

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 9798/14

In the matter between:

THANDEKA SYLVIA MAHLEKWA

First Applicant

and

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR-GENERAL: DEPARTMENT OF

HOME AFFAIRS - WESTERN CAPE

Second Respondent

MR JACKSON: IMMIGRATION OFFICER,

CAPE TOWN INTERNATIONAL AIRPORT

Third Respondent

EMIRATES AIRLINES

Fourth Respondent

MUHAMMAD ASIF KHAN

Intervening Party

Heard: 9 June 2014

JUDGMENT DELIVERED ON 10 JUNE 2014

SAVAGE AJ

Introduction

[1] The applicant, Ms Thandeka Sylvia Mahlekwa, and the intervening party, Mr Muhammad Asif Khan ('Mr Khan'), seek an urgent order interdicting and restraining the respondents from causing the deportation of, or assisting in or cooperating in the deportation of Mr Khan from the Republic of South Africa to Pakistan, or any other foreign state. In addition, an order is sought directing the respondents and/or any official of the Department of Home Affairs to release Mr Khan from the custody in which he is presently detained or is being caused to be detained by any of the respondents or at the instance of the Department of Home Affairs and/or any other department of state, together associated relief and costs.

[2] Mr Khan, a Pakistani national, is in possession of a temporary residence permit issued under s11(6) of the Immigration Act 13 of 2002 ('the Act')¹ by the Department of Home Affairs on 31 October 2013 and expiring on 28 October 2016. The permit provides for multiple entries into South Africa with the condition that Mr Khan does not become a 'prohibited or undesirable person' and that he resides with the applicant 'whilst conducting business – MH Khan only'. The permit was issued to Mr Khan on the basis that he is the spouse as defined in s 1(1) of the Act of the applicant, a South African citizen, with whom he has been living in a permanent heterosexual relationship akin to husband and wife for the last three years.

[3] Mr Khan left South Africa to visit Pakistan four months ago and returned to Cape Town International Airport on Emirates Airline flight EK 772

¹ As amended by the Immigration Amendment Act 13 of 2011 which came into operation on 26 May 2014.

from Dubai on 27 May 2014. On his return to South Africa he was interviewed by immigration officers at Cape Town International Airport. During the course of his interview he indicated that he had a wife and children in Pakistan, a fact the applicant confirmed during her interview with immigration officials. At the culmination of the interviews conducted, Mr Khan was provided with *Form 37: Notification to a Person at a Port of Entry that he or she is an Illegal Foreigner and is Refused Admission* in which he was stated to be an illegal foreigner on the following basis:

Contravene permit conditions. Made a misrepresentative to (sic) on application of section 11(6) permit. Applicant married in country of origin.

[4] Mr Khan was informed further in Form 37 that:

Should you have reason to submit that the refusal of your admission into the Republic was procedurally unfair, unreasonable or unlawful, you may, within three days from date of this notice, request the Minister to review this decision.

However, if the conveyance you arrived on is on the point of departing, your request for review must be lodged immediately and if the set request has not been finalised prior to the departure of the conveyance, you shall depart on such conveyance and await the outcome of the request outside the Republic.

In terms of section 35 (10) of the Act, the conveyor responsible for your conveyance to the Republic, namely Emirate Airlines, shall be responsible for the detention and removal of the person conveyed and any costs related to such detention and removal incurred by the Department.

[5] Following his entry into South Africa being refused, a declaration to the person in charge of Emirates Flight EK772 was issued by the Department of Home Affairs indicating that Mr Khan was ‘an illegal foreigner’ and that he ‘shall be detained and removed – ...(b) in the case of a person in charge of a conveyance, in terms of s 35(10) of the Act’. S35(10) came into operation on 26 May 2014 under the terms of the Immigration Amendment Act 13 of 2011 and

provides that the person in charge of a conveyance shall be responsible for the detention and removal of a person conveyed if such person is refused admission, and for any costs related to such detention and removal incurred by the Department. It appears that by the time this declaration was issued to Emirates Airlines, the aircraft that had transported Mr Khan had left South Africa but that the declaration was in any event served on Emirates Airlines which has a permanent office located at Cape Town International Airport.

