



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 2988/2021

In the matter between:

LAFAMO MATEWOS MEGABO

Applicant

and

**THE NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

First Respondent

**ACTING DEPUTY DIRECTOR OF PUBLIC
PROSECUTIONS**

Second Respondent

JUDGMENT

Govindjee J

Issue and background

[1] The issue for determination is the application of s 21(4) of the Refugees Act, 1998¹ ('the Refugees Act'), and the institution or continuation of criminal proceedings pending judicial review of a decision to refuse asylum.

[2] The applicant, an Ethiopian national, fled to South Africa in 2013. He lodged an application for asylum in the manner prescribed by s 21 of the Refugees Act and was issued with an 'asylum seeker temporary permit' or visa. The applicant's application for asylum was adjudicated by a Refugee Status Determination officer. The Refugee Appeal Board subsequently upheld the decision of that officer to reject the application, prompting an application for judicial review.

[3] The applicant failed to renew his permit thereafter due to financial difficulties. During August 2019 he was found by an immigration officer not to be in possession of a valid permit. He was arrested and detained and a criminal prosecution was instituted. An application to challenge the lawfulness of the arrest and detention was dismissed by Roberson J due to an absence of *bona fides*.² The applicant was subsequently released on bail.

[4] The applicant has made various attempts to have the criminal proceedings withdrawn or stopped since October 2020. Both the Senior Public Prosecutor (on 25 February 2021) and the Acting Deputy Director of Public Prosecutions, Makhanda, (on 14 April 2021) rejected those submissions. On 27 August 2021, the first respondent ('the NDPP') made a decision to continue prosecution. It is that conduct, or those decisions, on the part of the respondents that forms the basis of the application, the applicant alleging irrationality and arbitrariness, alternatively unreasonableness as the review grounds.

¹ Act 130 of 1998.

² The basis for that decision is apparent from the papers and the judgment and is immaterial for present purposes.

The applicant's case

[5] In particular, reliance is placed on s 21(4)(a) of the Refugees Act:

'(4) Notwithstanding any other 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...'

[6] The parties were agreed that the pre-amended version of this section, which operated at the time of the applicant's arrest and refers to 'rights of appeal and review in terms of chapter 4', does not materially alter the meaning of the section, that chapter in essence having been replaced by sections 24A and 24B.

[7] The applicant also places reliance on regulation 12(3) of the Regulations to the Refugees Act:

'An asylum seeker visa may be issued to a failed asylum seeker upon service of a Notice of Motion indicating an application for judicial review: Provided that such visa may be issued for a period not exceeding 30 days at a time.'

[8] In essence, the applicant's case is that s 21(4)(a) of the Refugees Act, also in its pre-amended form, barred the institution of any criminal proceedings for the contravention of s 49(1)(a) of the Immigration Act, 2002³ against the applicant. The claim is that this also bars the continuation of such criminal proceedings against him whilst there is a pending review application against the decision of the Refugee Appeal Board for rejecting his asylum application.

[9] Reliance is placed on *Saidi and Others v Minister of Home Affairs and Others*⁴ ('*Saidi*'). In that matter, the applicants were asylum seekers seeking refugee status in South Africa. They each received an asylum seeker temporary permit entitling them

³ Act 13 of 2002.

⁴ *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) ('*Saidi*').

to lawfully reside in the country for the duration of the application process. The temporary permits were extended by the Refugee Reception Officer ('RRO') on application on a few occasions while their asylum seekers' applications were finalised. Those applications were all rejected in terms of s 24(3) of the Refugees Act and subsequent internal reviews or internal appeals, lodged in terms of ss 25 and 26 of the Refugees Act, were unsuccessful. The applicants instituted proceedings for judicial review under PAJA, challenging the rejection of their applications.

[10] A previous practice, in terms of which the temporary permit would automatically be extended pending a PAJA review, had since been jettisoned, and the acting manager of the refugee facility concerned had refused to extend any of the applicants' permits, taking the view that this required a court order. This precipitated an urgent application to the High Court, and a subsequent appeal to the Constitutional Court.

[11] The Constitutional Court expressed itself on the proper interpretation of s 22(1) of the Refugees Act:⁵

'The Refugee Reception Officer must, pending the outcome of an application in terms of s 21(1) issue to the applicant an asylum seeker permit in the prescribed form allowing the applicant to sojourn in the Republic temporarily, subject to any conditions, determined by the Standing Committee, which are not in conflict with the Constitution or international law and are endorsed by the Refugee Reception Officer on the permit.'

