SACHS J ABRIDGED JUDGMENT (CONCURRING)

Union of Refugee Women and Others v Director, Private Security Industry Regulatory Authority and Others

126. At the heart of this case lies tension between the legal status accorded by our law to refugees and certain objectives sought to be achieved by the law governing private security. Thus, while section 27(f) of the Refugees Act declares in an unqualified way that accredited refugees may seek employment, section 23(1) of the Private Security Industry Regulation Act (Private Security Act) states broadly that non-nationals who are not permanent residents cannot enter the security industry. In my view, the impasse is not intractable. Officials may use the powers of exemption granted to them by section 23(6) of the Private Security Act in a flexible and expansive way to ensure that refugees are kept out of the industry only when objectively speaking it is fair to do so. By this means adequate weight can be given to the status refugees enjoy, without the legitimate legislative concerns about the private security industry being ignored.

127. The starting point for the officials is that when determining what would constitute good cause for granting an exemption under section 23(6), they are not acting as mere purveyors of administrative largesse, nor are they simply called upon to manifest an appropriate degree of compassion for a vulnerable group that has suffered considerable trauma. They are responding to claims made under international and domestic law, and their discretion is bound by the need to take account of corresponding legal obligations. These obligations strongly favour acknowledging the right of refugees to seek employment in all spheres of economic activity. Only clear and specific legislatively required reasons would authorise any avenues being closed to them.

128. In this regard the mere fact that they are non-nationals, which is built into their status as refugees, could not on its own render it fair to keep them out. If there were no escape from the peremptory terms of section 23(1), I would agree with Mokgoro J and O'Regan J that the provision is overbroad and that words should be read in to entitle refugees to enter the security industry in the same way as permanent residents may do. I believe, however, that there are substantive grounds of an objective character that are pertinent to the nature of the activity itself, that could render it fair to exclude them.

129. Thus, the absence of proof of a clean record, even though not attributable to the fault of the applicants, could be highly relevant in regard to people who might be called upon to guard key installations. At the same time the absence of proof could have relatively slight significance in respect of less sensitive tasks such as looking after parked cars or keeping order at a sports ground. After five years, the applicant for unqualified access to the security industry would be able to show a clean record for a considerable period, and, as a permanent resident, no longer be excluded from engaging in the more sensitive areas of security work. In these circumstances a requirement of a five-year period to prove reliability for the most sensitive security tasks would not impose a bar that discriminated unfairly.

130. Accordingly, while I accept the basic thrust of the eloquent and carefully articulated judgment by Mokgoro J and O'Regan J, I do not agree that section 23(1) is constitutionally unsustainable. If it is applied properly in conjunction with section 23(6), it need not have an overbroad effect. If the two sections are read together to avoid incompatibility with the equality provisions of the Constitution, the problem ceases to be one of interpretation and becomes one of application.

131. Thus, I agree with Kondile AJ that section 23(1) of the Private Security Act is not unconstitutional. In my view, the section can be saved from unconstitutionality if the powers granted under section 23(6) are used in a way that acknowledges and gives effective expression to the special status enjoyed by accredited refugees. I agree too with his finding that section 23(6) has not been properly applied in the present matter. Indeed, by tending to treat the applicants as being indistinguishable from the general class of non-nationals, the officials have hopelessly tilted the balance against them. The blanket negative approach adopted, reversing the flexibility formerly applied, is

in flagrant disregard of the status granted to refugees by international and domestic law, an issue I will deal with below. I therefore support the order Kondile AJ makes. The applicants may reapply and seek to establish good cause as required by section 23(6). Their applications must then be considered by the relevant officials on the basis of properly prepared papers and in the light of the principles enunciated by this Court.

132. In this respect I wish to supplement the factors which Kondile AJ identifies as being relevant to a showing of good cause for exemption. In my view, special emphasis has to be given to four considerations, all of which bear on the status given by law to refugees. Taken together, they strongly favour the notion that being an accredited refugee in itself goes a long way to establishing good cause for exemption.

133. The first factor to take into account is the set of obligations undertaken by South Africa in terms of international law. The second is the significance of the provisions of the Refugees Act. The third is the historical and social setting in which the rights and entitlements of refugees have to be determined. And the fourth is the constitutionally-mandated obligation to counteract xenophobia.

