THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 25/2010

In the matter between:

MUSTAFA AMAN ARSE **Appellant**

And

MINISTER OF HOME AFFAIRS **First Respondent**

DIRECTOR-GENERAL DEPARTMENT OF HOME AFFAIRS **Second Respondent**

BOSOSA (PTY) LTD t/a PROSPECTS TRADING **Third Respondent**

Neutral citation: *Arse v Minister of Home Affairs* (25/10) [2010] ZASCA 9 (12 March 2010)

Coram: MPATI P, CLOETE, CACHALIA, MALAN JJA and THERON AJA

Heard: **24 February 2010**

Delivered: **12 March 2010**

Summary: Refugees Act 130 of 1998 and Immigration Act 13 of 2002 – enactments to be read together – appellant an asylum seeker issued with asylum transit permit in terms of s 23 of Immigration Act – asylum seeker permit issued in terms of s 22 of Refugees Act – whether detention of appellant lawful.

ORDER

On appeal from: South Gauteng High Court (Johannesburg) (Willis J sitting as court of first instance):

An order is made in the following terms –

(1) The appeal is upheld with costs including the costs of two counsel;

(2) The order of the court a quo is set aside and replaced with the following order:

'(a) the detention of the applicant is declared to be unlawful;

(b) the first and second respondents are directed to re-issue the applicant with an asylum seeker permit in accordance with s 22 of the Refugees Act 130 of 1998 which permit shall remain valid until a decision has been made on the applicant's application for asylum and, where applicable, the applicant has had an opportunity to exhaust his rights of review or appeal in terms of Chapter 4 of the Refugees Act and the Promotion of Administrative Justice Act 3 of 2000;

(c) the respondents are directed immediately to release the applicant in possession of the asylum seeker permit as set out above; and

(d) the first and second respondents are directed to pay the applicant's costs including the costs of two counsel.'

JUDGMENT

MALAN JA (MPATI P, CLOETE AND CACHALIA JJA AND THERON AJA concurring):

[1] This is an appeal with the leave of Willis J against his judgment in the South Gauteng High Court dismissing the appellant's urgent application to secure his release from the Lindela Holding Facility. The appellant is an asylum-seeker from Ethiopia whose application for asylum was refused. He has appealed against this refusal to the Refugee Appeal Board. The following order was given in court immediately after argument was concluded.

'An order is made in the following terms –

(1) The appeal is upheld with costs including the costs of two counsel;

(2) The order of the court a quo is set aside and replaced with the following order:

"(a) the detention of the applicant is declared to be unlawful;

(b) the first and second respondents are directed to re-issue the applicant with an asylum seeker permit in accordance with s 22 of the Refugees Act 130 of 1998 which permit shall remain valid until a decision has been made on the applicant's application for asylum and, where applicable, the applicant has had an opportunity to exhaust his rights of review or appeal in terms of Chapter 4 of the Refugees Act and the Promotion of Administrative Justice Act 3 of 2000;

(c) the respondents are directed immediately to release the applicant in possession of the asylum seeker permit as set out above; and

(d) the first and second respondents are directed to pay the applicant's costs including the costs of two counsel."'

The court indicated that reasons for the order given would be given. These are the reasons.

[2] The appellant is an Ethiopian citizen who, according to the founding papers, fled from Ethiopia owing to persecution by reason of his tribal affiliation and political opinion.

He arrived in South Africa on 8 December 2008 for the purpose of applying for political asylum in terms of the Refugees Act 130 of 1998. He was provided with an asylum transit permit in accordance with s 23 of the Immigration Act 13 of 2002 so that he could proceed to a Refugee Reception Office to apply for asylum. An asylum transit permit is valid for a period of 14 days. The appellant stated that he attempted to gain access to the Port Elizabeth Refugee Reception Office during that period and in the months thereafter but that he did not succeed due to the lengthy queues. On 26 May 2009 he was arrested in Queenstown where he spent a week at the police station before being transferred to Lindela on 2 June 2009. He has been detained at Lindela since 2 June 2009 under the name Abdul Ahid Amon.