[12] Section 22(3) provides that a RRO 'may' from time to time extend the period for which a permit has been issued in terms of s 22(1). Reading the two subsections together, the Constitutional Court confirmed the parties' agreement that that the word 'may' in s 22(3) did not grant the RRO any discretion over the issuing of permits. In other words, the RRO had the power to extend permits and an obligation to exercise this power to extend the permit pending the outcome of an application for refugee status.⁶ This interpretation was held to better afford an asylum seeker constitutional protection whilst awaiting the outcome of their application.

⁵ The section, along with other parts of the Refugees Act, has been amended, but the relevant amendments only took effect from 1 January 2020, after the applicant was arrested.

⁶ *Saidi* above n 4 paras 16, 18.

[13] But what was the pending ‘outcome’ that ‘must’ result in the asylum seeker permit being issued to enable temporary sojourn in the Republic? Was this a reference only to an outcome in terms of the process provided for in the Refugees Act, including internal reviews and internal appeals? Or did ‘outcome’ also include the final outcome of judicial review?⁷

[14] The Constitutional Court favoured the interpretation considered to accord with the purposes of the Refugees Act, including giving effect to relevant international law, and more consonant with the constitutional rights of asylum seekers.⁸ The respondents approach in that matter, including the suggestion that an urgent interdict was possible adequate redress, was held to run counter to the principle of *non-refoulement* and the provisions of s 2 of the Refugees Act:⁹

‘The respondents’ interpretation exposes an asylum seeker whose application has been administratively turned down, but who is desirous of seeking, or has launched, a judicial review, to all the risks set out in the preceding quote. That, when a judicial review may eventually establish that the asylum seeker was, in fact, entitled to be recognised as a refugee. This is absurd, especially in the light of another point made by Judge Pinto de Albuquerque that ‘(a) person does not become a refugee because of recognition, but is recognised because he or she is a refugee’.’ (Footnote omitted).

[15] A textual approach would favour the respondents but was held to be untenable.¹⁰ The Constitutional Court arrived at the following conclusion:¹¹

[42] What I have held above relative to the existence of the power to renew pending judicial review does not leave much room for the exercise of a discretion before renewal. In particular, the imperatives of the principle of *non-refoulement* dictate that, until judicial review proceedings have been finalised, there must be a permit in place. Denying an RRO a discretion which she or he does not have before finalisation of the internal application process does not place the state in a disadvantageous position. To the extent that, for whatever legally acceptable reason, an asylum seeker should not have a permit, there may be a withdrawal by the Minister in terms of s 22(6) of the Refugees Act.

⁷ *Saidi* above n 4 para 19.

⁸ *Saidi* above n 4 paras 26, 27 and following.

⁹ *Saidi* above n 4 para 34.

¹⁰ *Saidi* above n 4 paras 37 – 39.

¹¹ *Saidi* above n 4 paras 42, 43.

[43] ... here are additional reasons why the RRO has to extend automatically ... in the case of the Minister, s 22(6) clearly specifies the circumstances under which the Minister may effect cancellation. The RRO, on the other hand, is given *carte blanche* ... why would the Minister's discretion be circumscribed, and the RRO's not? If anything, I would have expected the situation to be the reverse. To me, this is a pointer that – pending finalisation of judicial review – the RRO must extend a permit automatically.'

[16] The Constitutional Court accordingly ordered that a RRO had the power to extend a s 22(1) permit pending finalisation of proceedings for judicial review of a decision to refuse an application for asylum. Pending finalisation of this review, a RRO was obliged to issue or extend the permit of the asylum seeker concerned in accordance with the provisions of the Refugees Act and Regulations made in terms of s 38 of that Act. Notable is that the court did not in fact make a specific order for the issuing of extensions of the applicants' temporary permits, leaving it to the applicants to 'again approach the RRO and for the RRO to act in accordance with this judgment and the declaratory orders'.¹²

The respondents' case

[17] The respondents chose to oppose the relief sought by filing a notice as contemplated in Uniform Rule 6(5)(d)(iii), raising limited points of law absent any answering affidavit. The consequence is that the factual averments contained in the founding papers must be accepted and constitute the facts upon which the application stands to be determined.

[18] Initially, the respondents took the point that the applicant had erred in basing its case on the Promotion of Administrative Justice Act, 2000,¹³ when the decisions in question were not 'administrative decisions'. That angle was correctly jettisoned during arguments, the application, read in its entirety, being grounded in the constitutional principle of legality.

¹² *Saidi* above n 4 para 46.

¹³ Act 3 of 2000.

