ATINZWAISHE GUMBIE
and
LEO OSIKHENA IGBANOI
versus
MINISTER OF HOME AFFAIRS
and
CHIEF IMMIGRATION OFFICER

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 29 January 2019, 18 February 2019 & 27 March 2019

Opposed Application – Interdict

Mr M T Rujukwa, for the applicants
Ms Mabasa, for the respondents

CHAREWA J: the applicants seek a final mandatory interdict ordering first respondent to revoke second applicant's prohibited person status thus allowing him to enter Zimbabwe. The respondents oppose the application on the grounds that second respondent's subsequent marriage to first applicant after having been declared a prohibited immigrant does not exorcise his prohibited person status. Besides which the removal of prohibited persons is a prerogative of the state for the purpose of safeguarding the public interest.

Background

First applicant is a citizen of Zimbabwe. Second applicant is a citizen of Nigeria. On 19 July 2012, the second respondent was declared a prohibited person in terms of s 14 (1) (i) of the Immigration Act [*Chapter 4:02*], after having illegally entered and stayed in Zimbabwe. Nothing on the record shows that applicants did anything about this decision even though the Immigration Act provides for representations, reviews and appeals, as I will show later. It was only six years later, on 8 May 2018 that a letter, followed up by another dated 20 June 2018, was written to the Minister of Home Affairs seeking revocation of second applicant's prohibited person status, erroneously too as I will demonstrate.

The Minister not yet having made a decision in response to the letters, the applicants filed this application on 28 August 2018. In support, the applicants compiled a dossier of documents to show that second applicant was, between 17 February 2015 and 9 March 2016, a student properly resident in the Republic of South Africa. The dossier reveals that on 15 August 2015, fully three years later, and well knowing that second applicant held prohibited person status in Zimbabwe, the first applicant apparently contracted a civil wedding with the second applicant at Johannesburg in the Republic of South Africa. A child of this union was born in the Republic of South Africa on 30 December 2015 and is thus a citizen of South Africa by birth. A second child was subsequently born in Zimbabwe on 10 September 2018. On 5 August 2017, applicants apparently contracted a church wording in the Catholic Cathedral of Twelve Apostles Parish at Abuja, Nigeria.

Parties Submissions

The applicants submit that first applicant's rights to freedom of movement and residency in terms of s 66 (2) of the Constitution is being infringed by first respondent's refusal or delay to revoke second applicant's prohibited person status. Further, her right to found a family in terms of s 78 (1) is being infringed by the prohibition order which bars second applicant from living with her in Zimbabwe. In addition the second applicant's right to guardianship, custody and access to his children is being impinged upon to the detriment of the children's best interests and protection before the law contrary to s81 of the Constitution. As a result, applicants and their children have suffered actual injury consequent upon the alleged violations of their rights since first applicant must leave Zimbabwe in order to meet her husband, cannot found a family, the children are deprived of paternal love and care and second applicant cannot enter Zimbabwe to apply for citizenship. Finally applicants submit that they have no other remedy as the Immigration Act only provides for appeals to the Minister for revocation of prohibited immigrant status. They therefore pray that the court should order first respondent to revoke second applicant's prohibited person status and allow him to enter Zimbabwe.

In response, the respondents submit that applicants wilfully entered into a marriage with full knowledge of second applicant's prohibited person status. First applicant therefore took a voluntary risk to marry a prohibited person and must accept the consequences of her choice. As for second applicant, citizenship is not granted automatically, and as matters stand, he does not qualify to be granted citizenship. In any event, when second applicant met first applicant,

he was already a prohibited person and sought to manipulate the system and circumvent the law by entering into a marriage with first applicant. Such marriage cannot therefore exorcise his prohibited person status. Besides, all the documents that they have produced, being foreign documents, are not properly before the court as they are not notarized. Further, first applicant has never been denied, by the respondents, her right to freely move in and out of Zimbabwe as she pleases as borne out in her founding affidavit. And as for her first child, he is a citizen of South Africa and his best interests are better served living in that country.

