



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

Case No. 061261-2024

(1) REPORTABLE: NO (2) OF INTEREST TO OTHERS JUDGES: NO (3) REVISED
 SIGNATURE <u>28 JUNE 2024</u> DATE

In the matter between:

KEHINDE ISAAC OSALEYE

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

**THE DIRECTOR-GENERAL: DEPARTMENT OF
HOME AFFAIRS**

Second Respondent

This matter was heard virtually (MS TEAMS) and disposed of in terms of the directives issued by the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] The applicant, who is a Nigerian national, entered the Republic of South Africa through OR TAMBO International Airport, with an intention to apply for asylum. He left Nigeria his country of origin, due to the constant terrorist attacks by unknown gunmen, who invaded their community. Having entered the country, he was issued an asylum visa which allowed him to visit the refugee reception office to apply for asylum. The application was denied and he was arrested in terms of section 34(1) of the Immigration Act.¹ He is currently in detention at the Lindela Repatriation Centre, awaiting deportation to Nigeria.

[2] The applicant is before this court on urgency, seeking an order in the following terms: that the application be treated as urgent and the court dispense with the normal forms and services in accordance with the provisions of Rule 6(12); that the first and second respondents (“the respondents”) be interdicted from deporting him until his status under the Refugees Act,² alternatively the Refugees Act as amended by the Refugees Amendment Act,³ has been lawfully and finally determined; that his continuing detention be declared unlawful; that the respondents be directed to release him from detention at Lindela Repatriation Centre, with immediate effect; that the respondents issue him with a temporary asylum seekers’ permit pending the finalisation of his judicial review application, including the exhaustion of his right to review and appeal the decision of the Refugee Status Determination Officer (“the RSDO”); and that the respondents be ordered to pay the costs of this application jointly and severally the one paying the other to be absolved, on an attorney and client scale.

[3] The application is unopposed. The respondents were properly served but opted not to participate in the proceedings.

FACTUAL MATRIX

[4] The applicant gained access into the country on 10 March 2016. Having been issued with an asylum visa at the port of entry, he is said to have presented himself, on many occasions to the refugee reception office in Pretoria (the Desmond Tutu

¹ Act 13 of 2002.

² Act 130 of 1998.

³ Act 11 of 2017.

Refugee Reception Office), but could not be assisted due to several asylum seekers who had to be assisted. After many unsuccessful attempts, he decided to go to Cape Town with the hope of getting assistance there.

[5] In August 2023, he was finally assisted by the Refugee Reception Office in Cape Town. His fingerprints were taken and he was interviewed and was told to come back on 18 December 2023. When he went back on that day, he was informed that his application was still being processed and that he should return on 12 February 2024 to collect the outcome for the good cause decision.

[6] On 12 February 2024, when he arrived at the Home Affairs offices, he was informed that his application had been denied because his interviews contradicted each other. He was immediately arrested and forced to sign documents which he was not given an opportunity to read nor were the contents of the documents explained to him. The documents are attached to the founding affidavit as annexures C1, C2, C3, C4, C5, C6 and C7. As reflected in annexure C3, a notice of decision adversely affecting right of a person, the applicant was in terms of section 34(1) of the Immigration Act declared an "illegal foreigner who failed good cause", hence the arrest.

[7] He was taken to Maitland Police Station where he was detained pending his court appearance. He appeared at the Bishop Lavis Magistrate Court on 14 February 2024, where a detention and deportation order was granted against him. He was taken back to the Maitland Police Station and was further detained until 22 February 2024. He was later transferred to and arrived on 23 February 2023 at Lindela Repatriation Centre. He remains currently detained at the Centre.

DISCUSSION

Urgency

[8] For all the reasons alluded to by the applicant in his papers, the application is urgent. The urgency thereof was triggered when the applicant was arrested and detained. The applicant has been declared an illegal immigrant and an order for his deportation has been issued by the Magistrate. The date for his deportation has not been secured but there is an imminent threat of deportation. The applicant stands to suffer prejudice should he be deported to a country where he is likely to face

persecution and possibly death. In particular, when his status application has not been finally determined.

Whether the Applicant should be deported

[9] It is the applicant's claim that he cannot be deported to his country of origin because he remains an asylum seeker as his refugee status has not been finally determined. In support of this supposition, the applicant relies on section 2 of the Refugees Act which he contends protects aspirant asylum seekers, like him, from deportation to the country of their origin where they may be subjected to persecution.

