IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No 18985/2014

In the matter between:

MEIZHU CHEN	First Applicant
TONGXIANG GAO	Second Applicant
And	
DIRECTOR-GENERAL: HOME AFFAIRS	First Respondent
MINISTER OF HOME AFFAIRS	Second Respondent
SINGAPORE AIRLINES	Third Respondent

Court:	RILEY AJ
Heard:	3 November 2014
Delivered:	2 December 2014

REASONS FOR ORDER

RILEY AJ:

[1] On 3 November 2014 I heard argument by the parties and on 4 November 2014, due to the urgency of the matter, I made an order that:

'1. Pending the final determination of the first applicant's application for the judicial review of the decision of 5 October 2014 to refuse her entry into the Republic of South Africa, the first and second respondents are to permit the first applicant to enter and remain in

the Republic of South Africa, subject to reasonable terms and conditions, as prescribed by the first respondent.

2. If the application for judicial review has not already been issued it must be issued within 10 days of the granting of this order, failing which the relief in the preceding paragraph shall lapse.

3. The first and second respondents are to pay the costs of this application.

4. Written reasons for this order will be furnished in due course.'

These are my reasons for the order.

[2] The applicants, Meizhu Chen and Tongxiang Gao, are Chinese nationals who were married in conformity with "The marriage law of the People's Republic of China" on 13 April 1999. They seek an urgent order directing that first and second respondents permit the first applicant to enter the Republic to allow her to continue working at her existing place of employment at Erf 3402 Hill Street, Stutterheim, Eastern Cape, pending the outcome of the first applicant's internal review application to the second respondent, and directing that should the second respondent's decision in terms of the internal review be unfavourable that first applicant be permitted to remain in the Republic and work pending her rights of judicial review of that decision.

[3] It is common cause that first applicant has duly exhausted the internal review process to request second respondent to review the decision of an immigration official, Unathi Mfebe ('Mfebe'), in accordance with s 8(1) of the Immigration Act 13 of 2002 as amended ('the Act') read with the Immigration Regulations 2014 ('the Regulations'), that came into effect on 26 May 2014. On 28 October 2014 second respondent informed first applicant that the decision of Mfebe had been confirmed, but gave no reasons. First applicant now intends to apply for the judicial review of the first and second

respondents' decisions formally. At the time of the hearing of this application no such review proceedings had been brought.

THE FACTS

[4] First applicant is the holder of a work visa issued to her on 18 January 2013 and which expires on 17 January 2016. In terms of the visa first applicant is authorised to enter the Republic and be gainfully employed by a specific employer in the Republic. The first applicant is employed at Meizhu Trading at 52 Lower Mount Street, King William's Town.

[5] On 5 October 2014 the first applicant together with the second applicant, her husband, entered the country at Cape Town International Airport. First and second applicant had returned to China briefly to attend first applicant's father's funeral. The second applicant was allowed through passport control, but the first applicant was not.

[6] Upon entry she was interviewed by Mfebe who recorded the incident in her investigating diary. According to Mfebe she was attracted to and profiled the first applicant because there was 'tempering' (sic) with the permit in her passport. It is not in dispute that this permit is completed by hand by officials of the department and that a '1' had been changed to a '4' on the portion where the first applicant's passport number was written.

[7] She took the first applicant aside and commenced questioning her, initially without an interpreter, and later with one over the telephone. The answers she received via the interpreter raised her suspicions and she informed the first applicant that:

'I am refusing her entry in the country and that I am 'sanding' (sic) her back with the same flight she came with. She now understood English and asked me why I am sending her back. I informed her that she is not giving me the satisfaction to be in

the Country because she can not (sic) provide me with any information I am requesting from her'.

After having communicated the decision to the first applicant, first applicant gave Mfebe what Mfebe says was the first applicant's 'boss's' telephone number. Mfebe telephoned the number and the first applicant's brother-in-law, who had also arrived at Cape Town International Airport on the same flight with first applicant, answered. The first applicant told Mfebe that her brother-in-law would have second applicant's number and that he would have the 'boss's' number. It is clear that there was miscommunication between first applicant and Mfebe, due to the language difficulties and the failure to use an interpreter, as to who Mfebe believed she was calling. Mfebe clearly believed she was speaking to first applicant's brother. Mfebe says she called the second applicant, but that:

'another Chinese lady answered the phone. I asked for the number but he was not known to this lady. I redialled the number, now a guy answered and claimed to be Ms Chen's husband and I asked her for a name and he gave me a total different name of Ms Li. I have asked brother to leave the office after I checked his permit too.'