[3] With the assistance of officials of the second respondent the appellant applied for asylum status on 3 September 2009 and had an asylum seeker permit issued to him in terms of s 22 of the Refugees Act. His application was, however, rejected by the Refugee Status Determination Officer on the same day. He appealed to the Refugee Appeal Board (see s 26 of the Refugees Act) and a hearing took place on 4 December 2009, but allegedly in the absence of his legal representatives. The Refugee Appeal Board has not yet made its decision on the matter. On 18 December 2009 the appellant launched an urgent application in the High Court in Johannesburg for an order interdicting the respondents from deporting him; declaring his detention from 2 June 2009 to be unlawful; directing the first and second respondents to immediately re-issue an asylum seeker permit to him; and directing his immediate release from detention. The application was dismissed. Hence this appeal.

[4] During the hearing of the urgent application Willis J urged the parties to come to an agreement on conditions on which the appellant could be released. The respondents suggested that there should be an undertaking by a lawful resident of South Africa to provide the appellant with shelter, that he should pay R 2000 as security to the nearest inspection or Refugee Reception Office and that he should report to the nearest Refugee Reception Office every Tuesday and Friday pending the outcome of his appeal to the Refugee Appeal Board. The appellant rejected the conditions. Willis J was concerned that '[w]hile the court obviously has to have regard to the importance of a

person having freedom, the court must also have regard to the practicalities that would arise in ordering the release of a person such as this [applicant], who cannot even comply with eminently reasonable conditions put forward by the respondents.' He considered whether there was any 'absolute' statutory unlawfulness in the continuing detention of the appellant. Referring to s 22 of the Refugees Act he found that the right to 'sojourn' 'does not necessarily entail a right to go about freely in South Africa with[out] any restrictions. The applicant is sojourning in South Africa, he is not going to be deported or sent out of South Africa pending the outcome of his appeal relating to asylum status. He is indeed sojourning in South Africa, albeit under restriction.'

[5] Once it is established that a person has been detained, the burden justifying the detention rests on the detaining authority. In *Principal Immigration Officer and Minister of Interior v Narayansamy*[1] Sir John Wessels stated:

'Apart from any legislative enactment, there is an inherent right in every subject, and in every stranger in the Union, to sue out a writ of *habeas corpus*. This right is given not only by English law, but also by the Roman Dutch law. *Prima facie* therefore every person arrested by warrant of the Minister, or by any other person, is entitled to ask the Court for his release, and this Court is bound to grant it unless there is some lawful cause for his detention.'

In English law the remedy is known as *habeas corpus* but in Roman Dutch law it is referred to as the *interdictum de homine libero exhibendo*. Both terms are used in our law.[2]

[6] In the answering papers the respondents submitted that the Refugee Appeal Board is entitled to investigate certain factual averments made by the appellant so as to make an informed decision about his status in the country. The deponent expressed the apprehension that if the appellant was released before this was done the process might be frustrated and the proper functioning of the administration of justice be undermined.

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[1] 1916 TPD 274 at 276. See *Jeebhai & others v Minister of Home Affairs & another* 2009 (5) SA 54 (SCA) para 22; *Zealand v Minister of Justice and Constitutional Development & another* 2008 (4) SA 458 (CC) para 25; *Minister van Wet en Orde v Matshoba* 1990 (1) SA 280 at 284E-F; *Minister of Law and Order & others v Hurley & another* 1986 (3) SA 568 (A) at 589E-F.

[2] See S Kentridge 'Habeas corpus procedure in South Africa' (1962) 79 *SALJ* 283; DL Carey Miller 'A judicial extension of the interdict de libero homine exhibendo' (1975) 92 *SALJ* 242; Lawrence Baxter *Administrative Law* (1984) 692 ff.

