

**IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)**

Case No.:2010/101

In the matter between:

AS	First Applicant
AF	Second Applicant
ASA (duly assisted by AS)	Third Applicant
AFS (duly assisted by AS)	Fourth Applicant
AAS (duly assisted by AS)	Fifth Applicant
AQS (duly assisted by AS)	Sixth Applicant
ARS (duly assisted by AS)	Seventh Applicant
AZS (duly assisted by AS)	Eighth Applicant
CENTRE FOR CHILD LAW	Nineth Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Respondent
BOSASA (PTY) LTD t/a LEADING PROSPECTS TRADING	Third Respondent
THE MINISTER OF SOCIAL DEVELOPMENT	Fourth Respondent

JUDGMENT

DUKADA AJ;

(1). The Applicants, who are Afghani citizens, have instituted proceedings against the Respondents for reliefs which can be summarised as follows;

- (a) An order directing that the identity of the Applicants be concealed from the media and the public generally;
- (b) Declaring the detention of the First and Second Applicants in terms of the provisions of the Immigration Act (No.13 of 2002) invalid;
- (c) Declaring the separation of the First and Second Applicants from each other whilst detained at Lindela holding cells invalid;
- (d) Declaring the separation of the Third to Eight Applicants from the First and Second Applicants invalid;

- (e) Directing the First and Second Respondents to facilitate the applications of the Applicants for refugee permits in terms of the provisions of the Refugees Act (No. 130 of 1998);
- (f) An order interdicting the First and Second Respondents from deporting the Applicants pending the final determination of the application for their refugee permits;
- (g) Directing that the Applicants be released from detention forthwith; and
- (h) Directing the First and Second Respondents to pay costs of the application.
- (2). The First and Second Applicants are husband and wife respectively; the Third Applicant is engaged to the Fourth Applicant according to Afghani law; the Fourth to Eighth Applicants are children of the First and Second Applicants. The Ninth Applicant is an interested party in the proceedings.

(3). It is common cause that during the period between September and October 2009 the First to Eighth Applicants (conveniently referred to as "the Applicants") entered South Africa by means of the OR Tambo International Airport in Johannesburg. Subsequently, the Third and Fourth Applicants attempted to leave South Africa on or about 21 September 2009 and the remaining Applicants attempted to leave the country on 2nd November 2009. On each occasion, the Applicants were arrested by the immigration officers at the OR Tambo International Airport for attempting to leave the country by using false travel documents. The immigration officials declared them illegal foreigners; the First and Second Applicants were detained at Kempton Park Police Station.

(4). On 26 November 2009 the First Applicant was transferred to a detention cell at Lindela holding cells and was subsequently joined by the Second Applicant on 2nd December 2009 though they are not staying together in one cell. After their initial detention at OR Tambo International Airport, the Third to Eighth Applicants were declared children in need of care and

transported to a place of safety referred to as Mary Moodyly Place of Safety. It was necessary to keep the Third to Eighth Applicants in a place of safety because the First and Second Applicants were being detained.

- (5). Various issues have been raised by the parties in this matter. The Respondents dispute that the First and Second Applicants are married to each other; they also dispute that the First and Second Applicants are the biological parents of the Fourth to Eighth Applicants; there is also an allegation of human trafficking regarding the Fourth to Eighth Applicants. As a result of these allegations, detailed reports were secured on behalf of the Applicants. For purposes of this judgment, I am satisfied with the available evidence that the First and Second Applicants are indeed a married couple and they are the biological parents of the Fourth to Eighth Applicants. I am also satisfied that there is no evidence before me to prove that the First and Second Applicants were caught by the immigration officers engaged in human trafficking.

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(6). Ms Goodman, who appeared on behalf of the Applicants together with Ms De Vos, raised a number of legal points challenging the continued detention of the First and Second Applicants by relying on certain provisions of the Refugees Act and the Immigration Act. They raised four grounds for attacking the detention of the First and Second Applicants, namely;

- (a) The initial detention of the First and Second Applicants prior to the expiry of a period of thirty (30) days was not sanctioned by a warrant as required by Regulation 28 of the Regulations promulgated under the Immigration Act;
- (b) The First and Second Respondents failed to obtain a warrant authorizing the detention of the two Applicants beyond a period of thirty (30) days as required by the provisions of Section 34 (1)(d) of the Immigration Act;
- (c) The First and Second Respondents have breached the provisions of Section 28 (1)(b) of the Constitution in that they are detaining the First and Second Applicants

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separately from the Fourth to Eighth Applicants notwithstanding the fact that the latter are minor children;

(d) The First and Second Respondents failed to exercise their discretion properly in deciding to detain the First and Second Applicants; and

(e) The Applicants, being asylum seekers in terms of the Refugees Act, should not be detained under the provisions of the Immigration Act.