[6] Mr Khan currently remains in the transit facility at Cape Town International Airport, refusing to leave the facility for Pakistan, or another country and seeks entry into South Africa. He has in terms of s 8(1) applied for the review by the Minister of Home Affairs of the decision to refuse him entry into the Republic, which review remains undetermined. Pending the decision on review, given that the aircraft on which he arrived had left South Africa, s8(2)(b) prescribes that Mr Khan *'shall not be removed from the Republic before the Minister has confirmed the relevant decision'*.

Section 11 (6) permit

[7] A visa to temporarily sojourn in the Republic, previously a temporary residence permit, is issued in terms of s 10(4) on condition that the holder is not or does not become a prohibited or an undesirable person. The temporary residence permit held by Mr Khan falls under the categorisation of a visitor's permit in s 11 (6). In terms of this provision –

...a visitor's permit may be issued to a foreigner who is the spouse of a citizen or permanent resident and who does not qualify for any of the permits contemplated in sections 13 to 22: Provided that—

- (a) such permit shall only be valid while the good faith spousal relationship exists;*
- (b) on application, the holder of such permit may be authorised to perform any of the activities provided for in the permits contemplated in sections 13 to 22; and*
- (c) the holder of such permit shall apply for permanent residence*

contemplated in section 26 (b) within three months from the date upon which he or she qualifies to be issued with that permit.

[8] Section 11(2) provides that the holder of a visitor's permit may not work, unless authorised by the Director-General in the prescribed manner and subject to the prescribed requirements and conditions.

[9] In terms of s 1(1), a 'spouse' is defined as a party to a marriage as defined in the Act, or a '*permanent homosexual or heterosexual relationship as prescribed*'.² [In terms of the previous Immigration Act regulation 3, applicable at the time that Mr Khan's permit was granted, to prove a permanent homosexual or heterosexual relationship an affidavit had to be submitted confirming the exclusion of any other person to the spousal relationship and that neither of the parties was at the relevant time a partner to a marriage. The new regulation 3, which came into operation on 26 May 2014, requires a notarial agreement attesting that the permanent homosexual or heterosexual relationship has existed for at least two years before the date of application and that the relationship still exists to the exclusion of any other person; and that neither of the parties is a spouse in an existing marriage or permanent homosexual or heterosexual relationship.

Entry into the Republic

[10] Under s 9(3) '*(n)o person shall enter or depart from the Republic - ... (d) unless the entry or departure is recorded by an immigration officer; and (e) unless examined by an immigration officer as prescribed*'. Apparent from s 8 is that an immigration officer may make a decision to refuse entry to a person arriving at a port of entry. S 8(1) states that –

² The amendment to the definition of 'spouse' came into operation on 26 May 2014 by virtue of s2(k) of the Immigration Amendment Act 13 of 2011.

- (1) *An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision ...*

[11] Under s 29(1) ‘(t)he following foreigners are prohibited persons and do not qualify for a visa, admission into the Republic, a temporary or a permanent residence permit: ... (f) anyone found in possession of a fraudulent residence permit, passport or identification document’. S 30 details categories of foreigners declared undesirable by the Director-General who after such declaration do not qualify for a visa, admission into the Republic or a temporary or a permanent residence permit. There is no suggestion that Mr Khan currently falls into any category of undesirable person and the decision to refuse Mr Khan entry relates rather to a determination made under s 29(1)(f).

[12] The consequence of the decision taken that Mr Khan is a prohibited person is that the condition in s 10(4) that his visa is issued conditionally upon him not becoming a prohibited person is no longer met. This forms the basis upon which his entry into the Republic has been denied.

[13] The decision to refuse Mr Khan entry into the Republic constitutes administrative action insofar as it is conduct which amounts to the exercise of public power or the performance of a public function by an organ of state in terms of s 1 of the Promotion of Administrative Justice Act 3 of 2000 (‘PAJA’). While s 3(1) requires that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair, currently before this Court is not a review of the administrative action taken.