The respondents seek to justify the appellant's detention under s 23 and hence also s 34(1) and (2) of the Immigration Act. They provide as follows:

'23 Asylum transit permit —

(1) The Director-General may issue an asylum transit permit to a person who at a port of entry claims to be an asylum seeker, which permit shall be valid for a period of 14 days only.

(2) Despite anything contained in any other law, when the permit contemplated in subsection (1) expires before the holder reports in person to a Refugee Reception Officer at a Refugee Reception Office in order to apply for asylum in terms of section 21 of the Refugees Act, 1998 (Act 130 of 1998), the holder of that permit shall become an illegal foreigner and be dealt with in accordance with this Act.

34 Deportation and detention of illegal foreigners —

(1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, 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 this 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, when possible, practicable and available in a language that he or she understands;

(d) may not 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 minimum prescribed standards protecting his or her dignity and relevant human rights.

(2) The detention of a person in terms of this Act elsewhere than on a ship and 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, provided that if such period expires on a non-court day it shall be extended to four pm of the first following court day.'

[7] It was submitted on behalf of the respondents that s 23 meant that the appellant became an 'illegal foreigner' after the expiry of the asylum transit permit granted to him. An 'illegal foreigner' is a foreigner who is in the Republic in contravention of the Immigration Act.[3] Being an 'illegal foreigner' the appellant may be dealt with in terms of the Immigration Act, and hence detained and deported.[4] It was suggested that legislation of this nature was in accordance with international law and fell within the inherent powers of a sovereign state to regulate and forbid entrance to foreigners into its borders or admit them on such conditions as it may see fit to prescribe.[5] The right to freedom of movement, it was submitted, is not absolute and may be limited in appropriate circumstances.[6] Both the Immigration Act and the Refugees Act limit the rights of the appellant. Both ss 9 and 32 of the Immigration Act contain such limitations on the freedom of movement of foreigners. On expiry of the asylum transit permit issued in terms of s 23 (1) of the Immigration Act the appellant became an 'illegal foreigner' and also guilty of an offence.[7] As an 'illegal foreigner' he 'shall be deported'.[8] Relying on the decision of this court in *Jeebhai*,[9] the submission was made that pending a review or appeal an 'illegal foreigner' may be detained until he or she is deported in terms of s 34 of the Immigration Act.

[8] Even if the appellant is an 'illegal foreigner' as envisaged by s 23 of the Immigration Act his detention in terms of s 34 cannot be justified. Section 34(2) permits the detention of an 'illegal foreigner' only for a period not exceeding 48 hours subject to the proviso that if the said period expires on a non-court day it 'shall be extended to four

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[3] Section 1 of the Immigration Act.
[4] Section 32 of the Immigration Act.
[5] See *Nishimura Ekiu v The United States* (1892) 142 US 651 at 659 cited with approval in *Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA) para 29.
[6] *Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA) para 28.
[7] Section 49(1) of the Immigration Act.
[8] Section 32(2) of the Immigration Act. See *Jeebhai & others v Minister of Home Affairs & another* 2009 (5) SA 54 (SCA) paras 21 ff.
[9] *Jeebhai & others v Minister of Home Affairs & another* 2009 (5) SA 54 (SCA) para 32.

pm of the first following court day.' The appellant was arrested on 26 May 2009 and detained at Lindela since 2 June 2009. Section 34(2) is therefore of no assistance to the respondents.

[9] To justify the appellant's detention the respondents sought to bring it within the ambit of s 34(1). The respondents indeed produced the original warrant of detention dated 26 May 2009 but no evidence that a court (ie a magistrate's court)[10] has extended the period of detention in terms of s 34(1)(d). An 'illegal foreigner' may in terms of this paragraph not be detained for a period 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'. The respondents were not able to produce such a warrant justifying the appellant's continued detention.[11] It seems to me that the maximum period of detention permitted under s 34(1)(d) is 120 days, ie an initial period of 30 days, followed by an extended period or periods not exceeding 90 days.[12]

[10] A 'detained person has an absolute right not to be deprived of his freedom for one second longer than necessary by an official who cannot justify his detention.'[13] The

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[10] Section 1(1) of the Immigration Act.

