



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)
Misc Crim Appli 684 of 2003

IN THE MATTER OF AN APPLICATION FOR DIRECTIONS

IN THE NATURE OF HABEAS CORPUS

ADEL MOHAMMED ABDULKADER AL-DAHAS
APPLICANT

VERSUS

THE COMMISSIONER OF POLICE 1ST
APPELLANT

THE ATTORNDY –GENERAL 2ND
APPELLANT

AND

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES.....INTERESTED
PARTY

RULING

By chamber Summons filed on 02.09.03 under section 389 of the Criminal Procedure Code (Cap 75), Rule 2 of the Criminal Procedure (Directions in the Nature of Habeas Corpus) Rules and Rule 3 (1) of the High Court (Practice and Procedure) Rules under the Judicature Act (Cap 8), the applicant herein applied to this court for the following substantive orders:

1. That summons do issue directed against the 1st respondent to appear in person or by advocate together with the original of any warrant or order for the detention of the applicant to show cause why the applicant should not be released forthwith.
2. That the respondents do hand over the applicant to the interested party herein – the United Nations High Commissioner for Refugees (UNHCR) forthwith.

The applicant also prayed that costs of his application be borne by the respondents.

Grounds upon which the application was based are as follows:-

- (a) That the applicant has been unlawfully detained in police custody for an inordinately long period

without charge.

- (b) That the applicant has already been accorded refugee status by the interested party herein and ought to be in their custody.
- (c) That save for being a refugee in the country, the applicant has not committed any offence.
- (d) That the incarceration of the applicant in the circumstances is a flagrant violation of his fundamental rights enshrined in the Constitution of Kenya and in numerous international human rights instruments to which Kenya is a party particularly the UN Convention Relating to the Status of Refugees.

The applicant filed 3 affidavits in support of his above grounds, the first on 02.09.03; a supplementary affidavit on 03.09.03; and replying affidavit on 15.10.03.

The substance of the applicant's affidavit of 02.09.03 is that he is an Iraqi national. That between October, 1996 and 12.12.99, he moved to Turkey, Yemen, Djibouti, Ethiopia, Saudi Arabia and Ethiopia again in search of permanent refugee status. Finally he came to Kenya on 13.12.99 with the intention of applying for refugee status through the office of the UNHCR in Nairobi. That while making arrangements to leave for Yemen to seek refugee status there on the advice of the UNHCR, he was on 24.04.01 arrested and detained in police custody. That on 18.05.01 he was charged in Nairobi Chief Magistrate's Court Criminal Case No 1218 of 2001 with immigration offences to which he pleaded guilty and was sentenced to 4 months imprisonment or to a fine of Kshs 8,000/= and ordered to be repatriated to his country, Iraq. That he paid the fine and was taken back into police custody at Kileleshwa Police Station, Nairobi to await repatriation. That on 14.09.01 the UNHCR sent a letter to the Immigration Department to say that they had granted the applicant refugee status and requesting the Kenya Government to release him into UNHCR protection. That despite the UNHCR request, the immigration Department did on 09.10.01 put the applicant aboard a Kenya Airways flight destined for the United Arab Emirates (UAE) with the intention of finally repatriating him to Iraq. That on arrival in the UAE the applicant informed the immigration authorities there of the extreme danger he faced should he be taken back to Iraq following which he was placed aboard another Kenya Airways flight destined for Nairobi, Kenya and arrived back in Nairobi on 08.10.01.

That immediately on arrival in Nairobi (08.10.01), the applicant was arrested and taken to Kileleshwa Police station where he has been detained without charge to date. That the applicant is still very apprehensive of his safety in Iraq since there is presently no (stable) government in Iraq and the safety situation is very chaotic and he will be a target of reprisals from remnants of the loyalists of Saddam Hussein should he be repatriated. That Kenya is a party to the UN Convention Relating to the Status of Refugees and that by purporting to repatriate the applicant to Iraq. ON 06.10.01 after he had been conferred with refugee status, the Kenya Government was in direct violation of Article 33 of the Convention. That the applicant's detention in police custody since 08.10.01 without charge is a direct violation of the Constitution of Kenya and other international human rights instruments to which Kenya is a party.