Deportation

[14] The applicant and Mr Khan seek an order interdicting and restraining the respondents from causing the deportation of, or assisting in or cooperating

in the deportation of Mr Khan from the Republic of South Africa to Pakistan, or any other foreign state. In *Patel and another v The Chief Immigration Officer, OR Tambo International Airport and others*³ a distinction was drawn between a refusal of entry and a deportation, with the Court finding that the latter is directed at persons who are in the Republic illegally while the former is directed at persons yet to enter the Republic. For current purposes it seems to me that the distinction lies in the fact that pending the outcome of the review application lodged with the Minister by Mr Kahn, he may of his own accord leave the transit facility and return to Pakistan, or another country, although he is not obliged to do so and by virtue of the provisions of s8(2)(b) he may not be removed from the facility until the decision has been confirmed.

[15] A deportation is defined in s1 as ‘*the action or procedure aimed at causing an illegal foreigner to leave the Republic in terms of the Act*’. Deportation implies a compelled and compulsory departure from the country on certain grounds.

[16] There is nothing before this Court to support a claim that the respondents are currently engaged in efforts to deport Mr Khan, or that they are cooperating in the efforts of others to deport him. Immigration officials were entitled to interview him and the decision to refuse him entry is currently subject to the review of the Minister. The respondents accept that Mr Khan is entitled to remain at the transit facility if he wishes to do so pending the decision of the Minister and there is nothing before this Court to suggest that the respondents intend to act in a manner contrary to the provisions of s8(2)(b).

[17] In such circumstances, I am not persuaded that the applicant or Mr Khan hold a *prima facie* right to the relief sought, namely to interdict and restrain the respondents from causing the deportation of, or assisting in or cooperating in the deportation of Mr Khan.

³ North Gauteng HC unreported case no 26953/09 at para 28

Detention

[18] The applicant and Mr Khan seek an order directing the respondents and/or any official of the Department of Home Affairs to release Mr Khan from the custody in which he is presently detained against his will or is being caused to be detained. They claim that his unlawful detention in unacceptable conditions in the transit facility is without a warrant of detention having been issued and is a maximum period in terms of s34(2) of 48 hours.

[19] An immigration officer may, without a warrant, in terms of s34(1):

...arrest an illegal foreigner or cause him or her to be arrested and shall, irrespective of whether such foreigner is arrested, deport him or cause him 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) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of the Act;*
- (b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;*
- (c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, where possible, practicable and available in a language that he or she understands;*
- (d) may not to be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and*

- (e) *shall be held in detention in compliance with the minimum prescribed standards protecting his or her dignity and relevant human rights.*

[20] There is no dispute that at this time Mr Khan has not been informed either that he has been arrested, or that a decision has been taken to deport him. Ms Pratt places reliance rather on s 34(2), which provides that the detention of a person in terms of this Act for purposes other than his or her deportation shall not exceed 48 hours from his or her arrest or the time at which such person was taken into custody for examination or other purposes. S34(8) relates to the detention of an illegal foreigner by the master of a ship and is not relevant for current purposes.

[21] The respondents, in the opposing affidavit of Mr Adrian Jackson, a control immigration officer at the Cape Town International Airport, deny that Mr Khan has been arrested or that he has been placed in detention. Mr Jackson states that Mr Khan is *‘in the care of the fourth respondent, having been refused entry into South Africa in terms of the Immigration Act’* and it is denied that he is in the custody of the fourth respondent.

[22] In argument Ms Pratt conceded that Mr Khan was free to leave the transit facility and return to Pakistan, or another country. Following the conclusion of argument, Ms Pratt furnished me with copies of the decisions in *Lawyers for Human Rights v Minister of Home Affairs*⁴ in which the Constitutional Court considered ss34(8) and (2) and *Zealand v Minister of Justice and Constitutional Development*⁵. In *Lawyers for Human Rights* the Constitutional Court reiterated the importance of the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause in terms of s12(1) of the Constitution and that s35(2) extends to illegal foreigners detained. In *Zealand* the Court emphasised that it was sufficient for the applicant in that matter to plead that he was unlawfully

⁴ 2004 (4) SA 125 (CC)

⁵ 2008 (40) SA 458 (CC)

detained and that the respondents then bore the burden to justify the deprivation of liberty, whatever form it may have taken.⁶

