**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

***Reportable***

CASE NO: 10972/2013

In the matter between:

| | |
|---|---|
| **HASSAN ASMAN HARERIMANA** | **Applicant** |
| **And** | |
| **THE CHAIRPERSON OF THE REFUGEE APPEAL BOARD** | **First Respondent** |
| **M M MOHALE N.O.** | **Second Respondent** |
| **THE REFUGEE STATUS DETERMINATION OFFICER** | **Third Respondent** |
| **THE MINISTER OF HOME AFFAIRS** | **Fourth Respondent** |
| **THE DIRECTOR GENERAL OF THE DEPARTMENT OF HOME AFFAIRS** | **Fifth Respondent** |

---

**JUDGMENT: 11 December 2013**

---

**DAVIS J**

[1] This is an application to review a decision taken by first, second and third respondents in refusing to grant refugee status and asylum to applicant.

[2] Applicant arrived in South Africa in May 2007, then aged 18 and applied for refugee status and asylum in Johannesburg. In the interim he continued to

experience trauma. Unfortunately, the 2008 xenophobic violence occurred while applicant was living in the Yeoville. He was attacked and beaten by a mob and was forced to seek refuge at a police station. He was then accommodated at a safety site for some time. When it was broken down he was afraid to leave until he was accommodated in Lindela Holding Facility at Marabastad. It was here that he was assisted by Lawyers for Human Rights (LHR) to start the asylum application process afresh after LHR informed him that his initial application had 'been cancelled'.

[3] After assistance from LHR, applicant's B1 – 1590 form was filled out on 1 or 2 August 2008. The Refugee Status Determination Officer (RSDO) interviewed applicant on 2 August 2008 and issued a decision on 5 August 2008. According to applicant, the RSDO asked the applicant 5 *pro-forma* questions and then rejected his claim as unfounded.

[4] Applicant appealed this decision. The appeal hearing was convened on 11 September 2008, at which hearing second respondent sat alone in the presence of an interpreter. According to applicant, second respondent asked him a further series of *pro-forma* questions but did not share certain information or reports with applicant upon which he appeared to rely, and to which I shall return presently, in order to justify his decision to dismiss the appeal. This decision was made some three years later, on 3 November 2011.

[5] On 2 August 2012, almost four years after the initial interview and five years after applicant had first applied for refugee status and asylum, he was notified that his claim for refugee status and asylum had been unsuccessful.

[6] Applicant seeks to review and set aside the decisions of first and second respondent of 3 November 2011, dismissing his appeal against the third respondent's decision and rejecting his application for refugee status and asylum as well as reviewing and setting aside third respondent's decision of 2 August 2008 which rejected the applicant's appeal in order to be granted refugee status and asylum. In addition, applicant seeks a declaration that he is a refugee entitled to asylum in South Africa and further directing fourth respondent to issue to the applicant written recognition of his refugee status in terms of s 27 (a) of the Refugee's Act 130 of 1998 ('the Act'), read together with regulation 15 (1) thereof, within 7 days of the date of the order so granted.

**Review grounds**

[7] Applicant contends, in the first place, that the Refugee Appeal Board (RAB) was not lawfully constituted when it purported to dismiss his appeal. Further, applicant contends that second respondent's decision stands to be reviewed and set aside because second respondent failed to afford the applicant a fair hearing; in particular he denied applicant the opportunity to deal with a body of information upon which he relied upon when taking his decision. In addition, the written decision did not support the conclusion and thus he failed to conduct a rational

decision making process. Further, the delay of more than five years in finalising the application was unreasonable, unlawful and unfair.