According to Mfebe, first applicant then took money from her bag and begged her not to return her to China, because she wants to work in South Africa.

[8] According to the first applicant she was taken aside and asked questions concerning her work permit when she walked up to the immigration desk with second applicant and two others. Due to her lack of English she attempted to guess what the immigration officer was asking her, but could not answer the questions regardless.

[9] First applicant can hardly speak English and when Mfebe asked if she needed an interpreter she said yes. Mfebe then called a certain Gang Dong ('Dong'), an admitted advocate and sworn translator, to assist with the translation telephonically.

[10] According to first applicant Dong asked her where she was going, the name of her husband, her 'boss's' telephone number and where she married her husband. She told Dong that she was going to Durban, but he (Dong) misinterpreted what she had said and that he told Mfebe that first applicant was going to Johannesburg. According to first applicant the words "Durban" and "Johannesburg" sound similar in Chinese and that it is therefore easy to make a mistake or to be confused. She gave Dong her brother-in-law's telephone number as she did not know her 'boss's' telephone number off hand. She did this as she knew that her brother-in-law was outside the interrogating room and hoped that if he was called, he could assist.

[11] It appears that, due to miscommunication, Mfebe was unable to speak to first applicant's 'boss'. First applicant was then told by Mfebe that she would be sent back to China and she would need to buy a ticket. According to first applicant she could understand by the demeanour of and certain of the words used by Mfebe what was going on and she therefore took cash from her wallet to show how little money she had in cash for an airline ticket. She denied attempting to bribe Mfebe. Thereafter Dong was telephoned again and he and Mfebe spoke, whereafter Dong spoke to her telephonically and advised her that -

1. She was going to be kept in a transit lounge as her answers did not satisfy Home Affairs officials;

2. That she had two options, the first was to get a lawyer and the second was to go back to China immediately; and

3. That she could get a lawyer, but that regardless, she would still be sent back to China.

[12] Considering the contents of Mfebe's investigation diary and her version, it is not quite clear what exactly attracted her attention to the first applicant. On the one hand she avers that she saw first applicant tampering with her passport and then asked to look at it, and on the other hand she

avers that she saw that the passport had been tampered with and that she then questioned first applicant.

[13] It is clear that part of the whole process between Mfebe and the first applicant included the completion and handing over of certain official forms which are crucial to this matter in so far as they have a direct impact on the process and procedure followed by Mfebe, the decisions she made, and the consequences thereof on the first applicant. In this regard I refer to the following:

- A **Form 5** which is a declaration by a foreigner seeking admission to the Republic of South Africa;

- A **Form 6** which is a form completed by Mfebe headed '*Interview by Immigration officer of person not having satisfied Immigration Officer that he or she is not an illegal foreigner'*;

- A Section 41 *'Immigration Interview Questionnaire'* completed by Mfebe with reference to the investigation diary;

- A **Form 1,** otherwise known as a '*Notification regarding right to request review by Minister'*, in terms of which the first applicant had been refused admission into the Republic of South Africa and notified that she had the right in terms of the Act to request the Minister to review the decision.

- A **Form 37** which is a *'Notification to a person at a port of entry that he or she is an illegal foreigner and is refused admission'*; and

- A form headed '*Declaration to the Master of Ship or person in charge of the conveyance that person conveyed, is illegal foreigner'* and a notice to the master of ship or person in charge of conveyance regarding his or her obligations where the person conveyed is refused

admission. In short a notice to the third respondent to remove first applicant from the country.

[14] I am satisfied that no translator or interpreter was used to explain the forms to first applicant, nor are the forms signed by an interpreter.

[15] Within the process as herein before set out it appears that the first applicant was essentially –

1. Refused entry in terms of section 8(1) as an inadmissible person; and

2. Found to be an illegal foreigner in terms of section 8(1); and

3. Determined to be a suspected illegal foreigner as envisaged in terms of section 41 of the Act as amended.

[16] As the first respondent was unable to state whether she would not be placed on the next plane back to China, the first applicant's attorney Craig Smith launched an urgent application in this court on her behalf to prevent that from occurring.

[17] When the matter was brought before Van Staden AJ he did not hear the application, but required that the application be served on the third respondent and encouraged the parties to attempt to find a resolution to the matter.

[18] An agreement was then reached between the applicants and respondents in terms of which first applicant's attorney would complete the necessary form indicating that first applicant intended launching a review of first respondent's decision and that the Department of Home Affairs would inform the third respondent that first applicant could not be forced to return to her country of origin pending the outcome of the review application.

