THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 10/2003

In the matter between :

THE MINISTER OF HOME AFFAIRS	First Appellant
THE DIRECTOR-GENERAL, DEPARTMENT OF HOME AFFAIRS	Second Appellant
THE CHAIRPERSON: STANDING COMMITTEE FOR REFUGEE AFFAIRS	Third Appellant

and

MURIEL MILLIE WATCHENUKA	First Respondent
CAPE TOWN REFUGEE CENTRE	Second Respondent

Before:	**HOWIE P, NAVSA, MTHIYANE, NUGENT & HEHER JJA**
Heard:	**10 NOVEMBER 2003**
Delivered:	**28 NOVEMBER 2003**
Summary:	**Applicants for asylum – right to undertake employment and to study.**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] This appeal concerns the rights of asylum seekers – people who claim to be taking refuge in this country from persecution or conflict elsewhere – and in particular the extent to which they may be prohibited from being employed and from studying while they are waiting to be recognised as refugees.

[2] The rights and obligations of those who seek asylum are governed by the Refugees Act No 130 of 1998, which was enacted to give effect to South Africa's international obligations to receive refugees in accordance with standards and principles established in international law. The effect of s 2 of the Act is to permit any person to enter and to remain in this country for the purpose of seeking asylum from persecution on account of race, religion, nationality, political opinion or membership of a particular social group, or from a threat to his or her life or physical safety or freedom on account of external aggression, occupation, foreign domination or disruption of public order.

[3] A person who wishes to be given asylum must apply to be recognised as a refugee. If that recognition is granted the refugee – and his or her dependants – enjoys the various rights specified in s 27 of the Act, which include the right in certain circumstances to apply for permanent residence, the right to a South African travel document, the right to seek employment, and the right to receive basic health services and primary education. It is implicit in that section (particularly when it is read together

with the Aliens Control Act No 96 of 1991 and the Immigration Act No 13 of 2002 that replaced it)[1] that an applicant for asylum has none of those rights until he or she is recognised as a refugee.

[4] An application for asylum must be made in the prescribed form to a Refugee Reception Officer at one of the Refugee Reception Offices that are established in terms of s 8 of the Act. The Refugee Reception Officer must refer the application to a Refugee Status Determination Officer who is required to make appropriate enquiries and to determine whether or not the applicant qualifies for recognition as a refugee. If the application is refused the applicant is entitled to appeal.[2]

[5] Section 22(1) of the Act provides that once an applicant has applied for asylum:

> 'The Refugee Reception Officer must, pending the outcome of [the] application … 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.'

[6] The Standing Committee referred to in that section is the Standing Committee for Refugee Affairs established by s 9 of the Act. The Standing Committee comprises a chairperson (the third appellant) and members

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[1] The Aliens Control Act 96 of 1991 was repealed by s 54 of the Immigration Act 13 of 2002. Section 54 was brought into operation on 12 March 2003 by Proclamation R13, 2003 published in Regulation Gazette 7589 Government Gazette 24951 dated 20 February 2003.

[2] In terms of the Refugees Act the appeal lies to the Refugee Appeal Board established under s 12 of that Act. Amendments made to that Act by the Immigration Act No 13 of 2003 have the effect of abolishing that Board and allowing an appeal instead to the Immigration Court established in terms of s 37 of that Act. Those amendments have yet to come into operation.

appointed by the Minister of Home Affairs (the first appellant) and it 'must function without any bias and must be independent' (s 9(2)).

[7] The powers and duties of the Standing Committee are, amongst others, to formulate and implement procedures for the grant of asylum, to regulate and supervise the work of the Refugee Reception Offices, to advise the Minister and the Director General, to review certain decisions made by Refugee Status Determination Officers, and to monitor such decisions (s 11). Section 11(h) provides that the Standing Committee

'must determine the conditions relating to study or work in the Republic under which an asylum seeker permit may be issued.'

[8] Section 38(1) of the Act authorises the Minister of Home Affairs to make regulations relating to certain matters including:

'(c) the forms to be used under certain circumstances and the permit to be issued pending the outcome of an application for asylum;

(d) …

(e) the conditions of sojourn in the Republic of an asylum seeker, while his or her application is under consideration.'

[9] The Refugees Act came into operation on 1 April 2000. On 6 April 2000 the Refugee Regulations (Forms and Procedure) 2000 were promulgated. [3] Regulation 7(1)(a) provides that a permit issued in terms of s 22 of the Act (i.e. the permit issued to an asylum seeker pending the determination of an application for asylum)

[3] Under Government Notice R 366 in Government Gazette 21075 of 6 April 2000.

