

MUHAMMAD SHABBIR  
and  
REHANA SHABBIR  
versus  
COMMISSIONER OF PRISONS N.O.  
and  
CHIEF IMMIGRATION OFFICER N.O.  
and  
MINISTER OF HOME AFFAIRS N.O.

HIGH COURT OF ZIMBABWE  
MUSAKWA J  
HARARE, 24 and 31 March 2016

### **Urgent Chamber Application**

*S. Kachere*, for the applicants  
*E. Mukucha*, for respondents

MUSAKWA J: The applicants are seeking an order for their immediate release, with the third respondent being ordered to grant them temporary permits pending the outcome of the appeal they lodged with the third respondent.

The applicants are Pakistani nationals. They have been resident in Zimbabwe since 21 June 2012. Their permit expired on 14 June 2014. An application for an extension of residence permit was turned down by the second respondent on 26 June 2014. The issuance of temporary permits pending the appeal was also declined. The applicants were arrested and detained on an immigration warrant on 12 March 2016. They claim not to have been informed of the reasons for their detention.

Whilst the applicants claim to have been arbitrarily detained the respondents annexed to their notice of opposition copies of the warrants of detention dated 12<sup>th</sup> March 2016. The warrants show that the applicants were detained in terms of s 8 (2) of the Immigration Act [*Chapter 4:02*]. The provision in question empowers an immigration officer to detain a prohibited person pending removal from Zimbabwe.

Therefore the real issue is not that the applicants have not been informed of the reasons for their detention. The real contention is the validity of their detention beyond forty-eight hours. It was contended on their behalf that the applicants have been detained for more than forty-eight hours in contravention of s 50 (2) of the Constitution.

Mr *Kachere* submitted that s 50 (2) of the Constitution does not permit the detention of any person beyond forty-eight hours unless such detention has earlier been extended by a competent court. Consequently, where a person is arrested he must be brought before a court within forty-eight hours. Where the person is not brought before a court within forty-eight hours and such detention has not been extended, that person is entitled to immediate release. He also submitted that if the applicants contravened the Immigration Act they should have been charged accordingly and brought before a court within the prescribed period. Mr *Kachere* further submitted that the power of immigration officers to arrest and detain persons indefinitely was curtailed by the current Constitution.

Mr *Mukucha* submitted that s 50 (2) must be read in conjunction with s 86 (2) of the Constitution. As such, the Immigration Act is a law of general application. It is not in the public interest to have people stay in the country without permits. He further submitted that such a law is not peculiar to Zimbabwe as South Africa has similar legislation on immigration control. Mr *Mukucha* also submitted that the applicants were not detained for purposes of prosecution but to facilitate their deportation. He further submitted that deportations are not done individually and are done when a certain threshold is reached. Therefore there is no issue about the need for the applicants to appear before a court within forty-eight hours or having their detention extended.

Mr *Mukucha* made reference to South African Immigration laws without citing any particular provision. The South African Immigration Act, 13 of 2002 has different provisions from our legislation. For example, whilst s 34 (1) of the South African Immigration Act permits the arrest and detention of a foreigner pending deportation, s 34 (1) (b) provides that a detained foreigner:

“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, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;”

In addition, s 34 (1) (d) of the South African Immigration Act provides that a detained 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,”

Section 50 (2) of the Constitution provides that-

“Any person who is arrested or detained—

(a) for the purpose of bringing him or her before a court; or

(b) for an alleged offence;

and who is not released must be brought before a court as soon as possible and in any event not later than forty-eight hours after the arrest took place or the detention began, as the case may be, whether or not the period ends on a Saturday, Sunday or public holiday.”

It is clear from the submissions by Mr *Mukucha* that the purpose of arresting the applicants was not to bring them before a court. Section 8 of the Immigration Act relates to functions of immigration officers in relation to prohibited immigrants. A person cannot be a prohibited immigrant unless he or she has contravened a provision of the Act. A person who has entered or remained in Zimbabwe in contravention of the Immigration Act is considered a prohibited person in terms of s 14 (1) (i). Therefore the applicants were arrested for an alleged offence which brings them within the ambit of s 50 (2) (b).

Section 8 (2) of the Immigration Act provides that:

“Subject to section *nine*, an immigration officer may arrest any person whom he suspects on reasonable grounds to have entered or to be in Zimbabwe in contravention of this Act and may detain such person for such reasonable period, not exceeding fourteen days, as may be required for the purpose of making inquiries as to such person’s identity, antecedents and national status and any other fact relevant to the question of whether such person is a prohibited person.”

The above provision is clearly in conflict with s 50 of the Constitution. The Constitution is the supreme law of this country and any law, custom, practice or conduct that is not consistent with the constitution is invalid to the extent of such inconsistency. In this respect see s 2 (1) of the Constitution. When interpreting the Constitution a court is enjoined to give full effect to the rights and freedoms enshrined in Chapter 4 which relates to the declaration of rights. In so interpreting the Constitution the court may consider relevant foreign law. In this respect see s 46.

Section 50 (3) of the Constitution provides that:

“Any person who is not brought to court within the forty-eight hour period referred to in subsection (2) must be released immediately unless their detention has earlier been extended by a competent court.”

What s 50 (3) means is that a person who is detained for purposes of bringing him before the court must be brought to court within forty-eight hours. Since the applicants were not arrested for purposes of bringing them before a court, it follows that there was no need to bring them before a court within forty-eight hours. There remains the issue of the applicants' continued detention beyond forty-eight hours. If a detained person is to be held beyond forty-eight hours irrespective of any intention to bring them before a court, such detention must be extended by a competent court before the forty-eight hours expire.

That the second respondent intends to deport the applicants does not absolve him from complying with the need to have the applicants' detention beyond forty-eight hours extended by a competent court. I cannot see the provisions of s 8 (2) of the Immigration Act prevailing over s 50 of the Constitution. In any event, there can be no question of the second respondent fearing that public safety will be compromised. All that is required is that where the second respondent intends to detain a person beyond forty-eight hours, there must be an application to a competent court. If Police are required to do so in respect of accused persons they detain I cannot see immigration authorities thinking they are exempted from such a requirement.

The provisions of s 50 are an improvement on s 13 of the repealed constitution. It can be noted that s 13 of the repealed constitution did not specifically provide for a time frame within which an arrested person was to be taken to court. The best it did was to provide for that to be done without undue delay. That left the reasonableness or otherwise of any delay to be determined by the courts. In addition, s 13 of the repealed constitution had no provision for the immediate release of persons who had been over detained.

Therefore, it is my view that the applicants cannot be detained beyond forty-eight hours without an order of a competent court. If the second respondent persists in seeking the deportation of the applicants whilst they are in detention, he has to take into account s 50 (3) of the Constitution.

The applicants also seek an order that they be issued with temporary permits pending the determination of the appeal they lodged with the third respondent. The appeal in question was noted way back on 28 July 2014. That means since then the applicants have not regularised their stay in the country. In a letter addressed to the second respondent by the applicants' legal practitioners which is dated 27<sup>th</sup> July 2015, it was acknowledged that the applicants had been denied temporary permits pending the appeal that was noted with the third respondent. It is also surprising why an appeal that was lodged in 2014 is still

undetermined, two years later. The applicants have belatedly and fortuitously sought to compel the second respondent to issue them with temporary permits by virtue of challenging their detention. In addition, they have not cited which provision of the law entitles them to be issued with temporary permits pending the appeal.

In the result, a provisional order is issued to the effect that the applicants be released forthwith.

*Kachere Legal Practitioners, applicants' legal practitioners*  
*Civil Division of the Attorney-General's Office, respondents' legal practitioners*