[19] On 7 October 2014 an email written by Gideon Christians of the second respondent was forwarded to the third respondent, the contents of which reads as follows:

'1. that first applicant has launched a review of the decision declining her entry into the Republic of South Africa;

2. that in terms of s 8(2)(b) of the Act first applicant cannot be forced to return to her country of origin pending the outcome of her review application;

3. that first applicant remains the responsibility of third respondent and that first applicant will remain in the "inadmissible facility" as she cannot be admitted in the Republic of South Africa.'

[20] At the time of the hearing of the matter first applicant had been in the transit lounge of third respondent at Cape Town International Airport since 5 October 2014. The original "conveyance" that she arrived with had long since left.

[21] Considering the issues in dispute in this matter it is necessary at the outset to emphasize that the Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. It is accepted in our law that our Constitution and the rights contained therein apply equally to foreign nationals as well as citizens of our country unless the contrary emerges from the Constitution.

[22] The Act provides for the regulation of admission of persons to, their residence in, and their departure from the Republic; and for matters connected therewith.

[23] According to the preamble of the Act, it aims at putting in place a new system of immigration control that ensures inter alia that the security considerations are fully satisfied; the State retains control over the

immigration of foreigners to the Republic; that immigration laws are efficiently and effectively enforced; that immigration control is performed within the highest applicable standards of human rights protection; xenophobia is prevented and countered; and importantly that a human rights based culture of enforcement of the provisions of the Act is promised. (My underlining).

[24] The Act essentially seeks to regulate the entry and residence of foreign nationals within its borders and it has the power to deal with illegal immigrants who are in the country.

[25] It is accepted that citizens who are in South Africa are either in the country lawfully in terms of the necessary permits or valid documents allowing them to remain in the country, or they are in the country without valid papers and hence unlawfully.

[26] I will now deal with the sections of the Act which have an impact on illegal foreigners.

Section 8 of the Act, which deals with review and appeal procedures, provides that -

'(1) An immigration officer who refuses entry to any person or finds any person to be an illegal foreigner shall inform that person on the prescribed form that he or she may in writing request the Minister to review that decision and –

(a) if he or she arrived by means of a conveyance which is on the point of departing and is not to call at any other port of entry in the Republic, that request shall without delay be submitted to the Minister; or

(b) in any other case than the one provided for in paragraph (a), that request shall be submitted to the Minister within three days after that decision.

(2) A person who was refused entry and was found to be an illegal foreigner and who has requested a review of such a decision –

(a) In a case contemplated in subsection (1)(a), and who has not received an answer to his or her request by the time the relevant conveyance departs, shall depart on that conveyance and shall await the outcome of the review outside the Republic; or

(b) In a case contemplated in subsection (1)(b), shall not be removed from the Republic before the Minister has confirmed the relevant decision.'

Section 8(3) provides that any decision in terms of the Act other than a decision contemplated in subsection (1) that materially and adversely affects the rights of any person shall be communicated to that person in the prescribed manner and shall be accompanied by the reasons for that decision.

Section 8(4) provides for review and appeal of that decision within 10 working days of notification to the Director-General.

Section 8(5) provides that the Director-General shall consider the application contemplated in sub-section(4) whereafter he or she shall confirm, reverse or modify that decision.

Section 8(6) provides for the right of the aggrieved person to review or appeal the Minister's decision within a prescribed time period.

Section 8(7) provides that the Minister shall consider the application contemplated in sub-section (6), whereafter he or she shall either confirm, reverse or modify that decision.

In terms of Section 9(3) no person shall enter or depart from the Republic -

'(a) unless he or she is in possession of a valid passport; . . .

(b) except at a port of entry, unless exempted in the prescribed manner by the Minister, . . .

(c) unless the entry or departure is recorded by an immigration officer in the prescribed manner; and

(d) unless his or her relevant admission documents have been examined in the prescribed manner and he or she has been interviewed in the prescribed manner by an immigration officer; . . . .'

Section 34 deals with the deportation and detention of illegal foreigners.

In terms of Section 34(1)(d) a foreigner '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 . . . .'

Section 34(8) and (9) of the Act provides that -

'34(8) A person at a port of entry who has been notified by an immigration officer that he or she is an illegal foreigner or in respect of whom the immigration officer has made a declaration to the master of the ship on which such foreigner arrived that such person is an illegal foreigner shall be detained by the master on such ship and, unless such master is informed by an immigration officer that such person has been found not to be an illegal foreigner, such master shall remove such person from the Republic, provided that an immigration officer may cause such person to be detained elsewhere than on such ship, or be removed in custody from such ship and detain him or her or cause him or her to be detained in the manner and at a place determined by the Director-General.