[11] The procedure to obtain such a warrant for the further detention of an 'illegal foreigner' is regulated by Regulation 39(5) of the Immigration Regulations GN R616, *GG* 27725, 27 June 2005.

[12] In *Kanyo Aruforse v Minister of Home Affairs; Director-General, Department of Home Affairs and Bosasa (Pty) Ltd* (GSJ) (case 2010/1189) an unreported judgment of Meyer J delivered on 25 January 2010 in which he said in para 17: 'The intention of the statute undoubtedly includes an intention to deport illegal foreigners from this country. But the maximum period for which any person may be so detained in terms of s 34(1) is a period of 120 days. I also respectfully fail to appreciate how this interpretation will defeat the said purpose of the Immigration Act. In terms of its preamble the Act aims at putting in place a new system of immigration control which *inter alia* ensures that: "immigration laws are efficiently and effectively enforced, deploying to this end the significant administrative capacity of the Department of Home Affairs, thereby reducing the pull factors of illegal immigration"; "immigration control is performed within the highest applicable standards of human rights protection"; "a human rights based culture of enforcement is promoted"; and "civil society is educated on the rights of foreigners and refugees".' The citations are from paragraphs (g), (l), (n) and (p) of the preamble. Whether the extension must be a single one need not be decided here. It appears as if the word 'adequate' in s 34(1)(d) should read 'aggregate' so that more than one extension is possible although the aggregate period may not exceed 90 days. See, generally, LC Steyn *Die Uitleg van Wette* 5th ed (1981) by SIE van Tonder in co-operation with NP Badenhorst, CH Volschenk and JN Wepener 58 ff.

[13] *Silva v Minister of Safety and Security* 1997 (4) SA 657 (W) at 661H-I.

importance of this right 'can never be overstated'.[14] Section 12(1)(b) of the Constitution guarantees the right to freedom, including the right not to be detained without trial. This right belongs to both citizens and foreigners.[15] The safeguards and limitations contained in s 34(1) of the Immigration Act justify its limitation of the right to freedom and the right not to be detained without trial.[16] Enactments interfering with elementary rights should be construed restrictively. In *R v Sachs*[17] it was said:

'[T]he appellant in an able and admirably objective argument discussed the manner in which courts of law should approach the interpretation of statutes which give the Executive the power to invade the liberty of the individual. He submitted that such statutes should be subjected to the closest scrutiny of courts of law whose function it is to protect the rights and liberty of the individual. Courts of law do scrutinise such statutes with the greatest care but where the statute under consideration in clear terms confers on the Executive autocratic powers over individuals, courts of law have no option but to give effect to the will of the Legislature as expressed in the statute. Where, however, the statute is reasonably capable of more than one meaning a court of law will give it the meaning which least interferes with the liberty of the individual.'

In addition, s 39(2) of the Constitution requires courts when interpreting a statute that is reasonably capable of two interpretations to avoid an interpretation that would render the statute unconstitutional and to adopt the interpretation that would better promote the spirit, purport and objects of the Bill of Rights, even if neither interpretation would render the statute unconstitutional.[18] The detention of the appellant is clearly in breach of the express provisions of s 34(1)(d) of the Immigration Act and is unlawful. Indeed Mr Semenya who appeared on behalf of the respondents quite properly conceded this during argument.

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[14] *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC) para 36.
[15] *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC) para 27; *Jeebhai & others v Minister of Home Affairs & another* 2009 (5) 54 (SCA) para 26.
[16] *Lawyers for Human Rights & another v Minister of Home Affairs & another* 2004 (4) SA 125 (CC) para 43.
[17] 1953 (1) SA 392 (A) at 399F-H. See further *Dadoo Ltd & others v Krugersdorp Municipal Council* 1920 AD 530 at 552; *Johnson v Minister of Home Affairs & another* 1997 (2) SA 432 (C) at 434J – 435A.
[18] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd & others: In re Hyundai Motor Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) paras 22-6; *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC) paras 46, 84 and 107; *Fraser v Absa Bank Ltd (National Director of Public Prosecutions as Amicus Curiae)* 2007 (3) SA 484 (CC) para 47.