[10] In defending himself against the imminent deportation by the respondents, the applicant invokes the principle of non-refoulement. He alleges in his papers that even though his application for asylum was rejected, his refugee status has not been fully finalised because he has not exhausted all his remedies. The applicant alleges that his rejected application for asylum was supposed to have been referred to the Standing Committee for Refugee Affairs for review in terms of section 24A of the Refugees Act,⁴ however, to the best of his knowledge this was never done. He submits further that section 24B of the Refugees Act,⁵ entitles him to appeal the decision of the

⁴ Section 24A provides as follows:

- (1) The Standing Committee must review any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(b) and may act in terms of section 9C (1) (c) in respect of any decision taken in terms of section 24(3)(a) or (c).
- (2) A review contemplated in subsection (1) must be determined by a single member or, in particular matters, such number of members of the Standing Committee as the chairperson may consider necessary.
- (3) The Standing Committee may, after having determined a review, confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24(3)(b).
- (4) The Standing Committee must inform the Refugee Reception Office, where the application for asylum was lodged, of its decision within five working days of such decision, where after the Standing Committee is *functus officio*.

⁵ Section 24B provides as follows:

- (1) Any asylum seeker whose application has been rejected in terms of section 24 (3) (c) may lodge an appeal with the Refugee Appeals Authority in the prescribed manner and within the prescribed period.
- (2) The Refugee Appeals Authority may, after having determined an appeal, confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24 (3) (c).

RSDO, he must therefore be given an opportunity to do so before he can be deported. In addition, he contends that he has a right to apply to the High Court for judicial review of the decision rejecting his application within 180 days after the date that he received the rejection. He laments the fact that he was not informed about these rights and has, thus, not been able to exercise same. Under such circumstances, it is his contention that his refugee status remains not fully determined and he cannot, therefore, in accordance with the principle of non-refoulement, be deported.

[11] Non-refoulement is a well-established international law principle that forms the cornerstone of international law on refugees. The principle has been adopted and legislated for in our law. The principle has also been a subject of many cases on the determination of the status of refugees, and has been found to apply in many of those cases. The principle of non-refoulment in South Africa is legislated for in the Refugees Act. In section 2 of the Refugee Act it is provided that:

"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."

[12] The Constitutional Court in *Ruta*,⁶ one of its many cases where the principle of non-refoulement was a subject matter for determination, held as follows:

"[28] The right to seek and enjoy asylum means more than merely a procedural right to lodge an application for asylum - although this is a necessary component of it. While States are not obliged to grant asylum, international human rights law and international refugee law in essence require states to consider asylum claims and to provide

⁶ *Ruta v Minister of Home Affairs* [2018] ZACC 53 paras 28 and 29.

protection until appropriate proceedings for refugee status determination have been completed.

[29] In sum, 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."

[13] In another Constitutional Court judgment in *Ashebo*,⁷ it was held that

"[29] until an applicant's refugee status has been finally determined, the principle of non-refoulment protects the applicant from deportation."

[14] Furthermore, at paragraph 31 of that judgment, the court expressed itself as follows:

"The [non-refoulement] protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure. This means that the right to seek asylum should be made available to every illegal foreigner who evinces an intention to apply for asylum and a proper determination procedure should be embarked upon and completed. The shield of non-refoulement may only be lifted after that process has been completed."

[15] The law as it stands is that until an applicant's refugee status has been finally determined, the principle of non-refoulement protects her/him from deportation.

[16] In the premises, the relief sought by the applicant not to be deported at this stage, holds sway. The applicant has evinced an intention to apply for asylum. There is ample, uncontroverted evidence, that points to the fact that the applicant's refugee status has not been finally determined. He is protected by the principle of non-refoulement from deportation until the process for determining his status has been completed.

Whether the Applicant should be released from detention with immediate effect

[17] As regards the release from detention, the applicant seeks an order declaring his continued detention to be unlawful. He is, furthermore, seeking an order that the respondents be directed to release him from detention at Lindela Repatriation Centre

⁷ *Ashebo v Minister of Home Affairs and Others* [2023] ZACC 16 para 29.

with immediate effect. This in order to be given an opportunity to exhaust the internal remedies afforded to him in terms of sections 24A and 24B of the Refugees Act.