The substance of the applicant's supplementary affidavit of 03.09.03 is that the refugees status conferred on him by the UNHCR on 14.09.01 still hold and is valid to date and that the Executive Director of People Against Torture in conjunction with Amnesty International had on 05.08.03 written to the Minister of State – Provincial Administration and National Security seeking the applicant's release from police custody into the protection of the UNHCR but had received no response.

On 02.10.03 Cyrus Motende Omooria, an immigration officer, filed a replying affidavit and deponed that upon the applicant's arrest, investigations were launched about him. That he is an Iraqi national and a bomber pilot engineer. That the applicant left Iraq and went to Turkey, Yemen, Djibouti and Ethiopia. That finally he entered Kenya illegally in 1999 through Moyale. That he was arrested on 21.04.01 at Eastleigh following a tip-off. That on 03.05.01 he was charged in criminal case No 929 of 2001 with the following offences:-

- i. Being in possession of a forged passport.
- ii. Being unlawfully present in Kenya.
- iii. Failing to register as an alien.
- iv. Failing to report entry to the nearest immigration officer.

That the applicant pleaded guilty and was fined a total of Kshs 8,000/= which he paid and that the court ordered him to be repatriated back to his home country. That on 25.05.01 he was declared a prohibited immigrant by a ministerial order after which an order for his removal from Kenya was also issued (copies of the ministerial orders attached). That the Kenya Government bought the applicant an air ticket, Nairobi – Dubai – Aman, Jordan and put him on Emirates flight to Dubai on 05.10.01 but he was denied transit and was returned to Nairobi. That the applicant pursued refugee status with the UNHCR and was granted refugee status on 14.09.01. That the Government could not release that applicant to the UNHCR as he was a convicted criminal and a ministerial order that had declared him a prohibited immigrant is still in place and he can only be released to the UNHCR on condition that he is re-located to a third country or deported to Iraq. That the applicant has refused to go back to Iraq even after the ouster of Saddam Hussein, a fact that makes the Government suspicious of his intentions in Kenya. That the Immigration Department has offered to escort the applicant back to Iraq at Government expense and has even facilitated the obtaining of travel documents through the Iraq Embassy, which documents are being held by the Department in the hope that he will reconsider going back to his country of origin.

The applicant filed an affidavit on 15.10.03 in reply to immigration officer Omooria's affidavit (supra) and deponed that he came to Kenya in search of refugee status but not as an immigrant. That he has never committed any offence relating to his training as a military pilot. That he arrived in Nairobi on 13.12.99 and immediately presented himself to the offices of the UNHCR on 16.12.99 to be considered for refugee status. That after applying for refugee status the applicant was interviewed by the UNHCR and his application was rejected on 29.02.2000. That thereafter the applicant made several appeals to the UNHCR which led to his being conferred with refugee status in September 2001.

The applicant says in his affidavit of 15.10.03 in reply to immigration officer Omooria's affidavit that he was never served with the Ministerial Orders exhibited vide the said Omooria's affidavit nor was he heard by the Minister or any officer under him in connection with the making of the orders. That the applicant has never conducted himself in any way that would justify the Minister's declaration that his (applicant's) entry and presence added that he has been advised by his counsel that the immigration statutes do not apply to him as a refugee. That in the absence of a Kenyan statute governing the status of refugees, the only applicable law in his case is the Convention Relating to the Status of Refugees ("the Convention") to which Kenya is a party. That Kenya cannot defeat her obligations under the Convention by invoking the immigration statutes.