(7). During argument, Ms Manaka, who appeared on behalf of the First and Second Respondents, handed in certain documents which she contended were orders granted by the Magistrate's Court in Krugersdorp for the extension of the period of detention of the First and Second Applicants in terms of the provisions of Section 34 (1)(d) of the Immigration Act. Counsel for the Applicants did not dispute the correctness of the two documents and she accepted that they purport to be an

extension of the period of detention in respect of each of the two Applicants.

(8). However, Counsel persisted with the attack of the continued detention of the two Applicants, as will be shown more fully hereunder. The parties were in agreement that the Third to Eighth Applicants are not detained in terms of the provisions of either the Refugees Act or the Immigration Act. They are detained at Mary Moodley Place of Safety as a result of an order granted by the Commissioner of Children's Court and are the subject of an inquiry in terms of the provisions of Section 14(3) of the Child Care Act (No.74 of 1983). The parties further agreed that the Third to Eighth Applicants would be entitled to release from custody of Mary Moodley Place of Safety in the event of this Court finding that the detention of the First and Second Applicants is invalid. Therefore, a pronouncement on the validity or otherwise of the detention is relevant only to the First and Second Applicants.

(9). There is no evidence to prove that the Applicants have applied for asylum permits in terms of the provisions of Section 21 of the Refugees Act. What is clear is that when the Applicants were arrested by immigration officers at the OR Tambo International Airport their aim was to travel to France where they would apply for asylum. However, when they were arrested and detained, it would appear that the Applicants obtained a legal advice to apply for asylum permits in South Africa. Even the affidavits deposed to on behalf of the Applicants clearly indicate that it is their intention to apply for the asylum status, hence an order is sought from the Court directing the First and Second Respondents to facilitate the application by each Applicant for an asylum permit.

(10). Therefore, the provisions of the Refugees Act do not apply to the Applicants and they are not entitled to the protection provided in Section 22 of the Act i.e. to a stay of any proceedings pending the final determination of the application for an asylum permit. But this finding cannot deny the Applicants an order directing the First and Second

Respondents to facilitate their respective applications for asylum permits provided they fulfill the requirements set out in the Refugees Act. It remains to ask whether the Applicants have made out a case for the contention that their continued detention is invalid in terms of the provisions of the Immigration Act.

(11). The relevant provisions of Section 34 (1) of the Immigration Act read;

"Deportation and Detention of illegal foreigners

(i) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned

(a)

(b)

- (c)
- (d) **may not be held in detention for longer than 30 calendar days without a warrant of Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and**
- (e)

(12). Regulation 28 of the Regulations promulgated under the Immigration Act states;

"The detention and deportation of an illegal foreigner contemplated in Section 34(1) of the Act shall be by means of a warrant issued by an immigration officer which warrant shall substantially correspond to Form 28 contained in Annexure A".

(13). It is trite law that a Court should give a strict interpretation to statutory provisions which interfere with elementary rights. It should opt for an interpretation which avoids harshness and injustice, if possible (See; **Dadoo Ltd and Others vs Krugersdorp Municipality 1920 AD 530 at 552; See also**

Lawyers for Human Rights and Another vs Minister of Home Affairs and Another 2004 (4) SA (CC) at para 43 and Djama vs Government of Namibia 1993 (1) SA 387(Nm) at 395A-B and the authorities cited therein).

(14). No warrant of detention was served on each of the two Applicants at the time they were detained by the immigration officials on 2nd November 2009 whilst they were attempting to travel to France. On 26 November 2009 the First Applicant was detained at Lindela holding cells by means of a warrant purported to have been issued in terms of the provisions of the Immigration Act. On 1st December 2009 the Second Applicant was detained at Lindela holding cells, again, purportedly in terms of the provisions of the Immigration Act.

(15). Therefore, it means that prior to the 26 November 2009 (in the case of the First Applicant) and 1st December 2009 (in the case of the Second Applicant), there was no warrant for detention as prescribed by Regulation 28 of the Regulations promulgated under the Immigration Act, that is, from 2nd November 2009 to

25 November 2009 and from 2nd November 2009 to 30th November 2009, the detention of the First and Second Applicants respectively was not sanctioned by a warrant as prescribed by the provisions of Regulation 28 of the Regulation promulgated under the Immigration Act. During argument, Ms Goodman raised this point. Her argument, as I understood, was that if an arrest and detention was initially invalid, a subsequent warrant cannot cure the defect. The same applies to the purported extension of the period of detention for 90 days in terms of the provisions of Section 34 (1)(d) of the Immigration Act.

