CIV/APN/265/2000

IN THE HIGH COURT OF LESOTHO

In the matter between:

BETH KETRA NASSAKA MUJUZI

AND

THE SENIOR IMMIGRATION OFFICER
THE DIRECTOR OF IMMIGRATION
THE P.S. HOME AFFAIRS
THE MINISTER OF HOME AFFAIRS
THE ATTORNEY GENERAL

JUDGMENT

Delivered by the Honourable Mr Justice WCM Maqutu
on the 8th day of September, 2000

This is an urgent application which was served on the respondents.

In this application, applicant was claiming the following:

"1. That a Rule Nisi be issued returnable on a date and time to be determined by the Honourable Court, calling upon the Respondents to show cause, if any, why:-

(a) The 1st Respondent shall not be stopped from deporting or causing the deportation of the Applicant from Lesotho pending the hearing of this matter.

(b) The notice given to Respondent of 30 (Thirty) days shall not be suspended with immediate effect pending finalization of this matter.

(c) The letter dated 15th May 2000 shall not be declared to be null and void and of no effect.

(d) The permit to stay in Lesotho for the Applicant shall not be extended to the date of expiry of her work permit.

(e) The periods and modes of service shall not be dispensed with due to the urgency of this matter.

(f) The Respondents, jointly and severally, one paying the others to be absolved, shall not be ordered to pay the costs hereof.

(g) The Applicant shall not be granted such further and/or alternative relief.

2. That prayers 1(a), and (4) operate with immediate effect as an interim order."

The application had been filed on the 20th July, 2000, and it was to be heard on the 21st July, 2000.

On the 21st July, 2000, Mr *Makhene* appeared for applicant, while Mr *Molapo* was for the respondents. Naturally respondents asked for time within which to file opposing papers. The court therefore made the following order:

> "The matter is postponed to the 2nd August, 2000 at 9.30 a.m. Respondents are given until the 26th July to file opposing papers. Replying papers from applicant should have been filed by the 28th July, 2000. Proper Heads of Argument to be also filed."

On the 2nd August, 2000, Mr *Makhene* and Mr *Molapo* appeared for the parties and asked for a postponement, and this time by agreement of both parties the court made the following order:

> "The matter is postponed to the 15th August 2000 at 2.30 p.m. for argument. A *Rule Nisi* is issued returnable on that day."

On the 15th August 2000 the matter was argued and judgment reserved to the 8th September, 2000 and *Rule Nisi* was extended accordingly.

Applicant is a Ugandan national who gave her address as St Joseph's Hospital at Roma. She is a registered nurse and mid-wife and qualified at Virika Nursing and Midwifery School in Uganda between 1991 and 1994.

In her founding affidavit, applicant stated that she entered Lesotho in May 1999, and was granted residence permit which stipulated that she was not to take up employment in Lesotho. In May 1999 she was registered as a Nurse and Midwife by the Lesotho Nursing council. As a result of this registration, she got a job in August 1999 at St Joseph's Hospital, Roma, as a nursing sister. When she came to Lesotho her intention was not to work, but she found there was great need in Lesotho for her skills.

The St Joseph's Hospital obtained a work permit for her. She was sent to the Labour Department and to the police headquarters. She was then issued with a work permit which is valid until the 27th September 2001. The said permit was annexed and marked "BKM1". When applicant went to the Immigration Office in March 2000 to extend her residence permit which had expired, she was charged with contravening Section 7(5) of the *Aliens Control Act* 1966. She was cautioned and discharged by a magistrate. Respondents granted her a resident permit for 3 months up to the 23rd June 2000. This residence permit was granted pending the consideration of application for Permit Number 409(2000) which would permit her to stay longer if granted. When applicant went to extend her residence permit on the 22nd June 2000, she was given a letter dated the 15th May 2000 informing her that her application number 409(2000) for residence has not been approved and she is given 30 days to wind up her affairs and leave the country. Her residence permit was accordingly extended to the 22nd July 2000.