[19] By time the matter was argued, the respondents' stance had also changed in respect of its second point, namely that the protection afforded by s 21(4)(a) of the Refugees Act did not extend to unsuccessful asylum seekers who had lodged judicial review applications. An order interdicting and restraining the respondents from continuing with the criminal proceedings instituted against the applicant, pending the finalisation of the applicant's pending judicial review, was conceded. That concession was properly made and accords with my understanding of at least part of the appropriate interpretation to be afforded to s 21(4) of the Refugees Act, particularly when considering the judgment in *Saidi*.

[20] Following this concession, the only questions remaining, on my understanding, pertain to the formulation of the relief to be granted, and the question of costs.

Analysis

[21] The Constitutional Court has emphasised crucial aspects of the purposive reading to be given to the Refugees Act, including an interpretation in accordance with international law and the obligation of *non-refoulement*.¹⁴ It has been established that once asylum seekers are in the country, the Refugees Act ensures the immediate protection of their rights, regularising their status pending the determination of their applications and ensuring their freedom and security in the interim.¹⁵ *Saidi* specifically highlights the significance of 'immunity from prosecution' as part of the appropriate interpretation of the Refugees Act:¹⁶

'To illustrate a little more on the absurdity, an asylum seeker would be immune from prosecution while pursuing an internal appeal or review. This immunity would end as soon as this internal process is finalised. She or he would not have immunity pending a PAJA review. However, upon completion of the PAJA review, with the court deciding that the

¹⁴ See, for example *Saidi* above n 4 paras 27, 31. Section 233 of the Constitution provides: 'When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.' Also see *Minister of Home Affairs and Others v Somali Association of South Africa and Another* 2015 (3) SA 545 (SCA) para 2.

¹⁵ *Scalabrini Centre, Cape Town and Others v Minister of Home Affairs and Others* 2018 (4) SA 125 (SCA) para 35. Cf *Ashebo v Minister of Home Affairs and Others* 2023 (5) SA 382 (CC).

¹⁶ *Saidi* above n 4 para 35.

applicant ought to have been granted asylum, the immunity would kick in again. An unfortunate, ominous game of “ping pong”.’

[22] *Saidi* establishes that the principle of *non-refoulement* has an overarching effect that ‘at the very least’ endures until judicial review proceedings have been finalised.¹⁷ This follows the core principle of refugee law that asylum seekers must be treated as presumptive refugees until the merits of their claim have been finally determined through a proper process.¹⁸ That principle was linked to the ‘continued entitlement to a temporary permit’ and must extend to the prohibition of institution or continuation of criminal proceedings, ‘notwithstanding any law to the contrary’, in respect of a person’s unlawful entry into or presence within the country.¹⁹ As the Constitutional Court has explained, this interpretation accords with s 39(2) of the Constitution and constitutes an interpretation that better protects the rights of persons in the position of the applicant, including the rights to human dignity, freedom and security of the person, access to courts and just administrative action.²⁰ For an asylum seeker, a life of dignity includes protection from a possible violation of their right to freedom and security of the person, and ‘communing in ordinary human intercourse without undue state interference’.²¹ I am also mindful of the various underpinning principles of the 1951 United Nations Convention Relating to the Status of Refugees (1951 Geneva Convention), including non-penalisation.²²

[23] The judgment of Schippers AJ in *Scalabrini Centre of Cape Town v The Minister of Home Affairs and Others* is also relevant in determining the appropriate relief to be granted.²³ In that matter, deemed abandonment of asylum applications under impugned sections of the Refugees Act was held to cut across various fundamental rights, thereby exposing asylum seekers to arrest, detention and

¹⁷ *Saidi* above n 4 para 37. Also see *Ruta v Minister of Home Affairs* [2018] ZACC 52; 2019 (2) SA 329 (CC); 2019 (3) BCLR 383 (CC) para 29: all asylum seekers are protected by the principle of *non-refoulement*, and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure.

¹⁸ *Ruta* above n 17 paras 26-27. Also see *Abore v Minister of Home Affairs and Another* 2022 (2) SA 321 (CC); 2022 (4) BCLR 387; [2021] ZACC 50 para 48.

¹⁹ S 21(4)(a) of the Refugees Act, read with *Saidi* above n 4.

²⁰ *Saidi* above n 4 paras 38, 40.

²¹ *Saidi* above n 4 para 18.

²² See, for example, *Scalabrini Centre of Cape Town and Another v The Minister of Home Affairs and Others* [2023] ZACC 45 (*‘Scalabrini Centre’*) para 30.

