IN THE HIGH COURT OF BOTSWANA
HELD AT FRANCISTOWN

Miscellaneous Criminal Application No. F46 of 2005

In the matter between

PAULIN SEFU	**1ST APPLICANT**
JONATHAN BIGABE	**2ND APPLICANT**
IMANI MWAMBI	**3RD APPLICANT**
PALADIN BISIMWA	**4TH APPLICANT**

VERSUS

THE ATTORNEY-GENERAL OF BOTSWANA **RESPONDENT**

Francistown, 26 May and 10 June 2005.

Mr. M. C. M. Moseki for the applicants
Mr. P. T. Mhandu for the respondent

J U D G M E N T

CHINHENGO J.

1. This is a petition brought by the above named petitioners and in which the Attorney-General is cited as the respondent. Mr. *Mhandu*, for the Attorney-General had, in his heads of argument filed before the hearing, objected to the Attorney-General being cited as a party to these proceedings. At the hearing, however, he properly abandoned and withdrew that objection.

2. The petitioners are nationals of the Democratic Republic of Congo

(DRC). They come from the eastern part of the DRC. According to them that part of the DRC is "engulfed in a war of attrition."

3. All the petitioners came to this country and sought political refuge. They were therefore asylum seekers. The first petitioner arrived in Botswana on 24 January 2002. His application for recognition as a political refugee was rejected and he was notified thereof on 28 April 2004. The second petitioner arrived in Botswana on 11 June 1998. His application for recognition as a political refugee was rejected. He was notified of the outcome on February 2000. The third petitioner arrived on 20 August 2001. His application for recognition as a political refugee was also rejected and he was notified of the outcome on 29 July 2002. The fourth petitioner arrived on 25 June 2002. His application for recognition as a political refugee was rejected and he was notified thereof on 20 April 2005. The petitioners are described in the papers before me as "failed asylum seekers". I shall use the same description because it is convenient.

4. The petitioners do not take issue with the rejection of their applications for refugee status. They accept the outcome and have lived with it for some time now. After the rejection of their applications they have been kept at Dukwi Refugee Camp under the supervision of the United Nations High Commission for Refugees

(UNHCR). At the camp three of them have been given some work by the UNHCR and remunerated for it. The three petitioners choose to say that they were employed by UNHCR but I think that the proper description of their engagement is that given by the Settlement Commandant at Dukwi Refugee Camp who said that the UNHCR paid them for "performing various tasks within the camp." The first petitioner was initially engaged by the UNHCR to maintain the register of refugees, prepare ration cards and update files on children born at the camp. He was also involved in food distribution. He said that he was engaged on these duties on a monthly remuneration of P1 200 until December 2004 after which he was assigned to work in the UNHCR warehouse at the camp on a reduced salary of P504 per month. That his remuneration could be reduced so drastically and that he could be assigned to other tasks indicates that he was not employed as such but rather he was engaged to "perform various tasks within the camp" for which he was paid.

5. The petitioners were moved from Dukwi Refugee Camp to, and detained at, Francistown Centre for Illegal Immigrants on 30 March 2005. It is in respect of their detention thereat that they have lodged this petition. They allege that their detention was occasioned by a suspicion that they had committed a criminal offence. They petition this court to be admitted to bail and for a declaration that their

detention for over 48 hours without a warrant is unlawful. They also petition this court to grant any other relief as it may deem fit.

6. An application for bail presupposes that an applicant therefor is facing a criminal charge and that he is in detention for that reason. Bail is a security required by a court for the release of a prisoner who must appear at a future time (*Black's Law Dictionary* 7th ed at p 135). An application for bail can only be properly lodged where a person has been lawfully arrested and charged with the commission of an offence and he applies for his release pending his trial or the outcome thereof. It seems to me that this court has no common law powers in respect of bail because the question is governed by statutory provisions – Part IX of the Criminal Procedure and Evidence Act [Cap 8:02]. The petitioners have not asked this court to exercise its inherent powers under the common law by way of *interdictum de homine libero exhibendo*. It would not have been proper to do so on the facts of this case. The petitioners are in detention openly and for a reason which, though not accepted by them, has been given by the Attorney-General. The prior arrest of a person for an offence is a circumstance which must exist as a jurisdictional fact before an application for bail can be lodged. The petitioners contended that they were arrested in connection with an allegations of theft from the UNHCR warehouse where the first, third and fourth petitioners were engaged to perform

some work for the UNHCR. The respondent contended that the petitioners' detention has nothing to do directly with the alleged offence but only with the fact that they are failed asylum seekers who must be held in some convenient place until their removal from Botswana can be effected. These are two conflicting positions and I will examine the facts of the case in order to determine, as far as I can, why exactly the petitioners are in detention at the Francistown Centre for Illegal Immigrants. Such examination will also enable me to answer the question, as contended by the petitioners, whether they were arrested and detained by the police on an allegation that they had committed a criminal offence.