This is a photostat copy of the letter denying her residence:

filled by hand. It is signed by an officer whose designation is S.I.O. which I believe means Senior Immigration Officer. Applicant stated that she first saw the letter of the 15th May 2000 on the 22nd June 2000. She was not told the reasons for the decision, nor was she ever given any opportunity to make representations. This was written while she was working at St Joseph's hospital in accordance with a valid work permit. Applicant says the Senior Immigration Officer "acted capriciously, maliciously and arbitrarily" in deciding to terminate her stay in that manner. Even when his attorney wrote to respondents to ask for reasons there was no response.

The answering affidavits filed of record were made by Jeannette Toloane, the Director of Immigration, and Mamorapalla Morapalla the Senior Immigration Officer. The main affidavit is that of the Director of Immigration, Jeannett Toloane. The Senior Immigration Officer has said nothing except associating herself with what the Director of Immigration has said in so far as it relates to her.

The Director of Immigration in her affidavit says what ever applicant says which is in conflict with what she says, is false. She says applicant was never granted any residence permit, what applicant was given had been a temporary permit. This had been granted because applicant had furnished information to the effect that she was only visiting her sister in Lesotho. She does not know how and in what circumstances she was given a work permit that is valid up to 26th September 2001. The Director of Immigration had put

applicant to the proof of that allegation.

The Director of Immigration says on the 23rd March 2000 after applicant had been found guilty of being in the country illegally, applicant applied for a resident permit. Pending the Minister's consideration of her application, applicant was given a temporary permit that permitted her to remain in Lesotho for three months. This temporary permit was to expire on 22nd June 2000.

The Director of Immigration claims she mailed the letter "BMK2" to applicant at St Joseph's Hospital, Roma, by ordinary mail. She does not say when. She also adds it was up to applicant to check, what the fate of her application had been. Applicant was then given a month to wind up her affairs as more fully appears in "BKM3" dated 22nd June 2000.

The Director of Immigration says the application for residence (409-2000) was made by an illegal immigrant - it was a fresh application. When she told applicant on 22nd June 2000 that her application had not been successful, first respondent, Mr Ramarits'ana and Mr Molise a member of the Lesotho Mounted Police Service were present. She told applicant that among other reasons for refusal to grant her a residence permit, was that between December 1999 and March 2000, she had already flouted the conditions of her stay. Applicant's work permit had no relevance to the question of her stay in Lesotho. Applicant had unilaterally flouted her conditions of stay in Lesotho by taking up employment. Why these reasons were not given in writing, the

Director of Immigration does not say. The Director of Immigration admits she got the letter "BKM4" and that she did not bother to answer it because she wishes "to inform this Honourable Court that the addressees on the letter are not the people who took the decision but the Minister, hence the letter (BKM4) should have been addressed to the Minister. Applicant has to blame her "own self if she is deported".

In reply applicant said there was no document from the Minister that indicated that this was a Ministerial decision. No where does the stamp and the words "permit 409(2000)" indicate that the Minister had anything to do with this matter. Applicant challenges the Director of Immigration to prove she ever sent BKM2 by post. Applicant says everything surrounding the refusal to grant her a resident permit discloses lack of *bona fides*. She questions the absence of reasons and doubts that the matter ever went before the Minister or that her personal circumstances were taken into account. She denies she is an illegal immigrant.

Applicant says the hospital, which employed her by obtaining her a work permit, involved the respondents. Respondents knew when they granted her a permit in March that she was working. That is why they claim to have sent her a letter at St Joseph's Hospital, which is her place of employment. They never made an issue of this fact. Applicant says she "should at least be treated as a person who has the status of a Commonwealth citizen". Applicant disputes this is a decision of the Minister or that respondents are entitled not to give

reasons for the decision.

I examined the affidavit of the Senior Immigration Officer. It has only confirmed what the Director of Immigration has said, her affidavit therefore does not take this matter further. I am however not happy that in her affidavit she has not given the court the circumstances that led her to write Annexure "BKM2" which is the letter of 15-5-2000. The averments of the Director of Immigration on how this letter was written and sent by ordinary post are hearsay. It is wrong for a witness who has knowledge of the facts not to give evidence of those facts, but choose to briefly confirm hearsay from another person.