[11] The court a quo referred to the 'eminently reasonable conditions' which the respondents proposed for the appellant's release. Since the appellant could not meet these conditions, Willis J held that his application had to fail. He reasoned that because no right was absolute a balancing act had to be undertaken: the appellant had a right to freedom but, he said, the State 'had a legitimate interest in trying to curb illegal immigration, in trying to keep track of persons who have entered the country illegally and ensuring that persons who do not have places of shelter and who do not have any visible means of support, are not free to roam the streets.' I do not agree. A court, generally, cannot impose conditions for the release of a person unlawfully detained. Section 35(2)(d) of the Constitution entitles any person who is detained to challenge his or her detention before a court and, if the detention is unlawful, 'to be released.' This can be contrasted with s 35(1)(f) which allows a person arrested for allegedly committing an offence to be released from detention if justice permits 'subject to reasonable conditions'. It follows, it seems to me, that the Constitution does not permit the imposition of conditions on a person such as the appellant for his release. As long ago as 1879, De Villiers CJ stated that where a detention is unlawful the only course open was to order the release of the person immediately. In *In Re Willem Kok and Nathaniel Balie*[19] De Villiers CJ said:

'It is unnecessary to consider the rights which under the Roman-Dutch law free persons had to a release or to the writ *de homine libero exhibendo*, for, in my opinion, the rights of the personal liberty, which persons within this colony enjoy, are substantially the same, since the abolition of slavery, as those which are possessed in Great Britain. Where those rights are violated this Court would at least have the same power of restraining such violation as the Supreme Court of Holland had to interdict the infringement without sufficient cause of the rights to personal liberty as understood by the Roman-Dutch law. But in addition to the powers vested in this Court under the Roman-Dutch law, there are certain statutory provisions, which not only add to the powers of the Court, but make it the bounden duty of the Court to protect personal liberty whenever it is illegally infringed upon ... Supposing that the applicants had been detained in one of the ordinary gaols of the colony, and it had been brought to the notice of the Court that they were so kept without a lawful warrant, it surely would have been competent for the Court to call upon the gaoler to produce the prisoners and justify the detention. Can it then make any difference that they are detained in a military fortress instead of an ordinary gaol? I think not. In either case the person in

[19] (1879) 9 Buch 45 at 65-66 and 71.

whose custody they are is bound to produce his warrant or other authority for detaining them, and in case the return to the order of Court be found to be clearly bad it would be the duty of the Court, under ordinary circumstances, to order their discharge. But then it is said the country is in such an unsettled state, and the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it, and not to preserve the peace of the country … The Civil Courts have but one duty to perform, and that is to administer the laws of the country without fear, favour or prejudice, independently of the consequences which ensue.'

[12] For these reasons the continued detention of the appellant cannot be justified in terms of the Immigration Act and he is entitled to his immediate release. The respondents' reliance on that Act is also misconstrued: it ignores the provisions of the Refugees Act, as I shall demonstrate. It is necessary to examine the provisions of the latter Act.

[13] The court a quo held that the appellant's detention was compatible with the provisions of s 22 of the Refugees Act. This enactment gives effect in South Africa to international instruments and law relating to refugees and provides for the reception of asylum seekers. It was enacted to regulate applications for and recognition of refugee status and to provide for the rights flowing from that status. It must be interpreted and applied with due regard to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU 1969), the Universal Declaration of Human Rights (UN 1948) and other human rights instruments to which South Africa is or becomes a party.[20]

[14] Section 2(a) of the Refugees Act provides that:

'Notwithstanding any provision of this Act or any other law to the contrary, no person may be refused entry into the Republic, expelled, extradited or returned to any other country or be subject to any similar