Learned counsel for the applicant, Mr Mureithi reiterated the facts deponed to by the applicant and made lengthy submissions in connection therewith which may be summarized as follows:-

1. That the applicant, an Iraqi national, came to Kenya in search of refugee status and that his problems began when he was arrested and charged with offences relating to his "apparent illegal presence" in Kenya.
2. That the applicant pleaded guilty to immigration charges and was fined after pleading guilty and ordered to be repatriated back to Iraq. That he paid the fine and while awaiting repatriation / deportation, he was on 14.09.01 granted refugee status by the UNHCR which had intervened a day earlier fearing that the respondents would deport the applicant.
3. That despite the applicant's refugee status, the Kenya Government proceeded to deport the applicant but he was returned by the United Arab Emirates on reaching there and that he arrived back in Kenya on 08.10.01 whereupon he was put in police custody and has remained in such custody ever since.

4. That Kenya has no local legislation governing the status of refugees and that the Government has tended to treat them as immigrants which is inappropriate or erroneous.
5. That refugees and immigrants are two different categories of foreigners in that immigrants come in search of residence or jobs while refugees are running away from their country because they risk jeopardy to their life or limb on account, inter alia, of political opinion and that the applicant should be regarded as a refugee.
6. That since there is no local legislation governing the status of refugees in Kenya, there is a legal vacuum which should be filled by the United Nations Convention Relating to the Status of Refugees to which Kenya is a signatory.
7. That as signatory to the Convention, Kenya has committed itself to certain standard and obligations in the treatment of refugees, one of which is the prohibition of the return of a refugee back to the country he / she is running away from or near there, i.e. the doctrine of refoulement as stipulated in Article 33 of the Convention.
8. That the refugee will be left to decide voluntarily the time for his return or by an assessment of the UNHCR that the situation is no longer dangerous for the refugee to return. That this assessment cannot be done by the respondents as they have no requisite facilities or legislation.
9. That the replying affidavit of 01.10.03 by immigration officer Cyrus Motende Omooria, in alluding at Paragraph 3 to investigations having been opened after applicant's arrest without revealing the results of those investigations and in saying of the applicant at paragraph 4 that he is a bomber engineer and trained military personnel, the said affidavit engaged on a cunning and unfair demonisation of the applicant. That the applicant has never committed any offence relating to his training as a military personnel here or elsewhere and that he has explained his movements, i.e. they were in search of refugee status.
10. That the applicant was not served with the Minister's Orders of 25.05.01 alluded to by immigration officer Omooria –
 - (i) declaring that the applicant's entry and presence within Kenya is contrary to the national interest and declaring him a member of the prohibited class and a prohibited immigrant and
 - (ii) declaring the applicant's presence in Kenya unlawful and that he be removed from Kenya to his country of origin, Iraq and further that he remains in either police or prison custody while arrangements for his removal were being undertaken.

Are unlawful in that they were saying the Minister had assessed and found the applicant's presence prejudicial to national interests, which finding the applicant challenges.

11. That the UNHCR continues to regard the applicant as a refugee; that the applicant's detention without charge is unlawful; and that the respondents should not use the Immigration Act to justify the applicant's detention.

Applicant's counsel reiterated the applicant's two substantive prayers listed in the first paragraph herein and urged this court to order that the respondents hand over the applicant to the UNHCR.

Learned counsel for the respondent, Mr Okello started off his submissions by noting that the applicant's application was one of habeas corpus, either to produce the applicant or show cause why he cannot be released and that the respondents had by affidavit explained why the applicant is still being held. Respondent's counsel proceeded to make submissions summarized as follows:-

1. That the applicant was arrested on 21.04.01, an investigation file was opened and that the contents of paragraph 3 and 4 of immigration officer Omooria's affidavit actually arise from those investigations.