I am puzzled that the Director of Immigration at paragraph 11 of her affidavit should say she and the Senior Immigration Officer are entitled not to answer correspondence directed to them. It is their duty to answer correspondence. If applicant was wrong to write to either of them they should have timeously written back to applicant's attorney and informed him that, he should write direct to the Minister to enquire about the Minister's reasons for refusal to grant applicant a residence permit. She is not entitled to ignore correspondence and then impolitely say in her affidavit,

> "I wish to inform this honourable court that the addressees of the letter are not the people who took the decision, but the Minister, hence the letter (BKM4) should have been addressed to him."

I should have thought whatever is done by the Director of Immigration has been done on the Minister's behalf. The Director of Immigration has divorced herself from the Minister for some unknown reason. This attitude colours what has been done with arbitrariness and unfairness. If the Director of Immigration distances herself from the Minister in matters of administration, and does not regard herself as the hand of the Minister then this matter becomes even more unsatisfactory. If that is procedurally correct, then she is not entitled to make an answering affidavit on behalf of the Minister who is a party to these proceedings. Judgment against the Minister virtually goes by default because of the attitude of the Director of Immigration.

The letter from the Minister, which is very important in these proceedings, has not been annexed. The court is told it exists. Could it be that no reasons were given for turning the applicant's application down? In the circumstances of this case, it should have been annexed. If it was the Minister who had said he is not allowing applicant to have a resident permit that should have been clearly demonstrated and the reasons given. The Minister's letter would have clarified this issue.

The Director of Immigration says among other things, applicant's application had been refused because applicant had already flouted the conditions of her stay in Lesotho from December 1999 to March 2000. Even when she says this, she does not say this was the Minister's decision. I have already said as how the letter was delivered by post we have the Director of Immigration's hearsay. When the Senior Immigration Officer, who is the first

respondent, has not said anything save to confirm whatever the Director of Immigration's affidavit says. This makes everything suspect. Why this letter, which is so important to applicant, was not sent by registered post we are not told. The Director of Immigration adds to this rather cavalier treatment of applicant that applicant should have been checking regularly whether the Minister has answered. This is not how members of the public should be treated by Government officials in a democratic country. This is not how we would expect citizens of Lesotho to be treated in Uganda—or in any Commonwealth country.

The Director of Immigration knew very well that applicant was working at St Joseph's Hospital, Roma, when she granted applicant three months' temporary permit. She even knew her address was St Joseph's Hospital Roma. This was, according to the Director of Immigration, an entirely new permit, I do not understand why she claims applicant had breached its conditions. If it was an extension (which the Director of Immigration say it is not) then the Director of Immigration could say applicant has breached its conditions. When applicant was before the Immigration Office she could not be deemed to be an illegal immigrant, because that is the place where permission to stay in the country is sought.

It has to be borne in mind that if indeed applicant had sought a work permit illegally, respondents would not have granted her a temporary three months' permit, they should have endorsed her passport and told her to leave

the country. The Government of Lesotho granted her a work permit, and respondents on being appraised of this fact gave her leave to apply for a resident permit. The way I understand (the condition that a person should not work in Lesotho) is that such a person should not work in Lesotho without the permission of the Government. What Government has authorised cannot be illegal (that is) granting a person a temporary permit. By the same token, if Government decides to allow a person to work (when it admitted that person into the country on condition that he should not work) such an act cannot be deemed illegal.

It is precisely for the above reasons that applicant says, as a Commonwealth Citizen, she has been treated unfairly. She has after being granted a work permit by the Government of Lesotho, been refused residence without any reasons being furnished by public servants of the same Government. In the documents applicant had in her possession, nothing came from the Minister. In the circumstances of this case, applicant was entitled to reasons for Government allowing her to work and for no apparent reason denying her the right to stay in the country in order to fulfil her contract to St Joseph's Hospital, Roma.

While the papers of respondents do not say whether there is such a shortage of manpower in that hospital, making it necessary for foreigners to be employed, it is fair to accept applicant's averrment on this point or to assume that applicant was given a work permit after Government has satisfied itself that

there were no locals to fill that vacancy. The Minister has broad powers of enquiry and may collect any other evidence that papers before him do not disclose before making a decision. If applicant's allegation was false, the Minister should have checked the facts and rebutted applicant's reasons before not giving her a work permit. It is all the more necessary for the Minister to have given reasons, for those reasons would have shown if the decision was made by the Minister fairly.

