IN THE HIGH COURT OF SOUTH AFRICA/ie

(TRANSVAAL PROVINCIAL DIVISION)

DATE: 16 February 2007

CASE NO: 35377/05

REPORTABLE

In the matter between:

ISMAIL EBRAHIM JEEBHAI **Applicant**

versus

MINISTER OF HOME AFFAIRS **1st Respondent**

MICHAEL SIRELA 2ND Respondent

JUDGMENT

NGOEPE JP, PRETORIUS J, SNIJMANN AJ

IN THE HIGH COURT OF SOUTH AFRICA/ie

[1] The Applicant has cited himself as an adult businessperson acting, and deposing to his Founding Affidavit, on behalf of "Khalid Mahmood Rashid". For reasons which will appear later, the latter could not launch the application on his own. It is common cause, or at least not disputed in any manner, that throughout the voluminous papers filed by the parties concerned, the various references to "Rashid" or "Khalid' refer to one and the same person. The First Respondent is the Minister of Home Affairs and the Second Respondent is an adult immigration official, employed by the First Respondent, who at all material times acted within the course and scope of his employment with the First Respondent. Wits Law Clinic was admitted into the proceedings as *amicus curiae* .

[2] Some debate ensued about the *locus standi* the Applicant in this matter. For the reasons that follow, it is not necessary for purposes of this judgment to deal with that.

[3] This matter came before us following an order of this Court made by Legodi J on 19 June 2006, who considered the matter brought as an urgent one. The learned judge *inter alia* struck the matter off the roll and ordered that in the event of enrolment of the matter again, it should be heard on the merits by a Full Bench of this Division. The matter was so re-enrolled.

[4] The Applicant seeks declaratory orders that:

1. the arrest of Khalid Mahmood Rashid ("*Rashid"*) on 31 October 2005 is unlawful, inconsistent with the Constitution, Act 108 of 1996 and invalid;
2. the removal from South Africa of Rashid on 6 November 2005 is unlawful and inconsistent with the said Constitution;
3. the detention of Rashid is unlawful and inconsistent with the said Constitution;
4. the disappearance of Rashid falls within the purview of Article 7(2)(i) of the Rome Statute of the International Court;
5. the disappearance of Rashid was an act of enforced disappearance

as defined in the said Rome Statute;

6. that no circumstances whatsoever, whether a threat of war, a state of war, internal political stability or any other emergency, may be invoked to justify an enforced disappearance;
7. that an investigation must be conducted into the disappearance of Rashid.

[5] The answering affidavit deposed to by the Director-General of the first respondent sets out important material facts. On 31 October 2005, Anthony De Freitas who is employed by the First Respondent as a Senior Immigration Officer at its offices in Durban, proceeded to arrest and take into detention Rashid at his place of residence in Estcourt, KwaZulu Natal. The arrest and detention were effected pursuant to information received that Rashid was an illegal foreigner. The practice is often, when the First Respondent's officials effect arrests under their statutory powers, that the South African Police accompany them, and De Freitas was accompanied by a number of policemen. On this occasion the policemen were armed and clad in bullet-proof vests, which is also the practice employed in such operations. After they had pronounced the premises, where Rashid was residing, as safe to enter, De Freitas went in. He found Rashid and the Applicant. De Freitas asked for their identification and travel documents. Rashid replied that he did not have any identification papers but said that his passport was in Johannesburg. He produced a copy of the passport. No permit of any nature appeared on the page where his personal particulars were reflected. It was clear to De Freitas that Rashid was an illegal foreigner, as contemplated in the Immigration Act, No. 13 of 2002 ("the Act"). As such, he was subject to arrest and deportation.

[6] Thereupon De Freitas informed Rashid that he was being placed under arrest. The purpose of his arrest was to facilitate his deportation under Section 34 of the Act. In order to facilitate his deportation, it was decided to detain him at the Cullinan police cells, pending further investigation and compliance with the formalities prescribed in the Act. Rashid was then transported to the Cullinan police cells,De Freitas accompanied

the police who were responsible for such transportation. After Rashid was placed in the police cells at Cullinan, De Freitas returned to Durban. Whilst at the Cullinan police cells, Rashid was in the custody of members of the police force.

[7] Swartland, an employee of the First Respondent, conducted an investigation into the residence status of Rashid in South Africa. In his capacity as an employee of the Second Respondent's Tswhane Chief Immigration Office, Swartland had access to all the First Respondent's records on foreign nationals in this country. He interviewed Rashid at the Cullinan police station on 2 November 2005. Rashid admitted to Swartland that he had entered the country illegally. Swartland then advised Rashid that, as he was in the country illegally, he was liable to be deported. As required by the Act, Swartland gave Rashid written notification of his decision to deport him to his country of origin, namely Pakistan. He further informed Rashid of his right to appeal against that decision and to have his detention confirmed by a warrant of Court. A written notification to that effect was handed to Rashid on 2 November 2005. A copy of that notification is annexed as Annexure "JS2" to the papers in this application.