7. It is undisputed that the UNHCR warehouse at Dukwi Refugree Camp was broken into at a time not mentioned in the papers but before 25 March 2005 and that six twenty-litre containers of paraffin were stolen. The petitioners were suspected to be the culprits and after a report was made to Dukwi Police Station, they were invited to the police station on 25 March 2005. There is no indication that they were arrested. They were told to go back to the refugee camp and report again to the police station on 29 March. Though the petitioners state that after reporting on 25 March, they "were released to report back on Tuesday 29 March 2005 after Easter Monday", there is no any indication that they were actually arrested at any point.

They reported to Dukwi Police Station on 29 March as required. They were sent back with a further direction that they report again on 30 March. The reason for their not being dealt with on 29 March was that the UNHCR offices were closed on that day. Upon reporting again on 30 March, they were taken into a police motor vehicle and driven to the Francistown Centre for Illegal Immigrants. The only explanation which they say was given to them was that there was a letter from the Office of the President ordering that they be detained at the Centre for Illegal Immigrants. They have been detained there since.

8. The petitioners' contention, based on these facts, is that they were arrested and detained on suspicion that they had broken into and stolen from the UNHCR warehouse and so they are entitled to apply for bail. In consequence of adopting this contention, the petitioners argued that the proper course was for the police to take them before a court of law and have them dealt with according to law hence their application for bail and for a declaration that their detention beyond 48 hours without a warrant is illegal.

9. There is no doubt that the petitioners were suspects in the offence committed at the UNHCR warehouse and that they were invited to the police station on 25 and 29 March for the purpose of being questioned

in that regard. They stated that a search was conducted at their residences and no recovery of the stolen property was made. There is therefore no doubt that some investigation was carried out in respect of them in connection with the theft from the warehouse. It was perhaps not unreasonable for the petitioners to think and allege that their detention was related to the offence alleged against them. It is, however, not in dispute that the petitioners have not been charged with any offence and that the police have not shown any interest in them since their detention.

10. The petitioners also allege that their detention without charge and without being brought before a court of law violates subss (1), (2) and (3)(b) of s 5 of the Constitution. These provisions would be applicable if the petitioners were not failed asylum seekers as I shall instantly show. On the facts of this case therefore, these provisions do not fall for consideration.

11. Three affidavits were filed for the Attorney-General. The first is by Ephraim Gaokgakala Sekeinyana, the Settlement Commandant at Dukwi Refugee Camp. He averred that asylum seekers and refugees are kept at Dukwi Refugee Camp and that the petitioners were kept there before being moved to the Centre for Illegal Immigrants. He admitted that the petitioners were investigated by the police in

connection with the theft at the UNHCR warehouse and said that he did not know the precise manner in which those investigations were carried out. He said that he did not know if any charges will be brought against them by the police. He denied that the petitioners' detention at the Centre for Illegal Immigrants was at the instance of the police. On the contrary he stated that the correct position is that the petitioners are failed asylum seekers and they are liable to be removed from Botswana. He annexed to his affidavit the letters in terms of which the petitioners' applications for refugee status were rejected.

12. In paragraph 10 of his affidavit Sekeinyana gives the reason for removing the petitioners from Dukwi Camp to the Centre for Illegal Immigrants. He states that –

> "Overtime other refugees at the camp started making allegations of theft and misuse of camp property against the Petitioners. Things came to a head when allegations were made against the Petitioners concerning the theft of UNHCR property at the camp. The refugees at the camp nearly rioted and it became impossible for me to maintain peace and security at the camp."