'must be in the form and contain substantially the information prescribed in Annexure 3 to these Regulations.'

[10] The form prescribed by Annexure 3 contains various conditions that the permit-holder is required to adhere to and includes a condition in the following terms: 'EMPLOYMENT AND STUDY PROHIBITED'. The effect of Regulation 7(1)(a), when read together with the prescribed form, is that every asylum seeker is prohibited by the conditions in his or her permit from undertaking employment or from studying.

[11] The first respondent applied for asylum on 2 February 2002 after entering this country from Zimbabwe with her disabled twenty year old son. She alleges that she left Zimbabwe for fear that her son would be forced to join militant supporters of the ruling political party in Zimbabwe who she alleged were intimidating supporters of the political opposition. Shortly after applying for asylum she secured a place for her son to study at a Cape Town college. The first respondent is a widow who is trained as a pharmacy technician. She alleges that her savings have been depleted and that she needs to secure employment in order to support herself and her son.

[12] A permit was issued to the first respondent as provided for in s 22(1) of the Act that included the standard conditions to which I have referred and she and her son were thus prohibited respectively from undertaking employment and from studying.

[13] The first respondent applied to the Cape High Court for an order declaring the prohibition in Annexure 3 to the regulations to be contrary to the Constitution and directing the appellants to permit her and her son to be employed and to study respectively pending the finalisation of her application for asylum. The second respondent – which is a voluntary association that has amongst its objectives the provision of assistance to applicants for asylum – supported the application, not only in the first respondent's interest, but also in the interest of applicants for asylum generally.

[14] The application came before HJ Erasmus J who granted the relief that was sought (the judgment of the court *a quo* is reported as *Watchenuka and Another v Minister of Home Affairs* 2003 (1) SA 619 (C)) but he granted the appellants leave to appeal to this Court.

[15] The court *a quo* decided the matter on a narrow ground. The learned judge pointed out that while s 38(e) of the Act empowers the Minister in general terms to make regulations relating to the conditions of sojourn in the Republic of an applicant for asylum, s 11(h) expressly enjoins the Standing Committee to determine the conditions relating to study or work under which an asylum seeker permit may be issued. In those circumstances, the court *a quo* reasoned, 'the Minister cannot make regulations about conditions relating to study and work in the Republic under which an asylum seeker permit may be issued without having regard to the determination made by the Standing Committee'. It followed, said

the learned judge, that because the Standing Committee had made no such determination at the time the regulations were made the Minister had no power to prohibit employment and study. (The implication of that finding is that the prohibition in Annexure 3 to the regulations would have been *intra vires* if it had accorded with a prior determination that had been made by the Standing Committee).

[16] I agree that the Minister had no authority to impose the prohibition but my reasons for reaching that conclusion – and consequently its implications – differ from those of the court *a quo*.

[17] Section 11(h) of the Act confers upon the Standing Committee the power and the duty to determine the conditions under which a permit may be issued in so far as those conditions relate to work and study. Provided that its decision in that regard – in other words its determination – is properly taken, the Act prescribes no formalities in order for that decision to be put into effect. The court *a quo* appears to have been of the view that once the Standing Committee has determined such conditions they have no effect unless translated into law by regulation. I see nothing in the Act to justify that conclusion. On the contrary, it would be most unusual if the powers expressly conferred upon the Standing Committee were to have no effect unless the Minister chose to exercise the separate powers conferred upon him by s 38 for there would be an inherent potential for the exercise of the respective powers to be frustrated. In my view the Standing Committee exercises its power to determine conditions relating to work and

study, either generally or in particular cases, merely by making a decision to that effect. Any such determination is given effect to by being included as a condition in the permit that is issued in terms of s 22(1), which expressly requires such permits to be issued subject to, and endorsed with, any conditions that have been determined by the Standing Committee. No doubt the Standing Committee might publish, and make known to the public, the decisions that it makes in relation to such conditions but that does not mean that it must do so by causing regulations to be promulgated.

[18] Having vested the power to determine such conditions in the Standing Committee the Legislature could not have intended the same powers to be exercised by the Minister. It must necessarily be implied in s 38(1)(e) of the Act that the 'conditions of sojourn' that he is empowered to regulate do not include conditions relating to work or study.