Finally, the respondents submit that the power to revoke any decision or declaration made in terms of s14 reposes exclusively with the Minister and not any court of law. The court only has the power to review the decision, not to substitute itself for the minister. For this reason courts have always been loath to interfere with administrative decisions unless grave injustice may be suffered. In any event, the application is premature as respondents have not yet pronounced themselves on the second applicant's application. Besides, the act specifically limits the jurisdiction of the court to deal with issues of the identity of the person affected by the minister's decision.

The law

There is no dispute that first applicant is a citizen of Zimbabwe. Nor can it be disputed that first applicant's first child is a citizen of Zimbabwe both by birth and by descent[1] and her second child is a citizen of Zimbabwe by birth[2]. Thus, it cannot be gainsaid that first applicant and her children are entitled to the constitutional rights enshrined in ss 66, 78 and 81 of the Constitution. Respondents quite properly make these concessions.

However, it is also true that these rights are not absolute[3], and may be limited to the extent that s 86 (2) of the Constitution prescribes. It is instructive to note that the provisions of s 86 (2) are in consonant with international best practice and in line with the test developed and accepted at international law, that such limitation must:

a. be prescribed by law,
b. pursue a legitimate aim,

[1] S36(2)(b) and s37(a) of the Constitution Amendment (No. 20) Act 2013
[2] S36(1)(a) of the Constitution
[3] S86 (3) of the Constitution prescribes those rights which are absolute.

c. must be necessary in a democratic society in that it is transparent, is based on sufficient reasons and is proportional *viz-a-viz* its purpose and the extent of the restrictions it imposes, and
d. accords the authorities with a margin of appreciation within which to balance and protect competing rights and interests.[4]

Therefore, non-absolute rights due to a citizen may be interfered with as long as the law limiting or interfering with an individual's rights is sufficiently precise to allow individuals to regulate their conduct.[5] Thus, to the extent that the Constitution limits the scope of the rights accorded to the first applicant and her children in the present suit, the provisions of the Immigration Act must achieve a balance between the rights of the individual and the right of a sovereign state to regulate its affairs, including deciding who should and should not enter upon its soil.[6] Consequently, it is incumbent upon the first applicant to show that the Immigration Act, as a law enacted in terms of s 86 to limit the enjoyment of non-absolute rights, infringes upon those constitutional rights enshrined in ss 66, 78 and 81 of the Constitution, and that such act does so unnecessarily in a democratic society, without the pursuit of a legitimate aim, is disproportionate and without reasonable justification and does not sufficiently balance the applicant's interests with other competing interest.

In this regard, where litigants are alleging any violation of constitutional or other rights, they must be alive to the fact that it is not enough to merely throw constitutional provisions into the face of the court. They must be able to articulate and motivate the relevant principles and comply with the tests accepted for those principles, particularly where the interference with their rights is prescribed by law.

Further, it is trite that the exercise of administrative justice is squarely within the ambit of the authorities empowered to do so, not the courts. The role of the court is to maintain a supervisory eye on those administrative authorities to ensure that they take their decisions fairly, expeditiously, with sound justification and without committing grave injustices. It is therefore not ordinarily the function of the court to take over the function of administrative authorities or to order administrative authorities as to how to discharge their roles, except when such authorities have failed to discharge their mandate. In particular, courts traditionally

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[4] See *Farayi Khauyeza v The Trial Officer* HH311-18
[5] See *Human Rights Committee, Keun-Tae Kim v the Republic of Korea Communication* No. 574/1994 CCPR/C/64/D/574/1994, 4 January 1999 @para 25.
[6] See *Sergeant Khauyeza* (supra)

restrain themselves from interfering with management processes and have established clear principles as to when to do so. [7]

However, I note that both parties are mistaken as to the applicable provisions of the Immigration Act governing their dispute and their interpretation except that s 14 (1) (i) is the basis of the prohibition order against second applicant. For instance, it is only in terms of s14 (7) that the Minister is vested with power to revoke a prohibition order. However, such power is only limited to revocation of prohibited person status in terms of s 14 (1) (a) and (g), and not s 14 (1) (b) (c) (d) (e) (f) (h) (i) (j) and (k). The applicable part of ss (7) reads:

> (7) The Minister may revoke any decision or declaration in terms of paragraph (*a*) or (*g*) of subsection (1) or…..