As it is, we have only the word of the Director of Immigration, and the Director's attitude is that of complete lack of co-operation. She does not wish to disclose reasons and simply says it is not her business to do so –applicant's attorney should write to the Minister. If she had been acting on behalf of the Minister, when she said applicant's application has not been successful, in my view she should have stated whether the Minister gave the reasons for his refusal to grant a residence permit or not. Every member of the public, (including aliens) is the employer of a public servant consequently he should be treated civilly. I will therefore assume there were no reasons given by the Minister, because if there were, they should have been disclosed.

Applicant is not an ordinary alien, she is a Commonwealth citizen. A letter such as Annexure "BKM2" a photostat copy of which was shown above, is not the type of letter (in a democratic country) one would expect of a public servant to a member of the public however unimportant, such a public servant believes that member of the public is.

It is clear that Sections 6 and 7 of the Aliens Control Act of 1966 obliges the Minister to consider every application of an alien for residence permit. The actual words used in Section 6(2) are "the Minister shall consider every such application submitted to him in accordance with the principles set out in the First Schedule, and may obtain from any source such additional information relating to the applicant he may deem necessary.". From the aforegoing, it is clear that the Minister is bound to take an applicant's application seriously.

In this case, applicant had already been authorised by the Lesotho Government to engage in professional work as a professional nurse at St Joseph's Hospital, Roma—See annexure "BKM1"

Applicant qualified for positive consideration in that she met the following principles of the first schedule governing entry and sojourn of aliens:

1. She was and would be engaged in work as a professional nurse.

2. She would be able to subsist without becoming a public charge.

3. Her actions in curing the sick would promote public health.

4. She had not been convicted with any offences mentioned in Section 4.

5. While her temporary residence permit had lapsed between December 1999 and March 2000 while she was engaged in work as a professional nurse at St Joseph Hospital , Roma. The Magistrate in terms of Section 319 of the Criminal Procedure and Evidence Act 1981 convicted her for her oversight and discharged her after cautioning and reprimanding her. Save for this minor refraction of the rules, applicant has not rendered herself an undesirable person to reside in this country.

I have already stated that when a person is before an immigration officer inside this country, that person cannot be deemed to be in the country unlawfully. Applicant cannot be accused of being in the country illegally any more because she made an application for indefinite sojourn before the Immigration Officer and was granted a temporary permit pending the consideration of that permit by the Minister.

The country of origin of applicant is Uganda, which is a country which falls under Section 39 of the Aliens Control Act 1966 because it is a Commonwealth Country. Legal Notice No.18 of 1972, the Aliens Control Act (Commonwealth Countries and Republic of Ireland Proclamation 1972) extends special benefits such as an automatic 3 months' stay as a special benefit. It seems to me that a Commonwealth citizen has to be treated fairly. Applicant cannot be granted a work permit by the Government of Lesotho and for no disclosed reason be denied a permit of residence to fulfil her contract by the

Minister. The Director of Immigration who is an official of the Minister neglected to give applicant the Minister's reason for a refusal of a work permit (if she took that application to the Minister at all). She neglected to answer official correspondence and in her affidavit said she or her attorney should ask the Minister. This answer strikes me as disrespectful or impertinent to applicant. It will be observed that Section 39(4) and (5) of the *Aliens Control Act* of 1966 gives citizens of the Commonwealth a right to move courts if their rights and expectations are violated or are not met. Although the Chief Justice has not yet made regulations, it seems to me the bottom line is that Commonwealth citizens should be treated decently. The Government of Lesotho cannot give applicant a permit to work until the year 2001 and all of a sudden, the Minister decides not to allow her to stay without giving any reasons.

Mr *Molapo* for the respondents argued that whether Aliens are permitted to stay in the country, is a purely administrative matter. But he conceded that the Minister is obliged to act fairly. If the Minister has to act fairly and the Commonwealth citizen has a right to recourse to the courts, then there must be reasons. The Minister in exercising his power can go beyond the information placed before him by actually making further enquiries to other departments or other sources—See Section 6 of the *Aliens Control Act*.