[8] Applicant also contends that the decision of the RSDO stands to be reviewed and set aside because it is unlawful, unreasonable and procedurally unfair. Applicant contends that the RSDO unlawfully failed to comply with the express provisions of the Act and Regulations; in particular he unlawfully and unreasonably delayed interviewing the applicant for 11 months, he relied upon information contained in various reports which were prejudicial to the applicant's case without affording the latter an opportunity to deal with this information before making his decision and further, he committed errors of fact and law in assessing the claim as one based upon persecution rather than based on events seriously disrupting the public order. (See ss 3 (a) and (b) of the Act) In short, he based his decision as if the applicant's case was predicated on s 3 (a) of the Act, when it had been clearly based upon s 3(b). For these reasons, applicant contends that the decision was not rationally related to the information properly before the RSDO which, in applicant's view, showed that he was indeed a refugee in terms of the definitions under the Act and various applicable international conventions. The facts showed that he had been compelled to leave his country owing to events seriously disturbing or disrupting of public order, which situation endured at the time when he was assessed for asylum.

**The legal architecture**

[9] In terms of s 3 of the Act, a person qualifies for refugee status for the purposes of the Act if that person:

> (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group, is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country, or, not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
>
> (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part of the whole of his or her country of origin or nationality, is compelled to leave his or her place of habitual residence in order to seek refuge elsewhere.

[10] The grounds set out in terms of s 3 (b) draw their origins from the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa. Flowing further from this Convention, s 5 (2) provides for an exception to the grounds of cessation of refugee status by stating that, notwithstanding the provision that a refugee can no longer continue to refuse to avail himself or herself of the protection of the country of his or her nationality because the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist and no other circumstances have arisen to justify his or her continued recognition as a refugee, this proviso does

not apply to a refugee, who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself or herself of the protection of the country of nationality.

[11] The determination of refugee status as set out in the Act appears to be governed by objective factors. Thus, in the Handbook on Procedures and Criteria Determining Refugee Status published in terms of the United Nations 1951 Convention relating to the Status of Refugees, together with the 1967 protocol, a person is considered to be a refugee as soon as he or she fulfils the criteria contained in the definition. This would necessarily occur prior to the time at which his or her refugee status is formally determined. Thus, "recognition of his refugee status does not make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognised because he is a refugee." See also **Mayongo v Refugee Appeal Board and others** [2007] JOL 19645 (T) at para 8.

[12] Hathaway The Law of Refugee Status (2005) provides further guidance as to the concept of refugee status. He contends that it is reasonable for groups and individuals to 'disengage from fundamentally abusive national communities'; at which point refugee law provides protection. Significantly, Hathaway refers to the OAU definition and contends that as long as a person 'is compelled' to seek refuge because of an anticipated serious disruption of public order, he or she should not be placed in the position of having to demonstrate any linkage between her personal status (or that of some collectivity of which she is a member) and impending harm. Because the African standard emphasises

assessment of the gravity of disruption of public order rather than motive for flight, individuals are largely able to decide for themselves when harm is sufficiently proximate to warrant flight'.

[13] Turning to the procedures for refugee status, the Act provides for the determination of refugee status. An asylum seeker presents himself or herself at a Refugee Reception Office, where an officer assists in the application for asylum. This application is evaluated by the RSDO who, in terms of Regulation 10 (1), must conduct a non-adversarial hearing to elicit information bearing on the applicant's eligibility for refugee status and must ensure that the applicant fully understands the procedures. Section 24 (2) of the Act makes this clear: the RSDO is obliged to have due regard to the rights set out in s 33 of the Constitution of the Republic of South Africa 108 of 1996, particularly to ensure that the applicant fully understands the procedures, his or her rights and responsibilities and the evidence presented.

[14] The RSDO is then obliged to make a decision as to whether or not the asylum seeker is in fact a refugee and entitled to protection from South Africa.

[15] In terms of s 24, the RSDO may grant or refuse refugee status and asylum. An application may be rejected as 'unfounded' or 'manifestly unfounded'. An applicant whose applicant's is rejected as unfounded may then lodge an appeal with the RAB.

[16] In terms of s 13 (1) read with s 15 (5):

(1) The Appeal Board must consist of a chairperson and at least two other members, appointed by the Minister with due regard to a person's suitability to serve as a member by virtue of his or her experience, qualifications and expertise and his or her capability to perform the functions of the Appeal Board properly.

(2) At least one of the members of the Appeal Board must be legally qualified.

[17] Section 26 of the Act provides some guidance to the RAB in its work:

(1) Any asylum seeker may lodge an appeal with the Appeal Board in the manner and within the period provided for in the rules if the Refugee Status Determination Officer has rejected the application in terms of section 24 (3) (c).