Respondents are therefore incorrect in averring that the Minister has the exclusive right to order wholesale revocation of prohibited person status. He can only do so for orders made in terms of ss (1) (a) and (g). Nevertheless, in terms of s 16 (1) the Minister has wholesale power to exempt any person from prohibition in terms of the entirety s 14 (1). Section 16 (1) provides that:

> (1) Notwithstanding anything to the contrary in this Act, the Minister may, by order in writing, exempt any person described in subsection (1) of section *fourteen* from the provisions of that subsection subject to such terms and conditions as he may fix:……..

In terms of s 21 (1) the second applicant was entitled to appeal or seek a review of the decision of the Immigration Officer to the Magistrates Court, within three working days, if he was in Zimbabwe, or 10 working days, if he was outside Zimbabwe, after receiving the decision. Respondents are therefore incorrect that a court only has jurisdiction to review their decisions as a Magistrate Court is specifically granted both review and appellate jurisdiction.

Nor is it true that the Magistrates' Court's appellate jurisdiction is limited to appeals directed to the identity of persons affected by respondents' decisions. Such limitation only applies to appeals from decisions made in terms of s 14 (1) (a) and (g). The court is at large when dealing with appeals from decisions made in terms of s 14 (1) (b) (c) (d) (e) (f) (h) (i) (j) and (k).[8]

Finally any person affected by a decision made in terms of s14 (1) (a) and (g) can make representations to the Minister.

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[7] See *Affretair (Pvt) Ltd & Anor v MK Airlines (Pvt) Ltd* 1996 (2) ZLR 15 @21 B-C, E-F. See also *Arafas Mtausi Gwaradzimba N.O. v Gurta A.G*. SC10/15 (Civil Appeal 416/13).
[8] See s22(1) of the Immigration Act

Analysis

In casu, it is not disputed that the second applicant illegally entered and stayed in Zimbabwe, resulting in a prohibitive order being issued against him in July 2012. There is no suggestion that such an order was *ultra vires* the constitutional and statutory powers arrogated to the Chief Immigration Officer.

No attempt has been made to impugn the provisions of the Immigration Act in so far as they permit respondents to limit the first applicant and her children's constitutional rights to family life, and the best interests of her children as enshrined in s81 by declaring second applicant a prohibited immigrant. Nor can it, in the particular circumstances of this case, be seriously taken that first applicant's freedom of movement is impeded as found in *Rattigan v Chief Immigration Officer* and other similar cases,[9] as I will show later. She states in her founding affidavit that she frequently travels to South Africa to be with second respondent. At no time does she allege that she has been impeded from doing so. Her only gripe is that applicant, who is a prohibited immigrant, and was so prohibited before his marriage relationship with her, cannot enter Zimbabwe.

The applicants have not been candid with the court. In their founding and supporting affidavits, they do not disclose to the court when they met or when they entered into a customary marriage relationship. It is only when the respondents accuse them of having entered into a marriage of convenience to circumvent the law that first applicant avers that they "have been married for a considerably long time" and she met second applicant "prior to 2012" before he became a prohibited immigrant. However, she offers no proof of her averment, nor does the second applicant in his supporting affidavit. In this regard, the court takes judicial notice that had the applicants been customarily married prior to second applicant's prohibition, they would have produced documentary proof of the customary law marriage terms or filed affidavits from the relatives who participated in the customary marriage. The only proof of any marriage supplied by applicants is for the period 2015 – 2017, long after second respondent had been declared a prohibited person. It is also pertinent to note that the applicants' documents in this regard are unnotarized foreign documents. The originals were never produced to the court, nor did applicants address this issue at the hearing even though both respondents and the court

[9] *Rattigan & Others v Chief Immigration Officer and Others* 1994(2) ZLR 54(S). See also *Salem v Chief Immigration Officer* 1994(2) ZLR 237(S)

drew it to their specific attention. There is no way therefore that the court could ascertain the veracity of these documents.

In any event, even if the court were minded to accept them, the documents are evidence that the first applicant married a prohibited person, well knowing him to be so prohibited. The law governing prohibited person status, which results in the interference with her rights which first applicant complains of, was therefore clear enough to allow her to regulate her conduct and is thus in accordance with principles guiding lawful interference with rights. No attempt has been made to impugn the law as being disproportionate or not necessary in a democratic society.