[19] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC) at paras 58 and 59 the following was said:[4]

'It seems central to the conception of our constitutional order that the Legislature and Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim constitution … There is of course no doubt that the common-law principles of *ultra vires* remain under the new constitutional order. However, they are underpinned

[4] The case was decided under the interim Constitution but the remarks have equal validity under the new Constitution

(and supplemented where necessary) by a constitutional principle of legality .... In relation to legislation and to executive acts that do not constitute 'administrative action', the principle of legality is necessarily implicit in the Constitution.'

[20] In the absence of the power to prohibit an applicant for asylum from taking up employment, or from studying, the Minister acted in conflict with the Constitution in purporting to do so and the court *a quo* correctly set aside the prohibition in Annexure 3 of the regulations on that ground.

[21] It does not follow, however, that the first respondent was entitled to an order directing the appellants to permit her and her son to be employed and to study respectively for on the view that I take of the matter there was a further hurdle to the granting of that relief.

[22] At a meeting held on 18 September 2000 – well before the first respondent's permit was issued – the Standing Committee itself resolved that all permits issued in terms of s 22 of the Act must contain a condition prohibiting employment and study but that if an application for asylum was not finalised within 180 days the applicant could apply to the Standing Committee to lift the restriction. The conditions in the first respondent's permit were thus in accordance with the Standing Committee's own decision, quite apart from what was provided for in the regulations. I can see no proper grounds for directing the Standing Committee to act in conflict with its own decision unless that decision is itself assailable. Whether the prohibitions in the first respondent's permit fall to be interfered with at all seems to me to depend upon whether and to what

extent the Standing Committee's own determination might itself be unlawful.

[23] There was some suggestion in the papers that at the time the decision was taken the Standing Committee was improperly constituted with the result that all its decisions are invalid. That issue arose when the answering affidavit filed on behalf of the appellants revealed that the deponent was not only an employee of the Department of Home Affairs but also a member of the Standing Committee. The respondents allege that that is in conflict with s 9(2) of the Act, which requires the Standing Committee to be 'independent'. Whether the Standing Committee was indeed properly constituted was not decided by the court *a quo* and it is also not necessary – nor desirable – that we should decide it. The application was not brought on those grounds. The issue arose for the first time in reply and I am not satisfied that it was fully canvassed. No doubt the appellants will note the respondents' contention and will act appropriately if they consider it necessary to do so, but I do not think the matter falls properly to be dealt with in this appeal. I proceed on the assumption that the Standing Committee was indeed properly constituted at the time its decision was made.

[24] In my view the Standing Committee's general prohibition of employment and study for the first 180 days after a permit has been issued

is in conflict with the Bill of Rights.[5] I consider that the general prohibition in the regulations is unlawful for the same reasons, which constitutes a further ground for setting it aside.

[25] Human dignity has no nationality. It is inherent in all people – citizens and non-citizens alike – simply because they are human. And while that person happens to be in this country – for whatever reason – it must be respected, and is protected, by s 10 of the Bill of Rights.

[26] The inherent dignity of all people – like human life itself – is one of the foundational values of the Bill of Rights. It constitutes the basis and the inspiration for the recognition that is given to other more specific protections that are afforded by the Bill of Rights. In *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 144 Chaskalson P said the following:[6]

'The rights to life and dignity are the most important of all human rights, and the source of all other personal rights in chap 3. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others.'

In the same case, para 328, O'Regan J said the following:

'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched.'

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5 Chapter 2 of the Constitution of the Republic of South Africa, 1996.

6 The case was decided under the interim Constitution but the passages cited have equal relevance to the present Constitution.

[27] The freedom to engage in productive work – even where that is not required in order to survive – is indeed an important component of human dignity, as submitted by the respondents' counsel, for mankind is pre-eminently a social species with an instinct for meaningful association. Self-esteem and the sense of self-worth – the fulfilment of what it is to be human – is most often bound up with being accepted as socially useful.

[28] But the protection even of human dignity – that most fundamental of constitutional values – is not absolute and s 36 of the Bill of Rights recognises that it may be limited in appropriate circumstances. It may be limited where the limitation is of general application and is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors'.

[29] If the protection of human dignity were to be given its full effect in the present context – permitting any person at all times to undertake employment – it would imply that any person might freely enter and remain in this country so as to exercise that right. But as pointed out by the United States Supreme Court over a century ago in *Nishimura Ekiu v The United States*: [7]

'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'

[7] 142 US 651 at 659. The passage as it is cited in Tribe *American Constitutional Law* 2nd ed at 358 was cited with approval in the Certification judgment referred to in para 30, at para 21 fn 31.

