IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION

HELD AT JOHANNESBURG

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

Victor J

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DATE SIGNATURE

CASE NO: 27878/2021
DATE: 2021-07-06

MAFADI HERBERT **First Applicant**

MUSANA LUZAKE **Second Applicant**

and

THE MINISTER OF HOME AFFAIRS **First Respondent**

THE DIRECTOR GENERAL,

DEPARTMENT OF HOME AFFAIRS **Second Respondent**

J U D G M E N T

VICTOR J :

Introduction

[1] The applicants seek to set aside their arrest and detention as unlawful and seek to be released from Lindela Detention Centre with immediate effect. The applicants have been convicted in the Magistrates Court of contravening the Immigration Act.[1] At issue here is whether the respondents can deny the applicants an opportunity to apply for asylum status before deportation in terms of the Refugee Act[2] notwithstanding that they have been convicted of an immigration offence by a Magistrate together with an order of deportation. A further issue is whether they can be released from Lindela Detention Centre pending the outcome of the legal processes that they intend to pursue.

Relevant background facts.

[2] The first and second applicants are adult males who fled Uganda when their gay relationship was discovered. Members of their community and their family threatened to kill them. Being gay in Uganda carries great risk.[3]

[3] They fled Uganda and in November 2020 entered South Africa through Zimbabwe through an unofficial port of entry. They did not apply for asylum. They lived with a pastor in Makhado in the Limpopo Province. He advised they should move to Nongoma in KZN. On 14 April 2021 they were arrested and brought before the Magistrate at the Magistrates Court, Nongoma. They always intended to apply for asylum, but their hesitation in doing so was based on their fear that they might face persecution in South Africa as well.

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[1] Immigration Act 13 of 2002

[2] Refugee Act 130 of 1998

[3] The *Uganda Anti-Homosexuality Act, 2014* was passed on 17 December 2013 with a punishment of life in prison for "aggravated homosexuality".

"Where is it illegal to be gay?". *BBC News*. 10 February 2014. Retrieved 7 January 2017 .LGBT people continue to face major discrimination in Uganda, actively encouraged by political and religious leaders. Violent and brutal attacks against LGBT people are common, often performed by state officials. Households headed by same-sex couples are not eligible for the same legal protections available to opposite-sex couples. Same-sex marriage has been constitutionally banned since 2005. Vigilante torture, beatings, and executions are tolerated.

[4] On 26 April 2021 they were convicted of contravening the Immigration Act and sent to the Lindela Detention Centre in Gauteng to await deportation back to Uganda. They seek by way of urgency to be released from Lindela. The respondents oppose the relief. The first respondent is the Minster of Home Affairs cited in his official capacity and responsible for the administration of the Refuge Act. The second respondent is the Director General of Home Affairs.

[5] On 14 April 2021, the applicants were apprehended by members of the South African Police at Nongoma KZN province and charged with contravening the Immigration Act. The applicants tried to tell the arresting officers that they were seeking asylum in South Africa, and required an opportunity to make such application, but their requests were ignored. They were prosecuted, convicted and sentenced at the Nongoma Magistrate's Court in terms of the Immigration Act and transferred to Lindela Detention Centre in Gauteng for deportation where they are still being held.

Waiver of a constitutional right.

[6] The respondents submit that the applicants voluntarily agreed to be deported and signed documents to that effect. Various forms were signed by the applicants and upon analysis of the contents of the documents it is questionable whether they understood their legal rights. For example, in form 29 they acknowledge that they have rights in terms of section 34(1) (a) and (b) of the Immigration Act and the right to appeal the decision or at any time request the officer attending to have their detention confirmed by a warrant. It is clear from the record that these admissions were done without legal advice, without an interpreter being present and are suggestive of a case contrary to what a persecuted refugee would agree to.

[7] Form 29 also reflects that the applicants waived their right to appeal the decision to deport them. A waiver of legal rights is not easily presumed, and

the onus is heavily on one who alleges it to prove it.[4] Although waiver is more often used within the context of contract, the application of waiver to constitutional rights still needs to be finally pronounced upon by the Constitutional Court. There is no evidence to suggest the applicants understood and were aware of their legal rights sufficient to amount to a genuine waiver.[5] The respondents have simply not produced that evidence. Based on the facts in this case the purported waiver by the applicants cannot confer validity on their agreement to be deported. The respondents in charging and convicting the applicants and getting them to sign these forms constitutes a series of blunders that demonstrate the complete disregard for the Refugees Act and of course the entire jurisprudential context of refugee law in this country. The waiver of a constitutional right and rights in terms of the United Nations Convention on Refugees 1951 inure to an individual refugee and arguably may never be waived.

[8] Like in the case of *Mohamed* the point of waiver of a constitutional right was not fully argued. In this case before me this principle was also not fully argued but certainly can be inferred from the arguments presented to me on behalf of the applicants. [6] Nevertheless, in order for consent to deportation to be enforceable, it would have to be a fully informed consent and one clearly showing that the applicants were aware of the exact nature and extent of the rights being waived in consequence of such consent. Some constitutional rights inure to an individual and do not fall to be excised and may arguably never be waived. The principle of waiver was approved in *Mohamed* where a

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[4] *Gross v Unity Cafe* 1948 (3) SA 1164 (C) *at 171

[5] Further, being a matter of intention, election or waiver can only occur when the party concerned had full knowledge of the legal right which he is said to have waived, and of the facts under which, or from which, the right arose (*Ex parte Sussens* 1941 TPD 15 at 20; upra [24] para 17; and *Borstlap v Spagenberg en Andere* 1974 (3) SA 695 (A) at 704). As stated by Steyn CJ in *Hepner v Roodepoort-Maraisburg Town Council* 1962 (4) SA 772 (A) at 778H – 779A:

'In the ordinary case of waiver, the facta probanda would be full knowledge of the rights in question and express waiver or waiver by plainly inconsistent conduct, knowledge of a particular kind and surrender of the right in a particular manner.'

[6] *Mohamed and another v President of the Republic of South Africa and others (society for the abolition of the death penalty in South Africa and another intervening)* 2001 (3) SA 893 (CC)

number of authorities were referred to. Essentially any waiver 'is dependent upon it being clear and unequivocal' and must be made 'with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights in the process.[7] The issues of waiver of a constitutional right was not finally pronounced upon in *Mohamed.*

[9] A later case on the question of whether a constitutional right can be waived is that of *Occupiers, Berea V De Wet.* Mojapelo AJ in a unanimous judgment found that based on the facts in the case it was unnecessary to decide whether the rights to eviction are capable of waiver.

[10] Mojapelo AJ noted that the applicants in that case and the amicus curiae argued that:

> "the [constitutional] rights are therefore incapable of being waived because they are for the benefit of the public at large. Even if they were capable of waiver, such waiver would need to be free, voluntary and informed." [8]

The Court found:

> "It has not been disputed that the applicants were not informed of any of these rights. It must therefore be accepted that they were not aware of any such rights. Given that the applicants were not aware of their rights, the factual consent that they gave was not informed. Their consent is therefore not legally valid. It is not binding on them."[9]

[11] The apparent ease with which the applicants waived their constitutional rights and indeed their rights emanating from the United Nation Convention of Refugees (the Convention) by signing the forms is startling. Article 1 of the Convention defines the term "refugee" and in subsection 2 provides that if there is a *well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,* and

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[7] Ibid 6
[8] *Occupiers, Berea v De Wet No and another* 2017 (5) SA 346 (CC) at para 33
[9] Ibid para 33

that person 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.*

[12] If indeed the applicants waived these rights then at the very least they should have had legal representation and interpreters confirming they unequivocally waived all these rights both in terms of the Refugee Act and the Convention. The most plausible explanation is that the rights were put to the applicants in a mechanical manner without interpretation. There is no indication that a legal representation was present when they signed and that their rights were explained to them and were understood. I cannot accept that they voluntarily waived their rights in these circumstances.

[13] In this matter neither the applicants nor the respondents fully argued that these rights could be waived. The applicants did however assert that the answers on the forms were not accurately recorded and there is no suggestion that they knew they were waiving the rights they had as refugees. I find that the rights embodied in section 2 of the Refugee Act cannot be waived unless the protections of legal representation and the presence of an interpreter are in place and that the consent is an informed one.[10] Section 2 of the Refugees Act is an absolute protection if a person can prove that should they be returned to their country of origin they will be persecuted for example because of their social grouping.

[14] In terms of Form 1 which the applicants signed, it is recorded that they have been informed that they may request a review of the decision. But if

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[10] Section 2 of the Refugee Act provides
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 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- (u) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion or membership of a particular social group; or (6) 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.

their conveyance arrived before this, they would have to await the outcome in the country of their origin. This is contrary to the refugee jurisprudence set out in many cases before this and in particular the case of *Ruta* which set out in the clearest and definitive terms the rights of refugees.[11] For example one of the forms contains an ambiguous acknowledgment "I intend /do not intend to request a review of the decision". The appropriate election is not reflected. The ambiguity goes further "My written request is attached /will be submitted within three days" The appropriate election is not reflected.

[15] The respondents submit that this Court does not have jurisdiction to entertain the matter since there is a court order in place directing that the applicants must be deported forthwith. The respondent also submits that the applicants pretended not to be able to sign their names and used their thumbprints instead. Upon an analysis of the documentation which form part of the record it is quite clear that the document itself requires that a thumbprint be applied as well as the signature. It is clear that the signature of the first applicant has been applied above his left thumbprint. It is also clear from the record that the Immigration Officer conducting the investigation did not indicate that there was interpreter present. Nor is it clear from the record that the applicants understood the rights that were being put to them by the Investigating Officer and to which they were appended their signature in the affirmative.

[16] There is reference to the word *vacation* in their forms which form part of the record as being the reason for their presence in South Africa. Both applicants contend that it is not a word they have in their vocabulary, and they denied making such a statement to the Investigating Officer. It is also unclear from the record whether the applicants understood their rights during the court hearing. There is no reference on the record to indicate that they were given

[11] *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC)

an opportunity to obtain legal representation. [12] The magistrate found them guilty of entering or remaining in the Republic of South Africa without a valid permit of passport. Their sentence was a fine of R3000 or in default to undergo six months imprisonment wholly suspended for a period of five years on condition that the applicants were not convicted of contravening section 49 of the Immigration Act. The magistrate also ordered that they be deported back to Uganda.

[17] An analysis of the forms records that the applicants were informed that they were persons whose rights were adversely affected. Form 2 in terms of section 7(1)(g) read with section 8(3) and regulation 7(2) records that they understood they would be deported for being in South Africa illegally and more importantly had 10 working days from receipt of the notice to make written representations to the second respondent to review the decision.

[18] The document records that they understood its contents and that they "intend/do not intend" to make representations in terms of section 8(2) and the document goes on to state that they may within 10 working days from the receipt of this notice make written representations to the director-general to review the decision. The ambiguity as to whether they intended or did not intend to make representations demonstrates in my view that the applicants were unaware of their legal rights and in any event the forms were not accurately completed.

[19] And so the sorry saga of incomplete forms continues with not an iota of plausible evidence that the applicants knew that they were waiving their legal rights to which they were entitled to as refugees.

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[12] In terms of s 35(2)(b) of the Constitution '(e)veryone who is detained . . . has the right . . . to choose, and to consult with, a legal practitioner, and to be informed of this right promptly'.

[20] In the absence of full argument on this point as to whether a constitutional right can be waived by both counsel and the possible assistance of amici, I am satisfied based on the facts in this case, the applicants have not waived their rights. This is fortified by the analysis of the forms referred to above.

The scheme and harmonisation of the Refugee and Immigration Act

[21] The Refugee and Immigrations Act have to be read in harmony. Nothing in the amended Act changes this. Cameron J in *Ruta* held that:-

> "The two statutes can, as already indicated, be read in harmony: the Immigration Act affords an immigration officer a discretion whether to arrest and detain an illegal foreigner. That discretion must, in the case of one seeking to claim asylum, be exercised in deference to the express provisions of the Refugees Act that permit an application for refugee status to be determined. The two statutes can, as already indicated, be read in harmony: the Immigration Act affords an immigration officer a discretion whether to arrest and detain an illegal foreigner. That discretion must, in the case of one seeking to claim asylum, be exercised in deference to the express provisions of the Refugees Act that permit an application for refugee status to be determined. [13]
> Footnotes omitted.

[22] The applicants upon arrest did not want to set out the details of their asylum claim because of their fear of what would happen to them in South Africa. In any event they are entitled to their confidentiality because of the confidential nature of the process at that stage. Section 21(5) of the Refugee Act makes provision in the subsection for the confidentiality of asylum applications and the information contained therein must be ensured at all times. This aspect is relevant to what the respondents submit should have been divulged by the applicants to the Investigating Officer in terms of the Immigration Act. Importantly it is only the Refugee Status Determination Officer who can make the determination and who is empowered to make the decision as to whether the applicants are valid authentic asylum seekers or not.

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[13] *Ruta* para 46 – footnotes omitted

The applicants at that stage would have to divulge all that information to him or her. The further question is whether their arrest and deportation in terms of the Immigration Act can trump their rights in terms of the Refugee Act.

[23] In terms of s 21(2) of the Refugee Act in relevant part "the Refugee Reception Office *must accept* the application form from the applicant; and, where necessary, must assist the applicant in this regard, may conduct such enquiry as he or she deems necessary in order to verify the information furnished in the application, and must submit any application received by him or her together with any information relating to the applicants which he or she may have obtained, to a Refugee Status Determination Officer to deal with it in terms of section 24 of the Refugee Act." [14]

[24] It is clear therefore that the amendment to the Act did not exclude this existing right which asylum seekers have. The amendment to the Act has not removed the right to apply for asylum. The applicants have not had an opportunity to apply for asylum. The right to apply for asylum was dealt with in *Ruto,* Cameron J stated:

> "[28] The right to seek and enjoy asylum means more than merely a procedural right to lodge an application for asylum — although this is a necessary component of it. While states are not obliged to grant asylum, international human rights law and international refugee law in essence require states to consider asylum claims and to provide protection until appropriate proceedings for refugee status determination have been completed.
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> [29] In sum, all asylum seekers are protected by the principle of non-refoulement, and the protection applies as long as the claim to refugee status has not been finally rejected after a proper procedure."[15]

[25] The applicants also contend that the quartet of cases on refugee jurisprudence as set out in *Abdi, Arse, Bula* and *Ersumo*, remains in place. [16]

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[14] The amendment in 2020 to the Act did not change this
[15] *Ruta see ibid 9*
[16] *Abdi and Another v Minister of Home Affairs and Others* 2011 (3) SA 37 (SCA) ([2011] 3 All SA 117).

The applicants also claim the right to dignity and the right to life as set out in *Ruta*. A return to Uganda for the applicants will imperil their right to life and to dignity because of the social group they belong to. In *Ruta* Cameron J also referred to the relevant amendments at that stage and found that:

> "It followed 'ineluctably' that, once an intention to apply for asylum was evinced, the protective provisions of the Refugees Act and regulations come into play and 'the asylum seeker is entitled as of right to be set free subject to the provisions of the [Refugees] Act"[17]

[26] The law is therefore settled that once a refugee demonstrates an intention to apply for asylum the *protective provisions* of the Refugee Act must apply. South Africa has to proceed in terms of established standards and principles of international law. The preamble to the Refugees Act also provides as follows:

> "WHEREAS the Republic of South Africa has *acceded* to the 1951 Convention Relating to Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the I969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law."

[27] Section 2 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 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- (u) he or she may be subjected to persecution on account of his or her race, religion, nationality, political opinion *or membership of a particular social group;* or (6) 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.

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*Arse v Minister of Home Affairs and Other*s 2012 (4) SA 544 (SCA) (2010 (7) BCLR 640; [2010] 3 All SA 261; [2010] ZASCA 9).
Bula and Others v Minister of Home Affairs and Others 2012 (4) SA 560 (SCA) ([2011] ZASCA 209).
Ersumo v Minister of Home Affairs and Others 2012 (4) SA 581 (SCA).

[17] Ibid ft 5 para 18

[28] Until the matter is finally determined by the Refugee Status Determination Officer, the principle of non-refoulement applies, meaning that asylum seekers cannot be forcibly returned to a country where they are liable to be subjected to persecution. Section 3 in relevant part of the Refugees Act provides:

> Subject to Chapter 3, a person qualifies for refugee status for the purposes of this Act if that person- (u) owing to 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, is outside the country of his or her nationality and is unable or unwilling to avail himself 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;

[29] Cameron J in *Ruta* described it thus:

> "It is a remarkable provision. Perhaps it is unprecedented in the history of our country's enactments. It places the prohibition it enacts above any contrary provision of the Refugees Act itself — but also places its provisions above anything in any other statute or legal provision. That is a powerful decree. Practically it does two things. It enacts a prohibition. But it also expresses a principle: that of non-refoulement, the concept that one fleeing persecution or threats to 'his or her life, physical safety or freedom' should not be made to return to the country inflicting it. At this stage of the proceedings neither the respondents nor this Court can determine whether the applicants fall this and accordingly the applicants must be given an opportunity."

Respondents' submissions.

[30] The respondents contended that because the Magistrate's order still stands it cannot be set aside by this Court absent the appropriate procedure of appeal or review nor can the implementation of the order be delayed. The respondents challenge the jurisdiction of this Court to release the applicants whilst the magistrate's order is in place. There has been a gross violation of the applicants rights both at the Magistrate's Court and by the Immigration Officer in placing the applicants in a position where they waived their legal rights. The applicants dispute the information recorded by the Immigration Officer and contend that it is incorrect. The respondents contend that the applicants had ample opportunity to advise the magistrate of the alleged falsities and irregularities and did not do so. The respondents contend that the

applicants failed to place before this Court, the fact that have actually been convicted by a Court of law.

[31] In terms of section 165 of the Constitution, the Magistrates Court is an established court and in terms of section 165(1) the judicial authority of the Republic is vested in the courts. The courts are independent and subject only to the Constitution and the Rule of Law. The importance of ensuring that court orders are obeyed was referred to by the Constitutional Court in *Tasima I*,

> "The obligation to obey court orders 'has at its heart the very effectiveness and legitimacy of the judicial system'. Allowing parties to ignore court orders would shake the foundations of the law, and compromise the status and constitutional mandate of the courts. The duty to obey court orders is the stanchion around which a state founded on the supremacy of the Constitution and the rule of law is built. [18]

[32] In *SALC*, it was held that "if the State, an organ of State or State official does not abide by court orders, the democratic edifice will crumble stone by stone until it collapses, and chaos ensues."[19]

[33] In the case of the *Secretary of the Judicial Commission,* Khampepe J stated that it cannot be gainsaid that orders of court bind all to whom they apply.[20] Section 165(5) of the Constitution itself provides that an order or decision binds all persons to whom it applies. The reason being that ensuring the effectiveness of the Judiciary is an imperative. It is one of the foundational principles of our Constitution. Section 165(5) of the Constitution

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[18] *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima I*) at para 183.

[19] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development* 2015 (5) SA 1 (GP) (*SALC*) at para 37.2.In the

[20] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others* [2021] ZACC 18

that an order of court binds all persons to whom it applies. In *Mjeni,* the Court stated that "there is no doubt, I venture to say, that [complying with court orders] constitutes the most important and fundamental duty imposed upon the State by the Constitution".[21]

[34] It was submitted by the respondents that the applicants did not advise the Magistrate on 26 April 2021 of their reason for coming to the country. The respondents claim that the applicants claimed to be on vacation, and this was inserted by the Investigation Officer in the relevant form.

[35] The applicants' counsel argued that there was no need to appeal or review the magistrate's decision. The charge related to an immigration offence and because an immigration officer can sign a warrant for their release it is unnecessary to set aside the Magistrate's Court order. Should the applicants wish to challenge the decision which was confirmed by the magistrate the remedy would be the process through section 8 of the Immigration Act and not judicial appeal or review. It was submitted on behalf of the applicants that the net effect is that the decision of the magistrate is one that confirms the Immigration Officer's decision and not a judgment per se and it is not one which can only be set aside by appealing the decision. I cannot accept this submission. The court order stands until set aside. A process which involves an official given certain powers in terms of another statute cannot override a court order. This does however not preclude a higher court from providing relief pending the conclusion of the asylum application and the appeal or review process.

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[21] *Mjeni v Minister of Health and Welfare, Eastern Cape* 2000 (4) SA 446 (Tk) at 452C-E, which was cited by Kirk-Cohen J in *Federation of Governing Bodies of South African Schools v MEC for Education, Gauteng* [2016] ZACC 14; 2016 (4) SA 546 (CC); 2016 (8) BCLR 1050 (CC) at 678G-679A.

The effect of the amendment to the Refugee Act

[36] The applicants submit notwithstanding their arrest, conviction and deportation they are in law entitled to have their asylum applications determined by the Refugee Status Determination Officer (RSDO) in terms of section 21 of the Refugee Act. In relevant part, section 21(1) of the Act was amended as follows:

> " (1) An application for asylum must be made in person in accordance with the prescribed procedures, *within five days of entry into the Republic,* to a Refugee Status Determination Officer at any Refugee Reception Office or at any other place designated by the Director - General by notice in the Gazette";

By the insertion of (1A) "that prior to an application for asylum, every applicant must submit his or her biometrics or other data, as prescribed, to an immigration officer at a designated port of entry or a Refugee Reception Office."

[37] It is self-evident that the applicants cannot comply with those requirements as they have been in the country since November 2020 and in any event all the refugee reception offices have been closed for some time because of the Covid pandemic. The applicants wanted to approach the refugee reception office before they were arrested in order to legalise their stay, but all the refugee offices have been closed since March 2020. This was common cause. In addition, as required by the amendment, they have not given their biometric data to an immigration officer whether at a designated port of entry or at a Refugee Reception Office. This too has not been done and in any event now impossible because of Covid shut down. This patent inability to comply with these amended provisions does not preclude the applicants from applying for asylum.

[38] The further relevant part of the amendment provides that when the applicants apply for asylum at a Refugee Reception Office they will have to

show *good cause* for their illegal entry and stay in South Africa. Regulation 8(3) of the Refugee Act requires

> "Any person who upon application for asylum fails at a Refugee Reception Office to produce a valid visa issued in terms of the Immigration Act must prior to being permitted to apply for asylum, show *good cause* for his or her illegal entry or stay in the Republic *as contemplated in Article 31(1) of the 1951* United Nations Convention Relating to the Status of Refugees."

[39] In terms of regulation 8 (4)

> "A judicial officer must require any foreigner appearing before the court, who indicates his or her intention to apply for asylum, to show good cause as contemplated in subregulation (3).

[40] In this case it is not apparent from the record whether the Magistrate granted the applicants an option to pursue their rights in terms of the Refugee Act. There is no court record attached, recording whether the Magistrate gave the applicants an opportunity to *show good cause* in terms of sub regulations (3) and (4).

[41] The principle of *good cause* is an elastic and flexible concept. The amended regulation 8(3) itself attributes reliance on Article 31(1) of the Convention. The respondents themselves have adopted a fatal contradictory approach by deporting the applicants without granting them an opportunity to show good cause. If the concept of good cause is interpreted within the ambit of the field of jurisprudence of human rights then it should not pose any difficulty for the applicants to show good cause. If a refugee has a well-founded fear of persecution in Uganda then this is a substantive jurisdictional fact which of itself should constitute good cause.

[42] The applicants should not be denied an opportunity to at least have a hearing to show good cause. It requires little effort on the part of the respondents to ascertain the nature of the threats to members of the LBGTI

community in Uganda. The applicants face human rights abuses that appear to be systemic in Uganda, should they be returned.

[43] Notwithstanding that the amendment and the regulations make it more difficult for asylum seekers especially those who have entered the country at an illegal point of entry, the entire jurisprudential framework pertaining to refugees remains intact. The respondents were not able to refer the Court to any substantive jurisprudential changes pertaining to the amended Refugee Act and Regulations which bars the applicants from exercising their constitutional and Convention rights.

Fair trial rights

[44] Section 35 of the Constitution guarantees a detainee and an accused person fair trial rights. It is unclear whether these fair trial rights as required by the Constitution were explained to the applicants prior to the proceedings when they were prosecuted in terms of the Immigration Act. This is not evident from the record. The record does not reflect whether the applicants were given an opportunity to pursue their rights in terms of the Refugee Act and perhaps postpone the proceedings in terms of the Immigration Act. Both sections 35(2) and (3) of the Constitution protects persons detained and accused respectively. It is not recorded whether the applicants either after their detention or before the trial commenced were explained these rights at all or in a language they understood.

[45] In my view in the absence of complete clarity as to whether their rights were properly and fully explained at the stage prior to conviction, this of itself is a violation of their rights to a fair trial. In terms of section 35 (2) (c) everyone who is detained, such as the applicants were, has a right *whilst detained* by the state to have assigned a legal practitioner at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. In terms of section 35(3)(f) *every accused* person has the right to

choose, and be represented by, a legal practitioner, and to be informed of this right promptly. In terms of section 35(2)(g) an accused person has the right to have a legal practitioner assigned by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly. In addition, in terms of section 35(4) of the Constitution whenever this section requires information to be given to a person, that information must be given in a language that the person understands. There is nothing on the record which reflects that the magistrate applied these principles.

[46] The continued detention of the applicants at Lindela and the order of deportation is the result of the infringement of their fair trial rights.

Right to be released.

[47] The applicants seek their immediate release from Lindela. The respondents object to this as there is a court order in place deporting them. The respondents submit that the court order must be obeyed even if it is wrong. Of course, the law is clear that court orders must be obeyed. In the circumstances of this case, however, the respondents have not provided any basis why this Court cannot place the deportation in abeyance pending the challenge to the order made at Nongoma Magistrates Court and to allow the applicants their constitutional right to apply for asylum.

[48] The very amended regulation 8(3) on which the respondents rely, continues to embrace the principle in Article 31(1) in the Convention which provides:

That:

> " 1. The Contracting States shall not *impose penalties*, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence."

[49] Continued incarceration at Lindela would be such a penalty as envisaged in Article 31(1) of the Convention. The respondents have not demonstrated that continued detention is necessary. Whilst regulation 8(3) does not mention the next subsection 2 in Article 31, South Africa as a contracting party would also have to recognises the free movement of refugees and this would include their release. Article 31(2) in relevant part provides:

> "2. The Contracting States shall not apply to the movements of such refugees restrictions *other than those which are necessary* and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country.."