13. Sekeinyana averred that as Commandant of the camp, he had no responsibility over failed asylum seekers and that he periodically asks the police to transport such persons to the Centre for Illegal Immigrants which is under the Department of Immigration control. He averred that he had requested the police to transport the

petitioners from the refugee camp to the Centre for Illegal Immigrants on 30 March.

14. The second affidavit is that of Susan Motsei Kgaboesele, an Immigration Department Official in the Ministry of Home Affairs. She stated that the petitioners were surrendered to the Centre for Illegal Immigrants where she is based because their applications for asylum had been rejected by the appropriate Minister – the Minister for Presidential Affairs and Public Administration. She said that failed asylum seekers are liable to be removed from the country and that it was her office's responsibility to detain them pending such removal. She attached the warrants of detention dated 4 May 2005 which she said she had issued after satisfying herself that the petitioners were indeed failed asylum seekers.

15. The third affidavit is that of Ontiretse Freeman Ditshweu, an assistant superintendent in the police service and station commander of Dukwi Police Station. He confirmed that as at the time that they were moved from Dukwi to the Centre for Illegal Immigrants the petitioners were being investigated for theft from the UNHCR warehouse. He however said that their detention was not at the instance of the police but it was in terms of an order or orders from the Minister of Presidential Affairs and Public Administration. He said that the police only

provided transport to take the petitioners to the Centre for Illegal Immigrants and emphasized that their detention had nothing to do with the police. He denied quite strongly that the police are responsible for the petitioners' detention.

16. The petitioners took issue with the several averments made for the Attorney-General. They stated that the Attorney-General's deponents did not annex to their affidavits the orders by the Minister of Presidential Affairs and Public Administration and contended that such orders do not in fact exist. They referred to a newspaper article in the issue of 4 April 2005 of *Mmegi Monitor* in which the police were quoted as saying that the petitioners' detention at the Centre for Illegal Immigrants was in connection with the theft from the UNHCR warehouse. The statement attributed to the police is not directly to the point that the petitioners were being detained in connection with the theft from the UNHCR warehouse. Though the statement indicates some connection of the detention to the offence it does not state as a matter of fact that that is the reason for the petitioners' detention. The petitioners' detention whether indirectly connected with the theft from the UNHCR warehouse or solely because they are failed asylum seekers does not seem to me to require the production of the orders from the Office of the President as in any case their applications for refugee status were rejected thereby rendering them

failed asylum seekers. The production of the orders would not have advanced their case further.

17. There were, no doubt, some disturbances at Dukwi Refugee Camp as reported in the newspaper article attached to the petitioners' replying affidavit. These are acknowledged by the Camp Commandant in the passage which I have quoted. It is a fact that the petitioners were being investigated for theft at the time that they were taken to the Centre for Illegal Immigrants. The issue for determination, as I see it, is whether the petitioners were arrested and detained in connection with a criminal offence or they were detained solely because they were failed asylum seekers or both.

18. The petitioners were kept at Dukwi Refugee Camp. Certain disturbances occurred at that camp and an offence was committed in respect of which the petitioners were suspected to be involved. They are failed asylum seekers. It seems to me that the treatment which they are now receiving from the authorities was prompted by the disturbances and the theft at the Refugee Camp and the suspicions held against them. These occurrences provoked the authorities to begin to deal with the petitioners strictly in accordance with their status as failed asylum seekers. Hitherto, it seems to me, they were treated differently and benevolently in the hope that a third country

could be found for them or they would, on their own, leave Botswana. Their detention was, as a matter of fact prompted by the events at the refugee camp and the suspicions held against them. That became the immediate reason for handling them strictly according to their status. I do not find that their detention at the Centre for Illegal Immigrants is based on any intention on the part of the State to charge them with theft and to prosecute them for that offence. That is the reason why the police have shown no further interest in them. There is no more to be said beyond the Attorney-General's assertion that no criminal proceedings are presently contemplated against them. They cannot force the position that it is intended that they be prosecuted when everyone involved, the police and the Attorney-General, say that that is not the position.