Obligations under international law

134. After achieving democracy in 1994, South Africa for the first time adhered to a number of international instruments dealing with refugees. Refugees are legally entitled to a standard of treatment in host countries that encompasses both fundamental human rights and refugee-specific rights. The former are enshrined in international human rights law; for the latter, the 1951 UN Convention Relating to the Status of Refugees (the Convention), which predates most human rights treaties, remains the main instrument and contains a relatively detailed enumeration of rights. In some cases the Convention requires state parties to extend to refugees the same standard of treatment as for nationals; in others it obliges states to accord refugees as favourable a treatment as possible, and not less favourable than that accorded to non-nationals generally in the same circumstances. In devising these two main yardsticks, those who drafted the Convention clearly sought to ensure that refugees would not end up as pariahs at the margins of host societies.

135. Thus, the Convention obliges state parties to issue refugees with identity papers and with documentation required for international travel (the Convention travel document), prerequisites for many people to the rebuilding of their social lives and re-establishing means of livelihood. It forbids discrimination on the grounds of race, religion, or country of origin. And, of special importance, it protects refugees from being returned to the place where their lives and freedoms would be at risk (the principle of *non-refoulement*). Taken together, these obligations constitute a coherent and enforceable legal regime for refugees that are markedly more favourable than the discretionary regime generally applicable to immigrants.

136. The rationale for this regime and its binding element comes from the very circumstances that caused the refugees to abandon their homeland in the first place. In general terms, international refugee law, and the asylum built upon that regime, are designed to extend protection to refugees in an international context so as to substitute the national protection they have lost and cannot claim at home.

> "They have been forced out of their country as a result of persecution or danger, and now must receive legal protection and the opportunity to realise the most fulsome life possible in a foreign country.
>
> . . . .
>
> In recreating as closely as possible the national protection lost or not claimable by a refugee, the refugee regime seeks to put the refugee in a situation as close as possible to that of the national of the country of asylum."

The positive obligation to admit refugees, provide them with asylum and treat them in accordance with specific standards, thus contrasts sharply with the absence of a mandatory obligation to admit foreigners to the state's territory. It would accordingly be inappropriate for the state to act towards refugees in a manner that is consonant with the general discretionary provisions of the regime constructed upon immigration, security, and other municipal priorities, while ignoring the specific obligations that flow from the refugee regime.

137. It is important therefore that the progressive legal construct for refugees not be dominated by and held hostage to priorities drawn from immigration control or protection of the local labour force. As Okoth-Obbo has pointed out:

> ". . . the refugee protection system has, and should have, a validity all of its own. It should not be viewed as only the balance from requirements established at the level of immigration control and national penal and criminal law enforcement. It is possible to secure and even expand refugee space without this being seen as a constriction of the ability of states to pursue legitimate influx control and law and order objectives."

138. The Convention devotes considerable attention to the question directly raised in the present matter, namely, the obligation to respect the right of a refugee to engage in wage-earning employment. This obligation requires acknowledgement of the right to receive at least the most favourable treatment accorded to nationals of a foreign country in the same circumstances; and in any case not to be subjected to restrictive measures for the protection of the national labour market after three years of residence. Furthermore, the Contracting States are expressly required to give sympathetic consideration to assimilating the rights of all refugees with regard to wage-earning employment to those of nationals. These provisions should not be read in a begrudging, technical way so as to limit work opportunities and to guarantee only the bare minimum. On the contrary, they should be viewed conjunctively and purposively as being designed to encourage self-reliance on the part of refugees and to promote the possibility of their being able to lead valuable, dignified and independent lives; the quality of asylum, like the quality of mercy, should not be strained.

Refugees Act

139. The preamble to the Refugees Act notes that:

> ". . . the Republic of South Africa has acceded to the 1951 Convention Relating to the Status of Refugees, the 1967 Protocol Relating to the Status of Refugees and the 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa as well as other human rights instruments, and has in so

> doing, assumed certain obligations to receive and treat in its territory refugees in accordance with the standards and principles established in international law."