(2) The Appeal Board may after hearing an appeal confirm, set aside or substitute any decision taken by a Refugee Status Determination Officer in terms of section 24 (3).

(3) Before reaching a decision, the Appeal Board may-

(a) invite the UNHCR representative to make oral or written representations;

(b) refer the matter back to the Standing Committee for further inquiry and investigation;

(c) request the attendance of any person who, in its opinion, is in a position to provide the Appeal Board with relevant information;

(d) of its own accord make further inquiry of investigation;

(e) request the applicant to appear before it and to provide any such other information as it may deem necessary.

(4) The Appeal Board must allow legal representation upon the request of the applicant.

[18] The status and approach to be adopted by the RAB was examined in **Tantoush v Refugee Appeal Board and others** 2008 (1) SA 232 (T) at para 86 where Murphy J, on the basis of s 12 (3) of the Act, noted that this body must function without bias and must be independent. Not only is it required to be impartial in its decision making, but, in addition, it must be structurally independent.

**Evaluation**

[19] It was common cause that the RAB consisted only of one member, being second respondent, when the appeal of the applicant was dismissed on the 3 November 2011. Aware of this difficulty, Ms Mangcu- Lockwood, on behalf of the respondents, submitted that an interpreter was present at the hearing and the decision was monitored by first respondent. She therefore made two submissions in defence of the composition of the RAB. While s 13 (1) provided that the appeal board 'must consist of a chairperson and at least other two members', this did not mean that all three had to sit at any one appeal hearing. Secondly, to the extent that s 13(2) provided that at least one of the members must be legally qualified, she contended that first respondent, the legally qualified member, had monitored the decision of second respondent.

[20] In my view, neither of these submissions passes legal muster. It would be inconceivable that the legislature made provision for at least one of the members of the RAB to be legally qualified and yet this person would not be required to sit at a hearing. In response Ms Mangcu-Lockwood referred to s 14 (2) of the Act, namely that the appeal board may determine its own practice and make its own rules, but which presumably could include the member of members required to sit on an appeal. Even if the scope of this rule could be so stretched, a rule cannot override a specific provision of the Act which provides that, when the RAB sits, one of its members must be legally qualified. To the extent that there is any doubt with regard to this conclusion, s 15 provides that, in a case of the appeal board, meetings must be convened by the chairperson and the majority of members constitute a quorum; thus at least two persons have to be present, at a minimum. Further, the decision must be taken by a majority of votes. Manifestly, it was required that RAB sit with its full complement of members (or at the very least, two). Accordingly, the decision taken by the RAB on 11 November 2011 was legally invalid because it was not properly constituted. The implication of this finding is that the decision of the second respondent must be set aside.

[21] To this conclusion, there were two responses from the respondents. In the first place, this would still leave intact the initial decision of third respondent. A further argument was developed by way of a point in *limine*. Ms Mangcu-Lockwood contended that applicant had lodged an application for asylum on 21 May 2007 at the Johannesburg Refugee Reception Centre. This triggered a process in terms of Chapter 3 of the Act which required consideration from a

RSDO. An interview was held with the applicant and his asylum application was rejected. It appears that the applicant then noted an appeal against this decision. Thus, the decision taken pursuant to the Johannesburg application process was a relevant operational decision since, triggered by the applicant. Whatever the merits of the later decision, this earlier decision stood to be set aside before any relief could be considered in terms of the notice of motion.

[22] The problem with this argument is raised in the answering affidavit deposed to by second respondent when he states:

> "Meanwhile on 3 November 2011 the applicant noted another appeal in Johannesburg... he was invited to an appeal hearing on 2 December 2008. Unfortunately the decision of that hearing could not be found. I however assume that the appeal was dismissed otherwise the applicant would not have approached this court."

[23] Of equal significance is the chronology. The application which triggered the decision in this case was made on 2 August 2008, being the decision of third respondent. On 11 September 2008, an appeal was heard by second respondent. The decision of the RSDO in Johannesburg was made on 30 October 2008, by which stage the appeal before second respondent had already taken place.

