REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 72342/2012

NOT REPORTABLE

NOT OF INTEREST TO OTHER JUDGES

In the matter between:

BULAMBO BIAKOMBOKA MUBAKE	First Applicant
SAKINA OKOMO	Second Applicant
LYDIE MULUMBA	Third Applicant
SHEKHINA KASONGO MULIMBI	Fourth Applicant
TINA KAHUNDE	Fifth Applicant
MARTINE BALINGONGO BOLANDZA	Sixth Applicant
VANESSA AMISI	Seventh Applicant
MARIE DEMBO WOOKO	Eighth Applicant

and

MINISTER OF HOME AFFAIRS	First Respondent
DIRECTOR GENERAL: HOME AFFAIRS	Second Respondent
HEAD MANAGER: TIRRO AND MARABASTAD	Third Respondent
MINISTER OF EDUCATION	Fourth Respondent
MEC: EDUCATION (GAUTENG)	Fifth Respondent
MEC: SOCIAL DEVELOPMENT (GAUTENG)	Sixth Respondent
MINISTER OF SOCIAL DEVELOPMENT	Seventh Respondent
DIRECTOR-GENERAL: SOCIAL DEPARTMENT	Eighth Respondent

J U D G M E N T

MAKGOKA, J

[1] The applicants seek an order declaring that children who had been separated from their parents, are dependants of their primary care-givers in terms of the definition of 'dependant' in s 1 of the Refugees Act 130 of 1998 (the Act) and its accompanying regulations. In essence, the applicants contend that such children should automatically be recognized as dependents of existing asylum seekers or refugee adults who accompany them into South Africa. Ancillary to the main relief, the applicants seek an order that the first and second respondents should inform all refugee reception offices by way of departmental directive to issue the relevant permit to separated children who are dependents of their primary care-givers.

[2] Initially, the applicants also sought orders (in prayers 1 and 2 of the notice of motion) against the fourth respondent (the Minister of Basic Education) and fifth respondent (the Member of the Executive Council, Gauteng Province) in the following terms. Firstly, to provisionally allow the registration of the child applicants and other children of who are dependants of asylum seekers and refugees in public schools for 2013. Secondly, an order was sought against the Minister of Basic Education to review the admission policy for ordinary public schools by expressly making provision for child asylum seekers and refugees. That relief was granted by this court on 9 May 2013. That order took care of prayers 1 and 2 of the notice of motion. Prayers 3 and 4 also concerned the right of children to access education, and were not pursued by the applicants. What remains is the relief sought in prayers 5 and 6, and those prayers are mirrored in paragraph [1] above.

[3] The relief sought by the applicants is opposed by the first respondent (the Minister of Home Affairs), the seventh respondent (the Minister of Social Development), and the Directors-General of their respective departments, being the

second and eighth respondents. The fourth respondent (the Minister of Basic Education) initially opposed the relief sought against her, but later withdrew her opposition and filed a notice to abide the decision of this court. The Minister of Social Development and the Director-General of that department were later joined to the application. They, together with Minister of Home Affairs and the Director-General of that department, remain opposed to the relief sought by the applicants. I shall refer to them as 'the opposing respondents'.

[4] The first, second, third, fourth and seventh applicants are all children (the child applicants) from Democratic Republic of Congo (DRC). All of them are said to be orphans. They are asylum seekers on the basis that their parents had either been killed during political conflict in DRC, or had abandoned them. They are assisted by adult asylum seekers or refugees in South Africa, in whose care they are said to be. The fifth, sixth and eighth applicants are adult refugees or asylum seekers who seek the same relief on behalf of similarly placed children in their care. The adult asylum seekers or refugees appear in most instances to be aunts or uncles of such children.

[5] The situation of the applicants is, in broad terms, similar. The essence of their complaint is that they have not been issued with temporary asylum permits in terms of s 22, as the officials of the Department of Home Affairs allegedly demand that before such permit is issued, proof of a guardianship order was required as the persons who sought to register them were not their biological parents. To give a broad overview of the personal circumstances of the applicants, I summarise those of the first applicant. She alleges that she was born in the DRC in 1998. She alleges that her parents were killed in the war in her country in 1998 when she was a month

old. She is an asylum seeker in South Africa, having fled the war in DRC with her aunt, herself an asylum seeker, and arrived in the country during May 2011.