[23] Detention implies that a person is held in custody, restricted in their physical ability to leave such custody. The refusal to permit Mr Khan to enter the Republic does not, it seems to me, lead to the necessary conclusion that he has been detained by the respondents. This is given that while he has been refused entry into South Africa, he remains free to return to Pakistan, or another country he is permitted to enter. The restriction of his access into South Africa may take the form that he remains in a restricted facility for practical reasons given his location at Cape Town International Airport, yet with the freedom to leave such facility to return to Pakistan, or another country. It follows therefore the effect of his conduct is that Mr Khan has exercised an election, pending his review, to remain in the transit facility by virtue of his decision not to return to Pakistan. Given the urgency of this application, I have not been referred to any authorities by the parties that persuade me differently. It does not seem to me that the limitation on detention for a period of no more than 48 hours contemplated in s34(2) could have been intended to extend to a situation in which a person, such as Mr Khan, remained in the transit facility pending the finalisation of his review. This supports a conclusion in my mind that Mr Khan has not been detained within the meaning contemplated in s34(2).

[24] Given my finding that Mr Khan is not detained and remains free to leave the transit facility but not to enter South Africa, while his review is pending neither the applicant nor Mr Khan hold a *prima facie* right to obtain an order directing the respondents and/or any official of the Department of Home Affairs to release or cause the release of Mr Khan from custody. Even if this is not so, I am not persuaded that the balance of convenience warrants a different conclusion given that the review application remains pending.

⁶ At para 24

[25] Ms Slingers in argument indicated that to the extent required the respondents were prepared to undertake to ensure that the review application was determined on an expedited basis. What is clear is that the respondents do not intend to unduly delay finalisation of the review which will have the effect of resolving Mr Kahn's status.

[26] There exists a dispute between the parties as to the conditions in which Mr Khan remains in the transit facility. The transit facility, according to the respondents, is under the maintenance and control of the Airports Company of South Africa. Such facility is one established under international law, given effect it would appear by Chapter 2 of the Civil Aviation Act 13 of 2009. No relief is sought by the applicant or Mr Khan regarding these conditions and reference appears to be made to them in support of the application for an order for Mr Khan's release.

[27] Issue was taken with the interviews conducted with Mr Khan and the applicant, which interviews Ms Pratt argued were unlawful and *ultra vires* in that Mr Khan had produced a valid passport and visa or permit and is not a prohibited person insofar as he has complied with s 29 of the Act. Furthermore, issue is taken with the fact that the requisite form was not completed and that Mr Khan was not provided with the services of an interpreter. S 9(3) requires an immigration officer to examine a person entering or departing from the Republic. The fairness or otherwise of the interview process is not a subject for determination by this Court at the current time given that the matter is currently before the Minister for review. The review by the Minister must be exhausted before the relevant issues may be referred to this Court for determination, and, as was cautioned by Mokgoro J in *Koyabe and others v Minister of Home Affairs and others*⁷ a court should not be approached prematurely in a manner which seeks to usurp the executive role and function.

⁷ 2010 (4) SA 327 (CC) at para 36

[28] In exercising a discretion with regards to costs, it is trite that ordinarily it is the party that is wholly successful in an action or application that is awarded costs. In *the Trustees of the Time Being of the Biowatch Trust v Registrar Genetic Resources and Others* (Open Democracy Advice Centre as Amicus Curiae)⁸ it was stated that ‘...*the judicial officer may not, as he or she pleases, deprive a successful party of its costs. He or she must do so for reasons which he or she must set out or state. It similarly follows that, although ordinarily a successful party will be awarded its costs, it does not follow that that will always be the case.*’

[29] I am not inclined to grant costs against the applicant or Mr Khan given the circumstances of this matter and the issues raised in this application. I consider it appropriate therefore to make no order as to costs.

Order

[30] In the result, an order is made in the following terms:

1. The application is dismissed.
2. There is no order as to costs.

K M SAVAGE

Acting Judge of the High
Court

⁸ (A831/2005) [2008] ZAGPHC 135 (13 May 2008) 2008 JDR 0442 (T) at para 31

Appearances:

For applicant and

Intervening party: T-A Pratt

Instructed by T Nöckler Attorneys

For first to third

respondents: H Slingers

Instructed by the State Attorney

Fourth respondent: No appearance