CLEMENT KWAMI ADZAKEY
versus
THE PRINCIPAL DIRECTOR OF IMMIGRATION
and
MINISTER OF HOME AFFAIRS

HIGH COURT OF HARARE
ZIMBABWE
MUSHORE J, 24 September & 12 October 2016

Urgent Chamber Application- *habeas corpus mandamus*- s 29 of the Immigration Act- sections 38 and 50 and of the Constitution

Mr Jiti & *D Chimbgwa*, for the applicant
A. Kambarami, for the 1st respondents
Ms Siqoza & *T R Mawere*, for the 2nd respondent

MUSHORE J: This is an urgent application for a writ of *habeas corpus* in terms of s 50 (7) of the Constitution of Zimbabwe (Amendment) Act No. 20. The applicant was arrested on the 20th August 2016 on allegations that he had contravened section 29 (1) (a) as read with s 29 (2) (a) of the Immigration Act [*Chapter 4:02*] by continuously residing in Zimbabwe without a permit. He was arraigned before the Magistrates' Court; tried and thereafter acquitted on these charges. However after his acquittal he was arrested and detained at Harare Remand Prison awaiting deportation.

The applicant is desirous of a writ for his release from detention. He believes that the acquittal by the Magistrates of the charges referred to above, entitles him to his release. The trial magistrate pronounced that applicant is a Zimbabwean citizen by virtue of having acquired a national identity document. The basis upon which the trial Magistrate acquitted the applicant of the criminal charge was that the Magistrate determined that the national identity card which the applicant holds, is proof that applicant is a Zimbabwean citizen. In coming to this finding this is how the Magistrate analysed the law (in his words):-

> "Section 38 of the Zimbabwean Constitution provides that any person, who has been continuously and lawfully resident in Zimbabwe for at least 10 years, whether before or after the effective date and who satisfies the conditions prescribed by an Act of Parliament, is entitled on application, to be registered as a Zimbabwean citizen. In this court's view, the fact that the Registrar of Births and Deaths in Zimbabwe found accused person to be proper candidate to be issued with a national registration number makes the accused person an alien registered as a Zimbabwean citizen in terms of s (2) of the Constitution. The national identity card is proof that he is a Zimbabwean citizen and that conclusion makes a permit in terms of s 29 of the Immigration Act [*Chapter 4:02*] unnecessary. ".

In effect what the Magistrate was saying was that, because the applicant is the holder of a national identification document, ergo he is a citizen of Zimbabwe and accordingly exempted from having to apply for citizenship.

Jurisdiction

The Magistrate had no jurisdiction to determine the applicant's rights and make a pronouncement. This jurisdiction is exercised by the High Court and it is to that end that s 50 (7) of Constitution specifically grants the High Court original jurisdiction to deal with *habeas corpus mandamus* applications. Sections 50 (7) and (8) read as follows:-

> "Section 50
> …….
> (7) If there are reasonable grounds to believe that a person is being detained illegally or if it is not possible to ascertain the whereabouts of a detained person, any person may approach the High Court for an order-
> (a) of *habeas corpus* that is to say an order requiring the detained person to be released, or to be brought before the court for lawfulness of the detention to be justified, or requiring the whereabouts of the detained person to be disclosed; or
> (b) declaring the detention to be illegal and ordering the detained person's prompt release;
> And the High Court may make whatever order is appropriate in the circumstances.
> (8) An arrest or detention which contravenes this section, or in which the conditions set out in this section are not met, is illegal"

Section 14 of the High Court Act [*Chapter 7:06*] provides:-

> "14 High Court may determine future or contingent rights

> The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination"

It seems that applicant has misguidedly leant on the declaration made by the trial court as forming the basis for his claim that his detention is unlawful. However in the absence of jurisdiction to determine the applicant's personal rights, the Magistrate's concluding remarks where he conferred applicant with citizenship status have the undramatic effect of being just a mere observation on the part of the trial court. It was not within the premises of the trial court to declare that applicant is a citizen by drawing an inference which is vested with the High Court. That being said, however, the success of the current application will be whether applicant is a *de facto* Zimbabwean national and thereby exempted from having to have a permit in terms of s 29 of the Immigration Act in order to reside in Zimbabwe.

A determination of the applicant's *prima facie* right to a *habeas corpus mandamus* in the current case can only be properly extrapolated from the existing legal facts which were existent before he made the current application. If indeed such a *prima facie* right exists, then the continued detention of the applicant is unlawful. The position taken by the applicant is that he is a citizen by registration.

Section 38 of the Constitution reads as follows:-

"38. Citizenship by registration

(1) Any person who has been married to a Zimbabwean citizen for at least five years, whether after or before the effective date, and who satisfies the conditions prescribed by an Act of Parliament, is entitled on application to be registered as a Zimbabwean citizen.

(2) Any person who has been continuously and lawfully resident in Zimbabwe for at least ten years, whether before or after the effective date, and satisfies the conditions prescribed by an Act of Parliament, is entitled to be registered as a Zimbabwean citizen."

Applicant entered into civil union with a Zimbabwean citizen on the 3rd of July 2008. Applicant believes that the fact of his marriage having outlasted 5 years makes him a Zimbabwean citizen. Applicant's believes that because of his marriage he did not need to apply for a permit in terms of s 29 of the Immigration Act. In my view, s 38 (1) is clear. It directs that an alien in the position of the applicant would first have to make an application for citizenship first; and that thereafter the applicant's application would only granted, only if the Registrar considered that he was a proper candidate for citizenship. The second basis

upon which applicant claims that he is a citizen is that he has resided in Zimbabwe lawfully and continuously for 10 years.

Mr *Kambarami* for the respondent explained that from the facts as they stand, applicant is barred from claiming that he is a citizen by registration. Mr *Kambarami* explained that the applicant came to Zimbabwe sometime in 2001 under the care and custody of his father who at the time worked for the World Health Organisation. His father was here on diplomatic status and applicant as a dependant was also on a diplomatic status and thereby not ordinarily resident in Zimbabwe from 2001 to 2005. When the applicant's parents left to go to the Congo in 2005, the applicant remained behind in Zimbabwe. The applicant was then issued with a student permit sometime in 2005 which was extended to 2007. So from 2005 to 2007, he had the required documents which permitted him to reside in Zimbabwe legally. However applicant last held a permit in 2007 because from 2007 up until today the applicant has never applied for an extension of the student permit or for residency on any other basis. The respondent's case was therefore that applicant has been residing in Zimbabwe illegally since 2007. I am persuaded by Mr *Kambarami*'s argument. For the four years as a diplomat's son; those being the period between 2001 to 2005, the applicant was not resident in Zimbabwe. Further, applicant's subsequent marriage to a Zimbabwean citizen on the 3rd July 2008 did not provide the applicant with an exemption from the necessity of ensuring his stay was regularised in terms of the Immigration Act. The applicant was still obligated to formally apply for a permit. Furthermore, applicant still holds a Ghanaian passport. Thus the applicant has been unlawfully residing in Zimbabwe since 2007. From the facts therefore, applicant cannot claim to have a *de facto* right to claim that he is a Zimbabwean citizen, in terms of s 38 of the Constitution. Thus despite the spirited and admirably strenuous attempts by the applicant's counsel to convince me that applicant has a *prima facie* right to the relief of *habeas corpus*, I find that a case for such relief has not been made up.

Accordingly, the application is dismissed.

Musendekwa –Mtisi, applicant's legal practitioners
A. G Civil Division, respondent's legal practitioners