

## **REPORT: IMMIGRATION INVESTIGATION OF THE MUKHAMDIEVA CASE AT CAPE TOWN INTERNATIONAL AIRPORT ON 6 NOVEMBER 2011**

As the Western Cape Director of Immigration I was not in Cape Town at the time of the central events involving the Mukhamadieva case. This obligated me to investigate the core issues of that day particularly in that the honesty, diligence and integrity of an immigration official were seriously in question in the public arena. Based on disputed information, the reputation of other officials in terms of upholding of the democratic values of South Africa and its constitution by the state apparatus was also at issue.

Central to the disputed version of the events was the evidence of the policeman who performed the delivery of a court order in the proper manner, an examination of surveillance CCTV footage at the airport and the observations of others in the airport community. This evidence was vital to the case in determining the true course of events on that day. This evidence was not sought by anybody outside of CTIA.

It was also noted that Maverick's strip club website which has published a court judgement along with their own commentary on this judgement which projects a bad image of officials and makes an accusation of 'perjury' levelled at the immigration official, echoing an accusation in court of 'tailoring' information. Contextual to this abusiveness, which has found its way into the mainstream media, it is in the public and stakeholder interest to be open about the core findings and evidence of the investigation carried out at CTIA.

The aim of the investigation was to ascertain whether officials had acted with integrity and with due respect to urgency of an order of court, and with legislation, with human rights, with constitutional obligations and whether an honest account was given by the official accused. There was also a duty to examine any breach of security at CTIA or other irregularities that may have a bearing.

The investigation revealed through timed photograph stills backed by CCTV video footage that the immigration officer had indeed told the truth. These also place the legal practitioners involved in this case at different places at different times and, expose a difference of a full 45 minutes between two distinct occurrences which seem to be conflated as though they were one. One was a legitimate official delivery and respectful receipt of the court order and the second occasion was an irregular re-enactment. The hard CCTV evidence was further backed by accounts of role-players other than immigration officers.

It is noted that there is a formal expeditious system in place for handling the delivery of a Court Order at CTIA and for dealing with other emergencies and, this route was followed on that day, even although the legal practitioners took it upon themselves to engage in their own parallel actions. This is evidenced by the timed CCTV footage and the border policeman who explained exactly what happened that day when he was asked, according to standard procedure, to deliver the Court Order into the security restricted International Zone immigration sterile area of Cape Town International Airport. The CCTV footage shows the border policeman crossing the threshold of the immigration sterile area at 16h41 when he delivered the Court Order to the immigration supervisor at 16h42. This is the same verified core evidence as the evidence given in court by the immigration supervisor and rejected in favour of a different and clearly contradictory version.

The CCTV footage further shows the candidate attorney arriving at international arrivals staff security entrance to wait at 17h02 (not 16h30) and making several attempts at entry through this entrance to the restricted sterile area of international arrivals over a 20 minute period. She was joined by the attorney at 17h23 who had just taken 15 minutes to walk from the departures area where he was observed at 17h08 by CCTV cameras to be observing flight departures. He was first identified on camera at 16h54 after arrival at the departures security checkpoint after having earlier departed in the opposite direction from his engagement with the border policeman to whom he had given the Court Order to be delivered formally to immigration. CCTV cameras show that both attorneys without authorisation, after irregularly using the staff entrance at immigration arrivals, crossed the threshold of the immigration sterile area at 17h25 where they remained before leaving at 17h30 despite being asked to leave immediately. During which time, a cellphone was used in an unjustifiable altercation with the immigration supervisor in the area where there is a security prohibition on

cellphone usage by unauthorised persons. The interactions, dialogue and comments were in earshot of an official other than the immigration supervisor and the investigation took this into account.