Mr *Molapo* referred me to *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149. In that case applicant's action was struck out on the grounds

that as an alien he had no right to permission to enter or remain in Britain, nor did he have any legitimate expectation that permission would be granted. That case is distinguishable from this one because Schmidt was not a Commonwealth citizen. Secondly he had not been granted a work permit by the government of the country. In this case before me, applicant had a definite legitimate expectation that her application for a residence permit would be granted. If it was not she expected a good reason to be given.

R v Home Secretary Ex p Khawaja [1984] AC 74 showed that the powers of the court had been construed narrowly in the past in matters of immigration. Lord Scarman at pages 111 to 112 A said every person within the jurisdiction of the courts enjoys equal protection of the laws. I would therefore conclude that applicant who is subject to the laws of Lesotho is by virtue of this fact entitled to enjoy its protection. In the past, an impression had been given that the court had no power of review, but Lord Wilberforce in that case at pages 100H to 101AB said:

> "Now, there is no doubt that the courts have jurisdiction to review facts on which the Home Office's conclusion was reached: there is no doubt that procedural means exist, whether under the head of habeas corpus or of judicial review,... On principle one would expect that, on the one hand, the court, exercising powers of review, would not act as a court of appeal or attempt to retry the issue. On the other hand since the critical conclusion of fact is one reached by an administrative authority (as opposed to a judicial body) the court would think it proper to review it in order to see whether it was properly reached, not only as a matter of

procedure, but also in substance and law."

In short the court has to determine whether the proper procedure was followed, and whether the merits (or substance) were considered as the law provides. In other words the Minister has to weigh the facts and the evidence. At page 103D Lord Wilberforce continued:

> "The court may look at the evidence in order to see whether the Secretary of State or other authority could as a reasonable person have arrived at his decision upon that material and in order to see whether there was any substantial unfairness."

For a court to assess reasonableness, not only should facts be stated but reasons for those decisions have to be stated. That is obvious, if "substantial fairness" is to be determined. This function of the court is merely supervisory in immigration matters not appellate. At page 105 DE of *R v Home Secretary Ex p Khawaja* dealing illegal entry by an alien Lord Wilberforce said of the court:

> "It should appraise the quality of evidence and decide whether that justifies the conclusion reached—e.g. that applicant obtained permission to entry by fraud or deceit.... If the court is not satisfied with any part of the evidence it may remit the matter for reconsideration or itself receive further evidence."

The conclusion I have come to is that the *bona fides* of applicant has been attacked unfairly. It is as if she came into the country fraudulently and then sought employment and actually worked at St Joseph's Hospital, Roma

unlawfully. There has been no challenge to the fact that when she found a shortage of nurses at St Joseph's Hospital she decided to seek for employment, expecting the St Joseph's Hospital to seek a permit to employ her if it needed her services. The hospital authority sought a permit from Government in an open manner which must have involved the immigration authorities. If that was not so, she should have been given such a reason, so that she could know that her application had been dealt fairly. Alleging this was done verbally is unsatisfactory. To a member of the public Government cannot grant a work permit and deny residence at the same time. It would have been understandable if applicant had been denied a permit of residence because she was suspected of being involved in terrorist activities (something that involves national security). Even so she would have to be told—and she would be free to challenge that allegation.—See *R v Secretary of State (Ex P McQuillan* [1995] 4 All ER 400.

I have already said I am not sure this matter ever got to the Minister. If it has, then it has been dealt with arbitrarily and unfairly.

In the light of the aforegoing, I make the following Order:

(a) Applicant is permitted to remain in Lesotho pending a properly reasoned decision of the Minister of Home Affairs. The *rule nisi* is extended until the appropriate decision is reached.

(b) The Minister of Home Affairs (Fourth Respondent) is directed to

consider or reconsider applicant's application for a resident permit and to furnish reasons if he declines to grant applicant such a permit.

(c) The respondents are directed to pay costs.

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WCM MAQUTU
JUDGE

For the applicant : Mr *Makhene*

For the respondents : Mr T *Molapo*