[8] As to the procedure with regard thereto, the following is stated by the Director-General of the First Respondent in the Answering Affidavit:

> "*I might mention that the written notification is designed to ensure that the relevant provisions of section 34(1) of the Act and Regulation 28 are complied with. In giving the notification, the procedure that is adopted is as follows. The person concerned is given an opportunity to read the whole notification. Where he or she has any queries, these are dealt with. Then the person is asked what his or her decisions are in respect of the three matters listed on page 2 of the notification. The relevant blocks are then filled in. The person is then asked to acknowledge the correctness of what had been recorded in the blocks by appending his or her signature in the space provided.*"

Page 3 of the notification provides for certification by an interpreter, should the services of an interpreter be required. Where the person understands English, such service is not required. There was accordingly no need for an interpreter and that part of the notification was left blank. It was stated under oath that in giving the notification to Rashid, Swartland followed the procedure as mentioned above. After Rashid had read the notification, and after his decisions were recorded, he signed the document at the bottom of page 2. It was furthermore undisputed that in response to Swartland's enquiries as to how he had entered the Republic of South Africa and secured a "work permit", Rashid told Swartland that he had entered the country without a visa, and had paid an agent $600 "to get me through the immigration". He had thereafter paid R7, 000,00 to the agent for "a fake work permit".

[9] Furthermore, Rashid informed Swartland that he had decided to remain in custody whilst awaiting his deportation at the first reasonable opportunity. As regards his rights to appeal, Rashid also said that he had decided not to appeal against the decision to deport him. As to the confirmation of his detention by a warrant of the court, Rashid informed Swartland that he did not wish to require such confirmation. Those decisions were alse appended by Swartland on the said notification.

[10] Rashid was later on 6 November 2005 handed over to officials representing the Islamic Republic of Pakistan at Waterkloof Airforce Base. The facts and documentation show that he was handed over to one Habib Ullah, bearing an official stamp depicting passport control departure at the said airforce base and that he departed on aircraft registration number A6PHY with 5 crew members and 4 other passengers.

[11] It must also be noted that subsequent to the hearing of this application and on 20 September 2006 a further Notice of Motion was filed and duly served by the Respondents in terms of which further belated documents were tendered as evidence which, according to the Founding Affidavit made by an admitted attorney in the employ of the State Attorney, were not available to the Respondents at the time when this application was entertained by this Court. Although not strictly relevant to these

proceedings, it appears therefrom that (with regard to Annexures "MV5" and "MV6" to the papers in this application) Rashid indeed arrived at the Islamabad Airport in Pakistan and that he was received by representatives of the relevant law enforcement agency although no further particulars were furnished for "reasons of security".

[12] The affidavit by the Director-General not only serves to explain what had happened but, importantly, also deposes to facts which, by the nature of things, could only have been controverted, if untrue, by Rashid himself. This has not happened. We must therefore decide this case on the facts now before us. Submissions were made for the Applicant, apparently on probabilities, why the court should not believe the contents of the affidavit. These submissions are wild and speculative. A court would be careful not to indulge in speculation, and set its face against uncontested facts.

[13] It has been argued, especially by the *amicus,*that the detention of Rashid was invalid in that the provisions of section 8 of the Act had not been complied with prior to the decision to detain him for deportation in terms of section 34. The relevant portion of section 8 reads:

> "(1) *An immigration officer who 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*
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> *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.*
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> *2) A person who was refused entry or 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.*"

[14] Section 34 provides for the arrest without a warrant, of an illegal foreigner and for his/her deportation. The relevant portions thereof read as follows:

"(1) *Without the need of a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreigner is arrested, deport him or her or cause him or her to be deported and may, pending his or her deportation, detain him or her or cause him or her to be detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned –*

(a) shall be notified in writing of the decision to deport him or her and of his or her right to appeal such decision in terms of this Act;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

(c) *shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands.*"

[15] It has been submitted by Mr Mtshaulane, for the Respondents, that only a person found to be an illegal foreigner who has asked for a review by the Mininster would have his or her case referred to the Minister. Such a person may not be deported until the Minister has decided his or her fate. Where no such request for review has been made, the person falls to be deported. There can be no question of awaiting the Minister's decision as there was no request for review by the Minister. The Respondents argue that upon his arrest by immigration officer De Freitas on 30 October 2005, in Escourt, Kwa-Zulu Natal, Rashid was informed that as he was an illegal foreigner, he was arrested and detained for purposes of deportation. De Freitas came to the conclusion that Rashid was an illegal foreigner after examining a copy of his passport, which did not reflect any permit of any nature. It is therefore argued that already as on 30 October 2005 Rashid was being arrested and detained for the purpose of deportation in terms of section 34. Secondly, it is argued that if the arrest and detention of 30 October 2005 was for whatever reason invalid, it did not affect the validity of the decision taken on 2 November 2005 by another immigration officer, Swartland. The latter decision was taken after an independent consideration of Rashid's status, and therefore stands on its own. Its validity cannot depend on that of De Freitas.

