

ALSHABIBI ZULFIQAR
and
YASIR ZULFIQAR
versus
MINISTER OF HOME AFFAIRS
and
PRINCIPAL DIRECTOR OF IMMIGRATION

HIGH COURT OF ZIMBABWE
MANGOTA J
HARARE, 12 July, 2017 and 17 October, 2017

Opposed Application

E.H Mugwadi, for the applicants
Ms K Warinda, for the respondents

MANGOTA J: The applicants are a married couple. They got married on 1 May, 2014. They did so at the Masjid-Al-Abbas Holy Temple which is in Harare. Their marriage was in accordance with the couple's Islamic religious rites. A baby boy was born to them. He is one Azaan Zulfiqar. He was born on 18 November, 2016.

The first applicant is a Zimbabwean citizen. She was born, bred and educated in this country. The second applicant, her husband, was born on 9 September 1981 in Lahore, Pakistan. He is a citizen of that country.

Prior to, and at the time of, their marriage the applicants agreed to establish their permanent home in Zimbabwe. They, pursuant to their intention, visited and collected from, the office of the second respondent, forms for a spousal residence permit application for the second applicant.

The second respondent advised the second applicant to leave Zimbabwe as a prerequisite for the application. He complied and went to Mozambique where he was issued with a visitor's visa.

The first applicant remained in the country. She engaged the applicants' legal practitioners of record. These unsuccessfully applied to the second respondent for a spousal residence permit for, and on behalf of, the second applicant. They later appealed to the first

respondent who also turned down their appeal. They, as their next port of call, filed the present application.

It would be remiss of me if I fail to observe and make comments upon the length of time which the respondents took to communicate their decision(s) to the applicants. The decision reached the applicants after (thirteen (13) months of waiting. The second respondent communicated his decision to the applicants ten (10) months after he received their application. The first respondent who received the applicants' appeal two days after the second respondent's decision had reached them took a further three (3) months to tell them of his position.

The conduct of the respondents can, at best, be described as one of indifference and, at the worst, as a complete dereliction of duty. It offended s 68 (1) and (2) of the Constitution of Zimbabwe. The section enjoins those who are in the position of the respondents to deal with such matters as the one which the applicants placed before them promptly.

It is very disquieting to observe that none of the respondents gave any reasons for the adverse decision which he made against the second applicant. That was so notwithstanding the request for reasons which the applicants made in a letter which their legal practitioners addressed to the first respondent on 13 March, 2017.

Subsection (1) of s 68 of the Constitution of Zimbabwe states in clear and categorical terms that every person has a right to administrative conduct which is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair. Subsection (2) of the same section reads:

“(2) Any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing the reasons for the conduct” [emphasis added].

It is stressed that the above cited provisions of the constitution do not exist for cosmetic purposes. They impose a real duty on those who are in administration to adhere to them to the letter and spirit. Administrators in, and / or out of, Government should at all times act promptly, efficiently and fairly. They must give reasons for the decisions which they take. A *fortiori* when, as *in casu*, the decision adversely affects the right(s) of the person whose case has been placed before them.

Reasons are a *sine qua non* of any decision which an administrator, a court or any *quasi* judicial body takes. They enable the affected person to know why a particular decision was taken. They also allow him to appreciate the *rationale* of the decision. Once reasons are availed to him, he will be able to know if he was right or wrong in what he did or what he intended to

achieve. Where he remains convinced that the decision was fair and impartial, he will put the matter to rest. Where he is of the view that the decision was not all inclusive and therefore, unfair, he has a right to take the decision on appeal or review. The choice remains with him.

The constitution, being the supreme law of Zimbabwe, caters for both citizens and aliens. It does not discriminate on any grounds. It, in fact, confers rights and obligations on all persons who are in Zimbabwe. It does not allow those who are in administration, or anyone else for that matter, to read into it what is not part of it. It is all embracive.

The respondents flouted the constitution of the country in a very unconscionable manner when they:

- i. delayed in communicating their respective decision(s) to the applicants - and
- ii. failed to give reasons for the same.

The fact that their appointments are in terms of the constitution of Zimbabwe leaves them with no choice but to uphold the contents of the document on which their positions in Government rest. The first respondent, in fact, took the oath of office before he assumed his position as a government minister and member of Cabinet. He committed himself to upholding the constitution of Zimbabwe and all the laws which flow from it. He failed to live up to his commitment *in casu*.

The applicants rested their application on s 15 (2) (d) of the Immigration Act [Chapter 4:02] (“the Act”) as read with s 16 (1) (a) of the Immigration Regulations, [Statutory Instrument 195 of 1998]. They applied for a spousal residence permit for the second applicant.