[18] From the papers filed of record, it appears as if the applicant does not know why he was arrested and made to appear before the Magistrate. In the heads of argument, it is stated that the applicant appeared in the Magistrates Court in terms of section 34(1) of the Immigration Act. This is also apparent from annexure C3 attached to the founding affidavit which states that the applicant is in terms of section 34(1) of the Immigration Act declared an “illegal foreigner who failed good cause”.

[19] Section 34(1) of the Immigration Act provides that

“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.”

[20] It thus appears that upon arrest without a warrant, the applicant was taken to the Magistrates’ Court for the confirmation of his status as an illegal foreigner and an order for his continued detention and subsequent deportation.

[21] The question, therefore, is whether the applicant is entitled to be released from detention upon expressing an intention to appeal the decision of the RSDO whilst the order of the Magistrate that declared him an illegal immigrant to be detained and subsequently deported, is still standing.

[22] During argument in court it was brought to the attention of the applicant’s counsel that there is no relief on the papers against the order of the Magistrate which confirmed the status of the applicant as an illegal immigrant and further ordered his detention and eventual deportation. Which means that the applicant is detained in terms of a valid court order. Counsel was also made aware that even if such relief had been sought, this court, as constituted, has no authority to set that order aside.

[23] The question of whether a person held in detention for deportation in terms of section 34(1) of the Immigration Act should be released pending the finalisation of

his/her refugee status, was finally settled in the Constitutional Court judgment in *Ashebo*,⁸ where at para 39 of that judgment the court remarks as follows:

“Importantly, regulation 2(2) of the Old Regulations, which perished with the rest of those regulations when the new Regulations came into force on 1 January 2020, gave an illegal foreigner who intended seeking asylum an automatic right to so apply and made provision for the temporary release of an illegal foreigner pending the making of an asylum application. The new Regulations do not contain a comparable provision. . .”

[24] According to the court in its judgment, the ordinary wording of regulation 2(2) was clear. Read with section 22 of the unamended Refugees Act, once the intention to apply for asylum was expressed, the person was entitled to be freed subject to further provisions of the Refugees Act. The court found that there are no provisions similar to the old regulation 2(2) in the new Regulations which came into operation on 1 January 2020.⁹

[25] According to the court in *Ashebo*, there are two sections in the Immigration Act regulating the arrest and detention of illegal foreigners, namely, sections 34 and 49. Both sections regulate the illegal entry and stay by non-South African citizens in the country. But, each has a distinct purpose. Section 34 authorises the detention of an illegal foreigner solely for the purpose of deportation whilst section 49 authorises the detention of a person where he/she has been charged with a criminal offence. Section 34 is primarily intended for deporting illegal foreigners and detaining them for that purpose whereas section 49 criminalises certain conduct.¹⁰

[26] When addressing the issue of the unlawfulness of such detention,¹¹ the court in its reasoning, presumed that as an illegal foreigner awaiting deportation or criminal trial for his contravention of the Immigration Act, the applicant would have been lawfully detained under the auspices of section 34 and 49(1)(a) of the Immigration Act read with the Criminal Procedure Act.¹²

[27] The court went further to state that whether the detention was in terms of section 34 or pursuant to a criminal charge in terms of section 49, the same question of whether the applicant’s expression of an intention to apply for asylum entitled him

⁸ *Ashebo v Minister of Home Affairs and Others* [2023] ZACC 15.

⁹ Para 40.

¹⁰ Paras 47 and 48.

¹¹ Para 56.

¹² Act 51 of 1977.

to be released from such detention, would arise. The court held that the answer to such a question must be answered in the negative.¹³

[28] This the court reasoned was so, because

"The absence in the legislation of provisions similar to regulation 2(2) poses an anomalous and highly undesirable scenario that could result If an illegal foreigner in the applicant's position were simply allowed to remain at large on the mere-say-so that they seek asylum. That person would remain undocumented and there would be absolutely no means of checking whether they indeed promptly applied for asylum. There would be nothing to stop them from making the same claim to the next immigration officer who encounters them, thus repeatedly preventing their detention. That is not a result the legislature could have intended."¹⁴

[29] A submission was made on behalf of the applicant that his continued detention in terms of section 34(1) is unlawful. This assertion was supported by referring to the judgment in *Ashebo* whereat the court alluded, at paragraph 58 of that judgment, that

"Section 34 does not create or refer to any criminal offence. Section 34 is primarily intended for deporting illegal foreigners and detaining them for that purpose."