34(9) The person referred to in the preceding subsection shall, pending removal and while detained as contemplated in that subsection, be deemed to be in the custody of the master of such ship and not of the immigration officer or the Director-General, ...'

In terms of section 35(9) a person in charge of a conveyance shall ensure that any foreigner conveyed to a port of entry, for purposes of travelling to a foreign country, holds a valid passport and a transit or port of entry visa, if required. Section 35 (10) provides that -

'a person in charge of a conveyance shall be responsible for the detention and removal of a person conveyed if such person is refused admission in the prescribed

manner, as well as for any costs related to such detention and removal incurred by the Department.'

[27] In *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* 2004 (4) SA 125 (CC), Yacoob J writing for the majority of the court on the constitutionality of certain subsections of s 34 of the Act stated that:

'[4] The Act distinguishes between 'foreigners' and 'illegal foreigners'. A foreigner 'means an individual who is neither a citizen nor a resident, but is not an illegal foreigner'. An illegal foreigner 'means a foreigner which is in the Republic in contravention of this Act and includes a prohibited person' … Illegal foreigners therefore constitute a limited category of people. An illegal foreigner is either a prohibited person or a person who comes into the country or tries to enter without any permit at all or any consent or authorisation. . . . .

. . . .

[6] As I have mentioned, s 34 is concerned only with illegal foreigners and their treatment. The distinction between ss (1) and ss (8) is that the former applies to illegal foreigners inside the country while the latter is confined to illegal foreigners who have not yet formally entered South Africa, but are still at "ports of entry".

[7] There are two kinds of ports of entry through which people can enter South Africa. We have airports and seaports on the one hand, and border posts on the other . . . .

. . . .

[9] Sections 34(8) and (9), concerned with illegal foreigners at ports of entry, are different. The immigration officer at the port of entry must notify the people concerned or declare to the master of the ship on which they arrive that they are illegal foreigners. The master of the ship is then obliged to detain those people on the ship and remove them from the country unless the master is informed by the immigration officer that the people have been found not to be illegal foreigners. The

immigration officer may, as an alternative to detention on the ship, cause the people to be detained elsewhere than on a ship. Subsection (9) provides that people detained in terms of ss (8) are deemed to be have been detained by the master.

. . . .

[11] … Secondly, s 8(1) and (2) of the Act require the Department of Home Affairs to inform people of any determination adverse to them and of the 'related motivation'. That person then has a right to 'make representations' against that determination before it is finally made and, if finally made, to appeal against it to the Director-General and, ultimately, to the Minister of Home Affairs. Subsection (4) provides that a person may not be deported until the relevant decision is final. However, although ss (5) expressly preserves the ss (2) right of appeal, it renders the decision of an immigration officer refusing a foreigner entry into the country (at a port of entry and therefore in terms of s 34(8)) final for purposes of deportation.'

[28] The Constitutional Court ascribed a wide definition to the word "ship" that includes all modes of transport by means of which persons arrive at ports of entry. This definition of a "ship" has long since been removed by the Immigration Amendment Act 19 of 2004. The amending Act removed the definition of the word "ship" entirely. The effect of the amendment is that a ship is simply a ship and not an aeroplane or any other conveyance.

[29] In *Koyabe and others v Minister of Home Affairs and others (Lawyers for Human Rights as Amicus Curiae)* 2010(4) SA 327(CC) at para 61 Mokgoro J writing for the majority of the court noted that the declaration that a person is an illegal foreigner has an adverse impact on that individual. She therefore suggested that such a person will understandably want to know the basis for the declaration, particularly in circumstances where it might be based on a misunderstanding or incorrect information. Therefore the reasons for the findings are important in seeking a meaningful review and in enhancing the chances of getting the decision overturned. The provision of such reasons the learned judge suggests is an imperative of South Africa's constitutional democracy as it will often be important in providing fairness,

accountability and transparency. See *Koyabe v Minister of Home Affairs* supra at para 62.

[30] The reasons must be sufficient but need not be specified in minute detail. The affected complainant must be in a position to make a reasonably substantial case for review or an appeal. See *Koyabe v Minister of Home Affairs* supra at para 63.

[31] According to the authorities cited hereinbefore the process envisaged in terms of the Act is clearly of an inquisitorial nature. The immigration officer is allowed to request from the person any information or clarification that he or she deems necessary to allow the immigration officer to come to a conclusion and reach a decision based on the information. It is therefore paramount that the information required is elicited in a proper manner so that there is no uncertainty or misunderstanding about what the correct facts are. The immigration officer should accordingly exercise extreme caution in the manner in which the information is obtained. Considering the grave consequences for the affected person there can be no room for error.