Section 6 goes on to state that the Act must be applied with due regard to the above-mentioned legal instruments as well as the Universal Declaration of Human Rights and any other international agreement to which the Republic is a party. The statutory matrix in which the right to seek employment is embedded is notably facilitative and rights-based. A refugee is: accorded full legal protection, including the rights set out in the Bill of Rights; entitled to identity and travel status documents; given an unrestricted right to seek employment; and able to apply for permanent residence after five years continuous residence. Taken together, these provisions reflect acknowledgment by the legislature of the need to create a progressive and humane refugee regime in keeping with South Africa's international legal obligations. It is in this manifestly broad and supportive legislative setting that any question about the right to seek employment must be resolved.

The social and historical context

140. The context which led to the adoption of the Refugees Act was set out by the then Deputy Minister of Home Affairs in the following striking terms:

> "Because of our history and our struggle we have increasingly had to bear the mantle of champions of the oppressed. Furthermore, because of the political and economic stability in our country, and the fact that thousands of us have experienced the pain of destitution and homelessness, South Africa is in a unique position to chart a humane policy as far as refugees are concerned. This has meant that South Africa has had to put into practice the concept of international solidarity and burden sharing, allowing the victims of international conflicts and human violations to seek a safe haven within our borders. Although in comparison we host a relatively small number of refugees, we are hoping that we could lead the way in the development of progressive refugee policies. . . . South Africa had no experience of hosting refugees – instead we produced refugees. South African society has not been sufficiently educated on issues of refugees, the causes of refugees and particularly the government's responsibilities towards refugees."

141. These factors provide the stark background against which determinations must be made of what is "good cause" in relation to access of refugees to employment in

the security industry. It is not all that long ago that, during the late period of minority racist rule, tens of thousands of South Africans fled across our borders into neighbouring states. Few had documents or anything more than a change of clothing, if even that. They were well received and sheltered, and treated with humanity by many African states, who frequently paid a heavy price in lives and blood for fulfilling their international responsibilities. Thousands more South Africans were given shelter and enabled to lead productive lives in countries right across the globe. Many have returned and now occupy important positions in our country. These moral debts are paid off not through direct reciprocity, but by means of voluntary acceptance of international treaty obligations.

142. The preamble to the Constitution speaks of building "a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations." This acknowledges two things: the international support, based upon the principles of the Universal Declaration of Human Rights and the United Nations, that enabled our country to overcome division and achieve constitutional democracy, and the humanitarian obligations that go with achieving a dignified place as a democratic member of the international community.

Xenophobia

143. The Braamfontein Declaration has pointed out that

> "[x]enophobia is the deep dislike of non-nationals by nationals of a recipient state. Its manifestation is a violation of human rights. South Africa needs to send out a strong message that an irrational prejudice and hostility towards non-nationals is not acceptable under any circumstances."

This prejudice is strong in South Africa. It strikes at the heart of our Bill of Rights. Special care accordingly needs to be taken to prevent it from even unconsciously tainting the manner in which laws are interpreted and applied. If refugees are treated as intrinsically untrustworthy, with their capacity to perform honestly and reliably being placed presumptively in doubt, then xenophobia is given a boost and constitutional values are undermined. As the then Deputy Minister of Home Affairs pointed out at a conference on forced migration, because of the historic isolation of South Africa, our people's perceptions

are unfortunately insular, thus making them very susceptible to xenophobia. She observed that this situation is further exacerbated by the fact that there is often a problematic confusion in the minds of people between foreigners who are here illegally and refugees. This confusion is created because these two groups often occupy the lowest economic stratum in our society. She observed that they are invariably black and do not speak any local languages.

144. The constitutional response to xenophobia need not, of course, involve exaggerated xenophilia. Just as refugees should be protected from irrational prejudice, so they should not be able to lay claim to irrational privilege. The law – in this case section 23(6) – must be applied in a manner that is fair, objective, appropriately focused and in keeping with the letter and the spirit of our international and national legal obligations. Exercises of power that purport to have a neutral foundation but track stereotypes are often seen as flowing from and reinforcing negative presuppositions. Indeed, the routinised way in which power is exercised can readily become entangled in the public mind with existing prejudicial assumptions, reinforcing prejudice and establishing a downward spiral of disempowerment. One of the purposes of refugee law is precisely to overcome the experience of trauma and displacement and make the refugee feel at home and welcome. Disproportionate and uncalled-for adverse treatment would defeat that objective and induce an unacceptable and avoidable experience of alienation and helplessness. It would be most unfortunate if the left hand of government, that supervises the security industry, took away what the right hand of government, that accords to accredited refugees a special status, gives.

