REPUBLIC OF SOUTH AFRICA

IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO 9981/2011

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

9 June 2011 .....
SIGNATURE

In the matter between

ESTHU MARKOS FIKRE **APPLICANT**

and

MINISTER OF HOME AFFAIRS **FIRST RESPONDENT**

THE DIRECTOR- GENERAL
DEPARTMENT OF HOME AFFAIRS **SECOND RESPONDENT**

SUMMARY

Refugee – detention – review of in terms of s 29(1) of Act 130 of 1998 – nature of review proceedings – *sui generis* procedure – neither separate application nor akin to automatic review in terms of s 302 of Act 51 of 1977.
'Reasonable and justifiable' grounds for extending detention – absence of – no justification shown for extension sought - immediate release ordered.

J U D G M E N T

VAN OOSTEN J

[1] This is a review of the applicant's detention under the provisions of s 29 (1) of the Refugees Act 130 of 1998 (the Act). The applicant is an Ethiopian citizen, who fled from Ethiopia owing to fears of persecution by reason of his political opinion. He applied for political asylum in 2006, which was rejected in 2009. He was arrested on and has been in detention since 10 September 2010. He is presently being held at Lindela Holding Facility in Krugersdorp. On 8 March 2011 the applicant launched an urgent application to this court for his release from detention. It was enrolled for hearing on 15 March 2011 before Mbha J who postponed the application to 18 March 2011 and directed time limits for the filing of further affidavits. Those were filed and the application came up for hearing before Spilg J. Two further adjournments of the matter followed in terms of orders granting certain interim relief and facilitating further procedural steps. The last order was made on 11 May 2011 in terms of which Spilg J directed that the detention of the applicant be reviewed under the provisions of s 29 (1) of the Act by a judge of the South Gauteng High Court designated by the Judge President. The learned judge further directed time limits within which the parties were to file supplementary affidavits. Supplementary affidavits by the applicant and on behalf of the respondents were subsequently filed. On 1 June 2011 I was appointed to review the applicant's detention by the Judge President of this division pursuant to the order of Spilg J. In collaboration with the parties the review was enrolled for hearing on 6 June 2011. Having heard argument I ordered the immediate release of the applicant in terms of the order at the end of this judgment. What follows are my reasons for the order.

[2] Before considering the merits of the review it is apposite to reflect briefly on the nature of the review procedure which is an aspect that has given rise to considerable confusion. There are to date no cases in which the nature of the procedure has been considered. The procedure is novel in its nature and as it derives its existence from the provisions of s 29 (1) of the Act, I deem it appropriate to quote them in full:

> '**29 Restriction of detention**
>
> (1) No person may be detained in terms of this Act for a longer period than is reasonable and justifiable and any detention exceeding 30 days must be reviewed immediately by a judge of the High Court of the provincial division in whose area of jurisdiction the person is detained, designated by the Judge President of that division for that purpose and such detention must be reviewed in this manner immediately after the expiry of every subsequent period of 30 days.'

Counsel for the respondents submitted that the review provided for is akin *inter alia* to an automatic review in terms of s 302 of the Criminal Procedure Act 51 of 1977, which is determined by the reviewing judge in chambers. I do not agree. Section 29 (1) of the Act provides for a *sui generis* procedure which is a review of the detention of the refugee for a further period and therefore cannot be classified as a review of either the prior proceedings or the judgment in terms of which the review was ordered. In essence the purpose of the s 29 (1) is plainly to ensure judicial oversight as to the refugee's detention and the continuation thereof. The review consequently does not constitute an application on its own: in the present matter supplementary affidavits were filed and the matter simply proceeded before me as the judge designated by the Judge President for in effect, the determination of one single issue only which is whether the applicant's detention should be extended.