[32] It is clear that section 8 of the Act requires the Department of Home Affairs and the immigration officer on duty on behalf of the department at the port of entry, to inform the person of the determination that a person is an illegal foreigner and the reasons for doing so.

[33] It is necessary that the ‘applicant’ is afforded a fair opportunity to properly explain his/her position and the immigration officer should ensure that the person fully understands the process that is taking place and what his/her rights and responsibilities are. The process involving the first applicant had far reaching and grave consequences and it was incumbent on the immigration officer to ensure that all the processes and procedures were conducted in a proper and fair manner considering the constitutional protections afforded to the first applicant in terms of the Constitution.

[34] In the present matter it is clear that the first applicant is Chinese. She clearly does not understand and/or speak English properly. The possibility of mistakes and misunderstanding about the process and/or what was being said or what was taking place was real and very likely to occur. There is no doubt in my mind that the first applicant must have been nervous and traumatised by the events as they unfolded.

[35] In my view there was accordingly a duty and more so a constitutional obligation on the immigration officer to ensure that an interpreter/translator was present from the outset and throughout the process until she made her final decision. In *S v Saidi* 2007(2) SACR 637, following the approach in *S v Mponda* 2007(2), SACR (C) [2004] 4 All SA 229 (C), Yekiso J dealt at para [14] with the duty of magistrates to ensure that a competent interpreter is used in criminal proceedings and the right of an accused person in terms of s 35(3)(i) of the Constitution to be tried in a language that he or she understood or, if that was not practicable, to have the proceedings interpreted in that language. Although this is not a criminal trial the judgment dealt with the fundamental right of an accused person to competent interpretation.

[36] In *Katsshingu v Chairperson of the Standing Committee for Refugee Affairs* 19726/2010) ZAWCHC 480 (2 November 2011) Bozalek J, quite emphatically, held that where language is an issue, the failure to provide an interpreter competent in English and the applicant's mother tongue renders the Refugee Status Determination Officer's decision invalid on the basis that no fair hearing or process could have taken place. See Fatima Khan and Tal Schreier (Ed) *Refugee Law in South Africa* p160 para 9.3.3. In my view the sound principles as set out in the judgments referred to in paragraphs 35 and 36 hereinbefore are equally applicable in this matter.

[37] It has been alleged that first applicant attempted to bribe Mfebe. The allegation is very serious and constitutes a criminal offence in our law. If there was any merit to the allegation then one would have expected that Mfebe as a public official would have had the first applicant arrested and

charged. It is surprising that to date the first applicant has not been arrested and/or charged for the alleged attempted bribery.

[38] What I have said above relating to my concerns about the interpretation/translation and about the alleged attempted bribery is crucial as it impacts directly on the decision Mfebe made when she decided to deny the first applicant entry into the Republic.

[39] It is common cause and not disputed that Mfebe was entitled to interview first applicant by virtue of the provisions of s 9(3)(d) of the Act. The manner in which the interview is to be conducted is dealt with in regulations 6(3)(a) to (e) of the regulations to the Act. Mr Brink, on behalf of the applicants, contended that all the first applicant was required to do in terms of the Act was to satisfy Mfebe that:

1. she is not an illegal foreigner by producing a valid passport and port of entry visa, if applicable;

2. she is not a prohibited person by proving that she complies with the provisions of s 29 of the Act;

3. if previously declared an undesirable person, has complied with s 30(2) of the Act;

4. is not in contravention of the Act by producing a visa commensurate with the activities to be undertaken by her in the Republic.

[40] He further contended that first applicant did not fall foul of any of the above requirements as the first applicant had the necessary port of entry visa and she produced a valid passport. He argued further that no reliance could be placed on s 29 of the Act (as was done by counsel for first and second respondents) as it was not applicable and that Mfebe in any event did not have concerns about it at the time when she made her decision. He further

contended that first applicant has never been declared an undesirable person and lastly that she was in the country where she worked for Meizhu Trading in accordance with her permit.

[41] Mr Brink further contended that as immigration officers are obliged in law to follow prescribed procedures in terms of the relevant legislation that Mfebe had committed an unlawful administrative act by not conducting the regulation 6 interview, but on her own version had conducted a s 41 interview, and that based on this she then decided to refuse admission to first applicant.

[42] In his argument before me, Mr Nacerodien, for the first and second respondents, contended that the relief claimed by first applicant is *ultra vires* the Act and that the first applicant cannot try 'to gain entry into the country through the backdoor, when she clearly cannot get in through the front door'.