[30] It is for that reason, no doubt, that the right to enter and to remain in the Republic, and the right to choose a trade or occupation or profession, are restricted to citizens by ss 21 and 22 of the Bill of Rights. As pointed out in *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* 1997 (2) SA 97 (CC) para 20, the restriction to citizens of the right to choice of occupation is in accordance with recognised international human rights instruments. The Court went on to say the following at para 21:

> 'This distinction [between citizens and others] is in fact recognised in the United States of America and also in Canada. There are other acknowledged and exemplary constitutional democracies where the right to occupational choice is extended to citizens only, or is not guaranteed at all. One need do no more than refer to India, Ireland, Italy and Germany. [Constitutional Principle] II, as we made plain in the [Certification Judgment], requires inclusion in a bill of rights of 'only those rights that have gained a wide measure of international acceptance as fundamental human rights'. The fact that a right, in the terms contended for by the objector, is not recognised in the international and regional instruments referred to and in a significant number of acknowledged constitutional democracies is fatal to any claim that its inclusion in the new South African Bill of rights is demanded by [Constitutional Principle] II'.

[31] Those considerations alone, in my view, constitute reasonable and justifiable grounds for limiting the protection that s 10 of the Bill of Rights accords to dignity so as to exclude from its scope a right on the part of every applicant for asylum to undertake employment – a limitation that is

implied by s 27(f) of the Refugees Act, and that has been expressed in the Standing Committee's decision.

[32] But where employment is the only reasonable means for the person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfilment, but a restriction upon his or her ability to live without positive humiliation and degradation. For it is not disputed that this country, unlike some other countries that receive refugees, offers no State support to applicants for asylum.[8] While the second respondent offers some assistance as an act of charity, that assistance is confined to applicants for asylum who have young children, and even then the second respondent is able to provide no more to each person than R160 per month for a period of three months. Thus a person who exercises his or her right to apply to apply for asylum, but who is destitute, will have no alternative but to turn to crime, or to begging, or to foraging. I do not suggest that in such circumstances the State has an obligation to provide employment – for that is not what is in issue in this appeal – but only that the deprivation of the freedom to work assumes a different dimension when it threatens positively to degrade rather than merely to inhibit the realisation of the potential for self-fulfilment.

[33] In my view there is no justification for limiting beyond that degree the protection that is afforded by s 10. As pointed out in *Makwanyane*,

[8] In the United Kingdom s 95 of the Immigration and Asylum Act 1999 authorises the Secretary of State to provide material support for asylum seekers. It was noted in *R (on the application of Q and Others) v Secretary of State for the Home Department* [2003] 2 All ER 905 (CA) that that power is exercised at an annual cost of £1 billion.

supra, para 102, it is for the party relying upon the limitation to satisfy a court that the limitation is justified and not for the party challenging it to show that it was not justified.[9] The appellants made little attempt to show why such a limitation would be justified. It was alleged that the prohibition on employment is consistent with Article 17 of the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol but those instruments are neutral on this issue. There was some suggestion that the rights that are accorded to applicants for asylum are abused by persons who are not genuine refugees but that provides no reason for limiting the rights of those who are genuine. There was also a suggestion that to permit an applicant for asylum to undertake employment would deprive citizens of that opportunity but there is no reason to believe that that will always be so. No doubt these are matters that might properly be taken into account in determining whether a particular applicant for asylum should or should not be permitted to take up employment or to study but I do not think they provide grounds for applying a general prohibition. For a general prohibition will inevitably include amongst those that it affects applicants for asylum who have no reasonable means of support other than through employment. A prohibition against employment in those circumstances is a material invasion of human dignity that is not justifiable in terms of s 36.

[9] At para [102]. See too *In National Coalition for Gay & Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC); Stuart Woolman in Chaskalson *et al* Constitutional Law of South Africa 12.3; Halton Cheadle in South African Constitutional Law: The Bill of Rights para 30.5.