[3] This brings me to the supplementary affidavits filed for purposes of the review and the question arising for determination whether "reasonable and justifiable" reasons exist for an extension of the applicant's detention for a further period of 30 days or less (Cf *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC) para [23]). It is salutary to bear in mind that as Van Reenen J held in *Kiliko and Others v Minister of Home Affairs and Others* 2006 (4) SA 114 (C) para [28]:

> *'The State, under international law, is obliged to respect the basic rights of any foreigner who has entered its territory, and any such person is under the South African Constitution, entitled to all the fundamental rights entrenched in the Bill of Rights, save those expressly restricted to South African citizens.'*

[4] The salient background facts relevant to the present review are briefly the following. The applicant applied for asylum on 21 August 2006 and he was issued with a permit in terms of s 22 of the Act. On 9 January 2009 his asylum application was rejected by a Refugee Status Determination Officer. The applicant took no further steps either to appeal or review the decision and he was eventually on 10 September 2010, arrested as an illegal foreigner. On 3 March 2011 the applicant lodged an application for condonation for the late noting of an appeal against the rejection of his asylum application, with the Refugee Appeal Board. The condonation application Spilg J held (see para 82 of the judgment) "resurrected the Applicant's rights under the Refugees Act not to be deported until the exhaustion of all his appeal and review remedies" on the basis that "an application for condonation for the late filing of an appeal is expressly recognised in Rule 6 of the Refugee Appeal Board Rules of 2003". Although I have difficulty in aligning myself with the finding and reasoning of the learned judge I am for purposes of this review, bound by it as I am not sitting as a court of appeal or review on the correctness of the judgment. The

finding however, is pivotal to the present review: the respondents seek an extension for a further period of 30 days in order to enable the Refugee Appeal Board to determine the applicant's condonation application.

[5] The respondents have put preciously little before me in order to enable me to exercise my discretion. In the supplementary affidavit filed on behalf of the respondents, the Deputy Director: Directorate-Deportation Department of Home Affairs who is also the head of Lindela where the applicant is currently detained, states that his attempt on 11 May 2011 to ascertain the status of the applicant's application for condonation was met by a promise made by the chairperson of the Refugee Appeal Board to investigate this aspect and to revert to him on the outcome thereof. Nothing has been put before me concerning either the outcome of the proposed enquiry or for that matter, the status of the condonation application at this stage, almost a month later.

[6] In a nutshell this court is now urged to extend the applicant's detention on the simple basis that the condonation application is pending but with no indication whatsoever as to when it will likely be finalised. This is an unsatisfactory state of affairs when regard is had to the long chequered history of this matter and especially where the freedom of an asylum seeker is at stake (Cf *Arse v Minister of Home Affairs and Others* 2010 (7) BCLR 640 (SCA) para [10]). Counsel for the respondents correctly submitted that the respondents cannot be blamed for the absence of this information as the Refugee Appeal Board is an autonomous Board created by statute (s 12 of the Act) and therefore not falling under the control of the respondents. But, as counsel for the applicant rightly retorted, nothing prevents the

respondents from their side exerting some form of pressure on the Board to expedite matters. Be that as it may, I am unable at this stage to find that any reason exists for extending the applicant's detention. For these reasons the applicants' continued detention cannot be justified and I ordered his immediate release.

[7] It remains to mention two further aspects: counsel for the applicant correctly submitted that the applicant's release should be accompanied by the issuing to him of an interim refugee permit in terms of s 22 of the Act as a safeguard to protect him and others from being exposed to the usual dire consequences that may flow from refugee status without a permit. Finally, as to costs, the award thereof at this stage will be premature as the eventual outcome of the condonation application may well have a material bearing on the decision concerning liability for costs.

[8] In the result I make the following order:

1. The applicant must be released forthwith.

2. The respondents are ordered to immediately re-issue the applicant with an asylum seeker's permit in accordance with section 22 of the Refugees Act 130 of 1998, such permit to be valid until the applicant's application for condonation has been finalised.

3. The costs are reserved.

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FHD VAN OOSTEN
JUDGE OF THE HIGH COURT

COUNSEL FOR THE APPLICANT	***ADV S BUDLENDER*** ***ADV (MS) I DE VOS***
APPLICANT'S ATTORNEYS	***LAWYERS FOR HUMAN RIGHTS***
COUNSEL FOR THE RESPONDENTS	***ADV (MS) N MANAKA***
RESPONDENTS' ATTORNEYS	***THE STATE ATTORNEY***
DATE OF HEARING AND ORDER	***6 JUNE 2011***
DATE OF REASONS FOR JUDGMENT	***9 JUNE 2011***