[43] According to him the first applicant's permit is invalid and that immigration was entitled and correct to refuse her entry for inter alia the following reasons:

1. There is a discrepancy between the passport number on the work permit and that which appears in the first applicant's passport in that the work permit gives the passport number as G4037**4**102 whereas the passport number in her passport states G4037**1**102;

2. First applicant was unable to answer the questions posed to her and the immigration officer had a discretion to deny her entry based on the discretion granted to her in terms of s 9(3)(d) of the Act.

3. Based on the respondents' permit track and trace records it would appear that first applicant is in the country on the strength of a s 19(5) permit. The holder of a s 19(5) intra-company transfer work visa may

conduct work only for the employer referred to in subsection (5) and in accordance with the requirements set out in his or her visa;

4. The business Meizhu Trading CC is a business conducting import and export and it does not fall within the ambit of s 19(5) as it would appear to be a domestic juristic person with no sister/holding company from which an intra-company transfer can take place.

5. It is likely that first applicant obtained her s 19(5) permit by fraudulent means which makes s 29(1)(f) of the Act applicable.

Should this be the case, he argued, then first applicant does not qualify for entry into the Republic. In my view points 3, 4 and 5 were not considered by Mfebe when she made her decision to refuse the first applicant entry into the Republic and can therefore not be relied on by respondents at this stage to bolster its case against the first applicant.

[44] There is merit in the argument of Mr Brink that Mfebe was not entitled in law to use the reasons she based her decision on to refuse first applicant entry into the country. According to the evidence the first applicant had in fact produced the visa which entitled her to work in the country and she did give the correct information which appears to have been mistranslated. It is further correct that attempting to bribe an officer is not one of the factors on the list to be considered and the attempted bribery allegation is in any event denied by the first applicant.

[45] Mr Brink argued forcefully that the whole process has been tainted to the extent that first applicant had been denied a proper opportunity to be heard prior to the making of the administrative decision and that there has therefore been a breach of her constitutional right to fair and just administrative justice. On the whole I am satisfied that the decision of the respondents to refuse the first applicant entry into the Republic and to find

her to be an illegal foreigner constituted 'administrative action' as defined in section 1 of the Promotion of Administrative Justice Act 3 of 2000.

[46] These issues will no doubt be properly ventilated and dealt with when the review process takes place.

[47] Even though it is not necessary for me to pronounce on the first applicant's prospects of success should the review process take place the issues referred to above indicate that she has reasonable prospects of success on review.

[48] I turn now to deal with the relief sought by the first applicant. The sole issue to be decided is whether or not first applicant should be allowed to enter the Republic and remain in the country pending her judicial review. Mr Nacerodien argued strongly that I was bound by the judgment of Savage AJ in the matter of *Mahlekwa v Minister of Home Affairs & 5 Others* (case number 9798/2014) [2014] ZAWCHC 89 (10 June 2014) where she stated that:

'[6] Mr Khan currently remains in the transit facility at Cape Town International Airport, refusing to leave the facility for Pakistan, or another country and seeks entry into South Africa. He has in terms of Section 8(1) applied for the review by the Minister of Home Affairs of the decision to refuse him entry into the Republic, which review remains undetermined. Pending the decision on review, given that the aircraft on which he arrived had left South Africa, Section 8(2)(b) prescribes that Mr Khan "shall not be removed from the Republic before the Minister has confirmed the relevant decision".

. . . .

[10] Under s 9(3) "(n)o person shall enter or depart from the Republic ... (d) unless the entry or departure is recorded by an immigration officer; and (e) unless examined by an immigration officer as prescribed" . . . .

[11] ... the decision to refuse Mr Khan entry relates rather to a determination made under Section 29(1)(f).

. . . .

[14] ... In *Patel and Another v The Chief Immigration Officer, OR Tambo International Airport and others* a distinction was drawn between a refusal of entry and a deportation, with the Court finding that the latter is directed at persons who are in the Republic illegally while the former is directed at persons yet to enter the Republic. For current purposes it seems to me that the distinction lies in the fact that pending the outcome of the review application lodged with the Minister by Mr Khan, he may of his own accord leave the transit facility and return to Pakistan, or another country, although he is not obliged to do so and by virtue of the provisions of Section 8(2)(b) he may not be removed from the facility until the decision has been confirmed.

. . . .

[24] Given my finding that Mr Khan is not detained and remains free to leave the transit facility but not to enter South Africa, while his review is pending neither the applicant nor Mr Khan hold a *prima facie* right to obtain an order directing the respondents and/or any official of the Department of Home Affairs to release or cause the release of Mr Khan from custody. Even if this is not so, I am not persuaded that the balance of convenience warrants a different conclusion given that the review application remains pending.'