[30] The court elaborated further on how the said section may be applied in instances where an applicant is in detention by stating that to the extent that the detention may rest on section 34 it may become unlawful at some point, once a reasonable period elapsed with no effort made on the respondents' part to bring the applicant before a RSDO for the process envisaged in section 21(1B) of the Refugees Amendment Act, read with regulation 8(3).

[31] *Ashebo* is distinguishable from the present matter in that firstly, in *Ashebo*, unlike in this matter, the court was dealing with an asylum seeker who had not as yet applied for the determination of his status, whereas in the current matter the applicant's status application had been rejected. It is in that regard that the court was of the view that the detention would lapse once a reasonable period has lapsed with no effort by the respondents to bring the applicant before a RSDO. Secondly, it does not appear that in *Ashebo* the detention in terms of section 34 that was considered by that court, was in terms of a court order, hence its finding that the detention would become unlawful at some point. In this instance, the applicant's status as an illegal

¹³ Para 50.

¹⁴ Para 54.

foreigner was confirmed by the Magistrate at the Bishop Lavis Magistrate Court who further ordered the applicant's detention and subsequent deportation.

[32] It is trite that an order of court, which is valid, remains in effect until set aside by a proper forum. Furthermore, it was held in the Constitutional Court decision in *Abore*¹⁵ that the detention of an illegal foreigner pending the submission of an application for asylum that is authorised by a court's warrant of detention is valid as the court order must be obeyed until set aside. This principle will, similarly, find application in the circumstances of this current application where the applicant, who seeks to pursue the internal processes to finally determine his refugee status, is detained by an order of a Magistrate's Court. Until that order is set aside, the applicant cannot be released from detention as he has been lawfully detained.

[33] In order to avert an impasse, where an applicant who seeks to follow the process of establishing whether there was good cause for the absence of a visa and an asylum application is yet to occur, is languishing in detention unable to present himself for such a process, the Constitutional Court in *Ruta*¹⁶ and *Ashebo* opted to issue an order in terms of section 172(1)(b) of the Constitution. In terms of the said section, the court found it a just and equitable remedy to compel the respondents (in that matter) to facilitate the applicant's application for asylum, failing which to release him from detention unless he may be lawfully detained under the Criminal Procedure Act.

[34] The difference in the current application is that the applicant is not required to appear personally before anyone for the remedies that he seeks to pursue to finalise his asylum application. Section 24A provides that the rejected application should be brought before the Standing Committee. This actually, is a process that should be undertaken internally without anything expected from the applicant. From the papers on record it is not apparent whether this process has already taken place or not. If it has not taken place a letter addressed by the applicant or his legal representatives will suffice. Similarly, in terms of section 24B which entitles the applicant to appeal the decision of the RSDO, the applicant can with the assistance of his legal representatives file the appeal.

¹⁵ *Abore v Minister of Home Affairs and Another* 2022 (4) SA 321 (CC).

¹⁶ *Ruta v Minister of Home Affairs* [2018] ZACC 52.

[35] It is also evident that the applicant's legal representatives have already filed a judicial review against the decision of the RSDO. There is thus no need to issue an order in terms of section 172(1)(b) of the Constitution like the court in *Ruta* and *Ashebo* did.

COSTS

[36] The applicant has sought a punitive costs order against the respondents. This, under circumstances where the respondents have not participated in the application. There is no submission on the papers why a cost order should be granted against the respondents, let alone a punitive cost order. No order as to costs is made.

ORDER

[37] Consequently, the following order is made:

1. The application is declared urgent.
2. It is declared that the applicant is, in terms of section 2 of the Refugees Act 130 of 1998, entitled to remain lawfully in the Republic of South Africa.
3. The respondents are ordered to refrain from deporting the applicant until his status has been determined and finalised.



M KUBUSHI J

Judge of the High Court

Gauteng Division

Appearances:

For the applicant:

Adv S A Masokoameng

Cell: 079 950 8858

Email: sellomasokoameng@gmail.com

Instructed by: Mashimbye Pamela Attorneys
Tel: 012 001 0108
Email: pamela@mashimbyepamelattorneys.co.za

For the respondent: No appearance.

Date of argument: 20 June 2024

Date of judgment: 28 June 2024