IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 5441/2020

In the matter between:

The Minister of Home Affairs	**First Applicant**
The Director General: Department of Home Affairs	**Second Applicant**

And

Scalabrini Centre of Cape Town	**First Respondent**
Trustees of the Scalabrini Centre of Cape Town	**Second Respondent**
Consortium for Refugees and Migrants in South Africa	**Third Respondent**

JUDGMENT ELECTRONICALLY DELIVERED

22 APRIL 2021

BAARTMAN, J

[1] On 30 November 2020, I granted an interim interdict, Part A, in which the applicants, the respondents in the main application, were interdicted from implementing the impugned provisions pending finalisation of the constitutional challenge of sections 22(12) and 13 of the Refugees Act, 130 of 1998 (**the Act**), and related regulations[1], Part B.

[2] I was persuaded that the respondents, applicants in the main application, had shown that the continued implementation of the impugned provisions could potentially result in an asylum seeker's deportation to a country where he or she could potentially face death, genocide or other forms of treatment which the principle of *non-refoulement* seeks to prevent.

[3] This is so because the impugned provisions apply when an asylum seeker fails to timeously renew his or her visa and provide for an enquiry by the Standing Committee into the reasons for the delay. If the Standing Committee is not persuaded by the reasons advanced for the delay, it endorses the visa as abandoned and the asylum seeker faces deportation, potentially in contravention of the principle of *non-refoulement.*

[4] I further accepted that the applicants had in a PowerPoint presentation, which they intended to present to the relevant parliamentary committee, indicated that **396** asylum seekers had already been dealt with in terms of the impugned provisions. The first and second respondents received a copy of the PowerPoint presentation a few days before the scheduled meeting. I further accepted that the respondents were entitled to rely on that information as accurate and that it ill behoved the applicants to complain about the inclusion of the PowerPoint presentation in reply as it was their duty to

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[1] Regulation 9 and Form 3 of the Refugee Regulations, published in GNR 1707, Government Gazette 42932 on 27 December 2019.

have provided the information to the court. The information was relevant and necessary for a proper determination of the issues in dispute.

[5] In terms of the November order, the third respondent was allowed as *amicus* and allowed to lead the evidence of Ms Sophi Kamau Njoki (**Njoki**) and Ms Tegbab Belayney Bahrelaise (**Bahrelaise**). I was persuaded that their evidence contained necessary and relevant information[2]. It is convenient to repeat the content of the affidavits, paragraphs 23(a)–26 of the November judgment:

> '23 ...The amicus alleged that it introduced the affidavits to demonstrate "the severe impact of the abandonment provisions". The following appears from the amicus' affidavits:
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> **The first *amicus affidavit***
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> (a) Njoki, a Kenyan asylum seeker, arrived in South Africa in 2008. She currently awaits an appeal date from the Refugee Appeals Authority of South Africa (**RAA**). Njoki has 3 dependent children, 2 of whom are listed as dependants under her asylum application. The third child is undocumented as attempts to add her to Njoki's asylum application have been unsuccessful.
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> (b) Njoki's permit expired on 30 April 2019 and those of her children expired on 24 April 2019. On 9 April 2019 Jane, one of Njoki's children, was admitted to Millpark Hospital with a rare auto-immune disease known as Guillain-Barré syndrome. Njoki was unable to leave Jane, who became paralysed, and therefore did not renew her permit. Similarly, Njoki's son was unable to renew his permit as he could only do so accompanied by the main file member.
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> (c) On 25 May 2019, Jane, paralysed and bedridden, was discharged from hospital. In September 2019, Jane was more mobile and able to use a wheelchair. On 24 September 2019, Njoki and her children attempted to renew their permits. She was informed that she had to pay an overstay fine before she could renew her permit. Despite several attempts, Njoki

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[2] Paragraphs 27–29 of the November judgment.

was unable to pay the fine at the Pretoria Central Police Station between September and December 2019.

(d) On 14 January 2020, Njoki and her children attempted to renew their permits; she was informed that the law had changed and that it was no longer possible to pay an overstay fine. The official requested Njoki to submit a written explanation for her failure to have timeously renewed her permit. She did so, but was informed that her application had been deemed abandoned and had been referred for cancellation.

(e) Njoki was requested to submit further medical records pertaining to her daughter. She did so. However, 7 months later she has had no response and remains undocumented together with her children.

The second amicus affidavit

[24] Bahrelaise is an Ethiopian asylum seeker with 2 minor children who are joined to her file in terms of section 3(c) of the Act. Although she lives in Mpumalanga, she is required to attend the refugee centre in Pretoria. On 13 November 2019, Bahrelaise was unable to renew her permit due to her son's illness. At the time, her husband was out of town. She managed to travel to Pretoria a week later. Due to long queues, she was unable to renew her permit, but tried several times thereafter. On 18 December 2019 she was informed that she had to pay an overstay fine, which she did on 8 January 2020.

[25] On 12 March 2020 she gained access to the Pretoria centre where she learnt that she could no longer renew her permit; instead, she had to file an affidavit explaining her failure to have timeously renewed her permit. She complied and was informed that an official would contact her.

[26] On 16 March 2020, with the assistance of Lawyers for Human Rights, she learnt that her application had been referred to the Standing Committee for Refugee Affairs. The effect of the abandonment provisions is that Bahrelaise and her children remain undocumented until the Standing Committee has reached a decision.'

The grounds of appeal

[6] Below, I deal with the grounds of appeal in turn and consider the applicable test[3].

'The court erred in finding that the applicants (respondents in this application) met the requirements for interim relief.'