Conclusion

145. The culture of providing hospitality to bereft strangers seeking a fresh and secure life for themselves is not something new in our country. As Professor Hammond-Tooke has pointed out, in traditional society−

> ". . . the hospitality universally enjoined towards strangers, [is] captured in the Xhosa proverb *Unyawo alunompumlo* ('The foot has no nose'). Strangers, being isolated from their kin, and thus defenceless, were particularly under the protection of the chief and were accorded special privileges."

Today the concept of human interdependence and burden-sharing in relation to catastrophe is associated with the spirit of ubuntu-botho. As this Court said in *Port Elizabeth Municipality v Various Occupiers*:

> "The Constitution and PIE confirm that we are not islands unto ourselves. The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern." (footnote omitted)

These words were used in relation to homeless South Africans. The reminder that we are not islands unto ourselves, however, must be applied to our relationship with the rest of the continent.

146. The applicants in this matter all come from African countries. They have been granted refugee status because instability and bloodshed in their home countries has rendered life there intolerable. Their states of origin have either set out to persecute them or else been unable to provide them with the protection that citizens should be able to demand from their government. Two examples illustrate this. The tenth applicant, whose father was a school-teacher, states that:

> "It was alleged by the [Rwandan Patriotic Front] that all Hutu's were involved in the genocide, which occurred in my country during 1994. During the period 1994 to 1998 all my husband's family members were killed and two of my sisters, one of my brothers and a host of other family members were killed".

The twelfth applicant tells a similarly tragic story:

> "I have been a resident and citizen of the Democratic Republic of the Congo. . . . My father was a king in Bukavu, South Kivu. He was killed by rebel soldiers who were in the process of fighting a civil war against the government on or about April 2001. At the time of my father's death I was a student. The rebel soldiers killed my father because he refused to sign a proposition document."

One was the child of a school teacher, the other of a king. Both were students when forced to flee to South Africa. They do not seek hand-outs from the state, but simply the opportunity to work and earn a living. They have organised themselves into groups and received training as security guards. This capacitates them to do relatively humble tasks such as guarding parked cars or patrolling shopping-malls.

147. I see no reason why access to employment in the security industry by persons in their situation should not be permitted in relation to sectors such as these, where no high security interests are at stake. To bar them would be to discriminate against them unfairly. At the same time I would not regard it as unfair to keep them from guarding installations and persons where particularly high security considerations come into play.

148. The greater power of officials to grant unqualified exemptions to enter the industry should not exclude a lesser power to grant a restricted exemption, the only proviso being that the basis for the qualification be fair and reasonable in the circumstances. Indeed, it would be dangerous and self defeating for the public administration to function on the basis that if officials cannot grant everything an applicant might seek, they cannot grant anything at all. The converse should also apply: officials should not be required to accede to everything refugees may ask for on the basis that in fairness the applicants are entitled at least to something. The principle of 'all-or-nothing' is frequently dangerous in administrative law. It disregards the notion of proportionality that lies at the heart of fairness of treatment. Experience warns that because cautious administrators might be fearful of being regarded as unduly generous, in practice this principle will usually lead to nothing.

149. In summary: the applicants were correct in their initial approach to court when they challenged the criteria used by officials who had excluded them in blanket fashion from the security industry, in some cases withdrawing permits already granted. For the reasons I have given, however, I believe that the applicants' subsequent challenge to the constitutionality of section 23(1) was over-ambitious. The mere fact of being refugees does not entitle them to be admitted as of right to all spheres of the private security industry. The key factor is that being an accredited refugee goes a long way in itself to establish that there is "good cause" for exempting

an applicant from the prohibition against non-nationals and non-permanent residents entering the security industry.

150. It is to be hoped that, bearing in mind the special status that accredited refugees enjoy under our law, the clarifications given by this Court will assist both refugees and officials in streamlining the processes involved, engaging with each other in a mutually respectful manner, and achieving outcomes that are objectively grounded, fair and reasonable.