2. That the investigations revealed that the applicant went to very many countries and the respondents wonder why he was denied refugee status.
3. That the applicant entered Kenya illegally in 1999 through Moyale.
4. That the applicant was initially refused refugee status by the UNHCR and he apparently never went to the Immigration Department to say he was pursuing refugee status until he was arrested on 21.04.01 and charged under the Immigration Act.
5. That after the applicant's conviction, he was ordered immigrant on 25.05.01 and subsequently put on a flight at Kenya Government expense with a view to repatriating or deporting him back to his country, Iraq but that at Dubai in the United Arab Emirates he was denied onward passage and returned to Kenya.
6. That the applicant was apparently granted refugee status later on 14.09.01 but there was already an order declaring him a prohibited immigrant to be deported and that the order is still in place and has not been challenged 2 years later.
7. That the applicant has not been released because the Minister's order still stands and that it came first in time, before the grant of refugee status to the applicant. Respondent's counsel wondered how the Kenya Government would treat the applicant as a refugee when he did not bring it to the Government's attention that he was seeking refugee status.
8. That the respondents are not aware of the existence of any requirement that when a foreigner is being declared a prohibited immigrant, he should be heard.
9. That as the Minister's orders still stand, there is no way the Kenya Government can release him as in the eyes of the Government he should not be here in the first place.
10. That the Kenya Government is still willing to spend its resources to have the applicant taken back to Iraq or any other country willing to accept him.
11. That the Kenya Government is willing to release the applicant to the UNHCR on condition that the UNHCR will relocate him to a third country or even Iraq; that this undertaking has not been obtained from the UNHCR to date; and that this is why the applicant is still in custody.

Respondents' counsel urged that the applicant's application to be released forthwith and handed over to the UNHCR unconditionally be dismissed.

In reply, applicant's counsel conceded that the applicant entered Kenya illegally but added that all refugees to Kenya enter illegally and that there is no law for refugees to resort to the Government. Applicant's counsel posed the question: which should prevail, the Minister's Order declaring the applicant a prohibited immigrant or UNHCR's declaration of the applicant as a refugee? Applicant's counsel reiterated that in the absence of local legislation governing the status of refugees, the applicable law is the United Nations Convention Relating to the Status of Refugees and that the applicant's application be allowed.

It emerges clearly from the affidavit evidence of the applicant and submissions by his counsel supported by the interested party, i.e. UNHCR on the one hand and the affidavit evidence of immigration officer Cyrus Motende Omooria plus submissions of the respondents' counsel on the other that the applicant takes the firm position that UNHCR's declaration of 14.09.01 of the applicant as a refugee should take precedence over the Minister's orders of 25.05.01 declaring the applicant a prohibited immigrant and ordering his removal from Kenya while the respondents hold the opposite position.

Therefore the central issue for the determination of this court is: which of the two declarations should prevail over the other?

There are some discrepancies about certain matters, e.g. as to when the applicant was put on a flight to Dubai or when he was charged before court but they are minor and I shall ignore them.

I summarise the facts I find proved or admitted as follows: That the applicant is an Iraqi national, a bomber pilot engineer and trained military personnel. That he must be an educated and intelligent man. That he entered Kenya illegally in December, 1999 through Moyale, according to him on 13.12.99. I take judicial notice of the fact that Moyale is in northern Kenya at the border between Kenya and Ethiopia, i.e. it is a border town. The applicant says he presented himself to the offices of the UNHCR on 16.12.99 and I accept that in the absence of evidence to the contrary. Other than the applicant's statement that he reported his presence to the UNHCR, I find that he never reported his entry and presence in Kenya to Kenyan authorities until the Kenyan authorities themselves discovered and arrested him on 24.04.01, i.e. some 4 after his arrival in Kenya. Neither did any other person on his behalf report his presence and purpose in Kenya to the Kenyan authorities. That the applicant was found in possession of a forged passport. That he was charged with the following offences under the Immigration Act (Cap 172) and the Aliens Registration Act (Cap 173):-

1. Being in possession of a forged passport.
2. Being unlawfully present in Kenya
3. Failing to register as an alien
4. Failing to report his entry to the nearest (Kenya) immigration officer.