[24] It can surely not be suggested that it was the fault of a refugee in the position of applicant that he failed to understand the intricacies of the Act as opposed to first to third respondents which should have known, certainly by 30 October 2008, that the same applicant had been refused asylum and had subsequently taken the RSDO decision on appeal. In any event, a decision was taken by second respondent on appeal; that decision was taken by an improperly constituted body and stands to be set aside.

[25] The consequences of this finding are twofold.

(i) the matter may be referred back to first respondent for a rehearing by a properly constituted body; or

(ii) substitution of the decision can be effected by this court.

[26] In either case, the task would be to reconsider the decision of third respondent and make a fresh and valid decision. In this enquiry, the description of the functions of the RAB as an appellate body by Murphy J in **Tantoush**, *supra* at para 19 is of particular significance:

> "As already explained, because of RAB's powers to gather additional evidence, the intention of the legislature was to confer upon the RAB an appellate jurisdiction in the wide sense, meaning that it is not bound to pronounce upon the merits within the four corners of the record of the RSDO. An ordinary appeal is one where the appellate body is confined to the record of the body appealed against. A wide appeal is one in which the appellate body may make its own enquiries and even gather its own evidence, if necessary."

[27] The question thus arises whether this matter should be referred back to a properly constituted appeal board or whether substitution should take place, in both cases, to make a fresh decision within the scope described in **Tantoush,** *supra*.

**Substitution**

[28] When a court sets aside a decision of a body such as the RAB, the default position must be to refer the matter back to the designated body to enable to reconsider the issue and make a fresh decision. As Heher JA said in **Gauteng Gambling Board v Silverstar Development Ltd** 2005 (4) SA 67 (SCA) para 29:

> "An administrative functionary that is vested by statute with the power to consider and approve an application is generally best equipped by the variety of its composition, by experience, and its access to sources of relevant information and expertise to make the right decision. The court typically has none of these advantages and is required to recognise its own limitations."

A court must show respect for a legislative design which creates a specialist body to deal with the task of making decisions of an administrative nature. Besides, review cannot simply be conflated into an appeal to usurp these decision making powers, thereby expanding the powers of courts into areas which a legislative framework has expressly eschewed.

[29] However, as acknowledged in s 8 (1) (c) (ii) (aa) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), a court is granted the power on

review to substitute or correct a defect arising from a decision in 'exceptional circumstances'. The phrase 'exceptional circumstances' does not equate to a court adopting the view that it is in as good a position to make a decision as the administrative body. That would be to subvert the default position. But, fairness is a consideration which must be uppermost in the mind of a court in determining whether it is dealing with the kind of exceptional case which calls for substitution as opposed to a remittal.

[30] The concept of 'exceptional circumstances' received a careful and sustained treatment in **UWC v MEC for Health and Social Services** 1998 (3) SA 124 (C) at 131 where Hlophe J (as he then was) provided a series of guidelines in respect of determining whether a case was sufficiently exceptional for a court to substitute its own decision for that of the designated tribunal or body:

1. Where the end result is a forgone conclusion and it would be a waste of time to order the body to reconsider the matter.
2. A further delay would cause unjustifiable prejudice to the applicant.
3. The functionary or tribunal has exhibited bias incompetence of such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

See also **Theron en andere v Ring van Wellington van NG Sendingkerk in Suid Afrika en andere** 1976 (2) 1 (a) at 31 D; Hoexter Administrative Law in South Africa (2nd ed) at 552 -557 .

[31] In my view, to send this matter back to the RAB would be unjust, particularly in the light of the determined opposition of both first and second respondent to this review application brought by the applicant. This approach, to say the least, is surprising for as Murphy J had held in **Tantoush**, *supra* at para 86:

> "Not only must it (the appeal board) be impartial in his decision making, it must also be structurally independent. Secondly, once again the second respondent cannot make an affidavit on behalf of the Minister of Director-General. They, not he, are required to set forth the basis of their opposition to the application. That is an application to review and set aside two decisions relating to the quest by an applicant for refugee status and asylum in terms of the Act."

