other to be absolved, including the costs of two counsel where applicable.'

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E BERTELSMANN
ACTING JUDGE OF APPEAL

APPEARANCES:

For appellants:	S Budlender J van Garderen N Lewis Instructed by: Lawyers for Human Rights Johannesburg Law Clinic, Johannesburg Webbers, Bloemfontein
For respondents:	N Cassim SC N Manaka Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein