

'AR3'

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

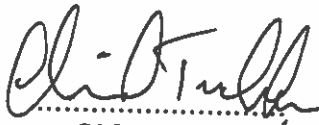
CASE NO: 79430/16

In the matter between:

ALEX RUTA

Applicant

and

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
23/11/16	
DATE	SIGNATURE

MINISTER OF HOME AFFAIRS

First Respondent

DIRECTOR-GENERAL, DEPARTMENT
OF HOME AFFAIRS

Second Respondent

HEAD, ATTRIDGEVILLE CORRECTIONAL
CENTRE

Third Respondent

JUDGMENT

Tuchten J:

- 1 This matter came before me in the urgent court. When I heard the case, if my memory serves me, the applicant was being held at Lindela pending deportation. After argument, I told counsel how I proposed to rule and invited counsel to assist the court by preparing a draft order. The order which I made was the product of counsel's

industry but I must make it clear that the respondents opposed any order in favour of the applicant.

2 The order I made reads:

- 1 The Respondents are directed to release the Applicant forthwith.
- 2 Directing that the Applicant be afforded 5 days from the order being granted to present himself at a Refugee Reception Office to apply for asylum in terms of Section 21 of the Refugee act.
- 3 Directing the First and Second Respondents to renew the Applicant's temporary asylum seeker permit in terms of Section 22(1) of the Refugees Act 130 of 1998, pending the finalisation of his claim, more specifically the exhaustion of his rights of either appeal or review in terms of Chapter 4 of the Refugees Act 130 of 1998 and the Promotion of Administrative Justice Act 3 of 2000.
- 4 Directing the First and Second Respondents to pay the Applicant's costs excluding costs of the 18th October 2016.

- 3 The facts are unusual. The applicant is a national of Rwanda. He claims he entered the Republic of South Africa in 2014 as a soldier in its exiled armed struggle against the then Rwandan government. But in 2015 he was told, in effect, that he was to kill someone from a rival party. The applicant says that his reaction was to approach the

Directorate for Priority Crime Investigation, the Hawks, and disclose his mission to them. The applicant was then, he says, placed in witness protection.

- 4 The applicant says that he was moved around South Africa by the Hawks and that during this time abortive efforts were made to secure refugee status for the applicant. At some later stage, the money available for witness protection for the applicant ran out and his Hawks handlers advised him to get a job. The applicant then got a job at a pizza restaurant. When the applicant told one of his Hawks handlers that he was concerned at having no immigration status, he says the handler asked him for the details of the manager of the restaurant so that the handler could explain to the manager about the applicant's position. A few days later, the manager provided the applicant with an asylum seeker's permit.
- 5 It transpired that the permit was fraudulent. On 19 March 2016, the applicant was arrested for possession of a fraudulent permit, driving a motorcycle without a driver's license and being an illegal foreigner. Following representations, the charge of possession of a fraudulent permit was withdrawn and the applicant was convicted of driving and unlicensed motorcycle and driving without a license. He was sentenced on 28 July 2016 to three months imprisonment. He was

released from custody on the criminal convictions in about August 2016.

- 6 Since 15 April 2016, the applicant has through his attorney been in correspondence with the Department of Home Affairs (the DHA) in an effort to regularise his position. In a letter dated 12 September 2016, the applicant's desire to apply for refugee status was communicated to the respondents. The applicant's position could not be resolved by negotiation and the applicant was transferred to Lindela to await deportation.
- 7 In resisting his claim broadly for the relief which I ultimately granted, counsel for the respondents submitted that s 4(1)(b) of the Refugees Act precludes the grant to the applicant of refugee status. Section 4 reads:
 - (1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she-
 - (a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or
 - (b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or

- (c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or
- (d) enjoys the protection of any other country in which he or she has taken residence.

8 The respondents' submission is that if the applicant's version is true, which the respondent does not concede, then the applicant is an assassin and a deserter. Section 4(1)(b) is in my judgment directed to crimes committed *outside* the Republic. There is not even a suggestion in the respondents' papers as to which law of which country renders the applicant's conduct punishable, let alone any expert evidence by which foreign law is usually proved. Furthermore, assuming that the respondents are suggesting that the law of Rwanda renders punishable by imprisonment the applicant's decision, on his version, *not* to commit the crime of murder in the Republic and to sever his connections with the organisation which wanted him to be its assassin, I cannot exclude the strong possibility that the alleged crimes are political in nature.

9 So much for the facts. Section 2 provides for the right of aspirant applicants for refugee status in very wide terms:

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-

- (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 social 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.

- 10 This position of an aspirant applicant for asylum has been made clear by the SCA. In *Bula and Others v Minister of Home Affairs and Others*,¹ the court held as follows:²

[72] Regulation 2(2) ought to have been the starting point as the appellants clearly fell within its ambit. They had not lodged an application within the terms set out in reg 2(1)(a). The word 'encountered' in reg 2(2) must be given its ordinary meaning, which is to meet or come across unexpectedly. The regulation does not require an individual to indicate an intention to apply for asylum immediately he or she is

¹ 2012 4 SA 560 SCA

² Footnotes omitted

encountered, nor should it be interpreted as meaning that when the person does not do so there and then he or she is precluded from doing so thereafter. The purpose of ss 2 is clearly to ensure that where a foreign national indicates an intention to apply for asylum, the regulatory framework of the [Refugees Act] kicks in, ultimately to ensure that genuine asylum seekers are not turned away. It is clear that the appellants, when they were detained at Lindela, communicated to the department's officials and enforcement officers by the letter referred to earlier in this judgment that they intended to apply for asylum. Once the appellants, through their attorneys, indicated an intention to apply for asylum they became entitled to be treated in terms of reg 2(2) and to be issued with an appropriate permit valid for 14 days, within which they were obliged to approach a refugee reception office to complete an asylum application. The contrary view expressed in *Shabangu v Minister of Home Affairs* (49231/10) [2010] ZAGPJHC 146 (10 December 2010) is incorrect. The order in that case had the effect of placing the persons released into an unregulated position, which could never have been the intention of the [Refugees Act].

[73] That does not mean that a decision on the *bona fides* of the application is made upfront. Once the application has been made at a refugee reception office, in terms of s 21 of the [Refugees Act], the [Refugee Reception Officer] is obliged to accept it, see to it that it is properly completed, render such assistance as may be necessary and then ensure that the application together with the relevant information is referred to a [Refugee Status Determination Officer].

[74] In terms of s 22 of the [Refugees Act] an asylum seeker has the protection of the law pending the determination of his application for asylum. To that end he or she is entitled to an

asylum seeker permit entitling a sojourn in South Africa. As can be seen from the provisions of s 24(3) set out in para [67] above it is for the [Refugee Status Determination Officer] and the [Refugee Status Determination Officer] alone to grant or reject an application for asylum. In terms of s 24(3)(c) the application could be rejected on the basis of being 'unfounded'.

- 11 As I read this passage, it is not for the court to determine whether the would-be refugee has any prospects of success in his or her proposed application for refugee status. The power and duty to make this determination is vested in the Refugee Status Determination Officer alone. Once a person communicates to an officer of the DHA that it is his or her wish to apply for refugee status, it is the duty of that officer and, indeed, all other authorities, to place no obstacles in the way of the prospective applicant to have his or her case considered by a Refugee Status Determination Officer.
- 12 It is unnecessary for me to deal with the position of a person held in custody on suspicion of committing an offence other than one under the immigration regime and nothing that I have said should be taken as indicating whether such a person should or should not be released to enable him or her to apply for refugee status.

- 13 It followed, in my view, that the applicant was entitled to the relief sought and I made the order I have described above.

A handwritten signature in black ink, appearing to read 'NB Tuchten', written over a horizontal line.

NB Tuchten
Judge of the High Court
23 November 2016