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[20] Section 6 of the Refugees Act. See John Dugard SC with contributions by Daniel Bethlehem QC, Max du Plessis and Anton Katz *International Law. A South African Perspective* 3ed (2005) 348 ff; FJ Jenkins 'Coming to South Africa: An overview of the application for asylum and an introduction to the Refugees Act' (1999) 24 *SAYIL* 182; M Beukes '"Economic refugees": South African reality in international refugee law' (2002) 27 *SAYIL* 206.

measure, if as a result of such refusal, expulsion, extradition, return or other measure, such person is compelled to return to or remain in a country where –

(a) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular group; or

(b) his or her life, physical safety or freedom would be threatened on account of external aggression, occupation, foreign domination or other events seriously disturbing or disrupting public order in either part or the whole of that country.'

In terms of the Refugees Act a person qualifies for refugee status if he or she has a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, and is outside the country of his or her nationality and is unable or unwilling to avail him or herself of the protection of that country or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it.[21] A person also qualifies for refugee status if owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality he or she is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere.[22] Any dependant of either of the two categories of persons referred to also qualifies for refugee status.[23] Certain groups of people do not qualify for refugee status. These include persons in respect of whom there is reason to believe that they have committed a crime against peace, a war crime or a crime against humanity, or a crime, albeit not of a political nature, which would if committed in South Africa be punishable by imprisonment.[24] Persons who are guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation for African Unity,[25]and persons

[21] Section 3(a) of the Refugees Act. See *Union of Refugee Women & others v Director: Private Security Industry Regulatory Authority & others* 2007 (4) SA 595 para 29.
[22] Section 3(b) of the Refugees Act.
[23] Section 3(c) of the Refugees Act.
[24] Section 4(1)(a) and (b) of the Refugees Act.
[25] Section 4(c) of the Refugees Act.

who enjoy the protection of any other country are also excluded.[26] Provision is made for the cessation of refugee status.[27]

[15] The Refugees Act and the regulations[28] made under it prescribe the procedure to be followed when applying for asylum. An application for asylum must be made to a Refugee Reception Officer at any Refugee Reception Office.[29] The Refugee Reception Officer must ensure that the application is properly completed and must, if necessary, assist the applicant in completing the form. He or she may also conduct an enquiry in order to verify the information furnished in the application. The application must then be submitted to a Refugee Status Determination Officer.[30] No proceedings may in terms of s 21(4) be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic if:

'(a) such person has applied for asylum in terms of subsection (1), until a decision has been made on the application and, where applicable, such person has had an opportunity to exhaust his or her rights of review or appeal in terms of Chapter 4; or

(b) such person has been granted asylum.'

[16] Section 22 deals with an asylum seeker permit to be issued to an asylum seeker. It provides:

'(1) The Refugee Reception Officer must, pending the outcome of an application in terms of section 21(1), 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.

(2) Upon the issue of a permit in terms of subsection (1), any permit issued to the applicant in terms of the Aliens Control Act, 1991, becomes null and void, and must forthwith be returned to the Director-General for cancellation.

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[26] Section 4(d) of the Refugees Act.
[27] Section 5 of the Refugees Act.

[28] GN R 366, *GG* 21075, 6 April 2000 as amended by GN R938, *GG* 21573, 15 September 2000.

[29] Section 21(1) of the Refugees Act.

[30] Section 21(2) of the Refugees Act.

(3) A Refugee Reception Officer may from time to time extend the period for which a permit has been issued in terms of subsection (1), or amend the conditions subject to which a permit has been so issued.

(4) The permit referred to in subsection (1) must contain a recent photograph and the fingerprints or other prints of the holder thereof as prescribed.

(5) A permit issued to any person in terms of subsection (1) lapses if the holder departs from the Republic without the consent of the Department.