19. The petitioners are, conveniently, of the view that their detention is because they are suspected of having committed an offence. The State authorities have all stated that the reason for the detention is that the State is now taking appropriate action against them in their capacity as failed asylum seekers. Quite candidly the Attorney-General does not deny that the events at the camp prompted the action against the petitioners. It would be correct, therefore, to sum up the Attorney-General's position as follows. The petitioners are failed asylum seekers. As such they ordinarily must be detained at a

place designated for that purpose until they are removed from the country. Since the rejection of their applications for recognition as asylum seekers, they have been permitted to reside at Dukwi Refugee Camp and only moved to the Centre for Illegal Immigrants when the authorities decided, because of events at the refugee camp, that they should now deal with them strictly in accordance with their status in the country. I therefore come to the conclusion that the petitioners are detained at the Centre for Illegal Immigrants, not because they are suspected of having committed an offence or of involvement in disturbances at the refugee camp but principally because they are failed asylum seekers, who according to the Attorney-General should be removed from the country. The petitioners' arrest and detention do not therefore arise from the suspicion that they committed an offence. This renders their application for bail inappropriate.

20. The attorney for the applicant appeared to me to have belatedly accepted that the petitioners' detention is connected only or primarily with their status as failed asylum seekers. In para 2 of his heads of argument dealing with the preliminary point of objection raised by the Attorney-General and later abandoned, Mr. *Moseki* states as follows –

> "It only transpired later when the Petitioners instructed us as attorneys of record that the police claimed they had nothing to do with the Petitioners' detention. Any attempt to obtain the warrant which detained the Petitioners prior to the launching of this Petition, were rebuffed by the Police in Dukwi and Prison Officers at the Centre for Illegal Immigrants."

21. The focus of Mr. *Moseki*'s argument shifted to s 14 of the Immigration Act [Cap 25:02] which provides that –

> "(1) Any person who is liable to be removed from Botswana under this Act may be detained by an Immigration Officer for such period as may be necessary for the completion of the arrangements thereof.
>
> (2) Such person may during such period be detained in the nearest convenient prison.
>
> (3) Any person so detained and not serving a sentence of imprisonment shall be treated as a person awaiting trial."

22. Mr. *Moseki* capitalized on subs (3) and submitted that since the petitioners must be treated as persons awaiting trial they were entitled to apply for bail. He persisted with this argument in his oral submissions. Another shift of focus by Mr. *Moseki* was to argue that in terms of the Refugees (Recognition and Control) Act [Cap 25:01] the petitioners were not persons liable to be removed from Botswana because a third country to which they may be removed had not been found. In addition he argued that the petitioners were issued with identity documents which is an indication that they are not subject of removal from Botswana. He also submitted that international treaties to which Botswana is a party do not permit the return of a refugee to his country of origin "if there is a well grounded fear of political persecution where the refugee comes from." Mr. *Moseki* concluded his

written submissions with following words –

> "It is submitted that the root cause of the Petitioners' detention started when the Petitioners were suspects in a criminal case. When evidence failed, the authorities worked out a scheme to detain the Petitioners as long as it pleases them. It is further submitted that this detention is contrary to law. It is further submitted that the Petitioners be released from detention and that such detention be declared unlawful."

23. At the hearing Mr. *Moseki* conceded that the detention of the petitioners as from 4 May 2005 was not illegal. That date is the date on which the warrants for their detention annexed to Kgaboesele's affidavit were issued. These warrants, according to Kgaboesele, were renewal warrants by which he meant that other warrants, not annexed, had been issued upon the petitioners' detention on 30 March. Mr. *Moseki* argued that the failure to produce the first warrants must be viewed as an indication that no such warrants were issued before 4 May. The petitioners' case is therefore that –

    (a) They are lawfully detained at the Centre for Illegal Immigrants (as from 4 May) and they should be treated in the same fashion as persons awaiting trial. Such treatment entails that they can apply for bail.

    (b) They are not persons liable to removal from Botswana and as such their detention at the Centre for Illegal Immigrants is not lawful. They should be returned to Dukwi Refugee Camp as charges of the UNHCR.

24. These positions are mutually exclusive. The petitioners cannot, in my view be lawfully detained at the Centre for Illegal Immigrants if they are not liable to removal from Botswana. Their detention can only be legal, as conceded by their attorney, if they are liable to be removed from Botswana. I will however examine the petitioners' case from both angles, contradictory as they appear to me to be.