[7] Mr Naidoo SC, who appeared for the applicants together with Ms Mokhoaetsi, submitted that 'an interdict restraining the exercise of statutory power is not an ordinary interdict and the Courts do not readily grant such an interdict in the absence of *mala fides*.' In the November judgment[4], I dealt with the requirements for interim relief and concluded that there was a real apprehension of harm and that no adequate alternate remedy was available to the asylum seeker whose visa is deemed abandoned.

[8] The applicants are at pains to stress that the impugned provisions adequately provide for the prevention of deportation of an asylum seeker who fails to renew his or her visa due to no fault on their part. I accept. However, even if the asylum seeker is at fault, he or she may not be returned to a country where the asylum seeker would face prosecution, among others, as that offends the principle of *non-refoulement*.

[9] Therefore, even if the applicants correctly complain that I 'erred in characterising the provision as one where the visa must be deemed abandoned while the legislation states that the visa is to be considered abandoned…' the effect remains that an asylum seeker may potentially be deported in circumstances where his or her right of non-return is violated. The respondents, the applicants in the main

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[3] Section 17 of the Superior Courts Act 10 of 2013.
[4] Paras 40–62.

application, have demonstrated that the impugned provisions could potentially operate in violation of the asylum seekers' right of non-return.

[10] The applicants complain that I relied on the PowerPoint presentation and the third respondent's affidavits, without giving them an opportunity to respond thereto. As indicated above, the applicants created the PowerPoint presentation and circulated it to the respondents. In paragraph 28 of the November judgment, I concluded that as follows:

> '...After circulating the PowerPoint presentation, from which it appears that 396 asylum seekers have already been dealt with in terms of the abandonment provisions, it ill behoves the respondents to complain that the applicants' allegations in that respect are speculative. The fact that the meeting did not take place does not change the information contained in the PowerPoint presentation and the respondents have not sought to correct any mistake contained in the presentation.'

[11] The third respondent filed its application, in which the Njoki and Bahrelaise affidavits were included, on 17 July 2020. In the answering affidavit, dated 31 July 2020, the applicants complained as follows:

> '40.1 Due to extreme time constraints, the state respondents are not in a position to consult with the relevant officials in order to obtain instructions in respect of the averments contained in this paragraph.'

[12] The applicants further sought to have the affidavits struck. The application was argued approximately 3 months later. In the interim, the applicants changed their lead counsel after Mr Seth Nthai withdrew. I afforded Mr Naidoo SC an opportunity to supplement the applicants' heads of argument; he did and the respondents replied. Despite the further delay, the applicants did not seek an opportunity to respond to the offending material, nor did they seek to correct the PowerPoint presentation. Although the application was brought on an urgent basis, the applicants had opportunity to seek leave to file further affidavits; indeed, they had an obligation to place relevant information

before court. There is no merit in the complaint, the information was relevant and necessary for the proper adjudication of this matter. It was in the interest of justice to have allowed the evidence.

'The court erred in finding that the respondents had a prima facie right and entitled to the relief sought.'

[13] The applicants submitted that the relevant officials have:

> 'the power to condone late renewals, the impugned provisions will not lead to deportation in all circumstances [and] the case advanced by the respondents is not based on the facts of any specific asylum seeker…'

[14] The first and second respondents have presented the case of Ms Hassan as an example of the implementation of the impugned provisions. I dealt with Ms Hassan's affidavit in the November judgment at paras 21–23; it is apparent that the Hassan affidavit had been included as an illustration of the operation of the impugned provisions. The respondents did not rely on the Hassan affidavit as alleged. There is no merit in the complaint.

'No Case for breach of separation of powers principle.'

[15] The applicants submitted that 'the court failed to carefully consider and give sufficient weight to the serious consequences that will flow from the immediate stop of the statutory obligations of [the applicants] …'

[16] Although the applicants complained that interim relief would disrupt their operations, they failed to give any detail thereof. Instead, they relied on the doctrine of separation of powers to caution against the granting of interim relief. The vague allegation of disruption to operations led me to conclude that the balance of convenience strongly favoured the granting of interim relief because I was persuaded that there was a real possibility that an asylum seeker would be returned in contravention of the right of non-refoulment. There is no merit in this ground of complaint.

'It is in the interest of justice to grant leave to appeal.'

[17] The applicants submitted that 'the relief currently granted unduly trespasses on the exclusive terrain of the applicants even before the final determination of the review grounds.'

[18] As indicated above, the applicants have not given any detail of the alleged disruption to their operations. In the circumstances of this matter, it was 'constitutionally appropriate' to grant interim relief[5]. The effect of the interim relief is that the applicants are restrained from deporting an asylum seeker who fails to renew his or her visa timeously until finalisation of the constitutional challenge to the impugned provisions. At worst, deportation is delayed. There is no merit in the submission that the relief is final in effect.

[19] In the circumstances of this matter, it is not in the interest of justice to grant leave to appeal. I am not persuaded that the appeal would have reasonable prospects of success.

Non-compliance of the interim relief

[20] The applicants have not complied with the order granted against them. They hold the view that the operation of the order was suspended by their lodging an appeal. The parties hold opposing views on whether it would be appropriate for me to make 'a statement' about the effect of the filing of the application for leave to appeal on the relief granted.

[21] I have dealt with the issues that were properly before me, from which my view of the dispute should be apparent.

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[5] *National Treasury and others v Opposition to Urban Tolling Alliance* and others 2012 (6) Sa 223 (CC) para 66.

Conclusion

[22] The application for leave to appeal is refused with costs.

(a) Costs only in respect of the first and second respondents, such costs to include the costs of 2 counsel.

BAARTMAN J