As far as this investigation could ascertain, a check on the flight departure movement for Turkish Airlines for 6 November 2011 shows the following sequence: Ms Mukhamdieva was boarded around 16h20 and it this was confirmed to immigration at 16h30 by an agent for Turkish Airlines (Menzies). Boarding closed around 16h40 and the aircraft doors closed around 16h42. The aircraft was being guided out of the airbridge area from 16h45 to taxi to the beginning of the runway by 17h00. Take-off was scheduled for 17h10 and actual take-off occurred 5 minutes later. CCTV footage shows the attorney viewing the aircraft on the runway at 17h08. This confirms that by the time at 17h25 when he decided to re-enact the delivery of the Court Order and to phone the judge giving an impression that his re-enactment was the actual delivery of the Court Order to a non-compliant official, he was fully aware that the flight had long left CTIA.

The CCTV footage supports the version of the immigration officer in the dispute. On being approached by the attorney, the border policeman explained that he had made it clear that the public must not violate airport security by entering any of the restricted zones and that it should be left to the police to carry out the formal delivery of the Court Order, which was done expeditiously. What occurred 45 minutes after the Court Order was formally delivered and a response acquired, was an unnecessary re-enactment of the original Court Order in contravention of this advice and the airport security regulations when an unauthorised ACSA private security guard, himself without clearance into this restricted zone, was used to assist the irregular entry into the restricted area through the staff entrance against the advice of the border police.

There is a standing agreement in place, as raised by the Border Control Operations Coordinating Committee (BCOCC) headed by SARS that no unauthorised public, without exception, are allowed entry through this checkpoint and, where authorised for a specific activity related to baggage claims and customs, they must be accompanied by a person vetted and authorised to enter.

The investigation showed that the immigration official was diligently carrying out his mandated security duty in immediately asking the intruders, regardless of their civil status to leave the restricted sterile area and refused to engage with this irregular action. This can in no way be said to either be in contempt of court nor disrespectful to a legal practitioner who had long before been given a positive and respectful response to the core issue. Nobody is above the law and security officials must act within the law without fear or favour.

The investigation noted that the international airport is a national keypoint and a complex security environment. It is also an environment where there is a transit international zone covered by international law and protocols, not unlike an embassy grounds which cannot be violated. Aircraft flying a foreign flag also cannot be violated. Immigration officials further have no authority over either the Transit International Zone or over an aircraft flying a foreign flag.

The investigation further noted that the complexity of the airport involves seven different state agencies carrying out different security roles, as well as ACSA and its own security. Like every other port of entry there is a chapter of the Border Control Operational Coordinating Committee in place to facilitate optimum communication between these different agencies. In an environment handling a high incidence rate of organised crime and syndicate activity, where security agencies have an excellent detection success rate, these structures are vital. The aberrations appearing daily in the press relating to rhino horn and abalone poachers, assassins, human traffickers, prostitution racketeers, immigration laundering, drug trafficking and so on, often gateway through the airport environment where immigration and customs are in the front line. Security at the airport does not exempt any category of person from scrutiny, including legal practitioners who cannot be assumed to not engage in questionable activity. There are indeed previous examples of persons from this profession tendering fraudulent documentation to the department and indeed carrying out the unlawful spiriting out of foreigners from the sterile area without them being cleared by immigration, and investigations with the view to prosecute, continue in this regard.

The investigation proceeded from an understanding that accountability of public and security officials is a vital element of South African democracy and thus it is important that facts are thoroughly investigated as was done by this investigation and there is no problem in availing this information to the public as with this report. It was equally noted by the investigation that officials were expressing a fear to be able to do their jobs

effectively due to a range of threats – some physical threats from syndicates and some in which other dubious means may be sought to unjustly undermine their integrity and intimidate them, and observed that this can lead to a paralysis of an effective democratic state. Again here the only means to address this threat effectively is thorough investigation of evidence in a transparent manner and being consistently vigilant.

Home Affairs was recipient in December 2011 of the Silver feather Award by ACSA for the best government service at CTIA based on international ratings. Commendations of Immigration, SAPS Border Police and Customs at CTIA for its success rate in busting crime have also been a regular feature in the media. This is testimony of recognition that state officials at the airport strive for the highest standards.