[6] Upon arrival, her aunt was issued with a temporary asylum seeker permit in terms of s 22 of the Act. However, when her aunt sought to apply for a similar permit for her, she was advised by the Refugee Status Determination Officer at the Marabastad, Pretoria office of the Home Affairs that since she was not her biological child, she could not apply for such permit, and needed the assistance of a social worker to apply for her guardianship. Despite her aunt's attempt to obtain guardianship, her efforts were unsuccessful, and to date, she has not been issued with a temporary asylum seeker permit. The effect thereof is that she is indefinitely not documented and the requirements for documentation are inaccessible. She is thus effectively an illegal immigrant.

[7] Section 1 of the Act provides that a dependant, in relation to an asylum seeker or refugee, includes the spouse, any unmarried dependent child or any destitute, aged or infirm member of the family of such asylum seeker or refugee. The applicants assert that the above definition should be read as being inclusive of separated children who accompany their alleged caregivers into South Africa. Thus, the issue is whether s 1 of the Act can be interpreted to include separated children as dependents of the adult asylum seekers accompanying them into South Africa, or who join them later in the country. The Act is silent as to how separated children are to be dealt with.

[8] On behalf of the applicants, it was contended that the definition of 'dependant' in terms of s 1, as set out above, should be read as being inclusive of separated

children who accompany their relatives who are their care-givers, into South Africa. Counsel for the applicants, Prof. *Skelton*, referred me to the following international instruments to buttress her submission: *The United Nations Convention on the Rights of the Child*, which was ratified by South Africa on 15 June 1995 (the Convention on the Rights of the Child); *The United Nations Committee on the Rights of the Child's General Comment on the Treatment of Unaccompanied and Separated Children Outside their Country of Origin, CRG/GC/2005/6* (the General Comment); *The African Charter on the Rights and Welfare of the Child* (the African Charter) ratified by South Africa on 7 January 2000. All the above instruments are concerned with the protection of children who seek refugee status. I set out in turn, the relevant provisions of the Convention on the Rights of Children and of the African Charter.

[9] Article 22(1) of the Convention on the Rights of Children obliges State Parties to take appropriate measures to ensure that a child who seeks refugee status, whether unaccompanied or accompanied by parents or by another person, receives protection and humanitarian assistance. Article 23(1) of the African Charter has a similar provision, but envisages that such a child may be accompanied by, among others, close relatives.

[10] The opposing respondents contend that the applicants and children similarly situated should be dealt with in terms of s 46 of the Children's Act 38 of 2005 (the Children's Act) in terms of which such children are placed with care-givers by means of a court order. In other words, the Children's Court should determine whether it is in the interests of such child to be under the primary care of the adult refugee or asylum seeker who purports to be their relative.

[11] Their stance is this. Prior to permitting a child to be joined as a dependant of an existing refugee or asylum seeker and prior to issuing separated child with an asylum seeker permit in terms of s 22 of the Act, an investigation must be conducted by the Department of Social Development. This, so contend the respondents, is to ensure that such adult who claims responsibility for the child is a fit and proper person to do so. Such an investigation might uncover, among others, that such a child bears no relationship to such adult, or that the child has been lured to the country under false pretences or is being trafficked or abducted into the country.

[12] To obviate this risk, the opposing respondents suggest that an enquiry needs to take place within the framework of the Children's Act, in terms of which the social workers with the necessary skills and expertise would be able to determine what is in the best interests of the child. Such a determination cannot be left to an official of the Department of Home Affairs, who would be expected to make such a determination on the mere say so of an adult refugee or asylum seeker. The opposing respondents further argue that the relationship between the adult refugee or asylum seeker and the child is not formalised or legally recognised, with the result that there is no binding responsibility of the refugee or asylum seeker in respect of the child.

[13] The upshot of the opposing respondents' argument is therefore that the automatic declaration of all separated children as dependants of adult refugees or asylum seekers without a proper investigation envisaged above, has the potential of being detrimental to the well-being of the children.

[14] It seems to me that the dispute between the parties falls within narrow compass. The applicants argue that when the adult asylum seeker is issued with a temporary permit, the children accompanying them, such as the applicants and

similarly situated children, should also be included in that process, similar to where the biological parents are accompanied by their children. Thus, the applicants contend that the first step to be taken prior to any investigation should be to document the child first, and issue the children with a permit in order to legalise their stay in the country. On the other hand, the opposing respondents argue that the Children's Court process should take place prior to the issue of such permit.

[15] While I agree that there are inherent risks associated with documenting separated children as 'dependants' of adult refugees or asylum seekers without any preceding investigation, there is a higher risk if that is not done. Insisting on a prior investigation through the process of Children's Court, which may be long and cumbersome, might actually result in the mischief the opposing respondents are concerned about - child abduction and trafficking. This is so because pending that process, the child is undocumented, invisible and untraceable within the database of the Department of Home Affairs. What is more, it should be borne in mind that a permit in terms s 22 of the Act is temporary.

[16] Thus, the temporary permit has the advantage that the separated children are documented in terms thereof, and thus legalising and regulating their stay in the country. This also means that the child is under the temporary care of a documented refugee or asylum seeker. The investigations and findings by the department of Social Development can be considered prior to a permanent permit being considered. There is nothing to prevent the department of Home Affairs, even at that early stage when a temporary permit is issued to the child, to bring a particular case to the attention of the department of Social Development for referral to the Children's Court if it has concerns about the adult asylum seeker's suitability or *bona fides*. In

other words, there is no reason why the processes of immigration status and that of the interests of the child in the Children's Court cannot run parallel. One does not have to exclude the other.

[17] It is also important to distinguish between what the outcomes of the process of a Children's Court, on the one hand, and that of the immigration process, on the other. The former can only determine the issues of welfare and the interests of the child, but cannot determined issues such as the granting of refugee status, for example. That determination is the sole preserve of the department of Home Affairs, and it cannot be made dependent on the findings of the Children's Court. Just to illustrate the point. The Children's Court might make a determination that the adult asylum seeker is a fit and proper person to care for the child. On the other hand, the immigration officials might determine that the child and/or the adult asylum seeker do not qualify for asylum. In that event, the child and the adult asylum seeker would have no choice but return to their country of origin. The finding of the Children's Court would be of no assistance at all.

[18] Earlier I stated that the Act is silent on how separated children are to be dealt with. The opposing respondents suggest that they could be dealt with in terms of s 32 of the Act, which is headed 'Unaccompanied child and mentally disabled person'. The short answer is that the section is clearly not applicable to separated children. Accordingly, it is thus not applicable to the applicants, as all of them, came into the country accompanied by adults. In any event, there is no serious dispute that the child applicants, and those on whose behalf the application was brought, are all separated children. There is therefore no merit in this argument.

[19] Consideration should also be given to our country's internal obligations in terms of s 233 of the Republic Constitution of South Africa, 1996 (the Constitution). It is clear from provisions of both the Convention on the Rights of Children and the African Charter referred to earlier, that s 1 of the Act should be construed purposefully and expansively. It is particularly noteworthy that the African charter expressly envisages a situation where a separated child is accompanied by a 'close relative'.

[20] This, in my view, ties in with the definition of a family member in s 1(d) of the Children's Act, which is not restricted to the nuclear family, but also includes 'any other person with whom the child has developed a significant relationship, based on psychological or emotional attachment, which resembles a family relationship'. I therefore agree with the submission by Prof. *Skelton*, for the applicants, that the Children's Act takes a broader, more African view to the concept of family, and that this should dispose this court towards a more flexible approach to the interpretation of 'dependant' in s 1 of the Act.

[21] Counsel also pointed out that the definition of 'dependant' in s 1 of the Act is flexible in terms of the interpretation of the word when it comes to older people who are dependents – the destitute, the infirm or aged. The definition obliges the Department of Home Affairs to accept such a person as a dependant and include them in the asylum application of the adult he or she accompanies. From that point of view, counsel contended that the same measure of flexibility should be applied in respect of children who accompany the adult asylum seeker. I agree.

[22] Constitutionally, this court is enjoined by s 39(2) of the Constitution, when interpreting any legislation, to promote the spirit, purport and objects of the Bill of

Rights. Two interpretational obligations arise from the Constitutional Court's construction of the obligations brought about by s 39(2). First, that where the court is faced with two interpretations, one constitutionally valid and the other not, the court must adopt the constitutionally valid interpretation provided that to do so would not unduly strain the language of the statute.[1] Second, where a provision is reasonably capable of two interpretations, the one that better promotes the spirit, purport and objects of the Bill of Rights should be adopted.[2]

[23] In the present case, the rights of children are implicated. Section 28(2) of the Constitution provides that the child's best interests are of paramount importance in every matter concerning the child. The interpretation accorded to s 1 by the opposing respondents is, in my view, inimical to the interests of the children. It leaves them in a state of uncertainty pending the determination by the Children's Court of the suitability of their relatives to care for them. As stated earlier, pending that determination, the children would not be documented. Thus, the child is virtually invisible to the immigration system. There is no mechanism in terms of which someone can be responsible for the child's welfare pending either the determination of the immigration status of the adult asylum seeker or the determination by the Children's Court.

[24] Given the above, I agree with the argument of the applicants that the separated children should be documented as they come into the country, accompanied by their adult care-givers. At the risk of repeating myself, this initial permit is temporary and is dependent on the later asylum claim, and possibly, an

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[1] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: in re Hyundai Motor Distributors (Pty) v Smit NO* 2001 (1) SA 545 (CC).
[2] *Wary Holdings (Pty) Ltd v Stalwo (Pty) and Another* 2009 (1) SA 337 (CC) paras 46, 84 and 107.

investigation by the Children's Court. If the asylum applications for the adult and child are dealt with efficiently and promptly by the immigration officials of the department of Home Affairs, their final immigration status would in time be determined. If the applications are favourably considered, the department of Social Development may, if it is concerned about the suitability or otherwise of the care-giver, refer the matter to the Children's Court for investigation.

[25] I have pointed out earlier that this referral can even be done simultaneously with the issuing of the temporary permit, in suitable circumstances. As to what those circumstances might be, I refrain from attempting to define them. It would neither be possible nor wise to do so. Each case would be evaluated on its own merits. The enquiry by the Children's Court is a separate and an insulated enquiry from the one as to whether the child should be granted temporary permit or permanent asylum status. The Children's Court would be undertaking an investigation into the best interests of the child. It has a wide discretion of the kind of orders it may make under the Children's Act, with regard to the best interests of the children.

[26] To sum up, I am satisfied that the applicants have made out a proper case for the relief they seek. Section 1 of the Act should be interpreted so as to include in the category of persons who are dependents of the adult asylum seekers, separated children. Such an interpretation accords with the constitutional values of our Constitution, and promotes the spirit, purport and objects of the Bill of Rights. It is also in line with our country's international obligations.

[27] There remains the issue of costs. The applicants have been successful. There is no reason why costs should not follow the costs.

[28] In the result the following order is made:

1. It is declared that separated children are dependents of their primary care-givers in terms of the definition of 'dependant' in section 1 of the Refugees Act 130 of 1998;
2. The first and second respondents are ordered to inform all Refugee Reception offices by way of departmental directive to issue the relevant permits to separated children as dependants of their care-givers;
3. The first, second, seventh and eighth respondents are ordered to pay the costs of the application jointly and severally, the one paying the others to be absolved.

Tati makgoka

T.M. Makgoka
Judge of the High Court

Date of hearing: 11 March 2015

Judgment delivered: 9 July 2015

Appearances:

For the Applicants: Prof. A. Skelton

Instructed by: Lawyers for Human Rights, Pretoria

For the First, Second, Seventh and Eighth Respondents: Adv. M. Bofilatos SC
Adv Maritz

Instructed by: State Attorney, Pretoria

No appearance for the Third, Fourth, Fifth and Sixth Respondents