²³ *Scalabrini Centre* above n 22 para 40.

deportation as if they were 'illegal foreigners', merely because a visa had not been renewed.

[24] In the present proceedings, the applicant duly lodged an application for asylum in the manner prescribed and was issued with 'an asylum seeker temporary permit', which is now a 'visa'. He followed the internal appeal process when his application for asylum was turned down, and launched an application for judicial review during 2016. That application remains pending. The applicant encountered financial difficulties and, for that reason, failed to renew his permit in person in Durban, which was seemingly the only option available at the time. This resulted in his arrest, during August 2019, detention and the institution of criminal proceedings.²⁴

[25] For the sake of completeness, it may be noted that Ms *Crouse*, applicant's counsel, handed in a copy of an 'asylum seeker temporary visa' by consent during the course of her argument. That document reflects that the applicant now enjoys temporary permission to remain in the country 'for the purpose of applying for asylum in terms of the Refugees Act...'. Reference is made to the pending judicial review. This visa was seemingly issued on 7 July 2023 for a five-month period. Reference is also made on the document to '7' extensions. I was informed from the bar that an online extension of this visa was now possible, had been sought and was pending.

[26] Although decisions to prosecute are subject to judicial review, it has been established that this does not extend to a review on the wider basis of PAJA, instead being restricted to grounds such as legality and rationality, the meaning of which continues to evolve.²⁵ Legality review is an incident of the rule of law and acts as a safety net, affording the court a measure of control over action that involves the exercise of public power but does not qualify for PAJA review.²⁶ To be rational, a decision must be based on accurate findings of fact and a correct application of the law. On the appropriate interpretation of s 21(4)(a) of the Refugees Act, also in its

²⁴ On the effect of the Refugees Act on detention pursuant to an evinced intention to apply for asylum, see *Abraham v Minister of Home Affairs and Another* 2023 (5) SA 178 (GSJ).

²⁵ *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA) (*NDPP v FUL*) para 27 and following.

²⁶ *Ibid* para 29.

pre-amended form, in the light of *Saidi*, no proceedings could be instituted or continued in respect of the applicant's presence within the country given the pending review. Being misaligned with the correct interpretation and application of the law, such decisions are irrational and must be set aside.

[27] As the applicant has already pleaded to the charge levelled against him, the respondents may not simply withdraw the charge.²⁷ Instead, it is the prerogative of the first respondent to stop the prosecution in respect of a charge, which will necessarily result in acquittal.²⁸ While it would be inappropriate for this court to direct that the prosecution be stopped, it is within the court's power to review decisions of the respondents and set them aside for reconsideration.²⁹ There is no compelling reason why the respondents should not be given the opportunity to perform their constitutional mandates.³⁰ This appears to me to be the appropriate relief to be awarded, coupled with the declaratory relief sought.

Costs

[28] The applicant has been successful in this application and is entitled to his costs. Both parties made use of the services of two counsel. Considering the complexity of this matter, which involved statutory interpretation, consideration of repealed legislation as well as the application of various decisions of the Constitutional Court and SCA, this was a reasonably necessary precaution, justifying a costs order to that effect.

Order

[29] The following order is issued:

1. The applicant's non-compliance with Uniform Rule 53(4) is condoned.

²⁷ S 6(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) ('the CPA').

²⁸ S 6(b) of the CPA, read with s 45 of the National Prosecuting Authority Act, 1998 (Act 32 of 1998). See *Attorney-General v Additional Magistrate, Middledrift, and Others* 1987 (4) SA 914 (Ck).

²⁹ *Essop v National Director of Public Prosecutions* 2020 JDR 2162 (KZP) para 1 fn 1.

³⁰ See *NDPP v FUL* above n 25 para 51.

2. The respondents' decisions rejecting the applicant's representations to have the proceedings instituted under case number A1353/2019 stopped, based on the provisions of s 21(4)(a) of the Refugees Act 130 of 1998 ('the Act'), are reviewed and set aside.
3. It is declared that s 21(4)(a) of the Act barred the institution of any criminal proceedings for the contravention of s 49(1)(a) of the Immigration Act 13 of 2002 against the applicant, and also bars the continuation of such criminal proceedings against him while there is a pending application to review the decision of the Refugee Appeal Board to reject his asylum application.
4. The matter is remitted to the first respondent to make a decision after due consideration of the declarator in the previous paragraph of this order.
5. The respondents shall bear the costs of the applicant, including the costs of two counsel where so employed.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 25 January 2024

Delivered: 13 February 2024

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