25. The Immigration Act, in providing that a person awaiting removal from Botswana must be treated as a person awaiting trial, does not, in my view, mean that that person may apply for bail. Whilst in a place of detention or prison, a person awaiting trial cannot be treated in the manner that a convicted person is treated. That is the difference which s 14(3) of the Immigration Act strikes and not that such person may apply for bail. I have earlier in this judgment stated that the question of bail is to be considered strictly within the context of the applicable statutory provisions. There is not, to my knowledge, a provision which entitles a person, other than one who has been arrested and detained for a criminal offence, to apply for bail. Part IX of the Criminal Procedure and Evidence Act is relevant in this regard. In any case s 90 of the same Act provides that until a warrant of committal for trial is made out, no prisoner can insist on being admitted to bail and in terms of s 106 a person may apply to be admitted to bail by the High Court after his commitment.

26. The petitioners' application to be admitted to bail is, for the reasons I have given, misconceived and inappropriate in the circumstances of this case. I will accordingly dismiss it.

27. The second leg of the petitioners' case is that their detention is unlawful in any case, a position which runs contrary to Mr. *Moseki's* concession that their detention from at least 4 May is legal. I will examine their contention anyway.

28. It terms of the Refugee (Recognition and Control) Act a recognised refugee means an immigrant whom the Minister has in terms of s 8(1) (a) of that Act declared that he recognizes him as a political refugee. In terms of s 8(1) (b) of that Act, the Minister may decline to recognize any applicant as a political refugee. In that connection s 8(2) provides that –

> "Where under subsection (1), the Minister declares that he does not recognize a person as a political refugee such person shall, if he is liable to be removed from Botswana under the Immigration Act, be so removed and shall, whether so liable or not, be subject in all respects to the provisions of that Act."

29. Section 7 of the Immigration Act specifies categories of persons whose presence in Botswana is unlawful and therefore liable to be removed from the country. The applicants, being failed asylum seekers fall

into this category of persons and are therefore liable to be removed from the country. Section 14 of the same Act provides that a person who is liable to be removed from Botswana under the Act may be detained by an immigration officer for such period as may be necessary for the completion of arrangements therefor and such person may be detained in a nearest convenient prison. There is no time limit to the period of detention but such detention is subject only to the necessary arrangements for removal having been completed. It is envisaged though that the authorities will act within a reasonable time to complete the arrangements and reasonableness will be relative to the particular circumstances of the person concerned.

30. It was submitted on behalf of the petitioners that they are not liable to being removed from Botswana because a third country to which they may be removed has not been found. The term "political refugee" is defined in the schedule to section 2 of the Refugee (Recognition and Control) Act. He is a person who, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social 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. When the Minister declines to recognize a person as a political refugee in terms of s 8(1) (b) of the same Act he will have formed the opinion, informed by a

recommendation of Refugee Advisory Committee established under s 3 of that Act, that the person concerned is not a political refugee or that there is no, or insufficient reason to treat him as a political refugee. The petitioners were not recognised as political refugees and they are therefore liable to be removed from Botswana. I have not been availed the Convention Relating to Status of Refugees nor the 1967 Protocol nor have any specific provisions of those treaties impacting on the issue in this case been drawn to my attention. From my own research it is clear to me that Article 31 of the Convention relating to the Status of Refugees acknowledges that some refugees may be in a country unlawfully and may suffer certain restrictions until their status in the country is regularized or they obtain admission into another country. The responsibility for obtaining admission in another country lies with the refugee concerned in terms of this Article and the State party is only required to allow such refugee a reasonable period and all necessary facilities to obtain admission into another country. Paragraph 5 of Article II of the OAU Convention on Refugee Problems in Africa is much to the same effect. Because they have not been recognised as political refugees in this country the petitioners may therefore be dealt with in such manner as will ensure their eventual removal from Botswana. It is regrettable that the petitioners did not seek any imput from the UNHCR. Any such imput may have clarified further their position in the country

and confirmed that despite the rejection of their applications for refugee status, they remain a charge of the UNHCR.

31. The petitioners' detention is lawful in terms of s 14 of the Immigration Act. Their attorney conceded that presently their detention is lawful. There is no basis on which I may declare that the petitioners' detention at the Centre for Illegal Immigrants is unlawful. There is also no basis on which I can grant them bail. Accordingly I dismiss the petition with costs.

DELIVERED IN OPEN COURT ON FRIDAY 10 JUNE 2005.

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M. H. CHINHENGO
JUDGE