[32] It is regrettable that first and second respondents did not have due regard to this *dictum*. It is they who have made 'the legal running' in this case, rather than fourth and fifth respondents who would have been expected, as custodians of the Act, to have provided the detailed justification for an opposition to this review application which turns on a refugee status. To remit the appeal to the body which, in so determined a fashion has resisted this review application, would at, the very least, be unfair. The conduct of these respondents promotes a perception that it is a body which is now biased and not sufficiently independent in respect of applicant's case. It would thus be unfair for it to be required to reconsider its own decision, that it obviously considers to be correct, both in substance and procedurally.

[33] In my view, the conduct of first and second respondent in actively opposing this application rather than abiding the decision of this court, and allowing fourth and fifth respondent to raise the necessary opposition, disqualifies the RAB from being perceived as a sufficiently fair and impartial body in this case. This is thus an exceptional case in which substitution by this court is justified.

[34] The further question therefore remains as to what decision can now be taken by this court, on the evidence which is available.

[35] I accept that the founding affidavit is not as complete as it should have been and that a number of further details were supplied in the replying affidavit. It is clear however that a number of facts which emerged from the papers can be employed as material for a decision. These include:

1. The applicant comes from Bujumbura on the north western border of Burundi, close to the heartland of the area which had been controlled by rebel militia, who are active throughout the eastern parts of the Democratic Republic of the Congo.

2. Applicant experienced severe trauma in his life. At the age of 16 he witnessed his father being murdered, after the latter had attempted to protect him and his brother when combatants sought to abduct them.

3. Two years later, he fled his home, made his way through Tanzania, Zambia and Zimbabwe, *en route* to South Africa.

4. At 19 he suffered from the xenophobic attacks in South Africa.

5. He has managed to establish and sustain a modest lifestyle by working as a security guard in South Africa.

6. He is 25 years old with no family remaining in Burundi. His only family is his brother who also lives in South Africa.

[36] Further, there is independent evidence, which is set out in the decision taken by the second respondent, by way of an analysis of present conditions in Burundi:

> "Burundi is a fragile state, which has managed to consolidate peace and make substantial progress after its civil war. Yet after 2010 elections, grave concerns have been expressed about the weak governance, the marginalisation of the opposition, and the emergence of violent political banditry. These elements themselves will not push Burundi towards a civil war, as there are positive elements as well, but it does still threaten democracy and the political security of Burundi. The most important aspect for the country to avoid the recurrence of was is for the Government and opposition to resume talks, while also denouncing the use of violence and intimidation. In general, both parties need to embrace democratic principles more. The international community must ensure that these principles are made clear and that the talks take place. Pressure needs to be put on the actors involved, even though the situation will not lead to a full-scale war; it

still endangers citizens on the grass-roots level and is damaging the democratic progress Burundi has made."

[37] Significantly, the problems raised in this analysis reproduced by second respondent in his decision, were given little importance in their application to applicant's case. Ms Harvey, on behalf of applicant, referred to reports of the 19 September 2013, generated by IRIN, Humanitarian News and Analysis Service, provided by the UN office for the Coordination of Humanitarian Affairs, to the effect that Tanzania has expelled 15 000 Burundi nationals accused of living in Tanzania illegally after having fled Burundi. This further piece of evidence is relevant when it is considered that the applicant made out his case in terms of s 3(b) of the Act.

[38] I pause to add that a further justification for setting aside the decision was the basis upon which second respondent proceeded to make his decision. In paragraph 12 of his decision, he states as follows:

"The Board has to assess whether the claim to asylum is well-founded on the evidence as a whole, going to past, present, future and prospective risk of persecution. The Board has to also assess the degree of risk facing the Appellant now at the date of making this assessment."

That is a s 3 (a) argument but applicant based his case on s 3 (b) of the Act.

[39] In summary, second respondent did not give sufficient weight to the only piece of evidence which he cited which provided clear evidence of the fragility of

Burundi and, in particular, 'the emergence of violent political banditry'. Perhaps it was because he committed a significant error of law by basing his analysis on s 3 (a) rather than 3 (b). Whatever the reason he provided no analysis of the factors which determine a decision in terms of s 3 (b) read together with s 5 (2) of the Act.