[16] We have been referred on behalf of the applicant to a few decided cases. In *Arisukwu and Others v Minister of Home Affairs and Another,* SA 2003 (6) SA 599 SA (TPD) De Villiers J considered a similar application. It was contended for the applicants in that case that their arrest and detention was unlawful in that the procedure set out in sections 7, 9 and 52 of the Aliens Control Act 96 of 1991 (the Aliens Act) had not been complied with. This act has since been replaced by the Immigration Act 13 of 2002. Section 7 of the repealed Act provided that an immigration officer could require a person thought not to be entitled to be in the country, make and sign a prescribed declaration or produce documentary or other evidence relative to his/her claim to be in the Republic. Section 9(1) stipulated that if a person failed to comply with section 7 or having done so, was nevertheless declared a prohibited immigrant, the official making the declaration had to comply with the provisions of section 52(1). In terms of the latter section, the person declared a prohibited immigrant had to be informed of the right to ask the

Minister within three days to review such a declaration and, once that option had been exercised, the person would not be removed from the country until the Minister had decided. A person declared to be a prohibited person would then fall to be dealt with in terms of section 44 (of the repealed Act) for purposes of deportation.

[17] The scheme under the then sections 9 and 44 of the previous Act corresponds to the one contained in the present sections 8 and 34 respectively. On the facts before him, De Villiers found that the case of some of the applicants (who eventually succeeded) fell to be dealt with in terms of section 9. He found that there had not been compliance with that section and therefore that the arrest and detention were unlawful.

[18] In respect of the second applicant before him, De Villiers J, after noting that the state had alleged that the second applicant was in the country on the basis of fraudulent and therefore invalid documents went on to say that he would "*accept in the first respon dents favour that the second applicant is a prohibited person in terms of s 11(1) and that he has obtained the said documents unlawfully*" (p606 H). Nevertheless, the learned judge decided that the applicant could not be detained in terms of section 44(1) for deportation without prior compliance with sections 7, 9 and 52(1). It is not clear why, with respect, if the documents made it clear that the applicant was illegally in the country (a prohibited person) these sections still had to be complied with, especially as the learned judge did "accept" that the applicant was indeed a prohibited person in terms of section 11(1)(a). The position of the third applicant was, with respect, correctly dealt with. "*The third applicant's temporary residence permit, obtained on 24 January 2003, expired on 24 February 2003. In terms of s 26(7), he may therefore be dealt with as a prohibited person. His arrest and detention in terms of s 44(1)(a), on 12 March 2003, are accordingly lawful*," (page 607 A-B). Insistence on the compliance with section 7 or 9 and 52(1) would therefore have made no sense. Objective documentary evidence established clearly that he was a prohibited person and his position fell immediately to be dealt with in terms of the then section 44(1). His status was indisputable. Rashid's position is the same: that he is in the country illegally is indisputable, not only in the light of the documents but, most importantly, given his

personal admission of his status as well.

[19] In *Arif Muhammed v Minister of Home Affairs and Others, case no 41182/05* (TPD: unreported), Southwood J, had to consider a similar application. In particular, the court had to deal with the contention that section 8(1) of the Act had not been complied with prior to detention for deportation in terms of section 34. The court found that the procedure in section 8(1) and (2) had to be followed before arrest and detention in terms of section 34. In our view however it is not so that section 8 always applies; that would depend on the procedure in terms of which the person was brought into section 34. In the present case, Rashid came under section 34, at best for him, via section 41, and not via section 8. He admitted that he was an illegal foreigner, admitting all the material facts for that conclusion; for example, that he had paid for the documents from an agent. The fact that he was an illegal foreigner was not in dispute; in fact, it was common cause. A decision was then taken to deal with him in terms of section 34(1). He was then advised of his rights including the appeal and review procedure to the Director-General (the completed form made no reference to appeal to or review by the Minister, presumably the person would be advised further after the Director-General's decision).

The judgment of Southwood J, does not therefore assist the applicant.

[20] We have also been referred to the unreported judgment by Bertelsmann J, (in *Muhamed Khan and others v Minister of Home Affairs and others*, case no 15343/06 (TPD). It too was an application by people, detained for deportation, for their release. The relevant portion of the judgment reads: "*In the first instance the first respondent's officials failed to apply section 8 of this Act as it has been judicially interpreted in two decisions of this division. In Arisukwu and Others v Minister of Home Affairs and Another 2003 (6) SA 599 (T), De Villiers J held that the current section's predecessor, section 9 of the Aliens Control Act 96 of 1991, must be complied with before an alleged illegal alien may be arrested. The same finding was made in respect of the current Act's section 8 by Southwood J, in Mohammed v Minister of Home Affairs and Another*

case number 41182/05 (not yet reported). Both decisions held that once an official had decided that a foreigner was illegally in the country and the foreigner had been informed of that fact, the foreigner must be informed of his rights in terms of the relevant section. The foreigner is entitled, as a matter of law, not to be detained immediately after his having been informed of the decision to deport him, but to exercise his rights either to appeal to the minister or to apply to the Director General to review of appeal the decision to deport him either in terms of section 8(1) and 8(2) or section 8(4) without and before being incarcerated." (pages 18 – 19 of the judgment). In fact one person had no documentation at all. The rest had false documents. In over view, and for the reasons given below, the department was entitled to keep the people in detention, provided of course they were held in accordance with acceptable minimum standards.

[21] To the extent that the judgments are to the effect that after a determination is made in terms of section 8 that the person is an illegal foreigner or a decision is taken in terms of section 34 to deport the person, that person is not liable to be detained pending the outcome of appeal or review (to the Director-General and or the Minister as the case may be), we disagree. With thousands of illegal foreigners entering the country everyday it would mean there would literally be thousands of people without proper documentation roaming freely all over the country; no country would allow that. With the level of crime in the country, it is difficult to see how, realistically speaking, that could be allowed. It must for example be remembered that people without proper documentation have not had their finger prints recorded anywhere.

[22] Even if a person determined to be an illegal foreigner in terms of section 8 were not liable to be detained pending the outcome of an appeal against that determination, the situation would surely have to change once a decision in terms of section 34 is coupled to such a determination. In such a case, whether or not a person may be detained must be determined by a conjunctive reading of the two sections. That person will still be entitled to invoke the appeal and/or review proceedings against either or both decisions in terms of the procedure respectively prescribed by the two sections.

Certainly, section 34 is unequivocal about the authority to detain pending deportation; indeed one can be detained even without a warrant. A detention *per se*, if in accordance with acceptable standards, cannot disable a detainee from making proper decisions; it is common practice in the civilised world. There are literally thousands of people sought to be deported. It would be unworkable to say that immigration officers should make an appointment with potential deportees to come back for possible deportation in the event of their representations failing, and then release them. How many of them would keep the appointment once their representations have failed? There are simply no resources to trace them.

[23] In his unreported judgment handed down on 11 November 2006, Mabuse AJ also dealt with an application by foreigners seeking their release: *Abil Ali and others v Minister of Home Affairs and others*, case no 36405/06 (TPD). The applicants contended that the provisions of section 8 had not been complied with. The learned judge had to consider whether or not people dealt with under section 8 can be detained. His answer is in the affirmative.

> "[14] *… it must be borne in mind that it is not all the foreigners who will be treated as section 8 prescribes. It is very important to note that it is a foreigner who has been found to be an illegal foreigner who will be treated in terms of section 8(1).*
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> [15] *There does not seem to be any wisdom in the applicants' view that they should be let free in the Republic once such a finding has been made. By entering the Republic without the necessary papers, such persons expose themselves to immediate arrest without any warrant of arrest. The offence would have been committed the minute such people entered the Republic without the necessary documents section 49 of the Act creates such an offence.*
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> [16] *Once arrested, such people may be kept in detention until their fate is determined by the Minister in terms of the provisions of Section 8(2)(b).*

Until the Minister has decided, the law requires that they be kept in detention. An illegal foreigner has no right, in terms of the provisions of the Act, to claim to be released while he is awaiting the decision of the Minister. A determination that he is a illegal immigrant presupposes that he has no lawful right to be in the Republic." (para 14 – 16)

[24] Regarding detention of a person being dealt with under section 41, the learned judge says the following:

"[18] *During this period or before such a person is arrested and detained in terms of Section 34, he cannot claim to be released on the grounds that he needs time to establish her status or to satisfy the immigration officer or police officer that he is entitled to be in the Republic. The mere fact that he is unable to satisfy the immigration officer or police officer that he is entitled to be in the Republic, is sufficient grounds for the Police Officer or Immigration Officer to effect an arrest in terms of section 34 of the Act. Of course it is expected that once the immigration officer has effected an arrest in terms of section 34, he will comply with the further requirements of the said section*." (para 18).

The section unequivocally gives an immigration or police officer the authority to detain, pending investigations into the status of the person concerned.

[25] We hold that once a person is found by immigration officials to be an illegal foreigner in terms of section 8 of the Immigration Act, and/or a decision is taken in terms of section 34 to deport that person, it is competent for the authorities to detain that person pending the outcome of that person's appeal or review to the Director-General and/or the Minister, as the case may be. So too the person can be detained pending investigation into his/or her status in terms of section 41.

[26] Section 34 can be invoked under three different circumstances. Firstly, after the

procedure in section 8 has been followed and exhausted; that is, once a person has, in terms of that section, been declared an illegal foreigner and his rights of review or appeal have been exhausted. A decision in terms of section 34(1) to deport the person is then taken. Secondly, once a person has been found to be an illegal foreigner in terms of the procedure set out in section 41(1); that is, after that person, following a reasonable suspicion, fails to prove that he/she is in the country lawfully after an inquiry into his/her identification. Thirdly, where the person concerned agrees, and it becomes common cause, that he/she is an illegal foreigner, section 34(1) can be invoked to deport that person. This may happen even where there was no prior inquiry based on reasonable grounds which had prompted a suspicion that the person was illegally in the country. For example, a person may present himself or herself to the offices of the Department of Home Affairs with false documents in an attempt to extend a residence permit. If the attending immigration officer discovers that the documents are false, questions the person and the latter concedes that he or she is in the country illegally (for example admits that he/she paid for false documents) it becomes common cause that the person is illegally in the country. That person falls to be dealt with in terms of section 34(1). The jurisdictional condition for invoking section 34 is that the person is an illegal foreigner. Rashid falls into the third and indeed also the second scenario. Section 8 has therefore no application in his case. The argument based on its non-compliance can therefore not stand.

[27] It is important to realise that the need to insist on compliance with section 8, is to ensure that the person is able to challenge, by resorting to higher authorities, the finding that he/she is an illegal foreigner. In the case of the third scenario referred to above, that is where even the person himself/herself, given for example the overwhelming documentary evidence, concedes that he/she is an illegal foreigner, it becomes senseless to insist on compliance with section 8. One must of course be mindful of the weak position in which such people often find themselves, as also of the danger of abuse. Where it is clear that the person indeed freely admits, backed by objective or extraneous facts such as patently false documents, that he/she is an illegal foreigner, it ought to be so accepted and the person dealt with in accordance with the law on that

basis. It is important to note that even when a person has admitted that he/she is an illegal foreigner, and a decision is taken to deport him/her in terms of section 34(1) that person is not without protection. The person must still be informed fully of his/her right under the latter section: the right to appeal the decision. The person may choose to exercise his/her rights one way or the other. Whether the person has been sufficiently advised of his/her rights as prescribed, will depend on the facts of each case. It is not inconceivable that the person may prefer to be deported as soon as possible given the conditions endured in a foreign country, or due to other factors weighing with the person's mind or emotions. Here again caution is necessary; but the proven facts must decide the case. We have looked at the relevant documents in terms of which Rashid was advised of his rights. We are satisfied that he was properly so advised; and that he chose neither to appeal or review decisions that he was an illegal foreigner, nor the decision to deport him.

[28] The validity of the decision to deport, and the act of deportation itself, are also challenged on an entirely different ground. It is argued that Rashid was sought in Pakistan in connection with alleged acts of terrorism; that in Pakistan the death sentence is competent in respect of such crimes and that indeed people have been executed in that country. It is argued that Rashid should therefore not have been handed over until Pakistan had given an undertaking that in the event of a conviction and a sentence of death, Rashid would not be executed. It is also argued that Pakistan practises torture. To substantiate these allegations, we were referred to documents compiled by Amnesty International. The respondents do not contest these allegations. Mr Omar, for the applicant, and Mr Katz for the *amicus*, relied heavily on the case of *Mohammed and Another v President of the RSA and Others 2001(3) SA893 (CC).* It is, in this respect, argued that the deportation was invalid in that the South African government should have first secured from Pakistan an undertaking that the death sentence would not be imposed on Rashid, and that, if it was, that the sentence would not be carried out. Of course, they relied on the provisions of our Constitution, which protects human life and forbids torture and cruel, inhuman or degrading treatment. Their interpretation of the Constitution must be correct. The real issue though is whether or

not this case falls within the category for which Mohamed's case serves as authority.

[29] In Mohamed's case, he had already been charged in the United States of America and indicted before the grand jury. The South African authorities were aware that he was being sought in connection with criminal allegations. This point is hotly contested by the respondents before us. They say that they were not aware that Rashid was being sought for alleged terror activities, and argue that Rashid was an ordinary illegal foreigner.

[30] Before dealing further with this issue, it would be appropriate to first give a ruling on an application by the respondents to strike out certain paragraphs of the applicant's founding affidavit as well as annexures relevant thereto. The application is on the ground that the annexures in question are documents which were uplifted by the applicant out of the file of first respondent, the contents of which file the court (Poswa J) had previously ordered should not be disclosed. The paragraphs sought to be struck out traverse, or are comments on, these documents. The paragraphs, and the annexures, are the following: paragraph 26 from the third sentence, starting with the word "Noteworthy" together with its corresponding annexure "MV6"(which come out of the prohibited file); the whole of paragraph 27, with its corresponding annexure "MV8"; (coming out of the prohibited file). The contents of the paragraph are also objected to on the ground that they are hearsay and/or infringe privileged communication between counsel and client (Ms De la Hunt/first respondent) and between first respondent (through De La Hunt) and Department of Foreign Affairs; the whole of paragraph 28 together with annexure "MV7", (also coming out of the said file), objected to on the same grounds raised against paragraph 27; paragraph 29 with annexure "MV9" also from the file); it was also pointed out that nobody knew when annexure "MV9" was written, in particular, whether it was an *ex post facto* report after Rashid had already been taken out of the country (the copy of the document was neither complete nor dated). The first part of paragraph 30 also relies on "MV9"; the rest of the paragraph and paragraph 31 are meaningless and/or irrelevant.

[31] The problem faced by the court is this: if the paragraphs and the annexures were allowed to stand, they could possibly sustain an inference beneficial to the applicant, namely, that the respondents were aware, at the time of the deportation of Rashid, that the latter was wanted for questioning in Pakistan. On the other hand, if the annexures were placed before us on behalf of the applicant in contravention of a court order, should we overlook that contravention, thereby effectively ignoring the order, as the applicant has done? It is important to allude to the circumstances under which the annexures found their way into the papers before us despite the order. But before doing so, it is noted that for the reasons given later, a finding is made that the documents were placed before this court in violation of the order of Poswa J. We will deal with this issue more fully when we consider the application for a finding of contempt of court brought in the wake of this violation.

[32] We were informed from the Bar – and that was common cause – that Poswa J, ordered that respondent's file, which later turned out to be containing amongst others the annexures sought to be struck out, should not be published. Thereafter the file disappeared. On the second day after the order was made, the file was presented to Mr Omar by someone who said he had found the file in a rubbish bin. The applicant decided to use the contents of the file and placed same before us as annexures. It was then that first respondent or its representative realised that the file was missing. To say the least, the circumstances under which the file disappeared, and the explanation how it found its way into the hands of applicant's representatives, is most bizarre. Apparently copies of the contents of the file were made and used, as shown by the annexures, before it was returned to first respondent. Indeed, it appeared during the hearing that Mr Omar had a further page of annexure "MV9".

[33] It is not for this court to question the validity of the order of Poswa J as we are not aware of all the facts that had lead to it. What admits of no argument is that a court order must be obeyed. This is of fundamental importance in a democratic society and in the administration of justice. This court must demonstrate its disapproval of this conduct by, inter alia, granting the application for striking out. The court must resist the

temptation to come to the applicant's assistance, no matter how inviting the case may be; a litigant may not reach the required remedy by violating so sacrosanct a principle such as compliance with a court order. How do we reward the violation of one court order in the name of fundamental human rights, with another court order against the respondent and expect the latter, this time round, to obey our order? Nothing would undermine the authority of the court more than such an inconsistency. The application to strike out the relevant paragraphs enumerated above and annexures must therefore succeed. They are struck out.

[34] Having struck out the allegations on which applicant could possibly rely for an inference that the respondents were aware, before deporting Rashid, that he was wanted for questioning in connection with allegations of terrorism, how much material is left from which such an inference can reasonably be made? One speaks of inference because there is no direct evidence that that fact was known. Both Mr Omar for the applicant and Mr Katz for the *amicus* rely heavily on the following averments in the answering affidavit by the Director-General (confirmed by de Freitas):

> "Khalid's (applicant) arrest and detention were effected pursuant to information that the Department had received that he was an illegal foreigner, residing in Estcourt. On 31 October 2005, Anthony de Freitas, who is employed by the Department as a Senior Immigration Officer at its offices in Durban, arrested Khalid in the following circumstances. He went to Khalid's place of residence, namely, 12 Canna Avenue, Fordville, Estcourt. As is often the practice when Department officials effect arrests under their statutory powers, De Freitas was accompanied by a number of policemen. On this occasion, the policemen were under the command of Inspector Arumugan Munsamy. They were armed and clad in bullet proof vests, which is the practice employed in such operations. After they had pronounced the premises safe to enter, De Freitas went in. There he found Khalid and Mohamed Ali Ebrahim Moosa Jeebhai ("Jeebhai"), the deponent to the founding affidavit.
>
> In view of certain allegations made about their arrest and detention, it is worth recording the following at this stage. Firstly, Jeebhai and Khalid are

> Muslems. Secondly, it was the holy month of Ramadhaan, when Muslems are fasting. Thirdly, the house occupied by Khalid and Jeebhai was in close proximity to a mosque. At the time De Freitas and the police arrived they had just concluded prayers, and there was a large crowd in the vicinity."

[35] It is argued that as a number of policemen accompanied De Freitas, and apparently also that they had bullet proof vests on, it must be inferred that first respondent or South African authorities were aware of terror allegations against the applicant. It is also clear, from the same affidavit, that involving the police was a common practice; they had to declare the place safe before immigration officers could come in. Given the circumstances under which we live in which the police themselves are often shot upon entering premises, it might indeed be so that the police often accompany immigration officers as a matter of practice when premises are searched. Troubling to the court, though, is the fact that Rashid was handed over to Pakistani officials at the Waterkloof Military Base. It was argued for the applicant that the base is not a port of entry, a point strongly denied by the respondents. Surely there is no reason not to accept what respondents say. It is common knowledge that especially important foreign political leaders enter the country through the base.

[36] It has been argued that Rashid was handed over to Pakistani authorities at the airport, and therefore that this is not an act of deportation as contemplated in the Act. Apparently it is argued that proper deportation required South Africa to deliver the person to the destination country. There is no justification to define deportation so narrowly as to exclude the act in terms of which Rashid was handed over.

[37] The conclusion is that notwithstanding the fact that there are some acts by the respondent which may be suspicious, there are not sufficient proven facts from which an inference can be drawn that at the time Rashid was handed over, the authorities were aware that he was being sought (if that was the case) for questioning in connection with alleged acts of terror. This finding is profound as it distinguishes this case from that of Mohamed. The prayer sought, namely, that the South African

government be ordered to intervene as Rashid could be facing a death sentence, cannot be granted if the authorities were not aware of those facts. It cannot be that the duty arises in respect of every person deported without such prior knowledge; this would be unworkable. All the authorities knew was that he was being taken back to his own country. As it is, it can be argued that on Mohamed's judgment, all that a person anywhere in the world facing capital crimes in their country need to do is to come to South Africa, even illegally, and receive insurance against the death penalty. It follows that Rashid's deportation cannot be declared invalid for the reason that the South African authorities did not extract an undertaking from the Pakistani government that his life would not be in danger. Such a duty cannot routinely exist in respect of every deportee. Rashid was sent back to his own country.

[38] A consequence of the finding that this is not a case where the authorities can be ordered to extract an undertaking from Pakistan or to intervene, is whether it would not be academic to adjudicate on the validity of his arrest and deportation, given the fact that he is already out of the country and has arrived in his own country. What would be the purpose of a mere declaration of invalidity? Mr Omar has argued, in response, that section 172 of the Constitution requires of the court to make a declaratory even if there is to be no enforcement of the order. The correctness of this contention is doubtful. Nonetheless, the court has assumed in his favour and decided to adjudicate on the validity of the arrest and deportation of the applicant.

[39] Prayers based on the Statute of Rome cannot be entertained because Rashid has not disappeared; it is common cause that he was handed over to the Pakistan authorities and that he is in Pakistan. How he is treated there in his own country is another matter.

[40] What now remains to be considered, is the application (counter application) for contempt of court brought by the respondents against the applicant and attorneys Omar and Naidoo. The parties to the counter application will be referred to as in the application in convention. The counter application seeks the following orders:

"*1. That the applicant, as well as his attorneys Zehir Omar and Yasmin Naidoo, be declared to have been in contempt of the order of Mr Justice Poswa dated 14 May 2006;*

2. Incarcerating the said applicant, Zehir Omar and Yasmin Naidoo for such a period of time or times as the honourable court may deem it meet, alternatively that the honourable court impose such incarceration and/or fine and/or combination of both, coupled with any possible suspension of the operation of the order, as the honourable court may deem it meet;"

[41] The background to this counter application is that there had been several applications and hearings before different judges by the applicant. A file belonging to the first respondent went missing and appeared from the attorneys of the applicant. Poswa J made an order on 14 May 2006 prohibiting the publication of the missing file and its contents. The order reads as follows:

"*1. There shall be no publication of the contents of the affidavit for the intended application for intervention as the amicus curiae and annexures whatsoever.*

2. There shall be no publication of the contents of the file of the Departement of Home Affairs.

3. The file shall be restored to the representative of the respondents."

[42] On 12 June 2006 an application was served on the first and second respondents which was supported by an affidavit deposed to by the applicant. The applicant relied on certain documents in his application. These documents were sourced from the so-called missing file of the first repondent, the contents which Poswa J had ordered not to be published.

[43] The documents which were used from the file by the applicant and which were

attached to his application were annexures MV6 (C55), MV7 (C56), MV8 (C57) and MV9 (C58). They were annexures to the Applicant's affidavit, and were the contents, of the file that Poswa J had ordered that should not be published. Furthermore, on 1 June 2006, one of the applicant's legal representatives Yasmin Naidoo, in an affidavit which was filed in support of applicant's Rule 49(11) application, attaches the same letter from the first respondent's prohibited file.

[44] Mr Zahir Omar, in an affidavit dated 18 June 2006 opposing the above counter-application, admits that Ms Yasmin Naidoo had deposed to an affidavit during rule 49(11) proceedings. He furthermore admits that she is a person with knowledge of the facts associated with this case.

He further states in his affidavit that he argued the matter in front of Poswa J and therefore he advised Ms Yasmin Naidoo to depose to the affidavit that he had prepared. He requests the court to exonerate both the applicant and Ms Yasmin Naidoo, as he was the person who had prepared the affidavits. They, however deposed to the said affidavits and cannot be said to be innocent as officers of the court.

[45] Both Mr Omar and his colleague, apparently his professional assistant, Yasmin Naidoo, were aware of the order; this much is common cause. Their defence to the charge of contempt of court, is that the order did not prevent the publication. This court has to decide whether the applicant, Mr Zahir Omar and Ms Yasmin Naidoo are guilty of contempt of court.

Later, and after the application for their committal for contempt of court was served, the applicant and the two attorneys approached Poswa J, without any substantive application supported by affidavits, to interpret the order. letter was written to the Judge President on behalf of the respondents objecting to the manner in which the judge was approached. Nevertheless, the matter was disposed of and a slightly amended order was issued. The relevant portions read:

"*1. There shall be no publication of the contents of the affidavit by the*

applicant for joinder as amicus curiae as well as annexures to it;

2. *There shall be no publication of the contents of the file of the Department of Home Affairs;*
3. *The file of the Department of Home Affairs shall be restored to the legal representatives of the Respondent;*
4. *Orders 1 and 2 above shall not prohibit use of the file of the Department of Home Affairs in the advancement of any other court proceedings;"*
5. … "

The amendment is minor, but still makes it clear that no one was allowed to use the contents of the file in any matter.

[46] According to **LAWSA First Reissue) part 1 Vol 3 par 354**:

"*Civil contempt is the wilful and mala fide refusal or failure to comply with an order of court. Since it is vital to the administration of justice that those affected by court orders obey them, disregard cannot be tolerated. Thus, civil contempt proceedings exist in order that a court order stemming from civil proceedings may be brought to a logical conclusion by the imposition of a penalty in order to vindicate the court's authority.*

All orders of court, whether correctly or incorrectly granted, have to be obeyed until set aside."

[47] The respondent must show that an order was granted against the applicant, that the order was served on the applicant or that the applicants knew of the contents of the court order.

There can be no doubt in this regard that all three parties knew of the order when it was granted, as Mr Zahir Omar appeared on behalf of the applicant in the application which resulted in this order being made. Ms Yasmin Naidoo declared that she was "*intimately involved*" in the matter. In fact, it has bever been argued that they were not aware of

the order. An attempt to copy it confirms that they were aware of it.

[48] In **Fakie NO v CCII Systems (Pty) Ltd 2006 (1) SA 326 (SCA)**Cameron JA in the majority decision declared as follows in par 22 :

> "*Once the prosecution has established (i) the existence of the order, (ii) its service on the accused, and (iii) non-compliance, if the accused fails to furnish evidence raising a reasonable doubt whether non-compliance was wilful and mala fide, the offence will be established beyond reasonable doubt: the accused is entitled to remain silent, but does not exercise the choice without consequence*."

Cameron JA declares in par 23 and par 24:

> "*What is changed is that the accused no longer bears a legal burden to disprove wilfulness and mala fides on balance of probabilities, but to avoid conviction need only lead evidence that establishes a reasonable doubt.*
>
> *There can be no reason why these protections should not apply also where a civil applicant seeks an alleged contemnor's committal to prison as punishment for non-compliance*."

The appeal court ultimately finds that the criminal standard of proof, that is "*beyond reasonable doubt"*applies in matters of this nature as well.
We are satisfied that the requirements referred to above have been met.

[49] In **De Lange v Smuts 1998(3) SA 785 CC para 147**O'Regan J states:

> "*It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness*."

The parties exchanged affidavits to ventilate issues, and after argument was concluded and judgment reserved, were given a further opportunity to submit written representtions, if so advised, on the issue of possible sanction. Mr Omar did so on behalf of himself, the applicant and Ms Naidoo.

[50] Mr Omar, as an officer of the court, and his assistant Ms Naidoo, chose to disobey the order by using the information in the file and exacerbating this conduct by attaching MV6 (C55), MV7 (C56), MV8 (C57) and MV9 (C58) to the affidavit of the applicant.

There can be no reasonable doubt in this court's mind that the actions of Mr Zahir Omar, Ms Yasmin Naidoo and the applicant were wilful and *mala fides*. Not one of the three persons created a reasonable doubt as to whether non-compliance to Poswa J's order was not wiful and *mala fide*. It is clear that they disobeyed the order wilfully and *mala fide*. Their attempt to seek a so-called interpretation of the initial order was a transparent attempt to evade the consequences of their conduct.

[51] In **Culverwell vs Beira 1992(4) SA 490 on 494 W**Goldstein J declared:

> "*All orders of this Court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside.*"

[52] The fact that the applicant applied to Poswa J for an interpretation of the order did not entitle Mr Omar, Ms Yasmin Naidoo or the applicant to disobey the order of 14 May 2006. The order of 14 May 2006 is the order that the applicant and his attorneys breached and on which the respondents rely for the application for contempt of court. In any event, the order, even in its "interpreted" or "varied" form, still carries the prohibition.

This court finds beyond a reasonable doubt that all three, that is the applicant, Mr Zehir Omar and Ms Yasmin Naidoo are guilty of contempt of court.

[53] Determining an appropriate sentence in a case like this one is not an easy task. As mitigating factors, we take into account that all three are first offenders. The applicant must have relied heavily on the advice he got from the other two as his legal advisers. As far as the latter two are concerned, one can assume that they were driven by the desire to help their client. Nevertheless, they are lawyers and should have known better. It is a serious matter for an officer of the court to undermine the authority of the court. Mr Omar is the most experienced; he could not have earned the right to appear in the High Court as an attorney if he were not experienced. The court has decided that the applicant be cautioned and discharged. Regarding the other two, there does not seem to be justification to distinguish between them, given the nature of the sentence we are to impose; it is not a severe one. The option to pay a fine and the suspension of the sentence, were also suggested by counsel for the respondents.

[54] The applicant was acting on behalf of someone who was not in a position to bring the application himself. Taking into account also the nature of issues before us, we have decided not to make an award with regard to costs.

The following orders are made:

1. The application is dismissed.
2. Ismail Ebrahim Jeebhai, Attorneys Zehir Omar and Yasmin Naidoo of the firm Zehir Omar, Springs, are hereby found guilty of contempt of court in that they disobeyed a court order by Poswa J, dated 14 May 2006; and they are sentenced as follows:
   2.1 Ismail Ebrahim Jeebhai is cautioned and discharged;
   2.2 Zahir Omar and Yasmin Naidoo are each sentenced to a fine of R2000,00 (Two Thousand Rand) or 6 months imprisonment, suspended for a period of 3 years on condition that they are not convicted of contempt of court committed during the period of suspension.
3. The Registrar is ordered to bring a copy of this judgement to the attention of the Law Society for the Northern Provinces.

IN THE HIGH COURT OF SOUTH AFRICA/ie

_____

B M NGOEPE

JUDGE PRESIDENT

I agree

_____

C PRETORIUS

JUDGE OF THE HIGH COURT

I agree

_____

J L M SNIJMANN

ACTING JUDGE OF THE HIGH COURT

Heard on: 25 August 2006

Representation for the applicant

Attorneys: Z Omar

Representation for first respondent

Counsel Adv N Bofilates

Adv P N Mshaullana SC

IN THE HIGH COURT OF SOUTH AFRICA/ie

Instructed by State Attorney

Representation for the second respondent

Amicus Curiae Anton Kutz

Max du Plessis