The system for the expeditious delivery of a Court Order is not a mystery, is simple and well known, and was indeed initially used by the attorneys on the 6 November 2011. **Under any emergency the central contact position is the conveniently located Border Police station, manned 24 hours, at the airport.** Court orders, correctly directed to the relevant authority governing a situation where an intervention needs to be made, will be taken directly to that authority by the quickest route by a border policeman. Any communication between the different authorities where cooperation may be required will also be facilitated by the border police. On the day in question the system was neither faulty nor untimely. On this day the order, which also was seriously defective, simply was given to the border police too late, after Ms Mukhamadieva had been boarded on the Turkish Airlines flight.

The investigation noted that it is well known that in the restricted transit international zone, ACSA and the Airlines agents are the main authority, while Border Police handle emergencies, subject to international laws and protocols that govern this area with a similar status to an embassy in terms of non-violation. Immigration officials cannot do cross-border pursuit in the transit international zone.

The investigation noted that it is well known that immigration officials only have authority at the borderline in the sterile area and in the South African zones. Immigration has no authority over a traveller after they have been denied entry across the borderline. This person remains under the authority of the airline in the transit international zone and retains their seat on an aircraft if not cleared for entry into South Africa.

The investigation further noted that the Airline agents control an overnight facility for such passengers that may need to stay overnight as a result of being denied entry to South Africa. The Airline agents have offices in the South African zone where a simple visit or phone call by any attorney to deal with matters that fell under the Airline authority could have been dealt with, while the police delivered the court order to Home Affairs. It is only Home Affairs legal mandate at the airport to deal with matters of clearance of the traveller into South Africa in the sterile borderline area of the international zone, as well as to immigration matters in the South African zone.

The investigation further covered the central issue of this case. It found that Ms Mukhamadieva, arrived on Turkish Airlines and had been denied entry to South Africa on grounds falling within the legislated mandate of an immigration officer about 25 minutes after she arrived in Cape Town and before 14h00 on 6 November 2011. It is stated on the visa that the visa authorises her to report to an immigration official at a port of entry and legislation clearly states that a visa is only in force once an immigration official clears a person for entry. In law there is no automatic entry on the basis of a valid visa having been issued abroad. She was not cleared as she failed essential elements required in her interview and because there was a contradiction with the directives underpinning the delegation of the Director General's decision, on Section 11 (2) permits. She was, in the prescribed manner, given opportunity to register any objection that she had to being denied entry to South Africa. She declined to do this. After 14h00 she was under the authority of the Airline agents and no longer subject to the authority of immigration. The Airline agent put her on a returning Turkish Airlines flight sometime around 16h20 when the crew and commander of the aircraft boarded and before all other passengers boarded.

Nobody is allowed to interfere with an aircraft at this stage. A Menzies agent for Turkish Airlines confirmed to immigration at 16h30 that Ms Mukhamadieva had boarded the aircraft. By the time that the border policeman delivered the court order, the immigration officer responded that it was too late for immigration to act as Ms Mukhamadieva was boarded and the aircraft was on its way.

The investigation examined the events that occurred between 16h41 and 16h58 by putting questions to a range of persons. This is what transpired:

The Court Order was put into the hands of the immigration supervisor at 16h42. On taking cognisance of the contents of the Court Order, the immigration supervisor first dealt with the urgency issue and immediately told the policeman delivering the Court Order that unfortunately it is too late to do anything that was in the power of immigration to do, as Ms Mukhamadieva was long boarded on the flight and, that the flight was on its way. They then dealt with the integrity of the Court Order and found that they needed to take advice.

It was reported in the investigation that the policeman and the immigration supervisor both questioned the authenticity of the Court Order when they noted that it carried no case number, and was not signed and stamped by the Court Registrar and it had no contact details on it for the judge. These officials deal with fraudulent documents on a daily basis and were right to ask questions. They also noted that the instruction contained in the Court Order, was contradictorily asking immigration to disregard the Immigration Act to clear Ms Mukhamadieva to enter South Africa so that a court hearing may decide whether indeed she could enter South Africa. The intention of the legal practitioners accompanied by an HR representative from Mavericks who came to fetch Ms Mukhamadieva was to have her cleared for entry that day, so that she may appear in court for the hearing the following day. The Court Order clearly supported this intended action. This immediately resulted in a query, and a phone call was made to the off-duty immigration operations manager for further advice.