The section under which the application is premised allows a spouse of a citizen of this country to enter and remain in Zimbabwe. The second applicant is the husband of the first applicant. He is, therefore, not prohibited to enter or remain in Zimbabwe. The only circumstances under which he is disqualified from doing so are when:

- a) he is deemed by the first respondent, on economic grounds or on account of standards or habit of life to be an undesirable inhabitant or to be unsuited to the requirements of Zimbabwe; or
- d) he is infected or afflicted with or suffering from a prescribed disease and is not in possession of a permit which allows him to enter and remain in Zimbabwe; or
- e) he, not having received a free pardon, has been convicted in Zimbabwe or elsewhere of—
 - (i) any offence specified in Part I of the Schedule; or

- (ii) any offence at common law or in terms of any enactment, not specified in Part I of the Schedule, for which he is sentenced to imprisonment without the option of a fine, whether such imprisonment is suspended or not; or
 - (iii) any offence specified in Part II of the Schedule, other than an offence referred to in para (ii), and is declared by the first respondent in terms of subsection (2) to be a prohibited person; or
- (f) (i) he is a prostitute; or
- (ii) he lives or has lived on, knowingly receives or has received, any part of the earnings of prostitution or homosexuality; or
 - (iii) he has procured persons for immoral purposes; or
- (g) he, from information received from any source, is deemed by the first respondent to be an undesirable inhabitant of, or undesirable visitor to, Zimbabwe.

Whether or not the second applicant passed the hurdles which s 14 (1) (a), (e) (iii), and (g) placed in his way depends on an objective analysis of the matter which is before me. The applicants stated that, when the second respondent turned down their application, they appealed his decision to the first respondent. They said the impression which they received from the first respondent was a favourable one. The unchallenged portion of the founding affidavit which relates to this aspect of the case reads:

“15. When the appeal (Annexure G) to the Minister of Home Affairs, First Respondent herein was filed, I had the occasion to attend a meeting between the Minister and my lawyers where First Respondent unequivocally advised that he was going to direct issuance of the necessary permit to enable me live here with my husband and I left his office smiling” (emphasis added).

Given the attitude which the first respondent displayed at the meeting, one wonders what persuaded him to act against the impression which he had conveyed to the first applicant and the latter's legal practitioners. The answer is not difficult to ascertain. The second respondent must have prevailed upon him to change his mind and sing in the second respondent's corner. The fact that no reasons were written for turning down the application speaks volumes of the entrenched position which the second respondent had taken of the matter. He most probably convinced, for reasons which I will examine shortly, the first respondent not to rule against him. I am satisfied that the decision which the first respondent made on appeal was ill-advised. He did not, it would appear, exercise his mind independently as nothing was written and presented to him to enable him to make an objective assessment of the application which came to him in the form of an appeal. Therein lies the danger of dealing

with such an important matter as the present application by word of mouth and, probably, with the assistance of one or two papers which contain(s) adverse comments about a person's way of life and/or character having been presented to him by the second respondent.

The respondents, it has already been observed, did not give any reasons for their decision(s). It was only at the time that they filed their opposing affidavit to this application that they made some unsubstantiated allegations against the second applicant. The allegations which they made centered on Annexure D which they attached to their papers. I will make some comments on the annexure in the subsequent portions of this judgment.

I must confess that the respondents' attempts to give evidence from the bar was very displeasing. Paragraphs (1) and (2) of their Heads of Argument are relevant in the mentioned regards. They read:

- “1. 2nd Applicant is a prohibited person. He was deported in August 2006. A notice of his prohibition status was served on him on 21 August 2006. Finger prints impressions to that effect were taken and equally served on him. His prohibition status under s 14 (1) (i) of the Immigration Act is beyond question and was never cured.
2. At the time 2nd Applicant became prohibited, his identity details were Zulfigar Yasir born on 9 September 1980. At the time he applied for his visa to enter the country, his names were Zulfigar Yasir as (sic) born 9 September 1981. It is the variation in date of birth that also enabled second applicant's duping of the system to be allowed a new file on revised identities to be opened on him.” [emphasis added]

The respondents' conduct of smuggling into their heads what should have been part of the contents of their affidavit left a lot to be desired. The conduct was unprocedural and totally unheard of. It deprived the applicants of the opportunity to deal with the allegations in rebuttal as they would, or should, have done.

The respondents' claim that the second applicant made an effort to dupe their system remained a mere allegation which they did not substantiate. They, in short, produced nothing which supported what they were asserting. They, in other words, should have produced a file which related to the second applicant's first application showing that he gave his date of birth as 9 September 1980. They should also have produced another file in which the second applicant gave 9 September 1981 as his date of birth.