[50] The continued detention of the applicants in Lindela constitutes an unnecessary restriction of movement which is contrary to Article 31(2). The respondents have failed to show that the detention is necessary.

Conclusion

[51] It follows therefore that South Africa as a contracting state to the Convention, cannot penalise the applicants any further by continuing to incarcerate them at Lindela Detention Centre. Their movements cannot be restricted. The respondents are not however precluded from ordering the applicants to report to a Refugee Reception Office, where the applicants must apply for asylum. Section 22(1) of the Refugees Act permits the refugee "while awaiting the adjudication of their application in terms of section 21(1) to request to be issued with an asylum seeker visa allowing the applicant to remain in the Republic temporarily, subject to such conditions as may be imposed, which are not in conflict with the *Constitution or International Law*." This is another example where the amendment fully recognises that the conditions cannot conflict with the Constitution as it must, but also International Law.

[52] The continued detention of the applicants cannot be justified and is unlawful. The applicants are being deprived of their liberty and an urgent order for their release is justified. Counsel on behalf of the applicants submits that there is no jurisprudential basis for their detention and that they are being treated contrary to the laws of this country and the international treaties to which South Africa is a signatory. Counsel on behalf of the applicants correctly submits that they do not have an alternative remedy, they will suffer irreparable harm by virtue of their detention and without an opportunity to exercise their rights in terms of the Refugees Act. They suffer irreparable harm with each day of detention. In my view it is appropriate for them to be released on condition they make the necessary application for asylum and challenge the orders made by the Magistrate at Nongoma Magistrates Court. The balance of convenience favours their release to enable them to have an opportunity to apply for asylum and for the reasons already stated, not to be incarcerated at Lindela Detention Centre by virtue of their rights in terms of the Constitution and the Convention.

[53] The applicants have been successful, and costs should follow the result.

Order

1. This application is heard on an urgent basis in terms of Rule 6(12)(a).

2. The first applicant shall by 31 August 2021 institute proceedings to appeal or review the orders of the District Court, Nongoma case numbers B50/2021 and 89/04/2021 handed down on 26 April 2021.

3. The second applicant shall by 31 August 2021 institute proceedings to appeal or review the orders of the District Court, Nongoma case numbers B49/2021 and 88/ 04/2021 handed down on 26 April 2021.

4. Subject to the applicants approaching the Refugee Office as contemplated in prayers 6 below and the completion of the proceedings referred to in prayers 2 and 3 above, the first and second respondents are interdicted from deporting the applicants unless and until:

   4.1 their status under the Refugee Act, 130 of 1998, has been lawfully and finally determined; and

   4.2 the proceedings referred to in prayers 2 and 3 above have been completed.

5. The first and second respondents are directed to release the applicants forthwith.

6. It is declared that the applicants shall be entitled to remain in the Republic of South Africa to a date, whichever is the later:

   6.1 for a period of 5 days after the refugee reception office re-opens, in order to allow them to approach a refugee reception office; and 6.2 the finalisation of the proceedings referred to in prayers 2 and 3 above.

7. Pending the finalisation of the applicants' claims, the first and second respondents are directed, upon submission by the applicants of their asylum application, to accept the applicants' asylum application and to issue them with a temporary asylum seeker permit in accordance with Section 22 of the Refugee Act:

   7.1 including the exhaustion of their right of review or appeal in terms of Chapter 3 of the Refugee's Act and the Promotion of Administrative Justice Act 3 of 2000 provided that the applicants applies for review or appeal in the time periods as afforded by him in terms of Chapter 3 of the Refugee Act and the Promotion of Administrative Justice Act 3 of 2000; and until

   7.2 The completion of the proceedings referred to in prayer 2 and 3 above.

8. The first and second respondents to pay the costs of this application including the 23 and 30 June 2021, jointly and severally, the one paying the other to be absolved.

Victor J
Judge of the High Court
Counsel for Applicant: Ms Lipschitz
Counsel for first and second respondent: Adv N Nharmuravate
State attorney.