After the court judgement was released and post the initial investigation, this investigation was continued when it was noted that court seemed to refer to a different instruction not on that Court Order. It may therefore just be possible that a different Court Order may exist from the one presented to immigration. On this matter, the investigation cannot comment. As investigator I could only proceed by examining what the Court Order on file actually said. This is how the two different instructions contrast:

Judgement: *The "Applicant would, if it was deemed necessary by Respondents, be held at the airport pending the enquiry in court the next morning, at which time the parties would be able to argue their respective cases pursuant to which a proper determination could be made."*

Court Order: *"The Respondents shall appear before this Court at 10h00 on Monday 7 November 2011 **together with the Applicant** in order to show cause why the Applicant should not be permitted to enter the Republic of South Africa on appropriate conditions."*

The investigation found that the advice from the operations manager was that the authenticity was a serious issue but that the defectiveness of the Court Order could be dealt with later. She expressed that nonetheless, the officials should attempt to deal with the urgent contents of the Court Order within the parameters of the law. Although not addressed to the Airline, the urgent matter was whether the Airline agents, Menzies, could still hold back on putting Ms Mukhamadieva on the flight. The immigration supervisor responded to the operations manager that Menzies had informed him that this passenger was already on the flight under the command of the aircraft commander. The flight itself was underway in terms of aviation procedure covered by international agreements. The investigation ascertained from the immigration supervisor that he received his information from Menzies at 16h30 when he had been over at international departures. Immigration has no instant contact with Menzies from International arrivals as their business with the Airline agents occurs when the Airline agents arrive with passengers and not otherwise; nor can they instruct Menzies outside of the original notice of denial of entry.

The operations manager further asked the immigration supervisor to note the deficiencies of the Court Order also for the record, as well as record the process. She then advised the official to take the Court Order from the border police officer and to make a photocopy of the order for record. This copy was given to the investigation as proof that this had indeed happened.

The operations manager then further told the immigration supervisor to note that he would need to speak to the department's legal service to ensure a response in terms of the central requirement of the Court Order necessitating that the department appear in Court the next day, and to receive advice now that Ms Mukhamadieva had left.

Having been assured that the immediate issues had been addressed by delegated authority, the operations manager then told the official to hand the original Court Order back to the police official so that the original document may, according to standard procedure, be directed to the office of the Minister and Director General, and the department's legal services. The original order cannot be accepted and kept by the immigration official as the department must respond appropriately with legal counsel to a required Court appearance and litigation. It is in keeping with the basic tenets of judicial fairness that any legal document must be delivered to the named respondents and their legal counsel when they are required to make a Court appearance, so that the department may ensure that it takes the necessary steps to protect itself legally. Default rulings have previously been made where the respondents had been oblivious to the fact that there had been litigation against the department and thus it was important for officials to follow this procedure.

The issue of taking of such a step is not mutually exclusive from dealing with urgency under delegated powers which was dealt with in this case and a copy of the Court Order was retained by the official. This approach is the same throughout the country. The full context of this advice from the operations manager and on previous occasions by myself has been severely distorted and, neither I nor the operations manager were given any fair opportunity, as per constitutional rights, to explain ourselves.

This concluded the immigration supervisor's phone call to the operations manager who in turn reported the matter to legal counsel and later at 21h00 on 6 November to myself as Immigration Director in Pretoria on business that day.

At the end of this formal and very proper process of respecting the Court Order, the immigration supervisor photocopied the Court Order and the border police official was handed back the original document to return to the attorney. The CCTV footage records the border police official leaving the sterile area at 16h58 – mission accomplished.