[34] That must necessarily mean that in exercising the powers and duties conferred upon it by s 11(h) the Standing Committee must take account of the circumstances of the applicant, whether on a case by case basis or by formulating guidelines to be applied by Refugee Reception Officers when issuing permits in particular cases. Provided that a Refugee Reception Officer acts within closely and clearly defined guidelines, and the Standing Committee retains its powers of oversight, I do not think the delegation to him or her of the power to assess what conditions should be imposed in particular cases would be unlawful. As pointed out by Botha JA in *Attorney-General, OFS v Cyril Anderson Investments (Pty) Ltd* 1965 (4) SA 628 (A) at 639:

> 'It is not every delegation of delegated powers that is hit by the maxim [*delegatus delegare non potest*], but only such delegations as are not, either expressly or by necessary implication, authorised by the delegated powers.'[10]

[35] There is one further consideration to be borne in mind. At the time that is relevant to this appeal the Aliens Control Act No 96 of 1991 was still in existence. It has since been repealed and replaced by the Immigration Act 13 of 2002.[11] Although an applicant for asylum is permitted to be in this country by the Refugees Act his or her presence might often be in contravention of the Aliens Control Act (and now in contravention of the Immigration Act) with the result that the prohibitions in s 32 of that Act (and the prohibitions in s 38 of the Immigration Act)

[10] See further: Lawrence Baxter *Administrative Law* 432-442
[11] See footnote 1.

would ordinarily be applicable. That construction would effectively negate the express power conferred upon the Standing Committee by the Refugees Act to permit applicants for asylum to enter into employment or to study and that could not have been intended. It must necessarily be implied in s 22 of the Refugees Act that a permit granting an applicant the right to work or to study confers those rights upon the permit-holder, and where applicable his or her dependants, notwithstanding the provisions of the Aliens Control Act or the Immigration Act.

[36] In my view the Standing Committee's general prohibition against study is also unlawful. The freedom to study is also inherent in human dignity for without it a person is deprived of the potential for human fulfilment. Furthermore, it is expressly protected by s 29(1) of the Bill of Rights, which guarantees everyone the right to a basic education, including adult basic education, and to further education. (We are not concerned in this case with whether the State is obliged to provide educational opportunities to applicants for asylum but only with whether they may be deprived of the freedom to receive education that is available). For reasons that I have already advanced that right, too, cannot be absolute, and is capable of being limited in appropriate circumstances, for I reiterate that the State cannot be obliged to permit any person to enter this country, and then to remain, in order that he or she might exercise that right. But where, for example, the person concerned is a child who is lawfully in this country to seek asylum (there might be other circumstances as well) I can see no

justification for limiting that right so as to deprive him or her of the opportunity for human fulfilment at a critical period, nor was any suggested by the appellants. A general prohibition that does not allow for study to be permitted in appropriate circumstances is in my view unlawful, and I reiterate what has been said in paragraph 34.

[37] It remains to consider whether the court *a quo* was justified in directing the appellants to permit the first respondent and her son to take up employment and to study respectively. I have pointed out that an applicant for asylum is not ordinarily entitled to take up employment or to study pending the outcome of his or her application, but that there will be circumstances in which it would be unlawful to prohibit it. Section 11(h) confers upon the Standing Committee the power and the duty to determine in any particular case whether that should be permitted, and it has not yet applied its mind to whether it ought to be permitted in the present case. I do not think it is for a court to usurp that function. There is no reason to believe that the outcome is a foregone conclusion, nor that the Standing Committee is not able properly to exercise its powers (*Johannesburg City Council v The Administrator of the Transvaal* 1969 (2) SA 72 (T); *Traube and Others v Administrator, Transvaal, and Others* 1989 (1) SA 397 (W)). The proper order is to direct the Standing Committee to exercise its powers in the present case, rather than to usurp its functions. (We were informed from the Bar that the first appellant's application for asylum was refused but that an appeal against that refusal has yet to be determined.)

[38] For those reasons the appeal can succeed only to the extent that the second part of the order made by the court *a quo* falls to be set aside. However that was not the main thrust of this appeal. The respondents have been substantially successful and are entitled to the costs of the appeal.

[39] The following orders are made:

1. The appeal succeeds to the extent that paragraph 2 of the order made by the court *a quo* is set aside and the following is substituted:

   'The Standing Committee for Refugee Affairs is directed to consider and determine whether the first applicant and her son respectively should be permitted to undertake employment and to study pending the outcome of the first respondent's application for asylum, and to cause the appropriate condition to be endorsed upon the permit issued to her in terms of s 22 of the Refugees Act.'

2. The appellants are ordered to pay the costs of the appeal.

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NUGENT JA

HOWIE P)
NAVSA JA)
MTHIYANE JA) CONCUR
HEHER JA)