- (16). Counsel further argued that when the magistrate extended the detention of each Applicant for a further period of 90 days (on 23rd and 30th December 2009 respectively), the extension had no legal effect because it was granted long after the expiry of a period of 30 days from the 2nd November 2009. In fortifying this argument, Ms Goodman drew an analogy to the then emergency regulations which empowered a minister to extend a period of detention of a person after the expiry of 14 days to a

further period mentioned in the Notice. (See; **Minister of Law and Order and Another vs Swaart 1989(1) SA 295 (A) at 298H-299C; Minister of Law and Order, Kwa-Ndebele and Others vs Mathebe and Another 1990(1) SA 114 (A) at 122A-D, and Minister of Home Affairs and Another vs York and Another 1982 (4) SA 496 (ZS) at page 504G-I)**)

(17). Obviously, the prescription of the periods of 30 days and 90 days in subsection (1)(d) of Section 34 of the Immigration Act is for the benefit of a detainee. A power conferred on a public official by a statute "... must be exercised within the prescribed limitations and for the purpose intended and no other" (See; **R v Padsha 1923 AD 281 at 308.**)

(18). When the immigration officers issued the warrants for detention of the First and Second Applicants on 26 November 2009 and 1st December 2009 respectively, he or she was not acting in terms of the provisions of Regulation 28 of the Regulations promulgated under Immigration Act because the legislation did not authorize him or her to first arrest and detain an illegal

immigrant and after some weeks to issue a warrant justifying the detention of such immigrant. The warrants of detention relied upon by the First and Second Respondents were *ultra vires* the powers conferred on the immigration officer by the provisions of Regulation 28.

(19). When the extension for a further period of 90 days was authorised by the magistrate on 23rd and 30th December 2009, the period of 30 days had long expired in respect of each Applicant because both Applicants were arrested and detained on 2nd November 2009. Again, the purported extension was not in terms of the provisions of Section 34(1)(d) of the Immigration Act.

(20). I am aware that the Applicants are not seeking this Court to review the decision of the magistrate to extend the period of detention for a further 90 days. In view of the fact that the initial arrest and detention is challenged by the Applicants in these proceedings, it would be wrong for this Court to simply ignore the initial arrest and detention and conclude that the continued

detention of the Applicants is valid on the basis of the orders granted by the magistrate. For the orders to be valid, both the initial arrest and detention must be lawful (compare **Minister of Law and Order, KwaNdebele and Others vs Mathebe and Another** (supra) at 122A-D.)

(21). The relief sought by the Applicants for their names not to be published in the media or become known to the public generally is not opposed by the Respondents. The basis of this relief is that the Applicants have fled from persecution by their own country and a publication of their names in these proceedings would enable the authorities in their country to trace them.

(22). Accordingly, I grant the following order;

1. It is ordered that;
 - 1.1 the names and identities of the First to Eighth Applicants be kept private and confidential and not be disclosed to the public and/or press, unless and

until this Honourable Court should, on application, order otherwise;

1.2 the Applicants must prepare a public court file wherein the names and identities of the First to Eighth Applicants have been concealed;

1.3 the original court file (wherein the full names of the First to Eighth Applicants are disclosed) shall be kept in safe custody by the Registrar and shall not be accessible to the public.

2. The arrest and detention of the First and Second Applicants is reviewed and set aside;

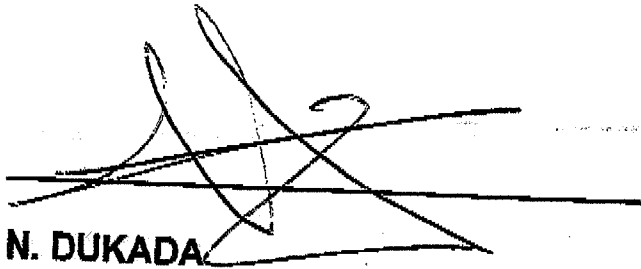
3. ~~The First and Second Respondents are ordered to~~
release the First and Second Applicants from detention at Lindela holding cells forthwith;

4. The Fourth Respondent is directed to release the Third to Eighth Applicants from Mary Moodley Place of Safety and surrender them to the First and Second Applicants;

5. The First and Second Respondents are directed to facilitate the Applicants' application for asylum in terms of the provisions of the Refugees Act;

6. The First and Second Respondents are interdicted and restrained from deporting the Applicants from South Africa pending final determination of their application for asylum in terms of the provisions of the Refugees Act.

7. The First Respondent is ordered to pay costs of the application.



N. DUKADA

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicants; Adv. I. Goodman and Adv. I. De Vos

Counsel for the First and

Second Respondents; Adv. N. Manaka