After later receiving the court judgement, as the investigator, I noted two contradictory accounts of the delivery of the Court Order – one where the attorney claims that **he was unaware** that policeman was delivering the Court Order and one in which it is stated clearly that the attorney **was waiting at international arrivals for Inspector Wildschut to return from delivering the Court Order**. It was noted too that two distinct events were being conflated. This is what the judgement actually says:

In the first instance – *“Mr Grobler already had taken possession of the order which had been issued by the Court. Mr Eisenberg had provided a copy to Inspector Wildschut. Although Mr Eisenberg was unaware at the time that Inspector Wildschut had served the order on Mr Grobler”...* (page 4) In the second instance – *“When she (Ms de Saude employed by Mr Eisenberg) arrived at international arrivals, she met Mr Eisenberg and Ms Vorster, who was employed by Mavericks, and who were at that stage waiting for Mr Wildschut to return because - as I understood from her evidence – he had proceeded to deliver the Court Order”.* (page 5). The timing of this contradictory version (one where it is stated that the attorney was unaware and the other where he was aware) was not in keeping with the CCTV footage nor the explanations received from various officials in the airport community.

What clearly emerged in the investigation was **that there was an official delivery of the Court Order in the proper manner as per the expeditious procedure** which is in place at CTIA. It was respectfully handled by the border police and immigration within the bounds of their authority between 16h42 and 16h58. There was no faulty system and neither was the system cumbersome and untimely. This system has been in operation for a long time and there are many other legal practitioners which frequently use it as it is supposed to be used.

The department generally enjoys a healthy relationship with the legal profession at CTIA where mutual respect is standard. This was not the first court order received by the department. Consultations had also been regularly taking place with a range of stakeholder entities and legal practitioners, as well as DTI and Wesgro over November and December around clarity on the correct use of Section 11 (2) permits and protocols governing its use and, as a result, Directive 29 of the Director General was produced for ports and embassies concerning how the delegated discretion of the Director General is exercised on this permit. Furthermore there was media coverage over Operation Compliance which focussed on the abuse of the Section 11 (2) permit. This illustrates that officials are not disrespectful to the legal profession and that there was widespread

engagement with stakeholders and clarity had been provided on reasons for denial of entry that may occur when this permit is abused. Legislation is clear in allowing for the Director General to produce such policy directives.

**The investigation also found that there was an irregular and questionable intrusion into a high security national keypoint area and that this was unacceptable.** This had nothing to do with the original delivery of the court order and the formal response by immigration. It was a re-enactment 45 minutes later and should be separated from any evaluation of the former. The investigation filed an official request for further investigation by the Border Control Operations Coordination Committee and State Security Agency as is required under such circumstances.

My investigation found that on the available evidence, officials' behaviour in carrying out their duty in this case, in no way reflects any form of general adverse judgement of the legal practitioners based on attitudes about their clients. Officials are obligated in law to show due respect to all. All citizens too, regardless of civil status, are expected to respect officials, regulations and the rule of law, and not to undermine or obstruct the legitimate processes of the administration of the democratic state and its international obligations. It is also a legitimate process for security officials to be vigilant and to check the credentials of travellers without this infringing on human rights.

It is understood and respected that the legal framework of South Africa upholds that a legal practitioner as counsel, rightly represents clients regardless of the actions of those clients, in a vigorous and partisan manner, in opposing the positions of opposing counsel. It is also understood and respected that this system is underpinned by a prosecution authority and an independent judiciary which demonstrates its independence by not taking sides with neither the partisan counsel nor opposing counsel in calling for evidence and exercising impartial judgement based on legislation and the constitution, free of any political, religious, racial, class, gender, disability or any other bias whether persons' actions addressed by court are state official or general public. The constitution guarantees that before any judgement is made; all persons have a right to be informed and to be present when charges are levelled against them, to be presumed innocent, to challenge evidence and not to be convicted for an act or omission that was not an offence. Officials spoken to in this investigation all expressed a thorough understanding of these principles and have expressed respect for the judiciary, the legal system and the constitution and bill of rights.

The investigation kept to its parameters and thus concluded its business. In the interest of stakeholder and media enquiries on this case and public openness, the original Court Order and the CCTV footage stills referred to in this investigation are available. This investigation report has also, in the interest of educating officials and affirming procedure, been distributed to all security role-players at CTIA through the Border Control Operations Coordinating Committee.

The CCTV footage stills and Court Order is here attached.

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