[40] If these two sections are read together and used as the legal basis by which to examine the facts as I have set them out, the applicant does qualify for refugee status. This decision must surely be strengthened by the disturbing fact, unacceptable in these cases, that it was more than four years after his initial interview, that applicant was ultimately notified that his claim for refugee status had been unsuccessful.

[41] Regrettably, recent research on South Africa's refugee system indicates that his case may not exceptional. See Roni Amit 2011 (23) International Journal of Refugee Law 458. In a review of 324 negative status determination decisions made by RSDO's, Amit found that these decisions were characterised by errors of law and absence of reasons, a lack of individualised decision making, a general failure by the decision maker to apply his or her mind or to use sound reasoning . Within the particular context of this case, the research found that RSDO's frequently failed to recognise a distinction between actual persecution and a well-founded fear of persecution, relying primarily on the former. Amit concludes as follows:

> "RSDO's routinely misapplied the core concepts of international refugee law. However, they also erroneously applied elements of domestic refugee law.

Section 3 (b) of South Africa's Refugees Act incorporates a provision from the OAU refugee convention that grants refugee status to individuals who have been compelled to leave their place of habitual residence 'owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part of the whole of this or her country of origin or nationality'.

RSDO's seemed largely ignorant of this provision. In fact, they often cited British case law stating exactly the opposite proposition, that fleeing the instability of civil war does not qualify an individual for asylum:

A general civil war situation is not in itself sufficient grounds for granting asylum. Where a state if civil war exists it is not enough for an asylum-seeker to show that he would be at risk if he were returned to his country. He must be able to show a differential impact. In other words, he must be able to show fear of persecution for Convention reasons over and above the ordinary risks of clan warfare. (1P, 1TT; see also, 1W)

The differential impact criterion is a requirement of Section 3(a) alone. The Section 3(b) provision, by contrast, is distinguished by the fact that eligibility rests solely on the presence of general conditions of instability and does not require an individualized assessment revealing a differential impact. Yet, RSDO's frequently and mistakenly based their rejection on the lack of individual persecution without considering whether the individual had a claim based on Section 3 (b). Many of these decisions acknowledged that the individual was fleeing political instability, but only analysed the claim under the Section 3 (a) criteria of individual persecution."

[42] The research also refers written reasoning taking the form of a 'cut and paste job'. This was manifestly the case with the initial decision taken by third respondent as is evident from the text of the decision attached to the papers. I accept that the decision makers empowered by the Act, the RSDO and the RAB, are required to make difficult decisions under pressurised conditions, in all likelihood, when possessed of limited resources. The least that can be expected however, is compliance with the Act in terms of its requirements for the composition of the RAB, fairness of procedures and a careful consideration of the available evidence. After all, these decisions affect the lives of extremely vulnerable people, many of whom would be placed in serious jeopardy were it not for the hospitality of this country.

**Conclusion**

[43] For all of these reasons, the following order is made:

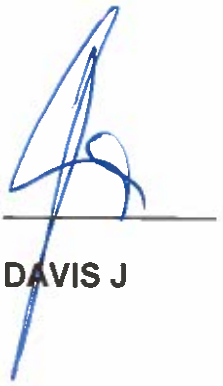
1. The decision of the first and second respondent of 3 November 2011, dismissing the applicants appeal against the third respondent's decision and rejecting applicant's application for refugee status and asylum as unfounded, is reviewed and set aside.

2. Third respondent's decision of 2 August 2008, rejecting the applicant's appeal for refugee status and asylum is reviewed and set aside.

3. It is declared that the applicant is a refugee entitled to asylum in the Republic of South Africa in terms of s 3 of the Refugees Act 130 of 1998.

4. Fourth respondent is directed to issue to the applicant written recognition of refugee status in terms of s 27 (a) of the Refugees Act read with Regulation 15 (1) within 10 days of the date of this order.

5. Respondents are ordered to pay the costs of this application, jointly and severely, the one paying the others to be absolved.



**DAVIS J**