That the applicant pleaded guilty to all the above charges and was sentenced to 4 months imprisonment or to a total fine of Kshs 8,000/= and to be repatriated back to his home country (Iraq) after serving the prison sentence or paying fine and that he paid the fine. That after the applicant's conviction for the aforesaid offences, the Minister of State in the President's Office did on 25.05.01 sign two orders, one declaring the applicant a prohibited immigrant on the basis that his presence within Kenya is contrary to the national interest and the other ordering his removal from Kenya to his country of origin, Iraq and that during the interim period the applicant remains in either police or prison custody. That during the said interim period the applicant was pursuing refugee status with the UNHCR. That the applicant's application for refugee status was rejected and he made several appeals. It appears that just as the immigration authorities were about to repatriate / deport the applicant, the UNHCR got wind of it and moved quickly and granted him refugee status on 14.09.01. That on 06.10.01 the immigration authorities put him on a flight to Dubai in the United Arab Emirates from where he was to proceed to Iraq but that he pleaded with the United Arab Emirates authorities not to sanction his onward journey to Iraq and they sent him back to Nairobi, Kenya where he arrived on 08.10.01 whereupon he was picked up and put in police custody where he has remained to date.

I note from the applicant's affidavit of 02.09.03 that the applicant has complained that when he was arrested on 24.04.01, he was making arrangements to leave for Yemen to seek refugee status there on the advice of the UNHCR.

It is true that there is no specific legislation on refugees as such in Kenya. The applicant has submitted through his counsel that in such situation the United Nations Convention Relating to the Status of Refugees, to which Kenya is a signatory, should be regarded as the sole law governing refugee affairs. He relied on article 33 of the Convention for his proposition that Kenya cannot send the applicant back to Iraq or to any other country as that would be a breach of the doctrine of refoulement prohibited by the Convention. Article 33 provides as follows:-

“Article 33. Prohibition of expulsion or return (“refoulement”)

1. ***No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social or political opinion.***

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. [underlining supplied]

Article 31 provides, inter alia, as follows:

“Article 31, Refugees unlawfully in the country of refuge.

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show cause for their illegal entry or presence. [underlining supplied]

Article 32 provides as follows:

“Article 32. Expulsion

1 The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2 The expulsion of such refugee shall be only in pursuance of a decision reached in accordance with the due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3 The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.”

Article 33 of the Convention is only one article in a Convention with 35 articles relating to the status of refugees. The Convention accords privileges to refugees and also imposes obligations on them. The stand taken by the applicant that he cannot and should not be sent back to Iraq or any other country seems to be premised on article 33 (1) of the Convention. It is clear to me from the provisions of articles 33 (2) (see underlined portion), article 31 (1) (see underlined proviso) and article 32 that they qualify article 33 (1) and that Contracting States are entitled in certain situation as instanced in the said qualifying provisions to exclude persons who seek refuge in their territories who do not meet requisite national requirements of those States.

As found and recorded earlier, the applicant not only entered Kenya illegally but also remained in the country for a long time without bothering to report his presence and purpose for his entry and stay to the Kenyan authorities. Neither did any other person on his behalf report the applicant’s presence and purpose in Kenya to the Kenyan authorities. He chose to ignore the Kenya Government completely even before he knew whether or not the UNHCR would grant him refugee status. He defied the law and the authority of the Government. Did he seriously expect the Kenya Government to take such defiance lying down?

Even if one takes the position, as the applicant has done, that the Convention is the sole law governing the treatment of foreigners by whatever name called, the same Convention imposes certain duties and obligations on him which he seems to have assumed to be either non-existent or unimportant. He is wrong in taking such a one-sided stand. But there is another problem in the stand taken by the applicant that the Convention and the Convention only is the one legal instrument or mechanism under which a foreigner or alien like himself should be dealt with while in Kenya. There is no evidence that the Convention has been incorporated into Kenya’s municipal law, or domesticated. It cannot be validly contended that Kenya is

impotent to deal with aliens who enter and stay in the country in violation of its existing national laws. There is no vacuum in this broader regard.