[49] In support of his contention Mr Nacerodien also referred me to the matter of *Funeka Khan v The Minister of Home Affairs & Others* (case number 8231/2014) [2014] ZAWCHC 99 (27 June 2014), which he argued supported the approach in *Mahlekwa v Minister of Home Affairs and 5 others (supra)*, where Rogers J stated:

'[64] I was addressed on questions relating to whether technically Khan had been 'arrested' or 'detained' and whether at any given time he was in the custody of the Department's officials or of Emirates Airline. Counsel were unable to explain to me

why the answers to those questions mattered to the relief now at stake. I may say, though, that, if Khan were currently being held at a pre-entry facility at the airport pending the determination of a ministerial appeal, he would not in my view be entitled to be released into South Africa pending the Minister's decision. In that regard, I agree with what Savage AJ said in *Mahlekwa v Minister of Home Affairs & Others* [2014] ZAWCHC 89 paras 18 – 24 (and see also *Ulde v Minister of Home Affairs & Another* 2008(6) SA 483 (W) paras 30 – 35). As explained by Yacoob J, writing the majority judgment in *Lawyers for Human Rights & Another v Minister of Home Affairs & Another* 2004(4) SA 125 (CC), ss34(1) of the Immigration Act, which authorises an immigration officer to arrest an illegal foreigner without the need for a warrant but which incorporates safeguards for the arrested foreigner, is concerned with an illegal foreigner 'who has already entered the country in the sense of being beyond the restricted area at a port of entry (para 8)'. 'Detention' prior to entry is governed by other provisions, including s34(8) and 35(8). *Jeebhai v Minister of Home Affairs & Another* 2009(5) SA 54 (SCA), to which I was referred, was a case of a s34(1) arrest of a foreigner already in South Africa.'

[50] Thus it was contended on behalf of the respondents that first applicant was not in detention and that she could return to China.

[51] Mr Brink countered by arguing that the judgments of Savage AJ and Rogers J were distinguishable from this matter on the basis that in both instances the applicants sought final relief as opposed to the interim relief sought by the first applicant in this matter. In his view the relief sought by the first applicant is competent in the circumstances of this case both because of the provisions of section 172(1)(b) of the Constitution and on the basis that such orders have previously been countenanced in this division. See *Khan v Minister of Home Affairs* (supra); and *Johnson and others v Minister of Home Affairs and others*; *In re: De Lorie and others v Minister of Home Affairs and another* (10310/2014, 10452/2014) [2014] ZAWCHC 101 (30 June 2014).

[52] It is trite law that an applicant for interim relief must demonstrate the following:

1. a prima facie right, ‘though open to some doubt’;

2. a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted;

3. a balance of convenience in favour of the granting of the interim relief; and

4. the absence of any other satisfactory remedy available to the applicant.

Our courts have found that the requirements referred to above should not be considered separately or in isolation but in conjunction with one another to determine whether or not the court should exercise its discretion in favour of the grant of the interim relief sought. See *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382(D) at 383E-F. It is now accepted law that less is required from the applicants seeking interim relief than at the final interdict stage. In my view the first applicant does have a prima facie right to be permitted to enter the Republic because on the face of it she has a valid permit permitting her to do so. The suggestion that she allegedly tampered with her permit in the presence of the immigration officer is illogical and falls to be rejected. It is very likely that the changes on her permit were due to human error on the part of the persons who completed and wrote out the permits. It is not disputed that the permit is registered on the first respondent’s data system against the first applicant’s passport number. The respondents in asserting that the permit is ‘dubious’, rely on their track and trace system which clearly contains errors. I am accordingly not persuaded by the first and second respondents’ attempt to defeat the application for interim relief on the assertion that the permit is “dubious”. All that first applicant is required to do is to show that she has a prima facie right even if it is open to some doubt. I am further not persuaded that by granting the interim relief that the effect thereof is ultra vires the Act and that it will ‘open the floodgates to foreigners to enter into the country’. There is no foundation

laid for such an argument based on the facts or the law. Each case must be judged on its own facts and/or merits.