While the onus is on the respondents to prove that the applicants' marriage was one of convenience, the form in which the applicants brought this matter to court limits the ability of the respondents to do so. In the event, I am inclined to conclude that the presumption is raised that applicants only entered into the marriage to exorcise second applicant's prohibited person status.

In fact, it seems to me that this application is an attempt by first applicant to obtain revocation of second applicant's prohibited person status by the back door as instead of seeking a declaration of her rights, first applicant seeks the relief that second applicant's prohibited person status be revoked.

As the person who has been prohibited from entering Zimbabwe, it was incumbent upon second applicant to take the necessary steps, as provided by law, to obtain a revocation order. Yet curiously enough, he chose to support first applicant (as the main applicant) with affidavits which are glaring in the paucity of evidence and averments that he is a person who is actually suitable to be granted that revocation. It is therefore difficult for the court to even order the respondents to revoke his prohibited person status, were this possible, when no evidence is before it that he satisfies the requirements for such revocation. Allusion to his being impeded from applying for citizenship by such prohibition is also unhelpful as no evidence or averments are made that he meets the qualifications and requirements for citizenship.

While it is true that first applicant has the right to marry a person of her choice and that any ensuing children have the rights enshrined in s81 of the Constitution, which this court, as the upper guardian of children, must ensure non-interference with to the detriment of the interests of the children, the fact remains that first and second applicant "married" each other in circumstances where they knew they ran the risk of such interference because of second

respondent's flouting of this country's immigration laws. The prejudice or harm that they and their children stand to suffer is entirely of their making.

I am of the view therefore that the applicants have failed to show that the interference with their constitutional rights predicated upon the provisions of the Immigration Act, are unwarranted in a democratic society, are disproportional and beyond the margin allowed to the state to permit it to govern. In particular, the cases which the applicants rely on are distinguishable[10]. Therein, the applicants' husbands did not have prohibited persons' status, and there was no dispute as to the validity and reasons for their marriages. They were merely being denied the right to permanently work and reside in Zimbabwe with their wives.

In casu, second applicant being a prohibited immigrant, the applicants had ample notice of the provisions of the Immigration Act which provisions are couched in clear terms to allow them to regulate their conduct. In that regard, case law already exists, that marriage to a citizen does not entitle a prohibited immigrant to enter and reside in Zimbabwe. Nor does it exorcise prohibited person status.[11]

In any event, it seems to me that the applicants have followed the wrong procedure. They ought to have appealed the decision of the immigration officer or sought its review in terms of s21 (1). Having failed to do that it was improper for second applicant to seek revocation of his prohibited person status from first respondent who, in terms of s 14 (7), clearly does not have the power to revoke a decision made in terms of s 14 (1) (i). Therefore to come to court seeking an order to compel first respondent to do that which he is not empowered to do is incompetent.

The applicants have not made any application, in terms of s16, which they were entitled to, for exemption of second applicant from the provisions of s 14 (1). Further, they could not legitimately make representations in terms s 23 as that section is not applicable to prohibition orders made in terms of s 14 (1). Thus second applicant remains a prohibited person until a Magistrates Court revokes his prohibited person status.[12] More particularly, while I am alive to the original jurisdiction of this court, I decline the invitation to order such revocation in the absence of evidence that second applicant fulfils the requirements for such revocation.

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[10] See *Rattigan & Others v Chief Immigration Officer and Others* (supra) and *Salem v Chief Immigration Officer* (supra)
[11] See *Edward v Chief Immigration Officer* 2000 (1) ZLR 485 (S).
[12] See *Sister Berny & Anor v Chief Immigration Officer* SC 41/16

In the circumstances, I do not think that this is a matter requiring me to look at the principles of administrative justice and review whether any decision or delay in rendering such decision by the respondents constitute a grave injustice requiring my intervention.

Disposition

Consequently, it be and is hereby ordered that

1. The application for an order mandating first respondent to revoke second applicant's prohibited person status is dismissed with costs.

Messrs Mtetwa & Nyambirai, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondent's legal practitioners