(6) The Department may at any time withdraw an asylum seeker permit if—

(a) the applicant contravenes any conditions endorsed on that permit; or

(b) the application for asylum has been found to be manifestly unfounded, abusive or fraudulent; or

(c) the application for asylum has been rejected; or

(d) the applicant is or becomes ineligible for asylum in terms of section 4 or 5.

(7) Any person who fails to return a permit in accordance with subsection (2), or to comply with any condition set out in a permit issued in terms of this section, is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding five years, or to both a fine and such imprisonment.'

[17] The Refugee Status Determination Officer must make the decision regarding the application for asylum. He or she may request any information or clarification from the applicant or the Refugee Reception Officer, may consult with or invite a United Nations High Commissioner for Refugees representative to furnish information and may, with the permission of the asylum seeker, provide the latter representative with any information that may be requested.[31] When the application is considered the Refugee Status Determination Officer must have due regard to s 33 of the Constitution and must, in particular, ensure that the applicant fully understands his or her rights and responsibilities and the evidence presented.[32] He or she must at the conclusion of the hearing grant asylum; or reject the application as manifestly unfounded, abusive or fraudulent; or reject it as unfounded; or refer any question to the Standing Committee.[33]

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[31] Section 24(1) of the Refugees Act.
[32] Section 24(2) of the Refugees Act.
[33] Section 24(3) of the Refugees Act. See also s 24(4).

Provision is made in the Refugees Act for the review by the Standing Committee of certain decisions made by the Refugee Status Determination Officer.[34] An asylum seeker may also appeal against the decision of the Refugee Status Determination Officer to reject his application as being unfounded.[35] The Appeal Board may confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of s 24(3).[36]

[18] A person whose asylum seeker permit has been withdrawn by the Department of Home Affairs in terms of s 22(6) may be arrested and detained pending finalisation of the application for asylum, in the manner and at a place determined 'with regard to human dignity'.[37] However, s 29(1) provides:

'No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a judge of the High Court of the provincial division in whose area of jurisdiction the person is detained, designated by the Judge President of that division for that purpose and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days.'

[19] The respondents' reliance on s 23(2) of the Immigration Act to justify the appellant's detention is, as I have said, misconceived. Section 23(2) provides that '[d]espite anything contained in any other law' the holder of an asylum transit permit becomes, on expiry of the permit, an 'illegal foreigner' liable to be dealt with under the Immigration Act. This contention, however, does not account for s 21(4) of the Refugees Act which provides that '[n]otwithstanding any law to the contrary' no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence in the country if that person has applied for asylum in terms of s 21(1) until a decision has been made on his or her application and that person has had an opportunity to exhaust his or her rights or review or appeal in terms of the Refugees Act. Section 23(2) of the Immigration Act is a general enactment passed after the Refugees Act which deals with the specific situation of refugees. In so far as there may be a

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[34] Section 25(1) and (2) of the Refugees Act.
[35] Section 26(1) of the Refugees Act.
[36] Section 26(2) of the Refugees Act.
[37] Section 23 of the Refugees Act.

conflict between the two provisions they should be reconciled. Where two enactments are not repugnant to each other, they should be construed as forming one system and as re-enforcing one another. In *Petz Products v Commercial Electrical Contractors*[38] it was said:

'Where different Acts of Parliament deal with the same or kindred subject-matter, they should, in a case of uncertainty or ambiguity, be construed in a manner so as to be consonant and inter-dependant, and the content of the one statutory provision may shed light upon the uncertainties of the other.'

The two provisions can be reconciled with each other without doing violence to their wording and in accordance with the spirit of the international instruments the Refugees Act seeks to give effect to.[39] It follows that s 23(2) of the Immigration Act ceases to be of application when an asylum seeker permit is granted to an 'illegal foreigner'. He or she can thereafter no longer be regarded as an 'illegal foreigner' and no proceedings may be instituted or continued against such a person in respect of his or her unlawful entry into or presence in the country until a decision has been made on his or her application or he or she has exhausted his or her rights of review or appeal. The judgment in *Jeebhai*[40] on which the respondents rely did not consider s 21(4) of the Refugees Act. It is of no assistance to them in this matter.