The evidence which the respondents gave in the first paragraph of their Heads aimed at explaining the contents of their Annexure D. The annexure is date-stamped 21 August, 2006. It informs the second applicant that he is a prohibited person in terms of s 14 (1) (i) of the Act. Two date-stamps which appear on the annexure are those of the office of the second respondent.

Neither the first, nor the second, respondent was able to explain why two date-stamps which emanated from the same office were on the face of the annexure.

The applicants challenged the authenticity of the annexure. The second applicant denied having ever endorsed his signature on it. He referred to it as a fraud which the respondents contrived and forged to cover what he termed their administrative inefficiencies. He submitted that the second respondent's act of over-stamping on his purported signature was a glaring example of an attempt to obliterate a signature which did not resemble his own signature at all.

The court took the opportunity to walk with the respondents' legal practitioners through the application which the second applicant submitted to the office of the second respondent on 2 February, 2016. The application was for a residence permit. It is filed of record as (A) and (B). It starts at p 32 and ends at p 35 of the record.

The court and the parties were agreed that the second applicant's signature which appears at p 35 was totally different from the purported signature of the applicant as it appears in Annexure D which is at p 40 of the record. The dis-similarities were too glaring even to the naked eye. One did not require the services of a question document examiner to satisfy himself that the genuine signature of the applicant was not the same as his purported signature. The genuine signature which is at p 35 read Ayasir. The purported signature which is at p 40 read Yasir

It is when such matters as have been observed in the foregoing paragraphs are taken account of that it can never be said that the second respondent was being candid with the court when he stated that the second applicant was deported from Zimbabwe in August, 2006. Because the annexure emanates from his office, it can only be surmised that the annexure was his own creation. If it did not and was, therefore, a genuine case, he could easily have furnished the second applicant with details of commission or omission which led to the latter's prohibition from entering, or remaining in, Zimbabwe. He left the issue of the details which related to the second applicant's contravention of s 14 (1) (i) of the Act unaddressed as he did not want to be taken to task for having created serious falsehoods which he could not explain when he is requested to do so.

If the applicant was a prohibited person in terms of s 14 (1) (i) of the Act as the respondents would have the court believe, the respondents would not have issued a visa to him after August, 2006. The record shows, through Annexure C p 11, that the second respondent issued a visa to the second applicant on 11 March 2014. He allowed the second applicant to remain in Zimbabwe from 15 April to 15 May, 2014. He extended that visa for a further period

of three weeks i.e 16 May to 6 June, 2014. Annexure F which the applicants attached to their application shows, further, that the second respondent, once again, issued a visa to the second applicant on 13 June, 2016.

It is inconceivable for the respondents, the second one in particular, to hide behind the allegation that the second applicant is a prohibited person when they know that he is not such. He qualifies not only to enter, but also to remain in, Zimbabwe as a spouse of the first applicant who is a citizen of this country. He is not in anyway disqualified under para(s) (a), (d), (e), (f) and (g) of subsection (1) of s 14 of the Act. A host of court precedents support his position. Chief amongst the cases in point is that of *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) where GUBBAY CJ laid emphasis on the importance of the institution of marriage. The learned Chief Justice remarked at p 61 C-E that:

“Marriage is a juristic act *sui generis*. It gives rise to a physical, moral and spiritual community of life - a consortium *omnis vitae*. It obliges the husband and wife to live together for life (more realistically, for as long as the marriage endures) and to confer sexual privileges exclusively upon each other. Conjugal love embraces three components:

- (i) *eros* (passion)
- (ii) *philia* (companionship) and
- (iii) *agape* (self-giving brotherly love)The duties of cohabitation, loyalty, fidelity and mutual assistance and support, flow from the marital relationship. To live together as spouses in community of life, to afford each other marital privileges and to be ever faithful, are the inherent commands which lie at the very heart of marriage “Marriage’ as observed by WARREN CJ in *Loving v Virginia*, 388 US 1 (1967) at 12 is one of the basic rights of man, fundamental to our very existence and survival.”

I can neither add to, nor subtract from, the chief justice’s words of wisdom. I would only add that the law supports the institution of marriage and that a couple should not unnecessarily be separated unless there are cogent reasons for that unfortunate circumstance to occur. Separation which is based on a government officer’s whim, as the second respondent attempted to do *in casu*, should be totally discouraged. It destroys an institution which God himself created in the garden of Eden. It serves no purpose, runs contrary to the progressive provisions of the country’s constitution and it must, therefore, be disallowed.

The applicants proved their case on a balance of probabilities. They were able to show the respondents’ unwarranted high handedness. The application is, therefore, granted as prayed.

Messrs, Mugwadi & Associates, applicants’ legal practitioners
Civil Division of the Attorney General’s office, respondents’ legal practitioners