[53] It is not necessary for me to find that the decisions of Savage AJ in *Mahlekwa* (supra) and Rogers J in *Khan* (supra) are wrong in order for me to find that the first applicant is entitled to obtain the interim relief that she seeks. In any event the judgments of Savage AJ and Rogers J appear to be distinguishable from the present matter. In those matters the applicants sought final relief as opposed to interim relief as applies in this matter. In the *Khan* matter, the applicant also admitted the facts on which the decision to exclude him were based, whilst in the present matter the first applicant does not. The first applicant has further made it clear that she cannot return to China even if she was forced to go there. The suggestion that she has a choice to go back to China and return when the review is concluded cannot be a choice if she cannot afford to return due to financial constraints and if the effect thereof is that she will be separated from her husband. In any event it seems to me that the judgment of Rogers J in the *Khan* matter (supra) may very well be authority for a finding that interim relief of the kind sought in this matter can be granted. In my view Rogers J confirmed the rule granting such relief and even provided for the potential extension of that relief after the Minister's decision had gone against *Khan*. In *Johnson* (supra) Yekiso J granted such an order in circumstances where a person was outside the Republic.

[54] The undisputed facts are that the first and second applicants have lived and worked in the country for a substantial period of time. It is clear that first applicant's financial situation is dire and that she lacks money to return to China and will not have money to return to the Republic should the judicial review be favourable to her. Even if she is removed from the country at the expense of the third respondent then she will still have an inability to pay for her return to South Africa. The effect of her removal from the country would result in her being separated from the second applicant, her home and her work. See *Dawood and another v Minister of Home Affairs and others*;

Shalabi and another v Minister of Home Affairs and others; *Thomas and another v Minister of Home Affairs and others* (CCT 35/99) [2000] ZACC 8 2000 (3) SA 936; 2000 (8) BCLR 837 (7 June 2000). She will also be deprived of the advantages of direct consultation with her South African legal representatives.

[55] In my view it is untenable and certainly not in accordance with the highest applicable standards of human rights protection or human rights based culture to expect that first applicant should remain in the transit lounge, in which she has been detained since 5 October 2014, until the judicial review process is finalised. The transit lounge facility has been described as nothing more than a small room, which has bars on the door, which, although it has a toilet and ablution facilities, is poorly ventilated and demoralizing. A security officer is posted at the door to this room which is kept locked and first applicant is not allowed out of this room. The situation first applicant finds herself in is tantamount to being kept in a cell. When she was examined by Dr Kan Li on 7 October 2014 she was found to be tired, weak and dehydrated. She had difficulty swallowing and was nauseous regularly. It is not surprising that she was diagnosed as suffering from acute stress. I accordingly have serious concerns that the first applicant's health and mental wellbeing is being severely compromised. In my view the situation that she finds herself in undermines her fundamental right to dignity, her right to freedom and security of person and her right to freedom of movement. I am accordingly satisfied that first applicant has proved irreparable harm.

[56] It is necessary to emphasize that should the interim relief that is sought be granted, first applicant does not acquire any more or better rights than what her permit allows her to have. There is further no reason why, with the constructive involvement of the first respondent, appropriate terms and conditions cannot be put into place to regulate the first applicant's presence in the Republic pending the final determination of the judicial review process. It is also common practice for foreigners who have committed offences in this

country to be released on bail with appropriate conditions. In my view there can be no inconvenience and/or prejudice to the respondents should the applicants be granted the interim relief they have asked for.

[57] The first applicant has already been subjected to severe prejudice and inconvenience by being forced to remain in the transit lounge. The prejudice and inconvenience will continue should she be forced to leave the Republic and should she be unable to return she will suffer further prejudice and inconvenience. On the whole I am satisfied that the relief sought by the applicants is not sought on frivolous grounds. The applicants are clearly suffering prejudice and have no alternative remedy available to them other than the relief sought in the notice of motion.

[58] Section 172(1)(b) of the Constitution affords me the power to make an order which is just and equitable even in instances where the outcome of a constitutional dispute does not depend on the constitutionality of legislation or conduct. In arriving at my decision I find support in what was said by Moseneke DCJ in *Head of Department: Mpumalanga Department of Education and another v Hoërskool Ermelo and another* [2009] ZACC 32; 2010 (2) SA 415 (CC); 2010 (3) BCLR 177(CC) at para 97:

‘It is clear that section 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in section 172(1)(b) is not only available when a court makes an order of constitutional invalidity of a law or conduct under section 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on constitutional invalidity of legislation or conduct.’

This approach was endorsed by Mogoeng J (as he then was) in *Minister for Safety and Security v Van der Merwe and others* 2011(5) SA 61 (CC) at para 59.

[59] In the circumstances I have decided to exercise the wide remedial powers afforded to me and make an order which is just and equitable considering the circumstances of this matter.

[60] In the result I granted the applicants the relief as set out above.

J F RILEY