Section 72 of the Constitution of Kenya provides, inter alia, as follows:

“72. (1) No person shall be deprived of this personal liberty save as may be authorized by law in any of the following cases –

(i) for the purpose of preventing the unlawful entry of that person into Kenya, or for the purposes of effecting the expulsion or other lawful removal of that person from Kenya...’

By his own admission, the applicant violated Kenya’s laws relating to the conduct of foreigners or aliens who come to this country. He was prosecuted for the violations, pleaded guilty and was, inter alia, ordered to be deported. He had not been granted any refugee status at the material time. He cannot call in aid the subsequent conferment on him of refugee status to validate his illegal entry and stay in total disregard of the concerns of the Kenya Government regarding Kenya’s national interests.

As found earlier, the applicant is a foreigner, a bomber pilot engineer and trained military personnel. By his own admission, he was in the process of making arrangements to leave for Yemen to seek refugee status there on the advice of UNHCR when he was arrested, charged, convicted, sentenced and ordered to be repatriated / deported. Why is it that after he successfully thwarted Kenyan immigration authorities’ attempts to deport him and found his way back after reaching the United Arab Emirates on his way to Iraq he does not want to leave Kenya? And why was he not granted refugees status in the countries he first went to before coming to Kenya? The Kenya Government says it is suspicious of his intentions for his illegal entry into and stay in Kenya.

Section 60 of the Evidence Act (Cap 80) provides, inter alia, as follows:

“60. (1) The courts shall take judicial notice of the following that –

(o) all matters of general or local notoriety”.

I take judicial notice of the following notorious facts: That on 07.08.98 the American Embassy in Nairobi was bombed and damaged. That an adjacent building i.e. Ufundi Co-operative Building was flattened. That the Co-operative House next door had its glass windows shattered. That many innocent Kenyans died and others maimed for life. That on or about 28.11.02, Paradise Hotel at Kikambala near Mombasa was bombed and flattened. That the media reported that about 15 people died and 80 others injured and that most of the victims were, given, Kenyans. So, the mere mention of a foreign pilot bomber engineer and trained military personnel entering and staying in Kenya illegally for months without reporting his presence to the Kenyan authorities until he is discovered, prosecuted, convicted, sentence and ordered to be deported and he insists on staying here naturally and jusficably sends shivers down the spines of many Kenyans.

Section 8 of the Immigration Act under which the Minister ordered the removal of the applicant from Kenya and as an interim measure ordered him to remain in either police or prison custody provides, inter alia, as follows:

“8. (1) The Minister may, by order in writing, direct that any person whose presence in Kenya was, immediately before the making of the order, unlawful under this Act, or in respect of whom a recommendation has been made to him under section 26 A of the Penal Code, shall be removed from and remain out of Kenya either indefinitely or for such period as may be specified in the order.

(2) A person to whom an order made under this section relates shall

(a) *be removed to the place whence he came, or with the approval of the Minister, to a place in the country to which he belongs, or to any place to which he consents to be removed if the Government of that place consents to receive him;*

(b) *if the Minister so directs, be kept in prison or in police custody until his departure from Kenya, and while so kept shall be deemed to be in lawful custody.*”

Valid orders were made by the Minister after the due process of law declaring the applicant a prohibited immigrant and ordering his removal from Kenya and ordering his detention in police or prison custody during the interim period. The orders are still in force. The evidence shows that the applicant is being held in police custody. The respondent say that that Kenya Government is still willing to spend public resources to have the applicant taken back to Iraq or any other country willing to accept him and that is willing to release the applicant to be UNHCR on CONDITION that the UNHCR will relocate him to third country or even to Iraq. The stand taken by the Kenya Government is within the law and I find nothing illegal or improper about it and Kenyans expect no less. The laws and national interest of Kenya as a Sovereign State should be accorded due respect.

The applicant’s application to be released and handed over to the United Nations High Commission for Refugees (UNHCR) unconditionally is hereby dismissed. There will be no order as to costs.

Orders accordingly.

Delivered at Nairobi this 10th Day of December, 2003.

B.P. KUBO

JUDGE