CONSTITUTIONAL COURT OF SOUTH AFRICA
Alex Ruta v Minister of Home Affairs

CCT 02/18

Date of hearing: 1 November 2018
Date of judgement: 20 December 2018

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On Thursday, 20 December 2018, the Constitutional Court handed down judgment in an application for leave to appeal against a judgment of the Supreme Court of Appeal.

At issue was whether a prospective asylum seeker should be allowed to apply for asylum at any time they might express an intention to do so after arriving in the country, even if they have delayed. Also, whether an asylum seeker who has been convicted of a crime committed within South Africa is barred from applying for asylum. These questions raised the interface between the Immigration Act 13 of 2002 and the Refugees Act 130 of 1998. Must a person who claims to be a refugee and expresses an intention to apply for asylum be permitted to apply under the Refugees Act or should they be dealt with as an illegal foreigner under the Immigration Act?

The applicant, Mr Alex Ruta, is a Rwandan national who entered South Africa unlawfully in December 2014. In terms of the Immigration Act he is therefore an illegal foreigner.

In March 2016, Mr Ruta was arrested in Pretoria for traffic violations and later convicted and imprisoned for those offences. While he was in prison, the Department of Home Affairs moved to deport Mr Ruta back to Rwanda. Mr Ruta countered by applying formally for asylum under the Refugees Act, arguing that he would certainly face death if returned to Rwanda. The Minister of Home Affairs (Minister) refused to allow Mr Ruta to lodge an application for asylum under the Refugees Act, saying he had applied too late. The Department continued with deportation proceedings.

With his deportation imminent, Mr Ruta applied to the High Court for an order interdicting his deportation and granting his release so he could apply for asylum under

the Refugees Act. The High Court granted him these orders. The Minister appealed to the Supreme Court of Appeal. The majority judgment of the Supreme Court of Appeal, reversed the High Court judgment. It held that he failed to apply for asylum without delay, as both the Refugees Act and the Immigration Act require. Additionally, that Mr Ruta was disqualified from applying for and receiving a refugee permit because he had been convicted of a crime – the traffic violations. Lastly, that Mr Ruta contravened the Immigration Act when he entered the country. This meant that he had to be dealt with in terms of the Immigration Act and not the Refugees Act.

In contrast, the minority judgment found that an asylum seeker who has shown an intention to apply for asylum is protected by the Refugees Act and is entitled to be afforded access to that statute's application process. The minority held further that only crimes committed outside of South Africa precluded an asylum application.

Before the Constitutional Court Mr Ruta argued that immigration officials are obliged to allow him to apply for asylum once he expresses an intention to do so. He urged that allowing immigration officials to bar him from applying under the Refugee Act is, contrary to that statute, a usurpation of the duties and powers of a refugee status determination officer (RSDO). Mr Ruta contended further that the Department's barring him from applying also undermines his constitutional rights to human dignity, life and freedom and security of the person.

In response, the Minister argued that Mr Ruta could have and should have applied for asylum much sooner to comply with the legislation. The Minister also contended that the Immigration Act was the primary statutory vehicle for managing illegal foreigners and that it is under this statute that the status of asylum claimants who have not yet applied for asylum and have not secured protection under the Refugees Act is to be determined.

In a unanimous judgment penned by Cameron J, the Constitutional Court overturned the majority ruling of the Supreme Court of Appeal. The Court held that the Refugees Act is clear: delay in itself does not disqualify an asylum application. The only grounds on which an application may be refused are those set out in the Refugees Act itself. This approach is clearly embedded in the Refugees Act, which was enacted by Parliament in compliance with South Africa's duties under international law.

The Refugees Act embodies a fundamental principle under international law – *non-refoulement* (prohibition to expel) – in terms of which one fleeing persecution has the right to seek and to enjoy asylum. This principle is the cornerstone of refugee law and a significant doctrine of human rights law. For reasons springing from persecution of its own people during apartheid, South Africa has emphatically embraced *non-refoulement*. It has signed and ratified both the 1951 Refugees Convention and the even more generous wording of the Organisation of African Unity Refugee Convention.

The Constitutional Court's judgment confirmed the reasoning of the Supreme Court of Appeal in the decisions of *Abdi*, *Arse*, *Bula* and *Ersumo*, which established the principle that delay and adverse immigration status do not bar access to the asylum application

process. Failure to apply for asylum at "the first available opportunity" cannot lead to disqualification from seeking and qualifying for asylum. The Court's judgment emphasises that delay may still be relevant in evaluating the authenticity of a claim to be a refugee. But it cannot bar an applicant from applying for asylum at the outset. Further, in terms of the Refugees Act only the appropriate refugee status determination agency may determine the truth or falsity of the asylum.

The Constitutional Court also held that while the Immigration Act determines who is an "illegal foreigner" liable to deportation, the Refugees Act is the only pertinent statute in determining who may seek asylum and who is entitled to refugee status. In entrusting the processing of asylum applications to Refugee Reception Officers and the determination of refugee status to RSDOs, the Refugees Act makes precise and detailed provision for the matters it regulates in a way that the Immigration Act does not cover or even envisage. This means that the RSDO alone is entitled to adjudge applications by asylum seekers.

The judgment recognises that non-South African nationals do not have the right to enter, remain or reside anywhere in the Republic and that no international conventions create such a right. By enabling Mr Ruta and asylum seekers in his position to have their status determined under the Refugees Act the law does not as a consequence give everyone or anyone the right to enter the Republic anywhere across our borders. All the Refugees Act does, in conformity with South Africa's international and regional law obligations, is to ensure that asylum seekers have a chance to have their status determined in the process the Refugees Act itself sets out, and not to be deported summarily under the Immigration Act.

As to the exclusion in section 4(1)(b) of the Refugees Act, the Court unanimously holds that it cannot apply to the offences of which Mr Ruta was convicted. This is because they were committed within South Africa.

In the result, leave to appeal was granted and the appeal upheld.