[20] There are other reasons why the detention of the appellant is unlawful under the Refugees Act. First, he has been detained for a period far in excess of 30 days. Section 29(1) of the Refugees Act prohibits the detention of a person for a longer period than is 'reasonable and justifiable' and, in any event, 'any detention exceeding 30 days' must be reviewed by a judge of the High Court. It is common cause that the appellant's detention has never been reviewed by the High Court.

[21] Second, s 23 regulates the detention of an asylum seeker. This may only be done 'if the Department has withdrawn an asylum seeker permit in terms of section 22(6)'. The withdrawal of the asylum seeker permit is thus a jurisdictional fact for the

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[38] 1990 (4) SA 196 (C) at 204H-I. See *R v Maseti & others* 1958 (4) SA 52 (E) 53H-I; *Nkabinde v Nkabinde and Nkabinde* 1944 WLD 112 at 122; *Johannesburg City Council v Makaya* 1945 AD 252 at 257 and 259; *Chotabhai v Union Government & another* 1911 AD 49. Steyn above p 153 and 188 ff.
[39] See Dugard above p 351 and s 6 of the Refugees Act.
[40] *Jeebhai & others v Minister of Home Affairs & another* 2009 (5) SA 54 (SCA).

lawful detention of the asylum seeker. It is common cause that appellant's asylum seeker permit has not been withdrawn.

[22] Third, s 22 of the Refugees Act obliges the Refugee Reception Officer to issue to an applicant for asylum 'an asylum seeker permit … allowing the applicant to sojourn in the Republic temporarily….' As I have said, in the court a quo Willis J held that the right to sojourn did not necessarily entail a right to move about freely in South Africa without any restrictions. The applicant was sojourning in South Africa, he opined, albeit under restriction. I do not agree. 'Sojourn' means 'to make a temporary stay in a place; to remain or reside for a time',[41] which implies a decision to stay or remain in a certain place. This is not the same as the detention of a person in a place against his will. After an asylum seeker permit has been issued to him or her the asylum seeker cannot be regarded as an 'illegal foreigner' as contemplated by the Immigration Act.[42] The provisions of ss 38(1), 39(1)(a), 42(1) and 49(6) prohibiting the employment, teaching or harbouring of an 'illegal foreigner' and rendering these acts offences cannot be applied to an asylum seeker to whom a permit in terms of s 22 has been issued. His or her detention would also be in contravention of s 2 of the Refugees Act entrenching the State's international obligation of *non-refoulement*. Since the appellant's asylum seeker permit has expired and has not been extended in terms of s 22(3) of the Refugees Act it is necessary to order that an asylum seeker permit be re-issued to him.

[23] I am aware of the concerns of the respondents as expressed in the judgment of the court a quo that the state has a legitimate interest in trying to curb illegal

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[41] *Oxford Universal Dictionary sv* 'sojourn'. A 'sojourner' is 'a temporary resident'.

[42] *Kiliko & others v Minister of Home Affairs & others* 2006 (4) SA 114 (C) para 27; *Tafira & Others v Ngozwane & others* (GNP) (case 12960/06 delivered on 12 December 2006) para 23. With reference to *Minister of Home Affairs & others v Watchenuka & another* 2004 (4) SA 326 (SCA) Dugard above p 351 remarks that '[a]sylum seekers are thus authorized in general to work or study in South Africa pending the finalization of their applications for asylum.'

immigration.[43] However, these concerns could have been addressed by the imposition of conditions in terms of s 22 of the Refugees Act and their effective monitoring.[44]

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F R Malan
Judge of Appeal

[43] See para 11 above.
[44] See Annexure 3 to the Refugee Regulations (Forms and Procedure) published under GN R 366, *GG* 21075, 6 April 2000 as amended by GN R938, *GG* 21573, 15 September 2000.

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